

**(2024) 04 GUJ CK 0100**  
**In the Gujarat High Court**

**Case No :** R/Special Civil Application No. 1371 Of 2024

Chiragkumar Labhubhai Patel & Ors

APPELLANT

Vs

M/S Realwax Industries (Plastic Division) & Ors

RESPONDENT

**Date of Decision :** 30-04-2024

**Acts Referred:**

Code Of Civil Procedure, 1908 — Order 37 Rule 2, Order 37 Rule 3(5)  
Negotiable Instruments Act, 1881 — Section 138

**Citation :** (2024) 04 GUJ CK 0100

**Hon'ble Judges :** Sunita Agarwal, CJ;Aniruddha P. Mayee, J

**Bench :** Division Bench

**Advocate :** Mehul S. Shah, Henil M Shah

**Final Decision :** Dismissed

## Judgement

Aniruddha P. Mayee, J

1. The present Special Civil Application impugns the judgment and order dated 6.12.2023 passed under Exh.31 and Exh.35 of the Commercial Civil Suit No.87 of 2016 whereby the learned Principal Senior Civil Judge, Rajkot has granted conditional leave to defend on deposit of Rs.79,77,023/- by the defendants – petitioners herein.

2. The brief facts of the case are that the parties to the suit are conducting business with each other since April/May-2010. As per the agreed terms, after the delivery of the goods by the plaintiff – respondent No.1 herein to the respondent No.2 firm, various invoices came to be issued. However, the dispute arose due to non-payment of the invoices so raised. During the business transactions, some cheques came to be issued in favour of the respondent No.1 – plaintiff which came to be dishonoured with an endorsement “funds insufficient”. Further, the respondent Nos.2 and 3 addressed a letter to the respondent No.1 company admitting and acknowledging dues to the extent of Rs.79,77,023/- out of total dues of Rs.93,46,023/- as claimed by the respondent

No.1 – plaintiff. Some more cheques, thereafter, came to be issued in favour of the respondent No.1 – plaintiff for the purpose of clearing the outstanding dues. However, the said cheques also came to be dishonoured with the endorsement “drawer’s signature differs”.

2.1 In the year 2011, the respondent No.1 – plaintiff initiated proceedings under Section 138 of the Negotiable Instrument Act, 1881 [“NI ACT” for short] in the Court of learned Additional Chief Judicial Magistrate, Rajkot vide Criminal Case No.4876 of 2011, which is pending adjudication. The respondent No.1 – plaintiff, thereafter, filed a suit praying for recovery of outstanding amount with interest thereon. The respondent No.1 – plaintiff filed his affidavit of Summons for Judgment before the learned Trial Court. The respondent Nos.2 and 3 – defendants jointly filed an application under Exh.31 seeking leave to defend in the said suit. Thereafter, the petitioners herein who claim to be “dormant partners” of the respondent No.2 partnership firm also jointly filed an application below Exh.35 seeking leave to defend. The learned Trial Court after hearing the parties, vide order dated 21.2.2013 was pleased to allow the application for leave to defend granting conditional leave to the defendants in the suit on a deposit of Rs.40,00,000/-

2.2 Aggrieved by the said order granting conditional leave to defend, the petitioners filed Special Civil Application No.8108 of 2013 in this Court. By order dated 15.1.2016, this Court set aside the order dated 21.2.2013 and remanded the matter back to the lower Court for fresh consideration on the ground that it was a non-speaking order and triable issues were involved. Pursuant to the remand, the learned Trial Court again heard the parties on two applications and by the impugned order dated 6.12.2023 was pleased to allow the application granting leave to defend on condition of depositing Rs.79,77,023/- jointly and severally before the learned Trial Court since as per the contentions and record of the suit, the said amount was an admitted liability of the defendants.

2.3 Aggrieved by the impugned judgment and order, the petitioners herein, who claim to be the dormant partners of the respondent No.1 firm, have preferred the present Special Civil Application.

3. Mr. Mehul S. Shah, learned senior counsel appearing for the petitioners, submitted that the respondent No.2 – firm being a partnership firm and as the petitioners herein were the dormant partners thereof, they did not participate in the day-to-day working of the said firm. He submitted that the respondent No.1 – firm has filed summary suit against the petitioners and the respondent Nos.2 and 3. However, since the said suit is raising triable issues and also claims 18% interest on the amount due, which is not part of the contract between the parties, the suit cannot be said to be summary in nature and hence, unconditional leave ought to have been granted by the Trial Court. He submits that even otherwise, the commercial suit is not maintainable in its present form in view of the provisions of Order XXXVII Rule-2 of the Civil Procedure Code, 1908 [“CPC” for short], as the issues raised by the petitioners and the

respondent Nos.2 and 3 herein are triable issues. It was vehemently urged that it is settled law that once the suit raises triable issues, unconditional leave to defend has to be granted to the defendants and it no more remains summary in nature.

3.1 In support of his submissions, Mr. Mehul S. Shah, the learned senior counsel for the petitioners, has relied upon the judgment of the Coordinate Bench of this Court rendered in case of Posco Poggenamp Electrical Steel Pvt. Ltd. v. Tbea Energy (India) Pvt. Ltd. [2023(0)AIJEL-HC 245805] wherein it has been held that if the claim of interest is not falling within the classes of suit which are based upon liquidated demand, then the same would fall outside the category of Order XXXVII of CPC. It is further held that if the suit is out of the sweep of Order XXXVII of CPC, it cannot apply the provisions of the said Order XXXVII and direct the defendant to deposit the admitted amount. Accordingly, he submits that the impugned judgment and order be set aside and the Special Civil Application be allowed and the petitioners be granted unconditional leave to defend.

4. Heard learned senior counsel appearing for the petitioners and perused the material on record.

5. In the present case, the documents on record and the pleadings in the suit as well as the application for leave to defend reveal that the suit has been filed by the respondent No.1 – plaintiff for recovery of total amount of Rs.1,07,47,926/- in the year 2011. The transactions between the parties being commercial transactions, the suit, thereafter, came to be transferred to the Commercial Court. In support of its claim, the respondent No.1 – plaintiff has annexed invoices towards the delivery of goods, two cheques issued on behalf of the respondent No.2 towards such invoices, an acknowledgment given to the respondent No.1 – plaintiff on the letter-head of the respondent No.2 partnership firm undertaking that an amount of Rs.79,77,023/- is due and payable which would be repaid from 23.11.2010 to 10.12.2010. Further, the respondent No.1 – plaintiff has also produced on record its audited accounts showing the amount outstanding against the respondent No.2 firm.

6. The petitioners claim to be dormant/sleeping partners in the respondent No.2 firm. The petitioners have pleaded ignorance with respect to the said transactions as the respondent No.3 herein is a managing partner of the respondent No.2 firm. The petitioners have also stated that they have not authorized the respondent Nos.2 and 3 to give any such undertaking. In the present case, the petitioners have signed some of the cheques which were issued to the respondent No.1 – plaintiff towards its outstanding dues which came to be dishonoured for various reasons. The defence of the petitioners herein is that they had signed the cheques for the personal use of the respondent No.3, who is a managing partner of the respondent No.2 firm and that the same had been misused. They have pleaded ignorance about the business deals as well as transactions with respect to the respondent No.2 firm done through its managing partner, the respondent No.3 herein. In the plaint, it is a specific case of the

plaintiff – respondent No.1 that some of the petitioners along with the respondent No.3 had approached the plaintiff – respondent No.1 for purchase of huge quantity of PP Woven Bags to which the plaintiff – respondent No.1 had agreed to and thereafter, supplied the same. It is not categorically denied that there was no business transactions between the parties or that the petitioners were not aware of such transactions.

7. The record further reveals that along with the plaint, documents have been annexed by the respondent No.1 – plaintiff showing the statement of the business transactions done with the respondent No.2 firm, which shows that a total business of Rs.1,64,07,404/- was transacted between the parties. Further, the statement of account has also been annexed along with the plaint which shows that the outstanding amount to be recovered by the respondent No.1 – plaintiff from the petitioners as well as the respondent No.2 is Rs.93,46,023/-, which is duly audited by the Chartered Accountant. Accordingly, the plaint has been filed for recovery of Rs.1,07,47,926/- out of which, amount due is Rs.93,46,023/- and interest at the rate of 18% is amounting to Rs.14,01,903/-. Since the contract between the parties, prima facie, does not envisage any fixed rate of interest to be charged, the learned Trial Court has come to the conclusion that the same is a triable issue which will have to be decided during the trial of the suit. Further, the respondent No.2 firm has not disputed the outstanding dues of Rs.79,77,023/-. In view of the above and the provisions of Order XXXVII Rule 3(5) of the CPC, the learned Trial Court has granted conditional leave to defend upon depositing a sum of Rs.79,77,023/- or in the alternative to furnish a bank guarantee of the same amount within 30 days which shall be paid by the petitioners as well as the respondent Nos.2 and 3 jointly and severally.

8. Learned senior counsel appearing for the petitioners has relied upon the decision of the Coordinate of this Court in case of Posco Poggenamp Electrical Steel Pvt. Ltd. (supra). The learned Trial Court has relied upon the judgment of the Apex Court in case of Southern Sales & Services & Ors. v. Sauermilch Design & Handles GmbH [AIR 2009 SC 320] holding that the Trial Court can impose the condition to deposit any amount as admitted before leave to defend the suit can be granted in terms of the 2nd proviso to sub-rule (5) of Rule-3 of Order XXXVII of CPC.

9. The 2nd proviso to Order XXXVII Rule-3(5) of CPC states as under:-

“Provided further that where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in the Court.”

10. In the present case, prima facie, it is established by the respondent No.1 – plaintiff by producing invoices, cheques in its favour and an undertaking to make payment in installments within a stipulated time, audited accounts showing the business transactions between the parties and the outstanding amount due

which has been only denied simpliciter by the defendants. The 2nd proviso to Order XXXVII Rule-3(5) distinguishes between a disputed claim and an admitted claim in a suit filed under Order XXXVII of CPC. Accordingly, in view of the said proviso, if any amount of claim, which is admitted by the defendant to be due from him from the pleadings of the parties, then such an amount of claim is to be deposited in the Court before the leave to defend a suit can be granted. The object intended to be achieved by introduction of Order XXXVII Rule-3(5) of CPC provides for depositing the admitting amount by making a condition precedent to grant leave to defend. A distinction has been made in respect of any part of the claim, which is admitted, and the said proviso makes it very clear that leave to defend a suit is not to be granted unless the amount as admitted to be due by the defendant is deposited in the Court.

11. In the present case, it has been duly brought on record that the amount as directed by the learned Trial Court to be deposited as a condition precedent for granting leave to defend has been acknowledged by the defendants by way of an undertaking given on its letter-head along with the cheques issued for certain amounts. The impugned order of granting leave to defend is only challenged by the petitioners who claim to be dormant or sleeping partners and who were unaware of the transactions since the respondent No.3 was the managing partners of the respondent No.2 firm. Further, the learned Trial Court has recorded a finding that the petitioners had signed some cheques on behalf of the partnership firm towards the dues of the respondent No.1 – plaintiff and therefore, it cannot be said that they were not aware of the outstanding dues.

12. The judgment relied upon by the learned senior counsel for the petitioners in respect of the grant of unconditional leave in case of triable issues, cannot be made applicable in the facts and circumstances of the present case and especially in view of the 2nd proviso to Order XXXVI Rule-3(5) of CPC.

No infirmity can be pointed out by the learned senior counsel for the petitioners in the impugned order. The present Special Civil Application is devoid of merits and is accordingly, dismissed. No order as to costs.