



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 655 OF 2023  
IN  
COMMERCIAL SUMMARY SUIT NO. 75 OF 2021  
WITH  
SUMMONS FOR JUDGMENT NO. 65 OF 2021  
IN  
COMMERCIAL SUMMARY SUIT NO. 75 OF 2021

Play Games 24X7 Pvt. Ltd.  
a company incorporated under the Companies  
Act, 1956 through having its registered office  
at, 5th Floor, Central Wing (B), Tower-4,  
NESCO IT Park, NESCO Centre, Western  
Express Highway, Goregaon (E), Mumbai -  
400063

.. Applicant

**IN THE MATTER OF**

Play Games 24X7 Pvt. Ltd.  
a company incorporated under the Companies  
Act, 1956 through having its registered office  
at, 5th Floor, Central Wing (B), Tower-4,  
NESCO IT Park, NESCO Centre, Western  
Express Highway, Goregaon (E), Mumbai -  
400063

.. Plaintiff

v/s.

Loran Leasing And Infotech Pvt. Ltd.,  
a private company incorporated under  
the Companies Act, 1956, having its  
registered office at Unit No. 6, Ground Floor,  
Kamath Industrial Estate, Opp. Siddhi  
Vinayak Temple, Mumbai - 400025

.. Defendant

...

Mr. Shanay Shah, with Ativ Patel, Viloma Shah, Darship Dave &  
Harshad Vyas i/b AVP Partners, for the Plaintiff.

Mr. Yashesh Kamdar, with Yashvi Shah, i/b M/s. Nahush Shah  
Legal, for the Defendant.

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**CORAM : KAMAL KHATA, J.**  
**RESERVED ON : 19TH AUGUST 2023.**  
**PRONOUNCED ON : 20TH SEPTEMBER 2023.**

**JUDGEMENT :**

1. This summary suit is filed in the Commercial Division under Order XXXVII of the Code of Civil Procedure 1908 (CPC) to recover the security deposit having surrendered the premises under a Leave and License Agreement.

2. The Plaintiff (the Licensee) seeks an order and decree against the Defendant (the Licensor) for the sum of ₹ 96,21,204/- (Rupees Ninety Six Lakhs Twenty One Thousand Two Hundred and Four Only) being the principal along with interest of ₹12,24,133.46/- (Rupees Twelve Lakhs Twenty Four Thousand One Hundred and Thirty Three point Forty Six Only) calculated at the rate of 18% per annum from 1st July 2020 till 15th March 2021 as more particularly set out at (Exhibit 'C' to the Plaint). The brief facts that led to the suit are as under.

3. The Plaintiff is engaged in the business of online games under the brand name "RummyCircle", "MyllCircle" and "Ultimate Games".

4. The Defendant is a private limited company. The Defendant is the sole and absolute owner of the premises being Unit No. 401, 4th Floor, Building No. 16, Interface Complex, Off Linking Road, Malad (West), Mumbai - 400067 admeasuring 17,196 sq.ft carpet area equivalent to 24,427 sq. ft (chargeable area) (“**Licensed premises**” for short).

5. The Plaintiff and the Defendant executed and registered a Leave and License Agreement dated 24<sup>th</sup> March 2015 for a period of five years from 24th March 2015 to 23rd March 2020 (referred to as ‘**LLA**’ for short). The Plaintiff deposited a interest free refundable deposit of ₹ 1,65,00,000/- (Rupees One Crore Sixty Five Lacs only) by way of security for the due observance and compliance of the terms and conditions under the Leave and License agreement. The monthly compensation was ₹ 18,32,025/- per month for the first three years and ₹ 21,06,829/- for the fourth and fifth year.

6. Desirous of surrendering the property, the Plaintiff served a termination notice on 16th December 2019, giving a three months’ notice as per sub clause 6 of clause B of the LLA. By the said letter the Plaintiff sought the refund of their security deposit of ₹1,65,00,000/- and requested the Defendant to visit the premises

to access the wear and tear after giving a week's notice. They also called upon the Defendant to clarify and settle any other aspects with regard to the Licensed Premises.

7. There were meetings held between the parties wherein it was communicated that the Plaintiff would hand over the Licensed Premises on 31st March 2020<sup>1</sup> and the same was placed on record by an email on 11th March 2020. The Plaintiff also requested the security deposit be released on the same day. The Defendant agreed to the extension as communicated by its Email dated 17th March 2020.

8. Thereafter, the COVID-19 pandemic assumed serious proportions. On 20th March 2020, the State Government announced that all offices/workplaces will be closed until 31st March 2020. On 23<sup>rd</sup> March 2020 the State Government notified a lockdown in the entire State of Maharashtra whereby all public and private transport except for essential services was prohibited and all commercial establishments and offices were directed to be closed until 31<sup>st</sup> March 2020.

9. On the same day i.e. 23<sup>rd</sup> March 2020, the Plaintiff by their email informed the Defendant that they would not be in a position

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<sup>1</sup>Modified as per order dated 7th October 2023.

to shift to their new office on 28<sup>th</sup> and 29<sup>th</sup> March 2020 as planned and would await the instructions from the government.

10. The lockdown was relaxed by a notification dated 31<sup>st</sup> May 2020. Therefore, taking the first opportunity, the Plaintiff by an email dated 1<sup>st</sup> June 2020 sought NOC from the Defendant to inform the society as they required to shift the material. The Defendant also communicated their consent by an email of an even date i.e. 1st June 2020 and informed the Plaintiff that they would speak to their site manager who in turn would speak to the society. Thereafter by an email dated 11<sup>th</sup> June 2020 the Plaintiff requested the details of pending rent payable, security deposit figures presumably (to be refunded) and NOC for shifting, which they proposed to be done in phase wise manner by end of June 2020. By another email dated 15<sup>th</sup> June 2020 the Plaintiff shared the proposed shifting plan with the Defendant. On 1<sup>st</sup> July 2020 the Defendant received the peaceful possession with keys of the Licensed Premises from the Plaintiff which was acknowledged by its letter. In fact the hand written foot note also mentioned the return of keys for removal of some material to be returned by 8<sup>th</sup> July 2020. Thus duly recorded by a letter dated 8<sup>th</sup> July 2020 the keys were finally handed over to the Defendant which was duly acknowledged by the Defendant.

11. Mr. Shah for the Plaintiff submits that having surrendered the Licensed Premises on 8<sup>th</sup> July 2020 and after awaiting for more than a month thereafter, on 19<sup>th</sup> August 2020 the Plaintiff placed on record all facts and the Defendant's entitlement to receive license fee for three months amounting to ₹ 74,58,174/- inclusive of TDS and thus return of the remaining amount of ₹96,21,204/- of the security deposit. The Plaintiff sought interest at the rate of 18% p.a. for failure to refund the same as per Clause D (3) of the LLA. In response to aforesaid letter the Defendant, clearly as an afterthought and with a view to unjustifiably enrich itself by its letter dated 26<sup>th</sup> August 2020 alleged breach of the terms of LLA on the ground that the Plaintiff was in use and occupation of the Licensed Premises after the expiry of the term of license from 1<sup>st</sup> April to 8<sup>th</sup> July 2020. The Plaintiff was informed that they have forfeited the entire security deposit invoking clause L-4 of the Agreement and claimed that the Plaintiff were in breach of the Agreement and entitled to recover a sum of ₹ 2,05,92,555/- being three times the rent and the proportionate amount upto 8<sup>th</sup> July 2020 as more particularly set out in the annexure to the letter.

12. Mr. Shah submitted that the Defendant did not raise any objection to the extension sought upto 31<sup>st</sup> March 2020. If the

Defendant believed that the Plaintiff was in breach they ought to have invoked the L-4 clause on 1<sup>st</sup> April 2020 or soon thereafter and not after the possession was taken on 8<sup>th</sup> July 2020. None of the correspondence upto 26<sup>th</sup> August 2020 raised any allegation of breach in fact time and again clarification was sought about rent payable & Security deposit figure for refund and was responded by stark silence. It is not the case of the Defendant that the Plaintiff had deliberately withheld the Licensed Premises. In fact the intention to vacate was communicated way back on 16<sup>th</sup> December 2019. It was only on account of the State Government directions the Plaintiff could not vacate and hand over the possession to the Defendant.

13. It is submitted that it was in these circumstances the Plaintiff was compelled to file the suit on 15<sup>th</sup> March 2021. The Writ of Summons was served on 2<sup>nd</sup> September 2021 and the Defendant has entered their appearance on 3rd September 2021. The Summons for Judgment was taken out on 14th September 2021 and the Defendant has filed the reply on 13<sup>th</sup> January 2022.

14. The learned Counsel relied upon the full bench judgment of this Court in the case of *Jyotsna Valia Vs. T. S Parekh & Co.*<sup>2</sup> to

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<sup>2</sup>2007 SCC OnLine Bom 413

submit that a written contract need not always be a contract signed by both parties and may consist of exchange of correspondence a letter or letters assented to by the promisor without signature or even of a memorandum of printed documents not signed by either party.

15. Learned Counsel relied upon the case of *M/S. Patil Automation Private Limited and Ors. Vs. Rakheja Engineers Private Limited*<sup>3</sup> to submit that the decision in *Deepak Raheja Vs. Ganga Taro Vazirani*<sup>4</sup>, declaring that section 12A of the Commercial Courts Act, is mandatory was passed on 1st October 2021, and the present suit was filed prior thereto On 17th March 2021. He submitted that since the declaration was made mandatory after 20th August 2022 the suit is saved and cannot be rejected for want of compliance of the mandate under section 12A as it was filed prior of quantum time on 15th March 2021. He submitted that with regard to the contention of the defendant ought to be value of ₹ 96,21,204/- being the specific value of the subject matter of the Commercial dispute this court would not have jurisdiction. He submitted that the defence was contrary to section 12A of the Commercial Courts Act, which specifies that where there is a suit for recovery of money. The money sought to

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<sup>3</sup>(2022) 10 SSC 1

<sup>4</sup>(2021) 6 Bom CR 115



be recovered would be inclusive of interest computed up to the date of filing of the suit and that is what would determine there specific value as per section 12 of the Commercial Courts Act.

16. The response in reply raises preliminary defenses in law that the Commercial Summary Suit does not comply with the mandatory provision of Section 12 A of the Act and the principal claim being ₹ 96,21,204/- is below the pecuniary jurisdiction of the High Court being ₹ 1,00,00,000/- and thus not maintainable.

17. The Defendant claim that they had not held up the removal of the goods from the premises or had any intention to cause any loss or hardship to the Plaintiff but that by itself cannot be construed as the relinquishment of contractual rights by the Defendant. Thus the Defendant was entitled to retain the security deposit and entitled to compensation by payment of liquidated damages for wrongful occupation of the Licensed Premises.

18. It is stated that the Defendant has instituted the Commercial Suit (L) No. 22750 of 2021 and thus is entitled to set off if any sum is found due and payable to the Plaintiff in this suit. It is stated that the reliefs sought are contrary to the terms of the LLA and thus has to be established in a trial. It is further stated that the

COVID 19 pandemic did not constitute a force majeure event as per the LLA.

19. Mr. Kamdar for the Defendant tenaciously argued that the Defendant were entitled to forfeit the security deposit in terms of Clause L (4) of the LLA which reads thus.

**"4. In case of expiry or sooner revocation and determination of this Agreement, the Licensee fails or neglects for any reason whatsoever to vacate and hand over quiet, vacant and peaceful possession of the Licensed premises to the Licensor within the time stipulated for the same herein then and in such event, without prejudice and in addition to all other rights and remedies available to the Licensor under this Agreement, and/or in law (including the right to bar the entry of the Licensee herein), the security deposit paid by the Licensee to the Licensor, if refundable under any other terms and provisions of this Agreement, shall notwithstanding anything to the contrary stated herein stand forfeited by the Licensor. Further, in such an event, the Licensee shall also be liable to pay to the Licensor for every month or part of the month from the date of the expiry or sooner revocation and determination of this Agreement till the Licensee hands back vacant and peaceful possession of the Licensed premises to the Licensor, further compensation at the rate of three times of the amount of the License Fee paid/payable at the time of expiry or sooner revocation and determination of this Agreement. In addition to the above, the Licensor shall be entitled to take all measures that it deems fit to remove the Licensee its employees and all its articles**

*and belongings from the Licensed Premises from the said premises including shutting the Licensed premises and forcibly entering thereon."*<sup>5</sup>

20. He contends that the delay, tolerance, indulgence or forbearance shown in enforcing the LLA could not be construed as waiver of any breach or non-compliance by the Defendant.

21. He submitted that the present suit is based on an oral agreement in paragraphs 18, 19, 26, 27 and 29 of the Summons for Judgement (S~~J~~) in addition to and in contradiction to the LLA and thus a Summary Suit is not maintainable as it would be incumbent on the Plaintiff to lead evidence his case. He contended that sections 91 and 92 of the Indian Evidence Act 1872 exclude any oral evidence contrary to the written document. He submitted that conditional leave could be granted only in a summary suit and would amount to an attachment before judgement in an ordinary suit. Thus in support of his submission that a suit based on oral agreement is not maintainable as a summary suit and consequently the Defendant would be entitled to unconditional leave to defend he relied upon the following cases:

- i. *Yogesh Babanrao Vedpathak v Ranjeet Singh Pyara Singh Kaura*<sup>6</sup>

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<sup>5</sup>Modified as per order dated 7th October 2023.

<sup>6</sup> 2018 SCC OnLine Bom 642 paras 4, 13 to 24

ii. *IAL Logistics India v Quantum International & Ors.*<sup>7</sup>

iii. *Kisan Mouldings Ltd. vs Mrs. Nirjala Gunanand Mishra & Ors.*<sup>8</sup>

22. He submitted that the balance principal amount of ₹96,21,204/- claimed is arrived at based on unilateral deductions of monthly compensation which is not confirmed by the Defendant. Thus, a reason to grant unconditional leave to defend.

23. He submitted that the waiver of rent depends on contractual arrangement between parties and that equitable considerations cannot overtake express contractual provisions. In support of the aforesaid contention he relied upon the following judgements:

i. *Deluxe Caterers Pvt Ltd. v Narayani Associates & Ors.*<sup>9</sup>

ii. *Gaurav Jain v Union of India & Anr.*<sup>10</sup>

iii. *Ramanand & Ors v Dr. Girish Soni & Anr.*<sup>11</sup>

24. The learned counsel submitted that if the Plaintiff as per its calculations seeks to recover an additional 10% as TDS amount that would have to be deposited with the Tax Authorities which would amount to a reciprocal obligation which is neither pleaded

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<sup>7</sup> 2011 SCC OnLine Bom 978 paras 3, 4, 9, 11 and 16

<sup>8</sup> 2015 SCC OnLine Bom 7387 para 10

<sup>9</sup> Order dated 17-2-2023 in Appeal from Order No 944 of 2022

<sup>10</sup> 2020 SCC OnLine Del 652 para 4

<sup>11</sup> 2020 SCC OnLine Del 635 para 13 &15

nor is readiness and willingness to perform expressed. He further contended that the Defendant would be entitled to license fee for 8 days duration with GST for July as well.

25. The learned counsel raised the following additional contentions:

- i. That the LLA stood revoked and determined with effect from 15<sup>th</sup> March 2020 by virtue of operation of clause (K) & L (1) and the Defendant's email dated 17<sup>th</sup> March 2020 does not extend the period of LLA
- ii. The conduct of the Plaintiff demonstrated their awareness about being in breach of the LLA and had lost entitlement to claim refund of the security deposit.
- iii. The Plaintiff had failed to obtain a declaration under clause L(4) and thus not entitled to refund of balance security deposit.
- iv. The contract was terminated from 15<sup>th</sup> March 2020 and thus changed circumstances cannot be said to have destroyed altogether the basis of the adventure and its underlying object or that the whole purpose or basis of a contract was frustrated.
- v. The LLA could not have been understood to have continued in force till such time that the Plaintiff vacated

the Licensed Premises.

vi. Since the security deposit is forfeited as contemplated under Clause L (4) there is no amount due and payable to the Plaintiff.

Thus sought unconditional leave to defend.

26. When I first heard the matter from the Plaintiff, I had requested the parties to settle the matter but it failed and hence I proceeded to hear the matter finally. The contentions raised for defending this summary suit clearly displays an intention to unjustifiably enrich itself. Yet another case of an owner trying to usurp the security deposit of the licensee having received the vacant and peaceful possession of the Licensed Premises. Undisputably, it was on account of the lockdown imposed by the Government due to COVID 19 pandemic that the premises could not be handed over on 31<sup>st</sup> March 2020 and no sooner it was relaxed, suitable alternate arrangements were made and the Licensed Premises were handed over on 8<sup>th</sup> July 2020. It is for this period i.e. 1<sup>st</sup> April 2020 to 8<sup>th</sup> July 2020 that the parties have a dispute. I am inclined to grant conditional leave to defend for the reasons narrated hereinbelow:

27. The Hon'ble Supreme Court in *IDBI Trusteeship Ltd vs*

*Hubtown Ltd.*<sup>12</sup> has held in paragraph 17.3 and 17.4 as under:

*“17.3. Even if the Defendant raises triable issues, if a doubt is left with the trial judge about the Defendant’s good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.*

*17.4 If the Defendant raises a defence which is plausible but improbable, the trial judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.”*

28. In the present case the defense is everything else but genuine or based on good faith. I am unable to accede to the submissions raised by the Defendant’s counsel that the termination as per the notice was effective from 15<sup>th</sup> March 2020. Emails dated 11<sup>th</sup> March 2020 seeking extension upto 31<sup>st</sup> March and its unconditional acceptance by email dated 17<sup>th</sup> March 2020 clearly are contrary to the submissions of the Defendant that LLA stood terminated from 15<sup>th</sup> March 2020. The submissions of the Defendant are thus to say the least dishonest. The further contentions based on this would consequently fail.

29. The next contention is that Plaintiff has pleaded an oral

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<sup>12</sup> (2017) 1 SCC 568

contract and the same is in contravention of the written contract i.e. LLA. I am unable to accede to this submission as there are emails exchanged prior to 31<sup>st</sup> March 2020 and thereafter too which display unconditional acceptance of the Plaintiff being allowed to continue in possession on account of the COVID 19 pandemic. Whilst it is evident from the emails that the Plaintiff has inquired about the return of security deposit and the monthly rent that would be payable, there is a stoic silence on the part of the Defendant to respond to either of their queries.

30. I agree with the Plaintiff's Counsel submission relying on the case of *Jyotsna Valia* (supra) that a written contract need not always be a contract signed by both parties and may consist of correspondence exchanged between the parties without signature. In the present case the authenticity or veracity or truth of its contents of the emails exchanged between the parties are not in dispute. Thus the contentions of the Defendant with regard to no agreement between the parties to extend time upto 31<sup>st</sup> March 2020 is repelled as misconceived.

31. It is not the case of the Defendant that they called upon the Plaintiff to hand over possession on a particular date in place and stead of the dates proposed by the Plaintiff. It is also not the



Defendant's case that they had forewarned the Plaintiff about their liability of being charged three times the license fee on account of any alleged breach. It is evident from the documents produced that the for the first time on 26<sup>th</sup> August 2020 that the Defendant informed the Plaintiff that they would forfeit the entire security deposit and that too only in response to the Plaintiff's claim for refund of security deposit with interest thereon. This in my view is clearly an afterthought and a dishonest intent on the part of the Defendant to misappropriate the funds of the Plaintiff lying with them.

32. The next contention of the Commercial Summary Suit filed being not in compliance with the mandatory provisions of the Commercial Courts Act, 2015 is also repelled as the mandate under section 12-A was effective from 20-8-22 as held by the Apex Court in the case of Patil Automation Private Limited & Ors (supra). The present suit was filed in March 2021 and thus the mandate is not applicable. In my view this defense is clearly misconceived.

33. The Defendant heavily relies upon the clause L (4) of the LLA to submit that the Defendant were entitled to forfeit the security deposit on the failure of the Plaintiff to vacate the

premises. This contention is unacceptable as the LLA has to be read as a whole and not in isolation. The Clause B (4 ) reads thus:

*“Subject to the provisions herein contained for sooner revocation and determination of this Agreement, the term of the License shall be for a total period of 5 years (hereinafter referred to as the “License Period”) i.e. 60 months on and from the Effective Date **unless extended** or terminated earlier by the parties hereto.”*

34. There is no doubt that the contract was extended with consent of the Defendant. Besides forfeiting the security deposit would be akin to seeking recovery of damages and compensation as stated in paragraph 12 to the reply to the SJ which reads thus:

*“12. As stated hereinabove, the Defendant has also instituted Commercial Suit (L) No. 22750 of 2021 to recover the amounts due and payable by the Plaintiff. Therefore, assuming whilst denying that this Hon'ble Court comes to the conclusion that the amounts claimed in the present Suit are payable to the Plaintiff, the Defendant would be entitled to claim a set off against the amounts claimed in Commercial Suit (L) No. 22750 of 2021. For this reason as well, the present suit raises a triable issue which cannot be determined in a Summary Suit.”*

35. It is amply clear that the Defendant seeks to recover damages and compensation from the Plaintiff in its own suit which certainly cannot be a defense to the admitted liability of refunding the security deposit. The Supreme Court in the case of ***Union of India vs Raman Iron Foundry***<sup>13</sup> paragraph 11 held as under:

*“11. Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one damages for breach*

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<sup>13</sup> (1974) 2 SCC 231

of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. **When there is a breach of contract, the party who commits the breach does not so instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not in actionable claim and this position is made amply clear by the amendment in s. 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred.** This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in *Jones v. Thompson Ex parte Charles* and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages

*dots not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O' Driscoll v. Manchester Insurance Committee, Swinfen Eady, L. J., said in reference to cases where the claim was for unliquidated damages "...in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given. The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, Javed Sheikh v. Taher Mallik, S. Malkha Singh v. M/s N. K. Gopala Krishna Mudaliar and Iron & Hardware (India) Co. v. Firm Shamlal & Bros. Chagle, C.J. in the last mentioned case, stated the law in these terms: (at pp. 425-26)*

*"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.*

*As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant"*

*This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under cl.*

*18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of cl. 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under cl 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim Injunction restraining the appellant from doing so”*

36. I am in respectful agreement with the judgement of this Court in the case of ***First Rand Services Pvt. Ltd vs Pantheon Infrastructure Ltd.***<sup>14</sup> which held that

*“I find substance in the submission of Mr. Engineer. If the contention on behalf of the defendant that the defendant is entitled to an unconditional leave to defend the suit since the defendant has raised a counterclaim is accepted, the very object of providing summary procedure under Order XXXVII of the Code would be rendered otiose. It is one thing to contend that while seeking leave to defend the suit, the Defendant has raised a counterclaim which raises a substantive defence or at any rate triable issues. It is a completely different thing to assert that since the Defendant has raised a counter claim, irrespective of the nature and quality of the defence and/or counterclaim the Defendant is entitled to an unconditional leave to defend the suit. It all turns upon the quality of defence raised by the Defendant. The tests enunciated by a catena of decisions and reformulated in the case of Hubtown (supra) are required to be applied even in a case where the Defendant raises a counterclaim. An unconditional leave cannot be granted on the sole premise that the Defendant has raised a counterclaim.”*

37. In the present case as well, the question as to whether the

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<sup>14</sup> Order dated 5<sup>th</sup> January 2020 in SJ No. 13 of 2021 in Sum Suit No. 2 of 2021

Defendant would be entitled to three times the license fee for the period 1<sup>st</sup> April 2020 to 8<sup>th</sup> July 2020 may be a matter of trial, leave to defend can only be granted upon deposit of balance amount in Court. According to the Defendant the amount of ₹90,41,825.34/- would be the principal amount towards balance security deposit.

38. The Defendant's reliance on judgements relating to section 32 and 56 of the Indian Contract Act, 1872 have no bearing to this case as the Plaintiff has not based its case on oral agreement as alleged nor on force majeure clause.

39. The Full Bench Judgement of this Court in the case of ***SICOM Ltd vs Prashant S Tanna and others***<sup>15</sup> summarized the legal position inter alia as under:

*“28 (4) At the hearing of the summons for judgement, it is open to the Court to grant conditional leave to defend in respect of a part of the claim and unconditional leave to defend for the remaining part of the claim. In such an order it would follow that in the event of the Defendant failing to comply with the condition, he would suffer the consequences mentioned in Order XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of that part of the claim for which unconditional leave has been granted....”*

40. Applying the aforesaid principles to the facts of this case, conditional leave is required to be granted upon deposit of

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<sup>15</sup> 2004 (2) Mh. L.J 292

₹.90,41,825.34/- alongwith interest thereon @18% p.a. from 1<sup>st</sup> July 2020 till deposit in Court.

41. Hence, the following order:

- i. Leave to defend the suit is granted to the Defendant subject to deposit of a sum of ₹ 90,41,825.34/- along with interest thereon at rate of 18% p.a. from 1<sup>st</sup> July 2020 till the date of this order within a period of two weeks from today.
- ii. If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the Defendant shall file its written statement within a period of four weeks from the date of deposit.
- iii. If the conditional order is not complied with within the stipulated period the Plaintiff shall be entitled to apply for an ex-parte decree against the Defendant after obtaining a non - deposit certificate, from the Prothonotary and Senior Master of this Court.

42. The Summons for Judgement and the IA stand disposed off in terms of the aforesaid order.

**(KAMAL KHATA, J.)**

**Note:** This order is modified as per order dated 7th October 2023. The corrections are shown in **bold** and **italics** and **underline**.

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Sonali Mane