



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 4264 OF 2021

1. Sanjay Mahadeoprasad Trivedi, aged about 62 years, Occ-Business.
2. Sneha Sanjay Trivedi, Aged about 52 years, Occ: Business.

Both R/o S-3 Arohi Apartments, Ravi Nagar,
Amravati Road, Nagpur - 440010.

PETITIONERS

VERSUS

Housing Development Finance Corporation Bank Limited,
(Amalgamated Company) Through its Authorized
Representative, Branch at HDFC House, Ravi Shankar
Shukla Marg, V.I.P. Road, Civil Lines, Nagpur 440001.

RESPONDENT

Shri Bhushan N. Mohata, Counsel for the petitioners.
Shri Awadhoot T. Purohit, Counsel for the respondent.

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE ON WHICH ARGUMENTS WERE HEARD : AUGUST 18, 2025

DATE ON WHICH JUDGMENT IS PRONOUNCED : OCTOBER 16, 2025

JUDGMENT

RULE. Rule is made returnable forthwith and heard finally with consent of the counsel for the parties.

2. By way of instant petition under Article 227 of the Constitution of India, the petitioners have challenged the order dated 15.03.2021 passed by the trial Court below application at Exhibit 15 filed under Order XXXVII Rule 3 of the Code of Civil Procedure, 1908 (for short, 'the Code') granting conditional leave to defend the summary suit.

3. The main controversy involved in the instant petition is whether in the wake of an inference of the trial Court that the petitioners having made out a triable issue are entitled for an unconditional leave to defend.

4. The background facts of the instant petition are as follows :-

The petitioners desired to purchase a rowhouse in a project of Sahara builders by name, Sahara Prime City situated at Wardha Road, Nagpur. The petitioners booked an independent house on 17.09.2007 for a total consideration of Rs.56,30,000/-. After payment of an amount of Rs.22,69,330/- out of the total consideration, the petitioners got executed a registered agreement to sell dated 24.04.2009 in their favour. For the purpose of arranging the balance consideration, Sahara Prime City had informed the petitioners that financial assistance can be availed from the respondent and accordingly petitioners applied for loan to the respondent. In view of a tie up which existed in between Sahara Prime City and the respondent, the loan of Rs.35,00,000/- was sanctioned by the respondent on the basis of an indemnity bond given by Sahara Prime City. Thereafter, on the basis of a demand note issued by Sahara Prime City, the respondent disbursed part of the loan amounting to Rs.24,66,529/- directly to Sahara prime city, on 25.01.2012. Although, the loan was disbursed, the project of Sahara Prime City went into serious trouble and the rowhouses were not at all constructed. However, in view of disbursal of the loan, the petitioners paid the EMI set by the respondent for more than three years from the date of mortgage and interest to the tune of Rs.8,31,000/- against the said loan. Since the entire project of Sahara Prime City had collapsed, the petitioners filed a complaint before the State Consumer Disputes Redressal Commission, Nagpur on 30.09.2015. On the other hand, the respondent had declared the account of the petitioners as NPA

in the year 2016 and raised a demand notice under sub-Section 2 of section 13 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The respondent also took symbolic possession of the mortgaged property.

Under these circumstances, the respondent filed Summary Suit No.476 of 2018 before the Civil Judge (Senior Division), Nagpur against the petitioners. After receipt of notice in the aforesaid suit, the petitioners filed an application under Order XXXVII Rule 3 of Code, seeking leave to defend, however on 15.03.2021, the trial court passed a conditional order on the application and granted leave to defend on condition of depositing 50% of the total claim amount in the said Court within a period of three months from the date of the order. Feeling aggrieved by this order passed by the trial court granting conditional leave to defend, the petitioners have filed instant petition.

5. Shri Bhushan Mohata, learned Counsel for the petitioners has vehemently submitted that the impugned order imposing condition to deposit 50% of the total claim amount as a condition to grant leave to defend is perverse. In view of the clear findings of the trial Court that there exist a triable issue, he submitted that the trial Court failed to consider the most crucial aspect that the petitioners have made out a reasonable defence and were thus entitled for unconditional leave to defend. He submitted that the petitioners have been made a scapegoat of the collusive activities of the respondent and Sahara Prime City since the respondent had sanctioned the loan only on the basis of the indemnity

tendered by Sahara Prime City. In view of the fact that the amount of loan was paid by the respondent directly to the Sahara prime city, the suit filed by the respondent only against the petitioners without joining Sahara Prime City as party defendant was defective and liable to be dismissed. He submitted that in view of the defence set up by the petitioners in the application seeking leave to defend, they were entitled for grant of unconditional leave to defend. By placing reliance upon section 58(f) of the Transfer of Property Act, 1882, learned counsel for petitioner submitted that the plaintiff has relied upon only two documents in the suit, namely loan agreement and demand promissory note, both dated 27.01.2012. He submitted that the suit is not filed on the basis of any document of equitable mortgage.

6. In support of his submissions, he relied on the following case laws:

- A. *Syndicate Bank Versus Estate Officer and Manager, A.P.I.C. Ltd. & Others* [(2007) 8 SCC 361].
- B. *United Bank of India, Calcuta Versus Abhijit Tea Co.Pvt.Ltd. & Others* [(2000) 7 SCC 357].
- C. *Moreshwar Yadaorao Mahajan Versus Vyankatesh Sitaram Bhedi (D) thr. LRs. & Others* [2022 SCC OnLine SC 1307].
- D. *IDBI Trusteeship Services Limited Versus Hubtown Limited* [(2017) 1 SCC 568].
- E. *Mechelec Engineers and Manufacturers Versus Basic Equipment Corporation* [1976 DGLS (SC) 409].
- F. *M/s HDFC Bank Ltd. Versus The Registrar, City Civil Court, Bengaluru & Others* [W.P. No.13440 of 2025 with connected writ petitions].

7. Per contra, Shri Awadhoot Purohit, learned counsel appearing for the respondent vehemently opposed the petition. He justified the impugned order by pointing out that the provisions of Order XXXVII confer discretion on the trial Court to grant leave to defend subject to any conditions. He also submitted that the petitioners have availed the loan and have accepted the terms and conditions of the home loan agreement, and they have also issued a demand promissory note. By inviting attention to various clauses of the home loan agreement, he submitted that the petitioners were bound by Clause 2.7 about delay in payment of EMI, Clause 10.5 about conditions agreed by the borrower and similar such clauses. He therefore submitted that in view of the fact that the petitioners' account had turned NPA, they were duty bound to repay the entire loan. As such, by pointing out the entitlement of the respondent to recover the amount, he submitted that the condition to deposit 50% amount is perfectly justified. In support of his submissions, he relied on the following case laws:-

- I. *Angu Pillai & Others Versus M.S.M. Kasiviswanathan Chettiar & Others* [AIR 1974 Madras 16 (V 61 C8)].
- II. *Sanjeev Lal & Others Versus Commissioner of Income Tax, Chandigarh & Another* [(2015) 5 SCC 775].
- III. *Indian Bank Versus M/s Blue Jaggers Estates Ltd. & Others* [(2010) 8 SCC 129].

8. Rival contentions, thus, fall for my consideration.

9. The only controversy involved in the instant petition is the condition imposed by the trial Court to deposit 50% of the claim amount as a condition for grant of leave to defend. The parties have not disputed the fact that the petitioners had availed loan from the respondent and on account of non-payment of the loan amount, the account was turned into NPA. It is also not disputed that on the basis of the indemnity given by Sahara Prime City, the loan was directly disbursed to Sahara Prime City by the respondent. There is no dispute that the petitioners have filed independent proceedings against Sahara Prime City before the consumer forum. So also, it is not disputed that the entire project of Sahara Prime City has failed and number of litigations are pending against it even before the honourable Supreme Court of India. As such, it is clear that the rowhouses for which petitioners have availed loan were never constructed and the petitioners have been cheated.

10. The summary suit filed by the respondent for recovery of the amount of loan against the petitioners is on the basis of the home loan agreement and the document of promissory note. An interesting contention is canvassed by the counsel for the petitioners that the suit filed by the respondent is itself not maintainable in absence of any equitable mortgage by deposit of title deeds. It is submitted that there is no sale-deed in existence and there is no document of title to any immovable property and therefore the alleged mortgage is hit by Section 58(f) of the Transfer of Property Act, 1882. In support of his submissions, he has relied upon judgment in the matter of *Syndicate Bank* (supra). A perusal of plaint shows that the summary suit

is filed on the basis of two documents, viz. Loan agreement dated 27.01.2012 and Demand Promissory Note dated 27.01.2012 and on the basis of these two documents the plaintiff has pleaded that the equitable mortgage as envisaged under Section 58(f) of the Transfer of Property Act, 1882 is created and it is valid, subsisting and enforceable. In this regard, by relying upon the judgment of Madras High Court in **Angu Pillai** (supra), Advocate Awadhoot Purohit for the respondent submitted that even by depositing an agreement a valid document of equitable mortgage could be created to meet the requirement of Section 58(f) of the Transfer of Property Act, 1882. He has also placed reliance on the judgment of the Hon'ble Supreme Court in **Sanjeev Lal & Others** (supra) and submitted that by execution of an agreement to sell, a right in personam is created in favour of the transferee/vendee and the same could be enforced in the Court of law. If these contentions are given due consideration, then it is crucial to note that the agreement of sale was executed by the defendant with Sahara Prime City, which is not arrayed as party defendant to the suit. In the instant case, in absence of any sale-deed being executed, this crucial issue needs adjudication. Therefore, it appears that that this is an issue which is triable and raised by the defendant as a *bona fide* defence.

11. The counsel for the petitioners also submitted that the suit is liable to be dismissed on account of non-joinder of necessary parties since the amount of loan was disbursed to Sahara Prime City and it is not joined as party defendant. In support of these submissions, reliance is placed on the

judgment of the Hon'ble supreme Court in ***Moreswar Mahajan*** (supra). True it is, this could also be an issue to be raised in defence before the trial Court and it needs adjudication.

12. Further, arguments are advanced by Shri Bhushan Mohata that in view of amalgamation of HDFC Ltd. in HDFC Bank Ltd. *vide* order dated 17.03.2023 passed by the National Company Law Tribunal, Mumbai, the assets and liabilities of HDFC Ltd. stood vested with HDFC Bank Ltd. and therefore jurisdiction of the trial Court to try the civil suit is barred by virtue of provisions of Section 17, 18 and 31 of the Recovery of Debts and Bankruptcy Act, 1993. Reliance is placed on the judgment in ***United bank of India, Calcutta*** (supra) and judgment of this Court in ***M/s Ashwini Trading Co. Versus HDFC Bank Ltd.*** [Writ Petition No.7008 of 2024]. However, Shri Awadhoot Purohit, learned counsel for the respondent vehemently opposed these submissions by pointing out various provisions of law and submitted that the petitioners cannot escape the liability to repay the loan. He relied upon the judgment of the Hon'ble Supreme Court in ***Indian Bank*** (supra) highlighting the position that the borrowers are duty bound to pay the amount strictly in accordance with the terms of contract. Pertinent to note, there is no dispute about advancement of loan by the respondent, although it is undisputed that the loan was disbursed to Sahara Prime City and not to the petitioners. As such, there are intricate issues raised by the parties, which do not appear to be lacking in *bona fides*.

13. The learned counsel for the petitioners has adverted my attention to the observations in the impugned order. It is seen that the trial court has recorded a finding that the defendants in the summary suit have raised a triable issue. Thus, the only area of further consideration is the necessity of imposing any condition for granting leave to defend.

14. After analyzing the position of law laid down by various judgments of the Hon'ble Supreme Court from time to time, right from the judgment of ***Mechelec Engineers & Manufacturers*** (supra) and subsequent judgments, the Hon'ble Supreme Court has laid down the position with respect to granting or refusing leave to defend on imposition of conditions. In this regard, it is profitable to make a reference to the authoritative pronouncement of the Hon'ble Supreme Court in ***B.L.Kashyap and Sons Limited Versus JMS Steels and Power Corporation & Another*** [(2022) 3 SCC 294]. The relevant extract from this judgment of the Hon'ble Supreme Court as stated in paragraphs 33, 33.1 and 33.2 is reproduced below:-

“33. It is at once clear that even though in IDBI Trusteeship, this Court has observed that the principles stated in para 8 of Mechelec Engineers case shall stand superseded in the wake of amendment of Rule 3 of Order 37 but, on the core theme, the principles remain the same that grant of leave to defend (with or without conditions) is the ordinary rule; and denial of leave to defend is an exception. Putting in in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the court.

33.1. As noticed, if the defendant satisfies the Court that he has substantial defence i.e. a defence which is likely to succeed, he is entitled to unconditional leave to defend. In the second eventuality, where the defendant raises triable issues indicating a fair or bona

fide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend.

33.2. Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule;”

15. In the wake of enunciation of law in the abovementioned judgment of the Hon’ble Supreme Court, it is clear that once the trial Court records an inference that a triable issue is raised by the defendant, the defendant becomes entitled for grant of unconditional leave to defend. It is also clear that even though the defence raised by the defendant is not a positively good defence, he would be ordinarily entitled to an unconditional leave to defend.

16. In the instant case, in view of the defence raised by the defendants, demonstrating that the amount of loan was sanctioned by the plaintiff on the basis of the indemnity of Sahara Prime City and further fact that the loan was directly disbursed to Sahara Prime City, the suit for recovery of money filed only against the petitioners without joining Sahara Prime City as party defendant, definitely gave a valid and substantial defence to the petitioners to contest the suit. The defence set up by the defendants cannot at all be considered to be lacking in *bona fides* much less a *malafide* defence.

17. Although the plaintiff has relied upon various clauses of the home loan agreement on the basis of which it is entitled to recover the loan amount, however, at this stage, it cannot be concluded that the defendants had no valid defence at all. The defence raised by the defendants about basis for grant of loan being the indemnity granted by Sahara Prime City and disbursal of loan directly to Sahara Prime City raises an issue as to whether the loan need to be recovered only from the defendants or even from Sahara Prime City. This issue will have to be decided only after adjudication of the suit and at this stage, it cannot be concluded that the defendants are the only persons who are liable to pay the entire loan amount, particularly in view of the fact that the rowhouses are not at all constructed by Sahara Prime City, which had in fact received the amount of loan directly from the plaintiff.

18. A perusal of the provisions contained in Order XXXVII of the Code dealing with summary suits shows that the parties are required to meticulously follow the procedure within the timelines and according to the stages provided for. An opportunity to leave to defend in a summary suit is a valuable right of the defendant. Once the defendant raises a triable issue of fact or of law, it becomes entitled to defend. As such, the Courts trying the summary suit are duty bound to meticulously consider the genuineness of the defence and to ensure that a defendant raising a *bona fide* defence be granted the leave to defend. Granting leave to defend will at the most require the parties to contest the suit on merits by considering the defence raised. Even after granting leave to defend to the

defendants, the plaintiff will be entitled to demonstrate the falsity of defence, however, denial of leave to defend will result into very serious consequences for the defendant as the suit would proceed and would be posted for judgment. As such, once a triable issue is demonstrated by the defendant, he becomes entitled for leave to defend. Further, imposition of condition while granting leave to defend is although discretionary should be based on rationale criteria and the trial Court should tilt towards leniency instead of harshness by adopting a pragmatic approach. The conditions for granting leave to defend cannot be of such a nature to create an impression in the mind of defendant that it will have to part with substantial amount by depositing it in Court, even though he had raised a valid, substantial and genuine defence.

19. In view of the abovementioned factual and legal aspects, the impugned order passed by the trial Court granting conditional leave to defend by imposing condition of deposit of 50% of the claim amount does not stand to the scrutiny of law. In view of categorical inference of the trial Court that the defendants had raised a triable issue, they became entitled for unconditional leave to defend.

20. In view of this, I am of the considered opinion that the impugned order granting conditional leave to defend is unsustainable in law and needs to be interfered under Article 227 of the Constitution of India, by granting unconditional leave to the defendants. Hence, I pass the following order:-

- I. The writ petition is allowed.
 - II. The impugned order passed by the 6th Joint Civil Judge (Senior Division), Nagpur below Exhibit 15 in S.C.S. No.476 of 2018 is accordingly quashed and set aside to the extent it imposes condition of deposit of 50% of the claim amount.
 - III. The application filed by the petitioners at Exhibit 15 seeking leave to defend is allowed by granting them unconditional leave to defend.
21. Rule is made absolute in aforesaid terms. The writ petition stands disposed of. No costs.

(PRAFULLA S. KHUBALKAR, J.)