

IN THE HIGH COURT OF DELHI

CM(M) No.899/04

M/s Trinaini Associates Petitioner
through: Mr.Prakash Goswami, Proprietor of
Petitioner.

VERSUS

\$ Ms. Madhu Goyal Respondent
through: Mr.Manish Vashistha, Advocate.

RESERVED ON: 18.01.2008

% DATE OF DECISION: 22.01.2008

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Vide present petition under Article 227 of the Constitution of India petitioner M/s. Trinaini Associates has laid challenge to the order dated 19.1.2002 passed by the learned Additional District Judge, Delhi.

2. By and under the impugned order the learned Trial Court has dismissed an application under Order XXXVII Rule 3(5) CPC filed by the petitioner seeking leave to defend a

recovery suit filed by the respondent under Order XXXVII CPC.

3. Facts necessary to dispose of the present petition are that the respondent Madhu Goyal who was the sole proprietor of M/s.Computer Graphics & Publishing (hereinafter referred to as the firm), a firm engaged in the business of advertisement filed a suit under Order XXXVII CPC against the petitioner for recovery of Rs.1,94,649/-. Suit was based upon 16 bills totaling Rs.2,76,926/- raised by the firm between the period January 2000 to April 2000 and alleged to be acknowledged by the petitioner and a letter dated 26.6.2000 addressed to the firm and allegedly written by the petitioner wherein petitioner admitted his liability to pay Rs.2 lacs to the firm.

4. Material averments in the plaint are being noted hereinunder:-

“3. That on 2nd January, 2001 the defendant alongwith Mrs.Suchitra Goswami contacted to plaintiff and placed order for designing and release of advertisement in the daily leading News Papers of Delhi titled as “CINE GOSSIP”, “AKELE HAI CHALO BAT KARE”, “WIN EXCITING GIFTS FOR YOUR LOVE”, “DIAMONDS ARE FOREVER”, “PARESHAN HAI HAMSE BAAT KARE”, “STRESS IS A KILLER”.

4. That as per the orders placed by the defendant, the plaintiff issued advertisement release schedule to defendant which has been duly acknowledged by the defendant and further the defendant received and approved the same by putting the signature on the same.

Further the defendant issued the letter of confirmation dated 27th December, 1999 regarding his advertisement and design of advertisement, and defendant agreed to pay the advertisement and designing charges raised by the plaintiff.

5. That after receiving the letter of confirmation by defendant the plaintiff went ahead with the said assignment in accordance with qualitative and quantitative specification made in advertisement release schedule. All approved advertisement by the defendant were published in different newspaper by the plaintiff on different dates continuously for the month of January to April, 2000.

6. That regarding the aforesaid advertisement the plaintiff raised following bills for advertisement releasing charges and designing charges.

<u>Date</u>	<u>Particulars</u>	<u>Bill Amount</u>
07.01.00	Bill No.1780	2000.00 (Design Charge)
10.01.00	BillNo.1783	1400.00(Release Charges)
17.01.00	Bill No.1792	1400.00 do
17.01.00	Bill No.1793	19950.00 do
01.02.00	Bill No.1795	43890.00 do
01.02.00	Bill No.1796	7776.00 do
09.02.00	Bill No.1798	1500.00 (Design Charge)
12.02.00	Bill No.1803	1200.00 do
28.02.00	Bill No.1807	1200.00 do
31.3.00	Bill No.1810A	82314.00(Release Charge)
1.04.00	Bill No.1811A	71014.00 do
8.04.00	Bill No.1812	2200.00(Design charge)
15.04.00	Bill No.1817	7980.00(Release charge)

18.04.00	Bill No.1819	23940.00	do
22.4.00	Bill No.1820	5175.00	do
30.4.00	Bill No.1822	3990.00	do
<u>Total 2,76,929.00</u>			

That so far the aforesaid bill raised by the plaintiff against the defendant regarding releasing and designing charges of advertisement, the defendant paid following amount to the plaintiff on different dates:-

<u>Date</u>	<u>Cheque No./Cash</u>	<u>Amount</u>
10.01.00	Cash	Rs. 2,000.00
09.03.00	Ch. No.033261	Rs. 22,300.00
25.05.00	Ch. No.178981	Rs. 25,000.00
27.07.00	Ch. No.178991	Rs. 25,000.00
Total amount paid		Rs.74,300.00

Further it is submitted that an amount of Rs.7980/- credited in the account of the defendant on 5.4.2000 as the same was excess charged in the bill No.1795 dated 1.2.2000.

9. That the defendant acknowledged the aforesaid bill raised by the plaintiff on different dates and the authorized signatory of the defendant firm put his signature on the aforesaid bill. Further the defendant acknowledged and admitted its liability from its letter dated 26.06.2000 whereas the defendant clearly admitted that the defendant would pay the outstanding amount of Rs.2,00,000/- approx. in due course of time.

Further as per the statement of account maintained by the plaintiff in its day to day

business the ledger of the plaintiff for accounting year 1999-2000 showing the outstanding or debit balance against the defendant for Rs.1,94,649.00, therefore, the plaintiff is entitled to recover an amount of Rs.1,94,649.00 besides interest as per the statement of account and ledger maintained by the plaintiff in his day to day business.”(underlining emphasised)

5. After perusing the aforementioned averments one thing that immediately strikes as odd, is the averment that the proprietor of the petitioner placed an order with the firm on 2.1.2001 and on the basis of said order firm issued an advertisement release schedule which was approved by the proprietor of the petitioner Prakash Goswami on 27.12.1999. How can this be possible? Is there a typographical error in mentioning the 2 dates?

6. The error, if any, could be in the date on which order was placed by the proprietor of the petitioner i.e. 2.1.2001 and not in the date of approval of advertisement release schedule for the reason advertisement release schedule has been placed on record and shows that the same was approved on 27.12.1999.

7. Petitioner raised its defence by way of filing a written statement. Noting that the proprietor of the petitioner was not assisted by a counsel vide order dated 28.9.2001 learned Trial Judge treated the said written statement as an application under Order XXXVII Rule 3(5) CPC seeking leave to

defend. Leave to defend was sought on following grounds:-

- A. 16 bills raised by the firm are highly inflated.
 - B. Neither proprietor of the petitioner nor any person acting on his behalf acknowledged the receipt of said 16 bills as claimed by the respondent.
 - C. Letter dated 26.6.2000 was written by the proprietor of the petitioner on the request of the husband of the respondent Uday Goyal and without verifying the accounts or the original bills.
8. Material averments in the application seeking leave to defend (written statement) filed by the petitioner are being noted hereinunder:-

“3. That the defendant and his wife never ever visited the plaintiff in her office. In fact, Mr.Udya Goyal came to the defendant in December, 99/Jan.2000 requesting him for advt. business. The plaintiff is indulging him unethical conduct by involving the defendant's wife, a senior officer in Civil Services, to give credence to her false and frivolous petition. The defendant reserves his right to initiate appropriate action under the law against the plaintiff for making such false and baseless statement in the court of law. The defendant further submits that the plaintiff be asked to produce the orders placed by the defendant on 2nd Jan. 2000 as claimed by her.

6-7 That the defendants can not comment on the bills raised by the firm unless copies of orders placed by the defendant are made available alongwith original tearsheets and bills of publications. However, the defendant's estimate is that after discounting

the over billing, excessive rates, cancelled Advts, poor prints, wrong dates etc. The firm has nothing much to claim from the defendant. In fact, an advance cheque of Rs.25,000/- issued to the firm had to be stopped because the firm failed to produce original billing documents inspite of repeated reminders.

9. That the defendant has neither any firm nor any authorized signatory who could sign advts. Orders worth thousands of rupees on behalf of the defendant. As regards the amount of Rs.2 Lacs as stated by the plaintiff, it was a hand written note which was given to Mr.Uday Goyal on his repeated pleadings. Mr. Uday Goyal appeared worried and shaken on that day and was infact, requesting for a note for outstanding of Rs.5, Lacs to appease his creditors who were pressing him for payment. The defendant could not give him a factually incorrect statement but under those circumstances decided to give that note because the firm's total billing including excessive billing could have been between 1 and 2 Lacs at that time. The defendant is unable to calculate the exact figure due to non-availability of original documents from the firm.”(underlining emphasised)

9. In response to the application seeking leave to defend (written statement) filed by the petitioner respondent filed her reply. In the said reply the reasons behind the oddity in averment in the plaint as noted in para 5 above were neither specified nor explained. It is pertinent to note that the respondent reiterated that letter of confirmation was signed by the proprietor of petitioner on 27.12.1999.

10. After noting respective pleadings and contentions advanced by the parties vide impugned order dated 19.1.2002

the learned Trial Court refused to grant leave to the petitioner and thus dismissed the application of the petitioner. The necessary consequence of the dismissal of the application was that the suit of the respondent was decreed. A decree was passed in favour of the respondent directing the petitioner to pay a sum of Rs.1,94,649/- together with interest @ 18% p.a. from the date of filing of the suit till date of realisation.

11. Unfortunately the learned Trial Court has not noted the oddity in the averment in the plaint as noted in para 5 above and has mechanically reproduced the averments in the plaint in the impugned order. The same is evident from following portion of the impugned order which is being reproduced hereinbelow:-

“On 2.1.2001 the defendant placed order for designing and release of advertisement in daily newspaper of Delhi titled as “CINE GOSSIP”, “AKELA HAI CHALO BAT KARE”, “WIN EXCITING GIFTS FOR YOUR LOVE”, “DIAMONDS ARE FOREVER”, “PARESHAN HAI HAMSE BAAT KARE”, “STRESS IS A KILLER”.

As per the orders placed by the defendant the plaintiff issues advertisement release scheduled to defendant which has been acknowledged by the defendant and further the defendant received and approved the same by putting the signatures on the same and the defendant issued the letter of confirmation dt.27.12.99. All approved advertisement were published in different newspaper by the plaintiff on different dates continuously for the month of January to April, 2000.”

12. Even though the learned Trial Court has noted in the earlier part of the impugned order that vide order dated 28.9.2001 it was held that written statement filed by the defendant was to be treated as application seeking leave to defend yet in the latter part of the impugned order it has been held that the suit of the respondent is liable to be decreed for the reason no leave to defend as required under Order XXXVII CPC was filed by the petitioner. In this regard, decision of the learned Trial Court reads as under :-

“It is submitted by Ld. Counsel for the plaintiff that in fact there is no leave to defend and in the absence of that the suit of the plaintiff is liable to be decreed. It is a fact that in fact there is no application for leave to defend as the defendant only filed the written statement without moving any application for leave to defend. Even though written statement was considered as leave to defend but technically it is not the leave to defend as it is not supported by affidavit. It is useful to refer to 95 (2002) DLT 183 in the case Rama Vision Ltd. Vs. Couvery Electronics Ltd. & Anr., in that case Hon'ble High Court relying 1973 Delhi 141 held that application for leave to defend is required to be supported by affidavit. In the absence of affidavit there is no option but to accept the averment made in the plaint and suit is liable to be decreed. Hence suit of the plaintiff is liable to be decreed, on this very ground.”

13. The next ground on which suit of the respondent was decreed by the learned Trial Court was that the application seeking leave to defend filed by the petitioner does not disclose any triable issue. In this regards decision of the

learned Trial Court reads as under:-

“It is useful to refer to case of 2001 VII AD (Delhi) 1018 in M/s Ganga Roller Flour Mills Pvt Ltd. Vs. M/s A.B. Industries (Baba Road) where it was held by the Hon'ble High Court that it is a settled law that leave should not be granted as matter of course unless and until there is substantial defence and plea raised by the defendant gives rise to triable issue. It was further held that if affidavit discloses positive defence that reflects such state of facts that the defendant may succeed in establishing his defence to the plaintiff's claim, the defendant is entitled for leave to defend. As already stated that the bills were duly received by the plaintiff as is apparent from the bills placed on record in para-6 the details of the bills is mentioned. The plaintiff has not specifically denied about the receipts of the bills in his written statement. What he stated in reply to this application that he cannot comment on the bills raised by the firm unless copies of the orders placed by the defendant are made available along with original tear sheets and bills of publication. So he is not denying about the receipt of this bills. What the defendant is stating is that plaintiff should supply him the orders placed by the defendant and the publication charges given by the defendant to the different newspapers. So far as the orders placed by the defendant are concerned, the defendant is naturally having the copies of those orders. The plaintiff is not required to tell the defendant as to how much publication charges he is paying to the newspaper. The contract between the parties was duly approved on 27.12.99. The same is duly signed by the defendant and in fact defendant admitted his liability in no uncertain terms vide his letter dt. 26.6.2000. Defendant has not disputed about this letter what he states about this letter is that Mr. Uday Goyal, who is husband of the plaintiff repeatedly pleaded and appeared worried. Hence this letter was given to him. Naturally

a party whose payment has not been made is worried. This letter clearly spells that the defendant has admitted his liability.

As already stated there is no leave to defend. There is no affidavit. Even otherwise there is no triable issue. Hence the suit of the plaintiff is decreed to the effect that plaintiff is entitled for a sum of Rs.1,94,649/- with 18% interest from the date of filing of the suit till realization with costs.....”

14. In these circumstances petitioner has filed the present petition under Article 227 of the Constitution of India.

15. In the present petition besides reiterating the stand taken by him in his application seeking leave to defend the petitioner has also drawn attention of this court to the oddity in the averment in the plaint as noted in para 5 above. In the context of oddity in the averment in the plaint petitioner averred as under:-

“(ix) Because the Ld. ADJ failed to appreciate that the plaint itself states that Petitioner/defendant contacted the Plaintiff on 2.1.2001 and placed order for designing and release of advertisements and subsequently says confirmation letter was issued on 27.12.1999 more than a year before the defendant is stated to have approached the plaintiff firm, which itself shows that the plaintiff has not approached the court with clean hands. In fact the document dated 27.12.1999 is a rank forgery.”

16. In the reply filed to the present petition respondent has averred as under:-

“2. That the contents of para No.1 (wrongly numbered) of the appeal also a matter of

record and it is submitted that petitioner Sh. Prakash Goswamy and respondent signed advertisement release schedule on 27.12.1999 and further placed an order as per the release schedule on 02.01.2000"

3. That the contents of para No.2 of the petition are matter of record. It is submitted that on 27.12.1999, the petitioner also with Mrs. Suchitra Goswami contacted the respondent and signed release schedule for designing and release of advertisement in different daily leading news paper of Delhi, ad title as "CINE GOSSIP", "AKELE HAI CHALO BAT KARE", "WIN EXCITING GIFTS FOR YOUR LOVE", "DIAMONDS ARE FOR EVER", "PARESHAN HAI HAMSE BAT KARE" "STRESS IS A MILLER". The petitioner further confirmed the respondent on 02.01.2001 regarding his advertising and design of advertising and petitioner agreed to pay the advertisement and designing charges raised by the respondent.

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REPLY TO THE GROUNDS OF PETITION:

ix) That the contents of the para ix) of the Ground of the petition are wrong and denied. It is submitted the advertisement release schedule was duly signed on 27.12.1999 and confirmation was made subsequently on 02.01.2002. How it possible that the date of confirmation letter will fall prior to the date of the approaching of the contract."

17. As evident from averments noted in para 4 above in the suit respondent had taken a definite stand that first an order was placed by the proprietor of the petitioner with the firm and thereafter on the basis of said order an advertisement release schedule was prepared by the firm which was duly

signed by the proprietor of the petitioner on 27.12.99 and that on same date a confirmation letter was also issued by the petitioner.

18. However in the reply to the present petition respondent made a complete turn around by averring that first advertisement release schedule prepared by the firm was signed by the proprietor of the petitioner on 27.12.99 and thereafter on the basis of said schedule an order was placed by the proprietor of the petitioner with the firm and that the confirmation letter was subsequently issued by the petitioner on 02.02.2001/02.01.2002.

19. It is relevant to note that from a reading of plaint of the respondent and reply filed by the respondent to the present petition three different dates i.e. 27.12.99,02.01.01,02.01.02 are emerging in respect of issuance of confirmation letter by the petitioner.

20. In coming to the conclusion that application seeking leave to defend filed by the petitioner does not disclose any triable issue following two things have weighed heavily with the learned Trial Court:-

I. The receipt of all 16 bills raised by the firm were duly acknowledged by the petitioner.

II. The receipt of said bills were not specifically denied by the petitioner.

21. It is also relevant to note that the very basis of the suit of the respondent was that the receipt of all 16 bills were duly acknowledged by the petitioner.

22. A perusal of the said 16 bills shows that the bills dated 31.03.00 and 01.04.00 for amount of Rs.82,314/- and Rs.71,014/- respectively does not bear any acknowledgment.

23. The portion underlined in para 8 above shows that the petitioner had clearly taken a stand that the receipt of said 16 bills were neither acknowledged by the proprietor of the petitioner or by any person acting on his behalf.

24. It is now necessary to note the law on the subject of Order XXXVII CPC.

25. After considering catena of judicial pronouncements on the subject of Order XXXVII CPC following legal principles can be culled out:-

I The question to be considered in applications under Order 37, Rule 3, Civil Procedure Code, is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must, as a rule, bring something more before the Court to show that it has a bona fide defence and is not a mere attempt to gain time by getting leave to defend.

II If there is a triable issue in the sense that there is a

fair dispute to be tried as to the meaning of a document on which the claim is based or the uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses then leave to defend should not be denied.

III If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

IV If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence the defendant is entitled to unconditional leave to defend.

V Even in cases where defendant shows that on a fair probability he has a bona fide defence, he ought to be granted leave to defend.

VI Leave to defend should not be refused where serious conflict as to matter of fact or where any difficulty on issues as to law arises.

VII The Courts should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

VIII At the stage of granting leave to defend, the Courts

can only consider whether the facts as alleged by the defendant, if true, afford a good defence and not whether they are true or not.

IX If the defendant disclosed such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet shows such a state of facts which leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

X Leave to defend is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even plausible defence on those facts.

XI If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

XII If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and given leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

26. Facts of the present case particularly, the loopholes in the case of the respondent, when analyzed in the light of afore-noted legal principles entitle the petitioner to be entitled to get leave to defend. The ever-changing and flip-flop stand of the respondent coupled with the fact that the 2 bills which account for 55% of the total payment claimed by the respondent from the petitioner does not bear any acknowledgment as alleged by the respondent entitles the respondent to get leave to defend.

27. However noting that the proprietor of the petitioner admitted that he had written letter dated 26.06.00 require a condition to be imposed as there is a partial acceptance of liability. It is for the proprietor of the petitioner to establish at the trial that he had written said letter at the request of the husband of the respondent and without verifying the accounts and original bills.

28. I note that vide order dated 14.5.02 this court had directed the petitioner to deposit a sum of Rs.1 lakh with this court. Pursuant to deposit of Rs.1 lakhs made by the petitioner execution of the decree was stayed.

29. I direct that the deposit of Rs.1 lakh made by the petitioner be treated as the condition upon which the leave to defend is granted to the petitioner.

30. In view of the above discussion I dispose of the present petition by holding as under:-

I Impugned order dated 19.01.02 passed by the learned Additional District Judge, Delhi is set aside.

II Conditional leave to defend the instant suit is granted to the petitioners in terms of para 29 above.

III The amount of Rs.1 lakhs deposited in this court be remitted to the learned Trial Court.

IV Parties are directed to appear before the learned trial court on 25.2.2008.

31. No costs.

January 22, 2008
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PRADEEP NANDRAJOG, J.