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HIGH COURT OF DELHI AT NEW DELHI

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FAO(OS) No.333-334/2005

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Date of decision : 20th May, 2008

ANIL ARORA & ANOTHER Appellants
Through: Mr. Adhip Iyer with Mr.Praveen
Aggarwal, Advocates

Versus

ANAND KUMAR ...Respondent
Through Mr.Sumit Bansal with Mr.Manish
Paliwal, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE S.MURALIDHAR

1. Whether reporters of the local news papers be allowed to see the judgment? No
2. To be referred to the Reporter or not ? y
3. Whether the judgment should be reported in the Digest ? y

JUDGMENT
20.05.2008

1. The question which is to be considered in this appeal under Clause X of the Letters Patent is whether the learned single Judge was right in granting leave to the appellants to defend the summary suit filed by the respondent on the condition that the appellants shall furnish security of an immovable property to the extent of the suit amount. The respondent has filed the suit under

Order XXXVII of the Code of Civil Procedure for recovery of Rs.1,20,48,788/- with pendent lite and future interest @ 18% p.a. Later the respondent filed an application for amendment of the plaint which was allowed by the Court. By way of amendment the respondent made certain additional averments and also claimed interest prior to the institution of the suit. The respondent's case as pleaded in the plaint is that he is engaged in the business of investment. The appellant No.2 is a company incorporated under the provisions of Companies Act, 1956 dealing in stocks and share broking and is having membership of the National Stock Exchange of India Limited. The appellant No.1 is the Director of the appellant No.2 company. The respondent had friendly and cordial relations with the appellant No.1 and his brother for more than a decade and the appellants used to borrow money from the respondent from time to time. During the dealings the appellants borrowed loans of the following description:

<i>Date</i>	<i>Amount</i>	<i>Cheque/Pay Orders</i>
06-01-2000	Rs.30,00,000/-	Federal Bank Ltd - 801710
10-01-2000	Rs.23,00,000/-	Federal Bank Ltd - 428168
18-02-2000	Rs.30,03,600/-	Federal Bank Ltd - 428287
29-09-2000	RS.20,02,400/-	Federal Bank Ltd – 861590

2. Out of the said amounts which were given to the appellants by cheques, the appellants had executed promissory notes and also repaid a sum of Rs.8 lacs on 24th March 2000 by cheque as against the amount borrowed of Rs.23 lacs taken on 10th January, 2000. The appellants paid part of the interest by different cheques during the period of 5th September, 2000 to 28th June, 2001 but in June, 2001 the appellants stopped making the payment of interest as well as the principal amount. Despite persuasion by the respondent, the appellants had not cleared the liability. The appellant No.1 also issued cheques duly signed by the appellant No.1 on behalf of appellant No.2 for an amount aggregating to Rs.91 lacs on various dates, the details of which have been given in para 13 of the plaint but later on the cheques were returned unpaid with the reason 'payment stopped by drawer'. According to the respondent the appellants are liable to pay a sum of Rs.1,20,48,799/- which includes Rs.95,02,400/- on account of principal plus Rs.25,46,388/- on account of interest.

3. The suit being under the provisions Order XXXVII of the Code of Civil Procedure summons was issued to the appellants who filed appearance and thereafter the respondent filed an application

being IA No.403/2004 praying for leave to judgment while IA No.2810/2004 was filed by the appellants under Order XXXVII Rule 3 CPC seeking leaving to defend unconditionally.

4. The case of the appellants in the application for leave to defend is that the respondent was the client of the appellant No.2 company and was dealing in purchase and sale of shares through the appellants since the year 1996 and the transactions between the appellants and the respondent were relating to the sale and purchase of shares. Due to a bust in the stock market in 2001 the respondent suffered huge losses and stopped dealing in shares through the appellants. Eventually when the dealing between the parties ceased on 27th June, 2001 there was left a debit balance of Rs.35,238.92 in the account of the respondent after accounting for the cheques against the so called loan in question and the so called loan was not actually a loan but payment in adjustment of the debit balance as a consequence of sale and purchase of shares on behalf of the respondent. It is further case of the appellants that having regard to the nature and the amount involved in the transactions relating to the sale and purchase of shares conducted by the appellants on the instructions of the

respondent, as per the trade practice, to secure the mutual interest, promissory notes were executed and blank cheques were given to the either party and which were later returned/destroyed upon settlement of accounts from time to time. The promissory notes and cheques issued by the appellants were blank cheques and were issued to the respondents as a security at his instance as he required that his interest be secured as per the trade practice being followed by the parties and had nothing to do with the repayment of the so called loan. Once accounts were settled, the appellants asked the respondent to return the cheques and the promissory notes but the respondent stated that they have been lost and also requested the appellants to inform the bank to stop payment of these cheques. Consequently the appellants stopped payment of the said cheques vide letters dated 16th April, 2001 and 19th April, 2001 addressed to the bankers. The respondent later turned dishonest and he fraudulently put the dates of 1st October, 2002, 21st October, 2002 and 23rd October, 2002 on these cheques without the consent of the appellants and presented them for encashment.

5. Upon a perusal of the plaint, submissions of the parties and

the documents filed along with the plaint the learned single Judge thought it fit to grant only conditional leave to the appellants to defend the suit. The learned single Judge observed that once the documents are admitted, the onus to show that they were not for consideration and were mere business transactions as per practice and trade is heavily on the appellants. The triable issues raised by the appellants are not free from doubt. The defence taken may not be sham or moonshine but it is a defence which defies even a common sense that if the cheques were given by the appellants to the respondent in business transaction where was the occasion for supporting such a liability by issuing pro-notes which at least prima facie is an admission of a liability with a commitment to repay the same with interest. In that view of the matter, the learned single Judge granted leave to defend subject to the condition that the appellant shall furnish security of an immovable property to the satisfaction of the Registrar of this Court to the extent of the suit amount.

6. Mr.Adhip Iyer, learned counsel appearing for the appellants strenuously contended that the appellants have a prima facie case and a good defence on merits and are thus entitled to an

unconditional leave to defend. Learned counsel submitted that when the learned single Judge has categorically observed that the defence taken by the appellant was not sham or moonshine, there was no occasion for imposing a condition for grant of leave to defend. He referred to the judgment of the Supreme Court in M/s. Mechalec Engineers and Manufacturers v. Basic Equipment Corporation AIR 1977 SC 577 where the following principles as evolved after comprehensive review of the authorities on the subject in Smt.Kiranmoyee Dessi v. Dr.J.Chaterjee (1945) 49 Calcutta Weekly Note 246, were approved by the Supreme Court:

- “(a) 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.
- (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
- (c) If the defendant discloses 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, shews such a state of facts as 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 plaintiff is not entitled to judgment and 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.

- (d) 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.
- (e) 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 give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

7. Learned counsel for the appellants also referred to the decision of the Supreme Court in Mrs.Raj Duggal v. Ramesh Kumar Bansal AIR 1990 SC 2218 wherein the Court reiterated the following principle while granting or refusing leave to defend a suit under Order XXXVII CPC:

"Leave 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 a plausible defence on those facts. If the court is satisfied about that leave must be given. 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

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 leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.”

8. Our attention was also drawn by the learned counsel to a judgment of the Division Bench of this Court in Babbar Vision India Pvt. Ltd v. Ram Vision Ltd 99(2002) DLT 556(DB) wherein the Division Bench following the decision of the Supreme Court in Santosh Kumar v. Bhai Mool Singh AIR 1958 SC 321 held that where the defence raises a triable issue, leave must be granted, whether the defence is legal or equitable one and even though it may not ultimately found to be a good defence. Where the defence is good and valid one, conditions cannot be imposed, power to impose conditions is only there to ensure that there be a speedy trial. In general the test to be applied should be 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 a plausible defence on those facts. As

rule where valid defence on trial discloses, defence is bona fide, leave must be granted unconditionally otherwise of grant of leave may become illusory.

9. Mr. Sumit Bansal, learned counsel appearing for the respondent, however, drew our attention to a larger Bench decision of the Supreme Court in Milkhiram (India) Private Ltd and Others v. Chamanlal Brothers AIR 1965 SC 1698 where the Court after distinguishing its earlier judgment in Santosh Kumar v. Bhai Mool Singh (supra) held as follows:

“Whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of material placed before it the court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but is improbable the court would be justified in coming to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. To hold otherwise would make it impossible to give effect to the provisions of Order 37 which have been enacted, as rightly pointed out by Bose, J., to ensure speedy decision in cases of certain types. It will be seen that Order 37 Rule 2 is applicable to what may be compendiously described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, money disputes between the parties are not adjudicated upon expeditiously. It is these considerations which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given should be

subjected to a condition.” (Emphasis supplied)

10. The Bench noted that in Santosh Kumar's case the Court mainly relied upon the decision in Jacobs v. Booth's Distillery Co (1901) 85 LT 262 in which the House of Lords held that whenever a defence raises a triable issue leave must be given and also referred to two subsequent decisions where it was held that when such is the case leave must be given unconditionally. In this connection Supreme Court referred to the following observations of Devlin L.J in Fieldrank Ltd v. Stein (1961) 3 All ER 681 at pp.682-83:

“The broad principle, which is founded on *Jacob v. Booth's Distillery Co.* is summarised on p. 266 of the *Annual Practice* (1962 Edn.) in the following terms:

‘The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition.’”

If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to some comments that have been made on *Jacobs v. Booth's Distillery Co.*⁴ They will be found at pp. 251 and 267 of the *Annual Practice*, 1962. It is suggested (see p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267 the learned editors of the *Annual Practice* have this note: “The condition of payment into court, or giving security, is nowadays more often imposed

than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the master 'is prepared very nearly to give judgment for the plaintiff."

It is worth noting also that in *Lloyd's Banking Co. v. Ogle* 1 Ex. D. at p. 264 in a dictum which was said to have been overruled or qualified by *Jacob v. Booth's Distillery Co.*⁴ Bramwell, B., had said that

"....those conditions (of bringing money into court or giving security) should only be applied when there is something suspicious in the defendant's mode of presenting his case."

I should be very glad to see some relaxation of the strict rule in *Jacob v. Booth's Distillery Co.* I think that any Judge who has sat in chambers in RSC, Order 14 summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency."

(Emphasis supplied)

11. The Court then held that the above observations and the observations of Chagla, C.J. In Rawalpindi Theaters Private Limited v. M/s.Film Group Bombay 60 Bom LR 1378 at p. 1874 may well be borne in mind by the Court sitting in appeal upon the order of the trial judge granting conditional leave to defend:

"It is indeed not easy to say in many cases whether the defence is a genuine one or not and therefore it should be left to the discretion of the trial Judge who has experience of such matters both at the bar

and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to Order 37 Rule 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the Order applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application."

(emphasis supplied)

12. The above judgment relates to a case under Order XXXVII Rule 3 CPC as amended by the Bombay High Court but the principles laid down will broadly apply to suits under Order XXXVII. When the court has doubt that the defence is not in good faith or it is improbable and wants to protect the plaintiff specially when there is no ground of hardship to the defendant in asking to deposit money in court or to furnish security therefor, the court may in its discretion grant conditional leave. However, care has to

be taken to see that real and triable issues are not shut out by unduly severe orders as to deposit.

13. Learned counsel appearing for the respondent also drew our attention to several decisions of different Division Benches of this Court in Raj Rahul Contractors & Builders Pvt. Ltd & Others(M/s) v. M/s.Viking Traders 2006 VI AD (Delhi) 388, Reliance Engg & Electricals Corpn & Anr v. Veena Aggarwal 2006(92) DRJ 158 (DB) and Rajesh Kumar Aggarwal v. Punjab & Sind Bank & others 129 (2006) DLT 792 (DB) wherein the Court imposed conditions for grant of leave.

14. In Raj Rahul Contractors' case (supra) the Court held that the stand taken by the appellant cannot be said to be ex facie sham or a moonshine defence, particularly in view of the fact that the appellant has clearly made a statement that the portion of the property in question which was covered by the agreement executed between the parties, is still available for user of the respondent. The Court, however, proceeded to hold that the appellant would be entitled to leave to defend but conditionally, subject to their furnishing a bank guarantee to the satisfaction of the trial court.

15. In Reliance Engineering & Electrical Corpn's case (supra) the fact that money was borrowed was not disputed by the defendant but a defence was raised that subsequently a settlement was arrived at between the parties and that the plaintiff had agreed to accept a sum of Rs.3,60,000/- in full and final settlement of the entire claim. According to the defendants they paid a sum of Rs.3,20,000/- in cash and issued two cheques for a sum of Rs.20,000/- each. The defendants relied upon a receipt which was alleged to have issued by the plaintiff to the Accountant of the defendants. The case of the plaintiff was that the receipt was a forged and manipulated document. The receipt was issued to the Accountant of the defendants towards part payment of the due interest for the previous years and the said receipt has been distorted and manipulated and fabricated by the defendants. The Court held that all these issues raised by the defendant can only be decided by producing evidence in this regard and granted only conditional leave by directing the defendants to deposit the entire decretal amount before the trial court.

16. In Rajesh Kumar Aggarwal's case (supra) again the Division Bench held that in view of the fact the defendant No.3 is alleged to

have executed a guarantee document, the execution of which is not disputed by the defendant, however the plea being that it was signed blank, the appellant should be entitled to conditional leave subject to furnishing a bank guarantee/security of immovable property as condition for grant of leave.

17. With the assistance of the learned counsel appearing for the parties we have gone through the case and we are in respectful agreement with the learned single Judge that though the defence taken by the appellant cannot be said to be sham or moonshine but certainly it is not a case where the defendant can be granted leave unconditionally. The loan transaction is supported by pro-notes. In fact respondent has placed on record letters empowering the appellant No.1 to take loan from the respondent on behalf of appellant No.2. This is the undisputed document which will show that the parties entered into loan transactions and not necessarily the sale and purchase of shares as pleaded by the appellants. The defence raised by the appellant is improbable in the sense that if the cheques were given by the appellants to the respondent in business transaction there was no occasion to support such liability by issuing pro-notes which

contains an unequivocal admission of the liability.

18. We may mention that this Court while entertaining the appeal stayed the order of the learned single Judge subject to the appellants furnishing security of 50% of the immovable property which has been duly furnished. In our opinion the ends of justice would be met if the order of the learned single Judge is modified to the extent that the security shall be furnished to the extent of 50% of the suit claim instead of the entire suit claim. It is ordered accordingly. The appeal stands disposed of in terms of the above order.

CHIEF JUSTICE

MAY 20,2008
“V”

S.MURALIDHAR
JUDGE