

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA (OS) NO. 46/2006

% Date of Decision : July 28, 2008

Jammu & Kashmir Bank Ltd. Appellant
Through: Mr.Vijay Hansaria, Sr.Advocate
with Mr. G.M.Khousar and
Ms. Sneha Kanta, Advocates

VERSUS

Shri Digvijay Cement Respondents
Through : Mr. Paban K.Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SARIN
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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

SUDERSHAN KUMAR MISRA, J:

1. This is an appeal filed by the Jammu and Kashmir Bank Ltd. against the decision of a Single Judge of this Court dated 8th March, 2006 whereby the bank's application for leave to defend a suit instituted by the respondent, Shree Digvijay Cement Company Ltd. under Order 37 of the Code of Civil Procedure was refused, and the suit decreed in favour of the respondent and against the bank. The facts relevant to this appeal are noted hereinafter.

2. On 4.7.1994, Shree Digvijay Cement Company, respondent herein, agreed to sell 12500 metric tonnes of Cement Clinker to M/s. Impression International. The contract, *inter alia*, required the buyer to provide an “irrevocable and confirmed letter of credit (LC) for 100% payment at sight ... in favour of the respondent through M/s. State Bank of Saurashtra.” On the same day, a message was conveyed by M/s Impression International that since the cargo had to be finally supplied by it to a foreign buyer, namely, M/s. Chittagong Cement Clinker, a foreign Letter of Credit had been opened in its favour by the foreign buyer and that the payment to the respondent would be made through a Back-to-Back LC. On the basis of the foreign LC, M/s. Impression International opened an irrevocable LC (LN/LV/05/95) in favour of the respondent which was to be advised through Jammu and Kashmir Bank Ltd. (hereinafter “the appellant”). The documents named for negotiating *inter alia* required the “full set of original Mate Receipts”. Vide a subsequent amendment on 12.08.1994 the expiry date for negotiation was extended upto 30.08.1994.

3. Pursuant to the boarding of the goods, the requisite mate receipts and other documents were supplied by the respondent to State Bank of Saurashtra which, in turn, forwarded the same to the Appellant bank on 30.08.1994 for payment. On 6.9.1994, the appellant informed to State Bank of Saurashtra that there were discrepancies in the submitted documents and consequently expressed its inability to release the payment.

4. It is the case of the respondent that on 15.09.1994, 16.09.1994, 21.09.1994, 22.09.1994 and 23.09.1994, several communications were sent

to the appellant informing it that M/s. Impression International had accepted the discrepant documents and therefore the payment in question be released by the appellant bank to the respondent. The appellant, on the other hand, relies on two letters dated 22.09.1994 and 23.09.1994 whereby M/s. Impression International denied the acceptance of the discrepant documents because of which the appellant was constrained to refuse to honour the LC. However, besides these documents, the respondent has also brought on record an undated letter written to the appellant bank by the said M/s. Impression International irrevocably accepting the discrepant documents. The respondent avers that this letter was written after the letters of 22.9.1994 and 23.9.1994. The appellant, on the other hand, claims that this undated letter was written prior to the letters of 22.9.1994 and 23.9.1994. Ultimately, on 13.10.1994, the appellant returned the documents of the respondent to State Bank of Saurashtra.

5. In the meanwhile, the requisite documents relating to the foreign LC opened by the foreign buyer, i.e., M/s. Chittagong Cement Clinker in favour of M/s. Impression International, who was the purchaser from the respondent, were received and negotiated by the appellant bank on 01.09.1994. Further to this foreign LC, on 10.10.1994, Banque Indosuez, the advising bank in the foreign LC took the decision to release the payment which was indeed realized by the appellant bank on 11.10.1994. It is also the appellant's case that the two letters of credit, i.e. the first one issued on the instructions of M/s Impression International by the appellant bank in favour of the respondent and the second one issued by Banque Indosuez in

favour of M/s Impression International, pertained to two separate, independent and distinct transactions and that therefore, based on this understanding on 01.09.1994, the funds received under the foreign letter of credit in favour of M/s Impression International were appropriated by the appellant towards some other dues of M/s Impression International that were outstanding with the appellant bank. It appears that by its letter of 08.12.1995, Banque Indosuez informed the respondent, Shri Digvijay Cement Company Ltd. of the fact that payment on the foreign letter of credit had, in fact, been made by it to the appellant.

6. It was in these circumstances, and since it had shipped the contracted goods but failed to receive payment therefore, the respondent, Shri Digvijay Cement Company Ltd. began making efforts to recover its payment from the Jammu and Kashmir Bank Ltd., the appellant herein. Towards this object, since its contract with M/s Impression International for the supply of cement clinker contained an arbitration clause, the respondent filed a suit under Section 20 of the Arbitration Act seeking appointment of an arbitrator. At the same time, the respondent also filed a complaint against the appellant bank before the Banking Ombudsman. It appears that at the initial stage, the Banking Ombudsman expressed its inability to entertain the complaint in view of the aforesaid arbitration suit which was pending before this Court. Consequently on 06.08.1996, the respondent withdrew the arbitration suit with a view to pursuing its complaint before the Ombudsman. Ultimately, on 8th May, 1997, the Ombudsman dropped all proceedings in the matter, for the reason, inter alia, that it was not empowered to record evidence and

that the loss appeared to it to be attributed to the negligence of the two banks, i.e. the appellant bank herein, as well as Banque Indosuez, which was the advising bank in the foreign Letter of Credit.

7. Faced with this situation, the respondent, Shri Digvijay Cement Company Ltd. ultimately instituted the instant suit, from which this appeal has arisen, under Order 37 of the Code of Civil Procedure on 17.9.1998 for recovery of Rs.1,19,36,136/- (Rupees one crore nineteen lakh thirty six thousand one hundred thirty six only) along with interest against the Jammu and Kashmir Bank, i.e., the appellant herein. After service of summons, the application filed by the Jammu and Kashmir Bank Ltd. for leave to defend the suit was dismissed by the Learned Single Judge vide impugned judgment and order dated 08.03.2006, *inter alia*, on the grounds that the appellant opened the LC in favour of the respondent on the basis of the foreign LC, and despite receipt of funds by the appellant under that foreign LC, appellant did not make the payment to the respondent. Further, the Learned Single Judge found that the aforesaid undated letter irrevocably accepting the discrepant documents by M/s. Impression International was written after its letter of 22.09.1994. The Learned Single Judge also observed that the appellant refused to release the payment against the LC with the motive of adjusting the same towards the outstandings of M/s Impression to the appellant bank. It concluded that the defence raised by the appellant in its application for leave to defend is moonshine and that no triable issues arise in the matter. The impugned judgment of the learned Single Judge is assailed before us chiefly on the ground of limitation. Although, admittedly, the bar of

limitation was not urged by the applicant in its application for leave to defend filed before the Single Judge; counsel for the appellant has sought to urge that this is a plea that can be urged even in appeal. Another ground urged at the bar was that the beneficiaries to the transactions were necessary parties to the suit and since they were not impleaded, the suit was bad. The latter plea was not seriously pressed.

8. The principles with respect to grant or refusal of leave to defend were enunciated in ***M/s Mechelec Engineers & Manufacturers Vs. Basic Equipment Corporation (1976) 4 SCC 687.***

9. They have been reiterated on several occasions by the Supreme Court, including ***Uma Shankar Kamal Narain v. M.D. Overseas Ltd.,(2007) 4 SCC 133; Defiance Knitting Industries (P) Ltd. v. Jay Arts,(2006) 8 SCC 25; State Bank of Saurashtra Vs. Ashit Shipping Services (P.) Ltd. and Anr. AIR 2002 SC 1993; Milkhiram (India) Private Ltd. and Ors. v. Chamanlal Bros. AIR 1965 SC 1698; Raj Duggal v. Ramesh Kumar Bansal, 1991 Supp (1) SCC 191, pg 192.***

10. Therefore, broadly, the settled position is that if the application for grant of leave raises an issue which is by its nature triable, leave to defend must be granted. An issue is a material proposition of fact or law which is affirmed by one party and denied by the other (See Order XIV, R. 1). A triable issue then is an issue liable to a judicial trial, i.e., an issue for the determination of which, a trial is warranted. By way of illustration, some indications, as to whether an issue answers the description of being a “triable issue”, were given by the Supreme Court in the ***Raj Duggal*** case

(supra), which come to this: existence of a fair dispute as to the meaning of a relevant document; dispute 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. That the application raises an issue which is triable, is an onus for the applicant/defendant to discharge. In case of his failure to show the triability of the issue raised, the court must refuse the leave to defend. Such onus is however light and the grant of leave is always to be preferred except in a crystal clear case. This approach also seems to be the intention of the legislature which is clearly expressed in the negative language used in proviso to Rule 3(5) of Order 37, which states, inter alia, “provided that the leave to defend *shall not be refused* unless the court is satisfied ...”. The rationale for imposing a light onus of proof is that the ordinary rule is the observance of the principles of natural justice, including the rule of *audi alteram partem*. This is a highly cherished norm of the Indian judicial system. In another context highlighting the respect that should be accorded to the principles of natural justice, it was held by the Supreme Court in ***Sangram Singh v. Election Tribunal, Kotah, Bhurey Lal Baya (1995) 2 SCR 1:***

“Now a code of procedure must be regarded as such. It is *procedure*, something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to *both* sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that *our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard*, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence *and that they should not be precluded from participating in them*. Of course, there must be exceptions and where they are clearly defined they must be given effect to. *But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.*" (Emphasis Supplied).

11. The Code of Civil Procedure endorses the principles of natural justice in its entire scheme. In this sense, by curtailing the ordinary procedure, Order 37 is a deviation from the general rule and accordingly is to be permitted only in crystal clear cases as it affects the valuable rights of the defendant, including the right to be heard. The regard for observance of principles of natural justice is pervasive and is manifest throughout the Code, including Order 37 where it provides for the derogation from the ordinary procedure only to the extent expressly provided for under that Order. While adjudicating an application for grant of leave, the adjudicating court must therefore strive to strike a subtle balance between the two competing claims: a) right not to be condemned unless given an opportunity of being heard and b) a defendant must be prevented from raising frivolous defences and playing delay tactics when the case is otherwise clear. The High Court of Jammu and Kashmir took this view in ***Mrs. Parvinder Kaur Vs. Ram Lal*** AIR

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"Order 37 of CPC deals with summary procedure for suits covered by it with the object to abridge the proceedings providing rapidity of disposal. *The*

provisions of the Order are merely procedural and cannot be construed as negating or superseding the substantive rights of the debtor available to them under the ordinary law. When the defendant enters an appearance and is served a summons for judgment in the form prescribed, he has a right to pray by affidavit or otherwise permission/leave to defend the suit after disclosing such facts as are deemed sufficient to entitle him. Such a prayer when made has to be disposed of by the Court in accordance with the provisions of law. The leave petition cannot be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he had substantial defence to raise or that the defence intended to be put up by the defendant was frivolous or vexatious. In other words, the general rule is to grant leave if substantial defence is disclosed and exception is to refuse the leave only after holding that the defence raised was either frivolous or vexatious. If the defence disclosed is bona fide, the leave should be granted unconditional.

...

The claim of the defendant and the pleas available to them in suits covered by Order 37 of the C.P.C. cannot be snatched or taken away under the cloak or on the hyper-technical pleas of the non-compliance of some directions of sub-rule (5) of Rule 3 of Order 37 of CPC. Justice cannot be sacrificed on the altar of technicalities and has to be dispensed with substantially and bona fide. If the pleas raised by the defendant are held to be mala fide, imaginary, without basis, frivolous or vexatious, the leave may be refused, but not otherwise.” (Emphasis Supplied).

12. The expression “defence”, as used in Rule 3 of Order 37, means lawful defence *i.e.* any defence available to a defendant under law. Such a defence may accordingly be a defence rooted in facts or in law. In other words, the defendant may plead any defence, which arises as an issue either of law or of fact. If law itself imposes an obligation on the court to consider an issue, the proceedings cannot be said to be lawfully concluded until the court discharges that obligation. Such an obligation arises particularly where,

owing to a legal provision, there is an illegality or irregularity in the very institution of a matter before a court. While such a question or any other question of law, materially affecting the ultimate decision, arises before a court in an O. 37 suit, the court while determining an application for leave must take the following recourse:

- a. If the question raised is a pure question of law *i.e.* it is not contingent on any issue of fact, the court must directly determine it and the leave to defend need not be granted on this basis alone;
- b. If the question is a mixed question of law and fact but may be determined from the averments in the plaint and the application for leave to defend, the court must determine it without granting leave to defend;
- c. If the issue is one where the law and fact are so inextricably mixed up that a decision on the issue cannot be reached at without appreciating the evidence, the court must grant leave to defend;
- d. If the issue of law is not decisive of all the rights of the parties or is decisive of only a part of the claims of the parties, and the other rights or the remaining claims arise as a matter of fact and evidence, the court must grant leave to defend in respect of all the rights, claims and issues.

13. This has been the practice of the courts in England also where after reviewing several authorities, the court, in **R G Carter Ltd v Clarke** [1990] 2 All ER 209, 1990 1 WLR 578, 8 March 1990, observed:

“As will be seen, I said: 'It is quite different if you are dealing with a triable issue which arises as a matter of law.' This aspect was considered, and the same conclusion reached, by this court in *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 at 516, [1983] 1 WLR 642 at 654, the reasoning of Robert Goff LJ being quoted and followed in *Israel Discount*

Bank of New York v Hadjipateras [1983] 3 All ER 129 at 135, [1984] 1 WLR 137 at 145. I would not resile from this view, even if I could, but it is as well to bear in mind the reason for this exception. It is this. If a judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide that issue one way or another. Even if the issue of law is complex and highly arguable, it is far better if he then and there decides it himself, entering judgment for the plaintiff or the defendant as the case may be on the basis of his decision. The parties are then free to take the matter straight to this court, if so advised. This was the situation in the classic case of Cow v Casey [1949] 1 All ER 197, [1949] 1 KB 474. But it is quite different if the issue of law is not decisive of all the issues between the parties or, if decisive of part of the plaintiff's claim or of some of those issues, is of such a character as would not justify its being determined as a preliminary point, because little or no savings in costs would ensue. It is an a fortiori case if the answer to the question of law is in any way dependent on undecided issues of fact."

...

14. The instant suit was instituted as a Summary Suit under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter "CPC"). Order 37 provides for a summary procedure for the trial of certain categories of cases which are, *inter alia*, instituted upon bills of exchange, hundis and promissory notes. Rule 7 of Order 37, which provides for the procedure to be observed in such suits, provides that, "save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

15. Thus, unless the Order itself lays down a different procedure on an aspect, the procedure applicable to an ordinary suit also applies to a suit under Order 37. While dealing with the applicability of the provisions of the

Code generally and Order VI in particular to summary suits, this Court in ***Container Movement (Bombay) Transport Pvt. Ltd. v. Capital Cargo and Container (India) Pvt. Ltd.***, ILR (2000) 2 Del 323, at page 323 observed:

“6. Order XXXVII does not state that suits falling within its contemplation are beyond the purview and application of other provisions of the Code. Order VI applies to all pleadings generally and I am unable to find any provision in this Order which states that it would not apply to Summary Suits, or vice versa. Rules of procedure are not intended to be pitfalls, or traps to litigants.” (Emphasis Supplied).

16. By the same reasoning, one can conclude that unless inconsistent with the provisions of Order 37, all the provisions of CPC apply to summary suits also. It follows, therefore, that the provisions of Order 7, Rule 11 are applicable to summary suits.

17. Order VII, Rule 11 of the Code provides for “**Rejection of plaint.** – The plaint shall be rejected, inter alia, in the following cases: -

(a) where the suit appears from the statement in the plaint to be barred by any law;

18. The Supreme Court very succinctly expressed the obligatory nature of Rule 11 of Order VII in **Syndicate Bank vs. Prabha D. Naik** (2001) 4 SCC 713, Pr. 13 where it observed that:

“The issue of limitation being a mixed issue of law and fact under the Limitation Act, the Court in spite of plea not being raised by the defence, can go into the same suo moto ...”

19. The Supreme Court while holding the mandatory nature of Rule 11 in **Popat and Kotecha Property Vs. State Bank of India Staff Association** (2005) 7 SCC 510, Pr. 19 observed:

“Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, *the word 'shall' is used clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant.*” (Emphasis Supplied).

20. In ***T. Arivandandam v. T.V. Satyapal and Anr. (1977) 4 SCC 467***, Para 5, the Supreme Court made the following observations:

“The [trial court] must remember that if on a meaningful -- not formal -- reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. *And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C.* An activist Judge is the answer to irresponsible law suits. *The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage.*” (Emphasis Supplied).

21. Upon a combined reading of O. 37, R. 7 and O. 7, R. 11, the position of law that emerges is this: a plaint by which a Summary Suit has been instituted under Order 37 shall be rejected if the same attracts any of the bars provided for under Order 7, Rule 11, CPC. And, in such a case, it is an obligation of the court receiving a plaint to examine it with special reference to the question whether the plaint is liable to be rejected for any of the reasons given in O.7, R.11.

22. Order VII, Rule 11 of CPC *inter alia* provides that “the plaint shall be rejected ... (d) where the suit appears from the statement in the plaint to be barred by any law.” Section 3 of the Limitation Act, on the other hand, bars the institution of a suit after the expiration of the prescribed limitation period. In other words, a plaint shall be rejected under Order VII, Rule 11 (d) if the same has been instituted after the expiration of the prescribed period of limitation. And, considering the mandatory scheme of Rule 11 and the obligation cast upon the court to examine the plaint for any infirmity provided for under Rule 11, the court must reject the plaint. This is particularly true where the rejection is warranted on the ground of expiration of limitation since Section 3 of the Limitation Act, which contains the general rule, is couched in a mandatory language and provides that “every suit ... shall be dismissed, *although limitation has not been set up as a defence.*” It is further backed by an obligation cast on the plaintiff under O. 7, R. 6 to show the ground upon which the exemption from bar imposed by the law of limitation is claimed.

23. In the instant appeal, the appellant impugns the judgement of the Learned Single Judge, *inter alia*, on the ground that the suit was barred by limitation. The same was however not raised before the Single Judge. Considering that this ground was not agitated before the Single Judge, a crucial question arises for this court to answer: whether the plea of limitation can be raised for the first time at the appellate stage?

24. Under the Indian law, the bar by limitation arises as a consequence of the Limitation Act, 1963. Further, Section 3 which bars the institution of a

suit after the limitation period is mandatory in nature. It enjoins an obligation on the court to dismiss a suit if the prohibition of Section 3 is properly attracted. The obligation operates independently and irrespective of the right of the defendant to challenge the maintainability of the suit on that ground.

25. In the same connection, the Supreme Court in ***V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and Anr.*** (2005) 4 SCC 613, Para 20 observed:

“The mandate of Section 3 of Limitation Act is that it is the duty of the Court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex-facie barred by the Law of Limitation, a Court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation.”

26. It was further also observed in ***Manindra Land & Building Corporation Ltd. v. Bhutnath Banerjee and Ors.*** AIR 1964 SC 1336, para 9:

"Section 3 of the Limitation Act enjoins a Court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate Court comes to an erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter."

27. The statute of limitation besides being a statute of repose, peace and justice, also vests a right in the defendant not to be sued after the expiration of the period of limitation, unless the plaintiff can explain the contrary on

the basis of any of the exemption clauses prescribed in the Limitation Act itself. The defendant cannot be denied of the right which vested in him by operation of law merely because he failed to raise the plea before the court, particularly when the court itself was under an obligation to consider it even without the defendant having raised it.

28. The Supreme Court highlighted this purpose of the statute of limitations in ***Popat and Kotecha Property v. State Bank of India Staff Assn.***

(2005) 7 SCC 510, pg 514 in the following words:

“9. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. *The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So, a lifespan must be fixed for each remedy.* Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time.” (Emphasis Supplied).

29. Furthermore, the bar of limitation may be pleaded for the first time even at the appellate stage. This position has been reiterated by the Supreme Court on a number of occasions.

30. In ***State Bank of Hyderabad v. Vasudev Anant Bhide, (1969) 2 SCC 491, pg 498, Pr. 19***, the Supreme Court held:

“The second contention of Mr Aggarwala relates to the claims being barred under Article 137 of the Limitation Act, 1963. This ground of limitation has not been raised either before the Labour Court or even in the special leave applications filed in this Court. The appellant has filed CMP No. 1259 of 1969 for permitting him to raise this question of limitation based upon Article 137 of the Limitation Act of 1963. As no fresh facts had to be investigated and as the matter could be dealt with as a pure question of law, we permitted the appellant to raise this plea of limitation.”

31. The Supreme Court further observed in ***Rama Shankar Singh v. Shyamlata Devi*, (1969) 2 SCR 360.**

“3. The High Court was right in allowing the defendant to raise the point of limitation, though the plea was not taken in the written statement. Under Section 184 of the Bihar Tenancy Act a suit instituted after the expiry of the period of limitation is liable to be dismissed though limitation has not been pleaded learned counsel for the appellants could not tell us what further evidence his clients could adduce on this point. In the circumstances, the absence of the plea of limitation in the written statement did not cause the appellants any prejudice.”

32. Therefore, there is no illegality in allowing the plea of limitation to be raised for the first time in appeal. However, the question whether or not the plea should be allowed in order to dismiss the suit of the plaintiff (at the appellate stage) is to be determined by examining what prejudice would be caused to the plaintiff which would not have been caused to him had the plea been raised in the first instance, and whether in order to dispose of the matter, the appellate court must take fresh evidence or investigate new facts.

33. An issue of limitation does not arise as a pure question of law. It is always a mixed question of fact and law. In order to decide the issue of

limitation, the court has to perforce appreciate the facts and evidence, unless from a plain reading of the plaint, the suit appears to be unambiguously barred by limitation.

34. In such a case, the appellate court may set aside the decree and dismiss the suit on the ground of limitation on the basis of the evidence and record available if, from such record and evidence, without more, the suit appears to be struck by the law of limitation. However, if the question of limitation is allowed without examining the relevant facts and evidence, or if the appeal, in which the plea has been raised for the first time, is allowed and suit dismissed without giving the opportunity to the plaintiff to oppose it on facts and evidence, it may cause prejudice to some of the parties to the suit. In ***Ramesh B. Desai v. Bipin Vadilal Mehta*, (2006) 5 SCC 638, 652 Pr.19**, the Supreme Court unequivocally observed:

“The plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact.”

Therefore, where the appellate court must require further evidence than that already available on-record, the appellate court must not determine the issue in appeal. The correct approach in such a case is to frame an issue and then remit the matter back to the trial court for a finding on it. This view found favour with the apex court in ***Banarsi Das v. Kanshi Ram*, (1964) 1 SCR 316**, where the Court in Pr. 14 observed:

“14. If the High Court felt overwhelmed by the provisions of Section 3 of the Limitation Act, it should at least have given an opportunity to the parties which supported the decree of the trial court to meet the

plea of limitation by amending their pleadings. After allowing the pleadings to be amended, the High Court should have framed an issue and remitted it for a finding to the trial court. ... We are clearly of opinion that the High Court was in error in allowing the plea of limitation to be raised before it particularly by defendants who had not even filed a written statement in the case.”

35. To our mind, the requirement of an adequate opportunity to oppose such a plea on facts and evidence applies more strictly and rigidly in case of summary suits instituted under Order 37 and where in an appeal filed against refusal of leave, the appellant prays for setting aside of the decree and/or grant of leave to defend. In summary cases, a decree is passed almost automatically upon denial of leave or failure of the defendant to enter appearance. In such a case, where the leave to defend has been denied, the appellate court does not have sufficient evidence from which it may determine the issue of limitation when raised for the first time. A paragraph from **Raj & Another v Bank Sepah Iran** Queen's Bench Division dt. 23 May 1988 reflects a similar position in England:

“It is of the utmost importance to stress at the outset that, in considering issues of disputed law or fact, it is not the function of the court in the present order XIV proceedings [summary suit proceedings] to come to any final conclusions, save as noted below on any questions of disputed law such as it may be necessary to decide for the purpose of determining the Order XIV proceedings.”

36. From the pleadings before us we find that a triable issue with regard to limitation does arise in this case. We also find that there are many circumstances that may have a bearing on the question of limitation,

including, inter alia, a letter written by M/s. Impression irrevocably accepting the discrepant documents. After the return of documents of the seller, Digvijay Cement Company i.e. the respondent herein, to the State Bank of Saurashtra on 13th October, 1994, the respondent first moved a petition under Section 20 of Arbitration Act before the Delhi High Court seeking appointment of an arbitrator in Suit No.1778-A/1995. At the same time, the respondent appears to have also filed a complaint before the Banking Ombudsman, who expressed its inability to entertain the matter on 4th July, 1996 in view of the pending arbitration suit. It appears that as a consequence of this order of the Banking Ombudsman, the respondent/seller withdrew its aforesaid arbitration suit on 06.08.1996. Ultimately on 08.05.1997, the Banking Ombudsman also dropped all proceedings after observing, inter alia, that the matter involved certain disputed facts and since it was not empowered to take evidence, it felt unable to express any opinion on the matter. It was thereafter that the present suit under Order 37, out of which the instant appeal arises, came to be filed on 17th January, 1998. The respondent, of course, maintains that its suit is within limitation.

36. In view of the above discussions, it is clear that although the defendant/appellant can be permitted to plead the bar of limitation for the first time in appeal; at the same time, keeping in mind the fact that the proceedings before the Single Judge were summary proceedings, and facts would be required to be adduced before the Court, and that a decision cannot be reached without appreciating the evidence that the parties may

seek to produce in that regard; the impugned judgment is set aside to the extent that leave is granted to the appellant/defendant restricted to the question of limitation. The appellant is granted leave to contest the suit subject to the condition that it shall deposit the decretal amount in Court within eight weeks. Upon deposit of decretal amount within eight weeks as aforesaid, appellant is granted leave to contest the suit confined to the ground that the suit is barred by limitation. Appellant shall be entitled to lead evidence in support of the said plea. Appeal is allowed in above terms.

37. The appeal is disposed of accordingly.

SUDERSHAN KUMAR MISRA, J

MANMOHAN SARIN, J

July 28, 2008
skw/OPN