

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA NO. 362 OF 2005**

Date of Decision: 25th August, 2009

PUNJAB & SIND BANK Appellant
!

Through:Mr. P.S.Bindra, Advocate

versus

\$ **M/S. RARE FUEL & AUTOMOBILES TECHNOLOGIES (P) LTD. & ANR.**

..... Respondents

^

Through: None

* **CORAM:**
HON'BLE MR. JUSTICE P.K.BHASIN

1. Whether Reporters of local papers may be allowed to see the Judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT

P.K.BHASIN, J(ORAL)

This appeal is directed against the order dated 31-03-2005 passed in civil suit no. 371/2004 filed by the respondent no. 1 herein against the appellant and respondent no. 2 under Order XXXVII of the Code of Civil Procedure, 1908. By the said order the application filed by the appellant seeking leave to defend the suit had been dismissed and consequently a decree for a sum of Rs. 3,82,500/- along with interest thereon @ 12% per annum from the date of filing of the suit till realization stood passed against it and in favour of the respondent no.1-plaintiff

as also against respondent no.2 herein since he had failed to even enter appearance in the suit within the statutory period after receiving the summons of the suit.

2. The relevant facts are that the respondent no. 1, which shall herein after be referred to as 'the plaintiff', filed a suit for recovery of Rs. 3,82,500/- along with interest thereon @ 18% per annum against the appellant, who was arrayed as defendant no. 1 and shall hereinafter be referred to as 'the defendant no. 1' and respondent no.2, who was arrayed as defendant no. 2 and shall be now referred to as 'defendant no. 2', under order XXXVII CPC. The allegations in the plaint were that defendant no. 2 was owner of diesel run bus no. DL 1PA 1053. He wanted to convert it to CNG mode. The plaintiff was into the business of retrofitment and conversion of diesel buses to CNG mode and the defendant no. 2 approached it for that purpose. The plaintiff agreed to undertake the job of conversion of the bus of defendant no. 2 from diesel to CNG mode and the charges for that conversion were agreed to be Rs. 3,75,000/-. Out of that amount the defendant no. 2 paid a sum of Rs. 80,000/- to the plaintiff as part payment and to secure the balance payment the defendant no. 2 had executed a Guarantee Bond. The defendant no.1 had sanctioned a loan to the defendant no. 2 for Rs. 2,81,250/- for getting his bus converted from diesel to CNG mode and had informed the plaintiff vide its letter dated 8th July, 2002 about the loan to defendant no. 2 and the plaintiff was requested to give prior information to the bank after the CNG kit had been fixed so that afore-said loan amount could be released to it(plaintiff). The bus had been hypothecated with defendant no.1 bank. Further averments in that plaint were that the job undertaken by the plaintiff was carried out and the defendants were informed and the defendant no.2 took the delivery of his bus but neither the defendant no. 2 nor defendant no.1 paid the balance charges to the plaintiff. The plaintiff having failed to get its

dues from both the defendants served them with demand notices and when the payment was still not released to it even thereafter a suit for recovery Rs.3,82,500/- with interest was filed under Order XXXVII CPC.

4. Defendant no. 1 entered appearance in the suit and sought leave to defend by filing necessary application supported by an affidavit. Leave to defend was sought primarily on the ground that there was no privity of contract whatsoever between the bank and the plaintiff. It was claimed that the bank had simply sanctioned a Transport loan on 02/07/02 to defendant no.2 out of which he had availed of Rs.1,43,730/- and since the terms & conditions of loan were not complied with full loan amount was not released to him. It was alleged that the payment of the dues of the plaintiff was not the bank's responsibility. Regarding the letter dated 8th July, 2002 written by the bank to the plaintiff it was stated that that letter did not constitute any privity of contract between the bank and the plaintiff and there was no liability on the part of the bank to pay the plaintiff's dues on account of the job done by the plaintiff for defendant no. 2.

5. The learned trial Court vide order dated 31-03-2005 rejected the application of defendant no. 1 for leave to defend the suit. While dismissing the application for leave to defend the trial Judge itself observed in the impugned order that " It is true that there was no contract in writing between the plaintiff and defendant no. 1 (appellant herein) for the installation of CNG kit." and as far as the dealings between the two defendants were concerned the observation of the trial Court was that " However, it is not disputed that the agreement in question was between defendant no.1 and defendant no.2 only and it was not a triparty agreement." The trial Court, however, after observing so held that it was only on bank's assurance conveyed to the plaintiff vide its letter dated 8th July, 2002 that the plaintiff got motivated to install the CNG kit in the bus of defendant

no. 2 and having done so the bank could not back out from that assurance and representation and it was estopped from disputing its liability in view of Section 115 of Indian Evidence Act and further that the bank could not escape from its vicarious liability along with the defendant no. 2.

6. I have heard the learned counsel for the appellant only since there was no appearance on behalf of any of the respondents on any of the three dates, including today, when the appeal was taken up for hearing.

7. Order 37 Rule 3(5) of the Civil Procedure Code which provides the procedure for moving the application for leave to defend by a defendant and the powers of the Court for grant of leave to defend reads as under:-

“(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.”

8. The principles for grant of leave to defend were laid down way back in the year 1976 by the Supreme Court in “M/s Mechalec Engineers & Manufacturers vs. M/s Basic Equipment Corporation”, AIR 1977 Supreme Court 577 . It was held

that the defendant is entitled to get leave to defend the suit instituted under Order XXXVII CPC under the following circumstances:-

“(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.”

These principles till date hold the field as far as the suits under Order 37 CPC are concerned and the same are kept in mind by the Courts while deciding the applications for leave to defend.

9. Having gone through the averments in the application of the defendant bank seeking leave to defend I am of the view that this is not a case where the defendant had failed to raise a triable issue or that its defence was illusory or sham justifying rejection of its application for leave to defend the suit. The trial Court itself, as noticed already, had observed in the impugned order that there was no written contract between the plaintiff and the defendant bank. The trial Court has heavily relied upon the bank's letter dated 08.07.2002 addressed to the plaintiff. However, a bare perusal of that letter would show that it was never represented by the bank to the plaintiff that it was guaranteeing the payment of its dues from defendant no. 2. It is the plaintiff's own case that the bus in question had been hypothecated by defendant no. 2 with defendant no. 1 to secure the repayment of the loan which the bank had sanctioned for defendant no. 2. So, the bank's letter appears to have been sent to the plaintiff only as an information to it about the loan to ensure that the delivery of the bus was not given to anybody else and it was only as per the understanding between the bank and defendant no. 2 that the bank had agreed to release the payment in favour of the plaintiff while delivering back the bus to defendant no. 2 on completion of the job of conversion of the bus to CNG mode. The plaintiff, however, appears to have understood that information as a guarantee coming from the side of the bank for the payment of its dues in the event of defendant no.2 failing to discharge his liability. That, however, prima facie does not appear to be a correct interpretation of the bank's letter dated 8th July, 2002 . The observation of the learned trial Court that it was on the bank's assurance and representation that the plaintiff had got motivated to do the job of conversion of bus of defendant no. 2 from diesel to CNG mode is not based on any material on record. It was not even the plaintiff's case that it had agreed to do the job for defendant no. 2 on credit because of the defendant bank having guaranteed the payment of unpaid charges for the job to be done by it for the defendant no.2. The contract between

the plaintiff and defendant no. 2 was an independent contract.

10. I am, therefore, of the view that the present appeal deserves to be allowed and the appellant bank is entitled to get unconditional leave to defend the suit of the plaintiff. This appeal is accordingly allowed. The order dated 31-03-2005 passed by learned Additional District Judge is set aside as far as appellant bank is concerned and consequently the decree passed against it stands set aside. The appellant bank will now be entitled to contest the suit by filing its written statement. As a result of the appellant succeeding in its appeal the decretal amount which it had deposited with this Court pursuant to this suit's order dated 22-11-05 shall now be released to it. The respondent no.1 shall bear the costs of this appeal.

The suit shall be taken up by the trial Court now on 7th September, 2009 at 2 p.m.

P.K. BHASIN,J

AUGUST 25, 2009
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