

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

+ RFA NO. 317 OF 2005

% Date of Decision: 26th July, 2010

VITAYSH KOSER ...Appellant

! Through: Mr. Rono Mohanty, Advocate

versus

\$ DEVINDER KUMAR ...Respondent

^ 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 has been filed against the order dated 9th March, 2005 passed by the Additional District Judge in a suit filed by the respondent/plaintiff under Order XXXVII of the Code of Civil Procedure whereby the appellant-defendant's application seeking leave to defend the suit was rejected. Consequent upon the rejection of the leave to defend application a decree for a sum of ₹ 8 lacs with interest @ 6% p.a. from the date of filing of the suit till realization came to be passed in favour of the respondent-plaintiff and against the appellant-defendant.

2. The plaintiff had filed the suit on the allegations that the defendant had taken a friendly loan of ₹ 8 lacs from him for a period of two months

on 17th May, 2003. Towards the repayment of the said loan the defendant had issued three cheques for a sum of ₹ 1,50,000/-, ₹ 5,00,000/- and ₹ 1,50,000/- and had also executed a pronote for ₹ 8 lacs. All the three cheques on presentation to the defendant's bank were dishonoured with the remarks "insufficient funds". The defendant having failed to pay the cheques amounts despite service of demand notice dated 11-08-03 the suit for recovery had to be filed.

3. The defendant filed an application seeking leave to defend the suit. In that application it was alleged that no loan was taken from the plaintiff and, in fact, the defendant did not even know him. He denied having issued any cheques or executed any pronote in favour of the plaintiff as claimed in the plaint. The defendant, however, admitted having signed three dishonoured cheques and the pronote referred to in the plaint. The defendant further claimed that he had some business transaction with one Mr. Suresh Kathuria for supply of T-shirts worth ₹ 8 lacs and he had given three undated cheques and three pronotes for the cheque amounts to that Kathuria as security only but he misused those cheques and pronotes in which names of the beneficiaries were not mentioned. That Kathuria had failed to return the cheques and the pronotes on cancellation of the deal despite his having been called upon to do so vide letters dated 15-07-03 and 09-08-03 by the defendant and the suit was based on stolen cheques and pronote.

4. The respondent-plaintiff filed reply to the leave to defend application

denying the aforesaid facts stated by the defendant in his leave to defend application. He denied that the cheques in question and pronote were stolen documents and further claimed that Suresh Kathuria appeared to be a man of defendant and that was evident from the fact that if actually there were any dealings between the two and the defendant had been defrauded by Kathuria the defendant would have pursued his criminal complaint allegedly lodged against Kathuria vigorously. The letter dated 15th July, 2003 allegedly written by the defendant to Suresh Kathuria was a fabricated documents on the face of it.

5. The learned Additional District Judge vide impugned order had come to the conclusion that the defence taken by the defendant in the leave to defend application that he had handed over the cheques and the pronotes to Suresh Kathuria was an afterthought and a frivolous defence and for coming to this conclusion the learned Judge also noticed the fact that in the reply dated 11-08-03 to the demand notice sent by the plaintiff to the defendant there was no reference whatsoever in respect of the business dealings between the defendant and Suresh Kathuria and handing over of the pronotes and cheques to Suresh Kathuria.

6. Learned counsel for the appellant, who alone has argued the appeal since respondent has chosen not to appear in the matter at the time of hearing, contended that the pleas raised by the defendant in the leave to defend application raised serious triable issues of facts and the same could not have been rejected by the trial Court without giving an opportunity to

the defendant to prove the same by adducing necessary evidence. Learned counsel placed reliance on three judgments of the Supreme Court in ***“John Impex (P) Ltd. Vs. Surinder Singh and Others”***, (2003) 9 SCC 176; ***“M/s Sunil Enterprises Vs. SBI Commercial & International Bank Ltd.”***, AIR 1998 SC 2317 and ***“Mechalec Eng. & Mfg. Vs. Basic Equipment Corporation”***, AIR 1977 SC 577 and one judgment of Rajasthan High Court in ***“Nanga Vs. Dhannalal”***, AIR 1962 Rajasthan 68. One judgment of Allahabad High Court has also been relied upon which is reported as ***“Ram Raj Ahir Vs. Hirdayan Narain”***, 1982 ALL. L.J. 1435.

7. The Supreme Court in Sunil Enterprises’ case(surpa) had after referring to some of its earlier decisions under Order XXXVII CPC summed up the propositions to be kept in mind by the Courts while considering leave to defend application in suits under Order XXXVII CPC. Those propositions are to be found in para no. 4 of the judgment and the same are reproduced below:-

“(a) If the defendant satisfies the Court that he has a good defence to the claim on merits, 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 possibly good defence, 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, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff’s claim, the Court may impose conditions at the time of granting leave to defend – the conditions being as to time of trial or more of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, 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, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.”

8. Placing strong reliance on the said judgment of the Supreme Court, learned counsel for the appellant has contended that his case falls within proposition (b) since the defence raised is a bona fide and reasonable one and needs trial.

9. When the appellant-defendant received the demand notice from the respondent-plaintiff he had denied having executed any cheques or pronote in favour of the plaintiff or having any acquaintance with the plaintiff. However, as noticed by the learned trial Court, further facts as narrated in leave to defend application regarding business dealings with Mr. Suresh Kathuria and handing over of the cheques in question without any name to Mr. Suresh Kathuria were not mentioned in that reply. The failure of the appellant-defendant to bring to the notice of the plaintiff that fact in his reply to the demand notice has been held to be an afterthought and rightly so and that fact brings this case in the category covered under proposition no. (e) formulated by the Supreme Court in **Sunil Enterprises’** case (supra). I am of the view that this is a case where while allowing the leave to defend application of the appellant-defendant interest of the respondent-plaintiff should also be protected by directing the appellant-defendant to deposit with the trial Court the amount of ₹ 8 lacs which shall be a condition for grant of leave to defend to the appellant-defendant.

10. This appeal is accordingly allowed. The impugned order dated 9th March, 2005 is set aside. The appellant-defendant is granted leave to defend the suit but subject to his depositing with the trial Court the amount of ₹ 8 lacs within a period of two weeks from today. In case of failure on the part of the appellant-defendant to deposit the said amount with the trial Court the trial Court's decree shall stand revived.

11. The trial Court shall now take up the case on 16th August, 2010 at 2 p.m.

JULY 26, 2010
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P.K. BHASIN,J