

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

+ **FAO 363/2010**

Reserved on: 25.10.2010

Reserved on: 27.10.2010

K & K HEALTH CARE PVT LTD

Through

..... Appellant
Mr. Tiger Singh, Mr. Manmeet
Singh, Advs.

versus

PEHACHAN ADVERTISING

Through

None

..... Respondent

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

: **MOOL CHAND GARG,J**

CM No. 17444/2010

Allowed.

FAO 363/2010

1. This appeal is being disposed of at this stage itself after preliminary hearing which has been filed by the appellant under Order 43 Rule 1 of the CPC against an order whereby the leave to defend has been permitted in a suit under Order 37 CPC whereby by passing order passed by the Addl. District judge while disposing of an application filed by the appellant seeking leave in a suit filed by the respondent under Order 37 of the CPC conditionally i.e. subject to the defendant/appellant giving a bank guarantee equal to the amount of various bills bearing No. 07/020, 08/010, 08/019, 08/022, 08/035, 09/003, 09/005, 09/008 along with interest calculated on this amount at the rate of 24 % per annum till the date of filing the suit within one month from the date of the order.

2. A bare perusal of Order 43 Rule 1 goes to show that such an order is not appealable.

3. However, the learned counsel for the appellant submits that in view of a matter pending before a Division bench of this Court FAO (OS) 128/2010 titled as M/S Vasu Tech Ltd. & Ors. Vs. M/s. Ratna

Commercial Enterprises Ltd., the appeal should not be dismissed but should be kept pending till the disposal of that appeal or the matter be transferred to that Court.

4. I have summoned the file of FAO (OS) 128/2010 for perusal. A perusal of that case goes to show that the said appeal is arising out of the order passed by a Learned Single Judge of this Court and that appeal is registered as FAO(OS).

5. Perusal of the impugned order in that case dated 26.11.2009 goes to show that in that case the suit filed by the respondent being Civil Suit (OS) No. 850/2007 and 1093/2008 was decreed with costs and as such it was not a case where the order granting leave to defend was subject matter of the appeal.

6. Perusal of the order sheet passed by the Division Bench also goes to show that the Division Bench in its order dated 26.04.2010 has virtually expressed disagreement with the argument of the appellant that the appeal filed i.e. FAO (OS) was maintainable and has observed that in fact in that matter a Regular First Appeal should have been filed. The order dated 26.04.2010 passed in FAO (OS) 128/2010 reads as under:

“26.04.2010

Present: Mr. C.A. Sundaram, Sr. Adv. with Mr. Sanjiv Bahl, Mr. Kunal Tandon, Mr. Saket Sikri, Mr. Aditya, Mr. Vijay Kumar, Mr. Ajay Shekhar and Mr. Abhishek Gupta, Advs. for the Appellant. Mr. Sudhir Makkar and Ms. Meenakshi Singh, Advs. for the Caveator/Respondent.

CM No. 3400/2010 (Exemption)

Allowed, subject to all just exceptions.
Application stands disposed of.

FAO No. (OS) 128/2010 and CM Nos. 3399/2010 (Stay) and 4404/2010

Arguments heard for quite some time. We are not satisfied that challenge to the impugned order/judgment by way of Appeal is maintainable in view of the fact that a Regular First Appeal has to be preferred for.

List for arguments on this point on 23rd July, 2010.

VIKRAMAJIT SEN, J.

A.K. PATHAK, J.”

7. As such pending of FAO(OS) 128/2010 is of no consequence and does not help the learned counsel for the appellant.

8. The appellant has also relied upon a Division Bench of this Court in the case of Kailashpati Steel Industries Ltd. & Anr. Vs. Steel Authority of India Ltd. 2008 (106) DRJ 532(DB) wherein certain observation has been made regarding an order made by a Learned Single Judge of this Court in a summary suit. The Division Bench in that case, in the peculiar circumstances of the case has considered the order passed by the Learned Single Judge in having granted conditional leave to defend as judgment within the meaning of Section 10 of Letters Patent Act. The relevant observations made by the Division Bench in this regard are reproduced hereunder:

14. In Central Mine Planning and Design Institute Ltd. Vs. Union of India & Anr., (2001) 2 SCC 588:, following the earlier decision in Shah Babulal Khimji (supra), the Supreme Court concluded that:

From the above discussion, it follows that to determine the question whether an interlocutory order passed by one Judge of a High Court falls within the meaning of 'judgment' for purposes of Letters Patent the test is: Whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned. This has to be ascertained on the facts of each case.

15. Applying the tests laid down in Shah Babulal Khimji's case we have no doubt in our minds that in this case the order made by the learned single Judge is a "judgment" within the meaning of Section [10](#). This is a summary suit, and the procedure laid down in Order XXXVII Rule 2 of the Code, would apply to such a suit. The effect of Sub-rule (2) of Rule 2 of Order XXXVII, is that if the defendant is refused leave, then he cannot appear and defend the suit, and he will be deemed to have admitted the allegations contained in the plaint, and the plaintiff would be entitled to a decree as a matter of course. The result, therefore, of a refusal of an application for leave to defend will deprive the defendant of the right to defend the suit, and as far as the defendant is concerned the order practically determines the whole cause. The order refusing leave is held to be

appealable in Shah Babulal Khimji's case. If this is the true effect of an order made refusing leave, then it is obvious that a conditional order would stand on the same footing. In case the defendant is not able to comply with the condition, the result is that the plaint is taken to be admitted and the plaintiff is entitled to an order on that basis. It is true that it will be open for the defendants to file an appeal against the decree that may be passed on account of the inability of the defendant to comply with the condition and in the appeal the grounds for not granting unconditional leave can also be agitated. But in the meantime the plaintiff, having got his final decree, may have levied execution, and it may be too late for all practical purposes for the defendant to challenge the interlocutory order. We have to look at the substance of this order and what the real effect of the order is, having regard to the provisions of Order XXXVII Rule 2 of the Code and in our opinion the effect of the order is to determine the rights between the parties, since in substance, it entitles the plaintiff to the order claimed in the plaint. That being so, the order granting conditional leave is clearly appealable under Section [10](#) of the Delhi High Court Act.

9. However, in this case considering the merits of the case the Division bench has not interfered with the conditions imposed upon the appellant in that case, & passed the following directions:

“16. Coming back to the merits of the Mr. G.S. Raghav contended that as laid down by the Supreme Court in Mechalec Engineers and Manufacturers v. Basic Equipment Corporation AIR 1977 Supreme Court 577:, the Court can impose a condition of deposit only if the defendant has no defence or the defence set-up is illusory or sham or practically moonshine. He submitted that when the learned single Judge has not recorded any finding that the defence taken by the defendants was sham or moonshine, there was no occasion for imposing a condition for grant of leave to defend. We find no merit in the submission of the learned Counsel. On going through the entire records we find that the defendants are unable to raise any plausible defence in the suit. In considering the totality of the circumstances the learned single Judge cannot be said to be wrong in imposing condition of deposit of Rupees one crore. In a recent case of Anil Arora and Anr. v. Anand Kumar FAO(OS) No. 333-334/2005 disposed of on 20th May, 2008 this Court following the decision of the Supreme Court in Milkhiram (India) Private Ltd and Ors. v. Chamanlal Brothers AIR 1965 Supreme Court 1698 : held that where 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.

17. Lastly, a plea was raised by Mr. G.S. Raghav that the claim for a pre-suit interest @ 27% per annum being more than statutory rate of interest prescribed under the provisions of the Negotiable Instruments Act in respect of unpaid cheque does not fall within the scope and ambit of Order XXXVII of the Code of Civil Procedure and it is nowhere explained in the plaint that the claim of pre-suit interest @ 27% per annum is covered by Order XXXVII of the Code. Mr. Phoolka, on instructions from his clients, stated that the respondent does not want to press the claim of interest @ 27% per annum and confine its claim only to 18% per annum which is permissible under the Negotiable Instruments Act. Therefore, the plea about the rate of interest is also liable to be rejected."

10. Taking into consideration that the said order was passed by a Learned Single Judge of this Court which was considered as a judgment within the meaning of Section 10 of the Letters Patent Appeal which provides for an appeal to a Division Bench under the provisions of Letters Patent Act, I do not find any reason to agree with the contentions of the learned counsel for the appellant that in this case the appeal as filed by the appellant is maintainable before this Court in view of the clear-cut provisions of Order 43 Rule 1 CPC. As already observed it is also not a case which is similar to the case pending before the FAO (OS) 128/2010 and therefore it is also not a fit case to transfer this petition to the Division Bench.

11. In view of the aforesaid the appeal is dismissed at this stage itself as not maintainable.

CM No. 17442/2010 & 18796/2010

In view of the order passed above in the appeal, both the applications are dismissed.

MOOL CHAND GARG,J

OCTOBER 27, 2010
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