

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA NO. 733/2010

% ***Judgment dated 29.11.2010.***

Sanjay Kumar Appellant
Through: Ms. Monica Kapoor, Advocate

Versus

\$ Suresh Chand Gupta ... Respondent
Through: Mr. Mukul Dhawan, Advocate

**CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI**

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**

G.S.SISTANI, J (ORAL).

1. Present appeal has been directed against the judgment and decree dated 22.07.2010 passed by the Ld. Trial Court dismissing the application filed by the appellant seeking leave to defend and decreeing the suit of the plaintiff respondent herein.
2. The brief facts necessary for disposal of the present appeal are that a loan of a sum of Rs. 6, 60,000/- was advanced by the respondent to the appellant vide a cheque dated 27.05.2005. As the amount was not paid despite notice, the respondent filed a suit under the provision of Order XXXVII Rule 2 for recovery of the loan amount. Summons for judgment were issued to the appellant. The appellant filed an application under Order XXXVII Rule 3 seeking leave to defend in which the appellant prayed for unconditional leave to defend on various grounds. The Learned Trial Court dismissed the application for leave to defend and decreed the suit against the appellant and held that the respondent is entitled to recover a sum of Rs.6,60,000 from

the appellant along with interest @ 15% per annum from the date of filing of the suit till the date of the decree.

3. The learned counsel for the appellant submits that the Learned Trial court has failed to appreciate the fact that there were triable issues raised by the appellant in the application for leave to defend. Counsel further submits that the grounds raised in the application for leave to defend would show that in case the matter goes to trial the appellant would certainly be able to establish a defence to the respondent's claim by leading evidence. The counsel further submits that the trial court erred in not appreciating the fact that the documents relied upon by the respondent are fake and fabricated. It is strongly urged by the counsel for the appellant that denying the existence of the documents implies that the appellant has also denied his signatures on those documents.
4. The main thrust of the argument of the counsel for the appellant is that the loan advanced by the respondent to the appellant was an interest free loan and that the entire loan amount has been paid to the appellant. It is submitted that the respondent has failed to adjust the various amounts paid by the appellant from time to time towards the repayment of the loan. It is further urged by the counsel for the appellant that the respondent has admitted the receipt of a sum of Rs. 3, 46,025/- which the respondent has erroneously adjusted towards the payment of interest as the loan was a friendly loan and no interest was payable. It is further contended that the balance amount has been paid in cash.
5. Another argument has been raised by counsel for the appellant that though the legal notice was issued to Sh. Rajiv Mittal, who had participated in materialising the loan, he was not made a party and,

thus, the suit was bad for non-joinder of necessary party. The counsel for the appellant further pointed out that there are various contradictions in the legal notice dated 21.03.2009 sent by the respondent to the appellant and the plaint filed by the respondent in the trial court. In the legal notice dated 21.03.2009, the respondent has admitted that that amount of Rs.3,46,025 included some part of the principal amount as well.

6. The counsel for the respondent submits that there is no infirmity in the order passed by the trial court as the appellant has failed to raise any triable issue in the application for leave to defend as the amount as claimed by the respondent. The suit is based on documents. The Counsel submits that the appellant has neither denied before the trial court nor before this court that a loan of a sum of Rs.6,60,000/- was advanced to the appellant by the respondent. It is further submitted to this court that the loan was advanced at an interest rate of 15% per annum as mutually agreed between the parties. The letters of confirmation of accounts dated 01.04.2006 and 31.03.2007 bear the signatures of the appellant making it evident that the appellant had consented to the payments having been adjusted towards the interest. The appellant has paid interest upto 30.06.2008 and thereafter stopped making payments against the interest as well as the principal amount. The appellant was requested orally, personally as well as through the mediator Sh. Rajiv Mittal to make the payments due but appellant has refused to make the payments.
7. I have heard counsel for both the parties and also carefully perused the pleadings and the judgment of the trial court dated 22.07.2010. The trial court has rejected the application for leave to defend primarily on three grounds. After noticing that it was evident from the

letters of confirmation of account dated 01.04.2006 and 31.01.2007 that the payments made by the appellant from time to time were only against the interest, what prevailed upon the trial court in dismissing the application was that appellant has not disputed his signatures on the letters of confirmation of accounts dated 01.04.2006 and 31.01.2007. Another reason that prevailed upon the trial court was that though the appellant alleged that the documents relied upon by the respondent are false and fabricated; the appellant has not taken any civil or criminal action against the respondent. The third reason for rejecting the application for leave to defend by the trial court was that the appellant did not bring on record any material to support his case and thus no substantial defence or triable issue was established by the appellant. The trial court has also taken into consideration the submission of the learned counsel for the respondent that the appellant signed various statements to show that the amount payable was only towards interest and not towards the principle amount.

8. The law with regard to deciding an application for leave to defend is well settled. The defendant is not entitled to leave to defend where the defendant fails to establish the facts alleged by him and the defence raised by him is illusory and practically moonshine. In **Sunil Enterprises and Anthr v. SBI Commercial and International Bank Ltd** reported in (1998) 5 SCC 354 ,the apex court observed:

“4. The position in law has been explained by this Court in *Santosh Kumar v. Bhai Mool Singh*¹, *Milkhiram (India) (P) Ltd. v. Chamanlal Bros.*² and *Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.*³ The propositions laid down in these decisions may be summed up as follows:

(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 mode 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."

9. Further in the case of **Mrs. Raj Duggal v. Ramesh Kumar Bansal**

reported in 1991 Supp 1 SCC 191 and more particularly in para 3

thereof, the Apex Court observed:

"**3.** 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."

10. A similar view was expressed in **Defiance Knitting Industries (P)**

Ltd. v. Jay Arts reported in (2006)8 SCC 25 wherein the court

observed that *“if 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, it may refuse leave to defend altogether.”*

11. The present appeal has to be decided on the touchstone of the law laid down by the Hon’ble Supreme Court. In the present appeal, the factum of loan is not in dispute. The Appellant has admitted receipt of loan amount of Rs.6,60,000/- however it has been contended that the same stands paid. The appellant further submits that a sum of Rs. 3, 46, 025 has been paid towards part payment of the loan and the balance amount was paid in cash. However, the appellant has failed to furnish any details of the cash payment as to the exact date on which the payment was made nor has the appellant placed on record any receipt with regard to the payment of the loan amount. There is nothing on record to suggest that the appellant has paid the loan amount through cash or the part payment was made towards the principal amount.
12. The respondent while admitting the receipt of Rs. 3, 46,025 further submits that the same has been adjusted towards the payment of interest on the loan amount since the loan was advanced to the appellant @15% per annum. The respondent has placed on record the statements of confirmation of accounts from 01.04.2005 till 31.03.2007 issued by the appellant which show that the appellant has been paying interest to the respondent. The statements bear the signatures of the appellant which would be an admission of an agreement to pay interest on the loan received. The appellant has not denied his signatures on the letters of confirmation of account nor has the appellant rendered any reasonable or plausible explanation to

support his contention that the loan was interest free. It has been contended by the appellant that the aforesaid documents are forged and fabricated. I find no force in the aforesaid submission of the counsel for the appellant as the appellant has not initiated any civil or criminal proceedings against the respondent with respect to the said documents even during the pendency of this appeal nor a single document has been placed on record to show that the appellant ever even protested. Thus, it cannot be said that the appellant has raised any triable issue in his application for leave to defend which would entitle him to leave to defend.

13. Based on the facts of the case and the settled position of law, I am of the view that there is no infirmity in the judgment of the trial court by virtue of which the trial court has rejected the leave to defend to the appellant. It may be noticed that during the course of hearing of this appeal, an offer was made to the appellant to pay the suit amount to enable this court to consider grant of conditional leave to defend. The same was refused by the appellant. Accordingly, the appeal is without any merit and the same is dismissed.

G.S. SISTANI, J.

November 29, 2010
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