

06.

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA 124/2010

% *Judgment dated 18.3.2011.*

DREAM CREATIONS & ORS Appellants

Through : Mr. K. Sunil, Adv.

versus

PALI RAM Respondent

Through : Mr. Rajiv Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

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

G.S.SISTANI, J (ORAL)

1. Present appeal is directed against the judgment and decree dated 20.01.2010 passed by learned Additional District Judge, Delhi, in Suit No.353/2009, whereby the application filed by the appellant (defendant before trial court) for leave to defend was dismissed and the suit was decreed in the sum of ₹12,71,200/- along with pendente lite interest @ 9%, per annum in favour of the respondent (plaintiff before the trial court) and against the appellant herein.
2. Brief facts necessary to be noticed for disposal of the present appeal are that vide an agreement/quotation of work dated 30.11.2007 the respondents were to supply fit and install stainless steel section for the appellants at the Picadilly Hotel New Delhi. The respondent filed a suit under the Provisions of Order XXXVII Rules 1 and 2 of the Code of Civil Procedure (hereinafter referred to as "CPC") for recovery for ₹12,71,200/-, against the appellants herein,

is on the basis of three invoices bearing Nos.(i) 366 for ₹25,34,237/-; (ii) 374 for ₹7,82,154/-; and (iii) 376 for ₹10,54,809/-, dated 14.6.2008, 29.07.2008 and 1.8.2008, respectively, and on the basis of statement of account for supply of stainless steel section, stainless steel railings and stainless steel flats to the appellant herein. The invoices/challan were duly received by the appellant in respect of the said material alongwith the material. Consequent to the summons being issued the appellant filed its memo of appearance and thereafter summons for judgment were issued. The appellant filed an application for leave to defend under Order XXXVII Rule 3 (5) of the CPC. Learned trial court by a Judgment and decree dated 20.1.2010 rejected the application on the ground that no triable issue was raised by the appellant herein.

3. Learned counsel for the appellants submit that a reading of the agreement entered into between the parties would show that respondent was not only to supply the material but also to provide installation, fitting and finishing in respect of the same. It is the case of the appellants that a payment of ₹30.0 lakh was paid as advance and a payment of another ₹5.0 lakh had already been made by cheque. However, on realizing that the material supplied was not as per the specifications agreed upon, the appellants later stopped the payment of cheque. It is further submitted by counsel for the appellant that on account of the material being defective and rusted the appellants had to engage services of another

agency and incur additional expenditure. Counsel next submits that in the circumstances that the terms of the work order/agreement were not complied with, a mere reliance on the invoices would not make the suit maintainable under the provisions of Order XXXVII of CPC. Counsel next submits that the said invoices do not contain detailed terms and conditions for supply of material and accordingly they could not be solely relied upon to set the controversy at rest. According to the appellants the main dispute is that the respondent failed to perform his part of the contract as agreed upon and it was only due to this reason that the payment was not made. The counsel next submits that the learned trial court despite noting that the agreement clearly and specifically mentioned that all material of stainless steel will be of grade 304 and the same shall be fitted and installed, did not place reliance on the terms of the said agreement and passed the order merely on the basis of the invoices/challans. In view of the aforesaid, the counsel states that the learned trial court has exceeded its jurisdiction and failed to appreciate the triable issues, which had been raised by the appellant.

4. Learned counsel for the appellant further submits that had the respondent supplied material as per specification the rusting would not have occurred and hence the respondent miserably failed to comply with the terms and conditions of the work order/agreement, which were given for the purposes of execution of the work at

Piccadilly Hotel, Janak Puri District Centre, New Delhi. Counsel next submits that on account of lapses on the part of the respondent, appellants had to complete the said project and had to incur extra expenditure for scaffolding and for which excessive charges have been incurred and the respondent is liable to pay for the same. It is in respect of this expenditure and excess payments that a counter claim was filed by the appellants however due to the application for leave to defend being dismissed the counter claim too was dismissed.

5. Learned counsel for the respondent has relied upon various invoices, photocopies of which have been placed on record of this court and originals of which have been filed before the trial court along with statements, which suggest that the entire material has been accepted by the appellant without any protest or demur and admittedly not a single communication was addressed by the appellant to the respondent at any point of time making any grievance with regard to quality of material supplied. Counsel for the respondent further submits that complete silence on the part of the appellant would show that they were satisfied with the material, which had been supplied by the respondent to them. Counsel also submits that trial court has rightly considered the application for leave to defend and rejected the same.
6. I have heard counsel for the parties and also perused the documents placed on record and also the judgment dated

20.1.2010 passed by learned trial court. In this case, respondent had raised three invoices bearing Nos.(i) 366 for ₹25,34,237/-; (ii) 374 for ₹7,82,154/-; and (iii) 376 for ₹10,54,809/-, dated 14.6.2008, 29.07.2008 and 1.8.2008, respectively. Out of the total sum of ₹42,71,200/-, the appellants had paid ₹30.00 lakhs, in advance, on various occasions, through cheques till 13.8.2008, leaving a balance of ₹12,71,200/- as on 28.8.2008. On 21.8.2008, the appellants had issued another cheque in the sum of ₹5.00 lakhs in the name of respondent, the payment of which cheque was later on stopped.

7. 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.”

8. 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.”

9. 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.”

10. The present appeal has to be decided on the touch stone of the law laid down by the Apex court. In the present appeal the scope of work/agreement entered into between the parties is not in dispute. It is further not in dispute that the material was supplied which is evident from invoices/challan duly signed by the appellant. Along with the application for leave to defend not a single communication has been placed in support of the plea that the material was not as per the specifications. An amount of ₹30.0 lakh was paid as advance out of a total of ₹42,71,200 Lakh. I find no force in the submission of counsel for the appellant that appellant communicated orally and over telephone to the respondents that the material was not as per specifications and the agreement stood frustrated. I also find no merit in the plea raised by the counsel for the appellant as it is highly improbable for a commercial entity to accept material worth over ₹42.0 lacs, that is not as per the agreed terms and conditions and it is even more improbable that the same is not communicated to the other party in writing. It is trite law that leave to defend application may be refused if it appears to the court that allowing the same would only increase the litigation and drag a litigant into useless and time consuming litigation and thereby deny him the timely enjoyment of his rights.

11. Based on the facts of the case, the settled position of law and in the absence of any document filed along with the application for leave to defend to show that the material supplied by the respondent to the appellants was either defective or not as per the specifications. The fact that no steps were taken before the filing of the suit to inform the respondents of the deficiency in material, accordingly it appears that the defence sought to be raised by counsel for the appellants is sham and moonshine. From the facts put on record it appears that the plea of deficiency in performance of the contract on part of the respondents is an afterthought. Accordingly, I am of the view that there is no infirmity in the judgment passed by learned trial court by virtue of which the trial court has dismissed the application for leave to defend. Accordingly, appeal stands dismissed.
12. Learned counsel for the appellant submits that counter claim filed has been rejected on the ground that no written statement has been filed. Counsel further submits that at the time of filing of the counter claim he has affixed the necessary court fee. It will be open for the appellant to take recourse to such remedies, which may be available to the appellants, in accordance with law, for agitating their counter claim.

March 18, 2011
'msr'

G.S. SISTANI, J.