

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

+ **RFA No.216/2012**

% **14<sup>th</sup> May, 2012**

VICEROY HOTELS LTD. .... Appellant  
Through: Mr. Buddy A. Ranganadhan,  
Advocate with Ms. Richa Bhardwaj,  
Advocate.  
versus

RADHA THAKUR ..... Respondent  
Through:

**CORAM:**  
**HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not?

**VALMIKI J. MEHTA, J (ORAL)**

**C.M. No.8677/2012 (Exemption)**

Exemption allowed subject to just exceptions.

Application stands disposed of.

**C.M. No.8678/2012 (condonation of delay)**

For the reasons stated in the application, delay of 60 days in  
re-filing the appeal is condoned.

Application stands disposed of.

**C.M. No.8676/2012 (condonation of delay)**

For the reasons stated in the application, delay of 37 days in

filing the appeal is condoned, subject to just exceptions inasmuch as I have heard the appeal in detail on merits.

Application stands disposed of.

**+ RFA No.216/2012**

1. This Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the trial Court dated 17.9.2011 dismissing the application for leave to defend filed by the appellant/defendant under Order 37 Rule 3(5) CPC in a suit filed by the respondent/plaintiff for recovery of ₹ 13,11,836/- alongwith interest and costs.

2. The facts of the case are that the respondent/plaintiff did the work of supply and installation of audio visual equipments at the hotel premises of the appellant/defendant. Disputes and differences arose with respect to the contract resulting in an earlier suit for recovery being filed by the respondent/plaintiff against the appellant/defendant. During the pendency of this earlier suit, parties entered into a written compromise on 9.12.2006. As per this written compromise, the appellant/defendant agreed to pay a total sum of ₹ 9,11,328 in two parts of ₹ 3 lacs and ₹ 6,11,328/- to the respondent/plaintiff in the manner and period as stated in the compromise. The compromise deed however contained clause 5.2 which

provided that if the validity of the compromise is not mutually extended, and if terms are not performed, the parties will revert to the position which existed prior to the signing of the compromise. Since the appellant/defendant paid only a sum of ₹ 3 lacs out of the amount of ₹ 9,11,328/-, the respondent/plaintiff filed the subject suit for recovery under Order 37 CPC.

3. Trial Court, by the impugned judgment dismissing the leave to defend application, has held that the defence of the appellant/defendant of the respondent/plaintiff failing to rectify the defects is a moonshine inasmuch as never from the date of entering into of the compromise deed on 9.12.2006, till the filing of the suit in August, 2008 was ever any letter written by the appellant/defendant to the respondent/plaintiff complaining that there were any pending defective works which were not rectified. Since no such letter was written in terms of the defence contained in the leave to defend application, trial Court has arrived at a conclusion that obviously this is not a valid defence (an afterthought) inasmuch as if this was a valid defence, surely, for a period of one and half years, the appellant/defendant would not have remained silent, considering the fact that the parties even earlier had litigation.

4. Another reason for seeking leave to defend by the

appellant/defendant was that on account of the respondent/plaintiff not doing the defective work, the defective work had to be got done through a third party, however, no details were forthcoming in the leave to defend application either of the name of such third party, or the details of the contract with the third party, and accordingly, the trial Court held that even this defence was a moonshine.

5. Another aspect dealt with by the trial Court, and as urged by the appellant/defendant in the leave to defend application, was that the appellant/defendant was caused losses on account of breach of contract by the respondent/plaintiff, however, once again the defence in this regard was found to be wholly vague inasmuch as there were no details of what were the losses which were caused and how were the said losses arrived at.

6. The principles with respect to grant of leave to defend are contained in the celebrated judgment of the Supreme Court in the case of *M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation, AIR 1977 SC 577*. Para 8 of this judgment lays down the tests with respect to grant of leave to defend and which reads as under:-

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :

(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.”

7. In my opinion, the facts of the present case, in view of the reasons contained in the judgment of the trial Court, and which reasons have been given by me above, show that the present case falls within the test (d) of the tests laid down i.e. the defence is a complete moonshine. I may additionally note that it is not as if the appellant/defendant is a small individual/or layman, but is in fact a company which owns a hotel in Hyderabad in which the work was done by the respondent/plaintiff, and therefore, there would have been available sufficient legal assistance at all stages to the appellant/defendant. Of course, once a suit for recovery is filed valuable legal advice how to seek leave to defend comes in, however, Courts have to examine the defence in the leave to defend application with respect to the contemporaneous evidence/correspondence, otherwise, it would be obvious that the defence has been raised for the first time in the leave to defend application only to frustrate the rights of the plaintiff.

8. In view of the above, I do not find any merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs.

**MAY 14, 2012/Ne**

**VALMIKI J. MEHTA, J**