

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

+ **RFA No.308/2018**

% **11th April, 2018**

BINOY KUMAR JHA Appellant
Through: Mr. Sandeep Sharma,
Advocate.

versus

RAMA ARJUN RETAIL PVT. LTD. Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.14055/2018 (exemption)

1. Exemption allowed subject to just exceptions.
C.M. stands disposed of.

C.M. No.14054/2018 (for condonation of delay)

2. For the reasons stated in the application, delay of 55 days
in re-filing the appeal is condoned.
C.M. stands disposed of.

RFA No.308/2018 and C.M. No.14053/2018 (stay)

3. This Regular First Appeal under Section 96 of the Code
of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant
impugning the judgment of the Trial Court dated 12.10.2017 by which

trial court has dismissed the leave to defend application filed by the appellant/defendant in an Order XXXVII CPC suit filed by the respondent/plaintiff for recovery of Rs.4,32,000/- along with interest.

4. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that it had sold to the appellant/defendant various electronic goods for a sum of Rs.4,19,513/- vide invoice no.39 dated 23.12.2013 with payment of Rs.4,00,000/- to be made in installments. The appellant/defendant except paying a sum of Rs.19,513/- at the time of delivery and a sum of Rs.40,000 thereafter, failed to pay the balance amount of installments due. Ultimately, after many reminders, at the request of the respondent/plaintiff, the appellant/defendant gave a cheque of Rs.4,32,000/- bearing no.035015 dated 1.2.2015 for repayment of the amount due, but when this cheque was presented, the same was returned dishonoured. The respondent/plaintiff thereafter served a legal notice dated 10.2.2015 upon the appellant/defendant, and since which was neither replied to nor the appellant/defendant paid any amount, therefore the present suit was filed.

5. The appellant/defendant filed the leave to defend application and pleaded that there are several triable issues and leave to defend should be granted. The appellant/defendant pleaded that the respondent/plaintiff was misutilizing the cheque given at the time of advancing of loan of Rs.1 lac by the respondent/plaintiff to the appellant/defendant. It was denied that the respondent/plaintiff had sold electronic goods to the appellant/defendant under the invoice no.39 dated 23.12.2013. It was submitted that documents filed by the respondent/plaintiff “seems” to be forged and fabricated. It was also pleaded by the appellant/defendant that invoice is forged because there is no serial number of the electronic goods/machines written in the invoice. It was pleaded by the appellant/defendant that correct facts were that in January, 2014 the appellant/defendant took a loan of Rs.1 lac from the respondent/plaintiff in the presence of one Sh. Amit Sen who stood as surety and the appellant/defendant provided 13 blank cheques, 12 for EMIs and one for the complete amount, but that in spite of receiving back the entire loan, the respondent/plaintiff did not return back the cheques and is mis-utilizing the cheques including by

filing the subject suit. It was prayed that unconditional leave to defend be granted.

6. Trial court has dismissed the leave to defend application firstly by observing that no one was appearing for the appellant/defendant at the time of arguments on the leave to defend application and that in fact even on the earlier date of hearing the appellant/defendant had taken adjournment on the ground that his counsel was not available. Trial court has noted in the impugned judgment the cause of action in the suit of the appellant/defendant having purchased the goods and issued a cheque which was dishonoured and the defence of the appellant/defendant of respondent/plaintiff alleging misutilizing of the cheque and other documents taken at the time of advancing of the loan of Rs.1 lac allegedly given by the respondent/plaintiff to the appellant/defendant as per the leave to defend application. Trial court has also noted the defence of the appellant/defendant of the documents being forged. Trial court has also noted that the appellant/defendant has relied upon statement of Sh. Rajesh Garg of the respondent/plaintiff in a Negotiable Instrument case bearing no.263/2015 and which was also

pleaded in the leave to defend application as a basis that the respondent/plaintiff was misutilizing the said cheque. In the leave to defend application, the appellant/defendant had referred to the aforesaid case bearing no.263/2015 under Section 138 of the Negotiable Instruments Act, 1881 titled as ***Rajni Kochar Vs. Binoy Kumar Jha*** and alleged that Sh. Rajesh Garg was the employee/associate of the respondent/plaintiff and statement was made by Sh. Rajni Kochar of the respondent/plaintiff in those proceedings of having given a loan to the appellant/defendant. Trial court has then dismissed the leave to defend application.

7. I may note that the impugned judgment is very poorly written because except noting the respective contentions and stating that there is no substance in the leave to defend application, there is no reasoning or conclusion as to why the leave to defend application should be dismissed. However, in exercise of powers of this Court under Order XLI Rule 24 CPC I have heard the counsel for the appellant/defendant on merits with respect to leave to defend application being allowed or not.

8. Counsel for the appellant/defendant during the course of arguments could not dispute that the Loan Term Sheet bears the signatures of the appellant/defendant as also the guarantor Sh. Amit Sen. Reference to this Loan Term Sheet shows that various electronic products of the value of Rs.4,19,513/- were sold to the appellant/defendant. With respect to the electric goods, the appellant/defendant paid the margin amount of Rs.19,513/- and therefore the balance amount of Rs.4 lacs was the loan repayable by the appellant/defendant to the respondent/plaintiff. There is also no dispute that the said cheque which was dishonoured and on the basis of which Order XXXVII CPC suit was filed bears the signatures of the appellant/defendant.

9.(i) Counsel for the appellant/defendant however argued that in view of statement made by Sh. Rajesh Garg of the respondent/plaintiff in case no.263/2015 whereby it was admitted that the appellant/defendant had taken a loan, therefore, the leave to defend should be unconditionally granted because the appellant/defendant cannot be said to have purchased any goods from the

respondent/plaintiff cost of which was to be repaid in installments with the principal amount being Rs.4 lacs.

(ii) In my opinion, once there is no dispute that the Loan Term Sheet bears the signatures of the appellant/defendant along with Sh. Amit Sen as surety, and the subject cheque also bears the signatures of the appellant/defendant, the leave to defend application has to be dismissed more so because counsel for the appellant/defendant has no answer to the query of the Court that if the appellant/defendant had repaid the alleged loan amount of Rs.1 lac then where are the documents filed to show repayment of this loan of Rs.1 lac, be such documents either in the form of receipts for cash paid or cheques issued for repayment. It is seen that even in the leave to defend application, there are no documents whatsoever referred to with respect to how allegedly the appellant/defendant repaid the alleged loan of Rs.1 lac. Also it does not stand to reason as to why if the entire loan amount of Rs.1 lac was repaid then why would the appellant/defendant not take back the subject cheque or any other cheques from the respondent/plaintiff. There is absolutely no substance or even some reasonable credibility to the defences of the

appellant/defendant in the leave to defend application and which defences are completely frivolous and lack substance.

10. The principles with respect to grant of leave to defend have been recently encapsulated by the Supreme Court in the recent judgment in the case of ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., (2017) 1 SCC 568***. Paras 17 to 17.6 of this judgment lay down the principles with respect to the grant of leave to defend and these paras read as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec's* case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in *Milkhiram's* case, as follows:

17.1. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the Plaintiff is not entitled to leave to sign judgment, and the Defendant is entitled to unconditional leave to defend the suit.

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the Plaintiff is not entitled to sign judgment, and the Defendant is *ordinarily* entitled to unconditional leave to defend.

17.3 Even if the Defendant raises triable issues, if a doubt is left with the trial judge about the Defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or

both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the Plaintiff is entitled to judgment forthwith.

17.6 If any part of the amount claimed by the Plaintiff is admitted by the Defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the Defendant in court."

In terms of paras 17.5 and 17.6 of the judgment in the case of ***IDBI Trusteeship Services Ltd (supra)*** once the defence is completely frivolous or vexatious and no triable issue or substantial defence is raised, then, the leave to defend application can be dismissed.

11. In the present case, and as already stated above, since the Term Loan Sheet bears the signatures of the appellant/defendant with the guarantor Sh. Amit Sen, subject cheque was issued by the appellant/defendant with the fact that appellant/defendant has not pleaded or filed any document in support as to how the alleged loan of Rs.1 lac was repaid by the appellant/defendant to the respondent/plaintiff, with the further fact that there is no reason why if the loan was repaid the subject cheque would not have been taken back by the appellant/defendant from the respondent/plaintiff, therefore the leave to defend application is completely frivolous and

vexatious, and therefore the appellant/defendant is not entitled to any leave to defend.

12. This appeal is therefore dismissed by giving the reasoning as detailed above. No costs.

APRIL 11, 2018
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VALMIKI J. MEHTA, J

