

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

+ **RFA No. 169/2018**

% **15th February, 2018**

NARESH KUMAR Appellant
Through: Mr. S.B. Sharma, Advocate.

versus

NITIN LUTHRA Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 5706/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 5707-08/2018 (for delays)

2. For the reasons stated in the applications, the delays of 12 days in filing the appeal and 4 days in re-filing the appeal are condoned, subject to just exceptions.

C.Ms. stand disposed of.

RFA No. 169/2018 and C.M. Appl. No. 5705/2018 (for stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit

impugning the judgment of the trial court dated 6.9.2017 by which the trial court has decreed the suit filed by the respondent/plaintiff by dismissing the leave to defend application filed by the appellant/defendant under Order XXXVII Rule 3 (7) CPC.

4. The facts of the case are that admittedly the appellant/defendant admits that he received a loan of Rs.15,00,000/- from the respondent/plaintiff in terms of cheque no. 377709 drawn on UCO Bank, Punjabi Bagh, New Delhi dated 9.3.2016 for a sum of Rs.15,00,000/-. It is also not disputed that the cheque was of the bank of the respondent/plaintiff and the amount was credited to the account of the appellant/defendant. Appellant/defendant in the leave to defend application pleaded that the loan of Rs.15,00,000/- was returned back by the appellant/defendant to the respondent/plaintiff in cash and in good faith the appellant/defendant neither took back the subject cheque of the appellant/defendant which was dishonoured on presentation being cheque No. 465877 dated 29.8.2016 for Rs.15,00,000/- nor and in fact any receipt evidencing payment to respondent/plaintiff was taken. It was pleaded by the appellant/defendant that he received the loan amount by means of a

cheque, but he repaid the amount in cash with interest and in support of which appellant/defendant only relies upon certain entries made by him in his own hand in his own diary. The appellant/defendant contends that in fact he had given to the respondent/plaintiff not one cheque but a total of four cheques bearing nos. 465877, 465878, 465879 and 465880 and that respondent/plaintiff is misusing the cheques although the loan amount with interest stands repaid.

5. The principles with respect to grant of leave to defend application in an Order XXXVII CPC suit have been recently stated by the Supreme Court in the judgment in the case of *IDBI Trusteeship Services Limited vs. Hubtown Limited* (2017)1 SCC 568. The relevant paras of this judgment laying down the test with respect to grant of leave to defend are paras 17 to 17.6 and theses 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."

6. Applying the aforesaid test if it is found that the appellant/defendant has raised no substantial defence or genuine triable issues and that the defence is frivolous or vexatious then leave to defend shall be refused.

7. In the present case, the trial court for dismissing leave to defend application filed by the appellant/defendant has rightly observed that the loan taken by the appellant/defendant from the respondent/plaintiff was in cheque and therefore there was no reason

why the loan would be repaid in cash, that too without taking any receipt of payment and also further by not taking back the cheque given as security. Clearly, therefore, the story put forth by the appellant/defendant is a moonshine and the same raises no substantial defence or genuine triable issue because such a story put forth is frivolous and vexatious as this Court cannot believe that if a loan is taken by a cheque repayment was made by the appellant/defendant in cash, that too not only without taking any proof of payment but also without taking back the cheque given as security. Admittedly, it is not as if the loan was given between close relations and appellant/defendant admits that he had taken the loan from the respondent/plaintiff for the purpose of constructing his house.

8.(i) Learned counsel for the appellant/defendant argued by placing reliance upon a letter dated 18.7.2016 sent by the appellant/defendant to his bank informing that the four cheques have been given to the respondent/plaintiff as security and since full and final payment has been made by the appellant/defendant to the respondent/plaintiff hence the payment of the cheques should be stopped. This letter date 18.7.2016 reads as under:-

“18 July 2016

To
The Bank Manager
Syndicate Bank
East Punjabi Bagh (Branch)
New Delhi 110026
Sir/Madam

Subject: **Application for stop payment of cheque Nos.465877, 465878, 465879, 465880, blank signed cheques**

I Naresh Anand s/o Shri Subhash Chander R/o E-263 Karampura, New Delhi 110015. My saving A/c No. 91412010037495 in your Bank (Syndicate Bank).

Kindly stop my above mentioned 4 cheques (four cheques) which was given to Shri Nitin Luthra as security. I have already given him his full final payment. So there is no use of my 4 above mentioned cheques that I am not related to these above mentioned (4) cheques in future.

Kindly do my a favour. So that I am highly thankful to you.

Thanking you

Sd/-

Naresh Anand
S/o Shri Subhash Chander
E-263 Karampura
New Delhi-110015
A/c No.91412010037495”

(ii) Learned counsel for the appellant/defendant argues that respondent/plaintiff was misusing one of the four cheques by filing the subject suit and that the appellant/defendant's letter to his bank dated 18.7.2016 shows that well before the date of the subject cheque which was dishonoured, and which is dated 29.8.2016, the appellant/defendant since had informed his bank, hence the appellant/defendant should be held to be not liable.

(iii) I cannot agree with the arguments urged on behalf of the appellant/defendant because firstly the appellant/defendant has failed to show that four cheques as stated in its letter dated 18.7.2016 of the appellant/defendant to his bank were ever given to the respondent/plaintiff. In fact, this letter to the bank dated 18.7.2016 admits that the subject cheque was the cheque given by the appellant/defendant to the respondent/plaintiff as security i.e security with respect to loan taken by the appellant/defendant from the respondent/plaintiff. I have put a specific query to counsel for the appellant/defendant that whether respondent/plaintiff was sent a copy of this letter dated 18.7.2016, but it is admitted that no copy of this letter was sent by the appellant/defendant to the respondent/plaintiff. In my opinion, therefore this letter dated 18.7.2016 written by the appellant/defendant to his bank will not in any manner help the appellant/defendant to show that the appellant/defendant had repaid the loan of Rs.15,00,000/- and that the respondent/plaintiff was misusing the subject cheque. As already stated above the story put forth by the appellant/defendant is completely unbelievable and is frivolous and vexatious, that the loan taken from a stranger by cheque

is repaid not by cheque but by cash and that too without obtaining any receipt for cash payment and also by not taking back the cheque given as security for the loan.

9.(i) Learned counsel for the appellant/defendant then sought to argue that appellant/defendant had filed a suit against the respondent/plaintiff for not misusing the four cheques, and which are the four cheques as stated in the letter dated 18.7.2016 to his bank, and that in that suit the respondent/plaintiff admitted for not misusing the cheque bearing no. 465879, therefore, it is argued that it is shown that the respondent/plaintiff is misusing the subject cheque for Rs.15,00,000/- bearing no. 465877.

(ii) I cannot agree with this argument because in the other suit filed by the appellant/defendant against the respondent/plaintiff, the respondent/plaintiff in his written statement in the suit filed by the appellant/defendant has not admitted to receiving four cheques from the appellant/defendant. In fact the respondent/plaintiff has admitted to having received only two cheques, with one cheque being the subject cheque bearing no. 465877 and the other cheque bearing no. 465879, and that as per the statement of the respondent/plaintiff

recorded on 24.1.2018 in the suit filed by the appellant/defendant the respondent/plaintiff clearly stated that he will not in any manner use the second cheque bearing no. 465879 received by him from the appellant/defendant.

10. In view of the above discussion, I do not find any merit in this appeal and the same is hereby dismissed.

FEBRUARY 15, 2018

AK

VALMIKI J. MEHTA, J

भारतमेव जयते