

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.11.2015

CORAM:

THE HON'BLE **MS. JUSTICE R.MALA**

C.R.P.(PD).No.3952 of 2015

and

M.P.No.1 of 2015

1.M/s.Door Solutions

Rep by its Partner C.T.Sankar

A.K.R.Garden, No.3/29, Kamarajar Salai

Ramapuram, Chennai – 600 061.

2.C.T.Sankar

S/o.Dakshinamurthy

..Petitioners/Defendants 1 & 2/Petitioners

Vs.

1.R.Satheesh Kumar

.. Respondent/Plaintiff/Respondent

2.Mrs.Bhuvaneswari

W/o.Mr.S.Iyyappan

.. Respondent/3rd Defendant/Respondent

Prayer:

Civil Revision Petition filed under Article 227 of the Constitution of India against the order and decree dated 09.09.2015 made in I.A.No.5899 of 2015 in O.S.No.774 of 2015 on the file of the VIII Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.S.Janarthanan

For Respondents : Mr.G.Jayachandran, for R1

ORDER

Heard the learned counsel appearing for the revision petitioners and the learned counsel appearing for the first respondent.

2. The revision petitioner has come forward with the present Civil Revision Petition challenging the impugned order passed by the Trial Court dated 09.09.2015 made in I.A.No.5899 of 2015 in O.S.No.774 of 2015, wherein the application filed by them under Order 37 Rule 3(5) of CPC to grant leave to permit the petitioner/defendant to defend the case in O.S.No.774 of 2015 came to be allowed on certain conditions.

3. The first respondent herein as plaintiff has filed the suit under Order 37 CPC for recovery of Rs.5,00,000/- with interest stating that he has paid the same for inducting himself as partner in the partnership firm of the defendants. However, the plaintiff was not inducted and so, when he insisted upon the defendants to return back his money, they had issued a cheque for Rs.5,00,000/- which when deposited was returned as 'stop payment'. Hence, after the issuance

of statutory notice, the plaintiff preferred a criminal complaint in C.C.No.354 of 2012 for offence punishable under Section 138 of the Negotiable Instruments Act. Though the proceeding ended in the conviction of the defendants, on an appeal made by the defendants in C.A.No.82 of 2013, the defendants were acquitted and thereafter, the plaintiff has filed the present suit in O.S.No.774 of 2015 for recovery of money.

4. While so, the defendants in the suit had filed an application in I.A.No.5899 of 2015 in O.S.No.774 of 2015 under Order 37 Rule 3(5) of CPC, to grant leave to defend, after the receipt of summons on judgment. The Trial Court after hearing both sides, grant leave to defend on condition that the defendants deposit 50% of the claim amount viz., Rs.2,50,000/-. Against the aforesaid order of the Trial Court, the present Civil Revision Petition has been preferred.

5. The learned counsel appearing for the revision petitioner would submit that the petitioners herein had received a sum of Rs.5,00,000/- as stated by the 1st respondent/plaintiff. However, whether the said amount was given as a loan or as a capital had to be decided only at the time of trial. Furthermore, the petitioners had also supplied materials to the tune of Rs.1,75,000/- to the

1st respondent/plaintiff and the petitioners are also ready and willing to supply materials for the balance amount. However, the 1st respondent/plaintiff insisted the petitioners to return back his money and hence, the cheque was issued. Since the said cheque was returned, a proceeding was initiated under Section 138 of the Negotiable Instruments Act which also ended in the acquittal of the petitioners herein.

6. The learned counsel further submitted that when there is a triable issue, no condition can be imposed. To substantiate the said contention, the learned counsel relied upon the decision of this Court reported in **2001 (4) CTC 178, N.Prabakaran v. Citibank.**

7. Resisting the same, the learned counsel appearing for the 1st respondent would submit that the receipt of the Rs.5,00,000/- had been admitted by the revision petitioners. However, the petitioners had insisted the 1st respondent to take the materials for the said amount. But the 1st respondent is not willing and ready to get the materials and he insisted the petitioner to repay the amount. Further, merely because a criminal complaint under Section 138 of the Negotiable Instruments Act had ended in acquittal, it cannot be taken as a ground for granting leave, as the grant of leave is discretionary.

At the time of ordering for leave to defend, the Court can impose any condition and the same cannot be challenged. To substantiate the said contention, the learned counsel for the 1st respondent relied upon the decision reported in **(1998) 5 Supreme Court Cases 354, Sunil Enterprises v. SBI Commercial and International Bank Ltd.,** and prayed for dismissal of the Civil Revision Petition stating that the order of the Trial Court does not suffer any illegality or irregularity.

8. Considered the rival submissions made by both sides and perused the typed set of papers.

9. The first respondent herein as plaintiff has filed the suit for recovery of Rs.5,00,000/- which was alleged to be given for inducting the plaintiff as a partner in the partnership firm. The receipt of the said amount was not disputed by the petitioners/defendants. It is also an admitted fact that the petitioners herein had issued a cheque for a sum of Rs.5,00,000/- and when the same was presented for encashment, it was returned as 'stop payment'. So, after the issuance of statutory notice, a criminal complaint was filed under Section 200 Cr.P.C for the offence punishable under Section 138 of the Negotiable Instruments Act and the same ended in conviction of the petitioners

herein. However, on an appeal made by the petitioners in C.A.No.82 of 2013, they were acquitted.

10. As per the leave to defend, the point to be decided is whether the amount of Rs.5,00,000/- was given as a capital for inducting the plaintiff as a partner in the partnership firm or as a loan or to purchase materials? However, the same could be decided only at the time of trial. Admittedly, material has been supplied for Rs.1,75,000/- and only the balance amount has to be paid.

11. At this juncture, it would be appropriate to consider the landmark decision made under Order 37 Rule 3(5) CPC reported in ***AIR 1977 SC 577, Mechelec Engineers and Manufacturers v. Basic Equipment Corporation***, which was followed in the decision relied on by the learned counsel for the 1st respondent reported in ***(1998) 5 Supreme Court Cases 354, Sunil Enterprises v. SBI Commercial and International Bank Ltd.***, wherein the following principles were laid down in respect of grant of leave in a summary suit.

"(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."

12. In the instant case, the receipt of Rs.5,00,000/- by the revision petitioners is admitted and the supply of materials to the tune of Rs.1,75,000/- is also admitted. As already stated, the only point to be decided is whether the said amount has been given as a capital or loan or for purchase of materials have to be decided and the same could be decided only at the time of trial.

13. It is also appropriate to incorporate paragraph 4 of the affidavit filed in support of the application in I.A.No.5899 of 2015 in O.S.No.774 of 2015.

"4. I further submit that I have informed several times to the plaintiff to take back the material for the payment due and even I have informed to him to take materials for the worth of Rs.5,00,000/- also, because to avoid the litigation, but very adamantly he has not taken

back the materials and caused heavy loss to the firm. Therefore, the transaction is purely business in nature and he has to file the suit for accounts and instead of filing the suit for accounts he has filed this suit for money and it is not maintainable. The main and foremost grounds that the plaintiff has not filed this suit within the limitation of the transaction, therefore the suit itself not maintainable.”

14. A perusal of the above averment would show that prima facie the plaintiff has proved that there is amount due. In such circumstances, the Trial Court has rightly directed the revision petitioners to deposit a sum of Rs.2,50,000/- for defending the case and I do not find any infirmity or illegality in the order passed by the Trial Court.

15. The revision petitioners are directed to deposit a sum of Rs.2,50,000/- as directed by the Trial Court within a period of eight weeks from today, failing which the application filed by the revision petitioners in I.A.No.5899 of 2015 under Order 37 Rule 3(5) of CPC shall stand automatically dismissed.

16. Accordingly, the Civil Revision Petition stands dismissed.

Consequently, connected miscellaneous petition is closed. No costs.

23.11.2015

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To

The learned VIII Assistant Judge,
City Civil Court, Chennai.

R.MALA, J.

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