IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No. 3803 of 2013 (O&M)
Date of decision: 09.07.2015

Atma Tube Products Limited ... Petitioner

versus

M/s Hero Cycles Limited .... Respondent

2. CR No. 3804 of 2013 (O&M)

Deepak Singh ... Petitioner

versus

M/s Hero Cycles Limited .... Respondent

3. CR No. 3805 of 2013 (O&M)

Balbir Singh ... Petitioner

versus

M/s Hero Cycles Limited .... Respondent

4. CR No. 3806 of 2013 (O&M)

Atma Tube products Limited ... Petitioner

versus

M/s Hero Cycles Limited .... Respondent

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. V.K. Sachdeva, Advocate for the petitioner(s).

Mr. Sanjeev K. Arora, Advocate,
for respondent Nos. 1 and 2.

K.Kannan, J.

All the four petitions arose out of interlocutory applications filed in 8 summary suits between the same parties. The order which is a subject of revision in CR No. 3803 of 2013 is against the order dismissing an application filed by the defendant-company to implead the 3rd party as a purchaser of one of the assets of the company under the proceedings initiated under the proceedings of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred to as 'SARFESI Act'). In the suits for prosecution in summary fashion under order 37 applications for leave to sue had been filed on behalf of the company as well as two of the Directors of the Company against whom the plaintiff was seeking for personal decrees. The Court has granted conditional leave to defend with direction to the defendants to furnish bank guarantees for the amounts claimed in suit. The challeng to the orders is on a plea that the order is a non-speaking one merely adverting to the plea raised on behalf of the plaintiff that the leave to defend might be granted subject to furnishing bank guarantees.

Learned counsel appearing on behalf of the defendant company in CR No. 3803 of 2013 would contend that the liability which is sought to be enforced against the company is a company which was proceeded against under the SARFAESI Act by secured creditor for enforcement of security and exercising all the rights available under Section 13, the unit of the company was sold and purchased by a 3rd party. According to him, the 3rd party has undertaken to discharge all the debts of the defendant company in an agreement entered into with the secured creditor. Consequently, the impleadment of the purchaser would be essential to shoulder the liability which is sought to be fastened against the defendant company. Learned counsel would also seek to defend the company's attempt to secure the impleadment of the auction purchaser by reference to Section 13 (7) under the SARFAESI Act. According to the counsel the auction purchaser holds the property purchased by him in trust to be applied firstly in the payment of cost, charges and expenses and secondly to the discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interest. The application of the residue for the benefit of the right and interest of the person entitled to the same would mean even an unsecured creditor and it will be only appropriate and proper that the plaintiff will have remedy against such a purchaser in the event of any decree. The attempt for impleadment is according to the defendant company a facilitative process for the plaintiff company to secure a surer method of assessment of its dues if there arises an excess after discharge of all other prior claims.

In my view, none of the contentions merits acceptance. The suits are for enforcement of amounts covered through cheques issued admittedly by the company. By the very nature of the suit it would be evident that it is for the enforcement of the Negotiable Instruments under the Negotiable Instruments Act (hereinafter referred to as NI Act) and the liability shall be principally on the drawer of the cheques. It is again an admitted case that the cheques have been drawn in favour of the plaintiff on the Bank with which the defendant company holds an account. It is therefore, a liability brought under the NI Act to which Section 118 of the Act is attracted. The said Section enacts a rule of presumption that any negotiable instrument is fully supported by consideration. If the cheque is issued by the authorized signatory of the company then there is a presumption of the liability of the company to the plaintiff. Enforcement of any claim by promisee against the drawer of the cheque is a personal obligation and even in an undertaking by 3rd party to stand a surety for making the payment or who is in any way statutorily made jointly liable cannot be forced to be impleaded as a party if the plaintiff does not want to secure such a benefit. This is taking the worst case scenario against the plaintiff that even if liability is not merely of the defendant but of an yet another person such as the auction purchaser who according to the defendant company has undertaken to discharge all the liabilities of the company, the plaintiff may elect to sue only one of the joint obligants. I have gone through the terms of the agreement of the 3rd party with the secured creditor and it is far-fetched to contend that this document contains an undertaking to discharge the simple money claims which the company might have against it. The recital reads in Clause 2.8 as follows:

> "The unit may have certain outstanding liabilities which are to be met by the purchaser and which will be over and above the purchase consideration. The prospective purchaser may carry out due-diligence in respect of likely liabilities pertaining to the unit before submitting the tender. It may be noted that the purchaser will be responsible for meeting

these liabilities, if arise, and Secured Creditors will not be liable to meet any such liabilities whatsoever."

It allows for a prospective purchaser to carry out due diligence for making enquiries about the outstanding liabilities over and above the purchase consideration. This Clause, in my view, would be a manner of warding off any attempt of an auction purchaser to declare that there had been no warranty for good title. It is a notorious fact that auction purchases do not at all times secure the best market price. An auction purchaser shall at all times encounter various obstacles in realizing the secured asset and a clause allowing for the due diligence made by a person who offers to purchase through a tender, literally fetters himself to the benefit of the secured creditor that he will not vex the creditor with any further claims later as having been attached to the property purchased by him and that the creditor should undertake the liability in respect of such sum. This Clause could hardly be used by the debtor who had incurred the liability to plead that an auction purchaser shall become jointly liable for an unsecured liability of the unit of the debtor company.

Assuming that such a liability exists for the auction purchaser which shall at all times be open to a creditor to either enforce his right against a co-obligant or he may, at his option, give up the claim against any such person. A law of joint liability in India is always joint and several and a creditor enjoys a full liberty to choose his own debtor and there can be no compulsion for a creditor to implead all joint obligants.

All this is merely to fend off the contention taken by the debtor company that an auction purchaser of his asset ought to be brought in as a party in suit for answering the claim made by an unsecured creditor. An impleadment of the person who the defendant wants will only create a needless confusion in the trial. The enforcement of a monetory claim will get derailed to an exercise of jurisdiction on matters which are wholly irrelevant. The defendant might press for an *inter se* adjudication between itself and the auction purchaser. The defendant could press for apportionment of liabilities and it could also plead for indemnification to the extent which it believes it has, through a term in the tender that contains an offer to purchase and the defendant will sully a smooth course of trial. It is imperative that the attempt of the defendant company to bring a 3rd party to the proceedings is thwarted judicially.

Even a plea that Section 13(7) of SARFAESI Act would require the impleadment of auction purchaser would betray a wrong reading of the provision. The Section will be attracted to allow for the excess proceeds for the benefit of persons who may have an interest in the estate purchased. In this case, the security is reported to be for an amount in excess of 40 crores and the auction sale is satisfied only for a portion of the claim to an extent of Rs. 10 crores and odd. There is no surplus proceeds available to be offered as security for protection of any other creditor. It is hardly necessary for a judgment debtor to cry wolf or turn maudlin for sake of a creditor who does not want any such benefit seemingly offered by a defendant for impleadment that another person shall shoulder the liability. The impleadment here will not help enforcement of the debt easily for the creditor, but, on the other hand the creditor will himself shoulder an unnecessary burden of a defence brought by a 3rd party who will have every right to contend that a money claim cannot be enforced against him.

The petition declining to implead the auction purchaser was therefore perfectly justified and I would find no cause for intervention.

As regards the directions given by the Court below for securing the bank guarantees for the benefit of the plaintiff for the suit claims, there are two independent lines of defence. The CR No. 3804 and 3805 of 2013 are at the instance of the two of the Directors of the company. As regards one of them, it is claimed by the counsel appearing on behalf of the plaintiff respondent that he has himself entered into an agreement to discharge the loan of about Rs. 8.80 crores due and payable on account between the plaintiff and the defendant company. This agreement was not before the Court below but has been filed only before this court. The counsel appearing for the respondent himself admits that the suit claim is not for enforcement of the agreement or for the rights given under the agreement, but, the suit is for the enforcement of the amounts mentioned on the cheque. This document, according to him is used for the purpose of proof of the existence of liability by the defendant company and his undertaking to offer his own personal property for enforcement. So long as the money claim is itself not on the basis of an agreement and the suit under Order 37 is brought for enforcement of NI Act, by the very nature of things, the right cannot avail against any property and this has to be only for the enforcement of specified amounts. For the amount determined through contract which in this case is through an admitted execution of negotiable instruments, namely, the cheques, the liability could be only on the drawer of the cheque and if there is liability also on the Managing Directors of the company, I would leave that to be a matter that would required to be considered. It is surely a tenable defense which the Managing Directors could take that there existed no personal liability and therefore the Managing Directors who are respondent Nos. 2 and 3 must have a right to contend that enforcement is not possible against them.

All this is not to state that the plaintiff cannot prove that such a personal liability against defendant Nos. 2 and 3 exists. Both parties rely on judgments of Hon'ble the Supreme Court that has comprehensively considered the nature of the discretion that the Court will exercise while entertaining a plea for grant of leave to defend in <u>M/s Mechalec Engineers and Manufacturers Vs. M/s Basic Equipment Corporation, 1977 AIR SC 577,</u> reproducing the law as laid down to be comprehensive and hence requiring judicial approbation. I take the law stated and would not find compelled to reproduce the same except to affirm that if there is even a triable issue that he is a bona fide defence, such a defendant shall be entitled to a unconditional leave to defend. Defendant Nos. 2 and 3, I certainly believe have a legal defense to contend for that they are not personally liable on the cheques issued on behalf of the company. The extent of liability of one of them under the agreement, a copy of which is filed before this Court, will still be a matter of adjudication at the trial. The leave granted ought to be unconditional to them and I therefore set aside the order passed against defendant Nos. 2 and 3 and allow the CR Nos. 3804 and 3805 of 2013.

CR No. 3806 of 2013 is a plea for an unconditional leave to defend by the company. I have already referred to the fact that the trial Court had allowed for the leave to defend on a plea made by the counsel for the plaintiff that such leave could be granted subject to furnishing of bank guarantee. The Court almost took as if it was concession made and found no room for even discussing whether there was such a requirement of furnishing bank guarantee. The order impugned is laconic and cannot be supported. I thought for a while whether I would refer the matter to the trial Court again for considering the application for grant of leave and pass a reasoned order. The suit has been instituted in the year 2006 on cheques issued in the year 2005. The summary suit that the Civil Procedure Code contemplates is a suit that would head for summons for judgments on the 1st date of hearing if leave to defend is not granted. Such a consideration must be undertaken soon after a leave to defend is filed and before a summon for judgment is issued. If there was a defense and a leave was to be granted it should be soon after the application is filed before the 1st date of hearing and after hearing the objections from the plaintiff. In this case, there have been several obstructions all along the way. Several interim orders have been subject of revision before this Court. The application which was filed came to be decided after nearly 7 years and it has gathered dust for another couple of years before this Court. I would believe it to cause a very serious travesty or justice that the case must go back to the trial Court only for the consideration of whether leave to defend were to be granted or not and that it should give a considered ruling. For sheer exigency of putting the matter for trial and not to waste any further judicial time, I asked the counsel on both sides to argue on merits of the contentions seeking for leave to defend. It was purely on the pleadings before the Court and on positions of law. Neither party had to lead any evidence for consideration of the plea for leave to defend. It is not even contemplated under the Cr.P.C. that there should be any opportunity to lead any evidence in the interlocutory application in a summary suit. I therefore, heard the counsel on the application and the arguments would reveal the following.

According to the defendant-company who seeks for the leave to defend the contention is that the cheques are meant merely as security for the purpose of several obligations on work orders which were entrusted to the defendant company and they did not represent a fixed liability. Company itself, according to the counsel for the petitioner, has detailed the liability as arising from transactions for a period of over 20 years. The details of the accounts furnished are not comprehensive in any way that could help the Court to correlate the entries of the specific amounts of Rs. 8 crores covered through the cheques. Without proof of several entries in the accounts, the liability under the cheques cannot be taken on its face value to allow for the plaintiff to walk away with the judgment without affording the defendant's right to defense. It is a further contention of the counsel for the petitioner that defendant has several claims against the plaintiff and there are debit notes issued by the plaintiff company admitting to its indebtedness for charges payable to the defendant for the works turned out and for value of the goods supplied by the defendant to the plaintiff. The defendant would refer to claim of over Rs. 75 lacs as still borne through records and was a subject of independent suit. When there were claims or counter-claims of mutual credits and debits, the Court must allow for the defense to be entered unconditionally. The counsel would let emphasis on the judgment which we already referred to in M/s Mechalec case (supra) and point out two important instances which the judgment expresses amongst the 5 clauses. Clause (a) refers to a situation where a Court finds that a defendant has a good defense, Clause (b) refers to a situation when the defendant's defense raises a triable issue and that he has a fair, *bona fide* or reasonable defense, although not positively good defense. In both these cases, Hon'ble the Supreme Court was holding affirming the rule laid down by the Calcutta High Court that the defense shall be unconditional. The defense which we have enumerated shall therefore be seen whether anything fair or bona fide to leave for an interference for us that the defendant will have such a benefit.

Elsewhere in the same judgment we have seen that the suit is for enforcement of money claims under cheques issued by the defendant company admittedly. I have also adverted to the legal presumption available under Section 118 of NI Act. The transactions are not between rustic villagers or local persons who could plead for illiteracy. The transaction is between the company through executives. The transactions are not amounts in driblets but they represent large volume of business and high value claims. One would expect that the parties take responsibility for what they do with their eyes open. A company that issues cheques ought to take responsibility for what it does. When it gets an authorized signatory to act on its behalf, this is again not for purchase of any fancy goods but it is for transactions of purchase of steel sheets which are the sole bread and butter for the defendant company to have any business or respectability. If the amounts drawn by cheques have to be taken on its face value, there is no question that there could be even a defense. The amendment of the NI Act that was brought in the year 1989 introduced Chapter XVII which was meant to encourage honesty in business dealings and impose responsibility for a person that issues a cheque to honour its commitment. A pure civil liability under a contract is sought to be criminalized through this chapter only to pave way for honest transactions in business and to prevent irresponsible defense of non-liability. It is a daily experience that the provision perhaps did not serve the lofty object with which it was introduced. Every drawer of the cheque has a defense to take that it was drawn without consideration. Denial of signature in a cheque leaf which ought to be only in his custody is still a commonplace occurrence. Criminal Courts in this genre of litigation occupies perhaps the highest incidence of institution. This is only to highlight that the liability which the law takes as strict and makes it criminal cannot be a liability that can be washed away by a company that operates on crores of rupees. This is again a company which has availed of large credit from a public sector financial institution and has burnt itself through a claim made under SARFAESI Act and lost a large unit of the company. I cannot therefore take any defense now taken regarding the untenability of the plaintiff's claim to have any value. If there is a modicum of defense in any way, it was probably to test the truth of debit notes which the plaintiff company itself appears to be issued in favour of the defendants. I have gone through the petition seeking for leave to defend drawn in an elaborate fashion. If there is a reference to claims by the defendants it is about a debit note for Rs. 45, 88,000/- and admitting to another debit claim of Rs. 55, 54,463/-. It would appear that the defendant filed a suit even before the institution of the present suit and before even filing an application for leave to defend in the Court at Dera Basi. It is admitted that the suit was dismissed although the petitioner defendant would qualify to be a dismissal of technical ground while the plaintiff would say it was comprehensively decided against the defendant herein.

I may draw two presumptions against the defendant to be statutorily drawn and the status of parties, as people who are operating on high volume business are guided at all times through legally trained persons and drawing up documents knowing the legal implication. I would not allow for the defense without appropriate condition. There are other judgments on which the counsel appearing on behalf of the respondents on and which sets out the parameters for imposing conditions. In Defiance Knitting Industries Pvt. Ltd. Vs. Jay Arts, 2006 (4) RCR (Civil) 493, the Court set out three grounds that if the case raises a triable issue defense should be granted unconditionally, secondly, where the Court is satisfied that the fact disclosed does not indicate that the defendant has a substantial defense or it is frivolous it should again refused the leave to defend. In case where the Court entertains a due whether the defense is genuine or sham or whether it raises a triable issue, the Court may impose condition in granting the leave to defend. The same point has been reiterated in two other decisions in M/s Uma Shankar Kamal Narain and another Vs. M/s M.D. Overseas Ltd., 2007 (2) RCR (Civil) 585. A still later judgment in Southern Sales and Services and others Vs. Sauermilch Design and handels GMBH, AIR 2009 SC 320, the Court refer to order 37 Rule 3 to 5 with the 2nd proviso to sub-rule 5 to hold that a leave to issue shall not be granted unless amount admitted to be due is deposited in Court. This arises in a situation where there is an admission of liability in Neebha Kapoor Vs. Jayantilal Khandwala, 2008(3) SCC 770, the Court was holding that in order to grant leave to defend the Court must insist production of original. I do not think we should be detained by the reference to each judgment with the reproduction of the expressions brought out in said decisions, as the legal proposition is that if there is anything substantial in defense but still there is any due, the Court may impose appropriate conditions for leave to defend. While holding that there is anything really substantial at all or there is any defense as with reference to some debit notes which the plaintiff has issued to the defendant, even this amount is denied by the plaintiff as still due and according to the plaintiff a right to enforcement claimed by the defendant in a separate suit was lost. The defendant denies that the suit represented liability of the debit note now. The moneys claimed are fairly large and the defendant company is in a bad way by, the defendants own showing. The principal asset which was the running unit has been lost which has not even discharged in full the liability to a public sector financial company. The money lost in a transaction in business causes a serious dent in the resources of not only the company which has lost its business and unable to reap, it causes serious hardship as much to the creditor who would depend on the regeneration of the amount lent by return of capital with interest. In this case, if the first defendant must have leave to defend that defense shall be possible only if the defendant furnishes security to the tune of 90% of the amount claimed in all the suits and the additional amount of Rs. 25 lacs towards cost and expenses for all suits and splitting it proportionately to the claims made in the previous suits. The security can be either by means of bank guarantee comprehensively for all the 8 suits or by means of immovable property. The property that is offered by the company shall be duly decided by the Court for its worth before its acceptance and if it is satisfied the Court assessment of the value for which the security is ordered the Court may allow for the defense to be given and take up the matter for trial. If the defendant company is unable to furnish security or offer guarantee in the manner directed the defense shall be struck off and the Court will proceed to consider the case for defendant Nos. 2 and 3 and dispose it in accordance with law.

The security that is directed shall be furnished shall be deposited within two weeks from the date of the passing of the order.

CR No. 3803 of 2013 is dismissed, CR Nos. 3804 and 3805 of 2013 are allowed and CR No. 3806 of 2013 is disposed of with conditional leave to defend in the manner directed.

09.07.2015 **K.KANNAN)**
kv **JUDGE**