

\$~4

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

+ C.R.P. 14/2014 & CM No. 2542/2014

% Decided on: 3rd March, 2015

SALEEM KHATRI Petitioner
Through: Mr. R.S. Soni, Adv.

versus
SHAFIQUDDIN Respondent
Through: None.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Despite service, none appears on behalf of the respondent. None appeared on behalf of respondent even on the last date of hearing. The petitioner is the defendant in the Civil Suit No. 61/2012 filed by the respondent/Shafiquddin under Order 37 CPC for the recovery of an amount of ₹5,66,425/- based on a cheque. The case of the plaintiff/respondent in the plaint is that the plaintiff transferred a Slaughter House to the defendant in consideration whereof, the petitioner/defendant paid a sum of ₹4,62,425/- by way of a cheque which was dishonoured due to insufficient funds. The plaintiff/respondent sent a notice under Section 138 of the Negotiable Instruments Act and thereafter filed a complaint before the Metropolitan Magistrate.

2. In the Civil Suit filed by the respondent under Order 37 CPC for recovery of the amount of ₹4,62,425/-, the petitioner filed a leave to defend

application challenging the territorial jurisdiction of the learned trial court to try the suit as according to the defendant, the agreement was executed at Gurgaon, Haryana and the Slaughter House was situated at Doha, Haryana and no cause of action took place in Delhi and hence, the trial court had no jurisdiction to try the suit. It was further stated that the possession of the Slaughter House was never handed over to the petitioner/defendant and hence the transaction having not taken place, there was no reason why the cheque ought to have been encashed.

3. In the suit, though, the plaintiff claimed that they had delivered the possession of the Slaughter House, however, no document showing the transfer or delivery of the Slaughter House was filed. Further, the agreement entered into between the parties was also not filed. In view of these facts, the learned trial court granted the leave to defend to the petitioner/defendant subject to the deposit of the cheque amount/furnishing bank guarantee to the extent of the cheque amount vide the impugned order.

4. The only grievance of the petitioner/defendant before this court is with regard to the direction to deposit the cheque amount/furnishing bank guarantee to the said extent as directed by the impugned order.

5. In a suit under Order 37 CPC, if the defendant raises triable issues, then he is entitled to leave to defend. In the present case, the petitioner/defendant has raised a triable issue with regard to the territorial jurisdiction of the learned trial court and secondly with regard to the very basis of the agreement i.e. the possession of the Slaughter House not having been handed over to the petitioner/defendant, thus leave to defend was rightly granted to the petitioner/defendant. However, as settled by the Supreme Court, only in cases, where the defence appears to be malafide or if

the defendant has no defence or the same is illusory or sham or practically moonshine, the court may grant leave to defend subject to the defendant depositing the contracted amount/liquidated damages.

6. In *Smt. Kiranmoyee Dassi and Anr. V. Dr. J. Chatterjee*, the Supreme Court laid down guidelines with regard to leave to defend in a suit under Order 37 CPC as under:-

“ (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 Santosh Kumar Vs. Mool Bhai AIR 1958 SC 321 the Supreme Court held that while granting leave to defend the conditions of deposit of the amount can be imposed only if the Court finds that triable issues are raised but defence appears to be malafide.

8. In the present case, as noted above, the petitioner/defendant has raised triable issues inasmuch as he has challenged the territorial jurisdiction of the learned trial court and also that the contract was never performed and the possession of the Slaughter House was not handed over for which the respondent/plaintiff failed to file any document. Thus, the defence of the defendant cannot be said to be either illusory, sham or practically moonshine or malafide, consequently, the direction of the learned trial court vide the impugned order to the extent it directed the petitioner/defendant to deposit the cheque amount or furnishing the bank guarantee is set aside.

9. The application and the petition are disposed of.

(MUKTA GUPTA)
JUDGE

MARCH 03, 2015

‘j’