

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

+ **CM(M) 1321/2009**

% **Decided on: 22nd January, 2015**

SRI NIWAS GUPTA@CHEENI Petitioner
Through Mr. B.S. Randhawa, Mr. Dinesh
Kothari, Advs.
versus

ARVIND KUMAR AGGARWAL Respondent
Through None

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA
MUKTA GUPTA, J. (ORAL)

1. The respondent/plaintiff had filed a suit for recovery of ₹5,39,000/- under Order 37 CPC wherein the petitioner/defendant sought leave to defend the suit. By the present petition the petitioner impugns the order dated 27th July, 2009 to the extent it directs the petitioner to deposit a sum of ₹3,50,000/- which is equal to the total cheque amount as security within one month while granting him leave to defend since triable issues had been raised by the petitioner herein.

2. Considering the fact that the petitioner/defendant had been able to demonstrate that neither the original cheques had been filed by the plaintiff and even the hand-writing on the cheques in question was different than the other cheques and that the interest amount had also not been calculated, the Court granted leave to defend since triable issues were raised. The

petitioner/ defendant also pressed his defence that in fact no transaction was entered into between the plaintiff and defendant, rather the plaintiff had entered into a transaction with one of the relatives of defendant.

3. Notice was issued in the present petition to the respondent who filed the reply affidavit, however since none appeared for the respondent for number of dates he was proceeded ex-parte on 19th July, 2013. Even thereafter none appears for the respondent. Today also none appears for the respondent despite pass-over.

4. In M/s. Mechalec Engineers and Manufacturers Vs. M/s. Basic Equipment Corporation AIR 1977 SC 577 the Supreme Court laid the following principles for grant of leave to defend 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, shows 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.

5. The Division Bench of this Court in Babbar Vision India Pvt. Ltd. Vs. Rama Vision Ltd. 99 (2002) DLT 556 following Santosh Kumar (supra) laid down that the pre-condition of deposit to grant of leave to defend can be imposed only when the defence though raises triable issues, however appears to be mala-fide.

6. There is no finding of mala-fide in the defences raised by the petitioner arrived at by the learned Trial Court. Considering the facts as noted, I am of the considered view that the petitioner was entitled to grant of unconditional leave to defend. Consequently, the impugned order dated 27th July, 2009 is set aside to the extent it imposes the condition of deposit of a sum of ₹3,50,000/- as security with the Trial Court.

7. Petition is disposed of.

(MUKTA GUPTA)
JUDGE

JANUARY 22, 2015
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