

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****APPEAL NO. 393 OF 2016****IN****SUMMARY SUIT NO. 757 OF 2014****WITH****NOTICE OF MOTION (L) NO. 1038 OF 2016**

Shahnawaz Y. Rais and anr.

.. Appellants

V/s.

Adil Khalil Bhure and anr.

.. Respondents.

Mr. C.K. Tripathi for the appellants

Ms Asha Bhambhwani i/b Rohit Joshi & Gauri Godse for the respondents.

**CORAM: DR. MANJULA CHELLUR, C.J. &
M.S.SONAK, J.****DATE : 15 DECEMBER 2016.**

P.C.

1] The appellants (original plaintiffs) appeal the order dated 22nd February 2016, by which the learned Single Judge has granted the respondents (original defendants) unconditional leave to defend Summary Suit No. 757 of 2014.

2] Mr.C.K. Tripathi, learned counsel for the appellants, submits that the appellants were not heard before the impugned order was made. In any case, he submits that the respondents in respect of the claimed amount of Rs.3 crores, had issued six post-dated cheques, which were dishonoured with the remark "*funds insufficient*". Although the proceedings under section 138 of the Negotiable Instrument Act, 1881 came to be quashed, the matter was pending before the Supreme Court and therefore, no case was made out by the respondents for grant of leave to defend. In any case, Mr. Tripathi submitted that no case was

made out for grant of leave to defend unconditionally.

3] Ms Asha Bhambhwani, learned counsel for the respondents, submitted that the respondents had raised a very substantial defence in the affidavit-in-reply filed on 20th February 2015. In particular, it is the case of the respondents that the cheques were issued by them to facilitate “*accommodation entries*” in respect of certain cash transactions indulged into by the appellants. She submitted that the respondents are not in respect of any amount from the appellants, either by way of loan or otherwise and the appellants have failed to produce even a single document to *prima facie* evidence any transactions of loan as alleged in the summary suit. She submitted that the circumstance that the appellants' criminal complaint was dismissed by the Magistrate and such dismissal was upheld by the Sessions Court is itself, sufficient to conclude that the triable issues have been raised. Accordingly, she submitted that unconditional leave was rightly granted and there is no case made out to interfere with the impugned order.

4] Upon taking into consideration the rival contentions as well as the material on record, we find no reason to interfere with the impugned order.

5] In *M/s. Mechalec Engineers & Manufactureres Vs. M/s. Basic Equipment Corporation*¹, the Supreme Court has approved the following propositions in the matter of considering the question of grant of leave to defend under 37 Rule 3 (2) of the CPC.

“(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*

1 AIR 1977 Supreme Court 577

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."

6] In the present case, the respondents have raised the defence that they have never received any amount, much less amount of Rs.3 crores as and by way of loan from the appellants. Rather, they submit that the appellants being flushed with cash amounts from their several business like hotels, sale of cars, real estate etc., requested the respondents, with whom, they had cordial relations, to issue certain post dated cheques, so as to facilitate the making of accommodation entries. At this stage, we are not concerned with the merits or otherwise, of such defences. However, it must be noted that there was no material placed on record

to evidence the grant of loan in an amount of Rs.3 crores by the appellants to the respondents.

7] Further, there is no dispute that the appellants consequent upon dishonour of the cheques had initiated proceedings under section 138 of the Negotiable Instruments Act. However, such proceedings came to be dismissed by the Metropolitan Magistrate and such dismissal was upheld by the Sessions Court. According to the appellants, the matter is now pending before the Supreme Court.

8] In *Raj Duggal vs. Ramesh Kumar Bansal*², the Supreme Court has held that where defence raises a triable issue, leave should not be declined merely because of inherent implausibility or inconsistency of the defence. The Supreme Court at paras 3 and 4 has observed thus:

“3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

² 1991 Supp (1) Supreme Court Cases 191

4. On a consideration of the material in this case — we have looked into the defence sought to be raised and the criminal complaint earlier lodged — we think that a triable issue arises. On the analogous provisions of Order 14 of the Rules of Supreme Court in England it was held that where the defence can be described as more than “shadowy” but less than “probable” leave to defend should be given. [See pages 146 and 147 of the Supreme Court Practice, 1988]”.

9] The defences raised by the respondents can neither be said to be illusory nor “*practically moonshine*”. The defences raised can neither be said to be implausible nor inconsistent, even though *Raj Duggal (supra)*, holds that such is not ground to reject leave to defend. Applying the principles set out in *M/s. Mechalec Engineers (supra)*, including in particular the principles at (b), (c) and (d) as aforesaid, we that there is no error involved for grant of unconditional leave to defend. The appellants, by themselves or through their counsel chose not to remain present on the date when the impugned order was made, even though, the matter was duly notified on the cause list. In such circumstances, the appellants can hardly say that the impugned order was made without afford of opportunity of hearing to them. Learned Single Judge, upon examination of the material on record has made the impugned order. Accordingly, we see no reason to interfere with the impugned order. This appeal is dismissed. There shall be no order as to costs.

10] Mr. C.K. Tripathi, however, submits that one of the appellant is 72 years of age and therefore, we should direct expeditious disposal of the suit, which now stands transferred to the list of commercial causes. If one of the appellants is indeed a senior citizen, it would be open to

the appellants to apply to learned Single Judge to seek early disposal of the suit.

11] In view of the disposal of the main appeal, notice of motion does not survive and the same is disposed of accordingly.

(M.S.SONAK, J.)

(CHIEF JUSTICE)