

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2372 OF 2016

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India is filed challenging the order dated 12.01.2016 in I.A.No.343 of 2013 in O.S.No.500 of 2013 on the file of II Additional Chief Judge, City Civil Courts, Hyderabad, filed under Order XXXVII Rule 3 read with Section 151 C.P.C., for grant of unconditional leave to defend the suit by the defendants ignoring the letter dated 12.03.2012 wherein they admitted their liability to pay Rs.13,47,77,060/- under sub-contract.

2. For convenience of reference, the ranks given to the parties before the trial Court in I.A.No.343 of 2013 in O.S.No.500 of 2013 will be adopted throughout the order.

The petitioners/defendants filed petition under Order XXXVII Rule 3 C.P.C. seeking leave to defend the suit alleging that they entered into a sub-contract with the respondent/plaintiff and the respondent, without completion of the work under the sub-contract agreement left the work incomplete and the same was not upto the satisfaction of M/s.Bramhani Industries Limited for whom the works are executed and suppressing the said fact, the respondent/plaintiff filed the suit for recovery of huge amount of Rs.13,47,77,060/- and approached the Court with unclean hands.

3. The respondent filed counter denying the material allegations contending that leave cannot be granted unconditionally and in view of the letter dated 12.03.2013 wherein

petitioners admitted the liability for payment of Rs.13,47,77,060/-, and unless the said demanded amount is paid, leave cannot be granted.

4. The trial Court considered the plea of the defendants in this petition and granted unconditional leave to defend the suit while observing in paragraph No.9 of the order that the last payment was made on 11.07.2009 and within three years, there was no acknowledgement of liability. The letter on which the respondent relied on is dated 12.03.2013 (wrongly referred the date). Therefore, the said letter would not extend limitation and on this sole ground, the trial Court granted unconditional leave. The letter filed along with the plaint by the plaintiff is dated 12.03.2012 and instead of referring the date of the letter as 12.03.2012, the trial Court referred its date as 12.03.2013 and by the time, the claim of the plaintiff is barred.

5. It is *ex facie* erroneous and on that ground, unconditional leave cannot be granted. The trial Court, on misconstruction of facts, granted such unconditional leave. On this ground alone, the present revision is liable to be allowed, since the trial Court passed order considering the extraneous evidence on record, by exercising power under Article 227 of the Constitution of India.

6. Learned counsel for the revision petitioner/plaintiff mainly contended that when the liability is admitted in the letter dated 12.03.2012, unless the admitted amount is deposited, leave cannot be granted to the defendants in the petition filed before the

trial Court and drew the attention of this Court to Order XXXVII Rule 3 (3) and (4) C.P.C which read as under:

“3. Procedure for the appearance of defendant:-

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiffs pleader or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No.4-A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.”

7. The revision petitioner/plaintiff complied with the requirement of sub-rule (4) of Rule 3. Thereupon, the petitioners/defendants filed petition under sub-rule (5) of Rule 3 of Order XXXVII C.P.C. and the same reads as under:

“(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just.”

The provisos to sub-rule (5) of Rule 3 reads as under:

“Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

Rule 3 (6) and (7) read as under:

“(6) At the hearing of such summons for judgment.-

- (a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith, or
- (b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.”

8. Based on the said Rule, learned counsel for the revision petitioner/plaintiff contended that granting unconditional leave to the respondents/defendants herein and the

petitioners/defendants before the trial Court to defend the suit when they are liable to pay Rs.13,47,77,060/- is erroneous and drew the attention of this Court to a judgment of the Apex Court in **Southern Sales and Services and others v. Sauermilch Design and Handles GmbH**¹ wherein the Apex Court while granting leave under Order XXXVII Rule 3 C.P.C. held that the question as to whether leave to defend a suit can be granted or not is within the discretionary powers of the High Court and where such discretion has been exercised erroneously or with any irregularity, no interference by Supreme Court is warranted. In paragraph No.14 of the judgment, the Apex Court held as under:

“14. Having considered the submissions made on behalf of the respective parties and the decisions cited, there appears to be force in Mr. Sharma’s submissions regarding the object intended to be achieved by the introduction of sub-rules (4), (5) and (6) in Rule 3 of Order 37 of the Code. Whereas in the unamended provisions of Rule 3, there was no compulsion for making any deposit as a condition precedent to grant of leave to defend a suit by virtue of the second proviso to sub-rule (5), the said provision was altered to the extent that the deposit of any admitted amount is now a condition precedent for grant of leave to defend a suit filed under Order 37 of the Code. A distinction has been made in respect of any part of the claim, which is admitted. The second proviso to sub-rule (5) of Rule 3 makes it very clear that leave to defend a suit shall not be granted unless the amount as admitted to be due by the defendant is deposited in Court.”

¹ AIR 2009 SC 320

9. When the law laid down by the Apex Court and the procedure prescribed under Order XXXVII Rule 3(5) C.P.C. are read together or co-jointly, grant of leave by the trial Court to defend the suit by the respondents/defendants is nothing but exercise of discretion based on extraneous material and since it is an erroneous exercise of jurisdiction of the trial Court under Order XXXVII Rule 3 (5) C.P.C., the same is liable to be set aside. It is also contended by learned counsel for the revision petitioner/plaintiff that the affidavit did not disclose anything to constitute a valid defence to defend the suit.

10. On a perusal of the affidavit filed along with petition under Order XXXVII Rule 3(5) C.P.C., it is evident that except in one paragraph, nothing has been said. For better appreciation of facts, paragraph No.3 of the affidavit is extracted hereunder:

“I submit that the respondent approached this Hon’ble Court with unclean hands and by suppressing various facts before this Hon’ble Court and in the circumstances stated above it is just and necessary to grant leave to defend the present suit or else the petitioner will be put to irreparable loss and injury.”

11. More curiously, the trial Court invented a different plea of limitation, ignoring the allegation of suppression of material facts etc. and *prima facie* concluded that if the letter dated 12.03.2013 is accepted as acknowledgment, by the date of such letter the claim of the plaintiff is barred by limitation. The trial Court misled the date of document and instead of referring the date as 12.03.2012 referred it as 12.03.2013 and by which time

the claim is barred. It is an apparent error on the face of the record, and on erroneous appreciation of the date of document, the trial Court arrived at such conclusion.

12. The petitioners/defendants contended that the affidavit need not disclose the facts which give rise to a valid defence and placed reliance on the judgment of this Court in ***Raghavendra Rice Mills v. Anant Kabra and others***² wherein this Court in paragraph No.6 held as under:

“It is obvious from this provision, the disclosure of facts as may be deemed sufficient to entitle the defendant for leave to defend may be made by affidavit or ‘otherwise’ for enabling the Court to grant leave to defend the suit. It is thus obvious that affidavit filed by the defendant is not the only means of disclosure of grounds. Such grounds may be brought to the notice of the Court by any other means also. In this case, the written argument must be deemed to satisfy the requirement of disclosure by means ‘otherwise’ than affidavit. This is all the more so when the plea disclosed in this case is not based on any questions of fact within the knowledge of the defendant. The defence disclosed relates to some defect in the form of the document on which the plaintiff’s claim is based.”

13. In the present case, the petitioners/defendants filed written statement along with the petition for grant of leave. Question of filing written statement would arise only after grant of leave and written statement would not form part of the affidavit filed along with Order XXXVII Rule 3(5) C.P.C. That would not amount to disclosure of defence in terms of Order XXXVII

² 2000 (5) ALT 439

Rule 3 (5) C.P.C. Even otherwise, sub-rule (5) of Rule 3 C.P.C. mandates disclosure of such facts as may be deemed sufficient to defend, file such application for grant of leave. Therefore, it is the duty of the revision petitioner/plaintiff to disclose such facts as may be deemed sufficient to defend, indicates that he has to disclose the facts which would form basis for framing defence.

14. This Court in **Raghavendra Rice Mills** (2 supra) did not consider the mandatory requirement under sub-rule (5) of Rule 3 of Order XXXVII C.P.C. The revision petitioner/plaintiff also drew the attention of this Court to a judgment of this Court in **T.C.I. Finance Ltd. v. Sree Vani Printers Pvt. Ltd.**³, wherein it is held that when the defence raised in the written statement is *prima facie* evident, unconditional leave cannot be granted. Truth or otherwise of the issues is not a relevant consideration while deciding the petition filed under Order XXXVII Rule 3(5) C.P.C. and held as under:

“The following principles are to be followed while considering the question of granting leave to defend.

- (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

³ LAWs (APH)-2000-9-86

sign judgment and the defendant is entitled to unconditional leave to defend.

The conspectus of the above judgments reveal that if the defendant in the suit has raised a triable issue indicating that he has a fair or bona fide defence although not a positively good defence the plaintiff is not entitled to sign the judgment and the defendant is entitled to an unconditional leave to defend. It is further obvious that at the stage of consideration by the Court as to whether the leave shall be granted or not what is germane is whether the defendant has any bona fide defence to offer and the truth or otherwise of the issue is not at all germane for consideration.”

15. Based on the principles, this Court concluded that when the petitioner disclosed fair or *bona fide* or reasonable defence, an unconditional leave can be granted. But, this Court did not discuss the mandate of sub-rule (5) of Rule 3 C.P.C. regarding disclosure of facts, which give rise to defence. Therefore, based on both the judgments, it is difficult to accept the contention that even without disclosing any fact which would give rise to a valid defence, the Court can grant unconditional leave.

16. Even if the requirement of Order XXXVII Rule 3(5) C.P.C. is ignored, still the material on record would go to show that the respondents herein and the petitioners/defendants before the trial Court admitted their liability to pay Rs.13,47,77,060/- by letter dated 12.03.2012. In such case, unless the admitted liability is deposited, leave shall not be granted in terms of Order XXXVII Rule 3 (6) C.P.C.

17. Learned counsel for the respondents/defendants placed reliance on a judgment of this Court in **M.V. Prasad v. Sri Durga Engineers, Hyderabad**⁴, wherein this Court placing reliance on a judgment in **Mechalec Engineers and Manufactures v. Basic Equipment Corporation**⁵ laid down certain guidelines for grant of leave. This Court while deciding the revision before it followed the law declared by the Apex Court based on the principle laid down in pre-amended C.P.C., i.e., prior to 1977 where it is not mandatory to direct deposit of admitted amount. Therefore, the principle laid down in the above judgment cannot be applied to the present facts.

18. As per the letter dated 12.03.2012, the respondents/defendants herein admitted their liability to pay Rs.13,47,77,060/-. Admissions are two types, one is judicial admission and another is evidentiary admission. Admissions are not conclusive proof, but the admissions estop the person, who made such admission, in view of Section 31 of the Evidence Act. Moreover, the judicial admission is on different footing than the evidentiary admission. When the judicial admission is made in the pleadings or in any document regarding a particular fact in issue, such fact need not be proved by adducing any amount of evidence in view of Section 58 of the Indian Evidence Act. It is settled law that admission is best piece of evidence in view of the principle laid down in a judgment reported in **Sita Ram Bhau Patil v. Ramachandra Nago Patil**⁶ wherein this Court held that:

⁴ 2002 (30 AALT 435

⁵ AIR 1977 SC 577

⁶ AIR 1977 SC 1712

“Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross examination to tender his explanation and clear the point on the question of admission.

In view of the above, the law on the admissions can be summarized to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff.”

19. In another decision reported in **Nagubai Ammal and others v. B. Shama Rao and others**⁷, wherein the Apex Court held as under:

⁷ AIR 1956 SC 593

“Admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in *Slatterie v. Pooley*, wherein it had been observed ‘ what a party himself admits to be true, may reasonably be presumed to be so’.

20. The aforesaid two judgments along with some other judgments of High Court were considered by the Apex Court in a judgment reported in **Union of India and others v. Ibrahimuddin and others**⁸, wherein it is concluded that admission is the best piece of evidence. Therefore, applying the principle laid down in the above judgments, the admission of liability by letter dated 12.03.2012 *prima facie* amounts to admission of liability by the respondents/defendants due to the petitioner/plaintiff. In terms of Order XXXVII Rule 3 (6) C.P.C., unless the admitted liability is recovered and deposited to the credit of the suit, leave cannot be granted. On a co-joint reading of Order XXXVII Rule 3(6) C.P.C. and the judgments of the Supreme Court referred to supra, it is clear that unless the admitted liability is deposited by the defendant, in a petition filed under Order XXXVII Rule 3 (5) C.P.C., the Court shall not grant unconditional leave.

21. The procedure under Order XXXVII is summary procedure and the same is intended for speedy redressal of the claim of the parties and if such leave is granted unconditionally by suppressing the material facts, it would go against the very intent of Order XXXVII C.P.C. The procedure contemplated under Order

⁸ (2012) 8 SCC 148

XXXVII C.P.C. is totally a different than the procedure in ordinary suits. Therefore, the Court, while passing an order based on wrong reference of the letter, which is not the basis for claiming defence, is an error apparent on the record. Therefore, the order passed by the trial Court is hereby set aside while granting permission to the respondents/defendants to defend the suit, subject to depositing the liability admitted in the letter dated 12.03.2012 within 90 days from the date of this order. However, liberty is given to the respondents/defendants to raise any substantial pleas to defend the claim of the plaintiff in the main suit by filing written statement.

22. In the result, the Civil Revision Petition is allowed directing the respondents/defendants to deposit an amount of Rs.13,47,77,060/- within 90 days from today to the credit of O.S.No.500 of 2013 on the file of II Additional Chief Judge, City Civil Court, Hyderabad, and on such deposit, the trial Court is directed to keep the amount in any interest bearing deposit in a Nationalized Bank during pendency of the suit and permit the defendants to file written statement. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in this revision shall stand closed.

M.SATYANARAYANA MURTHY, J

Date:22.08.2016

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