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

+ CM(M) 741/2015 & C.M. No.15053/2015

HDFC BANK LIMITED

..... Petitioner

Through Mr. Puneet K. Bhalla and Ms. Chetna
Bhalla, Advs.

versus

S S BHATIA

..... Respondent

Through Respondent with his counsel Ms.Ritu
Rastogi, Mr. Ashish Pande and Mr.
Ravi Kumar, Advs.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER

% **10.03.2016**

The petitioner is aggrieved by the order dated 14.07.2015. Contention is that the Trial Court while holding that although admittedly the application seeking leave to defend did not contain any triable issue yet having set aside the decree which had been passed in favour of the petitioner (HDFC Bank) has committed a grave folly; by the impugned order, the Trial Court inspite of returning this finding in favour of the petitioner Bank had permitted the non-applicant/respondent to amend his application seeking leave to defend. Submission is that this is not the procedure which is ordained and this procedure thus suffers from an infirmity.

Order XXXVII of the CPC is clear. It prescribes that a summary suit can be filed under the aforementioned provisions of law provided it fits into the parameters of Order XXXVII of the CPC. Summons are then issued in a prescribed format to the respondent who has to file his application seeking leave to defend within the stipulated period of 10

days. If this application discloses any triable issue, leave to defend may be granted. Leave may not be granted by the Court if the defence sought to be raised is moonshine or sham. In the instant case, the Trial Court had perused the application seeking leave to defend and had noted that no triable issue arises. This Court has also perused this application which is on the affidavit of the defendant. Apart from a narration of facts in the three page affidavit of the defendant, there is no triable issue whatsoever which emanates from this application. In the absence of any triable issue emanating from this application seeking leave to defend, the Trial Court had returned a finding that the judgment must follow in favour of the petitioner/HDFC Bank.

An appeal was filed against this judgment. The Appeal Court had passed the impugned order. The finding returned by the Appeal Court reads herein as under:-

“In leave to defend application, as already noted, except for the pendency of the complaint and the general defence, no grievance or the triable issues were raised and the contents of leave to defend application itself speaks volume about lack of legal acumen in drafting of the same. The result is that appellant has lost his case before consumer redressal forum because of the pendency of the civil suit whereas he has lost his case before the civil suit for not taking the appropriate defence before Ld. Trial court. Through noting the contents of leave to defend application, no fault can be found in order of Ld. Trial court but considering the abovesaid and the interest of justice, which warrants an opportunity to the appellant to be able to disclose his defence before Ld. Trial court correctly, decree passed by Ld. Trial court is set aside and instant appeal is disposed off with liberty to the appellant to file additional leave to defend application detailing all the issues before Ld. Trial court within 10 days from today which shall be disposed off in accordance with law. If the appellant fails to file such

application within 10 days, order passed by Ld. Trial court shall hold good. TCR along with copy of this order be sent back to the trial court. Appeal file be consigned to record room.”

The Appellate Court had returned a positive finding that no folly can be found in the order passed by the Trial Court. Since there was no triable issue raised in the application seeking leave to defend, a decree had to follow. At the same time, the Trial Court had by bye-passing the procedure which is mandated under Order XXXVII of the CPC and in spite of the fact that no triable issue had arisen had gone on to set aside the decree and granted permission to the non-applicant/respondent to amend his application seeking leave to defend. This is a wholly illegal order. Such a procedure is not envisaged by the Legislature and the Trial Court having returned a finding in favour of the petitioner that no triable issue had arisen in terms of the application seeking leave to defend and there being no application seeking amendment of the earlier application seeking leave to defend, the Trial Court had passed a perverse order.

Reliance by the learned counsel for the respondent on AIR 1981 SC 1400 Rafiq and Another Vs. Munshilal and Another as also 2002 LawSuit (Mad) 205 K.G. Venkatraman Vs. T. Sridevi is wholly misplaced. Her submission that a party should not suffer for the act of her counsel is not applicable to the factual matrix of the instant case as admittedly this argument now raised before this Court that the fault of a counsel should not penalize a client was not a ground taken in appeal which was filed before the Appeal Court. There were 9 grounds which were pleaded in the appeal before the Appeal Court enlisted as ‘A’ to

“I”. None of them contained this averment.

That part the procedure as mandated by the Legislature could not have been bye-passed if the finding returned by the Appellate Court that there was no infirmity in the order passed by the Appellate Court.

Needless to state that triable issues have to be culled out from the application seeking leave to defend. This is the procedure in a summary suit as contained in Order XXXVII of the CPC. If no triable issue arises, a decree must follow in favour of the petitioner which had accordingly been passed by the Civil Judge. This finding on merits had in fact been endorsed by the Appellate Court which had been noted in the impugned order yet the Trial Court had gone on to pass the impugned order which at the cost of repetition was an illegal order. If there was no triable issue raised in the application seeking leave to defend, the next corollary would be that the decree had to follow in favour of the petitioner Bank. The Trial Court could not have set aside the decree in this background and granted permission to the non-applicant to amend his application seeking leave to defend. This was also not the plea raised before the first Appeal Court.

The impugned order is accordingly set aside. Petition is allowed. Suit of plaintiff stands decreed.

INDERMEET KAUR, J

MARCH 10, 2016

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CM(M) 741/2015

Page 4 of 4