

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **03.02.2017**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP PD Nos.1467 and 1439 of 2016

V.Lakshmi Narayanan

.. Petitioner in both C.R.Ps

vs

S.Veeramathi
Proprietor Sri Dhanalakshmi Jewellery
Rep by her Power Agent
Mr.Rahul Sharma
C.R.Ps

.. Respondent in both

Prayer: Civil Revision Petitions filed under Article 227 of the Constitution of India against the fair and decretal order dated 17.11.2015 made in I.A.No.161 and 162 of 2015 respectively in O.S.No.3659 of 2015 and O.S.No.3660 of 2015 respectively on the file of the XVIII Additional City Civil Court, Chennai.

For Petitioner : Mr. S.Mythreye Chandru
in both C.R.Ps
For Respondent : Mr. R.Arun
in both C.R.Ps

COMMON ORDER

The revision petitions are directed against the orders refusing to grant leave to defend the plaintiff's claim under Order XXXVII Rule

5 of the Code of Civil Procedure by the defendant.

2. The suits are filed by the plaintiff for recovery of a sum of Rs.21,50,000/- (Rupees twenty one lakhs and fifty thousand only) with interest. The case of the defendant is that he is the cooking contractor, doing his business in the name and style of Nala Bogam for several years and as part time business, he is also doing chit transaction. The plaintiff joined the chit amount of Rs.2,25,000/-, for a period of twenty months. However, he was not regular in paying the chit amount. Even the first installment was not paid and the same was paid only after four months, that too, the amount due for two months chit. The plaintiff himself requested the defendant to discontinue him from the chit, as he was having a heavy loss in his jewelery business and wanted to return the amount, which was already paid. Accordingly, the defendant had issued two cheques to the plaintiff as security till such time he pays the amount received from the plaintiff. Even after settling the payment by cash, the plaintiff did not return the cheques with malafide intention and also presented the cheques in the bank, which were dishonored. The plaintiff also had issued a legal notice dated 04.03.2015 under Section 138 of the Negotiable Instruments Act and a reply notice was also sent by the defendant on 18.03.2015. But it was returned with an endorsement 'not claimed'. In the reply itself, it has been

explained about the said facts. Though it is stated that the proceedings has been initiated under Section 138 of the N.I. Act, the defendant has not yet received any notice. As the defendant has a good case on merits under triable issue, leave to defend the plaintiff's claim was sought for.

3. The said applications were opposed by the plaintiff. The learned trial Judge dismissed the same not accepting the case of the defendant. Aggrieved by the same, the above revisions have been preferred.

4. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the defendant.

5. According to the defendant, the plaintiff joined 2,25,000/- chit and paid only two installments and he defaulted in paying the other regular installments. At one stage, the plaintiff himself had requested the defendant to discontinue the chit as he had suffered heavy loss in his jewelery business. As he voluntarily withdrew from the subscription of the chit, the defendants settled two months installments amounting to Rs.5,00,000/- lakhs to the plaintiff. The defendant has also issued two cheques as security to the chit amount

paid to all the chit holders at the time of beginning of chit. When the plaintiff discontinued the chit after four months not able to pay the installments, he should have returned the cheques issued by the defendant. Though the defendant had settled the two months subscription of Rs.5,00,000/- to the plaintiff, the cheques given earlier as security were not returned. However, with malafide intention to defraud the defendant, even after receiving the amounts paid, the plaintiff presented the cheque for collection. As the cheques were dishonored after exchange of notices, proceedings under Section 138 of the N.I.Act were initiated. The defendant also had sent a reply explaining the details. However, the same was not served on the plaintiff and was returned as 'unclaimed'. There is a dispute with respect to the payment of chit made by the plaintiff and also the payment of cash by the defendant and the payment of cheques.

6. The only question that has to be decided is as to whether the defendant has raised triable issues, which require adjudication of further evidence at the time of final disposal of the suit.

7. Order XXXVII Rule 3 C.P.C prescribes the mode of service of summons and leave to defend. So far as the suits based on

negotiable instruments which carry a presumption as to their having been made or drawn for consideration and because such matters deserve more expeditious processing, if the defendant satisfies the Court that he has a triable issue, leave should not be refused. When 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. Even if the affidavit does not make it clear that the defendant has a valid defence, yet, shows such a state of facts which leads to the inference that at the trial he may be able to establish a defence to the plaintiff's claim, then leave has to be granted. In the case on hand, it is the plaintiff, who was a subscriber to the chits and it is admitted by both the parties that it was discontinued halfway. It is the case of the plaintiff that he has been paying the monthly subscription without any default whereas the defendant has stated that he had paid only two months installments and that too, it was paid in a period of four months.

8. In a recent decision of the Hon'ble Supreme Court in **[2016 (6) CTC 647] IDBI TRUSTEESHIP SERVICES LTD -**

HUBTOWN LTD, superseding the **Mechelec's case** in [1976 (4) **SCC 687** and following the **Milkhiram's case** in **AIR 1965 SC 1698**, it has been held as follows:-

"17. It is thus clear that O.XXXVII has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that Milkhiram's case is a direct authority on the amended O.XXXVII provision, as the amended provision in O.XXXVII Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order XXXVII to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to

Joseph's multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.”

Following the above principle, in the case on hand though the defendant has not raised the substantial defence to the claim made, however, he has made out an arguable and triable issue.

9. In such view of the matter, the defendant is granted the

leave to defend the suit. Therefore, the order of the trial Court is set aside and these Civil Revision Petitions are allowed. The suits shall be tried expeditiously preferably within a period of six months from the date of receipt of a copy copy of this order. No costs.

03.02.2017

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Index: yes/No
Internet: yes

To

The XVIII Additional City Civil Court,
Chennai.

PUSHPA SATHYANARAYANA,J.,

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