

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.08.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.693 of 2006
and
CMP.Nos.5732 of 2006
and
V.C.M.P.No.3 of 2008

K.Chellammal ... Petitioner/Petitioner

Vs.

1.P.Oommen Thomas

2.Kesavan Enterprises,
rep. by its partner

3.K.Krishnamohan ... Respondents/Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order dated 23.09.2005 passed in I.A.No.2200 of 2005 in O.S.No.4867 of 2004 passed by the VII Assistant City Civil Judge, Chennai.

For Petitioner : Mr.S.Parthasarathy

For Respondents : M/s.Menon and Goklaney Associates
(for R1)

No Appearance (for R2 and R3)

O R D E R

The 3rd defendant in O.S.No.4867 of 2004, on the file of the VII Assistant Judge, City Civil Court, Chennai, is the civil revision petitioner before this Court.

2.The case of the defendant is that the respondent/plaintiff has filed a suit in O.S.No.4687 of 2004 against the petitioner/defendant for claiming a sum of Rs.40,550/- together with interest on Rs.25,000/- at 1.90% per month from the date of plaint till realisation.

3.It is the case of the respondent/plaintiff that on 03.10.2001 at Chennai, this petitioner/3rd defendant, as a partner of the 1st defendant firm and as such agent of the other partners of the 1st defendant firm, executed a promissory note in favour of the respondent/plaintiff, in and by which, the defendants jointly and severally promised to pay to the plaintiff, or order on demand the sum of Rs.12,500/- together with interest thereon at 1.90% per month. On 05.10.2001, the 2nd defendant again received a cash on behalf of the 1st defendant and other partners and executed another promissory note in favour of the plaintiff, in and by which, the defendants jointly and severally promised to pay to the plaintiff, or order on demand the sum of Rs.12,500/- together with interest thereon at 1.90% per month. For each of the two promissory notes, the defendants paid interest for five months and failed to pay the entire principal and all the subsequent accumulated interest. When these petitioners/defendants have failed to pay the said amount of Rs.40,550/-, this respondent/plaintiff has filed the above suit in O.S.No.4867 of 2004 before the learned VII Assistant Judge, City Civil Court, Chennai and seeking direction that the defendants be directed to pay a sum of Rs.40,550/- together with interest on Rs.25,000/- at 1.90% per month from this date of plaint till realisation to the respondent/plaintiff.

4.On receipt of the summon, these defendants were appeared through their Advocate and filed a petition under Order 37 Rule 3 of C.P.C. seeking grant to leave the defendant in the above suit, since, the plaintiffs have filed the suit in O.S.No.4867 of 2004 under Order 37 Rule 4 of C.P.C.

5.The 3rd defendant K.Chellamal has filed an application in I.A.No.2200 of 2004 for seeking grant to leave the defendant in the above suit. In the affidavit, the petitioner/3rd defendant denied that she never borrowed any amount from the 1st respondent/plaintiff either in her personal capacity or partner of M/s.Kesavan Enterprises, the 2nd respondent / 1st defendant.

6.The petitioner/3rd defendant also denied that that the 3rd defendant borrowed as one of the Partner of the 2nd respondent firm and as agent of other partner. She was also denied that she never authorised 3rd respondent to borrow the alleged sum of Rs.25,000/- for the purpose of the said Firm Agent and also never authorised him to execute any promissory note as alleged in the plaint. The petitioner/3rd defendant also denied that she never promised to repay jointly and severally to the 1st respondent/plaintiff on demand the alleged sum with interest.

7.The petitioner/3rd defendant also states that since the petitioner has never borrowed any sum as alleged in the plaint, that the 1st respondent/plaintiff caused legal notice to this

petitioner. The petitioner/3rd defendant has not liable to pay any sum claimed in the plaint without prejudice to the above facts that the said firm has already dissolved and all liabilities are taken over by the 2nd defendant and the petitioner made due publication of the same.

8. Apart from this, the petitioner/3rd defendant already settled the property in favour of her daughters and grand son. Therefore, whether the petitioner, who is the partner of the 1st defendant firm is liable to pay the amount or not to be decided only on trial. Therefore, the petitioner/3rd defendant has filed a petition to grant to leave the defendant the above suit.

9. On receipt of the notice in I.A.No.2200 of 2004, the 1st respondent/plaintiff has filed a counter affidavit stating that a perusal of the suit promissory notes as stated in paras 3 and 4 of the plaint, would show that the 2nd respondent, as a partner of the 1st defendant firm and as such agent of the other partners of the 1st defendant firm executed the suit promissory note in favour of the 1st respondent/plaintiff. The 1st respondent/plaintiff also states that in respect of the said promissory notes, as stated in paras 5 of the plaint, the defendants did not pay the entire principal and subsequent accumulated interest and the 2nd defendant has executed the promissory note on behalf of the Company and as such agent of the other partners of the 1st defendant firm. It is the fundamental essence and understanding of the Indian Partnership Act that if a Partner has no power to borrow money and in spite of it he borrows money as a partner and for the partnership firm, the remedy available to the other partners is only to proceed against the erring partner and on that account a bonafide financier should not be penalised.

10. The 1st respondent/plaintiff also states that the consideration was received by the 1st defendant partnership and thus the partnership had the benefit of the money and therefore, by no stretch of imagination can disown her liability in respect of the present borrowal. The 1st respondent/plaintiff also states that institution of the suit, number of requests and demands were made on the defendants to pay the amount due and at all times, they were promising repayment that they have no intention of keeping up their promise, a notice of demand was sent to the defendants and the copy of the notice and postal receipt have been filed with the plaint. The defendants, including the petitioner herein, stating the contents thereof, refused to receive the notices and copy of the notice with returned covers have accordingly been filed as Document No.3 along with the plaint. Therefore, the 1st respondent/plaintiff has prayed the trial Court to dismiss the application and to decreed the suit in favour of the 1st respondent/ plaintiff.

11.Considering both side cases, the learned VII Assistant Judge, City Civil Court, Chennai, by order dated 23.09.2005, dismissed I.A.No.4867 of 2004 filed by the petitioner/3rd defendant and decreed the suit in favour of the 1st respondent/plaintiff, on the ground that though the 2nd defendant has executed the promissory note and borrowed the amount on 03.10.2001 and 05.10.2001, but, after the execution of the alleged debt should be repaid only by the 2nd defendant and to that effect an agreement dated 19.10.2003 was executed between the petitioners and partnership firm. Therefore, that could not be taken into account and this petitioner/3rd defendant escaping from the liability which has borrowed in the year 2001 has filed the said application. As per Section 32 and 72 of the Partnership Act, this petitioner/3rd defendant, if the 2nd defendant has committed a mistake in the 1st defendant firm, the other partners have permitted to file petition against the 2nd defendant and got the relief to them.

12.Apart from this, the learned Judge also states that this petitioner/3rd defendant has not raised any issue for triable in the suit. Therefore, the petitioner/3rd defendant has not make out any case for seeking the leave to defend the suit and hence the same was dismissed by the trial Judge and decreed the suit in O.S.No.4867 of 2004 in favour of the 1st respondent/plaintiff. Challenging the said order, the present Civil Revision Petition has been filed before this Court.

13.I heard Mr.S.Parthasarathy, learned counsel appearing for the petitioner and M/s.Menon and Goklaney, learned counsel appearing for the 1st respondent and there was no representation on behalf of the respondents 2 and 3 and perused all the materials available on record.

14.Admittedly, the 1st defendant is the firm and other two defendants are the partners of the 1st defendant firm.

15.It is the case of the 1st respondent/defendant that the 2nd defendant, as a partner of the 1st defendant firm, the 2nd respondent has borrowed a sum of Rs.12,500/- on 03.10.2001 and 05.10.2001, therefore, the petitioner/3rd defendant and other partners are under the 1st defendant Company are liable to pay the amount jointly or severally.

16.Apart from this, it is the case of the plaintiff that on 03.10.2001, the 2nd defendant has executed the promissory note on behalf of the 1st defendant, as a partner of the 1st defendant firm and as such agent of the other partners of the 1st defendant firm. It is the case of the plaintiff that this defendant again on 05.10.2001, for value received in cash, the 2nd defendant, as

a partner of the 1st defendant firm and as such agent of the other partners of the 1st defendant firm, executed another promissory note in favour of the plaintiff. Therefore, the Court must be followed in respect of entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 itself, in a case of Kiranmoyee Dassi v. J.Chatterjee reported in AIR 1949 Cal 479 and the Hon'ble Apex Court has held in the form of the following propositions to decide the issue for granting leave to the defendants as follows:

"(1) 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 the judgment and the defendant is entitled to unconditional leave to defend.

(2) If the defendant raised 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.

(3) 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 stage 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.

(4) 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.

(5) 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."

17.It is the view of this Court and the Hon'ble Apex Court while the Court below considering the petition filed by the defendant for grant of leave to defend them should strictly follow the judgments and decide the application. The Hon'ble Supreme Court has passed the above judgment in the case of State Bank of Hyderabad v. Rabo Bank reported in (2015) 10 Supreme Court Cases 521. The Hon'ble Apex Court has held the above case as follows:

"Civil Procedure Code, 1908 - Or. 37 R. 3 - Summary suit - Leave to defend - When ought to be granted - Principles summarised - Triable issue as to meaning or correctness of the documents pertaining to claim - Whether entitles the defendant to leave to defend

- Where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend - Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim - Furthermore, leave to defend the summons for judgment shall always be granted to the defendant when there is a triable issue as to the meaning or correctness of the documents on which the claim is based or the alleged facts are of such nature which entitle the defendant to interrogate or cross-examine the plaintiff or his witnesses, as in present case."

18.It is my absolute view that the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, is the plaintiff entitled to leave to sign judgment.

19.The Hon'ble Apex Court in the above said case reported in (2015) 10 SCC 521 it is held as follows:

"18.Insofar as the question of maintainability of the suit in question under Order 37 CPC is concerned, this Court has in Neebha Kapoor v. Jayantilal Khandwala observed that where the applicability of Order 37 itself is in question, grant of leave to defend may be permissible. The court before passing a decree is entitled to take into

consideration the consequences therefor. The courts dealing with summary trials should act very carefully taking note of the interests of both the parties. Merely on the ground that the defendant may resort to prolonged litigation by putting forth untenable and frivolous defences, grant of leave to defend cannot be declined. At the same time, the court must ensure that the defendant raises a real issue and not a sham one. The court cannot reject the defence on the ground of implausibility or inconsistency. Before recording a finding of granting leave to defend, the Court should assess the facts and come to the conclusion that if the facts alleged by the defendant in the affidavit are established, there would be a good or even a plausible defence on those facts.

19. Although the affidavit does not positively and immediately make it clear that he had a defence, yet, it shows such a state of facts leading to the inference that at the trial of the action, the defendant may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to the 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."

20. It is made clear that leave to defend the summons for judgment shall always be granted to the defendant when there is a triable issue as to the meaning or correctness of the documents on which the claim is based or the alleged facts are of such nature which entitle the defendant to interrogate or cross-examine the plaintiff or his witnesses, this was clearly held in the case of Raj Duggal v. Ramesh Kumar Bansal reported in 1991 Supp (1) SCC 191.

21. Apart from this, this Court in the case of K. Ramiah v. K. Subramanian and K. Ramiah v. S. Sabitha reported in (2015) 1 CTC 280, this Court has held as follows:

"6. When these pleadings are raised by the petitioner in his applications seeking leave to defend, the Court below has gone into the merits of those pleadings and given a finding against the petitioner in respect of each of his pleadings. I am of the view that such approach of the Court, while

considering the application filed under Order XXXVII Rule 3(5), is not in accordance with law. Whether such approach adopted by the Court below is valid or not, while considering the application under Order XXXVII Rule 3(5), has already been considered by this Court in the earlier decisions rendered in 2012 (5) CTC 313 and 2013 (5) CTC 260. It has been found at paragraph 6 of 2013 (5) CTC 260 as follows:

6. In my considered view, the approach of the court below while dealing with the application filed under Order XXXVII Rule 3 of Civil Procedure Code is totally erroneous and unsustainable. It has been repeatedly held that court has to only see as to whether the facts narrated in the affidavit filed in support of the application filed under Order XXXVII Rule 3, discloses any triable issues between the parties and if there are triable issues, then leave to defend has to be granted without going into the correctness or otherwise of the facts stated by the petitioner seeking to leave to defend. I have considered the similar issue in a case reported in 2012 (5) CTC 313 G.RAJARAJAN v. AIG CONSUMER FINANCIAL SERVICES (INDIA) LTD. and held at paragraph 19 as follows:-

"The Court below ought to have noted that even on merits the petitioner as the defendant is only called upon under Order 37, Rule 3(5), C.P.C. to show or disclose some facts which are triable in nature and he is not even required at that stage to establish those facts. Defending a suit is a valuable right available to a defendant, which cannot be denied or brushed aside in a casual manner. That is why the language of Order 37, Rule 3 (5) of C.P.C. only contemplates that the Defendant "may disclose such facts as may be deemed sufficient to entitle him to defend". Therefore, whether the facts are true in nature and based on those facts whether the Defendant is entitled to succeed in the Suit is purely a matter for trial, which could be possibly gone into only when the Defendant is granted leave to defend such suit. Therefore, the Application filed under Order 37, Rule 3 (5), seeking for grant of leave should be considered by the Courts only by keeping it in mind that a defence, which is a valuable right cannot be taken away in a lighter and casual approach, simply because the Suit is filed under Order 37, Rule 1, CPC. It is also to be

noted, at this juncture, that if no such leave is granted, he is thrown out at the threshold and made to suffer a decree forthwith. Therefore, the Courts must show utmost care and caution while considering the Application under Order 37, Rule 3(5), and see as to whether the facts disclosed would lead to a valuable defence with triable issues and of course, such defence is not frivolous and vexatious."

7. The above decisions were rendered by this Court after considering the various decisions of the Apex Court. No doubt the learned counsel for the respondent relied on a decision report in CDJ 2010 MHC 904 to contend that the Court has power under Section 73 of the Indian Evidence Act to compare the signatures found in the disputed document. There is no quarrel about the said proposition. The power is, undoubtedly, vested on the Court under the above said provision. But, the question is at what point of time or at what stage such power has to be exercised by the Court - Here the trial Court has exercised the said power at the prematured stage itself while considering the application filed under Order XXXVII Rule 3(5), which, in effect, amounting to considering the merits of the claim made by the petitioner in the suit itself as if the matter is taken up for trial."

22. Time and again, this Court and the Hon'ble Apex Court has categorically held in various cases that the Court has to only see as to whether the facts narrated in the affidavit filed in support of the application filed under Order XXXVII Rule 3, discloses any triable issues between the parties and if there are triable issues, then leave to defend has to be granted without going into the correctness or otherwise of the facts stated by the petitioner seeking to leave to defend.

23. In the case on hand, there are triable issues in this case that whether the 2nd defendant is an agent of the 3rd defendant has to be considered by the Court or the 3rd defendant is the partner of the Company alone and whether she must liable to pay the amount borrowed by the 2nd defendant and executed the promissory note on 03.10.2001 and 05.10.2001. It is settled principles of law that in the partnership firm if there are several partners are in the company, unless, the managing partner is permitted to sign and executing the promissory note

and borrowing the amount and other partners, whether they are permitted to proceed to claim against them or not to be decided?

24. The trial Court should consider whether the partners of the 1st defendant firm are liable to pay the amount borrowed by the 2nd defendant, who is one among the partners. This is the triable issue to be decided by the trial Court, but without considering all these facts, the trial Court had simply dismissed the application and decreed the suit. There is a total lack of judicial view and judicial consciousness on the part of the learned Judge in the order in I.A.No.2200 of 2005.

25. This Court and the Hon'ble Apex Court very clearly held that where the applicability of Order 37 itself is in question, grant of leave to defend may be permissible. The court before passing a decree is entitled to take into consideration the consequences therefor. The courts dealing with summary trials should act very carefully taking note of the interests of both the parties. Merely on the ground that the defendant may resort to prolonged litigation by putting forth untenable and frivolous defences, grant of leave to defend cannot be granted. At the same time, the court must ensure that the defendant raises a real issue and not a sham one, the Court cannot reject the defence on the ground of implausibility or inconsistency. Before recording a finding of granting leave to defend, the Court should assess the facts and come to the conclusion that if the facts alleged by the defendant in the affidavit are established, there would be a good or even a plausible defence on those facts. Although the affidavit does not positively and immediately make it clear that he had a defence, yet, it shows such a state of facts leading to the inference that at the trial of the action, the defendant may be able to establish a defence to the plaintiff's claim, the plaintiff is not entitled to the 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. It is my absolute view that leave to defend shall always be granted to the defendant when there is a triable issue as to the meaning or correctness of the documents on which the claim is based or the alleged facts are of such nature which entitle the defendant to interrogate or cross-examine the plaintiff or his witnesses.

26. The order of the learned Judge is totally against the order of this Court and the Hon'ble Apex Court and not consider the same in a proper and perspective manner. Therefore, this Court warranting necessary for the interference in the order passed in I.A.No.2200 of 2005 in O.S.No.4867 of 2004, dated 23.09.2005, on the file of the VII Assistant Judge, City Civil Court, Chennai and accordingly, it is liable to be set aside.

27.In the result:

(a) this civil revision petition is allowed, by setting aside the order passed in I.A.No.2200 of 2005 in O.S.No.4867 of 2004, dated 23.09.2005, on the file of the VII Assistant Judge, City Civil Court, Chennai;

(b) the petitioner/3rd defendant is hereby directed to file his written statement within a period of four weeks from the date of receipt of a copy of this order;

(c) on filing the written statement within the stipulated period fixed by this Court, the trial Court is directed to dispose of the suit within a period of three months and both the parties are hereby directed to give their fullest cooperation for early disposal of the suit.

(d) on passing Judgment within the time stipulated by this Court, the learned VII Assistant Judge, City Civil Court, Chennai, is directed to report to this Court within a period of 10 days from the date of Judgment in the suit. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vs

To

1.The VII Assistant City Civil Judge,
Chennai.

2.The Section Officer,
V.R.Section,
High Court, Madras 104.

+2ccs to Mr.S.Parthasarathy, Advocate, S.R.No.59156

CRP(NPD)No.693 of 2006 and
CMP.Nos.5732 of 2006 and
V.C.M.P.No.3 of 2008

NM(CO)
CA(24/10/2017)