

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition No.6282 of 2017

ORDER :

The revision petitioner-Durdana Khatoon is the plaintiff in O.S.No.338 of 2015 on the file of the XI Addl. Chief Judge, City Civil Court, Hyderabad. The revision respondent-M/s Pantaloons Retail India Ltd. Represented by its authorized signatory Dinesh Maheshwari is the sole defendant.

2. It is the suit filed for recovery of Rs.32,57,872/- and interest of Rs.6,17,595/- at 24%p.a. on the principal amount from 01.03.2014 to 30.04.2015 besides future interest from 01.05.2015 at the same rate and legal notice charges of Rs.15,500/- , costs and other reliefs.

3. The claim in the plaint is that the plaintiff along with M/s Imperial Constructions, partnership firm, let out commercial complex known as Prakruthi Plaza admeasuring 52,026sq.ft. with municipal No.1-8-577/ 1 of Chikkadapally, Hyderabad, to the defendant for operating one of the defendant business formats, namely Big Bazar covered by lease deed, dt.21.01.2006 and the lease was terminated by the defendant w.e.f.30.09.2012. During the lease period, the defendant, as agreed in the lease terms, has to pay service tax in respect of rents paid in the event of any claim being made by Service Tax Department and the defendant executed indemnity deed dt.30.12.2012 to that effect and caluse-3 of the indemnity deed speaks the same and it is based on that assurance of defendant, the plaintiff paid Rs.88,35,358/- towards the service tax till 31.01.2014 on different dates during February to April, 2013 as shown in para-6 of the plaint and defendant reimbursed only Rs.62,62,047/- and still there is balance

of 25.73,311/- which is the principal amount out of the suit claim Rs.32,57,872/- referred supra and despite legal notice of the plaintiff issued to the defendant to pay within 7 days, failing which to take action, the defendant having received and acknowledged sent false reply, dt.24.04.2014 while admitting execution of the indemnity but disputing quantum of liability and refused to pay said amount due which made the plaintiff from the accrual cause of action to file the suit for its recovery.

4. The defendant filed I.A.No.1008 of 2015 in the suit under Order XXXVII Rule 3(5) r/w 151CPC seeking leave of the Court to defend. The averments in the affidavit petition which are covered by the impugned order allowing the same on 07.08.2017 are that the plaintiff filed the suit as summary suit is not maintainable for summary procedure applicable only in respect of liquidated sum but the claim is under alleged indemnity bond, dt.31.12.2002 after termination of lease and vacation of the premises and the procedure contemplated by Order XXXVII Rule 2(a) and (b)CPC not followed by the plaintiff and there is no averment in the plaint that the suit filed is as a summary suit, apart from it, the suit is bad for non-joinder of M/s.Imperial Construction as a party to the suit as lease agreement was between the defendant and M/s.Imperial constructions and the plaintiff. There is also a clause referring any dispute to Arbitrators and the civil Court has no jurisdiction. Except rent all other taxes can be borne by the landlord-M/s.Imperial Constructions and the plaintiff as per clause 3(a) and clause 7(Xii) of the lease deed and thereby the defendant is not liable to pay taxes including service tax. The alleged indemnity bond says the obligation to pay service tax would arise only in the event of any claim being made by the concerned Department upon the lessors and in

the present case there is neither pleading in the plaint nor any document to show there has been demand by concerned authorities for service tax and thereby the defendant is not liable nor obliged to pay the so called lease, rents and in view of the discrepancies in payments of the service tax it is just and necessary to go for trial from the triable issues involved and unless the leave is granted to defend the suit by filing written statement, the defendant will suffer irreparable loss. It is further contended that the lessors in violation of the lease deed illegally collected Rs.62,62,047/- from the defendant though the defendant is not liable to pay any service tax and the defendant is entitled to claim refund of said amount. It is also contended even assumed of plaintiff entitled for service tax, there is no contract to pay interest at 24%p.a. nor there is any trade custom and the claim of Rs.6,69,061/- is not tenable that is also one of the triable issue for grant of leave.

5. The plaintiff filed counter in opposing the petition by denying the averments in the petition in saying not entitled to leave of the Court to defend by contending that the affidavit petition averments are unsustainable and futile and defendant failed to make out a case to grant leave to defend but for gaining time to prevent the plaintiff to realize legitimate amounts due from the defendant. The Court in the order granting leave to defend observed that there is no dispute regarding agreement between the parties covered by indemnity petition is allowed having sufficient grounds to contest. In fact, the decree prayer pursuant to it shows as if the petition was dismissed under the impugned order and the revision filed is from the orders speaking leave granted unconditionally as unsustainable and contrary to law referring to reply notice saying agreed to reimburse service tax

to the plaintiff and M/s Imperial Constructions. Before coming to the facts further Order XXXVII CPC clauses 1 to 7 reads as follows:-

1. Courts and classes of suits to which the Order is to apply.- (1) This Order shall apply to the following courts, namely:—

- (a) High Courts, City Civil Courts and Courts of Small Causes; and
- (b) other courts;

Provided that in respect of the courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the order applies to the following classes of Suits, namely:

- (a) suit upon bills of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising-
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt (other than a penalty); or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

2. Institution of summary Suits.- (1) A suit, to which this Order applies, may, if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,—

- (a) a specific averment to the effect that the suit is filed under this Order;
- (b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and
- (c) the following inscription, immediately below the number of the suit in the title of the suit, namely:—

(Under Order XXXVII of the Code of Civil Procedure, 1908)”. .

(2) The summons of the suit shall be in form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted

and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith

3. Procedure for the appearance of defendant.- (1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in court an address for service of notice on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid 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. 4A 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.

(5) The defendant may at any time within ten days from the service of such summons for its affidavit or otherwise d 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:

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.

(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 the defendant in entering an appearance or in applying for leave to defend the suit.

4. Power to set aside decree.- under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit.

5. Power to Order bill, etc., to be deposited with officer of court.- In any proceeding under this Order the court may Order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the court, and may further Order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof

6. Recovery of cost of noting non-acceptance of dishonoured bill or note.- The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

7. Procedure in Suits.- Save as provided by this order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

From the above as per the Order XXXVII 1(2) subject to notification in official gazette on matters other than in High Court, pursuant to the said notification of the High Court if any restrict the operation of the Order only to such categories of suits as it deems proper, and it applies subject to gazette notification, 2) suits upon bill of exchange, Hundis and promissory notes; suits where to recover a debt or liquidated demand and money payable by the defendant, with or without interest arising on written contract and on encroachment or on a guarantee. As per Order XXXVII Rule 2(a) a specific averments to the effect that the suit filed under this Order must be made and the relief claimed must be within the ambit of this Rule and it is to be inscribed as suit filed under Order XXXVII CPC, the summons shall be in Form-4 in Appendix B or in such other Form as may, from time to time prescribed. Then the defendant shall not defend the suit unless he enters in appearance and

in default of his entering in appearance, the allegations in the plaint shall be deemed admitted and the plaintiff is entitled to a decree to any sum not exceeding the sum mentioned in the summons with interest and costs to be determined. Whereas, the defendant appears and applies pursuant to the service of the copy of plaint and annexures thereto by plaintiff, within ten days of such service in person or through pleader and shall file in Court an address for service of notices and on the day of entering appearance shall give to the plaintiffs or his/ their advocate notice on appearance. After such appearance of defendant, the plaintiff be served by defendant a notice or his pleader in form 4-A in Appendix B or such other prescribed form returnable not less than ten days from date of service supported by an affidavit verifying the cause of action and the amounts claimed and stating that there is no defence in the suit and the defendant within ten days therefrom by affidavit or otherwise disclosing facts sufficient to entitle him to defend and apply on such summons for leave to defend, the Court may grant to the defendant unconditionally or upon such terms as may appear to the Court to be just. The proviso-1, sub Rule-3 speaks, leave to defend shall not be refused unless the Court satisfies the fact disclosed by the defendant do not indicate any substantial defence or the defence is frivolous or vexatious. The further proviso speaks admitted portion of the claim cannot be permitted to defend by granting leave.

6. The trial Court with reference to the pleadings observed supra in para-10 onwards that there is no dispute with regard to the agreement between the parties. The plaintiff contends that contract of indemnity will not come under category of summary suits under Order XXXVII but for in respect of liquidated sum. Whereas, it is the contest

of the defendants with reference to the petition averments of the disputed and complicated questions of law involved thereby it is a case for granting leave and having considered as sufficient grounds for the defendant to accord leave to contest the suit, petition is allowed and the same impugned in the grounds of revision by the plaintiff with contentions that the granting unconditional leave by the Rent Controller and to defend the suit by the defendant is contrary to law and perverse even the defendant did not present any substantial defence much less involving triable issues to grant such unconditional leave and what are the defence raised as fallacious with no likelihood of success from such defence in the suit including on questioning of maintainability of the suit and Order XXXVII CPC comply with by the plaintiff. The defendant filed I.A.No.1007 of 2015 to refer to matter to arbitration and it was allowed by the trial Court however in CRP No.4947 of 2016, this Court observed that after termination of lease, the arbitration clause also expired and becomes inoperative. So far as the alleged non-joinder of M/s Imperial constructions as one of the parties to the suit concerned, the claim in the suit is regards service tax liability of the defendant in relation to the rents paid to the plaintiff alone and the amount for which refund claimed from defendant has been paid by the plaintiff and such question of adding M/s Imperial Constructions will not arise and the indemnity executed by the defendant casts liability to pay service tax that is also referred in the reply para-3 of the defendant to appoint. Thereby the order of the trial Court granting unconditional leave to be set aside with a direction to the trial Court to adjudicate the suit on merits and as per law.

7. Heard both sides at length and perused the material on record.

8. The provisions covered by Order XXXVII CPC no way requires repetition and the fact that Section 8 of the Arbitration application filed to refer the matter to arbitration that was dismissed by the revision order even allowed by the trial Court saying once lease is cancelled the lease terms cannot be enforced invoking said clause of arbitration and once that is the order of this Court there is nothing more to discuss much less to go into merits of that for no grounds to sit against even otherwise.

9. Coming to grant of leave from the said provision, the Apex Court in the recent expression IDBI Trustship Services Limited Vs. Hubtown Limited¹ observed that leave to defend can be granted unconditionally in cases where the defendant satisfies the Court that he has substantial defence from which there is likelihood of success and ordinarily where the defendant raises triable issues indicating he has fair and reasonable defence although not positively could defend and leave to defend can be granted subject to conditions as to time or mode of trial as well as payment into Court on furnishing security in cases where defendant raising triable issues, a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues or the defendant raises a defence which is improbable to consider, as such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principle sum with interest as the Court feels the justice of the case requires and further leave to defend should be refused when the defendant has no

¹ (2017) 1 SCC 567

substantial defence or no genuine triable issues or defence is frivolous or vexatious or any part of the claim of the plaintiff admitted by the defendant to be due from him, their leave to defend shall not be granted unless amount so admitted to be due is deposited.

10. From the principles laid down in the expression, coming to the facts even from the very plaint referring to the indemnity executed by defendant stated admitted in the reply the balance amount payable is Rs.25,73,311/- and remaining portion out of the entire suit claim of Rs.32,57,872/- is regarding to interest claim at 24%p.a. It is not even the case that in the indemnity bond, there is any stipulation for payment of interest at such rate and so far as pre-liti substantial interest concerned as per the settled law in the absence of contract, the liability arises only from the provisions of the Interest Act, from the date of receipt of demand in case of non-payment within the time stated in the notice of demand to pay and for that even the Court may arrive at reasonable rate of interest irrespective of any rate demanded in the notice. Once such is the case, unconditional leave granted by the lower Court is unsustainable but for subject to furnishing of security for the said principal amount in the event of plaintiff's success to pay by the defendant as per the expression in IDBI Trustship Services limited Supra.

11. Having regard to the above and in the result, the revision is partly allowed by modifying the unconditional leave to defend granted by the learned XI Addl.Chief Judge, City Civil Court, at Hyderabad in I.A.No.1008 of 2015 in O.S.No.338 of 2015 to one of the conditions in the leave in permitting the defendant to defend subject to furnishing security for the principal amount out of the suit claim referred supra to

pay to the plaintiff in the event of success ultimately after contest by the defendant.

Consequently, miscellaneous petitions, pending if any, in this revision, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:27.12.2017
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