

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

+ **RFA No.639/2017**

% **21st July, 2017**

SH. RAJ SINGH Appellant

Through: Mr. B.B. Gupta, Advocate.

versus

SH. HARENDRA SINGH Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. No.25553/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No.639/2017 and C.M. No.25554/2017 (stay)

2. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the defendant under Order XXXVII CPC suit challenging the impugned judgment dated 29.4.2017 whereby the leave to defend application filed by the appellant/defendant under Order XXXVII Rule 3(5) CPC has been dismissed.

3. The facts of the case as per the respondent/plaintiff are that the appellant/defendant approached the respondent/plaintiff for grant of financial assistance of Rs.6 lacs for purchase of a plot in Jind, Haryana. The respondent/plaintiff is said to have given the loan of Rs.5.70 lacs to the appellant/defendant in cash and to ensure the return of which loan amount the appellant/defendant had issued a post dated cheque bearing no.485446 dated 30.5.2012 when the cheque was dishonored on presentation vide cheque return memo dated 5.6.2012, the appellant/defendant while promising to return the loan handed over the title deeds of the property in the name of his wife Smt. Sudesh to the respondent/plaintiff. A legal notice dated 29.6.2012 was served upon the appellant/defendant, on account of non-payment of loan amount, and thereafter the subject suit for recovery was filed under Order XXXVII CPC.

4. The law with respect to grant or refusal of leave to defend is now well settled. I may note that the main judgment of the Supreme Court in this regard was the judgment of the Supreme Court in the case of *Mechelec Engineers & Manufacturers Vs. Basic Equipment Corporation (1976) 4 SCC 687*, however, it is noted that the Supreme

Court recently in its judgment in the case of *IDBI Trusteeship Services Limited Vs. Hubtown Limited (2017) 1 SCC 568* has held that law as specified in judgment in the case of *Mechelec Engineers & Manufacturers (supra)* no longer applies and Supreme Court in the case of *IDBI Trusteeship Services Limited (supra)* has laid down the following ratio with respect to the grant or refusal of leave to defend:-

“17. Accordingly, the principles stated in para 8 of *Mechelec case* will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four judges in *Milkhiram case*, as follows:

17.1 If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4 If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues

or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.”

5. The aforesaid ratio of the judgment of the Supreme Court in the case of ***IDBI Trusteeship Services Limited (supra)*** in sum and substance is that leave to defend is granted only if there is a triable issue, meaning thereby that there is a possibility of the defendant succeeding in his defence. Such triable issue includes a very good defence or even an ordinary defence of which there is a chance to succeed. However where no triable issue is raised in the sense that the defence is a complete moonshine and there is no genuine issue to be decided because the defence is completely illegal or completely improbable then on a moonshine defence leave to defend cannot be granted. Once there is no substantial defence or there is no genuine triable issue because the defence is frivolous or vexatious then leave to defend has to be refused.

6. Let us examine the facts of the present case in terms of the ratio of the judgment of the Supreme Court in the case of ***IDBI Trusteeship Services Limited (supra)*** to decide whether there is a

triable issue or that the defence raised is not a substantial defence and hence does not raises a triable issue.

7. The defence of the appellant/defendant was that no doubt the cheque was issued in the name of the respondent/plaintiff, however, actually the appellant/defendant was said to be dealing not with the respondent/plaintiff but with one Sh. Sripal and who had promised to arrange a loan for the appellant/defendant who is the founder of the school “Hari Bhoomi Senior Secondary School” in Jind, Haryana. It was pleaded that the appellant/defendant had taken a loan of Rs.10 lacs for the school from Allahabad Bank and due to financial constraints the appellant/defendant could not deposit the loan installments with the bank whereby the bank had declared the loan account as NPA. The appellant/defendant had therefore approached two of its relatives for financial help and Sh. Sripal was also one of the person who was approached and who promised to help the appellant/defendant subject to the appellant/defendant giving some security. Appellant/defendant therefore is pleaded to have given the original registered sale deed of the school plot in Jind, Haryana to Sh. Sripal who promised that he would give a sum of Rs.5 lacs to the

appellant/defendant but this amount was not deposited by Sh. Sripal in the account of the appellant/defendant. On 30.5.2012 when the appellant/defendant visited Sh. Sripal along with one Sh. Dharambir it was informed that the respondent/plaintiff was not satisfied with the original registered sale deed as security and wanted a post dated cheque as security for the loan of Rs. 5 lacs. Accordingly, the appellant/defendant pleads that he gave the subject cheque in the name of the respondent/plaintiff and Sh. Sripal assured that he would give the appellant/defendant a loan of Rs. 5 lacs. Thus, it was prayed that the appellant/defendant was not liable to pay any amount to the respondent/plaintiff.

8. The court below has dismissed the leave to defend by observing that it is not believable at all that if Sh. Sripal was not satisfied with security of the sale deed and wanted a cheque as security then why at the time of giving of the cheque original title deeds were not taken back by the appellant/defendant. The court below also notes that there is no dispute that the appellant/defendant has admitted to the issue of cheque in the name of and in favour of the respondent/plaintiff. It is also found as a matter of fact that the

appellant/defendant admitted the need of the money for repayment of the loan to Allahabad Bank. Trial court also notes that no action was taken on the loan amount not being deposited with the appellant/defendant although the title deeds were with Sh. Sripal and the cheque with the respondent/plaintiff. The trial court also notes that if a fraud was played upon the appellant/defendant then why in spite of receiving legal notice dated 29.6.2012 and replying to the same by reply dated 31.7.2012, no police complaint was filed against the respondent/plaintiff by the appellant/defendant. The relevant observations of the trial court are contained in paras 16 to 20 of the impugned judgment and which paras read as under:-

“16. The case of the defendant is that the defendant had handed over the original registered Sale Deed of the aforesaid plot to said Sh. Sripal on his assurance to deposit an amount of Rs. 5,00,000/- in the account of the defendant on 01.06.2012 and when the amount was not deposited on the said date, the defendant along with Sh. Dharambir visited to Sh. Sripal on 30.05.2012, who then asked for post dated cheque as security for the loan of Rs.5,00,000/- on the plea that the plaintiff was not satisfied with the original registered Sale Deed as security. The defendant thus gave a cheque of Rs.5,00,000/- in the name of the plaintiff upon the assurance that the loan of Rs.5,00,000/- will be deposited in the bank account of the defendant. However, the said loan amount was stated to be not deposited by the plaintiff.

17. As per the case set up by the defendant, he has admitted the issuance of cheque in favour of the plaintiff and handing over of the original Sale Deed of the aforesaid plot to the plaintiff. The defendant refuted the need of money for the purpose of purchase of the aforesaid plot but admitted the requirement to repay the loan amount to the Allahabad Bank. The contention of the defendant is that he was not in need of money for purchasing the aforesaid plot as the sale deed registered on 21.05.2012

envisage that the amount had already been paid to the vendor. No doubt, the sale deed registered on 21.05.2012 infers that the sale consideration had already been received by the vendor but the date of receipt of the consideration amount has not been specified. Thus, it cannot be presumed that the sale consideration had been given prior to 20.05.2012 i.e. date of grant of alleged loan to the defendant.

18. Further, the defendant has also not been able to give any plausible explanation as to why he had handed over the original registered sale deed of the aforesaid plot to the plaintiff when no alleged loan was advanced to him by the plaintiff. Thereafter also, the question posed is as to why the defendant at the time of issuance of cheque in favour of the plaintiff did not ask for return of the original registered sale deed. Nothing has been stated as to what steps were taken by the defendant on non receipt of loan amount of Rs.5,00,000/- in his account. The defendant has also not filed any complaint against either the plaintiff or the said Sripal for alleged misuse of cheque by them.

19. It is settled law that wherever the defense put forth by the applicant/defendant is bonafide, raises triable issue and is not a moonshine, the applicant/defendant would be entitled to leave to defend conditional or unconditional depending upon the facts and circumstances of each case. It is in the interest of justice that no party should be jeopardized. Meaning thereby, where the interest of the plaintiff is to be secured, the defendant should also have a fair chance to prove his defense.

20. Admittedly, the defendant received legal notice dated 29.06.2012 and sent reply dated 31.07.2012 in response thereto. Even after receipt of legal notice, the defendant has not taken any action for the alleged misuse of the cheque by the plaintiff. The present suit has been filed on 27.03.2015. The defendant has filed nothing on record about the steps taken by him against the plaintiff and / or said Sh. Sripal for the alleged misuse of the cheque in question. He has not even asked for the return of the original sale deed alleged to be given as security to the said Sripal and the plaintiff."

(underlining added)

9. I completely agree with the aforesaid discussion and conclusions of the trial court because once it is shown that the appellant/defendant needed loan to repay Allahabad Bank, the cheque was issued and signed by the appellant/defendant in the name of the respondent/plaintiff, and the same was dishonoured, and that the

appellant/defendant did not seek to take back the original title deeds when the cheque was issued, or took no steps to get the loan amount deposited in his accounts, all these facts showed that no triable issue is raised and the defence is therefore illusory, sham and practically moonshine. I may also note that trial court has also decreed the suit by granting reasonable interest at 7% per annum.

10. There is no merit in the appeal and there is no reason to interfere with the impugned judgment. Dismissed.

JULY 21, 2017
Ne/ib

VALMIKI J. MEHTA, J