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

% **Date of decision: 10th November, 2017**

\+ **CM(M) 1269/2017**

SPICEJET LTD. ..... **Petitioner**

Through: Mr. Kapil Sankhla and Mr. Shiv B. Chetry, Advs.

Versus

ARUN KUMAR ..... **Respondent**

Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CMs No.40407/2017 & 40408/2017 (both for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM(M) 1269/2017 & CM No.40406/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 15th July, 2017 in CS No.15562/2016 (Old No.230/2016) of the Court of Additional District Judge (ADJ)-04 (South West), Dwarka Courts, New Delhi] granting unconditional leave to the respondent/defendant to defend the suit filed by the petitioner/plaintiff under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) for recovery of Rs.10 lakhs, on the basis of cheques issued by the respondent/defendant in favour of the petitioner/plaintiff and an agreement entered into between the respondent/defendant and the petitioner/plaintiff, who had an employer and employee relationship.

4. The contention of the counsel for the petitioner/plaintiff is not that

the leave to defend application should have been dismissed but that conditional leave to defend should have been granted. However, the counsel for the petitioner/plaintiff at this stage states that his first contention is that the leave to defend application should have been dismissed.

5. I have enquired from the counsel for the petitioner/plaintiff, as to how a petition under Article 227 of the Constitution of India is maintainable with respect to the aforesaid grievance. The grievance is redressable under the CPC by preferring a Revision Petition under Section 115 of CPC.

6. The counsel for the petitioner/plaintiff, instead of replying on the basis of law, states that he has filed several other petitions against similar orders and for this reason he has filed this petition under Article 227 of the Constitution of India and states that there are judgments in this regard. The counsel is however neither carrying the said judgments nor is able to show whether this aspect has been discussed therein. It is a typical case of cut, copy and paste arguments.

7. The law in this regard is well settled. Against an order of grant of leave to defend and for the grievance of the leave to defend application having not been dismissed, a Revision Petition under Section 115 of CPC lies. ***Mechelec Engineers & Manufacturers Vs. Basic Equipment Corporation*** (1976) 4 SCC 687 was also a case arising from exercise of jurisdiction under Section 115 of the CPC by this Court. Supreme Court held that this Court erred in interfering with the discretionary order and it is only in cases where the defence is patently dishonest or so unreasonable that could not be reasonably be expected to succeed that the

exercise of discretion by the Trial Court to grant leave unconditionally may be questioned. Reference may also be made to ***Siri Krishan Bhardwaj Vs. Manohar Lal Gupta*** AIR 1977 Delhi 226 (DB). It has been held by the Supreme Court in ***Sadhana Lodh Vs. National Insurance Co. Ltd.*** (2003) 3 SCC 524 that if a remedy under CPC is available, a petition under Article 227 of the Constitution of India, does not lie.

8. Be that as it may, having spent time on the matter, it is deemed appropriate to deal with the matter on merits on the parameters of Section 115 of CPC.

9. Inspite of the challenge being to the order of grant of unconditional leave to defend, no copy of the plaint has been annexed to the paper book. The counsel for the petitioner/plaintiff, on enquiry, has handed over a copy of the plaint and which is taken on record and a perusal whereof shows the petitioner/plaintiff to have instituted the suit, pleading (i) that the respondent/defendant was working with the petitioner/plaintiff as a Transition Captain in the Flight Operations Department; (ii) that during the course of his employment, the respondent/defendant was sent for a training program as Transition Captain on Bombardier DHC-8 Series 400 (Q 400); (iii) that the respondent/defendant had executed an Indemnity Bond-cum-Service Undertaking dated 21st November, 2011 in this regard in favour of the petitioner/plaintiff; (iv) that the aforesaid training was conducted at Toronto and the petitioner/plaintiff had incurred all expenses in this regard on the representation of the respondent/defendant that he shall work with the petitioner/plaintiff for a minimum period of three years in such functions as may be assigned to

him by the petitioner/plaintiff; (v) that the respondent/defendant had also deposited five cheques of Rs.2 lakhs each with the petitioner/plaintiff to cover up the tangible and other intangible costs of the training, in the event of the respondent/defendant leaving the employment of the petitioner/plaintiff before completing minimum period of three years; (vi) that the respondent/defendant attended the abovementioned training; however, his performance was assessed below standard by the Pilot Review Board; this performance analysis amounted to violation of the terms of the Letter of Appointment and his services were terminated by a termination order dated 21st June, 2012; (vii) therefore, the respondent/defendant became liable to reimburse the training costs incurred by the petitioner/plaintiff and the petitioner/plaintiff presented the cheques for payment and which have been dishonoured.

10. The counsel for the petitioner/plaintiff has drawn attention to the agreement, on the basis of which the suit was filed and copy whereof is filed at page 106 of the paper book and which is titled as "Indemnity Bond-Cum-Service Undertaking" and attention is invited to the following clauses thereof:

> *"A. SpiceJet Limited is sending me for training to assume pilot's responsibility as rated Transition Captain on Bombardier DHC-8, Series 400 (Q 400) (hereinafter referred to as the Type Rating Training).*
>
> *B. The above training costs are fully borne by SpiceJet Limited.*
>
> *C. I have deposited 05 undated cheques of Rs. 10 Lac (Rupees Ten Lacs Only) (amount to be arrived by dividing total cost by 2 Lacs each)], as a security to cover the tangible and other intangible costs of the above. In the event of my leaving employment with SpiceJet Limited before completing minimum period of Three (3) years, the same will be*

encashed by the company. Otherwise, on completion of 3 years of employment with the company, there cheques will be returned to me.

Now in consideration of SpiceJet Limited arranging the Type Rating Training at considerable costs; I, which expression shall include my heirs, agents, relatives and assigns, irrevocably undertake and covenant as follows:

1. *I shall work for a minimum period of 3 years with SpiceJet Limited in such functions as may be assigned to me by the management from time to time. The three (3) years period shall commence from the date of my joining the SpiceJet Ltd. However, cessation of my services before completion of 3 years as above under Clause 16 & 17 of Appointment letter dated 21-Nov-11 reference number SJ/HR/011/11/151 shall not preclude SpiceJet Ltd. from encashing the cheques given as security for the above training costs. Such early departure of mine shall amount to my leaving services of the SpiceJet Ltd. before completion of the minimum period of 3 (Three) years.*
2. *.....*
3. *.....*
4. *.....*
5. *I shall indemnify SpiceJet Limited and bind myself, my heirs, agents, relatives and assigns to pay all claims, charges, costs, damages, demands, expenses, and losses, which SpiceJet Limited may sustain, incur in connection with this Indemnity bond cum Undertaking.*
6. *.....*
7. *.....*
8. *In the event I am terminated as a result of non-conformance with DGCA and other relevant government and company regulations for flight crew, I have no objection to SpiceJet Limited encashing the cheques outlined above."*

11. What the respondent/defendant had undertaken in the aforesaid Indemnity Bond-cum-Service Undertaking, was to serve the petitioner/plaintiff for a period of three years and to indemnify the petitioner/plaintiff against all costs, damages, demands, expenditures and

losses which the petitioner/plaintiff may suffer and to, in the event of termination as a result of non-conformance with DGCA and other relevant government and company regulations for flight crew or on account of leaving the services of the petitioner/plaintiff before completion of the minimum period of three years not object to the petitioner/plaintiff encashing the cheques mentioned in the Indemnity Bond-cum-Service Undertaking.

12. Though in the plaint reference was also made to the Service Undertaking and to the Appointment Letter but the counsel for the petitioner/plaintiff states that the suit was filed only on the basis of the Indemnity Bond-Cum-Service Undertaking aforesaid and the cheques and on no other document.

13. The case of the petitioner/plaintiff in the plaint is not of the respondent/defendant having left the employment prior to expiry of three years. The claim of the petitioner/plaintiff can at best be said to be covered by Clause 8 supra which provides for termination as a result of non-conformance with DGCA and other government and company regulations.

14. I have enquired from the counsel for the petitioner/plaintiff, what is the document to show that the performance of the respondent/defendant was assessed below standard by the Pilot Review Board.

15. The counsel for the petitioner/plaintiff has argued that there is no document on record in this respect and it is the plea of the petitioner/plaintiff in the plaint and the said fact is not disputed.

16. Without knowing which is the Pilot Review Board which found the

performance of the respondent/defendant to be below standard, who had constituted the same and what is the report thereof and for what reasons, it is not understandable, as to how the suit in the first instance was maintainable under Order XXXVII of CPC.

17. The suit was essentially for recovery of losses with which the respondent/defendant had agreed to compensate the petitioner/plaintiff in certain situations and such a suit does not lie within the ambit of Order XXXVII of CPC.

18. Supreme Court in ***State Bank of Saurashtra Vs. Ashit Shipping Services (P) Ltd.*** (2002) 4 SCC 736 held that in cases of indemnities, the question of making good the loss arises only when there is proof that loss is suffered. It was held that Order XXXVII does not provide for a claim based on indemnity bond, because the loss would have to be proved and summary procedure cannot be adopted in such cases.

19. The counsel for the petitioner/plaintiff has drawn attention to ***Ashwani Bahl Vs. AIR India Ltd.*** 2014 SCC OnLine Del 275 and to ***Mahanagar Telephone Nigam Ltd. Vs. Haryana Telecom Ltd.*** 2010 SCC OnLine Del 1220.

20. The first case was a case of dismissal of objections to an arbitral award finding the appellant therein to be liable to the respondent therein AIR India Ltd. for the breach of his service agreement and while dealing wherewith, a Co-ordinate Bench of this Court held that when the parties have, before entering into the agreement, estimated the losses which will be suffered by breach thereof, the party in breach is liable for such estimate. The aforesaid was held relying on ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*** (2003) 5 SCC 705, the reasoning wherein was that for public losses, there

is no measure. Moreover, in ***Saw Pipes Ltd.*,** the Court on the basis of evidence had arrived at a finding of the parties having genuinely arrived at a pre-estimate of damages. It is for this reason only that a view different from otherwise settled position of law in ***Union of India Vs. Raman India Foundry*** (1974) 2 SCC 231 was taken. Moreover, it was a case, after full trial, and not a case of grant of leave to defend.

21. The second of the aforesaid judgments was again a case of objections to the arbitral award.

22. I may in this context notice that entirely different set of law applies to interference under Section 34 of the Arbitration and Conciliation Act, 1996 with the arbitral awards and merely because the Court has found no case for interference, cannot be a precedent for same analogy to be followed in a civil suit.

23. There is another aspect of the matter. I entertain doubt, whether there can be a claim under the Indemnity Bond, without evidence, on the basis of assessment of performance and which can be a variable factor. It was for the petitioner/plaintiff to assess its employees who would be able to justify the training or to reap returns to the petitioner/plaintiff commensurate with the costs incurred by the petitioner/plaintiff and if the petitioner/plaintiff chooses a person who is not able to deliver with the expectations of the petitioner/plaintiff, the petitioner/plaintiff itself is to blame therefor and cannot *prima facie* be held to be entitled to damages.

24. Though the suit was also based on cheques but since the cheques were for consideration mentioned in the Agreement aforesaid, it cannot be treated as a suit only on the basis of cheques to, on account of dishonour thereof, hold a case for dismissal of the application for leave to

defend the suit being made out.

25. The main argument of the counsel for the petitioner/plaintiff is that though the reasoning given by the learned ADJ is in favour of the petitioner/plaintiff but the outcome is against the petitioner/plaintiff.

26. I have for reasons hereinabove stated, entertained doubts about the very maintainability of the suit under Order XXXVII of CPC, on the basis of pleading in the plaint. Even if the petitioner/plaintiff were to be held to be entitled to the claim on account of below standard performance, the petitioner/plaintiff will have to prove the same.

27. The plaint is also absolutely silent as to for how much time the respondent/defendant served the petitioner/plaintiff, after the training. From the petitioner/plaintiff taking five cheques of Rs.2 lakhs each instead of one cheque for Rs.10 lakhs, it also appears that the purport of the Agreement was to, depending upon the loss, present the cheques for that much amount only. The petitioner/plaintiff however, without giving any reason, has presented all the cheques and without even disclosing the full facts or making even a whisper of the loss, if any suffered by it.

28. The counsel for the petitioner/plaintiff has at this stage stated (a) that the learned ADJ, though has relied on ***M/s Mechelec Engineers and Manufacturers*** supra but has not followed the same; (b) that a suit under Order XXXVII of CPC on the basis of Indemnity Bond and Undertaking Agreement is maintainable; and, (c) that I should record that the learned ADJ has returned findings in favour of the petitioner/plaintiff.

29. As far as ***M/s Mechelec Engineers and Manufacturers*** supra is concerned, the reliance thereon is misconceived in view of the subsequent judgment in ***IDBI Trusteeship Services Limited Vs.***

Hubtown Limited (2017) 1 SCC 568.

30. What I have held is not that a suit under Order XXXVII of CPC can never lie on the basis of an Indemnity Bond and Undertaking but that on the basis of the language and terms of the Indemnity Bond and Undertaking in the present case and the pleadings of the petitioner/plaintiff, the suit was not maintainable under Order XXXVII of CPC. An illuminating discussion on the subject is to be found in ***Smita Conductors Ltd. Vs. Prabhudas Liladhar Pvt. Ltd.*** MANU/MH/0952/2009. Reference may also be made to ***Varun Gauba Vs. Punjab & Sind Bank*** 2012 SCC OnLine Del 3486.

31. As far as the last argument is concerned, it is surprising that the petitioner/plaintiff, instead of making out a case on the basis of its document and its averments in the plaint, is wanting to make out a case on the basis of the contents of the order which is under challenge. Moreover, the observations in the order, in view of what I have recorded above, are of no avail.

32. Thus, though for reasons different from that given by the learned ADJ, no merit is found in the petition.

33. Dismissed.

34. No costs.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 10, 2017
'bs'
(corrected & released on 28th December, 2017)