

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.02.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)Nos.2383 to 2419 of 2015,
C.R.P(NPD).Nos.2943 to 2949 of 2015,
C.R.P(NPD).Nos.3337, 3338, 3340, 3342, 3345, 3348 of 2015,
C.R.P.(NPD).Nos.3466 to 3470, 3765 to 3770 of 2015
and 1796 & 1797 of 2015
M.P.Nos.1 to 1 of 2015 (37 MPs),
M.P.Nos.1 to 1 of 2015 (7 MPs),
M.P.Nos.1 to 1 of 2015 (6 MPs)
and M.P.Nos.1 to 1 of 2015 (5 Mps)

Dr.K.Senthilnathan
 Carrying on business
 Under the name and style of
 Sri Devi Hospital at No.1620-A,
 16th Main Road, Annanagar West,
 Chennai 600 040.



Vs.

.. Petitioner
 in all C.R.Ps.

Chandrakant
 carrying on business
 in the name and style of
 Sha Bhurmal chandrakant
 No.101, Siddarth Apartments,
 52, Hunters Road, Chennai 112.

.. Respondent in
 C.R.P.No.2383/2015

PRAYER IN CRP NO.2383/2015 : Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order dated 08.07.2014 made in I.A.No.18260 of 2012 in O.S.No.5044 of 2012 on the file of the XIV Assistant Judge, City Civil Court, Chennai.

In all CRPs

For Petitioner : Mr.S.Pugaleanthi

For Respondent : Dr.Ravichandran for
Mr.T.Skanda Kumar

COMMON ORDER

The petitioner in all the Civil Revision Petitions is defendant in all the suits and respondents in all the Civil Revision petitions are the plaintiffs in respective suits. The respondents filed the said suits against the petitioner under Order XXXVII of C.P.C for recovery of money. According to the respondents, the petitioner borrowed money from them and executed respective promissory notes. The major portion of the amount borrowed is by cheque and a small portion was paid by cash. The petitioner agreed to repay the same together with interest at 18% p.a. The petitioner repaid only a portion of the principal amount borrowed and interest. The petitioner failed to pay the balance amount inspite of repeated demands by the respondents. In the circumstances, the respondents issued notice through their counsel to the petitioner. The petitioner received the said notice but did not pay the amounts due and also did not send any reply to the said notice. In the said circumstances, the respondents have filed the suit for recovery of money.

2. The petitioner filed applications under Order 37 Rule 3 read with Section 115 of C.P.C for unconditional leave to defend the case. According to the petitioner, the respondents are strangers to him. He has not met them and borrowed the money from them and he denied the execution of promissory note. He contended that it is strange that the part of the alleged borrowed money is paid by cash and part of the amount is by cheque. The petitioner has not executed any promissory note. The petitioner is running a hospital by name and style Sri Devi Hospital and several patients pay by cheque and cash. According to the petitioner, it is to be seen as to what purpose the cheques were deposited in his account. More than 110 suits were filed by different parties against the petitioner. The petitioner has valid defence and there are triable issues in the suit. Injustice would be caused to the petitioner if the suits were decided summarily without verifying signatures in the suit promissory notes.

3. The respondents filed separate counter affidavits in all the above applications and reiterated the averments in the plaint. According to the respondents, the petitioner borrowed money through his finance agent. The petitioner wanted entire amount to be paid by cash as he is in urgent need of money. When the respondent declined to lend entire amount by cash, the petitioner

requested a portion of the amount to be paid by cheque and balance by cash. Having borrowed the money and executed promissory note, the petitioner is falsely denying the signature in the promissory notes. The respondents issued notice. The petitioner after receiving the notice has not sent any reply. The petitioner has encashed the cheques issued by the respondents and is falsely alleging that petitioner does not know the respondents. There is no valid defence or triable issues for the petitioner and prayed for dismissal of the applications.

4. Before the learned Judge, the petitioner did not let in oral and documentary evidence. The respondent marked three documents as Exs.R1 to R3, but did not let in any oral evidence.

5. The learned Judge considering the averments in the affidavits, counter affidavits and documents relied on by the respondents, dismissed all the applications.

6. Against the said order of dismissal made in respective Interlocutory Applications in respective suits, the present Civil Revision Petitions are filed by the petitioner.

7. The learned counsel appearing for the petitioner reiterated

the averments in the affidavits filed in support of the applications for leave to defend and contentions raised in the grounds of revision. The learned counsel for the petitioner further contended that the learned Judge, in a mechanical manner has dismissed all the applications filed for leave to defend. The petitioner has denied the signatures in the promissory notes and triable issue arises regarding whether signatures in the promissory notes are petitioner's or not. The respondents having admitted that petitioner borrowed through financial agent, must prove that amount was borrowed by petitioner and executed the promissory notes in their presence. The respondents after dismissal of the applications for leave to defend, initiated insolvency proceedings in five cases instead of filing execution proceedings only to harass the petitioner. The respondents for meagre amount, have attached the hospital of the petitioner worth Rs.50 crores. The learned counsel for the petitioner further referred to promissory notes filed in the additional typed set of papers and contended that except name of the respondents, no other particulars of the respondents like father's name and address are given in the promissory notes. There is no witnesses in the promissory note. After initiating insolvency proceedings in five cases and other harassments, the petitioner made investigation and found that there must be link between the respondents and one Naresh Babu, Anil Kumar and Manoj Kumar, who were executing the certain

contract jobs at Bangalore for the petitioner herein. Those persons are liable to pay amounts to the petitioner and they have instigated respondents to file false and vexatious suits to harass the petitioner. The learned counsel for the petitioner further contended that the above facts clearly show that there are triable issues and petitioner has valid defence and must be given an opportunity to let in evidence to prove his case.

8. The learned counsel for the petitioner relied on the following judgments in support of his contention -

(i) 2013 (5) CTC 260 [S.Balasubramanian v. V.Govindan]

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.

(ii) 1976 (4) SCC 687 [Mechalec Engineers & Manufacturers vs. Basic Equipment Corporation]

7. We need not dilate on the well established principles repeatedly laid down by this Court which govern jurisdiction of the High Courts under section 115 C.P.C. We think that these principles were ignored

by the learned Judge of the High Court in interfering with the discretionary order after a very detailed discussion of the facts of the case by the learned Judge of the High Court who had differed on a pure question of fact--whether the defences could be honest and bona fide. Any decision on such a question, even before evidence has been led by the two sides, is generally hazardous. We do not think that it is fair to pronounce a categorical opinion on such a matter before the evidence of the parties is taken so that its effects could be examined. In the case before us, the defendant had denied, inter alia, liability to pay anything to the plaintiff for an alleged supply of goods. It is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the Trial Court to grant leave unconditionally may be questioned. In the judgment of the High Court we are unable to find a ground of interference covered by Section 115 C.P.C.

(iii) 2012 (2) MWC (Civil) 785 [G.Rajarajan v. AIG Consumer Financial Services (India) Ltd.]

19. 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) CPC 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 CPC only contemplates that the defendant "may disclose such facts as may be deemed sufficient 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.

(iv) CDJ 2016 MHC 2460 [K.C.Somasundaram & Others v. Dr.T.G.Prabhakar]

8. On a perusal of the order passed by the Trial Court, it could be seen that the Trial Court has not taken into consideration the documents filed by the plaintiff as Exs.P1 and P2. Even without considering those documents, the Trial Court came to the conclusion that the plaintiff is entitled to get a decree as prayed for in the suit. When the defendants have taken a specific plea that letters of undertaking were obtained by force and with the assistance of police, the Trial Court should have taken into consideration those two documents and given a finding. The agreement dated 30.10.2000 and the execution of the letter of undertaking dated 3.12.2001 are matter for evidence, more so, when the defendants are disputing the execution of the letter of undertaking.

9. In these circumstances, I am of the considered view that the Trial Court should have given an opportunity to the defendants to contest the suit on merits.

(v) CDJ 2008 MHC 4127 [Aruna Hotels Ltd. Chennai v. Akmal Jan]

6. As far as the facts of the present case are concerned, it is a version of the plaintiff that as agreed, the defendant had not paid the remaining amount of Rs.1,25,537/- and inspite of demands the defendant remain tight-lipped. Per contra, it is the contention of the defendant that certain invoices, work completion reports have been burked by the plaintiff, that the works were completed on a later

date after the agreed time and the payment of Rs.1,00,000/- should be treated as a final settlement.

7. While this court considers the above aspects, as transpired from the plea in the affidavit of the defendant, the suit could not be adjudicated in a summary manner but it could be disposed of only on appreciation of the oral evidence on record and bearing in mind the legal position prevailing at the time of deciding the case. The above said matters entirely rest upon factual background and the truth has to be unearthed only by discussing about the oral evidence on the strength of the documents produced by both the parties. In this context, by no stretch of imagination it could be stated that the matter does not contain any triable issue.

(vi) 1991 (1) MLJ 307 [Ramalingam v. Basavalingam]

2. The order deserves to be set aside. Learned counsel for the respondent places reliance on the judgment of the Supreme Court in *Messrs. Machelee Engineering and Manufacturers v. Messrs. Basic Equipment Corporation*, . The Supreme Court set out the following principles to be followed while considering the grant of leave to defend (at p. 580 of AIR) :--

"(a) If the defendant satisfied the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend;

(b) If 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;

(c) 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 had a defence, yet, shows such a state 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 the payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled 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."

4. I am of opinion that the affidavit does disclose a triable issue and it does not leave the Court to make any guess work. The matter will fall under Clauses (a) and (b) of the principles extracted above from the judgment of the Supreme Court. The question has to be decided in the suit on the basis of the evidence as to whether the suit promissory notes are supported by any consideration.

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9. Per contra, the learned counsel for the respondents contended that the petitioner borrowed monies and executed promissory notes. He has encashed the cheques issued by the respondents in respect of the amounts borrowed by him. He has executed suit promissory notes and made part payments also. There is no triable issues and considering the facts, the learned

Judge has rightly dismissed all the applications. The learned counsel for the respondents further contended that the Civil Revision Petitions are not maintainable as already the decree has been passed and the remedy available to the petitioner is only by way of an appeal. The petitioner is already declared as insolvent and assets of the petitioner is vested with the Official Assignee. He cannot institute or defend the suit. Only the Official assignee alone is entitled to proceed in the suit.

9(a) The learned counsel for the respondents further contended that the petitioner has admitted the encashment of cheques and he has not produced any ledger of the hospital before the learned Judge. The respondents issued notice before filing of the suit demanding payment. The petitioner received the same and did not pay any amount. Only to postpone the payment of amounts due, the petitioner has filed applications for leave to defend and the present Civil Revision Petition.

9(b) The learned counsel for the respondents relied on the following judgments in support of his contention -

(i) 2013 (1) MWN (Civil) 213 [Praveen Kumar v. The Hongkong and Shanghai Banking Corporation Limited]

above cited decision, when the Appeal is maintainable against the dismissal of the leave to defend the Suit Petition under Section 96, C.P.C., the Revision Petition under Section 115, C.P.C., is not maintainable.

(ii) 2008 (2) MCL 370 [Sundaram Motors, Chennai v. B.Lalitha]

13. In that view of the matter, without going into the merits of the case, this Court comes to the conclusion that the revision is not per-se maintainable and this Court opines that the interlocutory order refusing leave to defend partakes the form of judgment and only a regular and substantive appeal can be filed against the said interlocutory order dated 11.09.2001, if so aggrieved and that the Civil Revision Petitioner/First Defendant/Applicant will have to pay necessary Court fee in appeal and in that view of the matter, the Civil Revision Petition is dismissed. In the circumstances of the case, the parties are directed to bear their own costs. The connected miscellaneous petition is closed.

(iii) 2005 (1) CTC 748 [V.K.K.Nair v. Kanchan Kavar]

11. The respondent herein has issued notice dated 15-09-2001, prior to filing of the suit, calling upon the revision petitioner to pay the amount. The notice was received by the petitioner herein but he has not chosen to give any reply. It is stated by the petitioner that the execution of the promissory note is admitted but the same was executed in favour of one Gulecha; that he discharged the entire amount payable under the Promissory note to Gulecha; that after his return from Kerala he tried to get back the promissory note from the legal heirs of Gulecha since he was dead, but it became vain. In respect of the said allegations, the trial court found that the

petitioner has not placed any materials to support his case and no valid defence or triable issue established by the petitioner to consider grant leave. In my view, for the aforesaid reasons, leave to defend could not be granted. The court below is right in dismissing the application filed by the revision petitioner.

(iv) 2007 (3) CTC 604 [Ajay Bansal v. Anup Mehta and Others]

10. A decree passed subsequent to the refusal of leave to defend could either be under Order XXXVII Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order XXXVII of the Code to reopen the decree. The theory of "dependant order" may not apply in a case of this nature because even if this Court were to set aside the order refusing leave to defend, the decree subsequently passed may not fall by itself. It has still to be set aside either by resort to Order XXXVII Rule 4 or by way of an appeal, or by some other mode known to law. In a given case like the present one as it may not be proper to interfere with the decree merely because in an appeal against an order refusing leave to defend, this Court is inclined to take a different view. [See V.S. Saini & Anr. v. D.C.M. Ltd., AIR 2004 Delhi 219.] The defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section 105(1) of the Code. A contentious issue,

(v) 2010 (9) SCC 256 [V.K.Enterprises and another v. Shiva Steels]

*10. Order XXXVII C.P.C. has been included in **the Code** of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted.*

10. Heard the learned counsel for the petitioner as well as respondent and perused the materials available on record.

11. The petitioner as defendant in the suit filed by the respondent filed application for leave to defend the suit under Order XXXVII Rule 3(5) CPC. According to the petitioner, the respondents are strangers to him. He has not borrowed any monies from them and he has not executed suit promissory notes and also disputed the averments of the respondents that part of the amounts were paid by cheque and part of the same by cash. He also denied having executed suit promissory notes. As far as encashment of cheque is concerned, the petitioner has stated that cheques were deposited in the account of the Hospital and he is not aware who has deposited the cheques. The respondents filed counter and

contended that the petitioner borrowed monies through his finance agent. The petitioner wanted the entire amounts in cash but the respondents declined to pay the entire amount in cash but only portion of the amount alone in cash. The petitioner has encashed the cheque and therefore the contention of the petitioner for leave to defend is not a valid defence and no triable issues arises.

11(a) The respondents have admitted that the petitioner has borrowed monies through his finance agent. The respondents have not stated the name of the finance agent and whether the petitioner met each and every respondents and received the cheque and cash and executed promissory notes. The petitioner has denied execution of promissory notes. In view of the statement of the respondents that petitioner borrowed money through the finance agent and petitioner has denied execution of promissory notes, a triable issue arises and the defence of the petitioner cannot be held to be illusory or sham or the petitioner has no defence. It is repeatedly held that if the petitioner discloses the facts that may be deemed sufficient to entitle him to defend the suit, then the petitioner must be given unconditional leave to defend the suit. The defence taken by the petitioner must be fair, bonafide and reasonable defence. Then only the petitioner is entitled to

unconditional leave to defend the suit. If the petitioner shows some facts which raise triable issues, then he must be given unconditional leave to defend the suit. The petitioner is not called upon to prove those facts at that stage and only during trial, the petitioner has to prove those facts and the averments cannot be decided in summary proceedings. The principle 2(C) laid down in **1991 (1) MLJ 307 [Ramalingam v. Basavalingam]** is squarely applicable to the facts of this case.

11(b) This Court, in the decision reported in **2013 (5) CTC 260 [S.Balasubramanian v. V.Govindan]** cited supra has held that the court has to only see whether the facts stated in the affidavit filed under Order XXXVII Rule 3 discloses any tribal issues between the parties and if there are tribal issues, then leave to defend has to be granted without going into the correctness or otherwise the facts stated by the petitioner seeking leave to defend. It is well settled law that unless the defence taken by the petitioner is illusory or moonshine, leave to defend must be granted by the Court. Right to defend a suit is valuable right and the petitioner is entitled to defend the suit if the defence taken by him shows semblance of defence. The Courts have also held that when a execution of promissory notes is denied, the petitioner must be given an opportunity to substantiate such a defence. From the

averments in the affidavit filed in support of the application for unconditional leave to defend, filed under Order XXXVII Rule 5, the petitioner has made out a case for unconditional leave to defend the suit. The judgments relied on by the learned counsel for the petitioner are squarely applicable to the facts of the present case.

11(c) The contention of the learned counsel for the respondents that the petitioner has to file appeal only and the Civil Revision Petition is not maintainable is without any merits. The order dismissing the application to leave to defend the case is revisable and the Civil Revision Petitions filed by the petitioner are maintainable. Section 104 Order XLIII Rule 1 of C.P.C deal with orders from which appeal lies. The order dismissing an application to leave to defend is not included in appealable orders. Only the judgment and decree passed after dismissing the application for leave to defend is appealable. Therefore, the fair and decretal orders made in respective Interlocutory Applications in respective suits are liable to be set aside and they are accordingly set aside.

12. In the result, all the Civil Revision Petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are closed. The petitioner is granted unconditional leave to defend the suit. The petitioner is directed to file written statement within four weeks from the date of receipt of a copy of this order.

13.02.2018

Index: Yes

Speaking Order/Non-Speaking Order

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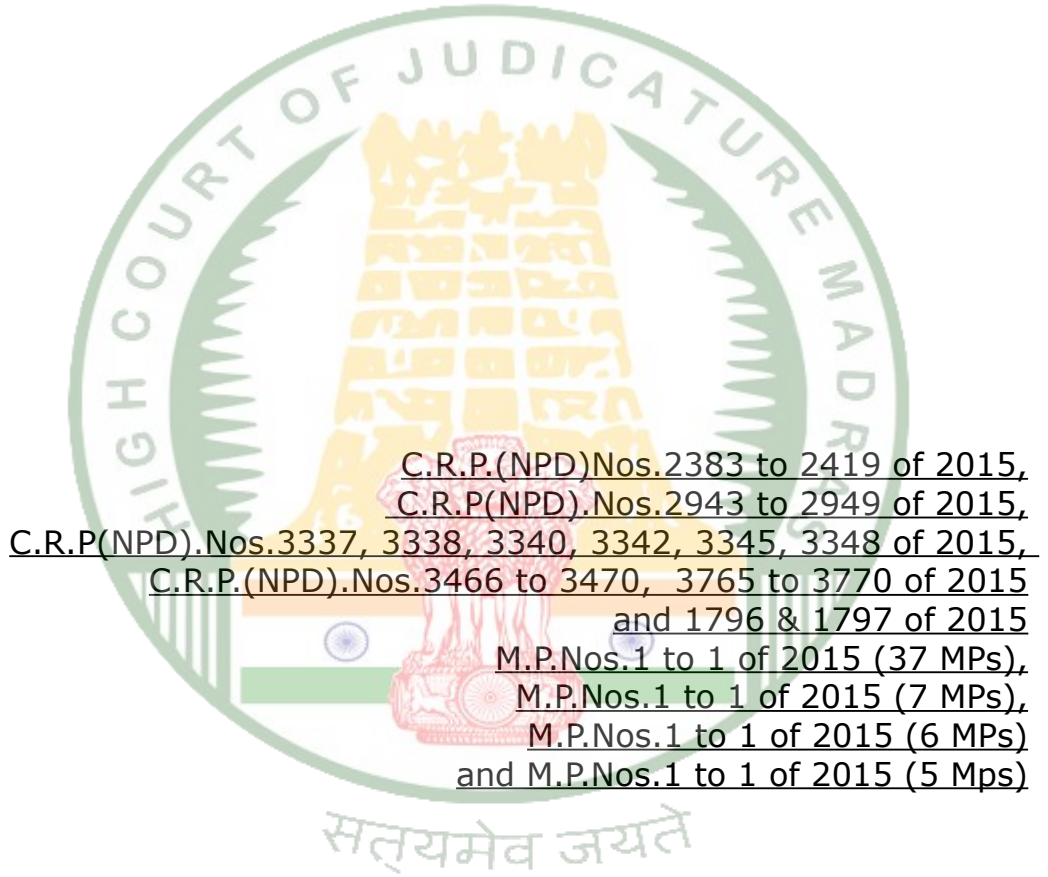
The XIV Assistant Judge,
City Civil Court,
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V.M.VELUMANI,J.

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