

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

+ **RFA No. 75/2016**

% **15th October, 2018**

RAHUL YADAV

..... Appellant

Through: Mr. Manoj Yadav, Advocate.

versus

HANS RAJ

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 26432/2018 (for restoration)

1. No one appears for the respondent.
2. This application is allowed and the present appeal is restored to its original number and position.

C.M. stands disposed of.

RFA No. 75/2016 and C.M. Appl. Nos. 5350/2016 (for additional documents), 34391/2016 (modification of order dt. 15.02.2016)

3. This Regular First Appeal under Section 96 of the Code of the Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the Trial Court dated 05.12.2015 by which the trial court has dismissed the leave to defend application filed by the appellant/defendant in the Order XXXVII CPC suit filed by the respondent/plaintiff for a recovery of Rs.11,03,000/-.

4. The facts of the case are that the respondent/plaintiff pleaded that he gave a friendly loan of Rs.11,03,000/- to the appellant/defendant and which was secured by the appellant/defendant vide cheque bearing no. 191702 dated 02.08.2014 for Rs.11,03,000/- drawn on Vijaya bank, Najafgarh Branch, New Delhi-110043. When the appellant/defendant failed to repay the loan amount, the subject cheque was presented, but the same was returned dishonored with the remarks 'funds insufficient', and therefore the subject suit was filed after serving a Legal Notice dated 02.09.2014.

5. The appellant/defendant filed his leave to defend application and raised the defence, that the subject cheque was one

which was stolen from the car of the appellant/defendant, and therefore, the application for leave to defend was bound to be allowed and the suit would ultimately be dismissed.

6. The trial court dismissed the leave to defend application by noting that though the appellant/defendant claimed that he had written to his bank and also to the police, that the subject cheque was stolen, but as no documents were filed to substantiate this claim, thus the leave to defend could not be granted.

7. That the appellant/defendant has filed the Complaint made to the bank dated 23.05.2014 and the Police Complaint dated 04.10.2014 before this Court. It is, however, seen that the complaint dated 23.05.2014, which is given to the bank is not of the appellant/defendant but of his mother Smt. Alka Yadav and that too pertaining to a different account rather than the account from which the subject cheque was issued. The said Complaint dated 23.05.2014, given by Smt. Alka Yadav, the mother of the appellant/defendant and states that Smt. Alka Yadav had lost some 3/4 cheques. In fact, in my opinion, this complaint of Smt. Alka Yadav dated 23.05.2014 shows lack of *bonafides* in the defence of the appellant/defendant because if

the mother found that some of her cheques were stolen, then the other family members, including her son being the appellant/defendant, would have ordinarily at that stage in May, 2014 itself checked to see as to if there were any other stolen cheques from any other cheque books of any other family members, including that of the appellant/defendant, but this is not the case of the appellant/defendant.

8. In fact, the next document being the Police Complaint dated 04.10.2014 completely demolishes the defence of the appellant/defendant showing the same to be frivolous, vexatious and not raising a *bonafide* triable issue, inasmuch as, this Police Complaint dated 04.10.2014, though filed by the appellant/defendant, talks of loss of cheques with the serial numbers 28088861-69. The subject cheque however is numbered 191702 and which would be of a different cheque book, and also there is no mention in the Complaint of appellant/defendant dated 04.10.2014, that the subject cheque was stolen. Once the appellant/defendant would have made a Complaint dated 04.10.2014 to the police with respect to some other cheques being stolen, there was no reason why the complaint would not have included the subject cheque no. 191702 if this cheque was stolen.

9. The principles with respect to grant of leave to defend have been stated by the Hon'ble Supreme Court in its recent judgment in the case titled as ***IDBI Trusteeship Services Ltd. v. Hubtown Limited, (2017) 1 SCC 568***, and the relevant paras of this judgment read as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec's* case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in *Milkhiram's* 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."

10. The Hon'ble Supreme Court has held in the aforesaid judgment, that when the defence is frivolous or vexatious or the same fails to raise a *bonafide* triable issue, leave to defend cannot be granted. As already stated above, the defence raised by the appellant/defendant is completely frivolous as well as vexatious and does not raise a *bonafide* triable issue.

11. There is no merit in the appeal and the same is hereby dismissed.

OCTOBER 15, 2018

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VALMIKI J. MEHTA, J