

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

+ **RFA No.359/2017**

% **30th July, 2018**

HAWA SINGH SAINI Appellant

Through: Ms. Rekha Rustagi, Advocate.

versus

RAJESH KUMAR JAIN (HINDU UNDIVIDED FAMILY)

..... Respondent

Through: Mr. Brij Bhushan Solanki,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the Trial Court dated 25.1.2017 by which trial court has dismissed the leave to defend application filed by the appellant/defendant under Order XXXVII (3)(5) CPC and has decreed the suit filed by the respondent/plaintiff for a sum of Rs.10 lacs with interest at the rate of 9% per annum.

2. The case of the respondent/plaintiff was simple. Respondent/plaintiff has pleaded that it gave a loan of Rs.10 lacs to the appellant/defendant on 7.7.2012 and that the appellant/defendant for the repayment of the loan amount issued a cheque no.943528 dated 7.4.2013, but this cheque was dishonoured, and therefore, the subject suit under Order XXXVII CPC came to be filed.

3. The appellant/defendant in the leave to defend application pleaded that between the parties there were business relations, and as per which the appellant/defendant used to purchase iron plates, and that these transactions were much earlier of the year 2009. It is pleaded that total iron plates worth of Rs.9,87,730/- were purchased by the appellant/defendant and payment of Rs.5,36,200/- was made by means of cheques and an amount was paid of Rs.3 lacs in cash on 29.6.2006, besides another amount of Rs.1.5 lacs was paid in cash . It was pleaded that the subject cheque was given as security, but the cheque was not returned, and the appellant/defendant did not pursue the same on account of good relations between the parties.

4. Trial court has dismissed the leave to defend application by firstly holding that the appellant/defendant is guilty of inconsistent

stands. Whereas in the leave to defend application, payment is said to be made to the respondent/plaintiff of Rs.5,36,200/- by cheque and Rs.3 lacs plus Rs.1.50 lacs in cash, however, when the appellant/defendant replied by Reply dated 26.8.2013 to the Legal Notice of the respondent/plaintiff dated 19.8.2013, the appellant/defendant had stated that Rs.5,36,200/- was paid through cheques and cash out of the amount of Rs.9,87,730/-. Trial court has also observed that in the counterfoil of the subject cheque, the cheque is said to be in favour of M/s Arihant Trading Company and not in favour of the respondent/plaintiff Sh. Rajesh Kumar Jain (HUF) and which shows that once the case of the appellant/defendant was that the cheque was given as security, the transactions between the Rajesh Kumar Jain/respondent/plaintiff would be different from the loan transaction, with the separate transaction of M/s Arihant Trading Company being of purchase of iron plates. Trial court has also held that the appellant/defendant does not dispute that the cheque has been issued by the appellant/defendant.

5. It is also relevant to note at this stage that the appellant/defendant had filed an application for amendment to leave to

defend application. By this amendment application, the appellant/defendant wanted to elaborate on the defence taken that the security cheque was in the name of M/s Arihant Trading Company. By this application, the appellant/defendant also wanted to plead that the subject cheque was not issued to Rajesh Kumar Jain but was issued for payment of iron plates supplied by M/s Arihant Trading Company and that the subject cheque was issued blank and the respondent/plaintiff filled up his name in the cheque instead of M/s Arihant Trading Company. This application was dismissed by the trial court, challenge thereto before this Court failed and the further challenge by the appellant/defendant before the Supreme Court also failed. These aspects, however, in my opinion, would not have bearing on the decision of the leave to defend application as is being discussed below.

6. One thing is clear that in the leave to defend application the appellant/defendant has taken up a specific plea that the subject cheque was issued not for any repayment of loan amount but as security amount. In the leave to defend application, it is also stated that appellant/defendant had purchased iron plates for Rs.9,87,730/-

and for which the subject cheque was given as security but in spite of payment of amount of Rs.9,87,200/- the cheque was not returned and not pressed for by the appellant/defendant as relations were cordial.

Paras 2 to 4 of the leave to defend application read as under:-

“2. That the brief facts of the case are that the defendant never took any loan from the plaintiff as alleged. It is submitted that the defendant purchased iron plates for a sum of Rs.9,87,730/- (Rupees Nine Lakh Eighty Seven Thousand Seven Hundred thirty only) from the plaintiff and the defendant issued the alleged cheque for the security of the amount. It is submitted that thereafter the defendant paid Rs.5,36,200/- (Rupees Five Lakh Thirty Six Thousand Two Hundred Only) till 21.03.2009 through cheque and cash out of the above said amounts of Rs.9,87,730/- (Rupees Nine Lakh Eighty Seven Thousand Seven Hundred Thirty Only). It is pertinent to mention here that the defendant also paid Rs.3,00,000/- (Rupees three Lakh Only) on 29.06.2006 and further paid Rs.1,50,000/- (Rupees One Lakh Fifty Thousand Only) in cash hence the defendant paid Rs.9,87,200/- (Rupees Nine Lakh Eighty Seven Thousand Two Hundred Only). It is submitted that no amount is due upon the defendant. It is submitted that the defendant asked the plaintiff to return the security cheques but the plaintiff did not return the security cheques on one pretext or the other as the relations between the plaintiff and the defendant were very cordial and business terms and relations.

3. That the alleged cheque was given to the plaintiff only for security purpose and not to discharge any liability.

4. That the alleged cheque was given to the plaintiff only for security purpose and not to discharge any liability. It is submitted that the plaintiff wrongly presented the security cheque of the defendant to create a false ground for filing the present suit to extort money from the defendant.”

7. Therefore in my opinion even if details which were sought to be added by seeking an amendment to the leave to defend application are not considered, yet, the fact of the matter is that the appellant/defendant has pleaded that the subject cheque was given as

security for purchase of iron plates and was not meant to be encashed. Of course, there is a stand of appellant/defendant with respect to the subject cheque not being issued in the name of the respondent/plaintiff but in the name of M/s Arihant Trading Company, however, at the stage of grant of leave to defend, the same will not enable the respondent/plaintiff to have the leave to defend application dismissed inasmuch as the appellant/defendant has filed his banking documents to show that the subject cheque was in a series of cheques of the year 2006 i.e not of the year 2012 when loan was given or 2013 when cheque was said to have been issued. The banking documents filed by the appellant/defendant are the cheque book showing the serial number of the cheques in that cheque book of 2006 as also the banking statements that serial number of cheques as per the cheque book filed had one cheque being the subject cheque, and the subject bank account was operated during the year 2006 qua the cheque series. Admittedly the respondent/plaintiff has pleaded that the loan was granted on 7.7.2012 i.e not in the year 2006 and therefore surely if a cheque bearing subject serial number (whose other cheques were used in the year 2006) would show that the subject cheque which is dated

7.4.2013 would not have been issued in the year 2013 but was issued in the year 2006 for payment to M/s Arihant Trading Company. Once such clear banking documents are on record showing that the subject cheque is in the series of cheques used in the year 2006, it cannot be that the subject cheque which is dated 7.4.2013 would have been issued on 7.4.2013 and for a loan dated 7.7.2012. I am also informed by the counsel for the appellant/defendant that the subject bank account of the appellant/defendant from which the subject cheque was issued stands closed long back in the year 2011.

8. Therefore it is seen that whereas the respondent/plaintiff is successful in arguing that there are contradictions in the case of the appellant/defendant because there is a difference in what is stated in the leave to defend application and what was stated in the Reply dated 26.8.2013, with the fact that subject cheque as per the counterfoil of the appellant/defendant shows that same was issued in the name of M/s Arihant Trading Company and not in the name of respondent/plaintiff as was originally contended by the appellant/defendant, however, the appellant/defendant has also been successful in proving that the subject cheque is of the series of the

year 2006, and therefore it could not have been given on 7.4.2013 for return of the loan dated 7.7.2012 and that too of an account which was closed in the year 2011. Therefore there are two contesting cases, and there is credibility and plausibility in both the stands of both the parties. Once therefore the appellant/defendant has a plausible and reasonable case, in spite of certain inconsistent facts which are pleaded, it cannot be said that leave to defend application should be dismissed at this stage itself without granting an opportunity to the appellant/defendant to prove his case during trial.

9. The principles with respect to grant of leave to defend have been recently summarized by the Supreme Court in the case of ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., (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. Applying the ratio of the judgment of the Supreme Court in the case of *IDBI Trusteeship Services Ltd. (supra)* it is seen that once there is a triable issue, courts should not decide triable issue of two separate plausible cases by finally pronouncing upon the same at the stage of deciding the application for leave to defend and the appellant/defendant should be allowed to lead evidence to prove his

case by grant of conditional leave to defend. In the interest of justice, directions for trial are issued with respect to the early disposal of the case which are stated hereinafter and also deposit of the part of the suit amount.

11. In view of the aforesaid discussion, this appeal is allowed. Impugned judgment of the Trial Court dated 25.1.2017 is set aside. Appellant/defendant is granted conditional leave to defend but the same is subject firstly to the condition that written statement will be positively filed within six weeks from today with an advance copy being supplied to the respondent/plaintiff within four weeks from today and that the appellant/defendant will not get more than four opportunities to complete his evidence in chief of all his witnesses. In case this direction of filing the written statement and giving advance copy are not complied with, then, leave to defend application will be taken as having been dismissed. Appellant/defendant is also directed to deposit a sum of Rs.4.50 lacs (being alleged cash amount paid for purchase of iron plates but not substantiated) before the trial court within a period of four months from today and which will be a further condition for grant of leave to defend. This amount on being

deposited in the trial court will be put in a fixed deposit so as to earn interest and this amount will abide by the final judgment in the suit. Trial court is also requested to dispose of the suit by hearing final arguments preferably within a period of four months of completion of recording of evidence.

12. Parties to appear before the District & Sessions Judge, South West, Dwarka Courts, New Delhi on 10th August, 2018 and the District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law and the directions issued in the present judgment. Trial court record be sent back alongwith a copy of this judgment to the concerned District & Sessions Judge.

13. Appeal is allowed and disposed of accordingly in terms of aforesaid observations and directions.

JULY 30, 2018
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VALMIKI J. MEHTA, J