

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

+ **RFA No. 387/2018**

% **8th May, 2018**

M/s AMCON ENGINEERS & ANR. Appellants

Through: Mr. Amit Gupta, Advocate.

Versus

SATVINDER SINGH Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.18886/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.18887/2018 (for condonation of delay)

2. For the reasons stated in the application, delay of 6 days

in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No. 387/2018 and C.M. No.18885/2018 (stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit

impugning the judgment of the Trial Court dated 31.1.2018 by which trial court has dismissed the leave to defend application filed by the defendants under Order XXXVII Rule 3(5) of Code of Civil Procedure, 1908 (CPC) and has decreed the suit for a sum of Rs.23,09,293/- along with interest at 9% per annum.

4. The facts of the case are that the respondent/plaintiff filed the subject suit under Order XXXVII CPC pleading that the respondent/plaintiff is the proprietor of M/s S.P. Construction Co. which is carrying on the work of engineers and contractors; dealing in pile foundation, pile testing, soil investigation and all type of civil works. The respondent/plaintiff was approached by the appellant no.1/defendant no.1 through its partner appellant no.2/defendant no.2 for doing work and work order dated 20.2.2016 for piling work at 32nd Milestone, Gurgaon, Haryana was placed upon the respondent/plaintiff. The respondent/plaintiff carried out the work and submitted his running account bill no.14 dated 8.11.2016 for an amount of Rs.6.44 lacs and another bill dated 9.1.2017 for Rs.16,55,187/-. On behalf of the appellant no.1/defendant no.1, the appellant no.2/defendant no.2/partner issued cheques totaling to

Rs.23,09,293/- after deducting TDS, and the cheques which were issued were dishonoured on presentation, and hence after serving the legal notice dated 10.4.2017, the subject suit under Order XXXVII CPC was filed.

5. Appellants/defendants filed the leave to defend application and pleaded for grant of unconditional leave to defend by contending that suit was not maintainable under Order XXXVII CPC and that the suit lacks cause of action and hence was liable to be rejected under Order VII Rule 11 CPC. On merits defence was that the respondent/plaintiff did not do the work in time as per schedule and therefore appellants/defendants suffered monetary loss which was therefore adjusted in the bills of the respondent/plaintiff. It was also pleaded that some amount was given as security to the respondent/plaintiff at the time of awarding of work which was not adjusted. It was accordingly prayed that suit was liable to be dismissed and therefore unconditional leave to defend be granted.

6. The principles with respect to grant of leave to defend have been recently stated by the Supreme Court in the case of ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., (2017) 1 SCC 568***. Paras

17 to 17.6 of this judgment lay down the principles with respect to the grant of leave to defend and these paras 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."

7. In view of the ratio of the judgment of the Supreme Court in the case of *IDBI Trusteeship Services Ltd. (supra)* once the defence is completely frivolous and vexatious and if the case is that defence is only to defeat a valid claim of the plaintiff, as no genuine triable issue is raised the leave to defend should be refused. In the present case, indubitably the three cheques are the cheques of the appellants/defendants which were issued by the appellants/defendants in favour of the respondent/plaintiff. Again, it is an undisputed fact that cheques were dishonoured on presentation. There is also no dispute that work order has been performed by the respondent/plaintiff. Suit was therefore maintainable under Order XXXVII CPC on the basis of dishonoured cheques and no leave to defend could have been granted unless the appellants/defendants showed existence of a substantial defence which was raised, but since this was not so, therefore leave to defend application has been rightly dismissed and the suit decreed.

8. Learned counsel for the appellants/defendants argues that respondent/plaintiff had delayed completion of work and therefore appellants/defendants suffered losses, however, no letter written by the

appellants/defendants to the respondent/plaintiff was pointed out to this Court as to appellants/defendants writing to the respondent/plaintiff that work has been delayed and therefore losses were suffered by the appellants/defendants. Also mere averring a mantra of losses does not entitle the appellants/defendants to grant of losses by refusing to make the payments for the work done by the respondent/plaintiff as it is not found that there are sufficient pleadings or any details of the losses suffered by the appellants/defendants on account of alleged delay of work by the respondent/plaintiff. This argument of the appellants/defendants is therefore rejected and while doing so it is relevant to note that work order was way back of 20.2.2016 and the cheques which were issued were after 8.11.2016 when the first bill was submitted by the respondent/plaintiff and in this entire period assuming that there was delay in work done by the respondent/plaintiff then appellants/defendants would surely have corresponded in this regard but admittedly there is no such correspondence.

9. Counsel for the appellants/defendants then argued that along with summons of judgment a detailed affidavit was not filed

verifying the cause of action, however it is not disputed that no such ground was urged in the leave to defend application, and once no such ground is urged in the leave to defend application which has to be filed within prescribed time, such an argument could not have been raised at the stage of the arguments of the leave to defend application or before this Court challenging the impugned judgment dismissing the leave to defend application.

10. There is no merit in the appeal. Dismissed.

MAY 08, 2018
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VALMIKI J. MEHTA, J