

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

+ **RFA No. 953/2018**

% **27th November, 2018**

ADESH TYAGI

..... Appellant

Through: Mr. Arun Kumar Tewari,
Advocate (9873039189)

Versus

POOJA TYAGI

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 49022/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 49023/2018 (delay in re-filing)

For the reasons stated in the application, delay in re-filing is
condoned, subject to just exceptions.

CM stands disposed of.

RFA No. 953/2018 & CM No. 49021/2018 (stay)

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 27.02.2018 by which the trial court has dismissed the leave to defend application filed under Section XXXVII Rule 3(5) of CPC and decreed the suit for recovery of Rs. 26 lakhs alongwith *pendente lite* and future interest at 6% per annum.

2. The facts of the case are that the respondent/plaintiff had filed the subject suit pleading that her late husband had advanced a loan of Rs. 25 lakhs to the appellant/defendant in May 2014. At the time of giving of loan appellant/defendant had given eight blank signed cheques for refund of the loan amount. The appellant/defendant had paid some interest to the respondent/plaintiff. An amount of Rs. 5 lakhs was said to have been paid by the appellant/defendant in October, 2015 and thus bringing down the liability from Rs. 25 lakhs to Rs. 20 lakhs. Some further amounts of interest were paid till November 2015, whereafter the appellant/defendant is pleaded to have stopped paying the interest.

Meanwhile, the husband of the respondent/plaintiff expired and the respondent/plaintiff who is the wife of the person who had advanced the loan to the appellant/defendant had therefore filed the suit after eight cheques given for repayment of the loan amount were dishonoured vide Cheque Return Memo dated 04.05.2017 for the reason that '*signature differs*'.

3. The appellant/defendant filed his leave to defend application. In the leave to defend application the appellant/defendant has raised the following grounds for grant of leave to defend:-

- “a) That the present suit for recovery under Order XXXVII CPC is not maintainable.
- b) That the defendant did not take any amount from plaintiff.
- c) That the suit is without any cause of action and is liable to be rejected under Order VII Rule 11 CPC.
- d) That the suit is bad for non-joinder and mis-joinder of necessary parties.
- e) That the plaintiff has not come to the court with clean hands.
- f) That in case leave to defend is not granted, defendant shall suffer irreparable injury and it would cause miscarriage of justice.”

4. The trial court, in my opinion, has rightly dismissed the leave to defend application because the leave to defend application is

completely without any substance. Though the appellant/defendant has claimed that no amount was taken, however, the appellant/defendant does not deny that the subject cheques are his cheques and the subject cheques were dishonoured on presentation by the bank of the appellant/defendant. Cheques are also presumed to have been issued for consideration in view of Section 118 of the Negotiable Instruments Act, 1881. Erroneously contending that no loan was taken or that the suit is without cause of action will not entitle the appellant/defendant to grant of leave to defend inasmuch as it has been held by the Hon'ble Supreme Court in its recent judgment in the case of ***IDBI Trusteeship Services Ltd. v. Hubtown Limited***, (2017) 1 SCC 568 that if there is no triable issue and the defence raised is frivolous and/or vexatious then leave to defend cannot be granted. The relevant para 17 of the judgment in the case of ***IDBI Trusteeship Services Ltd. (supra)*** reads as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec* case will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in *Milkhiram* 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."

5. In view of the aforesaid facts, I do not find that the trial court has committed any illegality in dismissing the leave to defend application and decreeing the suit. In fact, the trial court has been kind enough to the appellant/defendant because *pendente lite* and future interest have been granted only at 6% per annum whereas as per

Section 80 of the Negotiable Instruments Act, in case cheques are dishonoured, a creditor is entitled to interest at 18% per annum.

6. There is no merit in this appeal. Dismissed.

NOVEMBER 27, 2018/ib

VALMIKI J. MEHTA, J

