

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

+ **RFA No. 206/2018**

% **26th February, 2018**

SANTOSH UPADHAYAY

..... Appellant

Through: Mr. Anis Mohammad,
Advocate.

versus

AMARJEET

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No.7503/2018 (condonation of delay in filing) & CM No. 7504/2018 (delay in re-filing)

For the reasons stated in the application, delays in filing and re-filing are condoned.

CMs stand disposed.

RFA No. 206/2018 & CM No. 7502/2018 (stay)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the defendant in the suit impugning the judgment of the trial court dated 16.8.2017 by which the trial court has dismissed the application filed by the appellant/defendant seeking leave to defend in an Order XXXVII suit.

2. The facts of the case are that the respondent/plaintiff filed the subject suit for recovery of the loan amount of Rs.7 lacs given to the appellant/defendant and which was secured by the appellant/defendant by a cheque bearing no. 069288 drawn in the name of Bank of Maharashtra as also a written document dated 15.5.2015 acknowledging the *factum* of receipt by the appellant/defendant of a loan of Rs.7 lacs. Since the cheque given by the appellant/defendant in favour of the respondent/plaintiff was dishonoured on payment, hence, the subject suit was filed after serving a legal notice dated 18.4.2016 and which was replied to by the appellant/defendant *vide* his reply dated 28.4.2016.

3. The trial court has dismissed the leave to defend application by arriving at the following conclusions:-

(i) Appellant/defendant claimed that he had given three blank cheques as security to the respondent/plaintiff bearing cheque nos. 069287, 069288 and 069289, however, appellant/defendant failed to prove that three cheques were given and not two cheques as was the case of the respondent/plaintiff. One cheque was the cheque towards returning of loan and another cheque for Rs.1000/- was given by the

appellant/defendant to be encashed for ensuring that the bank account of the appellant/defendant was operative and existed in the name of the appellant/defendant.

(ii) The case of the respondent/plaintiff was that the appellant/defendant beside issuing the subject cheque which was dishonoured had also signed an agreement dated 15.5.2015 admitting to receipt of the loan of Rs.7 lacs, however, in the leave to defend application it is not denied by the appellant/defendant that the agreement dated 15.5.2015 was not executed by the appellant/defendant.

(iii) The case of the appellant/defendant carries no credibility that he returned the loan amount in cash inasmuch as not only there is no document evidencing the alleged repayment of loan but also there was no reason as to why if the loan was returned by the appellant/defendant to the respondent/plaintiff then the appellant/defendant would not have taken back the subject cheque (which was dishonoured) from the respondent/plaintiff.

4. I may note that now law with respect to grant of leave to defend in an Order XXXVII suit has now been crystallized in a recent

judgment of the Supreme Court reported as *IDBI Trusteeship Services Limited Vs. 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.”

5. In accordance with the ratio of the aforesaid judgment of the Supreme Court it has to be examined by a Court hearing leave to defend application if the defence raised by a defendant is or is not a substantial defence or whether genuine triable issues are raised or whether the defence raised is only a frivolous or vexatious one. In case there is no substantial defence or no genuine triable issue and the defence is found to be frivolous and vexatious, the leave to defend application has to be dismissed.

6. In my opinion, the trial court has committed no error in dismissing the application inasmuch as it is not believable that appellant/defendant would have returned the loan amount, allegedly in cash, and yet not had taken back the cheque given as security by the appellant/defendant to the respondent/plaintiff. Also, the appellant/defendant has not denied that he had executed the agreement dated 15.5.2015 acknowledging the receipt of loan of Rs. 7 lacs. Further, it may be noted that trial court has rightly observed that appellant/defendant has been taking different stands at different places because in the legal notice dated 26.10.2015 sent on behalf of the appellant/defendant to the respondent/plaintiff taking of loan was

stated to be of Rs.1,50,000/- at 10% per month interest and not Rs.7 lacs. As already noted the trial court has also rightly held there is no substantial defence made out by the appellant/defendant that allegedly three cheques were given by the appellant/defendant to the respondent/plaintiff and not two cheques.

7. Learned counsel for the appellant/defendant argues that the suit was not maintainable under Order XXXVII CPC because in the suit it has not been mentioned that the suit is filed under Order XXXVII and that no relief which does not fall within Order XXXVII CPC has been claimed, however, when queried as to whether such a defence was taken in the leave to defend application by the appellant/defendant, it is conceded that no such defence was taken. There is a prescribed period of limitation for filing of leave to defend application, and therefore, once no defence is taken within the prescribed period of limitation, then such a defence cannot be urged thereafter, much less in a first appeal against a judgment dismissing the leave to defend application filed. In any case, this defence is only a technical defence without any substance because the suit does mention filing of the same under Order XXXVII CPC and a holistic

reading of the plaint makes it clear that the suit is filed on the basis of dishonoured cheque for a sum of Rs.7 lacs and which amount of Rs. 7 lacs is claimed by filing of the suit.

8. Learned counsel for the appellant/defendant then argued that respondent/plaintiff has wrongly claimed interest at 18% per annum in terms of a suit though there is no agreement which is mentioned with respect to rate of interest, however this argument is completely misconceived because it is noted that trial court has only granted *pendente lite* and future interest till realization at 9% per annum, and no pre-suit interest has been awarded to the respondent/plaintiff. I may also note that the rate of interest granted by the trial court for *pendente lite* and future period is also a very reasonable rate of 9% per annum.

9. Learned counsel for the appellant/defendant argues that counsel for the appellant/defendant has made various mistakes, including of mentioning of interest at 10% per month in the legal notice dated 26.10.2015 sent on behalf of the appellant/defendant to the respondent/plaintiff, and the trial court has taken this adversely against the appellant/defendant. In my opinion, this aspect would not

entitle the appellant/defendant to set aside the impugned judgment because rate of interest of 10% per month obviously is stated which is a typing mistake because the rate of interest was 1% per month. In any case, as already stated above, no interest has been granted for the pre-suit period and the trial court has accordingly and only granted *pendente lite* and future interest and which the trial court is always entitled to do so under Section 34 CPC.

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

FEBRUARY 26, 2018/ib

VALMIKI J. MEHTA, J