

\$~81

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

Decided on: 28th May, 2019

+ CM (M) 880/2019 with CAV 587/2019 & CM Appl. 26281-26282/2019

S S THAPAR

..... Petitioner

Through: Mr. Suneet Bharadwaj, Advocate.

versus

L R VERMA

..... Respondent

Through: Mr. Arun Vohra, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

%

1. This petition under Article 227 of the Constitution is directed against the judgment of the Trial Court dated 28.03.2019 in CS No. 10039/2016. By the said judgment, the petitioner herein has been granted leave to defend the suit filed by the respondent under Order XXXVII of the Code of Civil Procedure, 1908, but this has been made conditional upon the petitioner depositing a sum of ₹34 lakhs. The petitioner challenges the imposition of the said condition.

2. The suit filed by the respondent is for a decree in the sum of ₹85 lakhs. The contention of the plaintiff is that money was advanced to the petitioner/defendant by way of loans amounting to ₹74 lakhs, out of which ₹ 41 lakhs was by way of cheques. It has also been contended that

the defendant had issued two cheques of ₹49 lakhs and ₹25 lakhs respectively, from his proprietorship account of M/s AAA Overseas Handicrafts which were dishonoured. It is undisputed that the parties had entered a mediated settlement dated 30.09.2009 under which the petitioner was required to pay a sum of ₹43 lakhs to the respondent, of which only a sum of ₹7 lakhs has been paid thereafter.

3. The defence urged by the petitioner in support of his application for leave to defend, was that the mediated settlement had been rendered null and void because of failure of the parties to abide by it. He also raised certain defences regarding the genuineness of the cheques issued in favour of the respondent by the proprietorship concern and contended that those defences would require to be examined in evidence.

4. The Trial Court, while disposing of the application to leave to defend, has taken into account the mediated settlement and the amount admittedly advanced by cheques by the respondent to the petitioner after adjustment of the amount received by the respondent after the mediated settlement was entered into, has imposed the condition of depositing an amount of ₹ 34 lakhs.

5. Learned counsel for the petitioner submits that, in the facts and circumstances of the case, he ought to have been granted unconditional leave to defend. He relies upon four judgments of the Supreme Court, in support of this contention, in *Santosh Kumar vs. Bhai Mool Singh*, AIR 1958 SC 321, *Raj Duggal vs. Ramesh Kumar Bansal*, (1991) Suppl SCC 191, *Defiance Knitting Industries (P) Ltd. vs. Jay Arts*, (2006) 8 SCC 25 and *State Bank of Hyderabad vs. Rabo Bank*, (2015) 10 SCC 521. Three of these judgments, with the exception of *Raj Duggal* (supra), have been considered by the Court in *IDBI Trusteeship Services Limited vs.*

Hubtown Limited, (2017) 1 SCC 568, wherein the principles governing grant of leave to defend have been formulated, following the amendment in Order XXXVII and superceding the principle laid down in *Mechelec Engineers & Manufacturers vs. Basic Equipment Corpn.*, (1976) 4 SCC 687. The Court, in *IDBI* (supra), has held as follows:

“17. Accordingly, the principles stated in para 8 of Mechelec case [Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case [Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698 : (1966) 68 Bom LR 36] , 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.”

6. On the facts of the present case, the payment of ₹ 41 lakhs, by the respondent to the petitioner, was by cheque. The settlement of disputes between the parties on 30.09.2009 also contemplated payment of the sum of ₹43 lakhs by the petitioner to the respondent. In these circumstances, the discretion exercised by the Trial Court to require deposit of ₹34 lakhs (out of the claim of ₹85 lakhs) cannot be said to be unreasonable or perverse. The condition imposed accords with the law laid down in paragraph 17.4 of *IDBI* (supra), applicable to cases where the defence is plausible, but improbable.

7. The judgment in *Raj Duggal* (supra) is also not of much assistance to the petitioner. Paragraph 3 of that judgment, on which learned counsel for the petitioner has sought to rely, lays down that judgment ought not to be entered where a triable defence of fact or law

is raised. The impugned judgment in the present case does not decline leave to defend, but imposes a condition for the same. In fact, the final order of the Court in *Raj Duggal*(supra) also granted conditional leave to defend.

8. In the facts and circumstances aforesaid, the petitioner has not made out a case for exercise of jurisdiction of this Court under Article 227 of the Constitution. The petition is, therefore, dismissed.

MAY 28, 2019

j's

PRATEEK JALAN, J.



नित्यमेव जयते