$~5

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

Decided on:05.08.2019

\+ CM(M) 341/2018 & CM APPL. 11520/2018

M/S KASHISH COUNTRY RESORT PVT LTD ..... Petitioner

Through: Mr. Ashish Aggarwal, Advocate with Ms. Shefali Kishore, Advocate

versus

M/S BANSAL SALES CORPORATION ..... Respondent

Through: Mr. Abhsihek Aggarwal, Advocate

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

%

1. The petitioner/defendant has filed this petition under Article 227 of the Constitution against an order dated 15.02.2018, passed by ADJ-04 (Central), Tis Hazari Courts, Delhi in Suit No.613077/2016. By the said order, the Trial Court has granted the petitioner/defendant leave to defend the suit instituted by the plaintiff/respondent under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC") but has imposed the condition of deposit of the entire principal amount claimed, i.e. ₹5,01,510/-. The contention of the petitioner is that the Trial Court ought not to have imposed the said condition and the petitioner was entitled to unconditional leave to defend.

2. The suit filed by the plaintiff is in respect of supply of goods to the

defendant. The plaintiff claims that, against the supplies made to the defendant, five cheques of ₹2,00,000/- each were tendered, of which three cheques were dishonoured. The plaintiff has referred to two invoices raised by it on the defendant being bill no. CMP1679 dated 18.11.2010 for an amount of ₹55,710/- (wrongly typed as ₹1,44,290/- in paragraph 5 of the plaint) and bill no. CMP1681 dated 26.11.2010 for an amount of ₹8,45,800/-(wrongly typed as ₹7,01,510/ in paragraph 5 of the plaint).

3. In the application for leave to defend filed by the petitioner herein, it is contended that the cheques given to the plaintiff were by way of advance payments and the invoices were payable only after a credit period of three months. It is specifically pleaded that only one cheque of ₹2,00,000/- was to be encashed at the time when the cheques were made over. The specific plea taken by the defendant is that invoice no.1681 is forged, and no material was received by the defendant from the plaintiff.

4. In the impugned order dated 15.02.2018, passed by the learned Trial Court, it has been recorded that bill no.454 does not show the signature on the copy, as shown in the original. This has been explained by the plaintiff on the basis that it would be on account of the photocopy being incorrect. (Bill no.454 mentioned in the impugned order appears to refer to challan no.462, which corresponds to bill no.1681.) The learned Trial Court has disbelieved the defences advanced by the defendant, but has granted leave to defend on the ground that the interest claimed by the plaintiff was not borne out by any contractual documents.

5. Having heard learned counsel for the parties, I am of the view that the condition imposed by the Trial Court for grant of leave to defend was unduly onerous in the facts and circumstances of this case. The principles governing the grant for leave to defend under Order XXXVII of the CPC

have been restated by the Supreme Court in the judgment in *IDBI Trusteeship Services Ltd.* vs. *Hubtown Ltd.* (2017) 1 SSC 568 in the following terms: **-**

> *"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. Applying these principles to the facts and circumstances of the present case, it appears that the defendant has raised triable issues relating to the genuineness of the invoices sought to be relied upon by the plaintiff. The order dated 15.02.2018 of the Trial Court itself finds a discrepancy between the copy of the invoice as filed with the plaint and the original produced before it. While the Trial Court did not permit the defendant to inspect the invoice at the stage of deciding the application for leave to defend, the plaintiff's explanation that the error was in photocopying also cannot be taken at face value. The further plea of the defendant that the goods were not received has also been disbelieved by the Trial Court on the ground that the defendant did not seek return of the cheques deposited with the plaintiff, and also did not raise any dispute contemporaneously regarding the quality of the goods.

7. A further point has been argued by learned counsel for the defendant in this Court. His contention is that the suit, insofar as it is based upon a running account between the parties, is not maintainable under Order XXXVII of the CPC at all. For this purpose, learned counsel for the defendant relies upon the judgment of this Court *in Saveena Enterprises Pvt. Ltd.* vs. *Kalatex and Ors.* [I.A. 13552/2007 in CS(OS) 1802/2001, decided on 20.11.2008]. It was held by a Coordinate Bench of this Court, in paragraph 12 of the said judgment, as follows:-

> *"12. The law is now settled that a suit under order 37 of the CPC, would lie on the basis of bills evidencing an agreement of sale of goods. I, however, do not find the plaintiff to have instituted the present suit on the basis of the said bills. A suit under order 37 on the basis of bills would be maintainable when the amount of the bills is claimed. In the present case, it is not the amount of the bills but the amount claimed due after taking into account the payments made and the value of the goods returned. Such amount due ceases to have a character of the bill amount and upon dispute being raised by the opposite party, the suit under order 37 would not be maintainable. The suit has been instituted on the basis of a statement of accounts coupled with admission of liability. It is the case of the plaintiff itself that the bills were payable within 45 days of the date of the bill. As aforesaid, the last of the bills alleged is of 13th February, 1998. The suit was instituted more than three years after 45 days of the last bill. Article 15 of the Schedule 1 of the Limitation Act prescribes a period of three years to institute a suit for the price of goods sold and delivered to be paid after the expiry of a fixed period of credit, commencing from the date when the period of credit expires. Section 18 of the Limitation Act extends the period of limitation from the date when an acknowledgement of liability is made in writing. The acknowledgement of liability claimed by the plaintiff in the present case is not of liability for payment of the amount of any bills but of the amount due under the*

statement of accounts. The fact that the plaintiff has not sued on the bills but on a statement of accounts coupled with acknowledgment is further borne out from the portion earlier set out of the reply of the plaintiff to the application for leave to defend whereby also the plaintiff has sought to bring the claim in suit within time applying the Articles in Schedule 1 of the Limitation Act relating to a suit for accounts. A suit for the balance due on an account does not fall within the domain of order 37 of the CPC."

8. Learned counsel for the plaintiff states that the present suit is based not just upon a running account, the ledger whereof has been annexed to the plaint, but upon the amounts due under two specified invoices, after adjustment for the amount received from the defendant. However, upon a perusal of the plaint and particularly, upon the legal notice dated 25.04.2012, wherein the particular invoices were not mentioned at all, and instead, the claim has been founded upon a ledger account maintained between the parties, it cannot be said that the argument of the defendant is wholly unmeritorious.

9. In these circumstances, I am of the view that the defendant has raised triable issues but has not advanced a defence which entitles it to unconditional leave to defend. The defences raised by the defendant are plausible, but do not answer to the standard of "fair or reasonable" as laid down in paragraph 17.2 of the judgment in *IDBI* (supra). The question then is of the condition to be imposed. Paragraph 17.3 of the aforesaid judgment cautions the Courts that the amount of security and conditions for disposal of the suit must balance the objectives of expeditious disposal of commercial cases, with the interest of the defendant to have the triable issues adjudicated without unduly severe orders of deposit of security. On a consideration of the defences offered by the defendant in the present case, I

am of the view that the interest of the parties can be balanced by modifying the condition imposed by the impugned order to deposit of ₹2,00,000/-.

10. At the request of the defendant, it is directed that the said amount be paid in four monthly instalments of ₹50,000/- each, payable on 19.08.2019, 16.09.2019, 14.10.2019 and 13.11.2019 respectively. The said amount will be deposited in the Trial Court. It is stated that the written statement has already been filed by the defendant. The suit may proceed, but failure to deposit any of the aforesaid instalments by the dates stipulated will render the leave to defend liable to be revoked.

11. The petition is disposed of with the aforesaid directions.

PRATEEK JALAN, J.

AUGUST 05, 2019

'j'/s