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

**Reserved on: 04.07.2019**

**Date of decision: 08.07.2019**

+ RFA 444/2018 & CM Nos. 21884/2018 (for stay) & 36998/2018 (for additional documents)

KADHIRVEL

..... Appellant

Through: Mr. C.Mohan Rao with Mr. Lokesh Kumar Sharma, Advs.

versus

VINOD KUMAR

..... Respondent

Through Mr. Rajeshkhar Rao, Mr. Vinay Sharma and Mr. Raghav Kacker, Advs.

**CORAM:**

**HON'BLE MS. JUSTICE REKHA PALLI**

**REKHA PALLI, J**

### **JUDGMENT**

1. The present appeal under Section 96 of the Civil Procedure Code, 1908 assails judgment and order dated 12.02.2018 passed by the learned Additional District Judge, South District, Saket Court, Delhi whereby the application filed by the appellant/defendant seeking leave to defend the summary suit preferred by the respondent/plaintiff has been rejected and, consequently, the suit of the respondent has been decreed for a sum of Rs.12 lakh with pendente lite interest at the rate of 12% per annum and future interest at the rate of 6% per annum.

2. The suit from which the present appeal arises was filed by the respondent under the provisions of Order XXXVII Civil Procedure Code, 1908 ('CPC' for short) claiming *inter alia* that he had advanced a friendly loan of Rs.12 lakh to the appellant, for the purpose of constructing a house for himself in his native village in Tamil Nadu, in cash in a piecemeal manner on various dates in the period between December, 2010 to December, 2012. It was claimed that, from the withdrawals made out of the bank accounts of his family members and him, the respondent lent the entire sum to the appellant in the following manner:-

*“(a) Rs.1,00,000/- on 15.12.2010 by way of cash.*

*(b) Rs.2,00,000/- on 10.03.2011 out of which Rs. 1,40,000/- as withdrawn and paid to the defendant from savings bank account of plaintiff's mother held in SBI, Dakshinpur Branch, New Delhi and Rs.60,000/- in cash.*

*(c) Rs.2,00,000/- on 19.11.2011, out of which Rs.1,75,000/- was withdrawn from the plaintiff's bank account no. 30701035365 with SBI, Dakshinpur, New Delhi-62, and Rs.25,000/- in cash.*

*(d) Rs.1,00,000/- on 10.12.2011 from plaintiff's mother bank account at SBI, Dakshinpur, New Delhi-62.*

*(e) Rs.3,00,000/- on 20.05.2012 out of which Rs.80,000/- was withdrawn from his own bank account and Rs.2,20,000 in cash.*

*(f) Rs.3,00,000/- on 02.12.2012 out of which Rs.2,40,000/- was withdrawn from the plaintiff's bank account and Rs.60,000/- in cash.”*

3. The respondent further claimed that the appellant had failed to repay the said loan amount and that, on his persistent demand, the appellant issued a post dated cheque bearing no.068141 dated 28.05.2013 drawn on UTI Bank Ltd. in the respondent's favour for a sum of Rs.12 lakh. The respondent contended that the said post dated cheque, when presented, was returned on 01.08.2013 with the remark 'payment stopped by the drawer'. Concomitantly, the appellant had also filed a complaint with the local police alleging therein that the respondent and his brother were in possession of a blank cheque signed by him which had been given by him at the time of obtaining loan of Rs.3 lakh from the respondent's father; he apprehended that the said cheque was likely to be misused by the respondent, even though the entire loan amount had been repaid.

4. After the dishonouring of the cheque, the respondent issued a legal notice to the appellant and preferred a criminal complaint against him under Section 138 of the Negotiable Instruments Act, 1881 ('NI Act' for short) bearing case no.425/1/2013, which complaint came to be rejected and the appellant was acquitted by the learned Metropolitan Magistrate on 28.01.2016. Pursuant thereto, the respondent instituted the aforesaid suit under Order XXXVII CPC claiming recovery of a sum of Rs.12 lakh along with interest at the rate of 18% per annum.

5. In his application seeking leave to defend, the appellant took the plea that he had never taken any loan from the respondent and that the bank statements relied upon by the respondent, to prove that the aforesaid loans were advanced to the appellant were, in fact, merely transactions between the respondent and his family members which did not concern

the appellant in any way. The appellant stated in his application that the respondent, in his suit, had even failed to aver any necessity compelling the appellant to take such a heavy loan from him, that too without executing any document or receipt recording such a transaction. He contended that, furthermore, the respondent had failed to file any documentary evidence reflecting the advancement of such a loan to the appellant in his income tax returns.

6. The learned Trial Court, after considering the defence of the appellant and examining the documents filed along with the plaint, including the appellant's statement in the respondent's complaint case recorded under Section 313 of the Criminal Procedure Code, 1973, came to the conclusion that the defence raised by the appellant was a sham. The learned Trial Court held that in addition to the appellant raising contradictory defences in different proceedings and documents which, in itself, was suggestive of falsehood in his defence, he had even failed to aver as to why he had handed over the cheque in question to the respondent. In these circumstances, the learned Trial Court passed the impugned order rejecting the appellant's application seeking leave to defend, after holding that his defence was frivolous and groundless and that he had neither denied the issuance of the cheque nor denied his signatures thereon. Resultantly, the learned Trial Court decreed the respondent's suit for a sum of Rs.12 lakh with pendente interest at the rate of 12% p.a. and future interest at the rate of 6% p.a.

7. Impugning the aforesaid judgment, Mr. C. Mohan Rao, learned counsel for the appellant contends that the learned Trial Court has

gravely erred in declining to grant leave to defend to the appellant even though the pleas raised by the appellant clearly show that his defence was fair and reasonable. He submits that the learned Trial Court failed to appreciate the appellant's primary contention that the blank cheques had never been given to the respondent but, instead, had been given to the respondent's father who was running a large scale business of chit fund committees and, therefore, possessed several cheques entrusted as security to him by various member participants. He submits that, in fact, the appellant had become a member of one of such committees organized by the respondent's father, consisting of 20 member participants for a total sum of Rs.1 lakh, wherein he was making a regular monthly contribution of Rs.5,000/-. As the appellant duly made all his monthly contributions to the respondent's father within time, no further amount was owed by him; however, following his demise in 2012, the dishonest intentions of the respondent and his brother, namely, Shri Rajesh Kumar manifested when they began attempting to misuse the appellant's blank cheque which had been entrusted to their father thereby compelling the appellant to file a police complaint against them.

8. Learned counsel for the appellant further submits that the falsity of the respondent's case is evident from his untenable claim that the cheque in question was issued in 2013 from the appellant's bank account in UTI Bank Ltd. when, in fact, the name of the said bank had been changed to 'Axis Bank Ltd.' w.e.f. 30.07.2007; in furtherance of this submission, reliance is made on the notification dated 30.10.2007 issued by the Reserve Bank of India. He contends that the respondent has claimed to have given a sum of Rs.3 lakh to the appellant on 20.05.2012 whereas,

on the said date, the appellant was not in town and had gone to his native village to attend to the last rites of his mother who had died on 13.05.2012. In conclusion, he submits that this is a case of the appellant, who is an illiterate person employed as a Beldar (Class-IV employee) in the South Delhi Municipal Corporation, being duped by the respondent whose criminal complaint under Section 138 of the NI Act already stands rejected and that, therefore, this is a case where the appellant is entitled to an unconditional leave to defend. Mr. Rao, thus, prays that the impugned order be set aside.

9. On the other hand, Mr. Rajashekhar Rao, learned counsel for the respondent supports the impugned order and submits that there is absolutely no infirmity with the well reasoned order passed by the learned Trial Court declining to grant leave to defend to the appellant. He submits that the learned Trial Court had rightly come to the conclusion that the appellant was trying to raise wholly false and contradictory pleas evident from a comparison of his police complaint dated 29.07.2003 and his leave application. Though the appellant, in his leave application, has taken a stand that he had never taken any loan from the respondent; in his police complaint, he has made a categorical statement that he had borrowed only a total sum of Rs.3 lakh from the respondent. In furtherance of this contention, the learned counsel also draws my attention to the appellant's reply dated 26.08.2013 to the respondent's legal notice stating therein that he had obtained a loan of Rs.1 lakh from the respondent's father. Mr. Rao further submits that the reliance by the appellant on the RBI notification or his plea regarding his participation as a member of a chit fund committee being run by the

respondent's father are merely an afterthought which, by the virtue of not being raised in the application for leave to defend, ought not to be considered by this Court. By placing reliance on the decision of the Supreme Court in **IDBI Trusteeship Services Limited vs. Hubtown Ltd.**, [(2017) 1 SCC 568], learned counsel for the respondent contends that once it is evident that the appellant has no substantial defence and that his defence is wholly frivolous and vexatious, the learned Trial Court was right to refuse him leave to defend. He, therefore, prays that the appeal be dismissed.

10. I have considered the submissions of the learned counsel for the parties and, with their assistance, perused the record.

11. The foremost fact which needs to be noted is that the respondent claims to have given the entire loan amount to the appellant in cash, without obtaining any receipt or acknowledgement reflecting such a transaction. While the appellant has not disputed either the issuance of the cheque or his signature thereon, he has specifically claimed that the cheque was never given to the respondent, but was given to his father in the year 2007 itself, as security for the chit fund amount which stood repaid. It also emerges from the record placed before me that the name of UTI Bank Ltd. stood changed to 'Axis Bank Ltd.' in 2007 itself, yet the cheque dated in the year 2013 - which the respondent claims as having been issued by the appellant, was still drawn on a chequebook of UTI Bank Ltd.

12. The fact, however, remains that the appellant's application and supporting affidavit filed under Order XXXVII Rule 3 (5) CPC for leave

to defend neither refers to any so-called chit fund committee run by the respondent's father, nor does it refer to the fact that the name of UTI Bank Ltd. had undergone a change in the year 2007 itself - which pleas have been raised for the first time before this Court. Nevertheless, the said affidavit states, in no uncertain terms, that the transaction of loan set up by the respondent was concocted and fabricated, and that nothing had been pointed out as to why the appellant would take such a huge amount of loan from the respondent or as to why the respondent had advanced such loan to him, that too, without any receipt/acknowledgment of the same. Relevant extracts of the said affidavit read as follows:

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*5. That I say that defendant has not taken amount and it is pertinent to note that the plaintiff has not submitted any document of receipt which was executed by the defendant. That plaintiff has issued the wrong statement of account of transaction which has not taken place between the plaintiff and defendant and falsity of the plaintiff are apparent on the face of records and it is pertinent to mention here that there is no express or implied agreement between the plaintiff and defendant and without any necessity the alleged the loan was advanced and hence the claim of the plaintiff is without basis.*

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*It is pertinent to mention here that no sensible person can advance the loan as mentioned above to a person who has defaulted many times and has not returned the loan amount and no sensible reason has been shown there is no agreement, no bank transaction and no cash receipt executed by the defendant, whole transactions are concocted, fabricated and no money has exchanged*

*between the plaintiff and defendant as alleged. It is also pertinent to mention here that none of the above transactions were reflected in the income return of the plaintiff.”*

13. In these circumstances, when I consider the defence raised by the appellant viz. the respondent's claim that the entire purported loan amount was given by him to the appellant in cash without taking any receipt/acknowledgement from him, as also the fact that the respondent's criminal complaint filed under Section 138 of the NI Act, 1881 stands rejected in respect of the same cheque, I am unable to agree with the learned Trial Court that the appellant does not have any defence whatsoever or that his defence is wholly vexatious. In my view, merely because the appellant has, in his police complaint, referred to some loan being taken by him from the respondent and his brother, it cannot be said that his plea in the application for leave to defend that no loan amount had been given to him by the respondent is wholly incorrect. The learned counsel for the appellant has sought to explain the appellant's stance in the aforesaid police complaint by contending that the same was not only qua the respondent but also his brother, to whom a sum of Rs.2.5 lakh already stood paid; and therefore, no further amount remained payable. While considering this explanation, I cannot also lose sight of the fact that the appellant is an illiterate person working as a Beldar in the South Delhi Municipal Corporation. Therefore, it cannot be said that merely because the appellant failed to take the specific pleas, as urged before this Court, in his application/affidavit for leave to defend, that such omission should disentitle him altogether from being granted leave to

defend when the said affidavit clearly shows that he had, in no uncertain terms, stated that the whole transaction as set out by the respondent was concocted, fabricated and that no money had been exchanged between the parties.

14. It is a settled legal position that the discretion to be exercised, while considering a prayer for grant of leave to defend the suit, would depend on the peculiar facts of each case and that the same cannot be put in any straitjacket formula. If the Court finds that the defence is wholly moonshine and sham, then leave to defend is liable to be rejected; but if the defence is found plausible, though not very probable, the Court would be justified in putting the defendant on terms while granting leave to defend. In this regard, reference may be made to para 17.4 of the decision of the Supreme Court in **Hubtown Ltd.** (*supra*) on which reliance has been placed by the learned counsel for the respondent wherein it was observed as under:-

*“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.”*

15. When I examine the facts of this case in the light of the aforesaid legal position, I have no hesitation in coming to the conclusion that even though the appellant's defence may not be very probable, yet the same cannot be said to be wholly vexatious. The defence raised by the appellant is, no doubt, a plausible one and to reject the same as being

moonshine or wholly frivolous at this stage would lead to miscarriage of justice. Thus, despite the fact that the appellant did not raise these vital issues specifically in his affidavit for leave to defend, interest of justice demands that he be granted an opportunity to lead evidence in support of his defence, though the same has to be subject to conditions.

16. For the aforesaid reasons, the decision of the learned Trial Court declining to grant leave to defend to the appellant cannot be sustained. The appellant is granted leave to defend, subject to his depositing 50% of the principal amount with the learned Trial Court within eight weeks from today.

17. The impugned judgment and decree are set aside and the matter is remitted to the learned Trial Court for consideration of the matter afresh, in accordance with law. The appeal is allowed in the above terms and it is further directed that the suit be tried expeditiously and, preferably, within a period of one year.

18. It made clear that this Court has not expressed any opinion on the merits of the matter.

**(REKHA PALLI)**  
**JUDGE**

**JULY 08, 2019**  
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