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

*Judgment Reserved on: 26<sup>th</sup> July, 2019*

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*Date of Judgment: 14 November, 2019*

+ **FAO(OS) (COMM) 207/2018 and CM No. 35952/2018**

**M/S SHRI COLONIZERS & DEVELOPERS PVT LTD**

.....Appellant

Through: Mr. Raman Gandhi, Adv with  
Ms. Harsha Sharma, Adv

versus

**M/S FELICIA REALCON INDIA PVT LTD**

..... Respondent

Through: Ms. Mukti Chaudhry, Ms Niharika  
Khanna and Ms. Tejaswini, Advs

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**G.S.SISTANI, J.**

1. The present appeal is directed against the order dated 27.07.2018 passed by a learned Single Judge of this Court by which an application filed by the appellant herein under Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908 (CPC) has been decided and a conditional leave to defend has been granted, directing the appellant herein to deposit the entire amount of the subject matter of the suit filed by the respondent under Order XXXVII CPC for the sum of Rs. 3 crores.
2. Some necessary facts which are required to be noticed for the disposal of this appeal are that the respondent herein had instituted a suit for recovery for the sum of Rs. 3, 48, 70, 000/- against the appellant herein.

The suit was based on 3 cheques bearing numbers 066056 dated 10.01.2015, 066057 dated 20.01.2015 and 066058 dated 30.01.2015 drawn on Punjab National Bank, K.G.Marg, New Delhi for Rs. 1 crore each.

3. The appellant represented to the respondent to be engaged in bulk land acquisition and structure development which offered allied real estate services to its clients such as Township planning, marketing and sales support. The Directors of the appellant fraudulently represented to the respondent about their terms with the principal developer and manipulated the respondent to participate in the development project of high-tech Township which was being developed by M/s U.P. Infraestate Pvt. Ltd, a subsidiary of the appellant.
4. The Directors of the appellant induced the respondent to invest a sum of Rs.3 crores. The said amount of Rs.3 crores was handed over by the respondent vide cheques bearing numbers 000011 and 000012 for a sum of Rs. 1 crore each dated 31.07.2014 and number 000013 for a sum of Rs. 1 crore dated 07.08.2014 in favour of the appellant, although the appellant was only an economic entity created by directors of the appellant. The directors of the appellant assured the respondent that this amount will be refunded in the event if the joint ventures were not accomplished. The payment of Rs. 3 crores made by the respondent in favour of appellant was duly encashed by the appellant through its directors.
5. While analyzing the project details, it came to the knowledge of the respondent that the principal developer M/s Rivaj Infratech Private Ltd, who had permitted the development of township to the subsidiary of

appellant, had sued the appellant and its directors due to the unaccomplished transactions. Thus, all the representations given by appellant were bogus and sham. The respondent was induced by the directors of the appellant to part with a sum of Rs. 3 crores on a false representation about their contract with the developer and possibility of their success in carrying out the project of high-tech Township, Uttar Pradesh.

6. As per the agreed terms, the Directors of the appellant had assured the respondent to refund the amount of Rs. 3 crores in case the transaction was not accomplished. Therefore, the appellant, with consent and knowledge of its directors, issued the following cheques which were signed by one of the directors of appellant, details whereof are as under:
  - (i) Cheque no. 066056 dated 10.01.2015 for Rs 1 crore drawn on PNB Bank, K.G Marg, New Delhi.
  - (ii) Cheque no. 066057 dated 20.01.2015 for Rs.1 crore drawn on PNB Bank, K. G Marg, New Delhi
  - (iii) Cheque no. 066058 dated 30.01.2015 for Rs. 1 crore drawn on PNB Bank, K.G Marg, New Delhi.
7. It is the case of the respondent that aforesaid cheques were presented for encashment with the bankers of the appellant, however, the same were returned unpaid with the endorsement being 'insufficient funds'. It is also the case of the respondent that upon the dishonor of the cheques it had issued notices dated 03.04.2015 and 05.05.2015 calling upon the appellant to pay the amount of Rs. 3 crores within 15 days of receipt of the notice. Despite the notices having been received, no payments were

made which led to the filing of a summary suit by the respondent under Order XXXVII, CPC.

8. The appellant had filed an application seeking leave to defend. Various grounds were raised before the learned Single Judge including the ground urged before us that the respondent had approached the Court with unclean hands; the respondent had suppressed and withheld material documents, more particularly, an agreement dated 26.07.2014, pursuant to which the respondent had paid a sum of Rs. 3 crores. It is also contended that in addition to Rs. 3 crores which was paid, the respondent defaulted to pay a further amount as per the terms of the agreement and on account of breach, the appellant had forfeited the already paid amount of Rs. 3 crores. It has also been urged before us that the learned Single Judge has failed to notice the fact that M/s Shri Infratech Pvt. Ltd. was only a domain name and it is in fact not a company. It is also contended that parties were *ad idem* that the respondent was dealing with the appellant only and Rs. 3 crores were thus paid to the appellant. Post dated cheques which were handed over to the respondents were only for the purpose of providing security and were not to be presented for encashment. It is also contended that since the appellant has been able to raise a plausible defence it has a strong *prima facie* case and is entitled to an unconditional leave to defend.
9. Mr. Gandhi, learned counsel for the appellant, while relying on a decision rendered in the case of ***IDBI Trusteeship Services Ltd. Vs Hubtown Ltd.*** reported in AIR 2016 SC 5321, submits that the rights of the appellant herein would be seriously affected as the learned Single Judge has failed to take note of the fact that it is only upon the grant of

an unconditional leave that an opportunity for filing a written statement would be given. When the opportunity to lead evidence will be given the appellant would be in a position to show that the respondent had entered into an agreement with the appellant only and not the company which is not in existence. The appellant and 'Shri Infratech' are the same entities as Shri Infratech is registered trademark of the appellant and it is only upon leading of evidence that the appellant would be able to prove its case. Additionally, Mr. Gandhi submits that the appellant had to satisfy the court only with regards to the fact that a triable issue had been raised. He further submits that in the absence of an opportunity to lead evidence, the appellant could not quantify the loss suffered on account of the breach of the terms and conditions of the agreement dated 26.07.2014. The relevant paragraphs 12, 13 and 18 of the aforementioned judgment are reproduced below:-

“12. We find that Milkhiram’s case is in fact an important judgment on the scope of O.XXXVII of the CPC, and is not a judgment on principles to be applied under Section 115. This judgment, being a judgment of four learned judges of this court, set out, in paragraph 1, O.XXXVII, Rule 3 sub-rules (2) and (3) as amended by the Bombay High Court at the relevant time, as follows:

“(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(3) The defendant may at any time within ten days from the service of such summons for judgment by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge appear just.”

13. The trial court found that the defence disclosed by the affidavit required by sub-rule (3) was sufficient to grant leave to defend the suit, but as against a claim of Rs. 4,05,434.38/-, the Court ordered the appellant to deposit security worth Rs. 70,000/-. The first appeal having been dismissed, the Supreme Court had to decide whether it was incumbent upon the trial court to grant unconditional leave to defend, having found that a triable issue exists. Since this judgment is of seminal importance in deciding the issue raised before us, it is necessary for us to quote parts of this judgment, as follows:

“Learned counsel relied upon a decision of this court in Santosh Kumar v. Bhai Mool Singh [ (1958) SCR 1211] and particularly upon a passage at p. 1216. That was a case in which the Court of Commercial Subordinate Judge, Delhi, had held that the defence raised a triable issue but that defence was vague and was not bona fide because the defendant had produced no evidence to prove his assertion. For these reasons the court granted leave to defend the suit on the condition of the defendant giving security for the entire claim in the suit and costs thereon. This court held that the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible defence on those facts. If the court is satisfied about that, leave must be given unconditionally. This Court further held that the trial court was wrong in imposing a condition about

giving security on the ground that documentary evidence had not been adduced by the defendant. This Court pointed out that the stage of proof can only arise after leave to defend has been granted and that the omission to adduce documentary evidence would not justify the inference the defence sought to be raised was vague and not bona fide. While dealing with the matter Bose, J., who spoke for the Court observed (p. 1216):

“Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts.” The latter part of the observations of the learned Judge have to be understood in the background of the facts of the case this Court was called upon to consider. The trial Judge being already satisfied that the defence raised a triable issue was not justified in imposing a condition to the effect that the defendant must deposit security because he had not adduced any documentary evidence in support of the defence. The stage for evidence had not been reached. Whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of material placed before it the court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but

is improbable the court would be justified in coming to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. To hold otherwise would make it impossible to give effect to the provisions of Order 37 which have been enacted, as rightly pointed out by Bose, J., to ensure speedy decision in cases of certain types. It will be seen that Order 37 Rule 2 is applicable to what may be compendiously described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, money disputes between the parties are not adjudicated upon expeditiously. It is these considerations which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given should be subjected to a condition. It may be mentioned that this Court relied upon the decision in *Jacobs v. Booth's Distillery Co.* [(1901) 85 LT 262] in which the House of Lords held that whenever a defence raises a triable issue leave must be given and also referred to two subsequent decisions where it was held that when such is the case leave must be given unconditionally. In this connection we may refer to the following observations of Devlin, L.J. in *Fieldrank Ltd. v. Stein* [ (1961) 3 AELR 681 at pp 682-3] : “The broad principle, which is founded on *Jacob v.Booth's Distillery Co.* is summarised on p. 266 of the Annual Practice (1962 Edn.) in the following terms:

“The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition.” If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to

some comments that have been made on *Jacobs v. Booth's Distillery Co.* [(1901) 85 LT 262] They will be found at pp. 251 and 267 of the Annual Practice, 1962. It is suggested (see p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267 the learned editors of the Annual Practice have this note: "The condition of payment into court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the master 'is prepared very nearly to give judgment for the plaintiff.'" It is worth noting also that in *Lloyd's Banking Co. v. Ogle* 1 Ex. D. at p. 264 in a dictum which was said to have been overruled or qualified by *Jacob v. Booth's Distillery Co.* [(1901) 85 LT 262] Bramwell, B., had said that "...those conditions (of bringing money into court or giving security) should only be applied when there is something suspicious in the defendant's mode of presenting his case." I should be very glad to see some relaxation of the strict rule in *Jacob v. Booth's Distillery Co.* I think that any Judge who has sat in chambers in RSC, Order 14 summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency;" These observations as well as some observations of Chagla, C.J., in *Rawalpindi Theatres Private Ltd. v. Film Group Bombay* [ (1958) BLR 1373 at p 1374] may well be borne in mind by the court sitting in appeal

upon the order of the trial Judge granting conditional leave to defend. It is indeed not easy to say in many cases whether the defence is a genuine one or not and therefore it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to Order 37 Rule 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the Order applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application.”

18. Accordingly, the principles stated in paragraph 8 of Mechelec’s case will now stand superseded, given the amendment of O XXXVII R(3), and the binding decision of four judges in Milkhiram’s case, as follows:

- a. 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;
- b. 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;
- c. 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;
- d. 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.
- e. 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;

f. 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.”

10. Learned counsel appearing for the respondent submits that there is no infirmity in the order passed by the learned Single Judge. The defence sought to be raised by the appellant is sham and moonshine. It is submitted that it is not in dispute that the respondent had paid a sum of Rs. 3 crores to the appellant. It is also not in dispute that three post dated cheques were issued by the appellant in favour of the respondent. Learned counsel further submits that when the aforesaid three cheques were presented before the bank, the same were dishonoured with the remarks ‘insufficient funds’. Ms Chaudhary further contends that post dishonour of the cheques, the respondent had sent two legal notices dated 03.04.2015 and 05.05.2015, to the appellant to which no reply was received. She further submits that in case there was any merit or truth in the defence sought to be raised, the appellant at the first opportunity available would have refuted the claim of the respondent and would have set up the defence as sought to be raised today. She submits that for the appellant to say that the agreement entered into between the respondent and M/s Infratech Pvt. Ltd was in fact entered into with the appellant is factually incorrect, as no evidence can be led with respect to the written agreement. Ms Chaudhary further contends that as far as the submission of the appellant with regard to M/s Shri Infratech Pvt. Ltd. being only a registered wordmark is concerned, the

constitution of the aforesaid company would only be within the personal knowledge of the appellant. She further contends that a reading of the preamble of the agreement dated 26.07.2014 would show that M/S Shri Infratech has been described as a private limited company and the agreement has been signed through its subsidiary namely M/s U.P. Infraestate Private Limited, the company which had signed a joint development agreement with M/s Rivaj Infratech Pvt. Ltd. Learned counsel contends that the agreement was signed by one of the directors of the appellant and thus he cannot plead ignorance with respect to the constitution and the legal status of M/s Shri Infratech Pvt. Ltd. Additionally, Ms. Chaudhary contends that the agreement dated 26.07.2014 nowhere reflects the payment of Rs. 3 crores made by the respondent to the appellant nor does this agreement reflect the issuance of post-dated cheques to the tune of Rs. 3 crores described as payment of security. She submits that the submissions so made are not born out of the record or any document and thus, even at the stage of evidence, the appellant would not be able to prove the nexus between M/s Shri Infratech Pvt. Ltd. and the payment made by the respondent to the appellant. Learned counsel further submits that the judgment sought to be relied upon by the appellant would in fact not apply to the facts of the present case in any manner. She also relies on paragraph 18(f), in the case of **IDBI Trusteeship Services Ltd.** (*supra*) as well as on proviso 2 of Rule 3(5) of Order XXXVII CPC, as it is contended that the payment of Rs. 3 crores made has been admitted by the appellant, which reads as under: -

“18f. 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.”

Rule 3(5) proviso 2 of Order XXXVII CPC:-“Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.”

11. Learned counsel for the appellant submits that the admission sought to be relied upon has been read out of context. The appellant has nowhere admitted that any amount is due and payable to the respondent and thus, the observations made in para 18(f) would not be applicable.
12. We have heard learned counsels for the parties and considered their rival contentions.
13. The learned Single Judge rendered a decision wherein a conditional leave to defend the summary suit was granted on a deposit of Rs. 3crores in an application seeking leave to defend filed by the appellant, which has led to the filing of the present appeal. The suit of the respondent is based on the aforesaid three cheques of Rs.1 crore each. As per the plaint, the defendant no.1 being the appellant herein is a private limited company acting through its Directors. On the representation and assurance of the directors of the appellant, the respondents paid a sum of Rs.3 crores by issuing three cheques of Rs.1 crore each, two dated 31.07.2014 and one dated 07.08.2014. The cheques were issued under the name of appellant on the assurance that

this amount would be refunded in the event the joint venture is not accomplished.

14. Admittedly, the aforesaid three cheques were encashed by the appellant. It is also not in dispute that since the parties could not proceed ahead in the project with the appellant, the amount of Rs.3 crores were returned back in the form of three cheques in the sum of Rs.1 crore each signed by the appellant. It is also not in dispute that the aforesaid cheques were returned with the remarks 'insufficient funds' on 12.03.2015, 08.04.2015 and 08.04.2015. A reading of the plaint also shows that upon receipt of the information regarding dishonour of cheques the respondent issued notices of demand dated 03.04.2015 and 05.05.2015. Despite receipt of the notices, the amount was not cleared by the appellant.
15. The leave to defend was sought on the ground that the appellants have raised triable issues which can only be decided after parties are allowed to lead evidence. Mr. Gandhi has placed strong reliance on the decision rendered by the Apex Court in the case of **IDBI Trusteeship Services Limited** (*supra*). Mr. Gandhi has submitted that M/s Shree Infratech Limited is only a wordmark of the appellant and the post-dated cheques issued in the favour of the respondent were in the form of a security. The respondents have concealed the information about the existence of an agreement dated 26.07.2014, pursuant to which Rs.3 crores were paid and since the respondents did not pay further amounts which were agreed to be paid, in fact the appellant had forfeited the sum of Rs.3 crores.

16. While there is no quarrel to the proposition of law laid down in the case of *IDBI Trusteeship Services Limited* (*supra*), the important aspect is that the application for leave to defend must raise triable issues. The application should be bona fide. The defence should not be frivolous, sham, moonshine, vague or simply with a view to prolong the litigation to prevent the plaintiff from an early decree. The Apex Court has repeatedly held that untenable and frivolous defence should be rejected and a speedy decision should be rendered in the interest of trade and commerce. In our view, the learned Single Judge has rightly held that the appellant has failed to raise any plausible defence or any triable issue, which would entitle him to an unconditional leave to defend. The appellants received a sum of Rs.3 crores and in return three post-dated cheques, duly signed by one of the directors of the appellant, were issued no.2. The same were deposited and were returned with the endorsement 'insufficient funds'. In case there was any merit in the defence sought to be raised today, the appellant would have, at first opportunity available, either stopped the payment of the post-dated cheques which were issued or at least replied to the legal notices and placed their objection and defence on record. The failure of the appellant to reply to the notices issued by the respondent clearly makes their defence sham, frivolous, untenable and moonshine.
17. In this backdrop, the submission of the learned counsel for the appellant that the learned Single Judge erred in not granting an unconditional leave to defend and further not granting an opportunity of leading evidence cannot be accepted. Once the amount of Rs.3 crores, based on which conditional leave has been granted, is deposited the appellant

would be entitled to file written statement and lead evidence. Thus, the appellant has failed to satisfy the Court that it has a substantial defence to be entitled for an unconditional leave to be granted.

18. We find no infirmity in the order passed by the learned Single Judge. Hence, the appeal stands dismissed.

**CM APPL 35952/2018 (stay)**

19. In view of the order passed in the appeal, the application also stands dismissed.

**G.S.SISTANI, J**

**SANGITA DHINGRA SEHGAL, J**

**NOVEMBER 14, 2019 //**