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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 09th July 2019

Judgment pronounced on: 9 December 2019.

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RFA(OS) 72/2018

CARGILL INDIA PVT LTD & ORS

..... Appellants

Through: Mr. Sandeep Sethi, Sr. Advocate
with Mr. Shadan Farasat, Mr.
Atif Shamim, Mr. Jasmeet Singh
& Ms. Rashmi Chopra,
Advocates.

versus

DEEPAYAN MOHANTY

..... Respondent

Through: Mr. Rohit Puri, Ms. Pragya Puri,
Mr. Mizan Siddiqui, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J.

1. This is an appeal against the judgment passed by a learned Single Judge of this Court in a suit instituted by the respondent under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") for recovery of Rs. 3,25,56,496/- along with interest. For the sake of convenience, the appellant shall be referred to as 'Cargill' and the respondent/plaintiff as 'DM'.
2. On 17.10.1996, DM joined the services of Bharat Cargill Holding Pvt. Ltd. as a Manager, Trade Finance. He completed his probation in the year 1997. Post confirmation, his services were transferred to Cargill. DM continued to serve Cargill till he resigned on 07.12.2009.
3. The suit of DM was based on a claim for bonus, which was guaranteed to him for the years 2006-2007, 2007-2008 and 2008-2009. The relevant

clause on which the deferred incentive was to be provided to an employee is extracted below along with the forfeiture provisions:

“DEFERRED INCENTIVES

Deferred incentives will be deferred for a period one (1) to three (3) Fiscal Years measured from the Grant Date of the award, as a function of the Individual Incentive Award amount, in accordance with the schedule below. Deferred Incentives will be paid out in annual installments over the deferred period. Each annual installment is computed by dividing the total outstanding Deferred Incentive balance (plus accrued interest thereon) as of May 31 preceding the relevant distribution date, by the years remaining in the deferral period.

<i>Individual Incentive Award</i>	<i>Deferred Incentive Percentage and Deferral Period</i>
<i>\$74,999 and below</i>	<i>0% No Deferred Incentive</i>
<i>\$75,000-\$199,999</i>	<i>50% of Individual Incentive Award deferred for 1 Fiscal Year from Grant Date</i>
<i>\$200,000-\$399,999</i>	<i>50% of Individual Incentive Award deferred for 2 Fiscal Years from Grant Date (2 annual payments)</i>
<i>\$400,000 and greater</i>	<i>50% of Individual Incentive Award deferred for 3 Fiscal Years from Grant Date (3 annual payments)</i>

Interest Rate Applied to Deferred Incentive

Deferred Incentive amounts will earn interest at the one-year USD LIBOR plus one percent per annum spread, which will be compounded annually. The USD LIBOR +1% will be set each Fiscal Year based on the prevailing one year USD LIBOR as quoted by Cargill Treasury on June 1st (or the next working day) of each succeeding Fiscal Year, Interest will be calculated annually over the remaining deferral period based on the remaining unpaid balance (including previous interest amounts calculated but not paid).

FORFEITURE PROVISIONS

Deferred incentives that have been awarded but not distributed will be forfeited if the Participant (1) is Terminated for Cause, or (2) (a) voluntarily separates from service with the Company or is Terminated for Sub-standard Performance, and (b) continues a career within the financial or commodity trading industry outside of the Company within a period of 2 years from the date of termination (referred to as the Two-year, Non-compete period). Continuance of a career within the financial or commodity trading industry is defined as employment by consulting with, establishing, or having a substantial ownership interest in any organisation, which competes with the Company for employees, customers, clients, market share, or financial/commodity resources or deals.

Deferred incentives will not be forfeited under the following circumstances:

- *A Participant's Reduction In Force (RIF), Disability or death.*
- *A Participant who voluntarily separates from service with the Company, Retires from the Company, or is Terminated for Sub-standard Performance and who does not compete within the Two-year, Non-compete period.*

In the event that a Participant seeks to engage in an activity or an employment relationship that may violate the Two-year Non-compete period, Participants may seek clarification relative to the acceptability of this relationship from the Business Unit or Platform leader.

PAYMENT SCHEDULE

Cash Awards

Cash Awards will be paid no later than August 15th after the Grant Date. For Non-US Participants, payment will be based on the foreign exchange rates in effect on the date to be specified in accordance with corporate policy. Non-US. Participants should confirm the payment date and foreign exchange rate with local Human Resources.

Deferred Incentives

1. For current Participants:

Deferred Incentive awards will be paid in one or more instalments (as applicable) over the Participant's respective deferral period. Payments will begin one Fiscal Year end following the Grant Date, and each payment will be distributed within 60 days of each Fiscal Year end.

2. For terminated Participants, due to a RIF, Disability, or death:

Deferred Incentive amounts will be paid within sixty (60) days of the date of RIF, Disability, Retirement or death ("Qualifying Event Date") as a lump sum payout of outstanding Deferred Incentive amounts due plus any accrued interest as of the Qualifying Event Date.

3. For all other terminated Participants, including Retirees, whose Deferred Incentives have not been forfeited in accordance with the Forfeiture provisions: Deferred Incentives will be paid within 60 days after the Two-year Non-compete Period expires at which time the Participant will receive a lump sum payout of outstanding Deferred Incentives and accrued interest. The final period accrual is calculated based on the timeframe between June 1st of the prevailing Fiscal Year and the day the Two-year Non-compete period expires.

Participants will be required to complete a statement to certify that they have successfully fulfilled the Two-year Non-compete period before they will be eligible for payment. The determination of whether or not the non-compete provisions have been successfully fulfilled will be determined at the sole discretion of the Business Unit Leader and Platform Leaders."

No Participant will be eligible to receive a distribution of any Individual Incentive Award other than as specified in this Plan."

4. According to the respondent, the following incentive awards for the 3 financial years as detailed above, stood vested in him and formed the basis of the suit filed under Order XXXVII of the Code:

“9. Thus, in order to summarize, the following Incentive Awards for the following years stood vested in Plaintiff:

(a) USD 525, 000 for the fiscal year 1st June, 2006 – 31st May, 2007;

(b) USD 510, 000 for the fiscal year 1st June, 2007 – 31st May, 2008; and

(c) USD 575, 000 for the fiscal year 1st June, 2008 – 31st May, 2009.”

5. After a period of two years came to an end, a communication dated 11.01.2012 was addressed to the respondent by the appellant calling upon him to provide details to enable the company to access his eligibility to receive the deferred award. However, no favourable response was received thereafter, and thus a legal notice was issued by the respondent on 23.05.2012 calling upon the company to release the incentive. This communication was replied to by a letter dated 06.06.2012 by which the appellants refused to pay the said amount. The respondent again vide letter dated 10.09.2012 called upon the appellant to release the amount of the incentive. The respondent was informed on 04.10.2012 that the deferred incentive amount was forfeited as per the forfeiture provisions of the grant of incentive awards. The appellant thus disputed and denied the incentive to the respondent relying on the forfeiture provision.
6. Respondent was dissatisfied with the denial of the incentives, and this led to filing of the suit under the provisions of Order XXXVII of the Code. The appellant No.1 filed an application seeking leave to defend which was dismissed and the suit was decreed in favour of the respondent with

interest at the rate of 12%. The present appeal arises out of the denial of leave to defend and passing of the decree.

7. Mr. Sethi, learned senior counsel appearing for the appellants submits that post the resignation of the respondent on 07.12.2009, the appellant learnt that during the period of employment, the respondent had indulged in carrying out business activities and that too competing business activities. This fact came to light when in a routine scan of the company's laptop, which was handed back by the respondent, it was discovered, on the basis of some e-mails that two companies had been floated by the respondent. These companies were established in the last few years of his employment with the appellant, to carry out competing business activities without the knowledge, consent and concurrence of the appellant and thus, a fraud was being played by the respondent upon the appellant, where he was gainfully employed.
8. In the leave to defend, emails exchanged between the respondent with one Divya Dhawan, who was a Director of the competing company were relied upon, certain other emails were also produced in support of the stand taken and defence raised seeking unconditional leave to defend. It was submitted that a company by the name of Kredence was floated, with two independent Directors. Another company by the name of Hamera Consulting India Pvt. Ltd., of which father of the respondent and one Divya Dhawan were the Directors, was also floated. Reliance was placed on an email dated 16.02.2009, more particularly a portion, which reads as: "Kredence was known to Cargill and was procuring clients for Cargill". In fact, the said e-mail shows that Kredence was introduced as an arms-length third party, along with other such third-parties, and not as

a company in which the respondent had any stake. The fact that the respondent ran Kredence means that the respondent was, at a minimum, making Cargill's clients pay his own company for doing business with Cargill, which was a conflict of interest of the highest order and never disclosed. Further, in the said email, the respondent stated that "this group is known to me for the last nine years", which suggests that this Group was independent of him.

9. Strong reliance was placed before us by Mr. Sethi, learned senior counsel appearing for the appellants, on an email dated 03.01.2008 sent by the respondent to Divya Dhawan, which we reproduce below:

"I could do only half work today—Have a look at the gantt chart. You would need to monitor the chart on venture progress and responsibility and keep remind people. As we move on we would need to fine tune the chart with various other milestones and targets and responsibilities. I have put my name as SK for hiding my name."

10. Mr. Sethi submits that the abovementioned e-mail would conclusively show that the respondent was simultaneously working for another company and he had every intention to conceal this fact which is evident by reading the last line of this e-mail, i.e. "I have put my name as SK for hiding my name". In the Gantt chart which forms part of this email, reliance is placed to show column 2 of the responsibilities and in almost every column, the name of SK figures either individually or along with DD which Mr. Sethi submits is none else but Divya Dhawan and one DK, who is D.K. Goswami. Another e-mail dated 07.04.2008 has been brought to our notice from the respondent to Divya Dhawan forwarding Air Tickets to her. Another email dated 15.09.2008 is relied upon which has been received by the respondent from one Bhushan which reads as

"Sir, go through the revised structure. Once Divya Dhawan puts her nod to this, we will put it on a formal paper". An attachment to this email is a salary structure of Divya Dhawan which is relied upon to show the connect between the respondent and Divya Dhawan. Subsequent emails have also been shown to us in support of the plea that prior to resignation and post the resignation, the respondent was carrying out competing business and thus, would be disentitled to the claim of bonus. Rather if the fact of the respondent indulging in a competing business had been unearthed by the appellant earlier it would have led to the termination of the services of the respondent and the respondent is not entitled to the claim raised by him in the suit filed under Order XXXVII of the Code.

11. Learned senior counsel submits that the appellant had raised a substantial defence; a plausible defence; a triable issue and thus was entitled to an unconditional leave to defend, a relief which could have only been denied in case the defence was illusory, sham or moonshine.
12. Learned senior counsel for the appellant places reliance on the judgment rendered by the Supreme Court in ***State Bank Hyderabad v. Rabo Bank***, (2015) 10 SCC 521, more particularly paras 13, 17, 18, 20, 22, which we reproduce as under:

"13. We have further noticed in the affidavit that the defendant has levelled an allegation that drawer and drawee of the Bills had perpetrated fraud on the defendant with the collusion of some officials of the plaintiff Bank and the CBI inquiry on this issue is also pending. Pertinently, the Reserve Bank of India has also been informed on this matter reporting that a fraud had taken place. It is also important to note the strong allegation raised in the affidavit that besides the Suit being barred by limitation, the persons who signed the plaint were not authorized or empowered to file the Suit.

17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment.

18. Insofar as the question of maintainability of the Suit in question under Order 37, CPC is concerned, this Court has in Neebha Kapoor Vs. Jayantilal Khandwala, 2008 (3) SCC 770 observed that where the applicability of Order 37 itself is in question, grant of leave to defend may be permissible. The Court before passing a decree is entitled to take into consideration the consequences therefor. The Courts dealing with summary trials should act very carefully taking note of the interests of both the parties. Merely on the ground that the defendant may resort to prolonged litigation by putting forth untenable and frivolous defences, grant of leave to defend cannot be declined. At the same time, the Court must ensure that the defendant raises a real issue and not a sham one. The Court cannot reject the defence on the ground of implausibility or inconsistency. Before recording a finding of granting leave to defend, the Court should assess the facts and come to the conclusion that if the facts alleged by the defendant in the affidavit are established, there would be a good or even a plausible defence on those facts.

20. We are in total agreement with the view taken by this Court in Raj Duggal Vs. Ramesh Kumar Bansal, 1991 Suppl.(1) SCC 191 that leave to defend the Summons for Judgment shall always be granted to the defendant when there is a triable issue as to the meaning or correctness of the documents on which the claim is based or the alleged facts are of such nature which entitle the defendant to interrogate or cross-examine the plaintiff or his witnesses.

22. Apart from these, the substantial revelations of the defendant (appellant) in the affidavit coupled with the views expressed by the Division Bench of the High Court makes it clear that there are certain triable issues for adjudication and the defendant/appellant is entitled to defend the Suit. The appellate side of the High Court ought to have taken into consideration the factual matrix of the case before recording its finding. Taking into consideration the totality of the facts and circumstances of the case, we are of the opinion that the defendant/appellant has made out a prima facie case of triable issues in the Suit which needs to be adjudicated. Therefore, the defendant is entitled to grant of unconditional leave to defend the Suit.”

13. Learned counsel for the appellant has also placed reliance on the judgment rendered by the Supreme Court in ***State of Saurashtra v. M/S Ashit Shipping Services (Pvt.) Ltd.***, 2002) 4 SCC 736, more particularly paras 12, 13, 15, 16, which we reproduce hereinunder:

“12. In this case, as already set out hereinabove, there is a dispute as to whether the document is a guarantee or merely an Indemnity. The 1st Respondent termed the document to be an indemnity/guarantee. The Appellants denied that the document was a Guarantee. On the face of it the document appears to be an Indemnity and not a Guarantee. The Court was therefore required to consider the nature and meaning of the document. This by itself necessitated granting of leave to defend.

13...The Appellants have made serious allegations of fraud and collusion. They had stated that such a document did not exist in their records. This was not a defence which could be characterised, at this stage, as sham or illusory or practically moonshine. These triable issues should not have been summarily rejected by the trial Court and/or the High Court.

15.. In the present case, it is not clear whether the document is an indemnity or a guarantee. In any event, there is no unconditional bank guarantee. Even if the document is held to

be a guarantee it is only on proof of loss. Also in this case fraud has been alleged. Thus the authority is of no assistance to the 1st Respondent.

16. In our view, for the aforesaid reasons, leave to defend could not have been refused to the Appellants. We therefore set aside the impugned Judgment dated 18th April, 2001 and the trial Court Order dated 30th October, 1996 and grant the Appellants leave to defend the suit. They shall file their written statement within a period of 8 weeks from today. The parties are at liberty to disclose documents within 4 weeks thereafter. The parties are at liberty to apply to the trial Court for expeditious hearing of the suit.”

14. Reliance is also placed on the judgment rendered by the Supreme Court in ***Raj Duggal v. Ramesh Kumar Bansal*** reported at 1991 Supp. (1) SCC 191 wherein it was held that summary judgments under Order XXXVII of the Code should not be granted where serious conflict as to matter of fact or on issues as to law arise and the court should not reject the defence of the defendant merely because of its inherent implausibility or inconsistency.
15. Reliance is also placed by the learned senior counsel for the appellants on ***Sunil Enterprise v. SBI Commercial and International Bank Ltd***, (1998) 5 SCC 354; ***S.P. Chengalavarya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs***, (1994) 1 SCC 1; ***IDBI Trusteeship Services Ltd. v. Hubtown Ltd.***, (2017) 1 SCC 568; ***Percept D'Mark India Pvt. Ltd. v. Zaheer Khan***, (2006) 4 SCC 227; ***Patel Roadways v. Prasad Trading***, (1991) 4 SCC 270 and a judgment rendered by the Court of Appeal of Singapore, ***Mano Vikrant Singh v. Cargill TSF Asia Pte. Ltd.***, [2011] SGCA 42.

16. It is also submitted by the learned senior counsel for the appellants that the incentive awards did not contain any clause pertaining to the jurisdiction or choice of law and the said awards were issued by appellants No.2 and 3 having no operational business in India. Therefore, with respect to any disputes arising out of the said incentive awards, neither Indian law would apply nor Indian courts would have jurisdiction. It is further submitted that the respondent never worked in New Delhi and all the communications received by him were at the office of the appellants at Gurgaon. Thus, the learned Single Judge erred in not granting a leave to defend to the appellants to try whether or not any part of cause of action arose in New Delhi.
17. *Per contra*, Mr. Puri, learned counsel for the respondent submits that there is no infirmity in the impugned order. The Single Judge has rightly dismissed the application seeking leave to defend filed by the appellant herein and has rightly decreed the suit.
18. Learned counsel for the respondent submits that the respondent worked with Cargill Group for thirteen years and three months and was the head of the TSF Business at the time of his resignation. During his employment, appellant No. 2 awarded Incentive Award of USD 525,000 for the fiscal year 2006-07. In recognition of the hard work, long hours and dedication of the respondent, the appellants informed the respondent that he shall be receiving a bonus award of USD 510,000.00 for the fiscal year 2007-08. Despite the financial crisis of 2008-09, the TSF Business headed by the respondent in India earned globally USD 226 million. Therefore, in recognition of the respondent's commitment, the appellants by a communication dated 27.07.2009 informed the respondent that he

shall be receiving a bonus award of USD 575,000.00 for fiscal year 2008-09. The terms and conditions of all three Incentive Awards are identical. As per the intimation letter, 50% of the award was paid upfront and the balance 50% was paid over the next two years. The payments were made by appellant No. 1 from its office in Delhi to the respondent in Delhi.

19. Learned counsel further submits that the respondent resigned from the appellant No. 1 on 07.12.2009. The resignation was accepted effectively on 07.01.2010. On 11.01.2012, the appellants called upon the respondent to verify his compliance with the Terms and Conditions of the Incentive Award. The respondent submitted a declaration dated 24.01.2012 wherein he informed the appellants about his appointment in Hemera Global Trade Private Limited and Hemera India Private Limited. Thereafter, by an undated letter, the appellant refused to pay the Deferred Incentive award. No reasons were given by the appellant for refusing to give the deferred amount which already stood vested in the respondent, much less the reason of forfeiture or alleged fraud.
20. It is further contended by the learned counsel for the respondent that the respondent issued a legal notice dated 23.05.2012 to the appellant demanding the outstanding amount. The appellant refused to pay as stated in their reply dated 06.06.2012. In order to avoid litigation and to prevail upon the appellants, the respondent by letter dated 10.09.2012 again reiterated his request for release of the deferred amount. Thereafter, a notice dated 12.09.2012 under Sections 433 and 434 of the Companies Act, 1956 was issued by the respondent. The appellant by a letter dated 04.10.2012 refused to pay the outstanding amount and for the first time informed the respondent that his deferred amount has been forfeited as

per the forfeiture provision of the Incentive Awards. Thus, the respondent filed a civil suit for recovery of Indian Rupee equivalent of USD 545,000.00, along with USD LIBOR+1%.

21. It is submitted by the learned counsel for the respondent that the Forfeiture Provision is violative of Section 27 of the Contract Act, 1872 and thus, was rightly declared as unenforceable by the learned Single Judge. It is submitted that the Forfeiture Provision restrains the respondent from continuing his career after quitting the job with the appellant. The said provision provides that if the respondent works in financial or commodity trading within two years of leaving the appellant, the deferred incentives, which stood vested in him, shall be forfeited. This is in clear violation of Section 27 of the Contract Act, 1872 as it restrains the respondent from working in the industry of his skill and expertise. Reliance is placed on paras 56 and 63 in the case of ***Percept D' Mark India Private Ltd v. Zaheer Khan***, (2006) 4 SCC 227.
22. Reliance is also placed on the judgment rendered by the High Court of Andhra Pradesh in C.C.C Appeal No. 215 of 1982 in the case of ***Bakelite Hylam Ltd v. S.J. Hasan***, wherein the Court declared a rule which allowed the employer to forfeit gratuity in a case where the employee engages in competitive activity as void, as it was violative of Section 27 of the Contract Act, 1872.
23. It is further submitted that once the appellants declared that the respondent shall receive the Incentive Award, the Incentive Award vested with the respondent. It belonged to the respondent. The appellants recognised that the Incentive Award belongs to the respondent and agreed to pay interest on the portion of the amount retained by the

appellants till such time it was released. The appellant could not place fetters in releasing the Award, especially those which are unenforceable.

24. Reliance is placed on a judgment rendered by the Court of Appeal, Singapore in the case of *Mano Vikrant Singh v. Cargill TSF Asia Pte Ltd*, [2011] SGCA 42, wherein the appellant No. 3 herein was one of the appellants therein. The Court dealt with identical clauses as in the present case and held that the same are in restraint of trade. Subsequent to this judgment, Cargill TSF Asia Pte Ltd has released such vested amount of all ex-employees in Singapore including the said Mano Vikrant Singh. It is contended by the learned counsel for the respondent that by not applying the same rule for respondent, the discriminatory mindset of the appellant is demonstrated for their Indian employees.
25. It is contended by the learned counsel for the respondent that although the appellants allege that they learnt about the respondent incorporating a competing company "few weeks after January 2010", however, no action was taken by them against the respondent either for recovery of 50% of the Incentive Award already paid or for alleged breach of contract. Instead, the appellants under their usual process for payment of deferred vested amount, called upon the respondent on 11.01.2012 for submitting the necessary affidavit for such payment. It is contended that the refusal to pay the Deferred Incentive was not on the ground of alleged fraud. Even in the pre-lis communications, the appellants never alleged that Deferred Incentive has been denied because respondent allegedly incorporated competing companies during his employment. In the reply by the appellants, dated 07.06.2012, more than two years after they supposedly discovered the alleged actions of the respondent, not a

whisper was made that the respondent incorporated companies during his employment. Again, in the reply dated 04.10.2012, no such allegation was made by the appellant. It is contended by the learned counsel, that the said allegation is an afterthought and made only to deny the amount rightly entitled by the respondent.

26. It is further contended by the learned counsel for the respondent that Kredence Global Services Private Limited (now known as Hemera Global Trade Private Limited) was incorporated on 30.03.2009 by Sangeeta Lekhi and Sanjay Israni, people unrelated to the respondent. In so far as Hemera Consulting India Private Limited is concerned, the same was established on 28.07.2008 by Mr. Sibaram Kumar Mohanty and Divya Dhawan. The respondent became a Director in Hemera Global Trade Private Limited on 01.07.2010, long after leaving the appellants. The respondent never worked for Kredence during his employment with the appellants. The respondent introduced Kredence Global to the appellants by his e-mail dated 16.02.2009. It is contended that the role of Kredence was to introduce clients to the appellants and that no money was paid by the appellants to Kredence.
27. It is thus submitted by the learned counsel for the respondent that there is no triable issue raised by the appellants. The issues raised by the appellants are sham, and are purely aimed at frustrating the respondent, who is an individual with limited resources, by delaying justice. The Single Judge rightly dismissed the application of the appellants for leave to defend the suit.
28. With regard to the plea of territorial jurisdiction, it is contended by the learned counsel for the respondent that the plea of territorial jurisdiction

was not pressed by the appellants before the Single Judge and thus the appellant is now estopped from raising the said plea at the appellate stage. Further, he submits that this Court has territorial jurisdiction because not only was the respondent working in the Delhi office of the appellant, but the payments were made to the respondent from the office of appellant in Delhi. The payment was made from the bank account of the appellant in Delhi to the bank account of the respondent in Delhi. This Court, thus, has a territorial jurisdiction. In any event, it is submitted that a plea of jurisdiction is not a defence to seek leave to defend a summary suit.

29. Reliance is placed by the learned counsel for the respondent on a decision rendered by this court in ***Punjab and Sind Bank v. S.K. Tulshan***, ILR 1991 Delhi 293, wherein it was held as under:

“12. So, no benefit can be taken from the law prevalent in England as the provision of summary suits in England appear to be different from the provisions contained under Order 37, Civil Procedure Code. It is also to be kept in view that the defendant is not legally bound to file any counter-claim. Assuming for the sake of argument that the defendant is granted leave to defend on the assumption that he has some prima facie good case for raising a counter-claim against the plaintiff and the defendant, after the grant of leave to defend, fails to file the counter-claim. In that situation, it is not explained by learned counsel for the defendants as to what the court could do if no trial is to take place in respect of the counter-claim; the grant of leave to defend to the defendant becomes illusory causing unnecessary delay in the disposal of the summary suit. As already mentioned above, the provision of Order 37, on the face of it, did not contemplate entertainment of any counter-claim from the defendant. If the defendant has any such counter-claim against the plaintiff, he can very well bring a separate suit in that respect. If the Legislature had intended that the plea of the defendant regarding his counter-claim should also be taken note of while deciding the application for leave to defend, it

would have made its mind clear by incorporating the same language under Order 37(3) (5) as it appears in the English law. So the omission of the Legislature to use the same language under Order 37, Civil Procedure Code, as is there under the English law, would rather support the contention of learned counsel for the plaintiff that the Legislature did not intend that the plea of a counter-claim should be entertained in a suit brought under Order 37, Civil Procedure Code

13. It is also pertinent to mention that, in the case of Krishan and Company v. Bank of India (RIA) (O.S. No. 10 of 1981 - decided on August 25, 1982), the single judge has held that there could be no adjustment of the claim for damages against the loan meaning thereby that no counter-claim was entertainable in a summary suit under Order 37, Civil Procedure Code, till leave to defend the application is allowed. The Division Bench did not express any view on this aspect of the case because the Division Bench held that the counter-claim on the face of it was barred by limitation. Hence the Division Bench did not go into the question whether the plea of counter-claim should be entertained while deciding the leave to defend application in a summary suit or not.

16. I am of the view that, in any suit brought under Order 37, Civil Procedure Code, while considering the facts mentioned in the affidavit of the defendant seeking leave to defend the suit, the court is not to consider the facts which may entitle the defendant to file any suit for damages against the plaintiff's claim or a counter-claim on the same aspect."

30. It is contended by the learned counsel for the respondent, that in the present appeal, the issue before this Court is entirely separate. The appellants herein, did not seek leave to defend on the ground that they had a right to file the counter-claim, nor did they make an averment to the effect that they wished to file a counter-claim. The grounds on which the appellant herein had sought leave to defend was that the respondent herein was not entitled to the amount claimed by him in the summary suit

as he had violated the terms of the agreement on the basis of which he was claiming the said amount, and that he had committed fraud against the appellants by running two companies while being in the employment of the company.

31. Mr. Sethi, learned senior counsel for the appellants, in rejoinder, submits that the judgment rendered by this court in the case of *S.K. Tulshan* (supra) is inapplicable to the facts of the present case, as it concerns a distinct and unrelated issue of law. In the said judgment, the defendants therein sought leave to defend on the ground that they were entitled to a counter claim, and hence they should be granted unconditional leave to defend. The defendants therein sought to file a counter-claim, and submitted that their action in filing such a counter-claim in itself was the ground on which unconditional leave to defend the suit brought against them should be granted. This Hon'ble Court, in the said judgment, held on this specific question that the defendants could not be granted unconditional leave to defend on the ground, that a counter-claim could be filed by the defendant. The Hon'ble Court did not consider any other legal issue as no other issue was raised.
32. We have heard the learned counsel for the parties and considered their rival submissions.
33. The defence of the appellants (defendants before the Single Judge) is based on the Forfeiture Provisions of the Terms and Conditions of the Incentive Awards, which we have extracted in the foregoing paragraph 3. It is our considered opinion Order XXXVII of the Code is a very stringent provision. The important aspect is that the defendant loses his right to file the written statement and lead evidence unless he is able to

establish triable issues and a reasonable defence. Therefore, while the application for leave to defend should be bona fide, the provision has been introduced to dissuade a litigant with no defence or a defence which is 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. However, the court must carefully examine the application seeking leave to defend.

34. In this backdrop, the short question which arises for our consideration is whether the appellant has been able to raise a reasonable defence giving rise to a triable issue or not.
35. The present appeal is to be decided on the touchstone of law laid down by the Apex Court in the case of ***IDBI Trusteeship Services Limited*** (*supra*), in regard to the scope of Order XXXVII Rule 3 of the Code. The relevant paragraph 17 read as under:

“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.”

36. As per para 17.1 of the aforesaid decision, in case, the defendant satisfies the court that he has a substantial defence and he is likely to succeed, he would be entitled to an unconditional leave to defend the suit. However, in case, the defendant raises a triable issue indicating that he has a fair or reasonable defence, although not a positively good defence, the defendant would ordinarily be entitled to an unconditional leave to defend. The Supreme Court has further held that in case the defendant raises a triable issue and there is a doubt in the mind of the trial Judge about the good faith of the defendant or genuineness of the triable issue, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court, or furnishing security, keeping in mind that the object of the provision to assist expeditious disposal of commercial

causes is not defeated while taking into consideration that such triable issues are not shut out by unduly severe orders as to deposit or security.

37. As per para 17.4, it has been held by the Supreme Court that should the defendant raise 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. It is only in cases where no substantial defence is raised or no genuine triable issues are raised and the court finds such defence to be frivolous or vexatious, then leave to defend the suit would be refused and the plaintiff would be entitled to judgment forthwith.
38. In the present case, the learned Single Judge reached a conclusion that the defendant has not raised any substantial defence much less any triable issue, and the defence being frivolous and vexatious, the application for leave to defend stood rejected.
39. The appellants have raised a defence that the respondent, while being an employee of appellant No. 1, engaged himself in a competing business activity with other companies, thereby acting in gross violation of the terms of the employment i.e. the Employee Confidential Information and Invention Agreement dated 14.10.1996, Employee Confidential Information, Inventions and Original Works of Authorship Agreement dated 02.07.2003, the Terms and Conditions of the Incentive Awards for each of the three years. The defence was also that the respondent had played fraud on the appellants by concealing the fact of establishing a competing company and directing business opportunities away from the appellants towards the competing company, without the knowledge or approval of any of the appellant companies. It is further stated in the leave

to defend that the appellants became aware of the said actions of the respondent after scanning the laptop on the basis of e-mails, that the respondent had established a company in the beginning of 2008, by the name of M/S Kredence Global Services Pvt. Ltd, acting through his close associates Mr. D.K. Goswami and Ms. Divya Dhawan, the Directors in the company. The e-mails dated 03.01.2008, 08.01.2008, 19.02.2008, 07.04.2008, 15.09.2008, 08.02.2009, 09.02.2009, 14.03.2009, 18.03.2009, 20.03.2009, 15.05.2009 29.06.2009, 15.07.2009, 17.09.2009, 23.09.2009, 11.12.2009 are directed either to or from the respondent to various individuals and entities, which prove that the respondent had the main role in the establishment of M/S Kredence Global Services Pvt. Ltd.

40. As per the averments made in para 5 of the plaint filed by the respondent herein before the learned Single Judge, it is the case of the respondent that in recognition of the respondent's hard work and commitment towards defendant No.1 (appellant No.1 herein), the respondent was given an incentive award for the fiscal period commencing from 1st June to 31st May each year, depending upon the revenue generated by the TSF business. The payment of the said incentive award was in two parts as 50% of the incentive was paid in cash and the balance 50%, although stood vested in the respondent, was deferred over a period of three years. It has also been averred in the plaint that on account of hardwork, long hours and dedication of the respondent, TSF business generated USD 335 MM of revenue and accordingly, in recognition of the commitment of the respondent, he was awarded by the Group a bonus of USD 510,000 for 2007-2008 fiscal year. It is in this backdrop that the learned Single Judge

reached a conclusion that the amount claimed by the respondent against the appellant No.1 is a 'Deferred Incentive' which was awarded to an employee as a reward for good performance during the course of his employment. It is an admitted position that the amount was awarded in full in favour of the respondent, only the payment was postponed partially; and for the postponement of the payment, interest was also to be paid by the appellant to the respondent. Therefore, the learned Single Judge observed that the amount, in fact, belonged to the respondent and stood vested in him.

41. Per contra, the stand of the appellant (defendant in the suit) is that this amount would be payable as an incentive as averred in paras 5 and 6 of the plaint in recognition of the respondent's hard work, dedication and commitment towards the appellant. The stand of the appellant herein is that the respondent played a fraud upon the company while working for the company and during the working hours with the company, carried out competing business against the employment agreements dated 24.10.1996 and 02.07.2003 and thus, it cannot be said that this amount lawfully vested with the respondent.
42. There cannot be a quarrel with the proposition laid down in para 18 of the judgment dated 03.08.2018 that that there is no bar for the employee to engage in a competing business after the employment period is over and any covenant, in restraint of trade, would be bad in law. The said proposition has been elaborately discussed in a decision rendered by the Apex Court in the case of ***Percept D'Mark (supra)***. Paragraphs 54, 56 and 63 are reproduced hereunder:

“54. On the pleadings contained in the arbitration petition, there can be no escape from the conclusion that what the

appellant sought to enforce was a negative covenant which, according to the appellant, survived the expiry of the agreement. This, the High Court has rightly held is impermissible as such a clause which is sought to be enforced after the term of the contract is prima facie void under Section 27 of the Contract Act.

...

56. The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within express exception engrafted in Section

...

*63. Under Section 27 of the Contract Act: (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable, (b) the doctrine of restraint of trade does not apply during the continuance of the contract for employment and it applies only when the contract comes to an end, (c) as held by this Court in *Gujarat Bottling v. CocaCola* [(1995) 5 SCC 545] this doctrine is not confined only to contracts of employment, but is also applicable to all other contracts.”*

43. However, this proposition cannot help the respondent as the case of the appellants was that if the appellants were aware about the gainful association of the respondent in a competing business during his employment, the respondent would have been terminated and there would be no question of his entitlement for the incentives. We are of the view that the said defence falls under paragraphs 17.3 and 17.4 of the judgment in the case of ***IDBI Trusteeship Limited*** (*supra*). Thus, the defence of the appellants is a plausible defence comprising of a triable issue and is not sham or moonshine. Thus, the appellants should be given

an opportunity to prove their defence. In regard to the objection of the appellants pertaining to the territorial jurisdiction of this Court, we deem it appropriate to leave the same open for consideration before the Single Judge.

44. In our considered view, the learned Single Judge erred in dismissing the application seeking leave to defend. Since the defence of the appellant is a plausible defence and it has raised a triable issue. The appellants herein are granted a conditional leave to defend the suit, subject to deposit of Rs.3,25,56,496/- within 8 weeks from today with the Registrar General of this Court and on deposit, the amount shall be converted into FDR for one year with an automatic clause of renewal. If the deposit of Rs. 3,25,56,496/- is not made within the stipulated period of time, the leave to defend shall be deemed to be rejected and the suit shall stand decreed in favour of the respondent for the same amount along with interest @6% per annum from the date when the amount became due i.e. 10.01.2012, till the date of realisation.

45. List before the Single Judge for further directions on 30 January 2020.

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46. In view of the order passed in the appeal, the applications also stand disposed of.

G.S.SISTANI, J

JYOTI SINGH, J

DECEMBER 9, 2019//