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

Date of Decision: 15th December, 2020

+ **C.R.P. 81/2020 & CM APPLs. 32670-72/2020**

RAJ KUMAR

..... Petitioner

Through: Mr. Lakshya Dheer & Mr. Piyush
Gupta, Advocates (M-9680592949).

versus

LATAFAT

..... Respondent

Through: Mr. Nizamuddin, Advocate.
(M:9810575581)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done by video conferencing.
2. The present petition challenges the impugned order dated 17th March, 2020, passed by the ADJ-05, South East District, Saket Courts, by which the Trial Court has granted conditional leave to defend to the Petitioner/Defendant in the suit.
3. A suit for recovery for a sum of Rs.9,50,000/- was filed by the Respondent/Plaintiff. The transaction was an agreement to sell based on certain documents in respect of the property measuring 92 sq. yards, bearing Khasra/Khewat no. 241/192, Khatoni no. 363/33, M. No. 15 Killa No. 15 (8-0) 16 (8-0), M. No. 23 Killa No. 6 (8-0), situated in the area of Mouja Agwanpur Abadi , Tehsil & Distt. Faridabad, Haryana (*hereinafter, "suit property"*). According to the Plaintiff, a sum of Rs.9,50,000/- was paid to the Defendant and in turn a promissory note and other documents like GPA, Agreement to sell and Receipt was executed. The Defendant, however, took

the position that the signatures on all the documents are not genuine and challenged the existence of the transaction itself. The Trial Court, after hearing the parties granted leave to the Defendant, via the impugned order, subject to a deposit of a sum of Rs.9,50,000/- in an FDR.

4. The submission of Mr. Lakshya Dheer, Id. counsel for the Petitioner, is that the promissory note does not contain the thumb impression of the Plaintiff/ Respondent, and in any case, the Defendant has very seriously challenged the genuineness of all the documents filed by the Plaintiff, before the Trial Court. He relies upon the judgment of the Gujarat High Court in ***Jashbhai Motibhai Patel v. Hasmukhbhai Rajivbhai Patel (AIR 1992 Guj 115)***, to argue that in such a fact situation, an unconditional leave ought to have been granted.

5. Mr. Nizamuddin, Id. counsel for the Respondent/ Plaintiff, upon a query from the Court, submits that the entire payment of Rs.9,50,000/- was made in cash. However, the documents was duly executed by the Defendant.

6. After hearing the parties and after going through the pleadings on record, it is clear from the perusal of the application seeing leave to defend that the Defendant's stand is that he never executed these documents. The relevant paragraph from the application is set out below:

“7. That the defendant never executed all these documents namely General Power of Attorney, Agreement to Sell, Receipt, all dated 22.12.2012 and Promissory Note and Receipt dated 20.12.2013 and letter dated 20.12.2013 are not signed and executed by the defendant in favour of Latafat or any person at any point of time.”

7. The legal position in respect of granting of leave to defend is well settled in the judgment of the Supreme Court in ***IDBI Trusteeship Services Ltd. v. Hubtown Ltd (2017) 1 SCC 568***. The Supreme Court held therein:

“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:

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;

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;

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;

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..
xxx"*

8. The decision of the Gujarat High Court in ***Jashbhai Motibhai Patel (supra)***, has been relied upon by the Petitioner to argue that if the signatures and the very existence of the promissory note are denied, it raises a “triable issue” and in such a situation, unconditional leave to defend ought to be granted.

9. A perusal of the impugned order shows that the basic premise on which the trial court observes that the Defendant’s case is not bonafide is that the Defendant has not denied his thumb impression on the documents. After this observation, however, the trial court in paragraph 20 concludes as under:

“However the defendant is given opportunity to prove its case that he had never entered into any agreement to sell regarding the said plot, he had not executed the said documents in favour of the plaintiff, he had not received sale consideration of Rs. 9,50,000/-, the said documents do not bear his signatures and thumb impressions and the suit is barred by limitation.”

10. A perusal of the Promissory note cum receipt shows that the same does not bear the thumb impression of the Defendant. It is a clear plea in the leave to defend application that the defendant has not executed the documents i.e., the GPA, Agreement to Sell, Receipt dated 22.12.2012 or the Promissory Note and Receipt dated 20.12.2013. Thus there is a clear denial by the Defendant. Moreover, no proof whatsoever has been adduced to show the payment of the amount of Rs. 9.5 lakhs which is a substantial sum which is allegedly paid in cash.

11. The question of grant of leave to defend depends on the facts and

circumstances of each case. There cannot be a hard and fast rule. The Court has to consider the pleadings and documents and whether they inspire confidence. In the present case the fact that the entire amount is stated to have been paid in cash without any acknowledgement, leads this Court to the conclusion, that the case of the Plaintiff cannot be taken completely on face value. None of the documents relied upon are registered. Thus, there is not independent corroboration of the payment of money by the Plaintiff. Leave to defend is to be granted considering the overall facts. The defendant's case cannot be held to be completely trivial or moonshine.

12. Another important fact is that the impugned order is dated 17th March, 2020 and the Defendant moved an application seeking extension of the time for complying with the order, which was granted on 16th October, 2020. After seeking extension, the present petition has been filed. Accordingly, the defendant does not deserve unconditional leave but the condition for granting leave deserves to be modified. The Defendant shall deposit a sum of Rs.2,00,000/- before the Trial Court within a period of eight weeks from today.

13. Subject to the deposit of Rs.2,00,000/- before the Trial Court, the leave to defend is granted, the written statement shall be taken on record and the suit shall proceed in accordance with law.

14. With these observations the present petition and all pending applications are disposed of.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 15, 2020

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