

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR-7436-2017 (O&M)
Date of decision: 15.07.2022

M/s Maya Traders

... Petitioner

Vs.

Jagdish Kumar

... Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Akshay Jindal, Advocate
for the petitioner.

Mr. Sanjiv Gupta, Advocate
for the respondent.

ARVIND SINGH SANGWAN, J. (ORAL)

Prayer in this petition is for setting aside the order dated 20.09.2017 passed by the Civil Judge (Jr. Divn.), Karnal, vide which unconditional leave to defend was granted in favour of the respondent-defendant in a suit filed by the plaintiff under Order XXXVII CPC.

Brief facts of the case are that the petitioner-plaintiff filed a suit under Order XXXVII CPC for recovery of Rs.33,90,408/-, as detailed in the plaint, against the respondent-defendant, on the ground that defendant had purchased sugar bags from the plaintiff and had issued a cheque No.718953 dated 28.07.2015 for Rs.27,34,200/-, which was dishonoured, as the payment was stopped. Later on, he filed a complaint under Section 138 of N.I. Act and

ultimately, the defendant was convicted in those proceedings vide judgment dated 04.08.2016 passed by the Judicial Magistrate 1st Class, Karnal. The respondent-defendant appeared and filed an application for leave to defend under Order 37 Rule 3(5) CPC. In para No.2(ii) of the application, it is stated that the plaintiff obtained the cheque from the defendant in a fraudulent manner, as the same was misplaced by the defendant and in this regard, he had also registered a DDR No.10 dated 04.03.2015, immediately when the cheque was misplaced. The defendant denied that he purchased any sugar bag from the plaintiff. It is further stated that the invoices set up by the plaintiff are in fact forged and self-created. It is also stated that the defendant is a govt. servant working as Head Clerk in Central Warehousing Corporation of India for the last 35 years and has never done any business or dealing with M/s Maya Traders for purchase of sugar.

The trial Court, vide impugned order dated 20.09.2017, allowed the application, by making the following observations: -

“After hearing rival submissions of both the parties and perusing the record on file, this court is of the considered view that point of adjudication in the present application is that whether defendant should be allowed to leave to defend his case on the ground mentioned in application. The present suit has been filed for recovery of the alleged amount on the basis of cheques and transaction done by the defendant with the plaintiff-firm. The defendant has submitted that he has no dealing with plaintiff-firm as he is a government servant and is not having any business. It

has been further submitted that he never purchased sugar bags from the plaintiff-firm.

It is case of the plaintiff that the defendant has been convicted under the Negotiable Instrument Act for dishonor of cheque but regarding this the defendant has contended that he has filed an appeal against that judgment which is still pending. The defendant submitted that DDR of lost of cheques has been lodged.

*It is settled law that just for determine whether they have real defence and no defence and whether the facts alleged by the defendant would, if established be a good defence then the court will not go into the question whether the alleged facts are true or not as it would arise only after to leave for the present case The defendant has denied to issue cheques in favour of the plaintiff. However, the criminal court has convicted the defendant under Section 138 of Negotiable Instrument Act, but against that judgment an appeal is pending. It has also been denied by the defendant that he has no transaction with plaintiff because he is Government Servant and is not having any business. Therefore, he did not purchase sugar bags from the plaintiff-firm. **These facts would be appreciated after taking evidence. It is also settled law that at this stage, we cannot see the defence taken in the present application as defence at the stage of trial.***

In the light of above discussion, this court is of the considered view that giving opportunity for defence would provide

proper justice to both the parties as applicant denying the issuing of cheques and transactions with the plaintiff. Accordingly, the present application is hereby allowed and applicant is granted unconditionally leave to defend his case.”

Learned counsel for the petitioner submits that before granting leave to defend, the Civil Court was required to form an opinion whether the defence taken by the defendant is plausible and rather to the contrary, it was observed in para No.9 of the impugned order that this fact can be appreciated after taking the evidence and not at the stage, when the application is decided. Learned counsel has relied upon judgment of the Hon'ble Supreme Court in **IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., 2016 AIR (Supreme Court) 5321**, in which it is held as under: -

“It is thus clear that Order 37 has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that Milkhiram's case is a direct authority on the amended O.XXXVII provision, as the amended provision in O.XXXVII Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another

cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order XXXVII to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

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.”

Learned counsel submits that the aforesaid judgment is again relied upon by the Hon’ble Supreme Court in **B.L. Kashyap and Sons Ltd. Vs. M/s JMS Steels and Power Corporation and another, 2022 (1) RCR (Civil) 785.**

It is argued that in view of provisions of Order XXXVII CPC and as per observations of the Hon’ble Supreme Court, the trial Court was required to form an opinion whether the defendant raises a plausible defence, only then leave to defend can be granted subject to imposing such condition, as the Civil Court may think fit from time to time and in case where the defendant has no substantial defence or no genuine triable issue is raised, the Civil Court may refuse the grant of leave to defend. It is further submitted that the findings recorded by the Civil Court in para No.9 is contrary to the observations of the Hon’ble Supreme Court.

In reply, learned counsel for the respondent has placed on record a copy of the judgment dated 20.09.2018 passed in Civil Suit No.CS/1988/2016, vide which the suit filed by the present respondent Jagdish Kumar against Viresh Jain, sole proprietor of M/s Maya Traders i.e. the petitioner praying for a decree of recovery of amount, was decreed to a tune of Rs.7.50 lacs along with interest @6% per annum. It is submitted that in this suit, all the documents, which are relied upon by the petitioner in the present suit i.e. invoices as well as the disputed cheque, were duly exhibited. The cheque was exhibited as Ex.D3 and the judgment of conviction dated 04.08.2016 of the respondent-defendant in the proceedings under Section 138 of N.I. Act was exhibited as Ex.D19 and after considering all the invoices, relied upon by the petitioner-plaintiff, which were duly exhibited, suit of the respondent-plaintiff was decreed against the defendant therein. Therefore, the respondent-defendant has raised a plausible ground for grant of leave to defend the present suit. A copy of the judgment dated 20.09.2018 passed by the Civil Judge (Jr. Divn.), Karnal is taken on record as Mark 'A'.

Learned counsel has relied upon judgment of the Hon'ble Supreme Court in **M/s Mechalec Engineers and Manufacturers Vs. M/s Basic Equipment Corporation, 1977 AIR (Supreme Court) 577**, wherein it is observed as under: -

“In S. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee, (1945) 49 Cal WN 246 at p. 253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following

propositions (at p. 253):

"(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence".

It is submitted that the aforesaid judgment was again followed in **State Bank of Hyderabad Vs. Rabo Bank, 2015 (4) RCR (Civil) 968.**

Learned counsel has further relied upon another judgment of the Hon'ble Supreme Court in **Sudin Dilip Talaulikar Vs. Polycap Wires Pvt. Ltd. and others, 2019 (3) RCR (Civil) 619**, wherein, while relying upon judgment in **IDBI Trusteeship Services Ltd.'s** case (supra), the Hon'ble Supreme Court has observed as under: -

“Order XXXVII, Rule 3 of the Code dealing with the procedure for summary suit, in the relevant extract provides as follows:

“3. Procedure for the appearance of defendant

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(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten 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.

(5) The defendant may, at any time within ten days from the service of such summons for judgement, 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 such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous vexatious:

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.

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In a summary suit, if the defendant discloses such facts of a prima facie fair and reasonable defence, the court may grant unconditional leave to defend. This naturally concerns the subjective satisfaction of the court on basis of the materials that

may be placed before it. However, in an appropriate case, if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend. In contradistinction to the earlier subjective satisfaction of the court, in the latter case there is an element of discretion vested in the court. Such discretion is not absolute but has to be judiciously exercised tempered with what is just and proper in the facts of a particular case. The ultimate object of a summary suit is expeditious disposal of a commercial dispute. The discretion vested in the court therefore requires it to maintain the delicate balance between the respective rights and contentions by not passing an order which may ultimately end up impeding the speedy resolution of the dispute.”

It is thus submitted that the order passed by the Civil Court may not be a well worded order, however, in the facts and circumstances of this case, the leave to defend has been rightly granted to the respondent-defendant.

Learned counsel has referred to proviso to sub Rule 5 of Order XXXVII Rule 3 CPC, to submit that the Court shall not refuse leave to defend only if it is satisfied that the facts disclosed by the defendant did not indicate that he has a substantial defence to raise or the defence intending to put up by the defence is frivolous or vexatious. In view of judgment of the Civil Court as well as other circumstances, it is clear that the Court below has rightly allowed the leave to defend to the respondent-defendant.

After hearing learned counsel for the parties, I find that there is no dispute with regard to well settled proposition of law held by the Hon'ble Supreme Court in the cases referred to above.

The Court below has rightly granted the leave to defend to the respondent-defendant, though in para No.9 of the impugned order, it is wrongly noticed that the grounds are to be seen after leading the evidence by the parties, whereas the Civil Court was required to form an opinion at the stage, when the leave to defend was granted, which otherwise is apparent from record that defendant has raised a plausible defence, for which the leave to defend should be granted.

On re-appreciation of the entire facts of the case and circumstances, I find no force in this petition.

With the aforesaid observations, present petition is dismissed.

[ARVIND SINGH SANGWAN]
JUDGE

15.07.2022
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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No