$~15 (Appellate Side - 2022 List)

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

\+ CM(M) 62/2021 & CM APPL. 2687/2021

M/S SIRIA INTERNATIONAL (REGD.) ..... Petitioner
Through: Mr. Nikhil Malhotra, Adv.

versus

NITIN JAIN AND ANR ..... Respondents
Through: Mr. Mukesh Goyal, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (ORAL)

% **05.04.2022**

1. The impugned order dated 13th July, 2020, passed by the learned Additional District Judge ("the learned ADJ") allows the application of the respondent for leave to defend Suit 827/2018, filed by the petitioner-Siria International under Order XXXVII of the Code of Civil Procedure, 1908 (CPC).

Facts

2. The petitioner-plaintiff ("Siria", hereinafter) alleges, in its plaint before the learned ADJ, that the defendants had induced and allured Siria to invest ₹ 25 lakhs in the defendant company M/s Green Ventures Securities Pvt. Ltd. ("Green Ventures", hereinafter), believing which Siria transferred an amount of ₹ 25 lakhs to respondent-Defendant 1, Nitin Jain, by way of Real-Time Gross Settlement (RTGS).

3. Siria alleges that the defendants had assured return of the principal amount of ₹ 25 lakhs on or before 14th November, 2018, and also assured a return of 1% on the total amount invested. In breach thereof, Siria alleges in its plaint, the defendants tendered, to Siria, three cheques, of which two were of ₹ 75,000/- each and one was of ₹ 40,000/- respectively and transferred an amount of ₹ 1 lakh to Siria, through National Electronic Funds Transfer (NEFT).

4. Additionally, the plaint alleges that the defendant had handed over, to Siria, an undated cheque bearing no. 499666, drawn on HDFC Bank, F-38, Kirti Nagar, New Delhi-110015, for ₹ 25 lakhs.

5. Mr. Nikhil Malhotra, learned Counsel for Siria, has pointed out, from the account statement of Siria, that, in fact, on 14th November, 2014, ₹ 25 lakhs was transferred from the account of Siria to the account of the respondent and that, on 25th November, 2014 and 26th February, 2015, ₹ 75,000/- and ₹ 40,000/- were credited into the same account of Siria by the respondent. Mr. Malhotra points out that, in the application filed by them for leave to defend, there was no denial, by the respondent, of the aforesaid payments credited into the account of Siria, or of the further transfers of ₹ 75,000/- and ₹ 1 lakh from the respondents to Siria on 29th April, 2015 and 7th July, 2015 respectively.

6. The plaint further alleged that, at the request of the defendant, Siria presented the cheque for ₹ 25 lakhs on 6th November, 2015, but that the cheque was dishonoured with the remark "insufficient funds".

7. Repeated requests to the respondents to liquidate the amount due to Siria having met with no success, Siria chose to file Suit 827/2018, before the learned ADJ, under Order XXXVII of the CPC, seeking a decree against the defendant for an amount of ₹ 25 lakhs along with interest with effect from 5th December, 2015 and *pendente lite* and future interest @ 12% per annum till realisation, and costs.

8. Summons for judgment were issued, by the learned ADJ, whereupon the respondent filed an application seeking leave to defend the suit.

9. The respondent, in its application for leave to defend, denied any direct financial transaction with Siria.

10. It was further pointed out, in the application seeking leave to defend, that Siria had not indicated the particulars of the scheme under which it had invested money with the defendant. In fact, submitted the application for leave to defend, the defendants were dealing in shares and commodities in the stock market and had, in this connection, interacted with one Jitendra Bhanthia and his son Shreyansh Bhanthia, who used to trade in shares and commodities through the Demat account of Green Ventures. Ground H in the application for leave to defend asserted that the amount transferred by Siria to the account of the defendant was utilised by Jitendra Bhanthia and his son for trading purposes, but went on, in the very next sentence, to acknowledge that "the defendant is not aware of any business dealings/terms between the plaintiff and Sh. Jitendra Bhanthia". The account details of the plaintiff, it was alleged, were forwarded to the defendants by Jitendra Bhanthia on 4th July, 2015.

11. In effect, therefore, what was sought to be alleged was that Siria and Jitendra Bhanthia were in collusion, and were dealing with shares through the Demat account of the respondent. Apropos the cheque of ₹ 25 lakhs which was dishonoured, the defendants alleged that the cheque was issued to, and was intended for, Jitendra Bhanthia and that Jitendra Bhanthia and Siria had, in collusion, entered the name of Siria in the cheque and thereby misused it.

12. The respondents also sought, in their application for leave to defend, to contest the Siria's suit as time barred. It was pointed out that, Siria had earlier filed CS No.DJ No.611230/16 and CS. No.179/15, under Order XXXVII, which were permitted to be withdrawn by the learned ADJ on 28th May, 2018, with the liberty to file a fresh suit. As such, it was stated that the petitioner's claim was liable to be dismissed even on the ground of limitation.

13. On these assertions, the respondents sought to contend that they had raised a triable issue and were, therefore, entitled to unconditional leave to defend.

14. The learned ADJ has, by the impugned order dated 13th July, 2020, granted unconditional leave to defend to the respondents.

15. Even while holding that there was no evidence of any contractual relationship between Siria and Jitender Bhanthia or his son, the learned ADJ has granted unconditional leave to defend on the sole ground that, on a perusal of the certified copy of cheque bearing no. 499666 for ₹ 25 lakhs, it was seen that the amount in words and the name of the payee thereon were not in the same handwriting, which indicated that the name of the payee had been entered at a later stage. The learned ADJ was of the opinion that, at that juncture, it could not be said, for certain, as to whether the respondents had handed over the aforesaid cheque to Siria or to Jitender Bhanthia and his son, who were also dealing with the respondents.

16. Solely (to quote the Ld. ADJ) "in order to decide the question as to whether the above said cheque bearing no. 499666 was given to the petitioner by the respondents for a valuable consideration", the learned ADJ was of the view that evidence and trial was required and had, therefore, the respondents were entitled to unconditional leave to defend.

Rival contentions

17. I have heard Mr. Nikhil Malhotra, learned Counsel for the petitioner and Mr. Mukesh Goyal, learned Counsel for the respondents, at great length.

18. On the observations of the learned ADJ with respect to the cheque for ₹ 25 lakhs, Mr. Malhotra has invited my attention to Section 20 of the Negotiable Instrument Act, 1881 (" The NI Act") the context of his contention that the defendants had admitted the signature of Defendant 1, as well as the fact that the amount covered by the said cheque was entered by Defendant 1, in the application for leave to defend filed by them before the learned ADJ. The defendants had also acknowledged the transfer of ₹ 25 lakhs, by RTGS, from the account of the Siria to that of the respondents.

19. The respondents' defence, it was submitted, was not substantiated by any document on record, and the entire case, set up by the respondents, involving Jitender Bhanthia was, it was submitted, a sham and moonshine. Mr. Malhotra further submitted that there was admittedly no privity of contract between the petitioner and Jitender Bhanthia.

20. Relying on Sections 118 and 139 of the NI Act, in the background of paras 13,14 and 17 of the report in ***M/s Kalamani Tex v P. Balasubramanian***[1], Mr. Malhotra submits that no case existed for grant of unconditional leave to the defendants to contest the suit of the plaintiff.

21. Supporting the impugned order, Mr. Mukesh Goyal, learned Counsel for the respondents, points out, *per contra,* that the plaintiff had not even filed, with its plaint, the plaintiff's balance sheet to indicate that the respondents had been reflected, therein, as debtors. He drew my attention to paras 5 and 6 of the plaint, to contend that it was not believable that if, on 14th November, 2014, the petitioner had

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[1] **(2021) 5 SCC 283**

invested ₹ 25 lakhs with the respondents, with a guarantee of assured return with interest, the respondents would have paid, practically immediately on the said deposit, two cheques for ₹ 75,000/-, one cheque for ₹ 40,000/- and additionally transferred ₹ 1 lakh into the account of the petitioner.

22. Additionally, Mr. Goyal sought to submit that the suit was barred by time, as the last payment had been made on 7th July, 2015 and the suit was filed on 20th July, 2018.

23. This contention, he submits, had been raised before the learned ADJ and was rejected in the impugned order on the ground that the respondents had not challenged the order dated 28th May, 2018, passed by the earlier learned ADJ, permitting the earlier suit of the plaintiff to be withdrawn with liberty to institute a fresh suit. Grant of such liberty, submits Mr. Goyal, does not extend limitation, for which purpose he relies on ***Haldiram Bhujiawala v. Anand Kumar Deepak Kumar***[2].

24. Mr. Malhotra, in rejoinder, submits that the suit was within limitation, as the cheque for ₹ 25 lakhs was dated 5th November, 2015 and the suit was filed on 20th July, 2018.

Analysis

25. Ordinarily, as has been held by the Supreme Court in ***Mechelec***

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[2] **(2000) 3 SCC 250**

Engineers & Manufacturers v. Basic Equipment Corporation[3], the High Court would not interfere with the exercise of discretion, by the court below, on the aspect of whether to grant, or not to grant, leave to defend under Order XXXVII Rule 3(5) of the CPC. Though, ***Mechelec Engineers***[3] dealt with revisional jurisdiction by the High Court under Section 115 of the CPC, one may fairly state that the same principle would apply, where the High Court is exercising jurisdiction under Article 227; if anything, the scope for interference may even be less.

26. Having said that, however, Order XXXVII of the CPC has a salutary purpose to serve. A suit maintainable under the said provision would, in a case where the defendant is unable to raise a triable issue, entitle a plaintiff to summary judgment and decree. In money suits, this aids expeditious disposal and is, therefore, a procedure engrafted in public interest.

27. The Supreme Court in ***State Bank of Hyderabad v. Rabo Bank***[4]***,*** endorsed the following principles enunciated by the High Court of Calcutta in ***Kiranmoyee Dassi v. Dr. J. Chatterjee***[5] as the definitive tests to decide, in summary suits; whether a triable issue has, or has not, been raised by the defendant:

> "(1) 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 the judgment and the defendant is entitled to unconditional leave to defend.

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[3] **(1976) 4 SCC 687**
[4] **(2015) 10 SCC 521**
[5] **AIR 1949 Cal 479**

> (2) If the defendant raised 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.
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> (3) 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 shows such a stage 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.
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> (4) 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.
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> (5) 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."

28. The test to be applied, to decide whether a defendant is entitled to leave to defend is, therefore, the test of whether the defence set up by the defendant is "illusory or sham or practically moonshine". If the defence qualifies to be regarded as such then, ordinarily, the plaintiff is entitled to judgment. though, in an appropriate case, the Court may grant the defendant conditional leave to defend.

29. In the present case, there is absolutely nothing, in the application for leave to defend, which supports the case set up by the respondents. Had the respondents put up even a scintilla of material, to justify their defence to the case set up by the petitioner then, perhaps, the Court could consider grant of leave to defend, conditionally or unconditionally. I am constrained to observe, however, that there was no such defence put up by the respondents and that their defence, as contained in the application to leave to defence eminently qualifies as "illusory or sham or practically moonshine".

30. The respondents have not denied the transfer of ₹ 25 lakhs from the account of the petitioners to the account of the respondents on 14th November, 2014**.** There is no explanation forthcoming, worth the name, for the said transfer. The respondents have, in the application seeking leave to defend alleged that the said money was used by Jitender Bhanthia to deal in stocks and shares. As to why the money paid by the petitioners to the respondents was permitted to be used by the respondents by a third party, with whom, even as per the respondents, the petitioners have no privity of contract, also remains unexplained. There is no explanation, either, for the payments of ₹ 75,000/- and ₹ 40,000/- credited by the respondents into the accounts of the petitioners. Insofar as the cheque of ₹ 25 lakhs, presented by the petitioners and dishonoured by the bank is concerned, the respondents have merely sought to allege that the said cheque was intended for Mr. Jitender Bhanthia. There is nothing, in the application for leave to defend, which makes out a case of the respondents having owed ₹ 25 lakhs to Jitender Bhanthia. Nor is there any explanation as to how, if the cheque was intended for Jitender Bhanthia, it fell in the hands of the petitioners, save and except for a bald allegation that there was collusion between the petitioners and Jitender Bhanthia. The allegation of collusion, as alleged in the application for leave to defend is directly in conflict with the admission, in the very same application, that the respondents were unaware of any financial dealings between the petitioners and Jitender Bhanthia.

31. Jitender Bhanthia, therefore, appears to have been set up as a stooge for the respondents to avoid paying, what, on the fact of the case, is a clear liquidated debt. The respondents defence, clearly, is completely illusory, being based on no material whatsoever, and is not supported by a single document worth the name.

32. On the aspect of limitation, Mr. Malhotra has pointed out that, as the date of the cheque which was dishonoured was 5th November, 2015, and the suit was filed within a period of three years therefrom, the suit was within limitation. In any event, the learned ADJ has not condescended to accept this contention of the respondents as making out a grant for leave to defend, and the respondents are not in challenge thereagainst.

33. In such circumstances, I am constrained to observe that the learned ADJ cannot be said to have exercised the jurisdiction, vested in him, appropriately, while deciding to grant unconditional leave to defend, solely on the basis of a presumption that the handwriting in which the amount had been filled in, in cheque no. 499666 dated 5th November, 2015 and which was undisputedly the signature of Respondent 1, was not the same as the handwriting in which the name of the payee had been entered. The passages extracted from the impugned order in para 16 *supra* indicate that the learned ADJ has deemed it appropriate to grant leave to defend solely on this ground, admittedly only to ascertain as to whether the cheque in question had been handed over by the respondents to the petitioners against valuable consideration or tendered by the respondents to Jitender Bhanthia. This finding, in my view, is perverse, especially given the fact that the respondents have no answer either to the transfer of ₹ 25 lakhs by the petitioners to their account or to the intermediate payments of ₹ 75,000/-, ₹ 75,000/- and ₹ 40,000/- made by the respondents to the petitioners.

34. The defence put up by the respondents was, therefore, moonshine, and not such as would entitle the respondents to be granted leave to defend.

35. The impugned decision of the learned ADJ to the respondents to grant leave to defend is, therefore, in my view, patently illegal and cannot be said to reflect proper exercise of jurisdiction by the learned ADJ.

36. In view thereof, the impugned order dated 13th July, 2020, of the learned ADJ, is quashed and set aside. The application for leave to defend, filed by the respondent, is accordingly dismissed.

37. The appeal stands allowed accordingly.

38. Let the suit be listed before the learned ADJ for further proceedings on the date already fixed. The parties may appear before the learned ADJ on the said date.

C. HARI SHANKAR, J.

APRIL 5, 2022
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