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

+ CM(M) 1503/2019

M/S DWARKESH DIAMONDS PVT LTD Petitioner

Through: Mr.Mohit Monga, Adv.

versus

KULDEEP BAKSHI Respondent

Through: Mr.Sanjay Kumar Bhasin and
Mr.Pardeep Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

19.10.2022

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1. These proceedings arise from CS DJ 158/2017 instituted by the petitioner M/s Dwarakesh Diamonds Pvt. Ltd against the respondent Kuldeep Bakshi under Order XXXVII of the Code of Civil Procedure, 1908 (CPC).

2. The petitioner in the suit sought a decree against the respondent for an amount of ₹ 9,67,750/- with *pendente lite* and future interest. The plaint averred that the petitioner was engaged in the business of purchase and sale of gold and diamond jewellery ornaments and that in the course of said business, the petitioner sold jewellery to the respondent under bill/invoice no. 28 dated 25th November 2014 for ₹ 7,01,306/-. A copy of the said invoice was filed with the plaint.

3. The plaint further averred that, on the request of the respondent, discount of ₹ 1,306/- was granted to the respondent so that the finally payable amount was ₹ 7,00,000.

4. Accordingly, three days after the invoice was issued, the respondent handed over, to the petitioner, a cheque bearing no. 473525 dated 28th November 2014 drawn on Oriental Bank of Commerce, Vikas Puri, for ₹ 7 lakhs. On presentation, it is alleged in then plaint that the said cheque got dishonoured on the ground of 'insufficiency of funds'.

5. The petitioner, therefore, issued a legal notice dated 23rd December 2014 to the respondent and, when the respondent failed to make payment of said amount, instituted criminal proceedings against the respondent under Section 138 of the Negotiable Instruments Act, 1881.

6. The petitioner approached the learned Trial Court, invoking its jurisdiction under Order XXXVII of the CPC. The petitioner claimed, in the suit, a total amount of ₹ 9,67,000/-, of which ₹ 2,67,000/- constitutes interest @ 18% p.a. from 25th November 2014 i.e. the date of cheque till the 9th January 2017 on the principal amount of ₹ 7,00,000/-.

7. Consequent to issuance of summons in the suit, the respondent

filed an application under Order XXXVII Rule 3(5)¹ of the CPC, seeking leave to defend the suit.

8. The respondent, in his application for leave to defend, denied having purchased jewellery from the petitioner, or having issued, to the petitioner, the cheque for ₹ 7,00,00/- thereagainst.

9. The respondent contended, instead, that he had sold the immovable property to Rajesh Kapoor and Sushma Rani, who were stated to be the associates of the petitioner, against which Rajesh Kapoor paid advance to the respondent of ₹ 7 lakhs. It was further contended that, in order to facilitate the transaction, the respondent handed over blank cheques to Rajesh Kapoor to cover miscellaneous costs involved in the transactions. These cheques, alleged the respondent, had been misappropriated by the petitioner and misused by it to institute CS DJ 158/2017 against the respondent.

10. The learned ADJ has, *vide* order dated 3rd September 2019, granted unconditional leave to the respondent to defend the suit. In doing so, the learned ADJ has observed that the invoices issued by the

¹ 3. Procedure for the appearance of defendant. –

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend 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 or 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.

petitioner did not bear the signature of the respondent. The learned ADJ has further expressed doubt regarding the sale of “such a high value jewellery” to the respondent, against payment by cheque.

11. In these circumstances, the learned ADJ has observed that the respondent’s defence could not be regarded as moonshine and was, at the very least, plausible. Following the principles enunciated by the Supreme Court in *IDBI Trusteeship Services v. Hubtown Ltd.*², the learned ADJ has granted unconditional leave to the respondent to defend the suit.

12. Aggrieved by the said decision, the petitioner is before this Court by means of the present petition under Article 227 of the Constitution of India.

13. Mr. Mohit Monga, learned Counsel for the petitioner, submits that the defence put up by the respondent in its application for leave to defend was *ex facie* unbelievable. He submits that it was unprecedented that a seller of immovable property would issue a blank cheque to the buyer; ordinarily, he submits, it would be the other way round. Mr. Monga submits that no documentary or other evidence, supporting the stand that the respondent sought to canvass, was forthcoming on the record. In the circumstances, Mr. Monga submits that the respondent’s defence could not be regarded as giving rise to

² (2017) 1 SCC 568

any triable issue, as would justify grant of unconditional leave to defend.

14. As against this, Mr. Sanjay Bhasin, learned Counsel for the respondent, submits that the impugned order is well reasoned and, in any case, would not justify interference by this Court within the limited confines of the jurisdiction vested in it under Article 227 of the Constitution of India. He submits that the decision of the learned ADJ is entirely in tune with the law enunciated in *IDBI Trusteeship*². He relies on the findings of the learned ADJ, to contest the present petition.

15. I have heard learned Counsel for both the sides and perused the record.

Analysis

16. Order XXXVII Rule 3(5) of the CPC empowers a Court to grant leave, to a defendant in a suit, to contest the plaint either unconditionally or upon such terms as may appear to the Court to be just. The first proviso to Order XXXVII Rule 5 proscribes refusal of leave to defend, unless the Court is satisfied that the facts disclosed by the respondent do not indicate the existence of any substantial defence or indicate the defence to be frivolous or vexatious.

17. There is no gainsaying the position, in law, that the Court is expected to display a considerable degree of latitude while dealing

with applicants seeking leave to defend summary suits.

18. *IDBI Trusteeship*², on which the learned ADJ has placed reliance, postulated the following principles, to be borne in mind while examining an application for grant of leave to defend under Order XXXVII Rule 3(5) of the CPC:

“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 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.”

19. The Supreme Court, in its somewhat more recent judgment in ***B.L. Kashyap and Sons Ltd. v. JMS Steels and Power Corporation***³, after taking into account ***IDBI Trusteeship***², ruled thus, in paras 33 to 33.3 of the report:

“33. It is at once clear that even though in the case of ***IDBI Trusteeship***², this Court has observed that the principles stated in paragraph 8 of ***Mechelec Engineers’ case***⁴ shall stand superseded in the wake of amendment of Rule 3 of Order XXXVII but, on the core theme, the principles remain the same that *grant of leave to defend (with or without conditions) is the ordinary rule; and denial of leave to defend is an exception. Putting it in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the Court.*

33.1. As noticed, *if the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend. In the second eventuality, where the defendant raises triable issues indicating a fair or bonafide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, where the defendant raises triable issues, but it remains doubtful if*

³ (2022) 3 SCC 294

⁴ (1976) 4 SCC 687

the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.

33.2. Thus, it could be seen that *in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend.* In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. *It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith.* Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.

33.3. Therefore, while dealing with an application seeking leave to defend, *it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence,*

he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.”

(Emphasis supplied)

20. *B.L. Kashyap and Sons Ltd.*³, therefore, rules thus:

(i) Leave to defend is ordinarily required to be granted to a defendant in a summary suit, whether with or without conditions.

(ii) Leave to defend a summary suit is to be rejected only where the defendant has practically no defence and is unable to give out even a semblance of triable issues in response to the suit. For leave to defend to be refused, the defence put up has to be “moonshine”.

(iii) Grant of leave to defend has to follow the following protocol:

(a) If a defendant satisfies the Court that he has a substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend.

(b) Where the defendant raises a triable issue which indicates a fair or bonafide or reasonable defence, albeit not a positively good defence, too, he would ordinarily be entitled to unconditional leave to defend.

(c) Where a defendant raises triable issues, but it remains doubtful whether the issues are bonafide or genuine, leave to defend should be granted, but conditionally, including conditions requiring part payment of the amount forming subject matter of the suit.

(d) Where the proposed defence is plausible but improbable, the conditions for grant of defend could be made more strict, which could extend to the entire principles sums sought in the suit along with just and requisite interest.

21. The upshot is, therefore, that unconditional leave to defend is to be granted not only where the defence put up by the defendant indicates that he is likely to succeed in the suit, but also where the defendant raises a fair or bonafide or reasonable defence, even if it is not positively good defence.

22. Conditions for grant of leave to defend may be imposed by the Court in all other cases except cases where no triable issue is raised or where the defence is, to use the classical expression, “moonshine”.

23. Insofar as imposition of conditions for leave to defend is concerned, *B.L. Kashyap and Sons Ltd.*³ pigeonholes the cases into two categories. The first category, in which conditions would be less rigid or stringent, applies to cases where, though triable issues are raised, a doubt remains as to whether the issues have been raised in good faith or whether they are genuine. The doubt, in such cases, therefore, relates not to the issues, but to the defendant itself, as is manifest from the considerations of good faith and genuineness. A lesser degree of stringency, qua the conditions to be imposed for grant of leave to defend in such cases, has been advocated probably because good faith and genuineness are matters of fact, which would require a trial to be positively determined.

24. The second category of cases in which conditional leave to defend may be granted would be those in which the defence raised is plausible, but is improbable. *Probability*, therefore, is the guiding test here. Where, therefore, the defence suffers from want of probability, the Supreme Court has advocated imposition of more stringent conditions for leave to defend which may extend to requiring deposit of the entire amount sought in the suit with or without interest. The dividing line, to apply this test, is thin and difficult to discern. The distinction between “plausibility” and “probability” has to be borne in

mind. “Plausibility”, etymologically, denotes “believability”, whereas “probability” denotes “likelihood”. The test, therefore, here, is – “it might have happened, but it’s unlikely”. A higher degree of stringency, qua conditions for leave to defend, is allowed in such cases, as the issue involves the *nature of the defence itself*, and would only require a *prima facie* assessment of the likelihood of the defence.

25. The learned ADJ has held that the respondent has raised triable issues. To that extent, this Court would not be inclined to interfere, as a defence has been raised by the respondent, which would have to be examined in trial and which cannot be shut out at the outset.

26. The nature of the issues raised by the defendant would, next, come up for consideration. According to the stand set up by the defendant, that the defendant had entered into transactions for sale of property to Rajesh Kapoor and Sushma Rani. No documents, supporting any such transactions, were placed on record. The application for leave to defend further averred that, against the said proposed sale of property, Rajesh Kapoor paid advance, to the defendant, of ₹ 5 lakhs and ₹ 2 lakhs. No details of the said transaction are forthcoming in the application for leave to defend.

27. The application further avers that blank signed cheques were handed over by the defendant to Rajesh Kapoor in order to facilitate the transaction, to cover miscellaneous costs. In this regard, I am in agreement with the contention of Mr. Mohit Monga that it is very

difficult to believe that a seller of an immovable property would hand over blank signed cheques to the buyer of the immovable property, whether to cover miscellaneous costs or for any other reason. No documents, evincing the intention of covering miscellaneous costs by handing over any such blank cheques have been placed on record, have been placed on record by the defendant.

28. The application for leave to defend is further silent not only as to the nature, but also as to the amount of the miscellaneous costs that these blank cheques intended to cover.

29. Interestingly, the application for leave to defend further avers that the blank cheques were tendered as security. It is difficult to believe that a seller of immovable property would hand over cheques to the buyer of immovable property to secure the buyer. The transition seems, on the face of it, *prima facie*, opposed to what is normally seen in ordinary trade and commerce.

30. The case set up by the respondent is, therefore, not merely improbable, but, in a sense, even implausible. On plausibility, however, this Court would, at this stage, while exercising its limited jurisdiction under Article 227 of the Constitution of India, defer to the subjective satisfaction of the learned ADJ. The Court is not, therefore, interfering with the decision for grant of leave, to the respondent, to defend the suit.

31. Even if it were to be treated as plausible, however, the defence set up by the respondent is clearly highly improbable. It is highly improbable that, against sale of immovable property, blank signed cheques would be handed over by the seller to the buyer as security to cover miscellaneous costs, with any accompanying documentary material.

32. The case, therefore, at the highest, would fall within the category of cases envisaged by *B.L. Kashyap*³ in which the defence proposed by the respondent may be treated as plausible but improbable.

33. In that view of the matter, the respondent would, at the very least, be required to be put to strict conditions for being permitted leave to defend the suit instituted by the petitioner.

34. In the circumstances of the case, the impugned order is modified to the extent that the grant of leave, to the respondent, to defend the suit instituted by the petitioner, shall be conditional upon the respondent depositing ₹ 7,00,000/- with the learned ADJ, before whom the case is presently pending, within four weeks from today. As and when the said deposit is made, the same shall be retained by the learned ADJ in an interest bearing fixed deposit and shall remain subject to the outcome of the suit.

35. The petition, therefore, stands allowed in part, with no order as to costs.

C. HARI SHANKAR, J.

OCTOBER 19, 2022

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