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

Date of Decision: 07th July, 2022

\+ **C.R.P. 59/2020 & CM APPL.21898/2020**

ALOK GUPTA ..... Petitioner

Through: Mr. Abhishek Gupta, Advocate. (M:9871032872)

versus

KRISHAN KUMAR SARIN & ANR. ..... Respondents

Through: Mr. Nityanand Singh, Advocate with D-2 in person.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present revision petition has been filed challenging the impugned order dated 24th August, 2020, passed in ***CS DJ ADJ No.517848/2016*** titled ***Alok Gupta v. Krishan Kumar Sarin & Anr.,*** vide which unconditional leave to defend was granted to Respondent No.2/Defendant No.2 (*hereinafter "Defendant No.2"*).

2. The suit underlying the present revision petition had been filed by the Plaintiff/Petitioner *(hereinafter "Plaintiff")* against the Defendants, who are husband and wife, namely, Mr. Krishan Kumar Sarin and Mrs. Priya Sarin, under Order XXXVII CPC, seeking recovery of a sum of Rs.25 lakhs, with *pendente lite* and future interest at 18% p.a. The suit has already been decreed against the husband/Defendant No.1 vide the Trial Court's order dated 20th August, 2020. The relevant extract of the said order reads as under:

> *"3) This Court is of the considered view that the plaintiff is entitled for a judgment against the*

defendant No.1 on account of default in appearance in terms of Order XXXVII, Rule 2(3), CPC, which reads as under:

"Rule 2. Institution of summary suits- (1) ..... .

(2) ..... .

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum. not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court/from time to time by rules made in that behalf and such decree may be executed forthwith. "[Emphasis added by underlining text}

4) In view of the above, the suit of the plaintiff is decreed qua the defendant No.1 on account of default in appearance under Order XXXVII, Rule 2, CPC for an amount of Rs.25 ,00,000/. (Rupees Twenty five lakhs only) alongwith pendente lite interest and future interest @ 15% per annum until its realization. Let decree sheet be drawn accordingly."

3. Thereafter, the wife of Defendant No.1 i.e., Defendant No.2, filed a leave to defend application before the Trial Court. The present revision petition arises out of the Trial Court's order, vide which the same has been unconditionally allowed. The relevant portion of the impugned order reads as under:

"37. This Court finds and rules that Priya/ defendant No.2 is entitled for unconditional leave to defend for the following reasons:

(a) Though on one hand, the plaintiff has pleaded and argued that he is a man of means and the loan was advanced in cash to the defendants but surprisingly the plaintiff did not bother to undertake any receipt and/or enter into a written agreement with the defendants at the time of advancement of a loan of Rs.20,00,000/- (Rupees Twenty lakhs only).

(b) This Court also finds that for a loan of Rs.20,00,000/- (Rupees Twenty lakhs only), the plaintiff did not care to take any collateral security towards the repayment of loan of Rs.20,00,000/- (Rupees Twenty lakhs only) by the defendants.

(c) That the entire loan transaction being in cash, a grave cloud is raised against the plaintiff for having not shown the availability of funds and also source of funds at the time of advancement of loan.

(d) This Court also observes from the list of documents and documents filed by the plaintiff that the plaintiff has only cared to file the certified copy (copy to copy) of cheques, his bank statement, five legal notices dated 24. 11.2015 coupled with postal receipt and envelopes, however, the plaintiff has failed to file the cheque returning memo(s) from which it would have properly been ascertained whether the cheques were dishonoured on presentation on account due to insufficiency of funds or dishonoured for mismatch of signature(s) of only one of the two joint account holders or any other reason. This does leave a huge void and thus it is imperative that such fact be established in trial by the parties.

(e) This Court also finds that Alok seems to be an active practitioner of the policy, don't ask,

don't tell. This Court cannot lose sight of the fact that Alok did not aver either in his plaint or in his reply to Priya's leave to defend application that he recorded his statement before the Court of Ld. MM about deletion of the name of Priya from the array of parties in the criminal complaint under Section 138, NI. It is also observed that it was only during the course of arguments, when this Court raised this query, did the learned counsel for Alok answer in affirmative that the name of Priya was indeed deleted, but the same was done, as a criminal complaint under Section 138, NIA against a non-signatory cannot be maintained. The dictum in law as old as hold as the hills, one who approaches the Court must approach with clean hands and has a bounden duty to state the true facts, even if the facts may go against the party, who is making such disclosure. Fairness and playing by the rules is a hallmark of any legal proceedings and no court of justice will abandon such rules.

38. In light of the above discussion and observations, Priya/defendant No. 2's application seeking leave to defend is found to be raising a fair and a reasonable defence, Alok/plaintiff is not entitled to a signed judgment, and Priya/defendant No. 2 is held to be entitled to unconditional leave to defend the suit. The application seeking leave to defend under Order XXXVII, Rule 3(5), CPC, moved by Priya/defendant No.2 is allowed in above terms.

39. This Court further observes that the suit shall be tried uninfluenced by any observations made in the present order, which is the prima facie view for disposal of the defendant No.2's application *seeking leave to defend the suit.*"

4. The present revision petition arises out of this order of the Trial Court.

5. The case of the Plaintiff is canvassed by Mr. Abhishek Gupta, ld. Counsel. It is his submission that the amount of Rs.20 lakhs was paid by means of five cheques from the joint account of both the husband and the wife. However, the cheque was signed by the husband. Even before the Trial Court as also submitted by ld. Counsel for Defendant No.2 before this Court, Defendant No.2-wife took the position that she was not aware of the transactions of the husband. Under such circumstances, the Trial Court granted her an unconditional leave to defend. Ld. Counsel further submits that the leave to defend could not have been unconditional as the admitted position was that the bank account was a joint bank account. The wife cannot claim to have no knowledge of the transactions made on the account, as she was one of the account holders, of the account from which the cheques were issued. He further submits that Defendant No.1 is avoiding payment in terms of the decree, and that the husband and wife are in collusion with each other and avoiding payment to the Plaintiff.

6. In the present revision petition, vide order dated 8th September, 2020, notice was issued in the matter and since Defendant No.2 took the position that she was unaware of the whereabouts of her husband, the SHO, Vikaspuri, was directed to file a status report after ascertaining the whereabouts of the husband, as also the financial status and other details of the family. It was also noted that the family consists of the couple and their two children, both of whom are married. The status report dated 22nd February, 2021 was then filed by the SHO, reporting that Defendant No.2 is

the owner of the property where she is currently residing, bearing No. AG-1/167B, which was a gift from her father, after her marriage. The said property has three rooms, out of which she lives in one room and other two rooms are given on rent. She also has a bank account hearing No. 34187144742 in SBI, Vikaspuri where the balance was about Rs.2,33,507/-. Additionally, the report noted that Respondent No.2 has an FDR of Rs.1 lakh in her favour in the same bank. The relevant portion of the said status report reads as under:

> *"2. It is submitted by Ms. Priya Sarin that her husband left her and her children in year 2011 and since then neither he has contacted her nor she knows where he is. She got married in Delhi and never visited her in-laws native place. She only knows that her husband belonged to Shamli but does not Village name or any other place nearby. Statement of two of the neighbours were also recorded, in which they submitted that Mr. Krishan Kumar Sarin left his house around 10-11 years ago and after that they have never seen him and never heard from him. He has never visited his house, AG-1/167B, Vikaspuri after that. On enquiring about the workplace of her husband, Ms. Priya Sarin submitted that her husband used to work as a property dealer in Mohan Garden, somewhere near Main Peepal wala chowk.*
>
> *3. Respondent No.2, Ms. Priya Sarin also submitted that her only son namely, Deepak along with her wife, Shally has also left her and shifted to London. He does not provide her any financial help. The daughter of the complainant Ms. Kritika got married in 2014 and she lives at her in laws.*
>
> *4. <u>The property, AG-1/167B, in which the</u>*

> *respondent No. 2 is currently residing is only property belongs to her and it was gifted to her by her father as a gift after her marriage. She submitted that there are 3 rooms in the property, out of which, she lives in 1 room while give other 2 rooms on rent. But she has not given those 2 rooms on rent for the last 1 year as she could not find any tenant. The respondent No. 2 also submitted that she does not do any kind of job and does not own any kind of Vehicle.*
>
> *5. Respondent No. 2 further submitted that she has a bank balance of Rs. 1,80,000/- Approx. in her only bank account in A-Block, Vikaspuri branch of State Bank of India having account number as 34187144742. She also submitted that it is a joint account. The statement from the Vikaspuri branch of SBI has been obtained regarding the account number 3418714472 and it was found that the account is joint account, in the name of Priya Sareen and her daughter, Kritika Sareen and has a total balance of 2,33,507/-.*
>
> *6. Respondent No. 2 also has a FD of 1 lakh rupees in her name in the A-Block, Vikaspuri, Delhi branch of SBI.*"

7. This Court was also not convinced that Defendant No.2 was unaware of the whereabouts of her husband, inasmuch as though it was claimed that he was missing for more than 10 to 11 years, the first information report for missing persons was lodged only on 3rd February, 2017 at PS, Vikaspuri. In this view of the matter and since the status report was not satisfactory on the whereabouts of Defendant No.1, vide order dated 21st October, 2021, a further status report was called for by the Court, seeking tracking of Defendant No.1 and not merely a reproduction of the wife's version of his

whereabouts. On 15th December, 2021, the said status report was considered and it was noticed that Defendant No.2 had refused to even give a photograph of her husband to the police, so as to enable the police to comply with the order. The relevant extract of the said report reads as under:

> *"2. A WT message in c/w Sh. Krishan Kumar Sarin has been circulated to all SSPs in India, All DCPs & SHOs in Delhi. A letter vide Diary No. 2694/SHO/VP dated 18.11.21 has been sent to DCP, FRRO to seek information in c/w Sh. Krishan Kumar Sarin's Foreign travel. Reply of the letter is awaited and will be filed ins Hon'ble court on receiving. Letter through email has been sent to NCRB and CBI to provide information in c/w Sh. Krishan Kumar Sanin Hue & Cry Notice and Newspaper publication could not be done as Ms. Priya, wife of Sh. Krishan Sarin, did not provide any photo of him.*
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> *4. Statement of Sh. Kewal Krishan Uppal S/o Sh. Barkat Ram R/o AG-1/168B, Vikaspuri, Delhi, Age-81 Years has also been recorded where he submitted that Sh. Krishan Kumar Sarin has left his house around 10- 11 years ago and since then there is no information of him. He never visited his home after that.*
>
> *5. Statement of Ms. Prabhjot Kaur W/o Sh. Amrik Singh R/o AG-1/ 169A, Vikaspuri, Delhi, Age-59 Years has also been recorded where she submitted that Sh. Krishan Kumar Sarin has left his house around 10 years ago and since then there is no information of him. He never visited his home after that.*
>
> *6. Search for the accused was made at Peepal Wala Chowk, Mohan Garden, Delhi and during*

> *enquiry one person namely, Dharambir Deshwal, Age-63 Years, Owner of Deshwal Properties, Mobile No. 9818378348, who refused give his statement but told that there was a person namely, K.K. Sarin @ Mangal Sarin who used to work as a property dealer around 15-16 years ago. But he suddenly disappeared, either he is dead or went to foreign. Later I came to know that he has cheated many persons.*
>
> *7. During further enquiry, one person namely, Chander Prakash S/o Sh. Prem Sagar R/o WZ-128-B, Uttam Nagar, Delhi, Age 72 Years, Mobile No. 9811373182 told that Krishan Kumar Sarin @ Mangal Sarin used to work as a property dealer at Peepal Chowk, Mohan Garden, Delhi around 15-20 years ago. He did not own any office of his own. He disappeared around 10-11 years ago and since then I have never seen him."*

8. Considering this report, as also considering the fact that Defendant No.2 had not filed the missing persons report for a long period, vide order dated 15th December, 2021, the ld. CGSC was asked to obtain the travel history of the Defendants and place the same before this Court. Pursuant to the said order, the third status report was filed by the Bureau of Immigration (FRRO), which showed that Defendant No.1 has travelled to various countries/cities including Thailand, London, Dubai, Singapore, Bahrain, and Doha between 2001 to 2014. Defendant No.2 was also shown to have travelled to London, Doha and Thailand between 2006 and 2017. Notably, one such trip to Thailand was after Defendant No.2 filed the first information report regarding Defendant No.1, i.e., in September, 2017.

9. Considering these facts, the Court, vide order dated 23rd December,

2021 reached the following conclusion:

> *"7. Apart from the above circumstances, it is also clear that the cheques which were issued in favour of the Petitioner, were from the joint account of Respondent Nos.1 & 2. As per the report, there is a fixed deposit which is in her name. Under such circumstances, prima facie, the grant of unconditional leave to defend would not be tenable as there is a serious apprehension that the Petitioner, if successful in the suit may not be able to recover any money from the Respondents. Accordingly, for the time being, it is directed that:*
>
> *(i) Respondent No.2 shall deposit a sum of Rs.1.50 lakhs within four weeks with the Registrar-General of this Court. The same shall be retained in an FDR on auto-renewal mode;*
>
> *(ii) This order shall be communicated by the SHO, Vikas Puri to the State Bank of India, A-Block, Vikas Puri, to ensure that no amounts are withdrawn by the Respondents from their bank accounts, without the deposit of the said Rs. 1.50 lakhs before this Court;*
>
> *(iii) Respondent Nos.1 & 2 shall be barred from travelling abroad, without making proper disclosures to this Court, in this writ petition.*
>
> *8. This order shall also be implemented by the Ministry of External Affairs, Government of India and the FRRO.*
>
> *9. In the meantime, status report be filed by Mr. Ahluwalia, ld. CGSC, giving all travel details regarding Respondent Nos.1&2, which have been submitted to the Court today."*

10. On the next date of hearing, being 24th March, 2022, directions were given to ld. Counsel for Defendant No.2 to seek instructions as to whether

his client would be willing to deposit a further sum of Rs. 3.5 lakhs, making a total sum of Rs.5 lakhs as the deposit, considering the nature of the matter and facts revealed during the petition's pendency.

11. Today, it is submitted on behalf of Defendant No.2, that she cannot pay the said amount and she can only pay Rs.1.5 lakhs, which has already been paid pursuant to the directions issued by this Court on 23rd December, 2021.

12. The Court has considered the overall facts, submissions of counsels, and the status reports filed by the police, as also by the Bureau of Immigration. The Defendants have two children, who are also working. Their travel history, as has been placed on record, clearly shows that they are financially stable. It is also unclear as to why Defendant No.1's status is being shown as a "missing person". This Court is further, not convinced that Defendant No.2 is not aware of the whereabouts of her husband and also has not the means to pay, inasmuch as she has a joint bank account with her daughter and an FD, with a total amount of over Rs. 3 lakhs, as also the immovable property where she is residing. She has also a travel history between 2006 and 2017 in various countries including UK, Qatar and Thailand.

13. Moreover, the payment was made by cheques which were dishonoured and the wife was a joint bank account holder. By simply claiming ignorance, she cannot be absolved of her liability. Therefore, the Court is *prima facie* of the opinion that Defendant No.2 has the means to satisfy any condition imposed on the grant of leave to defend and also that she may not have been truthful about all the facts, even to the authorities.

14. It is also well-settled that the grant of unconditional or conditional

leave to defend is dependent upon the facts and circumstances of each case. Most recently, the Supreme Court in ***B.L. Kashyap and Sons Ltd. v. JMS Steels and Power Corporation and Ors. [C.A. No. 379/2022, decided on 18th January 2022]***, held that if there is a reasonable doubt as to the probability of defence or the genuineness of triable issues, leave to defend may be granted, conditional upon payment or time/mode of trial.

15. This Court also reiterated this position in its recent decision in ***Chander Pal Singh v. Shripal Singh [RSA 20/2022, decided on 17th February, 2022]***. The relevant extract of the said decision as also the Supreme Court decision is as under:

> *"9. Recently, the Supreme Court in B.L. Kashyap and Sons Ltd. v. JMS Steels and Power Corporation and Ors. C.A. No. 379/2022 decided on 18th January 2022, relying upon IDBI (supra), has held that the leave to defend can be refused only in those cases where the Defendant has no substantial defence and is raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious. The Supreme Court has further observed in the said judgment that Court can impose heightened conditions as to payment into Court of the entire principal sum together with just and requisite interest where it is of the opinion that the defence raised by the Defendant is plausible but improbable. The relevant portion of the judgment reads:*
>
> > *"17.1. 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. <u>In the third eventuality, where the Defendant raises triable issues, but it remains doubtful if 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.</u>

17.2. 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.*

17.3. 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. <u>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.</u>"

10. <u>A perusal of the above decisions extracted above shows that unconditional leave to defend can be granted by the Court only when a substantial defence is raised by the Defendant.</u> The defence raised in this case does not seem to be plausible. It is worth reiterating that in the present case, the signature on the cheque is admitted by Defendant. The only defence raise by the Defendant is that a blank cheque given by the Defendant has been misappropriated by the Plaintiff. The said defence does not inspire the

> *confidence of the Court and is neither triable nor substantial. It is merely a plea taken to defeat the purpose of the issuance of the cheque itself. The Court enquired from the Ld. Counsel of the Defendant if he would be willing to deposit the entire principal amount. However, the Defendant has expressed inability to deposit the said amount."*

16. Under these circumstances and relying upon this settled position of law, this Court is of the opinion that the cheques of Rs.20 lakhs, having been issued from the joint bank account of the husband and the wife i.e., Defendant Nos.1 & 2, the impugned order shall stand modified to the effect that the leave to defend granted to Defendant No.2 shall be conditional upon her depositing a total sum of Rs.5 lakhs, with the worthy Registrar General of this Court. Out of such amount of Rs. 5 lakhs, a sum of Rs.1.5 lakhs is already stated to have been deposited with the worthy Registrar General of this Court and the same shall remain in an FDR in auto-renewal mode. The deposit of the remaining amount of Rs.3.5 lakhs, shall also be made to the worthy Registrar General, within a period of 3 months from today. The same shall be retained in an FDR, on auto-renewal mode. Subject to this condition, the leave to defend is being granted to Defendant No.2. If the said condition is not complied with, the Plaintiff is free to approach the Trial Court for appropriate orders in accordance with law. The amount deposited with the worthy Registrar General shall abide by any further orders passed by the Trial Court in the suit.

17. It is made clear that the bank account of Defendant No.2 at SBI, Vikaspuri bearing account number 34187144742, which has already been frozen vide order dated 23rd December, 2021, is permitted to be de-sealed, only so long as the amount lying in the said account is utilized for making

the above directed deposit in favour of the worthy Registrar General, pursuant to today's order. The Bank Manager, SBI, Vikaspuri, shall ensure compliance of this direction and shall not allow withdrawal of the amount lying in the said bank account except for making a Demand Draft or transfer in favour of the worthy Registrar General, Delhi High Court.

18. The present revision petition is disposed of in the above terms. All pending applications are also disposed of.

19. Copy of this order be sent to the Court of ld. ADJ-2, South West District, Dwarka Courts, Delhi in ***CS DJ ADJ No.517848/2016*** titled ***Alok Gupta v. Krishan Kumar Sarin & Anr***.

20. Let the order be also communicated to the Branch Manager, SBI, Vikaspuri by the Registry.

21. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as the certified copy of the order for the purpose of ensuring compliance. No physical copy of orders shall be insisted by any authority/entity or litigant.

PRATHIBA M. SINGH
JUDGE

JULY 7, 2022/*dk/ms*