

\$~38 (Appellate)

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

+ CM(M) 1154/2022 and CM 46675/2022

NITISH JAISWAL

..... Petitioner

Through: Mr. R.K. Dhawan, Mr. Vinod
Teny, Ms. Vanshika Agarwal and Mr.
Rishav Kashyap, Advs.

versus

RAM KISHORE TYAGI (SINCE DECEASED)

THROUGH HIS LEGAL HEIRS

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT(ORAL)

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11.11.2022

1. This petition under Article 227 of the Constitution of India assails the order dated 30th July 2022, passed by the learned Additional District Judge (“the learned ADJ”) in the Suit 252/2020 (*Nitish Jaiswal v. Ram Kishor Tyagi*), instituted by the petitioner, as the plaintiff against the respondent, as the defendant, as a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 (CPC). The suit claimed an amount of ₹ 35,75,000/- from the defendant and sought a decree to that extent along with interest.

2. According to the averments in the plaint, the plaintiff purchased a plot admeasuring 183 Gaj, Khasra Nos. 410/1 and 411/1, Laxmi Vihar, Burari, Delhi (“the suit property”, hereinafter), from the respondent for ₹ 91,50,000/-. The specific assertion to this effect, as contained in para 3 of the plaint, reads thus:

“3. That the defendant also showed the property

documents/paper of the said property in his name to the plaintiff and also assured him that the said property is free from all encumbrances i.e. mortgage, lien etc. thus after due negotiation the plaintiff purchased the said property from the defendant for a total sale consideration of ₹ 91,50,000/- (Rs. Ninety One Lacs and Fifty Thousand Only) and the papers qua the said property got registered in the name of the Plaintiff. The copy of Sale Deed is annexed herewith and marked as Annexure A.”

3. Subsequently, according to the assertions in the plaint, the respondent offered to buy back the suit property from the petitioner at the price at which the petitioner had purchased the suit property from the respondent which, as already noted, was averred, in para 3 of the plaint, to be ₹ 91,50,000/-. The plaint asserted that the respondent agreed, initially, to buy back half of the suit property at half of the aforesaid consideration of ₹ 91,50,000/-, which works out to ₹ 45,75,000/-.

4. According to the averments in the plaint, the petitioner, believing the offer of the respondent to be *bonafide*, transferred half the suit property to the respondent. Against the amount of ₹ 45,75,000/- which the respondent was required to pay to the petitioner towards the said transfer, the plaint alleges that the respondent paid only ₹ 10,00,000/-. The plaint alleges that the respondent, thereupon, agreed to pay the balance of ₹ 35,75,000/-, towards which the respondent furnished, to the petitioner, Cheque No. 130952 dated 23rd October 2017, drawn on the Union Bank of India, Burari Branch, Delhi – 110084, for ₹ 35,75,000/-. On presentation, alleges the plaint, the said cheque was returned by the bank with remarks “funds insufficient”.

5. The plaint avers that the petitioner, thereupon, served a legal notice dated 21st November 2017 on the respondent and also instituted

a complaint against the respondent under Section 138 of the Negotiable Instruments Act, 1881, which is presently pending.

6. Predicated on the above assertions and allegations, the petitioner, by Suit 252/2020 instituted under Order XXXVII of the CPC, sought a decree against the respondent for the aforesaid amount of ₹ 35,75,000/-, stated to be the balance sale consideration payable by the respondent to the petitioner against transfer, by the petitioner, of half the suit property to the respondent.

7. Consequent to issuance of summons, the respondent filed an application under Order XXXVII Rule 3(5) of the CPC, seeking leave to defend the suit. In the said application, the respondent alleged that the Cheque No. 130952 dated 23rd October 2017 had been stolen by the petitioner, in which regard the respondent had already filed a complaint before the learned Metropolitan Magistrate under Section 200 of the Code of Criminal Procedure, 1973.

8. While acknowledging in the application for leave to defend, that the petitioner had indeed sold half the suit property to the respondent, it was asserted that the sale consideration was only ₹ 10,00,000/-, which stood paid by the respondent to the petitioner. As such, the respondent, in the application for leave to defend, denied the claim of the petitioner, as asserted in the suit.

9. The learned ADJ has, while adjudicating on the application filed by the respondent for leave to defend the suit, noted the fact that the petitioner had not placed, on record, any document supporting his stand that the price at which the petitioner had purchased the suit

property from the respondent was ₹ 91,50,000/- and that, therefore, half the said consideration would work out to ₹ 45,75,000/-. As the petitioner had, according to the impugned order, not placed any document on record, in support of the claim that the original the sale consideration of the suit property was ₹ 91,50,000/-, the learned ADJ has found triable issues to have been raised by the respondent and has, therefore, granted unconditional leave to the respondent to defend the suit.

10. Consequent to a direction of this Court, the Sale Deed dated 28th February 2013 has been placed on record by the petitioner. The Sale Consideration of the suit property, as reflected in the Sale Deed, is ₹ 34,15,000/-. There is, admittedly, at least as of now, no document by the petitioner, filed with the suit, indicating that the original sale consideration of the suit property was ₹ 91,50,000/-. The assertion, in the plaint, that the respondent was liable to pay, to the petitioner, ₹ 45,75,000/- towards purchase of half the suit property is also not, therefore, supported by any document, which has been placed on record with the suit.

11. As the petitioner has not placed on record any document, with the plaint, in support of the claim, that original the sale consideration was ₹ 91,50,000/-, as that figure constitutes the very basis of the entire claim in the suit, the learned ADJ is correct in his finding that a triable issue had been raised by the respondent.

12. Where a triable issue has been raised by the respondent, which is not found to be lacking any *bonafides* or is otherwise implausible, the respondent, as a matter of principle, is entitled to unconditional

leave to defend as is manifest from the following passages from the judgment passed by the Supreme Court in ***B.L. Kashyap v. JMS Steels and Power Corporation***¹. Following passages from the said decision may be reproduced to advantage:

“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***³ case 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 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

¹ (2022) 3 SCC 294

² (2017) 1 SCC 568

³ (1976) 4 SCC 687

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)

13. In view thereof, within the limited parameters of the jurisdiction vested in this Court under Article 227 of the Constitution of India, no occasion arises for this Court to interfere with the impugned order passed by the learned ADJ. As such, this petition is dismissed *in limine*. It is clarified that the observations contained in this order are only for the purposes of examining whether a case for interference under Section 227 of the Constitution of India, with the decision of the learned ADJ to grant unconditional leave to the respondent to defend the suit exists or not. They are not to be treated as an observation

even collaterally, on the merits of the stand of either of the parties, and are not meant to influence the decision of the court below during the hearing of the suit.

14. Miscellaneous application also stands dismissed.

C.HARI SHANKAR, J

NOVEMBER 11, 2022

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