



O.S.A.No.297 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.11.2023

CORAM :

**THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ**

**Original Side Appeal No.297 of 2021
and
CMP.No.16834 of 2021**

**G.Karthik
Appellant**

..

Versus

**Shyam Krishna Agrawal
Respondent**

..

This Original Side Appeal filed under Order 36 Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent to set aside the order dated 11.03.2021 in A.No.3128 of 2018 in C.S.No.1022 of 2005.

For Appellant : Mr.MA.Gouthaman

For Respondent : Mr.S.Namasivayam

JUDGMENT

(Judgment of the Court was delivered by R. MAHADEVAN, J.)

This Original Side Appeal has been filed by the appellant against the order passed by the learned Judge in A.No.3128 of 2018 in C.S.No.1022 of 2005 on



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11.03.2021.
WEB COPY 2. The appellant is the defendant in the aforesaid suit and the respondent herein is the plaintiff. According to the appellant, he had borrowed a sum of Rs.20,00,000/- and undertook to repay the same by the end of December 2001, however, he failed to repay the same. The amount together with interest accumulated is to Rs.28,00,000/- as on November 2002. While so, the cheque issued for the discharge of the outstanding amount, was dishonoured, due to which, a complaint under section 138 of the Negotiable Instruments Act was filed by the respondent and the same culminated in CC No.1255 of 2003. Thereafter, the respondent instituted a summary suit in C.S.No.1022 of 2005 for recovery of a sum of Rs.42,70,000/- together with interest at 18% per annum.

3. Upon receipt of the summons in the suit, the appellant preferred an application in A.No.4056 of 2017 seeking unconditional leave to defend the suit, by stating that no documents have been filed by the respondent to prove the borrowal of such loan by the appellant. It was further contended on the side of the appellant that the appellant had paid a sum of Rs.16,00,000/- to the respondent in CC No.1255 of 2003, i.e., much before the filing of the suit, besides depositing a sum of Rs.15,00,000/- in the Criminal Revision Petition, which has also been withdrawn by the respondent and thus, the appellant had paid the entire amount that he borrowed



from the respondent. On the other hand, the respondent contested the application by stating that the amounts that have been paid by the appellant were only towards the earlier transaction of the year 1999 and the amount of Rs.20,00,000/- which the respondent had given to the appellant as loan in the year 2000, was not paid by him.

4. After due contest, the learned Master came to the conclusion that the appellant had not proved his stand that he has repaid the amount due to the respondent, and thus, rejected the plea for grant of unconditional leave to defend the suit, by order dated 25.01.2018.

5. Challenging the aforesaid order, the appellant filed an application in A.No.3128 of 2018 stating *inter alia* that the learned Master has failed to consider the fact that the respondent had received a sum of Rs.16 lakhs from the appellant in CC. No.1255 of 2003 and thereafter, a sum of Rs.15 lakhs pursuant to the order passed in the Criminal Revision Petition and that, the learned Master has not considered the deposit of a sum of Rs.5 lakhs as per the order of the Division Bench in OSA No.33 of 2017. It was also submitted on behalf of the appellant that the bank statement produced by the appellant from the year 1998 would clearly show that the entire loan has been repaid. On the other hand, the learned counsel for the respondent contended that the vital entries in the bank statement for the period from 30.04.1999 to 18.05.1999 have not been deliberately filed, since these entries would clearly prove



the earlier loan borrowed by the appellant.

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6. Considering the pleadings and documents filed on behalf of both sides, the learned Judge was of the view that the appellant's contention that the entire dues have been paid to the respondent, is not correct, since the oral evidence adduced to this effect, would reveal otherwise. The learned Judge has given a finding that for the loan borrowed in the year 1999, the amounts have been cleared, but a second loan borrowed by him from the respondent, is now due and owing from the appellant. Accordingly, it has been held by the learned Judge that the claim of the appellant that there has been only one borrowal, is not correct, since the records would reveal that there has been borrowal in the year 1999 as well as in the year 2000 and that, the amount due towards loan of the year 1999 has been repaid and the amount borrowed in the year 2000 was not paid. Having held so, the learned Judge dismissed the application filed by the appellant. Aggrieved by the same, the appellant is before this court with the present appeal.

7. The learned counsel for the appellant / defendant submitted that the respondent did not produce any document, such as, promissory note, loan agreement, etc., to prove that he had lent a sum of Rs.20,00,000/- as loan to the appellant, during 2000 and hence, there was no cause of action for filing the suit, in respect of the alleged loan transaction. Adding further, the learned counsel submitted that the entire



sum of Rs.20,00,000/- obtained as a loan has been paid by the appellant in the connected proceedings in CC No.1255 of 2003, which was admitted by the respondent in his cross examination on 27.05.2005 to the effect that apart from the loan transaction of Rs.20,00,000/-, there is no other transaction between them. It is specifically submitted that the appellant has paid a sum of Rs.16,00,000/- even prior to the institution of the suit and further sum of Rs.15,00,000/- in the criminal revision proceedings. Thus, according to the learned counsel, it is incorrect that there were two different loan transactions between the appellant and the respondent, one of the year 1999 and another of the year 2000, for which, two cheques were given by the appellant and the same got dishonoured. Whereas, it is the stand of the appellant that two cheques were issued for a single transaction and the amount has been paid and the said transaction attained finality, however, suppressing the same, the respondent instituted the present summary suit. Therefore, the appellant filed the application seeking leave to defend, which was dismissed by the learned Master as well as the learned Judge, without considering the said aspects in proper perspective. The learned counsel also placed reliance on the decision of the Hon'ble Supreme court in ***B.L.Kashyap and sons Limited v. JMS Steels and Power Corporation and another*** [(2022) 3 SCC 294] and sought to allow this appeal by setting aside the orders impugned herein.



8. Per contra, the learned counsel for the respondent / plaintiff submitted that based on the oral and documentary evidence, the learned Judge has correctly analysed the facts and circumstances of the case and has passed the impugned order with total application of mind and hence, the same does not require any interference in the hands of this Court.

9. Heard the learned counsel on either side and perused the records.

10. When this matter came up on 19.01.2022, this Court granted an order of interim stay of the proceedings in C.S.No.1022 of 2005 and the same was made absolute on 11.04.2023.

11. The challenge made in this appeal is to the order passed by the learned Judge in dismissing the application filed by the appellant / defendant under Order 37 Rule 3(5) of the Civil Procedure Code, for unconditional leave to defend the suit in C.S. No. 1022 of 2005.

12. Before proceeding further, it may be relevant to refer to position of law, with regard to the issue involved herein. In *M/s. Mechelec Engineers & Manufacturers v. M/s. Basic Equipment Corporation [(1976) 4 SCC 687]*, the



Hon'ble Supreme Court enumerated certain propositions as to when an unconditional leave can be granted or the defendant can be put on terms and the same read as follows:

"8. ... 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, shows 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."*

12.1. In the subsequent decisions of the Hon'ble Supreme Court in ***Sunil Enterprises & another v. SBI Commercial & International Bank Ltd. [(1998) 5 SCC 354]*** and ***SIFY Ltd. v. First Flight Couriers Ltd. [(2008) 4 SCC 246]***, the propositions, as noted above, were summed up.

12.2. In yet another decision in ***State Bank of Hyderabad v. RABO***



Bank [(2015) 10 SCC 521], the entitlement of the defendant to the grant of leave to

defend was elaborately discussed and the same is extracted below for ready reference:

*“15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in **Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee**, AIR 1949 Cal 479, in the form of the following propositions:*

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.

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.

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 made 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.

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.

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.

16. It is also noticed that the law as enunciated above, has been followed by the Courts in several cases [See also : Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321, Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros, AIR 1965 SC 1698, Mechelec Engineers & Manufacturers Vs. Basic Equipment Corpn., (1976) 4 SCC 687 and Sunil Enterprises & Anr. Vs. SBI Commercial & International Bank Ltd. (1998) 5 SCC 354].

17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the



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defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, the plaintiff is entitled to leave to sign judgment“.

12.3. In **IDBI Trusteeship v. Hubtown Ltd [(2017) 1 SCC 568]** the Hon'ble Supreme Court following the principles laid down in *Kiranmoyee Dassi* case, held as follows:

“17. Accordingly, the principles stated in para 8 of *Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.*, (1976) 4 SCC 687 will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in *Milkhiram (India) (P) Ltd. v. Chamanlal Bros.*, AIR 1965 SC 1698 : (1966) 68 Bom LR 36, as follows:

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 leave 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.



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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."*

12.4. The aforesaid decision was referred to in the decision in ***B.L.***

Kashyap & Sons Ltd. v. JMS Steels & Power Corporation & Anr. [(2022) 3 SCC

294] and it was observed by the Hon'ble Supreme Court as follows:

"33. It is at once clear that even though in the case of IDBI Trusteeship, this Court has observed that the principles stated in paragraph 8 of Mechelec Engineers' 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.



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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."

13. Keeping the aforesaid legal proposition in mind, we intend to examine the rival contentions raised by the parties. This is a case of concurrent finding. The application filed by the appellant seeking unconditional leave to defend the suit, was dismissed by the learned Master, on the finding that the appellant had not proved his stand that he has repaid the loan borrowed in the year 2000. The said order was also



affirmed by the learned Judge.

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14. On a perusal of the impugned order passed by the learned Judge, it is seen that the appellant has not produced any document to substantiate that the amounts borrowed from the respondent have been completely repaid nor any relevant particulars provided by supporting documentary evidence. Though the appellant stated that he had made payments of Rs.16 lakhs and Rs.15 lakhs and deposit of Rs.5 lakhs in the connected proceedings and hence, there was no due payable to the respondent, the learned Judge was of the view that there were two borrowals, viz., one in the year 1999 and another in the year 2000 and that, the amount due towards the loan of the year 1999 has been repaid and the amount borrowed in the year 2000 was not repaid by the appellant. In view of the said factual findings, the contention put forth on the side of the respondent that the vital entries in the bank statement for the period from 30.04.1999 to 18.05.1999 have not been filed by the appellant, assumes significance, and it would clearly prove that the appellant has intended to suppress the documents relating to the earlier loan borrowed by him and has conveniently wanted the court to believe his contention that only one loan was borrowed. Thus, there is no meritorious defence available to the appellant for granting leave to defend the suit.



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15. The decision of the Hon'ble Apex Court in *B.L.Kashyap and Sons Ltd* case, clearly expounds the present position of law that the defendant in a summary suit to obtain an unconditional leave to defend in his favour, ought to exhibit before the court that he has a substantially reasonable defence. However, the defence so taken by the appellant herein, is neither reasonable nor *bona fide*. Therefore, this court finds no reason to interfere with the impugned order passed by the learned Judge.

16. Accordingly, this original side appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

[R.M.D., J.] [M.S.Q., J.]
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