



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

% **Date of order: 11th August 2023**

+ **C.R.P. 18/2023**

TRANSPORT INDIA 3PL

..... Petitioner

Through: **Mr. Mayank Wadhwa and Ms. Srishti Raichandani, Advocates.**

versus

INDO ALUSYS INDUSTRIES LIMITED

..... Respondent

Through: **Mr. Rajesh Banati, Mr. Ashish Sareen, Mr. Ankit Banati and Mr. Adil Asghar, Advocates.**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 115 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") has been filed on behalf of the petitioner, praying as follows:

***"IN THE PREMISE,** it is prayed that this Hon'ble Court may be pleased to call for the record of the case and revise the impugned order dated 19/11/2022 passed by Sh. Chander Shekhar, Ld. District Judge (Commercial Courts), KKD Courts in Civil Suit No. 207 of 2021 titled 'Transport India - 3PL Vs. Indo Alusys Industries Ltd.' and set-aside the same and this Hon'ble Court may further be pleased to direct the respondent pay the money as sought in the plaint along with interest @18% p.a. from the date of default till realization;*



Pass any such other and further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present matter and in the interest of justice.”

2. Learned counsel for the petitioner submitted that the petitioner/plaintiff is a partnership firm, instituted a suit for recovery of Rs.15,48,496/- along with interest @ 18% p.a. with pendente lite and future interest against the respondent/ defendant no. 1, which is a company and defendants no. 2, 3 and 4 in the suit, who are the Directors of the Company. It is submitted that the petitioner rendered services to the defendant no. 1 company and raised invoices for the same.

3. It is further submitted that the respondent initially made regular payments but defaulted in making the payment in the year 2018 and certain invoices are still due against the respondent. It is contended that the respondent admitted the fact that certain invoices for the time period prior to 14th October 2019, by signing balance confirmation letter on 31st March 2021.

4. It is submitted that the petitioner on 14th July 2021 sent a legal notice to the respondent for making payment of the outstanding amount, however, the said notice could not be served. The petitioner sent another notice on 18th August 2021 which was duly served upon the respondent pursuant to which, neither the respondent paid the outstanding amount nor did he send any response to the same.

5. It is further submitted that due to non-payment of the outstanding amount, the petitioner instituted a civil suit bearing no. 207/2021 against the respondent for recovery of the outstanding amount.



6. It is submitted that as per the order dated 02nd November 2021, defendant no. 2 to defendant no. 4 in the suit were deleted from the array of parties on the basis that defendant no. 1 is a legal entity and it can be sued in its name.

7. It is submitted that the petitioner moved an application under Sections 114 and 152 of CPC seeking review and modification of the said order, the said application was dismissed on 23rd December 2021 by the Court below pursuant to which, the petitioner filed a fresh memo of parties deleting the names of defendant no. 2 to 4.

8. It is submitted that the petitioner sent the summons to the respondent, for settlement of issues under Order XXXVII CPC as per the prescribed form-IV in Appendix B. The respondent filed its memo of appearance and provided its address under Order XXXVII Rule 3(1) of CPC after receiving of the summons in the stipulated time.

9. It is submitted that the petitioner filed an application under Order XXXVII Rule 3(4) CPC for the issuance of summons for judgment against the respondent at the address provided by the respondent in the Memo of Appearance. It is further submitted that the respondent, after receiving the said summons, filed the application under Order XXXVII Rule 3(4) read with Section 151 CPC seeking leave to defend the suit of the petitioner.

10. It is submitted that the petitioner contested such leave to defend by way of filing reply to the leave to defend application of the respondent and stated in the reply that there is an acknowledged of debt regarding the invoices on or before 14th October 2019 by the respondent by way of balance confirmation letter dated 31st March 2021.

11. It is further submitted that the Annexure-D-3 of the respondent



annexed with application of leave to defend is a forged and fabricated document.

12. It is submitted that the petitioner further stated in the reply to respondent's leave to defend application that the respondent sent reply to the legal notice on 22nd September 2021 i.e., after filing of the suit by the petitioner. Therefore, the reply of the legal notice could not be placed on record by the petitioner.

13. It is submitted that the respondent filed rejoinder to its application for leave to defend under Order XXXVII CPC.

14. It is submitted that the application under Order XXXVII CPC was dismissed by the Court below vide order dated 19th November 2022. The petitioner has filed the present revision petition against the impugned order.

15. It is submitted that impugned order may be set aside by this Court as the respondent has raised frivolous and vexatious grounds in its application for leave to defend. There are no triable issues raised by the respondent in the said application.

16. In view of the foregoing paragraphs, the learned counsel for the petitioner submitted that the instant petition may be allowed and the reliefs sought may be granted thereby setting aside the impugned order dated 19th November 2022 passed by Learned District Judge (Commercial Courts), Karkardooma Courts in Civil Suit bearing no. 207/2021.

17. *Per Contra*, learned counsel appearing on behalf of the respondent vehemently opposed the averments made by the petitioners and submitted that the present petition has been filed with the sole purpose of harassing the respondent. The present petition is nothing but an abuse of the process of law.



18. It is submitted that the respondent in its application seeking leave to defend had asserted the fact that the suit of the petitioner is not maintainable under Order XXXVII CPC since the person who has signed the plaint is not competent to file the suit as well as the documents annexed along with the plaint.

19. It is further submitted that the petitioner has concealed the fact that the legal notice dated 18th August 2021 sent by the petitioner was replied to by the respondent on 9th September 2021 and the same was duly served upon counsel for petitioner.

20. It is contended that the respondent in its application for leave to defend has categorically stated that respondent has no outstanding liability towards the petitioner and instead it is the petitioner, who owes respondent an amount of Rs. 4,94,054/- .It is further contended that a copy of statement of account maintained by the respondent for the period 01st August 2019 till 09th February 2022 annexed as Annexure-D3 reflects the same, that there is no liability of respondent towards the petitioner.

21. It is submitted on behalf of the respondent that the respondent did not acknowledge the debt of Rs. 15,48,496/- or any other amount through the balance confirmation letter dated 31st March 2021. It is further submitted that the seal of the respondent company and signature appearing on the said balance confirmation letter are forged.

22. It is submitted that the disputes between the parties cannot be adjudicated under Order XXXVII CPC, since there is no acknowledgment on behalf of the respondent and there are triable issues raised on which, leading of evidence may be required.

23. Hence, in view of the foregoing submissions, the respondent seeks



that this Court may be pleased to dismiss this revision petition thereby, upholding the impugned order.

24. Heard both the parties at length.

25. This Court has perused the material on record including the pleadings.

26. Keeping in view the arguments advanced by the parties, the following issue has been framed for adjudication by his Court:

Whether the petitioner's challenge against the impugned order of the learned Trial Court, dismissing the petitioner's application under Order XXXVII of the CPC, is sustainable under the limited scope of Section 115 of the CPC?

27. Before delving into the merits of the case, at this stage, the scope of Order XXXVII of the CPC is pertinent to be discussed. The relevant provision is reproduced herein below for reference:

"Order 37 — Summary Procedure

Order 37 Rule 3(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."

28. The scope of Order XXXVII CPC has been discussed by the Hon'ble



Supreme Court in the judgment of ***Wada Arun Asbestos (P) Ltd. v. Gujarat Water Supply & Sewerage Board, (2009) 2 SCC 432*** as follows:

20. *Yet again in Raj Duggal v. Ramesh Kumar Bansal [1991 Supp (1) SCC 191] this Court held: (SCC pp. 191-92, para 3)*

“3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.”

29. The object of the Order XXXVII CPC is to ensure a speedy hearing and disposal of the suit. It aims at preventing the unreasonable delay in granting relief, which may be caused by defendant by participating in the suit despite the fact, that the defendant has no defence. Therefore, the plaintiff is entitled to speedy decision in such cases.

30. It provides a summary procedure in suits based on where the plaintiff seeks to recover a debt or liquidated amount. In such kinds of suits, there is



an admitted liability of the debt or liquidated amount on the part of the defendant, hence, there is no leave given to defend by the Court to the defendant. The summary suit differs from the suit in this aspect, unlike the ordinary civil suit the summary suit does not give an opportunity to the defendant to defend itself. The leave to defend in summary suit will be granted only when the defendant discloses such facts which make it necessary for the plaintiff to prove such facts therefore, the defendant has raised a triable issue.

31. In view of the above discussion and judicial precedent, it is a settled position of law that leave to defend should not be refused unless the Court is satisfied with the fact that the contentions asserted by the defendant are frivolous and do not raise any triable issue. Leave to defend has to be granted on case to case basis, there is no straightjacket formula for granting of leave to defend.

32. With regard to the ambit of Section 115 of the CPC, it is a settled position of law that the said provision only confers a supervisory power to this Court with the main aim of keeping an oversight on the Courts below. Section 115 CPC provides a restraint on the exercise of the power by the High Court and the Court shall not interfere until there is an error apparent on the face of the impugned order passed by the Court below.

33. Under section 115 CPC, a High Court does not sit as an appellate court. Therefore, the Court while exercising revisional powers shall not enter into the questions of facts or evidence or any errors thereto but shall limit itself to the question of errors of exercise of jurisdiction.

34. Based upon the abovesaid principles, I will now examine the facts of the present case.



35. The relevant paragraphs of the impugned order dated 19th November 2022 is reproduced below:

“10. I have considered the submissions of Ld. Counsel of both the parties and perused the judicial record. The relevant provision under Order 37 Rule 3(5) of CPC in which the application is filed by the defendant is quoted hereunder for reference:

xxx

The Hon'ble Supreme Court of India in case law titled as B. L. Kashyap and Sons Ltd. vs. J.M.S. Steels and Power Corporation and Anr. (2022) 3 SCC 294 has summarized the law to consider the application of the defendant seeking leave to defend u/0 37 Rule 3(5) of CPC after considering the pertinent preceding judgments on the said provision of CPC. The para no. 32 to 33.3 of this judgment are relevant for adjudication and disposal of the. present application, the same are quoted hereunder for reference and convenience:

Para 32:

"32. The High Court took note of the fact that the trial court relied upon the decision in Mechelec Engineers³ and observed that the applicable principles were those contained in the later decision of this Court in IDBI Trusteeship⁴. Having regard to the question at hand, it shall be worthwhile to read together the principles stated in the said two decisions^{3,4} of this Court.

Para 32.1:

32.1 In Mechelec Engineers³, the principles for consideration of a prayer for leave to defend in a summary suit were laid down by this Court in the following terms: (SCC p. 690, para 8)

"8. In Kiranmayi Dasi v. J. Chatterjif⁷, CWN at p. 253 Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions: (SCC OnLine Cal)'



'...(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 raised a triable issue indicating that he has a fair or bonafide 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 shews 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 condition 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.' "

Para 32.2:



In IDBI Trusteeship⁴ , this Court modulated the aforementioned principles and laid down as follows: (SCC pp. 596-97, para 17)

"17. Accordingly, the principles stated in para 8 of Mechelec case³ will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case⁸ , 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.



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." (emphasis in original)

Para 33:

33. It is at once clear that even though in IDBI Trusteeship⁴, this Court has observed that the principles stated in para 8 of Mechelec Engineers³ case shall stand superseded in the wake of amendment of Rule 3 of Order 37 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.

Para 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 appears 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.

Para 33.2:

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.

Para 33.3:

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."

11. A perusal of the above quoted principles explicitly emulate that denying the leave to defend is not the rule and it is also not a rule that 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. It is only in those cases where the defendant is found to be having no substantial defence and/or raising no genuine triable issues and wherein court's view is also that the defence is frivolous or vexatious, the refusal to leave to defend is to be countenanced and the plaintiff is entitled to judgment forthwith.

12. In the present case, the defendant has raised the issues that it has already made the full payment to the plaintiff and nothing is due against it, rather an amount of Rs. 4,94,054/(rupees four lakh ninety four thousand fifty four only) has been paid by it in excess to the plaintiff and to support this defence, it has annexed a copy of statement of account maintained by it for the period 01.08.2019 till 09.02.2022 as Annexure D3 with its present application. It has claimed that since payment in excess has been made by it to the plaintiff, therefore it is not liable to pay any interest. It has also claimed that it did not acknowledge the debt of Rs.



15,48,496/- or any other amount through balance confirmation letter dated 31.03.2021 or any other date, therefore there is no question of acknowledging invoices raised on or prior to 14.10.2019. Apart from aforesaid defences it has raised the Issues of maintainability of suit under Order 37 of CPC, competency of the person through whom suit has been filed, issue of cause of action, concealment of vital facts, forging and fabricating of documents, and non-payment of Rs. 1,83,7961 ever by the defendant to the plaintiff. The defendant has raised issues of facts and law, for determination of some of the issues, leading of evidence by both the parties seems to be essential. There is nothing on judicial record which suggests that the issues raised by the defendant are frivolous or vexatious. The defences raised by defendant seem to be substantial. In view of the aforequoted case law decided by the Hon'ble Supreme Court, the aforesaid submissions of Ld. Counsel for the plaintiff are not sustainable and hence, the same are rejected. The defendant seems to have raised such substantial and triable issues which justify granting of unconditional leave to defend, hence application of the defendant is allowed in terms of above observations and disposed off accordingly.”

33. The petitioner has preferred the instant revision petition against the order of the learned District Judge in the civil suit initiated by the petitioner which is pending between the parties. The application of the petitioners filed under Order XXXVII of the CPC, was dismissed by way of the impugned order dated 19th November 2022. The learned Judge while passing the impugned order has explicitly stated the ground for dismissal of the application of the petitioner that since the respondent has not admitted its liability regarding the outstanding amount and has instead averred that the petitioner owes him Rs. 4,94,054/-. It was also observed by the learned Trial Court that since, there is no admissibility of the purported document i.e.,



confirmation letter dated 31st March 2021 by the respondent, hence the respondent has raised a triable issue and is entitled to leave to defend under Order XXXVII CPC. The learned District Judge has also placed reliance on the judgment of the Hon'ble Supreme Court *B. L. Kashyap and Sons Ltd. vs. J.M.S. Steels and Power Corporation and Anr.* (2022) 3 SCC 294 for articulating the scope of grant of leave to defend under Order XXXVII CPC.

34. The learned Judge further held that the respondent has further raised issue with respect to the competency of the person through who filed the suit, issue of cause of action, concealment of vital facts, forging and fabricating of documents, and non-payment of Rs. 1,83,796/- by the defendant to the plaintiff.

35. Hence, in view of the foregoing submissions by the respondent, the learned Judge has raised issues concerning the facts and law, which cannot be adjudicated by this Court under Order XXXVII CPC. The learned Judge was of the opinion that the issues raised by the respondent are not frivolous or vexatious.

36. In view of the foregoing discussion, This Court is of the view that the impugned order dated 19th November 2022 passed by the learned District Judge under Order XXXVII CPC has correctly held that there is triable issue which has been raised by the respondent, since there is no admissibility on the part of the respondent with respect to the outstanding amount vide confirmation letter dated 31st March 2021. The respondent has further asserted that instead it is petitioner who owes him Rs 4, 94,054/- and has furnished document as proof in this regard.

37. The respondent has further raised disputed the competency of the person through who has filed the suit and issue of cause of action. It has



asserted that there is concealment of vital facts, forged and fabricated documents are placed in record of the Court and non-payment of Rs. 1,83,796/- by the defendant to the plaintiff. The learned District Judge has correctly held in view of above stated facts, that the respondent is entitled for unconditional leave to defend that there are triable issues raised by the respondent which cannot be adjudicated under Order XXXVII CPC.

38. Under Section 115 CPC, this Court shall intervene only if the Court below has exercised its jurisdiction illegally or there is found to be material irregularity in the exercise of jurisdiction by the Trial Court. In view of the present fact, there is no such illegal or material irregularity in exercise of the jurisdiction by the Court below.

39. This Court is of the view that no error of jurisdiction or other error which goes to the root of the matter, therefore calling for the intervention of this Court under Section 115 of the CPC.

40. Accordingly, the issue framed is decided.

41. In view of the above discussion of facts and law, this Court finds no infirmity in the impugned Order dated 19th November 2022.

42. For all the aforesaid reasons, no merit is found in the revision petition and the same is accordingly dismissed along with the pending applications.

43. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

AUGUST 11, 2023

pa/DB

Click here to check corrigendum, if any