



2023:DHC:8492



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

% **Date of order : 17th November, 2023**

+ **C.R.P. 335/2023**

MOHD ANWAR Petitioner

Through: Mr.Tushar Sannu, Mr.Priyankar
Tiwari and Mr.Naveen Bhati,
Advocates alongwith Petitioner

versus

PARVEZ AHMAD Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH
ORDER

CHANDRA DHARI SINGH, J (Oral)

CM APPL. 59291/2023 (Exemption)

Exemption allowed subject to just exceptions.

The application stands disposed of.

CM APPLs. 59292/2023 (Delay in filing) & CM APPLs. 59292/2023
(Delay in re-filing)

1. The instant applications under Section 5 of Limitation Act, 1963 read with Section 151 of the Code of Civil Procedure, 1908 for condonation of delay in filing and refiling the instant revision petition have been filed on behalf of applicant/petitioner.
2. For the reason stated in the applications, the delay of 11 days each in filing and refiling the instant revision petition is condoned.
3. The application is disposed of.

**C.R.P. 335/2023**

1. The instant civil revision petition has been filed on behalf of petitioner seeking the following reliefs: -

“A. Issue order or direction in the nature of certiorari to set-aside/quash the impugned order dated 17.05.2023 passed by the learned Additional District Judge-01, North East, Karkardooma Court Complex in CS No. 141 of 2020 titled “Mohd. Anwar vs Parvez Ahmad”

B. Pass such other or further orders in favour of petitioners, which this Hon’ble Court may deem, fit and proper in the facts and circumstances of the case.”

2. The relevant facts leading to the filing of the present petition are as follows:

- a. The respondent, i.e., the defendant before the learned Trial Court is nephew of the petitioner, i.e., the plaintiff before the learned Trial Court.
- b. It has been stated that the respondent had approached the petitioner on 1st January 2018, with a request for a loan of Rs. 4,50,000/- on the ground that he is in need of money to help his father in some criminal matter and to start his business. Further, the respondent had assured the entire sum of loan will be repaid within six months from the date of loan.
- c. Upon the request made on behalf of the respondent, the petitioner allegedly advanced a loan of sum of Rs. 4,50,000/-



on 5th January 2018, and a promissory note dated 5th January 2018, was also executed between the parties. As per the promissory note, the respondent promised to repay the said loan amount within six months.

- d. Upon completion of the six months' time period, the respondent failed to repay the loan amount. The petitioner made several requests to the respondent and accordingly sent a legal notice dated 3rd June 2020, demanding the money advanced to the respondent. The petitioner also sent a reminder legal notice dated 12th June 2020, but to no avail.
- e. Subsequently, the petitioner filed a civil suit bearing CS no. 141/2020, under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter "CPC"), for recovery of the sum of Rs. 4,50,000/-, before the learned Trial Court. Thereafter, the respondent filed an application under Order XXXVII Rule 3 (5) of the CPC, seeking leave to defend the above said suit.
- f. The aforementioned application of the respondent was allowed by the learned Trial Court vide order dated 17th May 2023. Being aggrieved by the same, the petitioner has approached this Court seeking setting aside of the impugned order.

3. The learned counsel appearing on behalf of the petitioner submitted that the learned Trial Court has passed the impugned order without taking



into consideration the entire facts and circumstances of the matter.

4. It is submitted that the learned Court below erred in holding that there are disputed facts which needs to be adjudicated by way of a full-fledged trial.

5. It is submitted that the learned Trial Court failed to consider the settled position of law that the leave to defend can only be granted if the affidavit filed by the defendant discloses a *bona fide* dispute.

6. It is submitted that there are glaring disparity in the defence taken by the respondent before the Trial Court and there is an active concealment of facts in the affidavit, furthermore, the respondent's reliance is placed upon fabricated and manufactured documents.

7. It is submitted that the respondent, through his leave to defend application, has raised frivolous and vexatious defence, and has therefore, miserably failed to raise any substantial defence.

8. It is submitted the respondent in his leave to defend application claims that he has already refunded a sum of Rs. 3,80,000/-, to the petitioner in the presence of seven witnesses, whereas, in his reply to the legal notice dated 15th June 2020, the respondent has stated that he has refunded a sum of Rs. 3,90,000/-, to the petitioner in the presence of four witnesses.

9. It is also submitted that on a perusal of the pro-note, as relied by the respondent, it is apparent that the details of only four instalments are mentioned therein, which is unsigned and undated.

10. It is further submitted that the comparison of the backside of the original pro-note dated 5th January 2018, placed on record by the petitioner,



makes it evident that the copy of the pro-note relied upon by the respondent is a forged and fabricate document since there are material contradictions among both.

11. It is submitted that the respondent has admitted to the fact that he has executed the promissory note dated 5th January 2018, in his reply to the legal notice but the same was concealed by him surreptitiously and with *mala fide* intentions in his application filed for leave to defend.

12. It is submitted that the respondent has manufactured a concocted story regarding the purchase of some property jointly and the same cannot be accepted as a contention since the respondent has failed to produce any documentary evidence such as an advance/bayana receipt or an agreement to that effect.

13. It is submitted that the learned Court below erroneously allowed the respondent's application filed under Order XXXVII Rule 3 (5) of the CPC, since it failed to exercise its jurisdiction conferred upon it that it has to refuse a leave to defend application in case the same is found to be frivolous and vexatious.

14. In view of the foregoing submissions, it is submitted that the instant petition may be allowed and the reliefs be granted as prayed.

15. Heard learned counsel appearing on behalf of the petitioner and perused the record.

16. Before analyzing the facts of the matter at hand, this Court deems it imperative to understand the settled position of law with respect to the principle of leave to defend under Order XXXVII Rule 3 (5) of the CPC.



The same has been reproduced below for reference:

“ORDER XXXVII - SUMMARY PROCEDURE 2***

....

(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....”

17. Order XXXVII of the CPC, provides for procedure in suits based on negotiable instruments or where the plaintiff seeks to recover a debt or any liquidated amount. The essence of summary suit is that the defendant is not, as in an ordinary suit, entitled with the right to defend the suit on merits. The defendant must apply for a leave to defend within the prescribed period of ten days. Such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration or such other facts as the Court may deem fit.



18. The principle governing the provision of leave to defend states that 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. Also, if the defendant raises a triable issue indicating to the fact that he has a fair, or *bona fide*, or a reasonable defence although not a positively good defence, the plaintiff is not entitled to sign the judgment and the defendant is entitled to unconditional leave to defend. The law further states that in case the Court is satisfied that the grounds for defence raised by the defendant in his application for leave to defend is frivolous and fails to prove his *bona fide*, the Court is empowered to deny such leave to defend.

19. At this stage, the question which this Court must answer is whether leave to defend can be claimed as a matter of right. The Hon'ble Supreme Court in the matter of ***Sunil Enterprises v. SBI Commercial & International Bank Ltd., (1998) 5 SCC 354***, while following the decision in earlier cases, reiterated the law and observed as under:

“4. The position in law has been explained by this Court in Santosh Kumar v. Bhai Mool Singh [AIR 1958 SC 321 : 1958 SCR 1211 : (1958) 1 MLJ (SC) 159] , Milkhiram (India) (P) Ltd. v. Chamanlal Bros. [AIR 1965 SC 1698] and Mechelec Engineers & Manufacturers v. Basic Equipment Corpn. [(1976) 4 SCC 687 : AIR 1977 SC 577] The propositions laid down in these decisions may be summed up as follows:

(a) If the defendant satisfies the court that he has a good defence to the claim on merits, 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 possibly good defence, 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, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend — the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, 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, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.

In fact in identical matters on the file of the said High Court in Summary Suit No. 2963 of 1990 Dena Bank v. Sunil Enterprises and Summary Suit No. 1153 of 1989 Bank of India v. Mahendra Sarabhai Choksi, leave to defend had been granted to the defendants.”

20. This Court is of the view that in the event 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. Moreover, if some triable issues are being raised, wherein, reasonable defence is being indicated, the defendant will ordinarily be entitled to unconditional 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 should be refused and the plaintiff is entitled to judgment forthwith.

21. The above said view of this Court has been followed by the Hon'ble Supreme Court in a recent judgment titled as ***B.L. Kashyap & Sons Ltd. v. JMS Steels & Power Corpn., (2022) 3 SCC 294***. The Hon'ble Court held that while dealing with an application seeking leave to defend, it would not be a correct approach that 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. The relevant extracts of the same are as follows:

“32.2. In IDBI Trusteeship [IDBI Trusteeship Services Ltd. v. Hubtown Ltd., (2017) 1 SCC 568 : (2017) 1 SCC (Civ) 386] , 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 case [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 case [Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698] , 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)

33. *It is at once clear that even though in IDBI Trusteeship [IDBI Trusteeship Services Ltd. v. Hubtown Ltd., (2017) 1 SCC 568 : (2017) 1 SCC (Civ) 386] , this Court has observed that the principles stated in para 8 of Mechelec Engineers case [Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687] 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.*

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 bona fide 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.

x

x

x

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.”

22. Now advertent to the facts of the instant matter. It is the case of the petitioner that the application filed by the respondent seeking leave to defend is baseless and the respondent has cooked up a false and frivolous story. It has been contended on behalf of the petitioner that the respondent has failed to disclose a *prima facie* and reasonable defence. It has been submitted that the application of the respondent reflects disparity in the defence raised by him *qua* the promissory note.

23. It has been argued on behalf of the petitioner that upon comparison of



both the pro-notes, i.e., the one filed by the petitioner and the one filed by the respondent before the learned Trial Court, it is revealed that the copy of the pro-note produced by the respondent is a forged and fabricated document. The petitioner has contended the same on the ground that there is material discrepancy in both the pro-notes since in the application the respondent has claimed that he has refunded a sum of Rs. 3,80,000/-, to petitioner in the presence of seven witnesses but in his reply to the legal notice dated 15th June 2020, the respondent states about presence of 4 witnesses and refunding a sum of Rs. 3,90,000/-. Thus, the petitioner, in view of the above, has urged that the impugned order may be set aside considering the frivolous and vexatious defence raised by the respondent before the learned Trial Court in his leave to defend application.

24. The respondent before the learned Trial Court had stated that the petitioner was engaged in the business of property dealing in the same locality from the year 2010, to 2015, and several transactions had taken place under their joint dealership. Both of them jointly bought a property, wherein, the petitioner initially made some payment but later defaulted and the respondent was forced to pay the entire installments. The said property was later sold out and the account was settled among them. The present respondent had further stated before the learned Court below that the petitioner had concealed the fact that he has received a sum of Rs. 3,80,000/-, from the respondent in presence of some witnesses, whose signatures appear to be on the backside of the pro-note.

25. While rejecting the petitioner's contentions, the learned Trial Court



allowed the respondent's application filed under Order XXXVII Rule 3 (5) of the CPC, vide order dated 17th May 2023, and it held as follows:

“....(B) Leave to defend should 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 by him is frivolous or vexatious.

(C) The test whether leave to defend should be granted or not is to see whether the defence raises a real, honest and bonafide dispute and raises a triable issue or not. If the court is satisfied that the defence has raised a triable issue or a fair dispute has arisen, leave to defend should not be refused. (Ref: Raj Duggal vs. Ramesh Kumar, 1991 Supp. (!) SCC 191).

Let us now examine whether defendant is entitled to leave to defend the suit in the light of aforesaid legal provisions and settled legal principles.

On perusal of materials placed on record by the parties, it is found that several disputed facts are there which need to be adjudicated by holding full-fledged trial in the present suit. In the opinion of this court claims -counter claims of the parties respective evidences, in accordance with law are required to be proved by leading respective evidence, in accordance with law.

In view of the above, the court is convinced that defendant has constituting substantial defence and raised triable issue disclosed facts which necessitate further trial in the present suit. The grounds taken are sufficient to entitle defendant to defend the present suit unconditionally. The application for the leave to defend the suit is, therefore, allowed unconditionally.

The application is disposed off accordingly.”



26. Upon perusal of the above quoted impugned order, this Court has observed that the learned Court passed a detailed order noting all the reasons for its satisfaction. It is observed that the learned Court below was satisfied with the grounds of defence raised by the defendant therein, and in pursuance to the same it held that the facts disclosed by the defendant indicate that he has a substantial defence. It held that the grounds taken in the application for leave to defend are sufficient to entitle the defendant to defend the present suit unconditionally, and hence, it allowed the said application.

27. This Court has perused the impugned order; promissory note dated 17th May 2023, which is appended as Annexure P-1/A; backside of the pro-note as relied upon by the respondent/defendant, which is annexed as Annexure P-1/F hereto, and the reply to the legal notice dated 15th June 2020. It is found that the defendant, i.e., the respondent herein, had placed certain facts before the learned Trial Court which evidently is of disputed nature and in view of the same the same requires a full-fledged trial.

28. The major fact which is found to be disputed on the face of it is, that the respondent claims that he has already refunded a sum of Rs. 3,80,000/-, to the petitioner in the presence of seven witnesses, whereas, in his reply to the legal notice dated 15th June 2020, the respondent has stated that he has refunded a sum of Rs. 3,90,000/-, to the petitioner in the presence of four witnesses. There is a contradiction among the facts narrated by both the parties.



29. This Court is of the view that the dispute between the parties with regard to the recovery of money requires a full-fledged trial which will include leading of evidences by both the parties, and only after following such due process, there could be proper adjudication of the dispute. Therefore, there has to be a grant of leave to defend unconditionally in favour of the respondent since the matter before the learned Court below involves triable issues.

30. The petitioner has filed the instant petition seeking setting aside of the impugned order passed by the learned Trial Court. It is a settled law that this Court has to look only into the issue of the jurisdiction of the Court below in deciding any application and not to go into the merits of the case. The mere fact that a decision of the Trial Court is erroneous due to a question of fact or of law does not amount to any illegality or a material irregularity. Only those matters are to be allowed under the revisional jurisdiction of the High Court, wherein, there has been an irregular exercise, or non – exercise, or the illegal assumption of the jurisdiction by the Court below.

31. In view of the above discussion of facts and law, and for the purposes of adjudication of the instant revision petition, the petitioner has not been able to make out a case which requires interference of this Court with the impugned order.

32. Therefore, this Court finds no error in the impugned order dated 17th May 2023, passed by the learned Additional District Judge-01, North East, Karkardooma Court Complex, in Civil Suit bearing CS no. 141 of 2020 titled “*Mohd. Anwar vs Parvez Ahmad*”, and the same is hereby, being



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upheld.

33. Accordingly, this petition is thus dismissed being bereft of any merits.
Pending applications, if any, also stand dismissed.

34. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

NOVEMBER 17, 2023

Dy/ryp/db

Click here to check corrigendum, if any

Signature Not Verified

Digitally Signed By: SARIKA
BHAMOO VERMA
Signing Date: 29.11.2023
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