

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.70 of 2023

1. Ashok Kumar Singh, Son of Late Virendra Kumar Singh @ Birendra Kumar Singh, Resident of Village- Rahuamani, P.S. Bangaon, District- Saharsa.
2. Shanti Devi, Wife of Shri Ashok Kumar Singh, Resident of Village- Rahuamani, P.S. Bangaon, District- Saharsa.
3. Juli Devi, Wife of Late Santosh Kumar Singh, Resident of Village- Rahuamani, P.S. Bangaon, District- Saharsa.
4. Deeksha Kumari, Minor, Daughter of Late Santosh Kumar Singh, through her mother guardian namely Juli Devi, Resident of Village- Rahuamani, P.S. Bangaon, District- Saharsa.
5. Ritu Raj Kumar @ Rituraj, Minor, Son of Late Santosh Kumar Singh, through her Mother guardian Namely Juli Devi, Resident of Village- Rahuamani, P.S. Bangaon, District- Saharsa.

... .. Appellant/s

Versus

Sudip Pratap Singh, Son of Subhash Chandra Singh, Resident of SRT 48, Road No.- 13B, Rajendra Nagar, Patna, at present Rahuamani, Ward No.- 1, P.S.- Bangaon, District- Saharsa.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Pramod Kumar Sinha, Advocate Mr. Arvind Kr. Sharma, Advocate Mr. Chetan Kumar, Advocate
For the Respondent/s	:	Mr. Manu Tripurari, Advocate Mr. Apurv Harsh, Advocate Mr. Hritik Anand, Advocate Mr. Raghu Raj Pratap, Advocate Mr. Gaurav Sharma, Advocate Ms. Almany, Advocate Mr. Astitva, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

C.A.V. JUDGMENT

Date : 24-09-2024

The present First Appeal has been filed under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred as “CPC”) by the defendants/appellants against the judgment dated 11.05.2023 and decree dated 24.05.2023 passed



by learned Sub-Judge-II, Saharsa (hereinafter referred as “Trial Court”), in Summary Suit No. 1 of 2022 filed under Order XXXVII of CPC whereby and whereunder the suit has been decreed on contest in favour of plaintiff/respondent that the plaintiff is entitled to Rs. 12,00,000/- alongwith 7 % simple interest from the date of filing of plaint till the date of payment from the legal representative of Santosh Kumar Singh after his death. Santosh Kumar Singh (now deceased) was son of appellant no.1 and 2, husband of appellant no. 3 and father of appellant nos. 4 (minor daughter) and 5 (minor son).

2. The case of the plaintiff/appellant is that the deceased Santosh Kumar Singh, was working as Manager in Prem Filling Centre Petrol Pump. The plaintiff is a financier from whom Santosh Kumar Singh took loan of Rs. 12,00,000/- on interest at the rate of 4 % *per annum* for personal need and for making payment in petrol pump. This fact has been admitted on affidavit and signed on non-judicial stamp paper of Rs.1,000/- on 08.06.2021. The plaintiff became ready to finance Premvada Devi, owner of the said petrol pump, on giving 75 % share to him in profit for which on 09.11.2021 the plaintiff and the deceased Santosh Kumar Singh had signed on behalf of Premvada Devi owner of petrol pump an agreement in presence



of witnesses and the plaintiff financed the said amount. The deceased Santosh Kumar Singh used to pay the interest and profit share. On 20.04.2022, on requirement, plaintiff demanded money then deceased Santosh Kumar Singh issued a cheque No. '887539' of S.B.I. for Rs. 12,00,000/- on 01.05.2023 and when the same was deposited in the bank account, it was dishonoured and returned on the ground of insufficient money. The advocate's notice was given to him but the same was not replied but he has accepted the said fact on non-judicial stamp paper of Rs.1,000/-. The defendants/appellants are the legal representatives of the deceased Santosh Kumar Singh, who being the legal representative of the deceased are liable to pay the said amount to the plaintiff. But they have not paid the said amount. Hence, the summary suit under Order XXXVII CPC has been filed on 12.09.2022 with prayer to get relief through summary procedure for award of Rs. 12,00,000/- along with interest and other reliefs.

3. The suit was admitted on 10.10.2022 and on notice, the defendants appeared on 03.11.2022 explaining the reasons for appearance on that date praying for grant of time to reply and the case was adjourned for 10.11.2022 for filing the reply. On 10.11.2022 the defendants filed contesting written



statement and denied the averments made in the plaint. It was denied that there was any contract, bill of exchange, *hundies* or promissory notes between plaintiff and defendants for the loan and the suit is liable to be dismissed. It is stated therein that the plaintiff is an accused in connection with Bangaon P.S. Case No. 81 of 2022 lodged by the defendant no. 1 on account of murder of the deceased Santosh Kumar Singh and to save the skin from the murder case and to make pressure on informant/defendant no. 1, the present suit has been filed. Against the loan amount of Rs. 12,00,000/- the deceased had paid Rs. 16,36,000/- on different dates through bank whose details have been given in paragraph 21 of the written statement. It is further stated that two blank cheques as a guarantee were deposited with plaintiff and despite payment of total loan amount the said cheque had not been returned and a forged agreement has been prepared. It is alleged that Santosh Kumar Singh was murdered by plaintiff by calling to his house and thereafter to create fear and torture filed the present false case which is not maintainable. It is claimed that, this summary suit, on the basis of forged agreement prepared by the plaintiff, is liable to be dismissed.

4. The learned Trial Court vide order dated 02.12.2022, after perusal of record and after hearing the parties,



accepted the appearance with affidavit on behalf of appellants/defendants and also taken the written statement on record and fixed the date for hearing.

5. After hearing the parties, point of determination were framed by the learned Trial Court, which are as follows:-

- (i) Whether the plaintiff's suit is satisfactory or not?*
- (ii) Whether a suit under Order 37 of CPC can be brought after the death of a person issuing Bill of exchange against his legal heirs or not?*
- (iii) Whether the plaintiff is entitled to the claim amount of Rs. 12,00,000/- under Order 37 of CPC 1908 or not?*

6. Defendant nos. 4 and 5 were minor accordingly, Sri Subham Kashyap, Advocate was appointed by the Court as legal guardian vide order dated 04.03.2003. Now her mother appellant no. 3 is legal guardian to them in this appeal.

7. Both the parties have filed documents in support of their claim in the learned Trial Court.

8. The learned Trial Court after hearing the parties and on the basis of material on record held that the suit of plaintiff is maintainable and the suit can be brought against legal heirs of a person issuing Bill of Exchange after his death. The learned Trial Court further held that the plaintiff is entitled to dues amount with interest from the legal heirs of the deceased and accordingly plaintiff is entitled to Rs. 12,00,000/- with 7 %



of interest *per annum* on the dues amount of Rs. 12,00,000/- from the date of filing of the suit.

9. Aggrieved by said judgment and decree, the defendants have filed the present appeal.

10. Learned counsel for the appellants submits that the impugned judgment and decree has been passed without considering the case of the appellants and the learned Trial Court failed to appreciate that the plaintiff/respondent is an accused in connection with the Bangaon P.S. Case No. 81 of 2022 lodged for the murder of Santosh Kumar Singh who happens to be son of appellant no. 1 and 2 and husband of appellant no. 3 and father of the appellant nos. 4 and 5 and the suit has been brought by the plaintiff only to save the skin form the said criminal case. It is further submitted that while deciding the issues, the learned Trial Court has wrongly held that the plaintiff is entitled to seek relief as well as to bring the summary suit under Order XXXVII of the CPC.

11. Learned counsel has further submitted that the learned Trial Court ought to have decided the suit as an ordinary suit when the written statement was taken on record. It is submitted that in relation to summary trial under Order XXXVII of CPC when a court is satisfied that a triable issue has been



raised in defence of the claim made on behalf of the plaintiff, unconditional leave has to be granted to the defendant to contest the suit. It is further submitted that the learned Trial Court vide order dated 02.12.2022 rightly held that opportunity be given to both the parties to adduce the evidence in order to reach on final adjudication but the appellants have neither been afforded opportunity to cross-examine the evidence nor the appellants have been heard in the matter of defence without adducing any evidence against the arguments advanced on behalf of the plaintiff.

12. Learned counsel for the appellants has further submitted that vide the order dated 02.12.2022, the learned trial court accepted the appearance of the defendants and also taken on record the written statement filed on behalf of the defendants/appellants. The Court after hearing the parties, framed point of determination in the suit and both the parties were allowed to file the documents in support of their respective claims. The learned Trial Court proceeded the suit as an ordinary/regular suit in view of Rule 7 of Order XXXVII which provides that save as provided by this order the procedure in summary suit shall be the same as a procedure in suits instituted in the ordinary manner.



13. Learned counsel for the appellants further submitted that the plaintiff /respondent has not challenged the said order dated 02.12.2022 passed by the learned Trial Court. The points for determination is nothing but issues contemplated by Rules 1 and 3 of Order 14 of CPC.

14. Learned counsel for the respondent/plaintiff has submitted that the suit under Order XXXVII CPC was filed on failure to return the loan amount of Rs. 12,00,000/- which was taken by late Santosh Kumar Singh and learned trial Court has rightly passed the impugned judgment and decree as the case of respondent/plaintiff stands established on the basis of the documents produced before the learned Trial Court which have been taken into consideration in accordance with law, therefore, there is no merit in this appeal which is liable to be dismissed. He has further submitted that the finding of the learned Trial Court *qua* the merits of the summary suit are correct and there is no illegality of any kind. It is further submitted that the appellants have failed to prove their claim. He has next submitted that there was delay in appearance of the defendants within time after service of summons and there is no provision to accept the written statement in place of leave to defend petition by the defendant. Since the defendants failed to file the



application for leave to defend, the defendants are not entitled to defend their case and in view of the provisions of Order XXXVII CPC, the plaintiff is entitled to judgment forthwith.

15. Having heard the learned counsel for the parties, the only point for determination in this appeal is “whether the impugned judgment and decree is sustainable when leave to defend is granted unconditionally which is evident from order dated 02.12.2022, but the normal procedure of suit is not adopted”?

16. The law is well-settled that the Court can exercise its discretion to condone the delay in appearance by the defendant within 10 days of the service of summons on him in a suit filed under Order XXXVII CPC. However, bearing in mind the expeditious nature of the provisions of summary suit, condonation of delay is an exception and must not be granted in a routine manner.

17. In ordinary suit, a defendant is entitled to defend suit as a matter of right and there is no need to apply leave from the Court to defend. In summary suit, the defendant has an additional burden to prove why he should be allowed to put up the defence.

18. In a summary suit the ‘trial’ really begins after



the court or judge grants leave to defendant to contest the suit. Therefore, the Court or Judge dealing with the summary suit can proceed up to the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if: (a) the defendant has not applied for leave to defend or if such application has been made and refused; or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted.

19. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment, in prescribed form, under Sub-Rule 4 of Rule 3, within 10 days from the service of such summons for judgment, the defendant may seek leave from the Court to defend the suit which will be granted to him either unconditionally or on such terms as the Court may deem fit. In regular suits after filing of written statement (Order 8) and framing of issues (Order 14), the Court hears the evidence of the parties and their witnesses (Order 18) and the Court pronounces its judgment (Order 20) after considering the evidence and arguments of the parties.

20. The Hon'ble Apex Court, in a case titled **M/s V.K. Enterprises & Anr. Vs. M/s Shiva Steels** reported in **(2010) 9 SCC 256**, at paragraph 10 and 11, has held to the effect



that

“10. Order 37 CPC has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted.

11. What is required to be examined for grant of leave is whether the defence taken in the application under Order 37 Rule 3 CPC makes out a case, which if established, would be a plausible defence in a regular suit...”

21. In as much as Order XXXVII CPC, does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to such suits is likewise the suits instituted in the ordinary manner.

22. Rule 2 of Order XXXVII CPC enables the plaintiff to institute a summary suit in certain cases. On such a suit being filed the defendant is required to be served with a copy of the plaint and summons in the prescribed form. Within 10 days of service the defendant has to enter an appearance. Within the prescribed time defendant has to apply for leave to defend the suit and the same may be granted to him unconditionally or upon such terms as may appear to the Court



or judge to be just. If the defendant has not applied for leave to defend, or if such an application has been made and refused, the plaintiff becomes entitled to judgment forthwith. If the conditions on which the leave was granted are not complied with by the defendant then also the plaintiff becomes entitled to judgment forthwith. Rule 7 of Order XXXVII provides that save as provided by this order the procedure in summary suit shall be the same as a procedure in suits instituted in the ordinary manner.

23. The Hon'ble Supreme Court in **Santosh Kumar Vs. Bhai Mool Singh** reported in **1958 SCR 1211** noticing that a clear defence to the suit having been made out, no condition could be imposed. It is held therein that if there is reason to believe that the defendant is trying to prolong the litigation and evade a speedy trial, then conditions can be imposed. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains.

24. The Hon'ble Apex Court, again, in **M/s. Mechalec Engineers & Manufacturers Vs. M/s. Basic Equipment Corporation** reported in **(1976) 4 SCC 687**



reiterated the following principles laid down in respect of grant of leave in a summary suit by Das J. in **Sm. Kiranmoyee Dassi Vs. Dr. J. Chatterjee** reported in (1945) 49 CWN 249:

“(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, shews such a state of facts as leads to the inference that at the trial of the action 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.”



25. Yet again in Raj Duggal Vs. Ramesh Kumar Bansal reported in **1991 Supp (1) SCC 191: AIR 1990 SC 2218**, the Hon'ble Supreme Court held:

“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.”

26. The Apex Court in the case of IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd. reported in **(2017) 1 SCC 568**, laid down the following principles for discretion to be exercised by the Trial Courts in such cases.

“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.”



27. The Hon'ble Supreme Court, again, in the case of **Sudin Dilip Talulikar Vs. Polycap Wires Pvt. Ltd. and Others** reported in **(2019) 7 SCC 577** held that the ultimate objective of a summary suit is expeditious disposal of commercial disputes and, when the defence discloses facts of *prima facie* fair and reasonable defence, unconditional leave has to be granted and it relates to the subjective satisfaction of the Court on the basis of the material that may be placed before it and when the court is satisfied that the defence is plausible or probable and is not sham or moonshine, but still it has some doubt over the defence, the conditional leave may be granted to the defendant. It was further observed by the Hon'ble Supreme Court in the aforesaid judgment that in case of unconditional leave, subjective satisfaction of Court is involved, whereas in conditional leave element of discretion vests with the Court. The discretion is not absolute, but is required to be exercised judiciously, tempered with what is just and proper in the facts and circumstances of the case by maintaining delicate balance between the respective rights and contentions by not passing an order which may ultimately impede speedy resolution of dispute.



28. In the instant case, admittedly, the plaintiff had not filed application under Order XXXVII Rule 3 (4) CPC i.e., summons before judgment on behalf of the plaintiff. The parties and the learned Trial Court were treating the written statement filed by defendants as application for leave to defend. The contents of the written statement filed by the respondent clearly set out the ground of defence and indicate the intention of the defendants to contest the suit. The Trial Court ignored the discrepancy in not filing an application styled as 'leave to defend' could be ignored in the interest of justice and the written statement could be treated as an application for leave to defend. The object of prescribing the procedure for seeking leave to defend under Order XXXVII Rule 3 (5) CPC. The rationale for evolving such a procedure requiring the defendant to file a leave to defend is to enable the Court to evaluate whether there exist any triable issue warranting the suit to be set down for trial. In the present case, the written statement filed by the defendants had clearly set out the grounds of defence. It is well settled that procedure is the hand-maid of justice and should not be construed so as to defeat it. The care must always be taken to ensure that the technicalities are not made the stumbling blocks on the road to justice.



29. The appellants disputed the execution of document on which the suit is based and taken specific plea that more than the said amount had been paid by the deceased through bank account by giving details of the same. All these contentions raised by the appellants/ defendants before the learned Trial Court, in the considered opinion of this Court, were plausible and, as such, he had raised triable issues.

30. Having regard of the aforesaid observations coupled with the mandate of law as enumerated by the Hon'ble Supreme Court the impugned judgment and decree is not sustainable, therefore, the instant appeal is **allowed** and impugned judgment and decree passed by the learned trial court is set aside. The proceeding of execution of the impugned judgment and decree is, accordingly, set aside.

31. The case is remanded back to the learned trial court for trying the suit afresh, as an ordinary suit at the stage after filing the written statement. Parties through their counsel are directed to cause appearance before the learned Trial Court on 18.10.2024.

32. Interlocutory Application(s), if any, shall stand disposed of.

33. It is clarified that all observations made herein



are *prima facie* and that they are not to be taken into account at the final hearing of the suit.

34. Record of the learned Trial Court be sent back, along with a copy of this judgment, for information and compliance.

(Sunil Dutta Mishra, J)

khushbu/-

AFR/NAFR	AFR
CAV DATE	30.07.2024
Uploading Date	24.09.2024
Transmission Date	

