2024:PHHC:103503

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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SAO No.20 of 2019 (O&M)
Reserved on: 02.08.2024
Pronounced on: 12.08.2024

SHRI BRAHAM PARKASH LATHWAL @ BRAHM PARKASH LATHWAL

. . . .APPELLANT

Vs.

SHRI KARAN SINGH AND ANOTHER

. . . . RESPONDENTS

****

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

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Present:- Mr. Amit Jain, Sr. Advocate with
Mr. Parit Aggarwal, Advocate,
for the appellant.

Mr. Kashmir Saini, Advocate, for
Mr. Deepak Girota, Advocate,
for respondents.

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DEEPAK GUPTA, J.

Appellant herein was the plaintiff before the Court of learned Civil Judge (Sr. Division), Rohtak, whose civil suit *[CNR N: HRRH02-000104-2017]* for recovery filed on 11.01.2027 for an amount of ₹15 lakh filed under the summary procedure of Order 37 Code of Civil Procedure, was decreed on 05.07.2017, after declining leave to defend to the defendants-respondents but the civil appeal [*CNR N: HRRH01-002986-2018*] filed by the said defendants was accepted by the First Appellate Court of learned Additional District Judge, Rohtak vide his order dated 19.01.2019. After setting aside the judgment & decree of the trial Court, the appellate court has remanded the matter to the trial court with direction to grant leave to defend to the defendants-respondents and then proceed further with the suit as per law.

2. The appellant-plaintiff is aggrieved by the aforesaid order 19.01.2019 of the First Appellate Court.

3.1 As per the pleaded case of the plaintiff, being neighbours and having good family relations, defendants approached him in October, 2008 requesting him to lend them a sum of ₹5 lakh for some financial compulsions. Plaintiff lent the amount of ₹5 lakh to the defendants in cash on 28.10.2008, which they promised to re-pay in 3-4 years along with interest at the rate of 2% per month. Defendants failed to pay either the principle or the interest amount and when plaintiff approached them in 2014, the defendants requested him to wait for another 02 years, as defendant No.1 would retire from service of Indian Railways in July, 2016 and would get huge amount. Although plaintiff acceded to this request but on his asking, the amount was calculated and it worked out to ₹20 lakh and both the defendants agreed to pay ₹15 lakh. On insistence of the plaintiff either to pay the amount of ₹15 lakh immediately or to acknowledge the same in writing, the defendant No.1 issued a pronote & receipt dated 14.01.2014 for an amount of ₹15 lakh and later on, defendant No.2 also put her thumb impression on the said pronote and receipt on 19.01.2014. After retirement of defendant No.1 on 31.07.2016, plaintiff requested the defendants to return the amount but they flatly refused. With these averments, plaintiff sought recovery of ₹15 lakh along with interest at the rate of 2% per annum with pendente lite and future interest.

3.2 Summons for appearance were served upon the defendants on 28.01.2017. Power of attorney on their behalf was filed on 08.02.2017 i.e. 11th day from service. Summons for judgment were served upon the defendants on 18.02.2017 and thereafter the Leave to Defend (Annexure A2) was filed on 17.03.2017 i.e. 27th days after the service of the summons. In the application for Leave to Defend, defendants denied issuance of any pronote in lieu of any loan amount. They denied having borrowed any amount from the plaintiff. It was further pleaded that even otherwise there were so many legal points available with them to defend the suit as per law as the alleged amount claimed by the plaintiff was much exaggerated and that plaintiff had not approached the defendants before filing the suit and so the suit was without any cause of action. It was alleged that with an ill motive to grab huge amount from them, suit had been filed by the plaintiff on false facts. Submitting that they had substantial defence to raise, in order to show that suit was false and frivolous, the defendants prayed for Leave to defend.

3.3 The trial Court vide its order dated 05.07.2017 declined Leave to Defend by the defendants on the ground that plaintiff had failed to appear within the prescribed period of 10 days from the date of service of summons and that defendants had failed to give notice of such appearance to the plaintiffs pleader. On merits, it was observed by the trial Court that defendants had failed to mention as to how their signed pronotes came into the hands of the plaintiff and so, the request for Leave to Defend was vague. As such, vide order dated 05.07.2017, the trial Court decreed the suit of the plaintiff directing the defendants to pay an amount of ₹15 lakh to the plaintiff along with interest @ 9% from the date of filing of the suit and on the calculated amount future interest @ 6% per annum was also granted.

3.4 In the appeal filed by the defendants, the First Appellate Court vide impugned order dated 19.01.2019 reversed the decision of the trial Court. The First Appellate Court was of the view that the trial Court overlooked the aspect of limitation in reference to Sections 18 and 19 of the Limitation Act, 1963 [for short 'the Limitation Act']. By taking this view and after granting the Leave to Defend, the appellate court remanded the case back to the trial Court for further proceedings, as has been stated earlier.

4.1 The contention of ld. Senior counsel for the appellant is that after service of summons of appearance upon the defendants, they did not put in appearance before the Court within 10 days as required under law. Even there was a delay of 27 days by the defendants in filing the Leave to Defend. No application under Order 37 Rule 3 (7) of CPC was moved to condone the delay as provided under Order 37 Rule 3 & 5 of the CPC in filing the Leave to Defend application and therefore, the Court at its own could not have condoned the delay. It is further contended by ld. Senior counsel that the Leave to Defend, as filed by the defendants, is vague as they failed to explain as to how their signed pronotes came in possession of the plaintiff. Merely by denying the factum of obtaining any loan, it cannot be said that defendants had raised any substantial defence, which was likely to succeed.

4.2 Ld. Senior counsel contends that as per the settled position of law, if the Court finds the ground for Leave to defend to be vague, it can refuse the leave. Ld. counsel contends further that the suit being based upon the pronote and the pronote being a promise to pay, it was not covered under Sections 18 & 19 of the Limitation Act, as has been held by ld. Trial Court and that the case is governed under Section 25(3) of the Indian Contract Act. Ld. counsel contends further that in the application for Leave to Defend, the defence of limitation has not been taken by the defendants and that ld. Appellate Court has wrongly held that trial Court was required to examine the aspect as to whether the pronote executed on 14.01.2014 could extend the limitation to file the Civil Suit in view of Section 18 of the Limitation Act.

4.3 Ld. Senior counsel has referred to ***Jitender Gupta Vs. Ramchandera Sardare, 1991(2) GLR 792; IDBI Trusteeship Services Limited Vs. Hubtown Limited, 2016(12) Scale 24;*** and ***Sumit Singla Vs. Kala Mandir Sarees and Jewellers, 2023 (2) RCR (Criminal) 57.***

5.1 On the other hand, it is argued by ld. counsel for the respondents-plaintiffs that even if defendants do not positively and immediately make it clear that they had a defence, yet in case there is such a state of affairs, which lead to the inference that at the time of action, defendants may be able to establish a defence to the claim of the plaintiff, then plaintiff is not entitled to the judgment and that defendants are entitled to Leave to Defend, though in such as a case, the Court may in its discretion impose condition as to the time or mode of trial but not as a payment to Court or furnish security. Ld. counsel has referred to a decision of Hon'ble Supreme Court rendered in ***State Bank of Hyderabad*** Vs. ***Rabo Bank***, ***Law Finder Doc ID # 712186***.

5.2 As far as not moving the application for Leave to Defend within time is concerned, on the strength of ***Delhi Power Supply Company Ltd. (Dt. Ltd.) Vs. Hindustan Vidyut Products Limited, Law Finder Doc ID # 652607,*** it is contended by ld. counsel that even if there is a default of appearance within 10 days, the scope of passing of judgment by default is that it is the duty of the Court at the time of passing of the judgment to first consider maintainability of the suit itself under Order 37 CPC. In case the Court finds that suit itself was not maintainable under Section 37 of the CPC, then non filing of the application within limitation under Section 37 of the CPC would be immaterial.

5.3 With these submissions, ld. counsel for the respondents-defendants defended the impugned order passed by the First Appellate Court and prayed for dismissal of the present appeal.

6. I have considered submissions of both the sides and have appraised the record carefully.

7. Order XXXVII of Code of Civil Procedure deals with the summary procedure for certain prescribed class of cases. Order 37 Rule 1 CPC, read as under: -

> ***"1. Courts and classes of suits to which the Order is to apply****.—(1) This Order shall apply to the following Courts, namely:—*
>
> *(a) High Courts, City Civil Courts and Courts of Small Causes; and*
>
> *(b) other Courts:*
>
> *Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.*
>
> *(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:—*
>
> *(a) suits upon bills of exchange, hundies and* ***promissory notes****;*
>
> *(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,—*
>
> *(i) on a written contract, or*
>
> *(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or*
>
> *(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.*
>
> *(iv) suit for recovery of receivable instituted by any assignee of a receivable."*

8. Although as per the aforesaid provision, a suit based upon promissory note is covered under Order 37 CPC providing summary procedure for recovery of the amount due under the promissory note, but the question is that as to whether the present suit is based upon the promissory note, as is claimed by the plaintiff.

9. In present case, the basis of the suit of the plaintiff is not the promissory note and rather, it is the loan amount of ₹5 lakh, which he had allegedly lent to the defendants on 28.10.2008 and which the defendants had allegedly promised to pay within 3-4 years. The promissory notes-cum-receipts as relied by the plaintiff in the suit is an acknowledgement, which the plaintiff wants to rely.

10. In such circumstances, it is to be seen as to whether Section 18 of the Limitation Act is applicable to the case or not. Section 18 of the Limitation Act reads as under: -

> ***"Effect of acknowledgment in writing -***
>
> *(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*
>
> *(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.*
>
> *Explanation.—For the purposes of this section,—*
>
> *(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,*
>
> *(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and*
>
> *(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."*

11. As will be clear on perusal of Section 18 of the Limitation Act, it will be applicable when an acknowledgement of liability is signed in writing before the expiration of the prescribed period for a suit or application in respect of the

property or writing in question. In that eventuality, the fresh period of limitation shall be computed from the time, when the acknowledgement was so signed.

12. In the present case, the loan was granted to the defendants as per the case of the plaintiff on 28.10.2008 and therefore, acknowledgement regarding the said loan should have been made before the expiration of the prescribed period of three years for recovery. However, the promissory notes have been signed not within the three years from 28.10.2008 and rather, the same are claimed to have been given by the defendants on 14.01.2014 and 19.01.2014.

13. As far as the contention of ld. counsel for the plaintiff-appellant that Section 25 of the Indian Contract Act, 1872 shall be applicable in this case, the said section reads as under: -

> ***"25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.—****An agreement made without consideration is void, unless—*
>
> *(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other ; or unless*
>
> *(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless;*
>
> *(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.*
>
> *In any of these cases, such an agreement is a contract.*
>
> *Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.*
>
> *Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given."*

14. Though an agreement made without consideration is void, but as per one of the exceptions provided under Section 25 of the Contract Act, if it is promise made in writing to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of the suits, in such cases such an agreement is a contract.

15. In the present case, the copy of the promissory note-cum-receipt, as relied by the plaintiff, would indicate that there is absolutely no reference about any prior loan of 28.10.2008. The said promissory note simply promises to pay a sum of ₹15 lakh along with interest @ 2 % month, without any indication of the prior loan. In such circumstances, it is highly doubtful that Section 25 of the Contract Act shall be applicable.

16. Apart from above said circumstances, the other circumstances would also clearly show that defendants had a substantial defence to plead before the Court. It is important to notice that as per the own case of the plaintiff, in January 2014, the parties calculated the amount payable by the defendants, which was required to be paid @ 2% per month and on calculation, the amount was found to be ₹20 lakh, though plaintiff agreed to receive ₹15 lakh. Here also, defendants have a good defence to make, as it is alleged by them that exaggerated amount has been claimed. The said contention on the face of it appears to be correct because if the interest @ 2% per month is calculated from November 2008 till the middle of January 2014 i.e. for a period of 62½ months, it comes out to be ₹6,25,000/- and by adding the principal amount of ₹5 lakh, the total will be ₹11,25,000/-. As such, defendants had a good defence to put forth before the Court that the amount claimed by the plaintiff was exaggerated.

17. Now comes the question *"as to in what circumstances Leave to Defend under Rule 3 of Order 37 CPC can be granted by the Court"*. Rule 3 or Order 37 CPC reads as under:

> *"**3. Procedure for the appearance of defendant**—(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an*

appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(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.

(6) At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.]

18. Explaining the scope of circumstances, in which grant of leave may be allowed, it has been held by Hon'ble Supreme Court in the case of ***State Bank of Hyderabad (Supra)*** that the circumstances in which Leave to Defend can be granted, the law was well settled long back in 1949. It was held in para Nos.15 to 17 of the judgment by Hon'ble Supreme Court as under: -

"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:

(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) 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. <u>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 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</u>."

19. When keeping in the mind the abovesaid legal exposition, the facts of present case are analysed, it will be clear that though the application moved by the defendants seeking Leave to Defend does not make out a positive case for grant of leave, but as per legal position, even if the defendant discloses such facts as may be deemed sufficient to defend, i.e. he does not positively and immediately make it clear that he has a defence, yet shows that a stage of facts as leads to inference that at the trial of action, he may be able to establish a defence to the plaintiffs claim, plaintiff is not entitled to judgment and that defendant is entitled to leave to defend, though in such a case, the Court has discretion to impose condition as to the time or mode of trial but not as to the payment to the Court or furnish security. The case of the defendants-respondents is squarely covered under Para 15 (3) of

the judgment of Hon'ble Supreme Court.

20. Coming to the question raised by ld. Senior counsel for the appellant that application for Leave to Defend was not moved within time as prescribed under law, herein also, the question to be considered is as to whether the suit itself was maintainable under Order 37 CPC. It has been held by Delhi High Court in ***Delhi Power Supply Company Ltd. (Supra)***: -

> "7. In my opinion, the trial court at the time of passing of the judgment by default on 07.4.2003 ought to have first considered the maintainability of the suit itself under Order XXXVII CPC. If the suit itself was not maintainable under Order XXXVII CPC, the non-filing of appearance under Order XXXVII CPC would be immaterial. The observations of the Supreme Court in the case of Rajni Kumar (supra) would have applied only if the suit was firstly filed under Order XXXVII CPC. I am allowing the petitioner/defendant to take up the non-maintainability of the subject suit, which only is a legal issue arising from the admitted facts i.e, admitted facts stated in the written statement and it goes to the root of the matter."

21. Even Hon'ble Supreme court in the case of ***State Bank of Hyderabad (Supra)*** has held in para No.18 of the judgement as under: -

> "Insofar as the question of maintainability of the Suit in question under Order 37, CPC is concerned, this Court has in **Neebha Kapoori Vs. Jayantilal Khandwala, 2008 (3) SCC 770** observed that <u>where the applicability of Order 37 itself is in question, grant of leave to defend may be permissible</u>. The Court before passing a decree is entitled to take into consideration the consequences therefor. The Courts dealing with summary trials should act very carefully taking note of the interests of both the parties. Merely on the ground that the defendant may resort to prolonged litigation by putting forth untenable and frivolous defences, grant of leave to defend cannot be declined. At the same time, the Court must ensure that the defendant raises a real issue and not a sham one. The Court cannot reject the defence on the ground of implausibility or inconsistency. Before recording a finding of granting leave to defend, the Court should assess the facts and come to the conclusion that if the facts alleged by the defendant in the affidavit are established, there would be a good or even a plausible defence on those facts."

VIVEK PAHWA
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I attest to the accuracy and integrity of this document

22. Considering the legal position as above, in the present case, as has been observed earlier that though plaintiff has based his claim on a promissory note, but in fact the real basis of his claim is the loan granted to the defendants allegedly in October 2008 and the pronote has been pleaded only as an acknowledgement of the debt executed by the claimants in January 2014. In such circumstances, the very basis of the applicability of Order 37 CPC is in question and therefore, grant of Leave to Defend may be permissible, as has been held by Hon'ble Supreme Court in ***State Bank of Hyderabad (Supra)*** by referring to the case of ***Neebha Kapoori (Supra).***

23. Having discussed all the aforesaid facts and circumstances, this Court finds that there is no merit in the present appeal. The order passed by ld. Additional District Judge is well reasoned and there is no scope for interference therein. Consequently, the present SAO is hereby dismissed by maintaining the order of the First Appellate Court.

12.08.2024 **(DEEPAK GUPTA)**
Vivek **JUDGE**

Whether speaking/reasoned? *Yes*
Whether reportable? *Yes*