



CR No.16 of 2024 (O&M)

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.16 of 2024 (O&M)

Reserved on: 12.07.2024

Pronounced on: 15.07.2024

M/s Sky Construction Company

.....Petitioner

Vs.

Man Pyare (Building Contractor) & ors.

.....Respondents

CORAM:- HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Vibha Nagar, Advocate for
Mr. Manan Jain, Advocate for
the petitioner.

Respondent N: 1 & 2 ex-parte

Mr. Rohal Mittal, Advocate for
respondent No.3
(Service of said respondent N:

DEEPAK GUPTA, J.

In a recovery suit filed by plaintiffs (*respondent N: 1 & 2 herein*) under the provisions of Order XXXVII of the Code of Civil Procedure, leave to appeal has been denied to defendant No.1 (*petitioner herein*) by the trial Court on 24.08.2022. The Appellate Court affirmed the same vide its impugned order on 3.10.2023 (*Annexure P-1*). The defendant No.1 in the circumstances has approached this Court by way of the present revision.

2. As the perusal of the paper book reveals, plaintiff Man Pyare is a building contractor. As per the case pleaded by him in plaint (*Annexure P-2*), defendant No.2 – Dr. Shyam Sunder Bansal (*respondent N: 3 herein*) had engaged the defendant No.1 – M/s Sky Construction Company (*petitioner herein*) to construct his house consisting of the two plots situated in Sector

21-A, Faridabad. Defendant No.1 further appointed the plaintiff as sub-

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contractor to construct the house. A letter of intent dated 25.01.2019 was executed to that effect. According to plaintiff, he carried out the construction work at the site of defendant No.2 as per the details given in the measurement book, which were duly acknowledged by defendant No.1. However, defendant No.2 repealed the contract of defendant No.1 on 02.04.2019, due to which construction work was to be stopped. It was further pleaded by the plaintiff that he had raised the bills towards the construction work carried out by him in favour of defendant No.1 for an amount of ₹4,42,503/- and ₹8,26,691/-. However, he was paid only ₹3,22,000/- out of the afore-said amount and thus, an amount of ₹7,53,590/- was outstanding against defendant No.1. When he approached defendant No.1 to pay his outstanding dues, he refused to pay the same by stating that defendant No.2 had not released the payment. Plaintiff served a legal notice to both the defendants but with no response. With these submissions, plaintiff prayed for a decree of recovery of ₹7,53,590/- along with interest by contending that both the defendants were jointly and severally liable to pay the amount.

3. During pendency of the suit, the claim against defendant No.2 – (*respondent No.3 herein*) was given up.

4.1 After being served notice, defendant No.1 (*petitioner herein*) moved an application (*Annexure P-3*) under Rule 3 of Order XXXVII CPC, seeking leave to defend the suit. It was pleaded by him that claim of the plaintiff was not covered under the definition of summary suit; that notice was not served upon him as per the mandate of Rule 2; that plaintiff had not annexed any such document to prove that any amount was recoverable from him or any admission on the part of the applicant –defendant No.1 of the alleged liability; that suit of the plaintiff was false and frivolous, which the

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defendant No.1 can prove, if proper opportunity is granted to him and for that purpose, he had sufficient evidence to defend the matter and to place on record the documents in his defence.

4.2 The plaintiff by way of his reply (*Annexure P-4*) refuted the contentions.

4.3 After hearing both the sides, learned Civil Judge (Junior Division), Faridabad, vide her order dated 24.08.2022 (*Annexure P-5*) dismissed the application and thus, declined the leave to defend. Defendant No.1 filed appeal (*Annexure P-6*) before the District Court. However, the same was dismissed by learned Additional District Judge, Faridabad by way of the impugned order dated 03.10.2023 (*Annexure P-1*).

5.1 Assailing the afore-said order, though the petitioner i.e. defendant No.1 has not touched upon his pleas taken before the Court to the effect that plaint was not covered under Order XXXVII CPC or that no notice as per Rule 2 had been served upon him but he contended that leave to defend has been wrongly declined to him. Learned counsel contends that even the trial Court adjourned the matter vide orders dated 12.07.2023, 24.07.2023 and 21.11.2023 (*Annexure P-7 to P-9 respectively*) for want of affirmative evidence in support of the documents filed along with the suit. Learned counsel contends that this in itself vindicates the stand of defendant No.1 – petitioner to the effect that claim of the plaintiff was suspect and that defendant had sufficient ground to defend his suit.

5.2 Learned counsel has referred to a judgment of Hon'ble Supreme Court in ***B.L. Kashyap and Sons Limited Vs. JMS Steels and Power Corporation and another, (2022) 3 Supreme Court Cases 294***, wherein guidelines have been laid down by Hon'ble Supreme Court to the effect that grant of leave to defend is the ordinary rule and denial is an exception.

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5.3 Learned counsel contends that in the present case, there was genuine and triable issue involved and there was no exception so as to deny the leave to defend.

6. Notice of motion was issued. Appearance was made on behalf of respondent No.3. However, the appearance of said respondent No.3 was dispensed with after noticing that he had been given up before the trial Court itself. Respondents No.1 and 2 i.e. the plaintiffs were duly served but nobody appeared on their behalf to contest this revision and so, they were proceeded against ex parte.

7. I have considered submissions of learned counsel for the petitioner and have appraised the record carefully.

8. Rule 3 (5) & (6) of Order XXXVII of the CPC, which are relevant in this case, read as under:

“(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

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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.”

9. Thus, as per above rule 3(5), the defendant may apply for leave to defend within ten days of the delivery of notice to appear for judgement, by affidavit or otherwise, revealing such factual information as may be deemed sufficient to enable him to justify to defend the suit. Said leave to defend may be given to him unconditionally or on such conditions as the court deems fit. Furthermore, the provision states that permission to defend will not be denied unless the court is convinced that the facts revealed do not suggest a significant defence or that the defence is absurd or unreasonable. Further, the case pleaded by the plaintiff, supported by the documents on which plaintiff relies, should be such that in case, leave to defend is not applied, and if applied, the same is refused, the plaintiff should be entitled to the judgment forthwith.

10. The question regarding the leave to defend was considered by Hon'ble Supreme Court in **B.L. Kashyap's case (supra)**. In that case, it was observed by Hon'ble Supreme Court as under:-

“15. In regard to the question of leave to defend, as noticed, the High Court has observed that the appellant would not be entitled to such leave because no triable issues were arising out of the defence sought to be taken by the appellant. The High Court has also observed that the defences were frivolous and vexatious; and were raised only in order to deny the just dues of seller of the goods, i.e., the plaintiff. According to the High Court, while applying the principles for grant of leave to defend, as delineated in the case of **IDBI Trusteeship (supra)**, the appellant was not entitled to the leave to defend.

16. The High Court took note of the fact that the Trial Court relied upon the decision in **Mechelec Engineers (supra)** and observed that the applicable principles were those contained in the later decision of this Court in **IDBI Trusteeship (supra)**. Having regard to the question at hand, it shall be worthwhile to read together the principles stated in the said two decisions of this Court.



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16.1. In the case of *Mechelec Engineers (supra)*, 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: -

“8. In *Kiranmoyee Dassi Smt v. Dr J. Chatterjee* [AIR 1949 Cal 479, 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 (at p. 253):

‘(a) If the defendant satisfies the court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action, he may be able to establish a defence to the plaintiff's claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case, the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine, then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.”

16.2. In the case of *IDBI Trusteeship (supra)*, this Court modulated the aforementioned principles and laid down as follows: -

“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] , as follows:

17.1. If the defendant satisfies the court that he has a substantial defence,



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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.”

17. It is at once clear that even though in the case of *IDBI Trusteeship*, this Court has observed that the principles stated in paragraph 8 of *Mechelec Engineers' case* shall stand superseded in the wake of amendment of Rule 3 of Order XXXVII but, on the core theme, the principles remain the same that grant of leave to defend (with or without conditions) is the ordinary rule; and denial of leave to defend is an exception. Putting it in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the Court.

17.1. 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

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the third eventuality, where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.

17.2. 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.

17.3. 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. Thus, after taking note of the precedents on the issue pertaining to grant of leave to defend and the legal position explained by the Hon'ble

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Supreme Court in the *B.L. Kashyap's case (supra)*, the following principles emerge:-

- (a) Ordinary rule is to grant the leave to defend (with or without conditions); and denial of leave to defend is an exception. In other words, generally, the prayer for leave to defend is to be denied only 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.
- (b) 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.
- (c) 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.
- (d) 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.
- (e) In the fourth eventuality, where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.
- (f) Besides above, considering the language of Rule 3(6), the case pleaded by the plaintiff, supported by the documents on which plaintiff relies, should be such that in case, leave to defend is not applied, and if applied, the same is refused, the plaintiff should be entitled to the judgment forthwith.

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12. Applying the afore-said principles to the facts of the present case, it is to be seen that it is an admitted fact that defendant No.2 had granted the contract to raise construction of his house to defendant No.1 i.e. petitioner. Petitioner – defendant No.1 had further given sub contract to the plaintiff. The contract was repealed by defendant No.2 on 02.04.2019, due to which the construction work was stopped. Plaintiff has not given any reasons for cancellation of the said contract. It has been specifically mentioned by him that when he demanded his money, it was stated by defendant No.1 to him that the amount had not been released by defendant No.2 without telling any reason further. The defendant No.1 in his application for leave to defend specifically stated that plaintiff had not annexed any document to prove that claimed amount was recoverable from him or any admission on part of plaintiff and thus, the suit was false and frivolous and that he has sufficient evidence to defend the matter and to place on record the documents in his defence.

13. Although defendant No.1 – petitioner, in his application for leave to defend, did not specifically state the nature of documents in his possession, which would refute the claim of the plaintiff but at least, triable issues appear to be involved in the case and so, the case falls within scope of principles mentioned at serial N: (c) or (d) in Para 11 of this order, based on legal position explained by Hon'ble Supreme Court in ***B.L.Kashyap's case (supra)***.

14. It will not be out of place to mention that subsequent to the denial of leave to defend, when the court adjourned the matter for orders, it noticed as per order dated 12.07.2023 (*Annexure P-7*) that documents relied by the plaintiff & placed on record were not admissible and so, the plaintiff was asked to bring affirmative evidence to support his documents, so that



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case could be decided on merits. The case has been adjourned repeatedly for this purpose, as evident from orders dated 24.07.2023 & 21.11.2023 (*Annexures P-8 & P-9*). It clearly indicates that the plaintiff had supported his case by such documents that after denial of leave to defend to the defendant N: 1 - petitioner, the plaintiff could be entitled to the judgment forthwith.

15. On account of entire discussion as above, it is held that impugned orders passed by the courts below, declining leave to defend to the petitioner, cannot sustained in the eyes of law. The same are hereby set aside. The present revision is allowed. Trial court is directed to grant leave to defend to the petitioner – defendant No.1 and then proceed further in accordance with law.

July 15, 2024
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(DEEPAK GUPTA)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No