

(2022) 08 DEL CK 0128

In the Delhi High Court

Case No : Civil Miscellaneous (Main) No. 854 Of 2022, Civil Miscellaneous Application No. 36993, 36994 Of 2022

Fox Mandal And Co. And Anr

APPELLANT

Vs

Ravi Bishnoi & Anr

RESPONDENT

Date of Decision : 29-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Order 2 Rule 2, Order 37 Rule 2, Order 37 Rule 3, Order 37 Rule 3(5)

Citation : (2022) 08 DEL CK 0128

Hon'ble Judges : C. Hari Shankar, J

Bench : Single Bench

Advocate : Atul Chitale, Savinder Singh, Parth Awasthi, Ipsita Katakya, Kailash Vasdev, Manish Sharma, Vijay Kaundal, Nandini Aishwarya

Judgement

1. The petitioner, a reputed firm of lawyers, was sued by the respondent, a lawyer who was working with the petitioner on retainer basis. The respondent preferred a suit as a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 (CPC). Leave to defend the suit has been granted by the learned Additional District Judge ("the learned ADJ") under Order XXXVII Rule 3(5) of the CPC, vide order dated 9th June 2022, conditional on the petitioner depositing, with the court, Rs. 58,93,935/-, being the amount claimed by the respondent from the petitioners in the suit. The learned ADJ has also directed release of the said deposited amount to the respondent, on the respondent furnishing of an equivalent bank guarantee.

2. Aggrieved by the direction, of the learned ADJ, to the petitioners, to deposit Rs. 58,93,935/- as a condition for leave to defend the suit instituted by the respondent, the petitioners have approached this Court, invoking Article 227 of the Constitution of India for the said purpose.

3. I have heard Mr. Atul Chitale, learned Senior Counsel for the petitioners and

Mr. Kailash Vasdev, learned Senior Counsel for the respondent, at length.

4. Learned Senior Counsel ad idem request that the present hearing be limited to question of issuance of notice and grant of stay in the petition.

5. Mr. Chitale prays that notice be issued in the petition and that an interim order, staying the direction, by the learned ADJ, to the petitioners, to deposit Rs. 58,93,935/-, be granted.

6. Mr. Vasdev, per contra, submits that the petition is completely devoid of merits and prays that the petition be dismissed.

7. This order, therefore, is restricted to the consideration of the question of whether the petition filed by the petitioners is required to be dismissed outright, or whether notice should be issued thereon and, if so, whether the petitioner deserves any interim protection.

8. As such, it is not necessary to delve deep into the controversy between the parties. A brief recital of facts would suffice.

9. The dispute revolves around a Consulting Agreement, dated 8th December 2009, executed between the petitioners and the respondent. The relevant clauses/recitals of the Consulting Agreement may be reproduced thus:

"This Consulting Agreement ("Agreement") is entered into on the 8th day of December 2009 in Delhi by and between Fox Mandal & Co. a Partnership Firm, having offices at Delhi and Noida among others, through Mr. Som Mandal, Managing Partner of the firm duly authorised to sign (hereinafter referred to as "FM") and Mr. Ravi Bishnoi s/o Mr. H.R. Bishnoi R/O C-98B, Sector 44, Noida, 201303 (hereinafter referred to as "Consultant").

WHEREAS the company is in the business of providing legal services to its clients in various fields of law and the Consultant is a lawyer who has worked with FM on a retainerhip for the period April 2006 to 30th of November 2009.

WHEREAS now FM has approached the Consultant to engage the services of the Consultant for assisting FM with the legal services related to the Hinduja National Power Corporation Ltd.'s (HNPC) thermal power project in the state of Andhra Pradesh (hereinafter referred to as the "Project") and the Consultant agrees to offer his services, subject to the terms and conditions hereinafter set forth:

NOW, THEREFORE, in consideration of the mutual promises and upon the terms and conditions set forth below, FM and the Consultant agree as follows:

1. OUTSTANDING DUES AND THE PAYMENT OF OUTSTANDING DUES OF THE CONSULTANT

1.1 FM acknowledges and agrees that the Consultant has rendered services to FM as a retainer till the 30th of November 2009 on the basis of a pre agreed retainerhip fee and out of which an aggregate amount of Rs. 90,43,935/- (Rupees Ninety lakhs Forty Three thousand Nine hundred and Thirty five) of the

retainership fee is due and payable to the Consultant (Outstanding Amount) by FM as on November 30, 2009. The parties agree that the said Outstanding Amount shall be paid by FM to the Consultant as follows:-

a. An amount of Rs. 20,00,000/- (Rupees Twenty lakhs) shall be paid by the 7th of January 2010.

b. An amount of Rs. 12,00,000/- (Rupees Twelve Lakhs) shall be paid in four equal monthly instalments of Rs. 300,000/- (Rupees Three lakhs) each on 15th December 2009, 15th January 2010, 15th February, 2010 and 15th March, 2010 respectively.

c. An amount of Rs. 20,00,000/- (Rupees Twenty lakhs) shall be paid by the 31st March 2010.

d. The balance amount of Rs. 38,43,935/- (Rupees Thirty Eight Lakhs Forty Three thousand Nine hundred Thirty Five only) shall be paid in four equal installments of Rs. 7,68,787/- (Rupees Seven lakhs Sixty Eight Thousand Seven Hundred Eighty Seven) each on 30th April 2010, 31st May 2010, 30th June 2010, 31st July 2010 and 31st August 2010 respectively.

The parties acknowledge and agree that payment of the above Outstanding Amount is exclusive of any service taxes whenever applicable.

2. SCOPE OF SERVICES FOR THE PROJECT.

2.1 The Consultant agrees to provide legal services to FM for the project.

3 TERM

3.1 The term of this Agreement shall be from the 8th of December 2009 till the 31st of August 2010. The parties may extend this Agreement upon mutual agreement, as evidenced by written amendment at any time prior to the end of the Agreement.

4. FEES AND PAYMENTS FOR THE CONSULTANCY SERVICES

4.1 FM agrees to pay the Consultant an hourly fee of Rs. 9,000/- (Rupees Nine Thousand) for each man hour spent by the Consultant in rendering the legal services on the Project. The fees shall be payable on a monthly basis. The Consultant shall raise an invoice by the 7th day of every month for the services rendered in the previous month and FM shall make payments by the 14th day of every month. The hourly fee is exclusive of any service tax whenever applicable.

6. REPRESENTATION

6.1 The Consultant shall during the term of this Agreement always represent to HNPCL that he is a part of the team of FM and is rendering services as a part of the team.

7. TERMINATION

7.1 The parties may terminate this Agreement upon not less than fifteen (15) days written notice to the other party. In the event of termination, FM shall have no obligation to the Consultant save and except to (i) make all the payments of unpaid Outstanding Amount as per Clause I of this Agreement; and (ii) to compensate the Consultant (as provided in clause 4 of this Agreement) for the services and expenses actually performed or incurred by him prior to termination of this Agreement.

8. ENTIRE AGREEMENT

8.1 This Agreement represents entire agreement between FM and the Consultant and supersedes and is in full substitution for any and all prior agreements or understandings, whether oral or written, relating to the Consultant's services."

10. The Complaint

10.1. The respondent alleged, in the complaint, that he had rendered legal services to the petitioners on retainer basis, for the period April 2006 to November 2009 and that, as on 30th November 2009, an amount of Rs. 90,43,935/- remained outstanding to be paid by the petitioners to the respondent. It was at this stage, pointed the complaint, that the Consulting Agreement dated 8th December 2009 was executed between the Petitioner 1 and the respondent.

10.2. Reliance was placed, in the complaint, on the acknowledgment, in Clause 1.1 of the Consulting Agreement, of the dues of Rs. 90,43,935/-, as owed by Petitioner 1 to the respondent as on 8th December 2009. It was pointed out that the schedule for payment of the said dues also stood delineated in Clause 1.1 of the Consulting Agreement.

10.3. Of the aforesaid dues of Rs. 90,43,935/-, as they existed on 30th November 2009, the complaint alleged that Petitioner 1 had paid, to the respondent, merely Rs. 31,50,000/-, vide cheques dated 16th December 2009 and 7th January 2010. As such, an amount of Rs. 58,93,935/- was alleged to be outstanding from Petitioner 1 to the respondent. The legal notice to Petitioner 1, by the respondent, calling on the Petitioner 1 to pay the said amount having failed to elicit any response, the respondent instituted CS 20407/2016 against the petitioners under Order XXXVII of the CPC, seeking a decree for Rs. 79,36,305/- in favour of the respondent and against the petitioners along with pendent lite and future interest @ 24 % annum.

11. Petitioners' application for leave to defend

11.1 Consequent on issuance of summons for judgment by the learned ADJ, an application was filed by the petitioners under Order XXXVII Rule 3(5) of the CPC, seeking leave to defend the suit. The petitioners contended, in the said application, that the Consulting Agreement contained reciprocal promises, and envisaged payment, to the respondent, of the dues reflected in para 1.1 of the Consulting Agreement, conditional on the respondent fulfilling his obligations under the said agreement. The petitioners alleged that the respondent had

defaulted in fulfilling the obligations under the Consulting Agreement, as contemplated by Clauses 2 and 6, and could not, therefore, seek to enforce Clause 1.1 of the said agreement in isolation.

11.2 The respondent, it was alleged, had defaulted in complying with the obligations that Consulting Agreement cast on him as, inter alia,

(i) he had kept Petitioner 2 in the dark, regarding the quantum of work executed by him,

(ii) he had delayed execution of various duties that the Consulting Agreement cast on him and

(iii) he had violated Clause 6 of the Consulting Agreement by representing and holding out, to Hinduja Powers Corporation Ltd. (HNPCL), the client under the Consulting Agreement, that he was no longer part of Petitioner 1.

These, it was asserted in the application for leave to defend, were some of the defaults committed by the respondent in complying with his obligations under the Consulting Agreement.

11.3 The petitioners further alleged that, owing to the machinations of the respondent, other team members who, with him, were associated with the project forming subject matter of the Consulting Agreement gradually became disassociated with the project, resulting in a situation in which the respondent alone was liaising with HNPCL on the project. The respondent, it was further alleged, had also defaulted in raising invoices on HNPCL, which were required to be raised at the time of financial closing. The application for leave to defend further alleged that, on Petitioner 2 requesting the respondent to provide details of the work executed for HNPCL, the respondent resigned the services of Petitioner 1 on 30th November 2009 and threatened to quit the project. According to the application for leave to defend, it was in these circumstances that, driven to the wall, the Consulting Agreement dated 8th December 2009 came to be executed by the petitioners.

11.4 Various other allegations are also to be found in the application for leave to defend, which, given the fact that the present order is limited to the aspect of issuance of notice and grant of stay, are not of particular relevance.

12. The respondent filed a reply to the petitioners' application for leave to defend the suit.

13. The Impugned Order

13.1 By the impugned order dated 9th June 2022, the learned ADJ has granted leave, to the petitioners, to defend the suit, conditional on the petitioners depositing the entire claimed amount of Rs. 58,93,935/-, which could be released to the respondent against a bank guarantee of an equivalent amount to be provided by the respondent. As already noted, the petitioners have approached this Court, challenging the said decision.

13.2 The learned ADJ has, in the impugned order, proceeded on the premise that the Consulting Agreement dated 8th December 2009 was in two parts, the first part relating to the dues outstanding by the petitioners to the respondent and the second relating to the services to be rendered by the respondent to or on behalf of the petitioner under the Consulting Agreement. The recitals in the Consulting Agreement, relating to the dues outstanding from the petitioners to the respondent, it has been observed, had nothing to do with the performance, by the respondent, of his obligations thereunder. Paras 8 and 9 of the impugned order, which so hold, read thus:

"8 Both the parties have admitted Consulting Agreement dated 18.12.2009. From the perusal of this document, it appears that the same is in two parts. First part speaks about outstanding dues and the second part speaks about the scope of services for the project.

9. Plaintiff have sought the recovery of money on the basis of outstanding dues. Nowhere in this entire document, there is any stipulation that the outstanding dues mentioned in Clause 1.1 has any connection with the performance of any other clauses."

13.3 Though he has not said so in so many words, the learned ADJ, therefore, proceeded on the premise that no triable issue had been raised by the petitioners, insofar as the claim of the respondent for Rs. 58,93,935/- was concerned. A triable issue, it was found, existed only with respect to the claim of the respondent for 18% interest on the said amount.

13.4 It is for this reason that the impugned order has granted leave, to the petitioners, to defend the suit instituted by the respondent subject to deposit by them, and consequent release to the respondent, of Rs. 58,93,935/-, conditional on the respondent furnishing of a bank guarantee of an equivalent amount.

Rival Submissions

14. Submissions of Mr Chitale

14.1 Mr. Chitale, learned Senior Counsel for the petitioners, submits that the learned ADJ seriously erred in bifurcating the Consulting Agreement into two parts. He has invited my attention to the opening recital, in the Consulting Agreement, which specifically states that the agreement envisaged "mutual promises". The clauses that follow thereafter, starting with Clause 1.1, submits Mr. Chitale, are, therefore, mutually dependent on each other. Default, on the part of the respondent, in adhering to his obligations under the Consulting Agreement would, therefore, submits Mr. Chitale ipso facto disentitle the respondent to payment in terms of Clause 1.1.

14.2 In this context, Mr. Chitale has invited my attention to an e-mail dated 17th May 2010, addressed by the respondent to the petitioners, which reads thus:

"From: Ravi Bishnoi <ravi.bishnoi@srglaw.com>

Date: 17 May 2010 12:58; 12 PM GMT+05:30

To: 'som.mondal@foxmandallittle.com'

Cc: Ravi Bishnoi

Subject: Re: Outstanding Payments

Dear Sir,

I had written the below mail to you on the 13th of this month and subsequent to that I had tried to call you up but neither have I received a response to my below mail nor has my phone call been answered or returned.

Please note that I have been diligently working as per the terms of the Agreement entered into between us and I accept the same level of commitment at your end. I request you to clear my Outstanding Payments at the earliest.

Best Regards,

Ravi

Ravi Bishnoi

Partner

SRGR Law Offices

E-mail: ravi.bishnoi@srgrlaw.com"

Mr. Chitale submits that the afore-extracted e-mail clearly indicates that the respondent, too, understood the obligations envisaged by the Consulting Agreement to be mutual in nature.

14.3 Mr. Chitale has also adverted, in this context, to paras 2, 3 and 5 of the preliminary submissions/objections contained in the application filed by the petitioners seeking leave to defend the suit, which read thus:

"2. The suit as filed by the plaintiff is not maintainable under the Summary Procedure of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) as the basis of the suit, i.e the Consulting Agreement dated 08.12.2009 contemplates reciprocal promises. It is submitted that the payments claimed by the Plaintiff was dependent on him providing the services in respect of the Project mentioned in the said Agreement, which was not provided. It is pertinent to mention that the Plaintiff in his own e-mail dated 17.05.2010, contents whereof are disputed, filed with plaint, has acknowledged this aspect wherein he has himself asked for the payments based on his alleged services. Thus, on plaintiff's own admission it is beyond any doubt that the said agreement contemplated reciprocal promises. There has been admitted failure on the part of the Plaintiff to perform his part of the promises. He is, therefore, precluded from seeking any relief.

3. The provisions of Order XXXVII Rule 2 of the CPC mandates that a suit under the said provision could be filed to recover a debt or liquidated demand in money payable by the Defendant. It is thus clear that such a written instrument ought to be unequivocal wherein the Defendant, in no uncertain terms, has acknowledged his liability. In other words, the payment ought not to be preconditioned on certain contingencies. It is submitted that a bare perusal of the Consulting Agreement relied upon by the Plaintiff would show that the payment was contingent upon the Plaintiff performing his obligations in so far as rendering his services to the Defendant No.1 in terms of the said Agreement. It is further submitted that the plaintiff failed and neglected to perform his obligations as contained inter alia in Clause 2, and Clause 6 of the said Agreement. The aforesaid provisions are reproduced herein below for ready reference:

2. SCOPE OF SERVICES FOR THE PROJECT

2.1 The Consultant agrees to provide legal services to FM for the project.

2.2 The services rendered by the Consultant shall cover the following areas amongst others: Drafting, finalization, negotiation of the (i) Power Purchase Agreement (ii) Documentation related to the financing of the Project (iii) EPC Contract (iv) Investment Agreements (v) other Agreements, documents, approvals etc. and any other areas of services as may be mutually agreed between FM and the Consultant.

2.3 The Consultant shall make himself reasonably available to FM on a part time basis throughout the term of this Agreement, which may entail reasonable travel within India, and to other countries.

6. REPRESENTATION

6.1 The Consultant shall during the term of this Agreement always represent to HNPCL that he is a part of the team of FM and is rendering services as a part of the team.

It is stated that the Plaintiff, during the subsistence of the said Agreement, acted contrary to the agreed terms by not providing the services as mandated in Clause 2.2 by deliberately keeping the Defendant No.2 in dark regarding the quantum of work carried out by him as also delaying execution of various works as mandated in the said provision of the Agreement. The Plaintiff also violated Clause 6 of the Agreement by representing and held out to the client in question that he was no longer part of the Defendant No. 1. It is submitted that these are only few instances of violation on the part of the Plaintiff of the said Agreement. In view of the same and since the plaintiff has failed to perform his part of the obligations mandated by the said agreement, he is precluded from claiming any relief whatsoever much less the amount claimed in the instant suit. At best, the claim could be in a suit for accounts which cannot be filed under Order XXXVII CPC.

5. Without prejudice to the above, the Plaintiff is guilty of suppressio veri. He has deliberately suppressed material facts from the Hon'ble Court by not disclosing that he was a Partner in the zonal partnership of Defendant No.1 under the name and style of Fox Mandal & Partners having its office at 1104, Dalamal Towers, Nariman Point, Mumbai-400023. The Plaintiff has also not disclosed before this Hon'ble Court that by virtue of him being a Partner in the said entity that he held himself out as Partner of the Defendant No. 1. Copy of the Partnership deed dated 19.04.2007 is annexed herewith as Annexure-A. Furthermore, the Plaintiff has malafidely suppressed that as per the Partnership deed of the Mumbai entity, he was precluded from soliciting the clients of the Defendant No.1 for a period of one year from the date of his resignation/retirement. Admittedly, the Plaintiff has acted wilfully and contrary thereto by not only soliciting work from the clients of the Defendants but also in effect has taken away various clients, namely PFC, Sunborne. Sky Lufthansa. Ecolution Gre Energy to name a few. The Plaintiff by not disclosing this material fact has sought to mislead this Hon'ble Court and has approached the Hon'ble Court with unclean hands and on this ground itself the Defendants ought to be allowed leave to defend the suit."

14.4 To substantiate his allegation that the respondent was soliciting the clients of the petitioners, Mr. Chitale has placed reliance on the following e-mail, dated 4th March 2010, from the respondent to Mr Hugh Gardner, who, at that time, was a client of the petitioners:

"Ravi's letter writing to our clients and contact

From: Ravi Bishnoi

To: Hugh Gardner

To: Ravi Bishnoi

Cc: saroj.jha@srglaw.com

Cc: Akshat Pande

Subject: Introduction to SRGR Law Offices and Meeting in London

Sent: Mar, 4, 2010 12:49

Dear Hugh,

Trust this finds you in best of health and professional excellence.

I hope you would recall our meeting November 2009 at FoxMandal offices. We had met while I was a Partner with Fox Mandal.

There has been a recent development. I along with three other Partners have quit Fox Mandal and have set up a law Firm by the name of SRGR Law Offices. It's a full service law firm with 8 Senior Associates/Associates and a list of

international/domestic clients. The other three Partners are Saroj Jha (Real Estate, M&A), Rajan Gupta (M&A), Tax, General Corporate) and Gaurav Bhatia (Litigation).

I would be in London along with Saroj from the 22nd to 25th of March 2010 and would like to take this opportunity to meet up with your colleague at the London offices. Please let me know if it would be possible. We would suggest the following times.

22nd March

09:00 AM, 12.30 PM, 06:30 PM

23rd March

09:00 AM, 11.00 PM, 06:30 PM

25th March

09:00 AM, 06:30 PM

I am attaching the following for your perusal:

1. General practice profile of the Firm
2. Profile of Saroj
3. My profile

Looking forward to hearing from

Best Regards

Ravi"

14.5 These submissions, points out Mr. Chitale, have been noticed by the learned ADJ in para 4 of the impugned order, but have not been addressed therein.

15. Submissions of Mr Kailash Vasdev

15.1 Responding to Mr. Chitale's submission, Mr. Kailash Vasdev, learned Senior Counsel for the respondent, submits that the present petition is completely bereft of merit, in view of the clear covenant contained in Clause 1.1 of the Consulting Agreement. Clause 1.1, he submits, unequivocally admits the debt of Rs. 90,43,935/-. Not only was the debt admitted, Mr. Vasdev submits that the manner in which the debt was to be liquidated was also admitted. The petitioners cannot, therefore, in Mr. Vasdev's submission, seek to contend that there was no admitted debt, as would justify a decree under Order XXXVII Rule 3(5) of the CPC. No triable issue can, in the face of the express recitals contained in Clause 1.1 of the Consulting Agreement, be said to exist in favour of the petitioners and, therefore, no exception could be taken by the petitioners, to the impugned order passed by the learned ADJ.

15.2 Mr. Kailash Vasdev submits that there is no infirmity whatsoever, in the view of the learned ADJ that the Consulting Agreement was in two parts. A bare reading of the Consulting Agreement, he submits, vouchsafes the correctness of this interpretation. Referring to the opening recitals of the Consulting Agreement, Mr. Vasdev submits that the two opening recitals in the Consulting Agreement themselves indicate that the agreement is in two parts. The first part, reading "Whereas the company is in the business of providing legal services to its clients in various fields of law and the Consultant is a lawyer who has worked with FM on a retainerhip for the period April 2006 to 30th of November 2009", submits Mr. Vasdev, refers to the earlier services rendered by the respondent to the petitioners, and relates to Clause 1.1 of the Consulting Agreement. The second opening recital, reading "Whereas now FM has approached the Consultant to engage the services of the Consultant for assisting FM with the legal services related to the Hinduja National Power Corporation Ltd.'s (HNPCL) thermal power project in the state of Andhra Pradesh (hereinafter referred to as the "Project") and the Consultant agrees to offer his services, subject to the terms and conditions hereinafter set forth", submits Mr. Vasdev, relates to the services to be rendered under the Consulting Agreement to HNPCL, the substantive recitals in respect of which commenced from Clause 2 onwards. These two distinct opening recitals, submits Mr. Vasdev, justify the view, of the learned ADJ, that the Consulting Agreement is in two parts.

15.3 The petitioners cannot, therefore, according to Mr Vasdev, seek to renege from their obligations under Clause 1.1 of the Consulting Agreement on the ground that respondent had failed to discharge the obligations cast on him under the succeeding covenants thereof. Where, therefore, there was an admitted debt of Rs. 90,43,935/-, out of which an amount of Rs. 31.5 lacs alone had been paid, the learned ADJ, in Mr. Vasdev 's submissions, was entirely justified in requiring the petitioners to deposit the balance Rs. 58,93,935/-, as a condition for grant of leave to defend.

15.4 In this context, Mr. Vasdev has also invited my attention to Clause 7 and, particularly, Clause 7.1 of the Consulting Agreement which deals with termination thereof. Even if the agreement were to be terminated, submits Mr. Vasdev, Clause 7.1 requires the petitioners to pay, to the respondent, all outstanding amounts as per Clause 1 of the Consulting Agreement. The responsibility to pay, to the respondent, the amounts envisaged by Clause 1.1 of the Consulting Agreement is, therefore, according to Mr. Vasdev, non-negotiable in nature.

15.5 Insofar as the Clause "NOW, THEREFORE, in consideration of the mutual promises and upon the terms and conditions set forth below, FM and Consultant agree as follows" on which Mr. Chitale relies, is concerned, Mr. Vasdev submits that the Clause is required to be understood as disjunctive in nature and not as resulting in an amalgamation of all succeeding clauses of the Consulting Agreement.

15.6 Mr. Vasdev further submits that, in an earlier suit instituted by the

respondent against the petitioners, the petitioners had raised a defence that the suit was barred by Order II Rule 2 of the CPC. The said defence was, however, dismissed by the learned Trial Court, against which the petitioners approached this Court by way of CRP 95/2015 (Fox Mandal Company and Ors. v. Ravi Bishnoi and Ors.), which was also dismissed vide order dated 24th September 2015.

15.7 In view thereof, the present petition, he submits, cannot be maintained.

15.8 Mr. Vasdev has, finally, relied on the well-established limitations that apply to the jurisdiction vested in High Courts by Article 227 of the Constitution of India. He submits that the impugned order being discretionary in nature, this Court should refrain from interfering with it under Article 227.

Analysis

16. As already observed at the commencement of this order, this Court is presently only examining whether a case of notice or grant of interim relief is made out or not. In that regard, if a sufficiently arguable case is made out by the petitioners, given the nature of the impugned order, ordinarily, a status quo regarding the direction for deposit would be justified, pending disposal and final hearing of the present petition.

17. Tested on that touchstone and keeping in view the principles that have, from time to time, been enunciated by the Supreme Court regarding the scope of Order XXXVII Rule 3(5) of the CPC, it cannot be said that the petitioners have not made out an arguable case, as would justify issuance of notice and a direction for status quo at present.

18. The development of the law, relating to the law on Order XXXVII Rule 3(5) of the CPC, as it stands today, may easily be charted through three decisions of the Supreme Court, namely *Mechelec Engineers & Manufactures v. Basic Equipment Corporation* (1976) 4 SCC 687, *IDBI Trusteeship Services Ltd v. Hubtown Ltd* (2017) 1 SCC 568 and *B.L. Kashyap and Sons Ltd v. JMS Steels and Power Corporation* (2022) 3 SCC 294.

19. Order XXXVII Rule 3 of the CPC was amended in 1976. *Mechelec Engineers* (1976) 4 SCC 687 dealt with a case arising under the pre-amended Order XXXVII Rule 3(5) of the CPC, whereas *IDBI* (2017) 1 SCC 568 and *B.L. Kashyap* (2022) 3 SCC 294 deal with cases arising under the provision as it stood after its amendment.

20. Needless to say, we are concerned with the post-amendment Order XXXVII Rule 3(5) of the CPC in the present case.

21. *IDBI Trusteeship* (2017) 1 SCC 568, in para 17 of the report, postulated the following principles, to govern Order XXXVII Rule 3 of the CPC, in supersession of the principles earlier enunciated in *Mechelec Engineers* (1976) 4 SCC 687:

"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;
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;
 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;
 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.
 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;
 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."
22. Though IDBI Trusteeship (2017) 1 SCC 568 envisaged the afore-extracted principles, enunciated by it, as superseding the principles laid down in Mechelec Engineers (1976) 4 SCC 687, the Supreme Court, in paras 33 to 33.3 of the report in B.L. Kashyap (2022) 3 SCC 294 held as under:
- "33. It is at once clear that even though in the case of IDBI Trusteeship (2017) 1 SCC 568, this Court has observed that the principles stated in paragraph 8 of Mechelec Engineers' case¹ 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.
- 33.1. As noticed, if the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend. In the second eventuality, where the defendant raises triable

issues indicating a fair or bonafide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, where the proposed defence 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.

33.2. Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.

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."

(Emphasis supplied)

23. The guidelines enunciated in the afore-extracted passage from B.L. Kashyap

(2022) 3 SCC 294 are clear and categorical and delineate, with positive certainty, the principles governing grant of leave to defend under Order XXXVII Rule 3(5) of the CPC. What is clear, from the afore-extracted passages, is that, as the legal position stands today, unconditional leave to defend is the rule, conditional leave to defend is the exception and denial of leave to defend is to be limited to the most extreme of cases. The Supreme Court has, in para 33.1 of the report, gone to the extent of holding that, where the defendant raises a triable issue, indicating a fair or bona fide or reasonable defence, albeit not a positively good defence, he would be entitled to unconditional leave to defend. This position is reiterated in para 33.2 by observing that “even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend” and, in para 33.3, by observing that “even in the case of raising of triable issue with the defendant indicating its 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”. Two important indicia which emerge from these principles are that

(i) a “triable issue” indicates the existence of a fair or bona fide or reasonable defence, albeit not a positively good defence, and

(ii) where a case of existence of such a triable issue is made out by the defendant, unconditional leave to defend is to be granted, unless there be any strong reason to deny the leave.

If, therefore, even in the face of the existence of a triable issue having been raised by the defence, the Court decides not to grant unconditional leave to defend, the Court has to provide strong reasons for the said decision. The precedential tilt is, therefore, clearly in favour of grant of unconditional leave to defend.

24. The submissions of Mr. Chitale and Mr. Vasdev are, to one extent or the other, equally compelling and deserving of serious consideration. The exact interpretation of the clause “NOW, THEREFORE, in consideration of the mutual promises and upon the terms and conditions set forth below, FM and Consultant agree as follows” in the Consulting Agreement, is a matter which appears, prima facie, to be complex and debatable.

25. Read literally, the Clause would seem to indicate that it envisages the succeeding clauses in the Consulting Agreement to contemplate mutual obligations, which is what Mr. Chitale seeks to contend. If the clause is so understood, it would mean that the entitlement of the respondent, even to payment of the amount admitted in Clause 1.1, is conditional on fulfilment, by the respondent, of the obligations envisaged by the succeeding clauses of the Consulting Agreement. In that event, breach, by the respondent, of the clauses in the Consulting Agreement which succeed Clause 1.1 could be legitimately cited as a ground to deny, to the respondent, any right to payment under Clause 1.1.

26. If, on the other hand, as the learned ADJ holds and as Mr. Vasdev would seek

to contend, predicated on the two opening “whereas” clauses in the Consulting Agreement, Clause 1.1 relates to the obligations discharged prior to the Consulting Agreement and the remaining clauses of the Consulting Agreement relate to the obligations to be discharged in future, then the entitlement of the respondent to payment under Clause 1.1 would arise irrespective of whether the respondent has or has not, fulfilled its obligations under the remainder of the Consulting Agreement. That, Mr. Vasdev would seek to contend, is the correct interpretation of the Consulting Agreement.

27. In any event, it cannot, *prima facie*, be said that the petitioners have not raised a triable issue. At the very least, the petitioners have advanced a bona fide and reasonable defence to the suit, which involves a proper and incisive consideration of the various clauses of the Consulting Agreement. Applying the principles enunciated in *B.L. Kashyap (2022) 3 SCC 294*, the petitioners would, therefore, be ordinarily entitled to unconditional leave to defend.

28. The only circumstance in which unconditional leave to defend could be denied, would be where the bona fides of the petitioners are in doubt. There is no such finding in the impugned order. Besides the fact that no real want of bona fides of the petitioners appears, *prima facie*, to exist, that is a consideration which at the highest, may be examined when the present petition is finally heard. At the stage of issuance of notice and grant of interim relief, it would not be appropriate for this Court to return any finding on the said decision, especially as the impugned order passed by the learned ADJ, too, does not doubt the bona fides of the petitioners. To reiterate, this Court being seized with the challenge of the impugned order, which does not use want of bona fides as a consideration to direct complete deposit by the petitioners, it is somewhat doubtful as to whether such a plea would be available to the respondent, contesting the present petition.

29. Mr Vasdev has also relied on order dated 24th September 2015 vide which CRP 95/2015 was dismissed. This Court does not have, with it, the record of CRP 95/2015 or any other document on the basis of which the circumstances in which the order came to be passed could be gleaned. The order, itself, dismisses the CRP as not maintainable, as it was preferred against an order passed in a suit filed under Order XXXVII of the CPC seeking damages on account of a disability suffered by the respondent. Holding that the suit, from which the CRP had emanated, was not founded on any negotiable instrument, and did not claim any liquidated amount, the learned Trial Court had apparently dismissed the suit. This Court upheld the decision, and dismissed the CRP as not maintainable. How the said order would operate against the petitioner in the present proceedings is not immediately apparent. Nonetheless, I refrain from voicing any opinion, even tentative, on the issue, and leave it open for decision at a later, and appropriate, stage.

30. In view of the aforesaid, I am of the opinion that a *prima facie* case has been made out by the petitioners. The impugned order of the learned ADJ does not appear to have considered all these aspects while directing deposit by the

petitioners. Prima facie, therefore, a case for issuance of notice and grant of interim relief is made out. Inasmuch as Petitioner 1, as Defendant 1 in the suit, instituted by the respondent is a law firm of considerable repute, there is no threat of the respondent being unable to recover, if he were ultimately to succeed in the suit. Considerations of balance of convenience and irreparable loss would also, therefore, justify non-enforcement of the direction for deposit, as contained in the impugned order dated 9th June 2022 passed by the learned ADJ, pending consideration of the present petition.

31. Indeed, any direction for deposit at this stage would result, effectively, in the impugned order being affirmed at the interlocutory stage.

32. In the circumstances, issue notice, returnable on 21st December, 2022. Notice is accepted on behalf of the respondent by Mr. Manish Sharma.

33. Reply be filed in four weeks from today with advance copy to learned Counsel for the petitioners, who may file rejoinder thereto, if any, within four weeks thereof.

34. Till the next date of hearing, there shall be an ad interim stay of operation of the impugned order dated 9th June 2022 passed by the learned ADJ, insofar as it directs the petitioners to deposit Rs. 58,93,935/- as a precondition for grant of leave to defend the suit instituted by the respondent.

35. Needless to say, this Court is not interdicting continuance of the suit. The trial of the suit may continue, without, however, insisting on compliance with the direction for deposit, contained in the impugned order dated 9th June 2022 passed by the learned ADJ.

36. Observations contained in this order are merely prima facie, and intended to adjudicate on the prayer of the petitioner for issuance of notice and grant of stay pending disposal of the present petition under Article 227 of the Constitution of India. They would not bind either this Court at the stage of final hearing of the present petition, or the learned ADJ, while proceeding with and trying the suit instituted by the respondent.

37. Dasti.