

(2006) 10 MP CK 0001
In the Madhya Pradesh High Court

Kazi Sayed Ahmed Ali and Another

APPELLANT

Vs

Veeah Finance and Investment Pvt. Ltd.

RESPONDENT

Date of Decision : 27-10-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3(5)

Citation : (2007) 3 BC 602

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Judgement

N.K. Mody, J.—Being aggrieved by the order dated 18.7.2006 passed by XIII ADJ, Indore in Civil Suit No. 17-B/2005 whereby the application filed by the petitioners under Order 37 Rule 3(5) of CPC has been allowed and leave to defend is granted to the petitioner with a condition to furnish a solvent security of Rs. 10,00,000/-, the present petition has been filed.

2. Short facts of the case are that the respondent filed a suit against the petitioners on 6.10.2005 for realization of an amount of Rs. 18,08,000/- alleging that respondent is a Private Limited Company before whom petitioner moved an application on 3.3.2003 for grant of loan of Rs. 10,00,000/-. Further case of the respondent was that the application filed by petitioner was placed before Board of Directors of respondent vide resolution dated 10.3.2003. The application submitted by petitioner was allowed subject to furnishing the promissory note and the undertaking/personal guarantee by the petitioners. It was alleged that a sum of Rs. 10,00,000/- was given to the petitioner as loan and the amount was given in cash on the request of petitioners as the petitioners were badly in need of money. It is also alleged that the petitioners executed necessary documents and also undertaking-cum-personal guarantee along with promissory note in favour of respondent. It was alleged that since the amount was not paid, hence the suit was filed under summary procedure. It was alleged that the petitioners issued a cheque of Rs. 11,30,000/- which was submitted by the respondent in its account but the same was returned with a note that "Exceeds Arrangements",

hence the suit was filed wherein the respondent claimed Rs. 11,30,000/- towards principal and Rs. 6,78,000/- towards interest. The suit was filed under Order 37 of CPC.

3. After service of summons for appearance, petitioners filed an application under Order 37 Rule 3 of CPC wherein leave to defend was prayed. The application was contested by the respondent. After hearing the parties, the said application was allowed vide order dated 18.7.2006. However, a condition was imposed on the petitioners to furnish solvent security for a sum of Rs. 10,00,000/- within a period of 15 days as promissory note is for an amount of Rs. 10,00,000/-. Being aggrieved by this part of the order, the present petition has been filed.

4. Learned Counsel for the petitioners submits that the petitioner No. 2 is a widow aged 70 years and the petitioner No. 1 is the son of petitioner No. 2. It is submitted that from perusal of the document Annexure-P/7 which is the cheque dated 1.2.2004, it is evident that the amount mentioned was Rs. 30,000/- initially and by interpolation in words and also in digit the amount has been converted in Rs. 11,30,000/-. It is submitted that in the facts and circumstances of the case, learned Court below found that the petitioners are having a good defence. It is submitted that learned Court below committed error in imposing the condition of furnishing solvent security for an amount of Rs. 10,00,000/-. Reliance was placed on a decision of Hon''ble Apex Court in the matter of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , wherein the Hon''ble Apex Court laid down the following principles are to be followed while considering the question of granting leave to defend:

(a) If the defendant satisfies the Court that he has a good defence to 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 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, shew 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 defendant on such condition, and thereby show mercy to a defendant by enabling him to try to prove a defence.

5. Further reliance was placed in the matter of M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd., wherein the leave to defend was sought on the ground that the bills of exchange were executed without consideration as neither the goods were sold nor supplied in the transaction in question and that there was fraud, collusion and connivance between officers of the Bank and the drawees of the bills, Hon''ble Apex Court held that the learned Courts below erred in refusing to grant leave to defend.

6. In view of the aforesaid position of law, it is submitted that in the present case the cheque itself speaks in volume which was initially for Rs. 30,000/- and was converted to Rs. 11,30,000/-, learned Court below committed error in imposing condition for furnishing solvent security of Rs. 10,00,000/-.

7. Mr. Yogesh Markan, learned Counsel for the respondent supports the order and submits that in the similar circumstance, unconditional leave was granted to the petitioner in other cases against which the respondent filed a Writ Petition No. 4440/ 2005 between the same parties which was disposed of on 8.3.2006 wherein this Court found that the learned Court below committed error in granting leave unconditionally.

8. From perusal of the settled position of law laid down by Hon''ble Apex Court in the matter of MA. Mechalec Engineers (supra), it is evident that 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 defendant is entitled to unconditional leave to defend.

9. In the present case, learned Court below has found that there was good defence made out by the petitioners. In the facts and circumstances of the case, there was no justification for imposing the condition to furnish solvent security. In view of this, the petition is allowed. The impugned order so far as it relates to imposition of condition to furnish solvent security of Rs. 10,00,000/- is concerned is set aside.

10. With the aforesaid observations, petition stands disposed of. C.C. as per rules.