

(2017) 11 DEL CK 0755

In the Delhi High Court

Case No : Civil Revision Petition No. 200 Of 2017, Civil Miscellaneous No. 32848 Of 2017

Madhusmita Bora

APPELLANT

Vs

Rahul Bhatnagar & Ors

RESPONDENT

Date of Decision : 02-11-2017

Acts Referred:

Code Of Civil Procedure, 1908 — Section 115, Order 37, Order 37 Rule 3

Citation : (2017) 11 DEL CK 0755

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Zeba Khair, Bijoy Kumar Pradhan, M.A. Khan

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J

1. This petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 3rd July, 2017 in CS No.55699/2016 of the Court of Additional District Judge (ADJ), Patiala House Courts, New Delhi] of grant to the respondents/defendants of unconditional leave to defend the suit filed by the petitioner/plaintiff under Order XXXVII of CPC.

2. Notice of the petition was ordered to be issued for 22nd September, 2017 and on the counsel for the respondents/defendants on that date seeking adjournment, the matter was posted to today for hearing.

3. Counsels have been heard.

4. The petitioner/plaintiff instituted the suit, from which this petition arises, under Order XXXVII of the CPC, for recovery of Rs.5.25 lakhs jointly and severally from (a) Rahul Bhatnagar; (b) Santosh Kumar Bagla; and (c) United Human Rights Federation, pleading (i) that the petitioner/plaintiff is an Advocate on Record of the Supreme Court of India; (ii) that in the month of October, 2015,

the respondents/defendants No.1&2 representing the respondent/defendant No.3 approached the petitioner/plaintiff for filing a matter before the Supreme Court of India where they wanted the matter to be argued by eminent senior members of the Bar; (iii) that the petitioner/plaintiff filed the case and it was numbered as W.P.(C) No.764/2015 with case title United Human Rights Federation Vs. Union of India & Ors. and which was heard on 30th October, 2015; (iv) that the fee was settled at Rs.9.25 lakhs all inclusive, towards services agreed to be rendered in the course of filing and arguing the matter before the Supreme Court and the petitioner/plaintiff was instructed by the defendants No.1&2 to engage Mr. P. Chidambaram, Senior Advocate; (v) that Mr. P. Chidambaram, Senior Advocate, after reading the case brief, showed his inability to argue the case; (vi) that the petitioner/plaintiff was further instructed by respondents/defendants No.1&2 to engage two Senior Advocates in the matter and as per their instructions and concurrence, Mr. L. Nageswar Rao and Mr. Basava Prabhu Patil, Senior Advocates were briefed by the petitioner/plaintiff and they both caused appearance before the Supreme Court on 30th October, 2015; (vii) that the respondent/defendant No.1 had issued four cheques for a total sum of Rs.9.25 lakhs towards the services rendered by the petitioner/plaintiff as well as towards payment of fee of the two Senior Advocates which as per the understanding was to be paid by the petitioner/plaintiff from the funds received via cheques; (viii) that at the time of issuance of cheques, the respondents/defendants No.1&2 assured the petitioner/plaintiff that the cheques would be honoured on presentation; (ix) that all the said cheques, on presentment, were returned dishonoured on 2nd November, 2015; (x) that the petitioner/plaintiff immediately informed the respondents/defendants No.1&2 of the same; (xi) that on 3rd November, 2015, the respondent/defendant No.1 handed over a pay order of Rs.4 lakhs to the petitioner/plaintiff towards part payment of the sum agreed and further assured the petitioner/plaintiff that the balance amount of Rs.5.25 lakhs would be sent in a day or two; (xii) that the respondents/defendants however failed to pay the balance amount of Rs.5.25 lakhs; (xiii) that the respondents/defendants have thereby burdened the petitioner/plaintiff with fee to be paid to the Senior Advocates by the petitioner/plaintiff from her own pocket. Hence the suit.

5. The respondents/defendants in their joint application seeking leave to defend pleaded (a) that the respondent/defendant No.3 wanted to file a Public Interest Litigation (PIL) before the Supreme Court of India regarding the Safeguard Duty imposed illegally and arbitrarily by the Central Government; (b) that accordingly the respondent/defendant No.3 got prepared and drafted the petition; (c) that thereafter on advise of a friend, the respondents/defendants contacted the petitioner/plaintiff for filing the same; (d) that during the meetings, the petitioner/plaintiff represented and assured that she being an Advocate on Record would file and pursue the case diligently and in the interest of the respondents/defendants; (e) that the petitioner/plaintiff was paid a sum of Rs.25,000/- towards her fee and expenses; (f) that the said PIL was likely to be listed on 30th October, 2015; (g) that during the meetings, it was agreed and

decided that the said matter should be argued by a good Senior Advocate and the petitioner/ plaintiff suggested the names of Mr. P. Chidambaram and Mr. K.K. Venugopal, Senior Advocates and it was decided to get one of them engaged in the matter; (h) that on enquiry about the fee of the Senior Advocates, the petitioner/plaintiff informed that their fee could be between Rs.8 to 9 lakhs; since the matter was a PIL, the respondents/defendants requested for reduction in fee; (i) that the petitioner/plaintiff suggested that the respondents/defendants should deposit cheques for Rs.9.25 lakhs including the fee of the petitioner/plaintiff and the petitioner/plaintiff will manage settling the payments out of the said funds and for which the respondents/defendants agreed and issued the cheques for Rs.9.25 lakhs; (j) that the petitioner/plaintiff asked the respondents/defendants to issue the cheques in her favour as she will decide/manage, as to what and how much to pay, at the last moment; (k) that the cheques were issued on the representation and assurance of the petitioner/plaintiff that the petitioner/plaintiff will engage Mr. P. Chidambaram or Mr. K.K. Venugopal, Senior Advocates and the petitioner/plaintiff will ensure their presence at the time of hearing; (l) that despite requests, the petitioner/plaintiff did not arrange meeting/conference with any of the Senior Advocates; (m) that at last minute i.e. on 29th October, 2015, the petitioner/plaintiff informed the respondents/defendants that both, Mr. P. Chidambaram and Mr. K.K. Venugopal, Senior Advocates, were not available; (n) that the petitioner/plaintiff further advised the names of Mr. L. Nageswar Rao and Mr. Basava Prabhu Patil, Senior Advocates and on enquiry about the fee, informed that the fee of the said Advocates would be between Rs.3.30 lakhs to Rs.4.40 lakhs; (o) that the petitioner/plaintiff further represented that either one of the said two Senior Advocates will appear; (p) that on 29th October, 2015 itself, the petitioner/plaintiff informed the respondents/defendants that the matter had been gone through by the said Senior Advocates and they were of the opinion that the matter should be withdrawn, as the Supreme Court would not be inclined to even issue notice in the matter; (q) that the respondents/defendants agreed to go by the said advise and instructed the petitioner/plaintiff to withdraw the petition; (r) that the petitioner/plaintiff informed that she will withdraw the petition and there was no need of appearance of any Senior Advocate for the same and further informed that the Senior Advocates shall be paid for briefing only; (s) that on 30th October, 2015, both Senior Advocates aforesaid appeared and only sought permission to withdraw the petition; (t) that the respondents/defendants sought explanation from the petitioner/plaintiff for appearance of the Senior Advocates for withdrawal of the petition; (u) that the respondents/defendants also asked the petitioner/plaintiff to return the cheques; (v) that the petitioner/plaintiff on the contrary deposited the cheques for Rs.9.25 lakhs; (w) that the respondents/defendants paid a sum of Rs.4 lakhs towards full and final settlement but the petitioner/plaintiff on the Receipt issued, wrote the said amount as having been received in part payment only; (x) that though the respondents/defendants objected but the petitioner/plaintiff assured that she will return and hand over the dishonoured cheques at the earliest.

6. The learned ADJ, relying on the dicta of the Division Bench of this Court in V. Sreenivas Vs. Felex Enterprises Pvt. Ltd. 2016 SCC OnLine Del 350 and which in turn relied on the dicta of the Supreme Court in Mechelec Engineers & Manufacturers Vs. Basic Equipment Corporation (1976) 4 SCC 687 and holding that the respondents/defendants in their application for leave to defend had raised triable issues, by the impugned order, has granted unconditional leave to defend to the respondents/defendants.

7. The counsel for the petitioner/plaintiff has argued that in the facts aforesaid, no case for grant of leave to defend was made out.

8. Per contra, the counsel for the respondents/defendants has contended that there is neither any cheque for the sum of Rs.5.25 lakhs being the suit amount nor any agreement in writing whereunder the respondents/defendants have agreed to pay a sum of Rs.9.25 lakhs or Rs.5.25 lakhs to the petitioner/plaintiff; the suit under Order XXXVII of the CPC itself was thus not maintainable.

9. I have considered the controversy.

10. What is not in dispute is (A) that the respondents/defendants had engaged the petitioner/plaintiff as an Advocate; (B) that the petitioner/plaintiff acted as an Advocate for the respondents/defendants and filed the petition aforesaid on behalf of the respondents/defendants in the Supreme Court of India; (C) that as per the instructions of the respondents/defendants, Senior Advocates were to be engaged by the petitioner/plaintiff in the matter; (D) that the respondents/defendants did issue cheques for a total sum of Rs.9.25 lakhs in favour of the petitioner/plaintiff towards professional fee of the petitioner/plaintiff including the fee to be paid by the petitioner/plaintiff to the Senior Advocates to be engaged; (E) that two Senior Advocates instructed by the petitioner/plaintiff appeared on behalf of the petitioner/plaintiff before the Supreme Court on 30th October, 2015; (F) that the said cheques were presented for payment by the petitioner/plaintiff and were returned dishonoured for the reason of the payment having been stopped by the respondents/defendants and/or the difference in the amount of the cheque in figures and in words; and, (G) that the respondents/defendants thereafter made payment of Rs.4 lakhs and accepted receipt from petitioner/plaintiff of the same being in part-payment.

11. It is the plea of the respondents/defendants in the application for leave to defend that on 29th October, 2015 owing to the Senior Advocates earlier intended to be engaged being not available, the fee was re-negotiated and substantially stood reduced. However notwithstanding the same, the respondents/defendants did not insist upon return of the cheques issued for Rs.9.25 lakhs and allowed the same to remain with the petitioner/plaintiff.

12. It is also not in dispute that the petitioner/plaintiff banked all the four cheques for a total sum of Rs.9.25 lakhs on 30th October, 2015 itself i.e. when the petition filed on behalf of the respondents/defendants was listed and withdrawn. The conduct of the petitioner/plaintiff of banking the cheques on the

same day is in the normal course of human/Advocate's behavior. Had there been any talk of reduction of the fee as pleaded by the respondents/defendants in the application for leave to defend, the petitioner/plaintiff, in the normal course of human conduct would not have banked all the four cheques on the same day on which the petition was listed and withdrawn.

13. The respondents/defendants in their leave to defend application have not disclosed any reason for stopping payment of three cheques out of the four cheques. The three cheques which were returned unpaid for the reason of payment thereof having been stopped are for Rs.5.50 lakhs, Rs.2 lakhs and Rs.1 lakh. It is not known, whether the payment for fourth cheque for Rs.75,000/- also had been stopped, though the same has been returned for the reason of discrepancy in amount thereof in words and in figures. If there had been any talk as pleaded by the respondents/defendants in their leave to defend application, of reduction of fee, the respondents/defendants would have stopped payment only of the cheques in excess thereof and not of all the cheques. If according to the respondents/defendants, payment of only Rs.3 to 4 lakhs was due to the petitioner/plaintiff, the respondents/defendants would have stopped payment only of cheque of Rs.5.50 lakhs. The conduct of the respondents/defendants of stopping payment of all the four cheques shows the mala fides of the respondents/defendants to avoid payment of professional fee, after the professional had done the work for which the professional was engaged.

14. Though according to the respondents/defendants, the petitioner/plaintiff presented the cheques for payment contrary to the understanding between the petitioner/plaintiff and respondents/defendants but the respondent/defendants, notwithstanding the petitioner/plaintiff having presented the cheques, still did not raise any protest and on the contrary, on the very next day i.e. on 3rd November, 2015, paid a sum of Rs.4 lakhs to the petitioner/plaintiff. Had the petitioner/plaintiff been acting contrary to the mutual agreement, the respondents/defendants would have insisted on return of the dishonoured cheques but did not do the same. If the petitioner/plaintiff had been acting contrary to mutual understanding, as pleaded by the respondents/defendants, the respondents/defendants would not have trusted the petitioner/plaintiff again, as they admittedly did.

15. Not only so, when the petitioner/plaintiff in the receipt issued, expressly mentioned the sum of Rs.4 lakhs to have been received as 'part payment', the respondents/defendants played along and did not at the contemporaneous time raise any objection. The plea in the application for leave to defend of the respondents/defendants having objected and the petitioner/plaintiff having assured them of return of the dishonoured cheques is clearly an afterthought.

16. I have drawn the attention of the counsel for the respondents/defendants to the dicta of the Supreme Court in IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd. (2017) 1 SCC 568 which remained to be noticed by the learned ADJ also. Supreme Court by the said judgment has held Mechelec Engineers &

Manufacturers supra on which inter alia the learned ADJ in the impugned judgment has relied, to be no longer good law. In IDBI Trusteeship supra it was held that Order XXXVII of the CPC suffered a change in the year 1976 and the amended Order XXXVII of CPC is the same as the Bombay Amendment to Order XXXVII of CPC on which Supreme Court pronounced judgment in Milkhiram (India) (P) Ltd. Vs. Chamanlal Bros. AIR 1965 SC 1698. It was further held that Mechelec Engineers & Manufacturers supra on the contrary was pronounced with respect to Order XXXVII as it stood prior to 1976 amendment. It was thus concluded that Mechelec Engineers & Manufacturers supra stands superseded, given the amendment of Order XXXVII Rule 3 and the binding decision of four Judges in Milkhiram (India) (P) Ltd. supra. It was further held that the position of law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case; but justice, like equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies; the life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; at one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence and at the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend; in between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. The test of real doubt about the defendant's good faith and the genuineness of the triable issue and of the defence being in the realm of plausible but improbable, was applied. It was held that the entire transaction on which the suit is based is to be looked at as a whole and on the one hand care must be taken to see that the object of the provision, to assist expeditious disposal of commercial causes is not defeated and on the other hand to see that triable issues are not shut out by unduly severe orders as to deposit or security.

17. The matter thus has to be viewed in the facts of the present case and applying the law aforesaid.

18. The transaction subject matter of a suit is between an Advocate and a client, relationship between whom is of faith. Judicial notice is taken of the fact that normally there are no written contracts between a litigating Advocate and his client. Though the client executes a Vakalatnama authorising the Advocate to represent him/her in the Court but the said Vakalatnama is generally in a printed form and I am yet to come across a Vakalatnama containing the terms of fee, etc. settled between the client and the Advocate. In fact, I have during the hearing, asked the counsel for the respondents/defendants, whether he himself enters into a written contract for fee with his client and the counsel has fairly replied in the negative.

19. Once it is so, the decision of a dispute, as to fee etc., if arises between an Advocate and his/her client, has to be necessarily resolved on the basis of respective versions and the surrounding circumstances.

20. The surrounding circumstances in the present case are not in dispute as

recorded by me hereinabove. The same explained with the normal human conduct, also mentioned by me hereinabove, support the version of the petitioner/plaintiff and negate the version of the respondents/defendants in their application for leave to defend. I cannot fathom what purpose, in this factual scenario, grant of leave to defend and which would result in trial, serve except to delay the decision. The admitted facts, even then will be the same and the version of the respective parties is also likely to be the same.

21. Once the Legislature has created a class of suits to which a summary procedure is applicable, every plea which an Advocate for the defendant with his legal acumen can raise in the application for leave to defend cannot entitle the defendant to leave to defend. If it were to be so, it will be a great disservice to the summary procedure laid down by the Legislature for a certain class of suits.

22. As far as the plea of the respondents/defendants, of there having been no need for two or any Senior Advocate to appear merely for withdrawal of the petition, is concerned, judicial notice can also be taken of the fact that many a time, an order of simple withdrawal of an appeal or a petition is preceded by elaborate hearing and petitions/appeals are withdrawn, after failing to satisfy the Court of the merit thereof and in an endeavour to avoid likely costs or closure of other avenues intended to be availed, after withdrawal of the petition. Thus, merely because the order dated 30th October, 2015 in the petition filed by the petitioner/plaintiff on behalf of the respondents/defendants is of withdrawal of the petition, cannot lead to any inference of the petition having not been argued and pressed on 30th October, 2015. In fact, the very appearance of two Senior Advocates on 30th October, 2015 is suggestive of the attempt on 30th October, 2015 being to have the petition entertained and notice thereof issued.

23. A contract of payment of fee to an Advocate is not a wager, fulfillment whereof by the client is dependent upon success or desired result or target being achieved. The respondents/defendants herein have unequivocally issued cheques for Rs.9.25 lakhs in favour of the petitioner/plaintiff and allowed the said cheques to be dishonoured and on dishonour, made part payment of the cheques and accepted a receipt of part payment and did not insist upon taking back the dishonoured cheques. The only reasonable conclusion is of the remaining payment due from the respondents/defendants to the petitioner/plaintiff being of Rs.5.25 lakhs and for which amount the suit has been filed.

24. The counsel for the respondents/defendants has referred to GE Capital Services India Vs. May Flower Healthcare Pvt. Ltd. 2012 SCC OnLine Del 4530 holding that a suit under Order XXXVII of the CPC does not lie for the balance due on the foot of a statement of account. The present suit is not based on the balance due on the foot of a statement of account or a ledger. The present suit has been filed for the amount of the dishonoured cheques less the admitted payment by the respondents/defendants.

25. The petition thus succeeds.

26. The impugned order dated 3rd July, 2017 is set aside. The application of the respondents/defendants for leave to defend the suit is dismissed and the petitioner/plaintiff is found entitled to a decree for Rs.5.25 lakhs.

27. As far as the claim of the petitioner/plaintiff for interest pendente lite and future is concerned, it has been held in Palm Art Apparels Pvt. Ltd. Vs. Enkay Builders Pvt. Ltd. MANU/DE/3533/2017 and Khera Handloom Supply Vs. O.B. Experts 1990 (18) DRJ 337 that merely because there is no agreement in writing qua payment of interest, the same will not come in the way of the Court granting interest pendente lite and future at such rate as may be deemed expedient. On the facts of the present case, I consider it expedient to grant interest @ 10% per annum on the principal amount of Rs.5.25 lakhs, from the date of the institution of the suit and till realisation.

28. Accordingly, a decree is passed in favour of the petitioner/plaintiff and jointly and severally against the respondents/defendants for recovery of Rs.5.25 lakhs with interest @ 10% per annum from the date of institution of the suit and till realisation. The petitioner/plaintiff shall also be entitled to costs of the suit.

29. Decree sheet be drawn up by the Suit Court.