

(2001) 10 DEL CK 0123

In the Delhi High Court

Case No : CR No. 481/97

Music Systems

APPELLANT

Vs

Dena Bank

RESPONDENT

Date of Decision : 04-10-2001

Acts Referred:

Citation : (2001) 10 DEL CK 0123

Hon'ble Judges : Ramesh Chand Jain, J

Bench : Single Bench

Advocate : A. Banerjee, for the Appellant; S.C. Sharda, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Jain, J.—This revision petition is directed against the judgment of the learned Additional District Judge, Delhi dated 1st November, 1996, thereby dismissing the application of the petitioner-defendant praying for leave to defend a summary suit filed by the plaintiff under Order xxxvII of the CPC and consequently decreeing the suit of the plaintiff in the sum of Rs. 3,56,537/- along with pendente lite and future interest at the rate of 18.5% per annum and proportionate costs.

2. Briefly, the facts leading to the revision petition are that the respondent bank had filed a suit against the petitioner-defendant for recovery of Rs. 3,56,737/- with interest at the rate of 18.5% per annum with costs with the averments that the Bombay Branch of the respondent bank at the request of M/s. Oriental Melodies sanctioned a cash credit hypothecation limit and a bill discounting facility to M/s. Oriental Melodies and under the said facility M/s. Oriental Melodies discounted 22 bills of exchange (hundies) aggregating to a sum of Rs. 2,52,645-12 drawn by the said M/s. Oriental Melodies on the petitioner and against the said bills of exchange moneys were advanced to M/s. Oriental Melodies, Bombay being the drawer and the respondent bank being the payee of the said bills which had been duly accepted by the drawee/petitioner. The bills of

exchange were presented to the petitioner for payment on the respective dates through the State Bank of India, Connaught Circus, New Delhi but the same were dishonoured by non-payment. As the defendant has failed and neglected to pay the amount of the bills, which fact was recorded through the Notary Public in his report dated 26th May, 1984, plaintiff filed the suit.

3. The petitioner-defendant being served of the summons of appearance in the prescribed form, entered appearance and filed an application for leave to defend with the averments and allegations that triable issues arise entitling them to unconditional leave to defend; the plaintiff respondent had filed a suit bearing No. 279/85 against M/s. Oriental Melodies, Bombay for recovery of the suit amount and as the issues in the said suit and the present suit were substantially the same, the present suit is liable to be stayed; the bills of exchange had been accepted by the petitioner-defendant in respect of the supplies made by M/s. Oriental Melodies the distributor of Northern India territory and that the hundies had been accepted in anticipation that the goods viz pre-recorded audio cassettes tapes supplied by M/s. Oriental Melodies would be sold within a period of 30 days but owing to the manufacturing/recording defect in the said cassettes their sale did not materialise and this fact was brought to the notice of M/s. Oriental Melodies and they were requested to take back the goods and the petitioner-defendant had negotiated with M/s. Oriental Melodies in terms of the instructions dated 17th January, 1984 and all the unsold goods were returned back to them. Accordingly it was pleaded that no amount is now due and payable to the respondent bank. The suit was also stated to be bad for mis-joinder of causes of action as each hundi is a distinctive negotiable instrument and separate advalorem court fee was required to be paid on the value of each hundi. The suit was also stated to be bad for non-joinder of the necessary party i.e. M/s. Oriental Melodies, the principal debtor.

4. The learned trial court on a consideration of the matter and after recording its findings on all the pleas put forth by the petitioner-defendant declined leave to defend holding that the petitioner-defendant has not been able to raise any triable issue which could entitle him for leave to defend.

5. I have heard the learned counsel for the parties at sufficient length and have given my thoughtful consideration to their submissions. Learned counsel for the petitioner emphatically urged before me that in view of the pleas put forth by the petitioner-defendant and more particularly the legal pleas about the mis-joinder of causes of action and non-joinder of necessary party and that owing to the pendency of an earlier suit filed by the plaintiff bank against M/s. Oriental Melodies, there was sufficient justification for allowing the leave to defend application. The Supreme Court in the case of *Milkhiram (India) Private Ltd. v. Chaman Lal Bros*, (1965) ASC 1698 held that if there is a triable issue, unconditional leave to defend must be granted and that if the defense is fake or frivolous, leave to defend should be refused altogether. In the subsequent case of *Michale Eng. & Mfg. v. Bank Equipment Corporation*, (1977) ASC 577 the

Supreme Court laid down the following principle about granting the leave to defend:-

"(a) If the defendant satisfies the Court that he has a good defense to the claim on merits, 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 defense, although not a possible good defense, 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, if the affidavit discloses that at the trial he may be able to establish a defense to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend - the conditions being as to time or trial or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defense, or if the defense is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defense but at the same time protect the plaintiff by imposing the condition that the amount claimed should be paid into Court or otherwise secured."

In the case of *Bank of Maharashtra v. Swastic Sales Corporation*, II (1992) BC 530 this Court has held that liability of the acceptor of bill of exchange is in absolute terms and cannot be avoided. In another case of *Bank of India v. Krishan Lal Nand Lal*, 1990 (3) DL 200 this Court declined the leave to defend by repelling the objection of the defendant about the non-joinder of the drawer of the hundies as necessary party and the suit filed by the bank against the said drawer of the hundi which was stated to be pending.

6. Applying the legal position emerging from the above decisions to the facts of the present case, it is apparent that none of the defense pleas put forth by the petitioner-defendant in their leave to defend application were legally and factually sustainable. The defense of the petitioner-defendant that the goods supplied by M/s. Oriental Melodies were not up to the mark owing to certain manufacturing defects etc., may perhaps constitute a plausible defense in an action which could be brought by M/s. Oriental Melodies against the petitioner-defendant but it is not a tenable defense qua the plaintiff bank in the present suit. Similarly the plea about the mis-joinder of causes of action and non-joinder of necessary party was also untenable because the plaintiff bank was entitled to maintain the suit in respect of the bills of exchange for which moneys were advanced by the plaintiff bank pursuant to cash credit hypothecation limit and bill discounting facility granted to the petitioner-defendant. The pendency of an earlier suit filed by the plaintiff bank against M/s. Oriental Melodies in Bombay Court is no bar to the filing of the present suit because the liability of the

petitioner-defendant is joint and several with M/s. Oriental Melodies and they cannot escape their liability on the ground that the plaintiff bank has already filed a suit for recovery of the same amount against M/s. Oriental Melodies in Bombay.

7. Having considered the matter in its entirety this Court is of the opinion that on the facts and circumstances of this case and the materials placed on record the learned trial court was fully justified in declining leave to defend to the defendant. The impugned order/judgment does not suffer from any illegality or material irregularity which calls for any interference by this Court.

8. The revision petition is accordingly dismissed.