

(1987) 03 DEL CK 0091

In the Delhi High Court

Case No : LA. No. 4975 of 1984 in Suit No. 1655 of 1983

Punjab and Sind Bank

APPELLANT

Vs

Seth Roller Flour Mills and others

RESPONDENT

Date of Decision : 27-03-1987

Acts Referred:

Citation : (1987) 03 DEL CK 0091

Hon'ble Judges : Mahesh Chandra, J

Bench : Single Bench

Advocate : A.S. Chandhiok, for the Appellant; M.S. Dewan with H.L. Vij, for the Respondent

Final Decision : Allowed

Judgement

Mahesh Chandra, J.—By this order I propose to dispose of this I.A. filed under O. XXXVII R. 3(5) of the Civil P. C, filed by the defendants for obtaining leave to defend this suit for recovery of money filed against the defendants under O. XXXVII of the CPC by the plaintiff-Punjab and Sind Bank. The LA. is opposed on behalf of the plaintiff-Bank. I have heard the learned counsel for the parties and have gone through the file and after giving my considered thought to the matter before me, I have come to the following findings.

2. The facts giving rise to this order are that the plaintiff-Bank has filed suit No. 1655/83 against defendants 1 to 12 for recovery of Rs. 5,23,864/77 p. under O. XXXVII of the CPC and after notice of this suit was served upon the defendants, appearance was put in and in course of time I.A. 4644/84 was moved by the plaintiff under O. XXXVIIR. 3(4) of the Code of Civil Procedure, for summons for judgment and summons for judgment were served upon the counsel for the defendants on 8th Aug. 1984 and thereafter on 18th Aug. 1984 LA. 4975/84 for leave to defend has been filed by the defendants under O. XXXVII, R. 3(5) of the Code of Civil Procedure.

3. It has been urged in the LA. that the plaintiff has filed this suit under O.

XXXVII of the CPC but no documents which were the basis of the suit were filed with the plaint and no copies thereof were supplied to the defendants, so much so that even a copy of the statement of account was not furnished to the defendants; that the plaint has not been signed and verified by a duly authorised person while summons for judgment have been signed by different officials; that the suit under O. XXXVII of the CPC is not maintainable because it relates to primarily reconciliation of accounts rather than is for liquidated demand or debt as such; that only defendants 2 to 6 are partners of defendant No. 1 and there has not been any other partner of defendant No. 1 and defendants 7 to 12 have been improperly joined as defendants and the suit was bad for mis-joinder of parties and is not maintainable under O. XXXVII of the Code of Civil Procedure, that the documents which are the basis of this suit were not signed by the defendants on 5th Dec. 1980, as alleged and rather the same were blank when they were signed by defendants 2 to 6 and the same do not bear the signatures of other defendants; that the documents were blank forms and were got signed on different dates from defendants 2 to 6; that the allegations as to guarantor were contradictory as a reference to para 4 of the plaint vis-a-vis para 9 of the application for summons for judgment would show inasmuch as in para 4 of the plaint it has been stated that surety and guarantee of defendant No. 7 was offered while in para 9 of the application for summons for judgment it has been stated that defendant No. 12 executed and delivered a letter of guarantee; that in any event the guarantee in the instant case could not extend to the liability of defendants 7 to 11 who were never partners and have never been partners of defendant No. 1; that the suit cannot lie under O. XXXVII of the CPC for recovery of any penalty in any form and the plaintiff admittedly is charging and debiting penalty interest to the account of the defendants; that the plaintiff has debited various unauthorised amounts to the account of the defendants and as such the suit under O. XXXVII of the CPC was not maintainable.

4. The said application has been contested, inter alia, on the ground that the application was not maintainable that the application was not within time; that the application did not raise any triable issues and did not raise any substantial defence; that the documents were not made annexure to the plaint and as such copies thereof were not required to be served or delivered to the defendants although the plaintiff delivered copies of the documents later on: that the plaint was signed and verified by duly authorised person and the officers signing and verifying the plaint and the affidavit supporting the application for summons for judgment are principal officers of the plaintiff-Bank and were its duly constituted attorneys and they could sign these documents; that the suit did not relate only to reconciliation of accounts: that the defendants 7 to 11 were joined and inducted partners of defendant No. 1 in 1983 and have taken over all the assets and liabilities of defendant No. 1 and as such the suit is not bad for misjoinder of parties, that in any case if it is held that defendants 7 to 11 are not the partners of defendant No. 1, the plaintiff does not claim any relief against these defendants, that it is wrong that blank printed forms were got signed from

various defendants, as alleged; that it was wrong that the documents were not signed on 5th Dec. 1980; that the guarantor was defendant No. 12 and any reference to any other defendant as guarantor was wrong but that itself did not admit of leave to defend in favour of the defendants; that no unauthorised debits have been raised in the accounts of the defendants and the additional interest has been charged according to the agreement and no penal interest has been charged: that the application is liable to be dismissed and be dismissed.

5. In order to entitle the defendants for leave to defend, it is incumbent upon them to show that they have a substantial defence and triable issues to raise and their defence is not frivolous or vexatious. No rule of thumb can be laid down for grant of leave to defend and each case has to be decided on its particular facts and circumstances. Leave to defend would be granted if it is shown that the defendants are raising triable issues and their plea is at least bona fide and plausible and not sham or illusory or practically moonshine.

6. The first contention of the defendants is that the documents which were basis of the suit had not been filed with the plaint and no copies thereof were supplied to the defendants, so much so that even a copy of the statement of account was not furnished to the defendants and as such leave to defend is sought. I have gone through the provisions of O. XXXVII of the CPC and I do not find anything therein which warrants that copies of documents which are basis of the suit have to be furnished to the defendants. The only requirement of O. XXXVII R. 3(1) of the CPC is that copy of the plaint and annexures thereto has to be furnished to the defendants. It has not been shown that any of the documents which are basis of the suit or which have been filed by the plaintiff are annexure to the plaint. In view thereof, I do not find that the defendants are entitled to leave to defend on this ground.

7. The next submission of the learned counsel for the defendants is that the suit under O. XXXVII of the CPC is not maintainable because the present is a suit primarily for reconciliation of accounts rather than for liquidated demand or debt as such. The suit is for recovery of money and is based upon written contract and no part of the amount is sought to be recovered by way of penalty. In addition, it is based also on the guarantee. In these circumstances, the suit is prima facie within the compass of O. XXXVII R. 1(2) of the Code of Civil Procedure. From the perusal of the plaint it cannot be said that it is not a suit for liquidated demand or debt. It cannot be said that it is a suit primarily for reconciliation of accounts. In these circumstances, it would be difficult to say that the defendants are entitled to leave to defend on this ground either.

8. The next ground on which leave to defend is sought by the defendants is that in fact, only defendants 2 to 6 were partners of defendant No. 1 and defendants 7 to 12 have been improperly joined as defendants and the suit was bad for misjoinder of parties and is not maintainable as such under O. XXXVII of the Code of Civil Procedure. In this behalf my attention has been drawn by the learned counsel for the defendants to various orders passed from time to time in

this suit. The suit was initially filed against defendants 1 to 12 and on 14th Feb. 1985 the learned counsel for the plaintiff had stated in the Court that "The plaintiff gives up defendants No. 7 to 11. Their names be struck off from the array of defendants in the plaint." and in view of the said statement the names of defendants 7 to 11 were ordered to be struck off from the array of defendants in the plaint and the plaintiff was directed to pay Rs. 1.000/- as costs to these defendants. However, thereafter an application was filed which was registered as I.A. 1805/85. The said application was filed under O. VI, R. 17 read with O. I, R. 10 of the CPC wherein the plaintiff had sought permission to retain the names of defendants 7 to 11 on the plea that their deletion earlier was a mistake and on mis apprehension of their status as partners. of defendant No. 1 and it was further sought to elaborate in what manner the suit was maintainable against those defendants and how it was within time qua them. The said application was opposed on behalf of the defendants. However, D.R. Khanna, J. vide orders dated 22nd April. 1985 directed that :

"In view of the circumstances above brought by Mr. Chandiok on behalf of the plaintiff that the names of defendants No. 7 to 11 were deleted under mistake, these defendants are allowed to remain on record. The plaintiff is also allowed to amend the plaint in order to show in what manner the cause of action exists against these defendants....."

The said amendment was allowed subject to payment of Rs. 250/- as costs. It has now been urged on behalf of the defendants that in this background it is doubtful if defendants 7 to 11 are liable in the suit at all or not. This contention of the defendants appears to be weighty and cannot be said to be mala fide, illusory or practically moonshine. At one stage the learned counsel for the plaintiff himself was in doubt if defendants 7 to 11 are liable in the suit or not and this led him to make a statement for deletion of the names of these defendants from the arena of defendants in the suit and such deletion was, in fact, ordered as well. It was only on second thought and on moving an application under O. VI, R. 17 read with O. I, R. 10 of the CPC that their names were again ordered to be brought on record. This suggests that the liability of defendants 7 to 11 is of a doubtful nature at least prima facie. If the liability of defendants 7 to 11 is of a doubtful nature, it would essentially have repercussions upon the liability of other defendants as well and consequently it would be appropriate in the circumstances that leave to defend is granted to all the defendants on this ground at least, more so because defendants 7 to 11, even according to the plaintiff, joined as partners of defendant No. 1 in Dec. 1983 and the question has to be considered whether their liability can be traced back to the original agreement when the loan was raised and I hold accordingly.

9. The other ground on which leave to defend is sought on behalf of the defendants is that the documents which were basis of this suit were not signed by the defendants on 5th Dec. 1980, as alleged and rather the same were blank when these were signed by defendants 2 to 6 and the same did not bear the

signatures of other defendants and the same were got signed by defendants 2 to 6 on different dates. It has also been urged that the plaintiff has not given/ written the words "Suit under O. XXXVII CPC" immediately below the number of the suit in the plaint. However, keeping in view my conclusion and finding above, I do not think it would be necessary for me to determine these points while granting permission of leave to defend this suit to the defendants.

10. In view of my discussion and findings above, I allow this application and grant the defendants leave to defend this suit unconditionally. Let the written statement be now filed within six weeks hereof with advance copy to counsel for the plaintiff so that replication is filed within further four weeks. Be listed before the Deputy Registrar for completion of this exercise on 7th July, 1987. The parties would file such documents as they would like to within two weeks of completion of the pleadings and the admission/denial would be carried out thereafter and on completion of admission/denial the case would be listed before the Court for issues.