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**(1958) 07 BOM CK 0029**

**In the Bombay High Court**

**Case No :** Civil Revision Application No. 1023 of 1958

Rawalpindi Theatres Private Ltd.

APPELLANT

Vs

Film Group

RESPONDENT

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**Date of Decision :** 04-07-1958

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 115

**Citation :** (1958) 60 BOMLR 1373

**Hon'ble Judges :** M.C. Chagla, C.J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## Judgement

M.C. Chagla, C.J.—This is an application in revision against an order of the learned Judge of the City Civil Court granting conditional leave to the defendants in a summary suit. The order directed that the petitioners should deposit a sum of Rs. 5,000 within a specified time as a condition to the right of the defendants to appear in and defend the suit.

2. The facts are that the plaintiffs are producers of a film and they produced a film by the name of "Musafir". Defendants No. 1 are distributors and they entered into an agreement with the plaintiffs to take up the distribution of this film for Delhi and U.P., and under this agreement the defendants were to pay Rs. 1,35,000 to the plaintiffs. Rs. 65,000 were to be paid during production and Rs. 70,000 against the delivery of prints. It is common ground that Rs. 48,000 were paid by the defendants as against the sum of Rs. 65,000 which was to be paid. It is the case of the defendants that on May 3, 1957, they entered into various agreements with exhibitors in U. P. and Delhi and one of these agreements was with Nishat Talkies of Kanpur by which Nishat Talkies agreed to pay the petitioners Rs. 25,000 as minimum guarantee on condition that they gave the Talkies two prints simultaneously with the release of the film at Delhi, and according to the defendants the Nishat Talkies paid on May 17, Rs. 11,000 as against this minimum guarantee of Rs. 25,000. This film was released in Bombay

on May 17, and it is again common ground that notwithstanding the brilliant caste the film was a flop, In view of this, and the parties having realised that not much profit was to be made out of this after the exploitation of this film, the original agreement entered into between the plaintiffs and the defendants was modified on July 3, 1957, and the main modification with which we are concerned is that the mode of payment of Rs. 1,35,000 was altered and the mode of payment settled by this agreement was that the defendants were to pay Rs. 52,000 against delivery of 11 prints, three of which were to be looked upon as a loan which were to be returned within two or three weeks, Rs. 15,000 were to be paid by hundis drawn by the defendants in favour of the plaintiffs payable on August 31, 1957, and the balance of Rs. 20,000 were payable out of the realisations made by the defendants. It is the case of the defendants that only five out of the 11 promised prints reached Delhi on July 16, and on intimation being given by the bank the defendants took delivery of these five prints against payment of Rs. 52,000, and it is the case of the defendants that they paid Rs. 52,000 and took delivery of these prints in the supposition that they were 11 prints as agreed to under the contract. Having paid Rs. 52,000 and having found that only five prints instead of 11 prints had been delivered to them, they sent a telegram to the plaintiffs protesting against having been made to pay Rs. 52,000 only against delivery of five prints. The three other prints were taken delivery of by the defendants at a later date and there is some dispute with regard to the three loan prints into which we need not enter at this stage. On November 4, 1957, the defendants filed a suit in the Delhi Court contending that they had suffered damage to the extent of Rs. 30,000 by reason of the failure on the part of the plaintiffs to deliver 11 prints on July 17, 1957, and the summary suit out of which this revision application arises was filed a few days later.

3. With regard to damages, the defendants' case is that it was essential that they should supply the Nishat Talkies the prints of the film on the same day as the film was released in Delhi. The film was released in Delhi on July 19, 1957, and as the defendants did not have sufficient prints they could not supply two prints to the Nishat Talkies with the result that the Nishat Talkies could not release the film on July 19, 1957, The film was released subsequently by the Nishat Talkies, but the defendants lost the minimum guarantee and they only became entitled to receive rental on percentage basis, and this is the main damage which according to the defendants they have suffered by reason of the breach of the agreement by the plaintiffs. It is to be noted that the summary suit is filed on the hundis drawn by the defendants in favour of the plaintiffs and payable on August 31, 1957. It is a suit on a negotiable instrument and any defence put forward by the defendants to this suit must be viewed in the light of the fact that what the plaintiffs are suing on is not any agreement or contract but a negotiable instrument.

4. My attention was drawn by Mr. Malhotra, and drawn very pointedly and very emphatically, to the recent decision of the Supreme Court in Santosh Kumar Vs. Bhai Mool Singh, . It is said that the Supreme Court has now laid down a new

principle of law with regard to the granting of leave in summary suits, and according to Mr. Malhotra the learned City Civil Court Judge has contravened that principle of law, and if I am satisfied that that principle of law is contravened it is my duty to interfere in revision. First let us turn to the Supreme Court decision and see what it has done. It is said that the Supreme Court has now laid down that if the affidavits filed by the defendant disclose a triable issue, then leave must be given unconditionally, otherwise the leave may be illusory, and this is based on the principle of natural justice that a defendant should be heard in his defence if he has a defence to put forward and his mouth must not be compulsorily shut if he is not in a position to comply with the condition imposed by the Court. Now, it is my experience both at the Bar and on the Bench that Judges on the Original Side and of the City Civil Court have been dealing with hundreds of summary suits and observing the identical principle which according to Mr. Malhotra the Supreme Court has enunciated for the first time. The practice in summary suits is well settled in the High Court for the last, I believe, 75 years and in the City Civil Court since the City Civil Court was established. The difficulty arises not in failing to realise that leave must be granted when there is a triable issue but in understanding and appreciating what a triable issue is. With respect, the Supreme Court has not defined a triable issue. A triable issue cannot possibly be any issue which may be raised at a trial on the pleadings. If that were so, however frivolous, however untenable, however dishonest the defence may be, it would give rise to an issue. A triable issue does not and cannot mean a raisable issue, an issue which can be raised on the affidavits or on the pleadings. In relation to a summary suit where matters are decided on affidavits, a triable issue can only mean that a defence is revealed or disclosed in the affidavit of the defendant which cannot be summarily disposed of on the affidavits and which requires a trial and a further investigation. It also means that if the trial and further investigation resulted in the defendant's contention being found to be correct, the defendant would be entitled to succeed. This is clear also from the judgment of the Supreme Court itself because at p. 324 the Supreme Court points out:

In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts.

Further, the Supreme Court also says that if the Court is of opinion that the defence is not bona fide, then it can impose conditions and it is not tied down to refusing leave to defend. Therefore, it is open to a learned Judge dealing with a summary suit to peruse the affidavits, to consider the defence and to decide whether the issue which the defendant seeks to raise is a real or a sham issue and also whether the defence is put forward bona fide or mala fide. It is, therefore, only a defence which is a real defence, real both in law and in fact, and a defence which is not put forward mala fide, that results in a triable issue as understood by the House of Lords and which the Supreme Court has accepted as the true test. Therefore, it is entirely erroneous to suppose that, with very great

respect, the Supreme Court has laid down any new principle of law or has laid down any new test or that the Supreme Court has suggested that the hands of the Judges dealing with summary suits are completely tied down and as soon as they find a paragraph in the affidavit putting forward a defence they must immediately stop any further discussion and give unconditional leave to the defendant. That is not, and with respect cannot be, the effect of the decision of the Supreme Court.

5. But there is a further aspect of the matter which must be considered and which was not considered by the Supreme Court. Mr. Malhotra has come in revision u/s 115 of the CPC and the jurisdiction of the High Court u/s 115, it need hardly be emphasised, is a very limited jurisdiction. I am conscious of the fact that this Court and other High Courts have liberally construed Section 115 and have interfered when they felt that injustice was being done or there was a miscarriage of justice, even though the matter did not strictly fall within the purview of Section 115. But if Section 115 was to be strictly construed, it is only in matters of jurisdiction that this Court can interfere with the order of the City Civil Court. Admittedly, the case does not fall under Clause (a) or (b) of Section 115, and Mr. Malhotra has urged that it falls under Clause (c), viz., the Court has acted in the exercise of its jurisdiction illegally or with material irregularity. I fail to see what illegality or material irregularity there is in the decision of the learned Judge below. The illegality or material irregularity contemplated by this clause is a procedural illegality or material irregularity. It is not an error of law committed by the lower Court which entitles the High Court to interfere u/s 115. Mr. Malhotra has failed to point out to me any procedural illegality or material irregularity committed by the City Civil Court Judge. The utmost he can say is that the lower Court has ignored the decision of the Supreme Court, and if it has ignored the decision of the Supreme Court it is my duty to correct the Judge and direct him to follow the law laid down by the Supreme Court. As I have pointed out, a mere error of law will not justify interference on the part of the High Court. It may be, and that view has been taken, that a clear and conscious violation of law may fall under Clause (c) of Section 115. But surely it cannot be said in this case that the decision is so patently wrong that it must be attributed to a conscious violation of the law on the part of the learned Judge.

6. Now, clearly two views of the case are possible. One view so strenuously urged by Mr. Malhotra is that there was a clear breach of the agreement on the part of the plaintiffs in sending only five prints instead of 11 prints, and if there was a breach of the agreement, the defendants are entitled either equitably to set off the damages caused by this breach or to make a counterclaim against the claim of the plaintiffs based on the promissory notes. The other view for which Mr. Bhagwati has contended is that looking to the agreement of July 3, 1957, there does not appear any obligation on the part of the plaintiffs to send 11 prints in one lot. It is true that equally there was no obligation upon the defendants to pay Rs. 52,000 unless all the 11 prints have been delivered. But if they chose to pay Rs. 52,000 before the complete delivery was made, it was

their own volition and there was good reason why they did so because they wanted the prints for being released in Delhi, and it is said that all this indignation about short delivery is the result of the knowledge that the film was a flop and an attempt at getting out of their obligation under the agreement, and it is pointed out that the suit is confined to the hundis drawn by the defendants, which hundis were drawn under the agreement and on which they were clearly liable. It is also pointed out that even after the five prints were delivered the defendants have taken delivery of three more which leaves only three loan prints with regard to which there was some dispute. It is said that whatever may be the case with regard to damages which may be litigated in a counterclaim, there is no answer which the defendants can give to a claim on the negotiable instrument for Rs. 15,000. I do not wish to indicate which of the views is the correct view, nor is it my function to do so. The two views are pertinent because what the learned Judge has done is to have exercised his discretion which the law vests in him and in revision it is difficult to understand how the exercise of that discretion can be challenged. It is challenged on the ground that the discretion has been exercised erroneously, but surely that is not a ground for revision. Unless I am satisfied that the discretion is exercised not merely erroneously but has been exercised so patently and palpably contrary to law that the only inference that I can draw is that the learned Judge was ignorant of the law or has consciously violated the law, I have no jurisdiction to interfere. It is not suggested that any injustice has been caused to the defendants. The learned Judge has only ordered a deposit of Rs. 5,000 and Mr. Malhotra's clients are distributors and not poor people whose defence would be stifled by having to pay the deposit.

7. I have been at pains to discuss the law and to suggest what the right test is for interference by the High Court, because hundreds of summary suits are filed in the City Civil Court, and ultimately it must be left to those Judges who are men of experience as to whether they should grant unconditional leave or grant conditional leave, and if conditional leave is granted what should be the proper amount that should be ordered to be deposited. I have never heard it said that the learned Judges of the City Civil Court have on the whole not exercised their discretion fairly and judicially. If Mr. Malhotra's contention were to prevail, we would be doing nothing else in the High Court except scrutinizing the discretion exercised by the City Civil Court Judges and deciding for ourselves whether we should give conditional leave or unconditional leave and what the quantum of the deposit should be.

8. The result is that the revision application fails. Rule discharged.

9. Time to make the deposit extended till August 11, 1958. Except for this alteration with regard to the extension of time, the order made by the learned Judge will stand.

10. Costs of the revision application costs in the cause.