(2021) 07 DEL CK 0189

In the Delhi High Court

Case No : Civil Miscellaneous (Main) No. 148 Of 2020

Sarvesh Bisaria APPELLANT

Vs

Anand Nirog Dham Hospital Pvt Ltd RESPONDENT

Date of Decision : 30-07-2021

Acts Referred:

Constitution Of India, 1950 — Article 227
Negotiable Instruments Act, 1881 — Section 138
Code Of Criminal Procedure, 1973 — Section 251
Code Of Civil Procedure, 1908 — Order 37

Citation : (2021) 07 DEL CK 0189

Hon'ble Judges : Asha Menon, J

Bench : Single Bench

Advocate : Vivek Kumar Tandon, Sanchit Garga

Final Decision : Dismissed

Judgement

Asha Menon, J

CM (M) 148/2020 and CM APPLs.4803/2020 (by the petitioner u/S 151 CPC for ex-parte stay), 16711/2020, 9007/2021 & 9198/2021

(by the petitioner u/S 151 CPC for directions and orders)

1. This petition under Article 227 of the Constitution of India has been filed with the following prayers:

â??It is therefore most respectfully prayed that your lordship graciously be pleased to quash / set aside the orders dated 18.01.2020 and 24.01.2020 in

C.S. No.836 of 2019 passed by Ms.Chetana Singh, ADJ-03/PHC/New Delhi in the case titled as Sarvesh Bisaria Vs. Anand Nirog Dham Hospital

Pvt. Ltd. or may pass any other order and directions as may deem fit and proper in the interest of justice and also award costs in favour of petitioner.â??

2. The brief facts as are relevant for the disposal of the present petition are that the petitioner filed a suit for recovery of Rs.1,65,75,000/-under Order

XXXVII of the Code of Civil Procedure, 1908 (â??CPCâ? for short). The petitioner/ plaintiff averred in the plaint that the respondent/defendant was

known to him for a long period of 20 years and had family relations with each other and were close friends (sic).

3. The Managing Director and other Directors of the respondent/defendant persuaded the petitioner/plaintiff to give friendly loans to them at an

interest @ 18% per annum. The petitioner/plaintiff and his wife gave Rs.18,00,000/- from the bank account to Shri Hari Om Anand as the Managing

Director of the respondent/defendant, who was also the sole proprietor of Anand Medical Store, on 06th November, 2015. On the request of Shri Hari

Om Anand, the petitioner/plaintiff also started looking after the legal consultation work of the respondent/defendant and the Managing Director and

other Directors. Subsequently, the petitioner/plaintiff gave another friendly loan of Rs.3,20,00,000/- from his bank account to Shri Hari Om Anand and

continued to take care of the legal work.

4. He claimed he used to raise bills for his fees and expenses which were paid by the Managing Director and other Directors from their personal

accounts as also from the account of the respondent/defendant. One such bill towards fees for consultation, legal work, etc., was submitted by him on

17th March, 2017 for a sum of Rs.30 lacs, which had been paid to him. Since he had a running account with the respondent/defendant, the

petitioner/plaintiff submitted a bill towards his fees etc. on 28th December, 2018 for a sum of Rs.1.50 crores, which was duly acknowledged by the

respondent/defendant.

5. The further case of the petitioner/plaintiff is that six cheques were issued by Shri Hari Om Anand after deducting TDS. Those cheques were

dishonoured on presentation due to funds being insufficient and the petitioner/ plaintiff filed a criminal case under Section 138 of the Negotiable

Instruments Act, 1881 (â??N.I. Actâ?, for short). This was preceded by a notice dated 6th April, 2019, to which no reply was sent. The learned

Magistrate had summoned the respondent/defendant to face trial and the case was pending.

6. Thereafter, the petitioner/plaintiff issued a Demand Notice on 10th August, 2019 claiming Rs.1,50,00,000/- along with the unpaid TDS of

Rs.15,00,000/- and interest. No reply was sent by the respondent/defendant and the suit for recovery was filed under Order XXXVII CPC. The

respondent/defendant was served, but though no appearance was entered by it, no decree was passed. The petitioner/plaintiff then approached this

court in CM(M) 1787/2019, which was disposed of vide order dated 17th December, 2019 directing fresh service of the respondent/defendant under

Form 4 Appendix B and in the meantime, restrained it from operating the bank accounts listed in the order to the extent of Rs 1.5 crores. This order

was subsequently modified on 24th December, 2019 after the respondent/ defendant entered appearance and offered to furnish a corporate guarantee

duly signed by the Managing Director and duly authorized by the Board Resolution, along with documents relating to immovable properties, for

securing the suit amount, and the restraint order was lifted.

7. The present petition has been filed against two orders of the learned Trial Court dated 18th January, 2020 and 24th January, 2020. The order dated

18th January, 2020 has been challenged on the ground that the learned Trial Court allowed the respondent/defendant to place on record photocopies of

the immovable property furnished as security. This, the petitioner/plaintiff contended, was against the tenor of the order passed by this court dated

24th December, 2019 in Review Petition No. 540/2019 in CM (M) 1787/2019 against the order dated 17th December, 2019. Vide orders dated 28th

July, 2020, this court observed that the learned Trial Court had erred in not securing the amount of Rs. 1.5 crores as directed in the order dated 24th

December, 2019 and ought to have asked the respondent/defendant to submit documents of a property of which the title was clear or a bank

certificate recording a no objection to the creation of a second charge on the property to the extent of Rs.1.5 crores ought to have been furnished.

8. Vide orders dated 4th December, 2020, this Court had after noting the letter of the Punjab National Bank, Gymkhana Branch, Meerut, U.P. that a

lien had been created in the sum of Rs.1.50 crores, directed that the said amount of Rs.1.50 crores be deposited in an interest-bearing fixed deposit

initially for a period of six months with auto renewal facility. This FDR was not to be encumbered further or released without the leave of the Court and was further subject to orders of this Court. This FDR has since been deposited in the Registry of this Court as has been noted in the orders of this

Court dated 5th March, 2021 and 8th March, 2021. In these circumstances, Mr. Vivek Kumar Tandon, learned counsel for the petitioner/plaintiff has

submitted that the relief sought against the order dated 18th January, 2020 has been satisfied.

9. With regard to the order dated 24th January, 2020, the learned counsel for the petitioner/plaintiff has submitted that the learned Trial Court had

wrongly granted leave to defend to the respondent/defendant in a case where the respondent/defendant had raised no triable issues. Learned counsel

for the petitioner/plaintiff submitted that the learned Trial Court had proceeded in a wrong direction as the loan transactions between the

petitioner/plaintiff and the respondent/defendant were different transactions and had nothing to do with the payment of Rs.1.50 crores, which was

towards the legal fees of the petitioner/plaintiff and for which the invoice had been raised. There is no dispute that the petitioner/plaintiff had acted as

a legal advisor to the respondent/defendant. An earlier bill for Rs.30 lacs had also been paid by the respondent/defendant.

10. It is further submitted by the learned counsel for the petitioner/plaintiff that as regards the cheques in respect of which proceedings under Section

138 of the N.I. Act are still pending, t he signatures thereon have not been disputed. Since the cheques were issued in the year 2019, they were

presented that year and it is not relevant whether the cheques were taken from a cheque book that was issued to the respondent/defendant in the year

2013. Reference was also made to the orders passed by the learned Chief Metropolitan Magistrate dated 3rd September, 2019 (Annexure-G) and, it

was urged that as cognizance had been taken, and Notice under Section 251 Cr. P.C. served, a presumption had to be drawn against the

respondent/defendant and the suit ought to have been decreed under Order XXXVII CPC. Instead, unconditional leave to defend was granted.

11. Reliance has been placed on the judgment of this Court in Lakshmi Builders v. Devinder Lakra, 2016 SCC OnLine Del 1453 and the judgment in

Hari Om Gupta v. IFB Industries Ltd., 2014 SCC OnLine Del 2055 and the judgment in Shri Colonizers & Developers Pvt. Ltd. v. Felicia Realcon

India Pvt. Ltd., 2019 SCC OnLine Del 11106.

12. Mr. Sanchit Garga, learned counsel for the respondent/defendant submitted that the learned Trial Court had rightly granted leave to defend the suit

as it was replete with incorrect facts. A single invoice for a sum of Rs.1.5 crores had been raised apparently, towards fees for legal opinion and

assistance. However, the petitioner/plaintiff in the plaint had himself referred to business transactions, namely, loans of vast amounts being given to the

respondent/defendant and the receipt of interest @ 18% per annum. The cheque book was issued in the year 2013 and the six cheques were clearly

lying in the possession of the petitioner/plaintiff for several years is indicative of the fact that they were given, not towards any legal liability but only as

security. There is no document to establish a lawyer-client relationship, no retainership agreement had been filed and therefore, the claim of the

petitioner/plaintiff was suspicious that he was entitled to a sum of Rs.1.50 crores towards such legal assistance.

13. As regards the payment of Rs.30 lakhs on account of legal advice, the learned counsel has submitted that this was drawn from the personal

account of Shri Hari Om and not from the account of the hospital and therefore, the respondent/defendant has never acknowledged having availed of

legal services. In the background of these facts, the respondent/defendant had raised triable issues. Learned counsel submitted that now that an FDR

of Rs. 1.50 crores has been furnished, the leave to defend is clearly conditional and the petitioner/plaintiffâ??s claim has been fully secured. As

regards the judgments relied upon by the learned counsel for the petitioner/ plaintiff, it was submitted that they are all related to delivery of goods and

were not applicable to the facts of the present case.

14. In the light of the orders already passed in this case, whereby an FDR has been furnished for a sum of Rs.1.50 crores, the grievance of the

petitioner/plaintiff against the orders dated 18th January, 2020 does not survive any longer and no further directions on the said aspect are called for.

15. As regards the question whether leave to defend has been rightly granted to the respondent/defendant or not, the facts that prevailed upon before

the learned Trial Court were that the petitioner/plaintiff himself has referred to loans having been given to the respondent/defendant by way of bank

transfer. The petitioner/plaintiff had also accepted that the respondent/defendant had been paying interest for some time after which it defaulted. In fact, the plaint record reflects this position. The existence of some business transactions is, therefore, made out even from the plaint. Though the

petitioner/plaintiff has claimed now that those loan transactions were something different, that would be a matter to be seen during trial.

16. When the respondent/defendant has challenged the claim of the petitioner/ plaintiff that he had acted as legal advisor to them and, therefore, the

invoice raised was for a fee, this fact too will have to be proved. In fact, in the application for leave to defend, the respondent/defendant has averred

that the petitioner/plaintiff had claimed to have been providing legal assistance to the respondent/defendant since the year 2000, yet the invoice had

been raised only in December, 2018, and therefore, the amounts raised in the invoice would also be time-barred.

17. With regard to the submissions made by the learned counsel for the petitioner/plaintiff, that, on taking cognizance of an offence by the learned MM

under Section 138 of the N.I. Act automatically a decree against the respondent/ defendant should follow, cannot be accepted, as cognizance leads to

trial and the accused can also get acquitted. Secondly, on the one hand the petitioner/plaintiff claims that the cheques were towards loans which were

separate transactions and on the other hand, wants this Court to draw conclusions on that basis, that the signatures on the cheques were admitted and

the learned MM had taken cognizance of the case to decree this suit.

18. In the light of these submissions, it is indeed a matter of trial as to what was the liability of the respondent/defendant towards the petitioner/plaintiff

and towards what transaction or service rendered by the petitioner/plaintiff, that is, as a lender or as a legal advisor, would he be entitled to the suit

amount.

19. The learned Trial Court was, therefore right in observing that the defence taken was not moonshine and disclosed triable issues which required

inquiry. Leave to defend had to be granted in the light of these varying stands taken by the petitioner/plaintiff in different proceedings.

20. The judgments relied upon by the petitioner/plaintiff have no relevance to the facts of the present case and do not require detailed discussions.

21. Though in the impugned order, it has not been so recorded that any condition was attached to the grant of leave to defend, however, in the light of

the previous orders of this Court and the deposit of the FDR for a sum of Rs.1.5

crores with the Registry of this Court, the leave to defend granted to

the respondent/defendant is not unconditional and does not work to the disadvantage of the petitioner/plaintiff.

22. However, it is reiterated that the respondent/defendant is bound by the earlier orders of this Court that the said FDR shall not be encumbered in

any fashion and nor shall the Registry release the FDR to the respondent/ defendant till further orders of this Court.

23. The petition is devoid of merit and is dismissed along with the pending application

24. The judgment be uploaded on the website forthwith.

