

(1998) 01 RAJ CK 0030

In the Rajasthan High Court

Case No : Civil Revision Petition No. 1105 of 1997

Shree Bikaner Wools

APPELLANT

Vs

Bank of Rajasthan Ltd. and Others

RESPONDENT

Date of Decision : 13-01-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3(5)

Citation : AIR 1998 Raj 197

Hon'ble Judges : A.S. Godara, J

Bench : Single Bench

Advocate : D.S. Shishodia and Manish Shishodia, for the Appellant; P.K. Bhansali, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Godara, J.—This revision petition has been preferred u/s 115, CPC, against the order dated 5-8-97 passed by the learned Addl. District Judge No. 2, Bikaner in Civil Summary Suit No. 31/96.

2. Briefly stated, for the disposal of this petition, the relevant facts are that the petitioner-firm is carrying on the business of wool at Bikaner while Bijay Chand Surana as well as defendant-non-petitioner No. 2 Kamal Kumar are partners of the firm. Defendant-non-petitioner No. 1-firm is also carrying on business of wool at Kckari (District Ajmer). Plaintiff-non-petitioner No. 1 - Bank instituted a summary suit purporting to be under the provisions of Rules 1 and 2 of Order 37, CPC before the Court of District Judge, Bikaner against the defendant-petitioner-firm as well as defendant-non-petitioner-firm with the wool worth Rs. 96986.22 from defendant-petitioner-firm and the latter was running a cash credit account with the plaintiff-Bank at Kekari. The goods (wool) were despatched from Kekari to Bikaner through bulky No. 36156 dated 24-10-88 and the defendant No. 2 drew a bill of exchange (90 days "Hundi") for a sum of Rs. 96986.22 on defendant No. 1 which was duly accepted by defendant No. 1 on 29-7-88 and, consequently, the bill of goods and MTR were delivered to the defendant No. 1

through the branch of the plaintiff-Bank at Bikaner and, on acceptance of the "Hundi" by defendant No. 1, the sum of Rs. 96986.22 was duly credited in the cash credit account of defendant No. 1 after discounting the "Hundi" drawn on defendant No. 1. The defendant No. 1 was under obligation to have paid amount of the "Hundi", discount, interest and commission within the stipulated period of 90 days but the same was not paid till last. Even on demand from Bijay Chand Surana, partner of the defendant No. 1-firm, personally, he refused to oblige and his refusal was duly endorsed by the Notary on 13-4-89. Consequently, the plaintiff filed a suit for recovery of principal amount of Rs. 97,614.22 plus Rs. 32,133.54 as interest totalling Rs. 1,28,747.76 against defendant No. 1 as well as defendant No. 2. Alternatively, it was held that instead of defendant No. 1, defendant No. 2 was liable for payment of amount to the plaintiff- Bank.

3. Pursuant to summonses of the suit under Sub-rule (2) of Rule 2 of Order 37, the defendants entered appearance to contest this suit and the plaintiff thereafter served on the defendants summonses for judgment in compliance of Sub-rule (4) of Rule 3 of the said Order supported by an affidavit verifying the cause of action and the amount so claimed stating that in his belief there is no defence to the suit. Consequently, the defendants, separately, in view of the provisions of Sub-rule (5) of Rule 3 of the said Order, asked for grant of leave to defend unconditionally. The defendant No. 2 denied having accepted the "Hundi" denying total liability and, instead, the defendant No. 2 pleading that the goods as per order of defendant of defendant No. 1 were despatched to Bikaner and the delivery was taken by the defendant No. 1 and, simultaneously, a "Hundi" was drawn on defendant No. 1 for payment of the suit amount which was discounted through the agency of the plaintiff-Bank and so he had received payment of the price of the goods sold and delivered to the defendant No. I and, therefore, there did not arise any liability of payment by the defendant No. 2.

4. Consequently, while considering the prayer of the defendants as to whether they were entitled to grant of leave to defend either unconditionally or upon such terms as appearing to the Court to be just, vide his impugned order the learned trial Judge in the aforesaid circumstances, while observing that the defendants raised triable issues indicating that they have a fair, bona fide and reasonable defence though not a positively good defence, ordered that it was fair to grant permission to defend the suit unconditionally to defendant No. 2 whereas defendant No. I having taken delivery of the goods despatched by the defendant No. 2 and, simultaneously, having accepted the "Hundi" enabling him to take delivery of the goods and having failed to honour the "Hundi", it was further observed that the defence so advanced regarding non-acceptance of the "Hundi" was far from being bona fide and, therefore, he was not entitled to unconditional leave to defend the suit. Consequently, the defendant No. 2 was granted unconditional leave to defend whereas defendant No. 1 was ordered to furnish solvent security to the extent of Rs. 1,00,000/- to satisfy the decree, if any, likely to be passed in favour of the plaintiff-Bank within a period of 20 days from the date of the order failing which the prayer of the defendant No. 1 shall be deemed

to have been rejected and hence this revision petition.

5. I have heard the learned counsel for the contesting parties and have also considered the legality and jurisdictional propriety of the impugned order.

6. The learned counsel for the petitioner submits that the petitioner has totally denied the liability by way of acceptance of any "Hundi" and, therefore, there does not arise any liability for payment of amount of the "Hundi" and in case there was any contract having coming into being, it was between the plaintiff-Bank and the defendant No. 2 who had actually, admittedly, withdrawn the amount credited in his cash credit account and even then the learned trial Judge was pleased enough to have granted leave to defend in the suit unconditionally to the defendant No. 2 while, though on a better footing, the defendant No. 1, presently petitioner before this Court, being equally entitled to unconditional leave to defend, has been burdened with severe condition to furnish security of Rs. 1,00,000/- and, consequently, it has been further submitted that the defendant-petitioner has been able to raise a triable issue of fact as well as law and when the defence was triable and far from being illusory or sham or practically moonshine and, in view of these circumstances, as also contemplated in the decision of the Apex Court rendered in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, the case of the present petitioner is squarely covered by the circumstances as contemplated under Clauses (B) and (C) respectively and, resultantly, unconditional leave to defend be granted or else, alternatively, some reasonable condition resulting in modification of the said condition be imposed granting leave to defend as such.

7. The learned counsel for the petitioner have relied on the decision of learned single Judge of this Court rendered in Nemi Chand v. Shanti Lal RLW (1990) 2 120, wherein it has been held that whenever the defendant raises a triable issue, leave to defend must be granted unconditionally otherwise the leave may be illusory and no severe condition must be imposed to disentitle or disable the defendant to defend the suit unless the same suffers from any infirmity as referred to above.

8. Besides, the learned counsel for the petitioner also, while referring to para 13 of the impugned order wherein the learned trial Judge, in the beginning of the para has concluded that there is a fair and bona fide defence while, in the same para, the case of the defendant No. 2 has been distinguished resulting in grant of leave to defend whereas the defendant-petitioner has been discriminated against holding that the defence of the petitioner does not appear to be bona fide and, therefore, he is not entitled to unconditional leave to defend and, hence the petitioner is also equally entitled to unconditional leave to defend on the grounds that have weighed with the learned trial Judge while granting similar permission to his co-defendant.

9. However, the learned counsel for the non-petitioner-Bank, while relying on the decision of the Apex Court rendered in the case of Mechelec Engineers and

Manufacturers Vs. Basic Equipment Corporation, besides, the contents of the plaint and so also as many as six sheets of the "Hundi" as well as the admitted signatures of Bijay Chand Surana as made on the Vakalatnama, submitted that as per the admission of the defendant now himself, the defendant No. 1 ordered for purchase of wool from defendant No. 2 and the same was despatched and delivered at Bikaner to the defendant No. 1 through Bijay Chand Surana himself and, simultaneously, the "Hundi" drawn by defendant No. 2 on defendant No. 1 was also accepted on its behalf by none else but Bijay Chand Surana in the capacity of partner which is undeniable fact and the admitted signatures of Bijay Chand Surana exactly tallied and are similar to each other as are existing on the admitted documents and so also the suit documents i.e. six sheets of the "Hundi" drawn by defendant No. 2 firm and the same having been accepted by Bijay Chand Surana, as above. Consequently, when Bijay Chand Surana accepted the "Hundi" and even as per defence of defendant No. 1, no payment has as yet come forward and the "Hundi" has never been honoured and the amount of the "Hundi" was immediately credited in the cash credit account of defendant No. 2 consequent upon acceptance of the "Hundi" drawn by defendant No. 2 on defendant No. 1, on latter's acceptance and, consequently, the Bank having discounted the "Hundi" and credited its amount in the cash credit account of defendant No. 2 who has admittedly, received the amount so credited by the Bank and the same being as yet outstanding and, therefore, in the aforesaid circumstances, the learned trial Judge did not appear to have fallen into any jurisdictional error or to have committed any illegality while holding that in view of the aforesaid circumstances, while leave to defend was just and proper to be granted to the defendant No. 2, at the same time, defendant No. 1 who appears to be liable for payment of the suit money, had no bona fide defence and, in view of these circumstances, the learned trial Judge was justified to have passed the impugned order.

10. Now reverting to the controversy whether the impugned order suffers from any illegality or jurisdictional error by way of exercise of its jurisdiction with any material irregularity by the trial Court, suffice it to observe that this is a summary suit filed under the provisions of Order 37, C.P.C. By the Amending Act of 1976, such suits have to be tried summarily as a result of which, the defendant is not, as in ordinary suit, entitled as of right to defend the suit. He has to apply for leave to defend, as in the case in hand too, within 10 days, as prescribed in Rule 3 of Order 37, C.P.C., and the leave is to be granted only if the affidavit or other material facts shown by the defendant disclose such facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. The sole object underlying the prescribed summary procedure is to prevent unreasonable obstruction by a defendant who has no defence.

11. In view of the principles that have been laid down and made applicable to such cases covered by Order 37, C.P.C. in *Smt. Kiranmoyee Dassi v. Dr. J. Chatterjee* 49 C WN 246, after a comprehensive review of authorities on the subject and which have been followed with approval by the Hon'ble Apex Court in the case of

Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, it is worthwhile to quote para No. 8 of the judgment running as follows :

"(a) if the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and 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 defence although not a positively good defence the plaintiff is not entitled to sign judgment and 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 to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

12. As already stated above, the learned trial Judge might not have been able to observe unequivocally that the defendant-petitioner had no defence at all or the defence so proposed to be made was illusory or sham or practically moonshine and, instead, having observed that the defence so proposed to put forth by the defendant-petitioner as envisaged by Sub-rule (5) of Rule 3 of Order 37, C.P.C. was far from being bona fide and, implicitly, holding that the defendant had virtually no defence but, however, in these circumstances too, the learned trial Judge appears to have been moved by Clause (e) of the aforesaid principles while granting leave to defend conditionally.

13. Resultantly, for the present, no nice discussion on merits is called for but a bare perusal and consideration of the suit "Hundi" bearing alleged signatures of Bijay Chand Surana and so also his admitted signatures, at present, there is no escape from arriving at the conclusion that the impugned order whereby the defendant-petitioner has been called upon to furnish a security squarely falls within the scope of Clause (e) of the aforesaid principles and, consequently,

looking to the suit money, the quantum of the security so called for to be furnished also cannot be held to be unreasonable, severe or unjust requiring any modification or variance in respect thereof. However, the facts of Nemi Chand's case RLW (1990 (2) 120) (supra) have no bearing on the facts of the present case and, therefore, on this score as well, no different conclusion is possible and, in this case too, while the defendant was conditionally allowed to defend the suit on the condition that the suit amount of Rs. 12,500/- was either deposited in the Court within 1-1/2 months from the date of order or, in the alternative, in case unconditional bank guarantee was furnished, the defendant was entitled to defend the suit and, instead, the learned single Judge was pleased to have modified this condition and to have ordered for furnishing solvent security to the satisfaction of the trial Court and so also there is no warrant for interference with the impugned order passed by the learned trial Judge.

14. On the basis of above discussion, there is absolutely no merit in this revision petition and, consequently, the impugned order does not suffer from any jurisdictional infirmity or illegality and so the same deserves to be dismissed.

15. However, looking to the nature and urgency of the suit, it is expected from the learned trial Judge that, in no case, any adjournment of more than 30 days shall be granted to either party at a time and, instead, as far as possible each party shall be required to produce its evidence on the dates fixed for recording the evidence and possibly the suit shall also be finally disposed of within a period of nine months from the date of receipt of copy of this order.

16. With the aforesaid observations, since this petition is devoid of any merit and, consequently, the same stands dismissed resulting in affirmation of the impugned order but without any order as to costs.

17. This petition along with stay petition is disposed of in the manner indicated hereinbefore.