

(1999) 08 DEL CK 0050

In the Delhi High Court

Case No : C.R.No. 732 of 1997 and C.M. No. 957 of 1999

Sudesh Kumar B. Dhawan

APPELLANT

Vs

J.S. Sood and Others

RESPONDENT

Date of Decision : 13-08-1999

Acts Referred:

Citation : (1999) 6 AD 388 : (1999) 82 DLT 460 : (1999) 51 DRJ 673

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Mr. Ajant Kumar Adv, for the Appellant; Mr. K.K. Mehra Advocate, for the Respondent

Judgement

Dr. M.K. Sharma, J.—The petitioner has preferred this petition being aggrieved by the order dated "17th April, 1947 passed by the Additional District Judge, Delhi in suit No. 485/93 giving him conditional leave to defend the suit filed by the respondent No. 1 under order 37 CPC.

2. The respondent No.1 filed the aforesaid suit under order 37 CPC for recovery of Rs. 1,95,000/-. It is alleged in the plaint that an agreement was entered into between defendants 1 and 9 pursuant to which an amount of Rs. Two lacs for the production of picture "JAAN HATHELI PE" was paid to be produced under the partnership of defendant No. 2. It is further alleged that as partner of defendant No. 2, defendant No. 9 executed bills of exchange (Hundies) and the said hundies were duly endorsed by defendant No. 1 in favor of the plaintiff. The aforesaid hundies when presented for acceptance to defendant No. 9, who accepted the same by endorsement made on the hundies. The said hundies were, however, dishonoured. For recovery of the amount under the hundies, the present suit was instituted by the plaintiff under order 37 CPC.

3. Defendants 1, 7 and 8 did not appear and contest the suit whereas defendants 2 to 6 have been granted unconditional leave to defend under Order 37 CPC. Defendant No.9, who is the petitioner herein, also filed an application seeking for

leave to defend and the said application was disposed of by the Additional District Judge granting him leave to defend with condition that he should furnish bank guarantee of the suit amount or an FDR of the equivalent amount or cash amount in the name of the court, failing which the application for leave to defend would be deemed to be rejected.

4. Counsel for the petitioner submitted that when defendants 2 to 6 have been granted unconditional leave to defend, the petitioner should have been also granted the leave to defend unconditionally as the defense put up by the said defendants is also similar to that of the petitioner defendant No.9. He also submitted that when the Additional District Judge found that a triable issue has been raised by the petitioner/defendant No. 9 indicating that he has a fair, bonafide and reasonable defense, the leave should have been granted unconditionally.

5. In support of his contention the learned counsel relied upon the decision of the Supreme Court in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . He also relied upon the decisions in M.N.P.L Firm Vs. Kirwan Gyan reported in Vol. XVII Indian Cases 915 and also a decision in, Brijbhusan Pande and Others Vs. Ramjanam Kuer, .

6. Mr. Mehra appearing for respondent No.1, however, Submitted that the defense put up by the petitioner/defendant No.9 is practically a moonshine and, Therefore, the trial court acted within his jurisdiction and exercised his discretion in accordance with the settled proposition of law. He also drew my attention to a decision of this court in Bank of Maharashtra Vs. Swastic Sales Corporation, .

7. I have considered the rival submissions of the learned counsel appearing for the parties and have also carefully scrutinised the records of the present case. A perusal of the impugned order would indicate that the decisions relied upon by the learned counsel appearing for the parties were also placed before the Additional District Judge and he upon consideration of the same found that the defense put up by defendants 2 to 6, who have been granted unconditional leave to defend is different than the defense put up by defendant No. 9 the petitioner herein. He also found that the defendant No. 9 cannot escape his liability in view of the fact that if payee can be identified and ascertained then there would be no defect in the hundies can be paid to the named person or to the order or to the holder in due course. The plea that name of the payee is left blank was rejected by the Additional District Judge.

8. In the case of Bank of Maharashtra (Supra), this court held that the plaintiff being the holder of hundi in due course without notice such defenses that the hundies were blank while issuing are not open to the defendant so far as the plaintiff is concerned. Considering the facts, the Additional District Judge came to the conclusion that defendant No. 9 cannot escape his liability but since there is a rubber-stamp on the hundies of defendant No. 2, partnership firm , so there is a doubt as to whether the aforesaid amount was taken on behalf of defendant

No.2 and it was invested in the said business of defendant No. 2 or it was in the personal capacity by the defendant No.9 and in order to ascertain the same the leave to defend was granted to the defendant No.9 with the aforesaid condition.

9. The decisions relied upon by the counsel appearing for the petitioner relates to pronote and the facts of the said case are distinguishable from the facts of the present case.

10. In the case of M/s .Mechalec Engineers (Supra), the Supreme Court has laid down five principles that are to be followed while considering the question of granting leave to defend. The said decision also sets out the circumstances under which leave to defend should be granted conditionally and also the cases where leave to defend should be granted unconditionally. it is set out in the said decision that if the defendant has no defense or the defense is illusory Ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defense 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 defense. On appreciation of the defense set up by the defendant No. 9. petitioner herein, the court came to the conclusion that the said defendant cannot escape the liability and thus the trial court was of the definite view that the defense is illusory or Practically moonshine but in order to ascertain as to whether the aforesaid amount was taken on behalf of defendant No.2 and it was invested in the said business of defendant No. 2 or it was in the personal capacity by defendant No. 9, leave to defend was granted by the Additional District Judge with the aforesaid condition.

11. It is settled proposition of law that while granting leave to defend under the provisions of Order 37 CPC the Court has a discretion in the matter of attaching condition to the grant of leave to defend. It is true that the said discretion must be exercised judicially and in consonance with the provisions of natural justice.

12. On consideration of the entire facts and circumstances of the case , I find that while granting leave to defend to the petitioner/defendant No. 9, conditionally, the Additional District Judge has given cogent reasons and the discretion is not exercised arbitrarily. Therefore, I am not inclined to interfere with the said order passed by the Additional District Judge. The petition along with the interim application stand dismissed, The interim order stands vacated. The petitioner/defendant No. 9 shall furnish bank guarantee of the suit amount or FDR or cash amount in the name of the Additional District Judge , Delhi in terms of his order, within one month from today.