

RAJASTHAN HIGH COURT

Sapna Saree Centre

Vs.

Bank of Rajasthan Ltd.

Civil First Appeal No. 15 of 1993

(Arun Madan, J.)

29.03.2000

ORDER

Arun Madan, J.

1. This first appeal arises out of judgment and decree dated 9-10-1992 of the learned Additional District Judge No. 3, Kota who decreed plaintiff Bank's suit for recovery of a sum of Rs. 1,45,743/- under Order 37, CPC, against the defendants appellants.

2. The facts relevant for deciding this appeal, briefly stated, are that the plaintiff Bank instituted a civil suit under Order 37 Rule 2, Civil Procedure Code on 08-03- 1990 for recovery of Rs. 1,45,743/- averring therein inter-alia that M/s. Sapna Sari Centre (defendant No. 1) being a partnership firm with its partners namely Nandlal Jain and Arvind Kumar Jain (defendants Nos. 2 and 3 respectively) having its registered office situated at 17/285, Sati Chabutra, Maqbara Bazar, Kota and dealing with business of clothes and sarees, presented an application on 7-1-1986 with the Bank of Rajasthan Rampura Bazar Branch, Kota (plaintiff) seeking to avail of cash credit hypothecation loan facility (for short "credit facility") for a sum of Rs. one lac only so as to expand its business of sarees and, thereby opened an account under the said credit facility with the plaintiff Bank on 20-1-1986 and upon acceptance of the credit facility, the defendants executed some documents such as D. P. note, letter of waiver, letter of continuity, hypothecation agreement in favor of the plaintiff Bank and pursuant thereto, proceeded to avail of the said credit facility. As a collateral security, the defendant No. 2 in his individual and personal capacity in lieu of credit facility executed equitable mortgage of his own House No. 17/285 situated at Sati Chabutra, Kota. The credit facility was allowed at the interest of 17.5% per annum at quarterly interval period. The defendants continued to avail of the credit facility and a sum of

Rs. 1,17,719.50 p. (one lac seventeen thousand seven hundred nineteen rupees and fifty paise only) was outstanding as on 11-1-1989 against them for repayment of the loan under the credit facility, and in acknowledgement thereto the defendants Nos. 2 and 3 executed receipt on 11-1-1989, when a new pronote, letter of waiver and continuity and hypothecation agreement were also executed by them in favor of the plaintiff Bank.

3. In the plaint, it has been the case of the plaintiff Bank that violating the terms and conditions of the hypothecation agreement and other documents executed by the defendants, they closed the business of clothes and sarees, inasmuch as they did not operate their account of the said credit facility without finalizing the outstanding amount by payment thereof, despite persistent reminders to settle the outstanding amount due to the Bank which ultimately led to further accumulating it to Rs. 1,45,743/- as on 7-3-1990 with interest, while defendant No. 2 as partner of the defendant Firm admittedly had already acknowledged the outstanding amount of Rs. 1,23,300/- as on 6-4-1989. Hence it was not open to the defendant appellant to plead to the contrary. A legal notice was also sent by the plaintiff to the defendant Bank on 26-12-1989 and having failed to elicit any reply, the suit was filed.

4. After service of the summons on or about 20-2-1991, the defendants moved an application under Order 37 Rule 3, Civil Procedure Code on 30th November, 1991 for leave to defend the suit averring *inter alia* that the suit, itself, was time barred because plaintiff is said to have given loan under credit facility on 20-1-1986 to the defendants while the suit was filed on 8-3-1990; that neither the defendant acknowledged receipt of the loan on 6-4-1989 nor pronote on 11-1-1989 in favor of the plaintiff bank, inasmuch as even if there is any document, the same is false, vague and baseless being forged. However, the learned trial Court by the impugned judgment while rejecting defendants' application for leave to defend, decreed the plaintiff's suit for recovery of the amount, with costs and interest thereon @ 18 per annum, as indicated above. Hence this appeal.

5. Sri S. K. Jain, learned counsel for the appellants (defendants) contended that the learned trial Court failed to consider principles of law as to the grant of leave to defend as are enunciated in *M/s. Merchalec Eng. and Manf. v. Basic Equipment Corpn.*,¹ inasmuch as it failed to record any conclusion (i) that the defense pleaded by the defendants in their application for leave to defend is illusory or sham and (ii)

whether the defendants have raised triable issue or not. Learned counsel further contended that the defendants have raised a triable issue, in their application to leave to defend and contest the suit indicating therein that they have fair and reasonable defense and therefore, they are even entitled to unconditional leave to defend. Learned counsel placed reliance upon the decisions of this Court in *Renuka Parihar v. Bank of Baroda*² and *Nemi Chand v. Shantilal*,³

6. While supporting the conclusions drawn by the learned trial Court and controverting the appellants contentions, Sri J. K. Singhi on behalf of the Bank contended that it is wrong to urge by the defendants that the trial Court did not consider the principles as to the leave to defend as enunciated in M/s. Mechalec Eng. and Manf.'s case (supra), whereas the defendants failed to establish a triable issue either indicating in their application for leave to defend under Order 37, Rule 3 (5) Civil Procedure Code or producing any document along with their application so as to *prima facie* controvert the plaintiff's case pleaded in the plaint or to satisfy the Court that they have good defense to the claim disentitling the plaintiff to leave to sign judgment and entitling them to unconditional leave to defend. Sri J. K. Singh then contended that the grounds urged in the application for leave to defend do not satisfy any of the essentials enumerated in the principles to follow while considering issue as to the leave to defend under Order 37, Rule 3, CPC, as laid down by the Apex Court as relied by the learned counsel for the appellant.

7. I have heard the learned counsel for the parties at length, and perused the impugned judgment on the relevant record as also the findings recorded by the learned trial Court with reference to the legal position as discussed.

8. The provisions in Order 37, Civil Procedure Code incorporated by the amending Act of 1976 prescribe summary procedure for trial and expeditious disposal of cases in suits on the basis of bills of exchanges, hundies and promissory note. The very object underlying summary procedure for trial of suits under Order 37 Civil Procedure Code is to prevent unreasonable delay and obstruction by a defendant from advancing sham or illusory defenses which if allowed to do so, in facts, the very purpose of legislature incorporating Order 37 in the Civil Procedure Code would stand frustrated. That apart, the very object by insertion of such provision in Order 37, Civil Procedure Code by the amending Act of 1976 was to curb malady prevailing in the society when loans are advanced by the Financial Institutions to borrowers who refused to honor the spirit of

the agreements at the cost of public exchequer and also with intent to keep control over financial institutions over excessive charge of interest from the helpless borrower. If sham and illusory defenses are allowed to be advanced by the defendants then no institution such as nationalized Banks would be so safe in advancing the loan to any party in difficulty. Therefore, provisions of summary trial of suits under Order 37, Civil Procedure Code has been envisaged with a view to safeguard the *bona fide* money lenders like the banks from exploitation at the instance of those borrowers who take loan by making all promises of repayment by executing all relevant documents relating to loan advanced to them and thereafter take false plea and betrays promises by saying that no loan was advanced, so as to defeat the legitimate and genuine rights of the financing authority.

9. Sub-rule (5) of Rule 3 to Order 37, Civil Procedure Code stipulates that the defendants may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just; provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put up by the defendant is frivolous or vexatious and further provides that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

10. The Apex Court in *M/s. Mechalec Eng.'s case* (supra) approved the principles applicable to cases covered by Order 37, Civil Procedure Code laid down by Das, J., after a comprehensive review of authorities on the subject in *Kiranmoyee Dassi v. Dr. J. Chatterjee*,⁴ viz. following principles are to be followed while considering the question of granting leave to defend (at P. 580 of AIR) :

(a) If the defendant satisfies the Court that he has a good defense 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 defense although not a positively good defense 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 has a defense, yet, she was such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense 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 defense or the defense 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 defense or the defense 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 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."

11. The position which emerges from the perusal of relevant provisions under Order 37 Rule 3 (5), Civil Procedure Code as also the principles as enunciated by the apex Court referred to above, is explicit that normally the Court where the suit is filed shall ordinarily not decline leave to defend unless on *prima facie* view of the matter it is satisfied that the facts disclosed by the defendant in his application for leave to defend do not indicate that he has any substantial defense to raise or if where the defense raised by him is such frivolous or vexatious or practically moonshine or is such that even if leave to defendant is granted to him conditionally, no purpose would be served by doing so. Even sub-rule (5) to Rule 3 of Order 37, Civil Procedure Code stipulates that where part of the amount claimed by the plaintiff has been admitted by the defendant to be due from him by way of partial acknowledgement; leave to defend the suit should be granted only in the event of amount having been acknowledged as partial due being deposited by the defendant in the Court, and therefore, in that event alone, leave to defend and contest the suit may be granted to the defendant subject to his furnishing solvent security to the satisfaction of the Court as regards remaining amount due which is subject-matter of the contest between the parties.

12. In the instant case, no material has been disclosed in the application for leave to defend, on which basis the trial Court could arrive at *prima facie* satisfaction that the defendant had any triable defense to disclose for contesting the suit and even with regard to partial acknowledge of the liability, admittedly the plaintiff had failed to furnish any solvent security along with the application to defendant, to the satisfaction of the trial Court. Hence in the absence of aforesaid pre-requisites and essential requirements as enshrined in sub-rule (5) to Rule 3, Order 37, CPC, not being satisfied, the learned trial Court had rightly declined leave to defend to the appellant.

13. Learned counsel for the plaintiff Bank further contended that what were those exceptional circumstances, in which the trial Court could in its wisdom grant leave to defend muchless any conditional leave to defend, have also not been brought on record, since admittedly the defendants have failed to furnish any plausible or satisfactory defense in their application for leave to defend in the suit, the leave to defend has rightly be declined to the defendant.

14. Faced with this situation, learned counsel for the appellants while controverting aforesaid contention advanced by the learned counsel for the plaintiff Bank, contended that the defendants had been regularly making deposits towards repayment of the loan under credit facility in their account with the Bank and last deposit was made by them on 15-7-1988. The suit was filed on 08-03-1990. Hence in my considered view, the suit was within limitation and thereby the conclusions arrived at by the learned trial Court on this issue are not open to challenge.

15. As regards other issues, mere denial of the documents as to the execution being made in favor of the plaintiff Bank under credit facility for being renewed from time to time would not by itself entitle the defendants to the grant of leave to defend in view of partial acknowledgement as the deposits having been made by them towards repayment of the loan and the last deposit was admittedly made by them on 15-7-88. In this view of the matter, in my considered view, the defense set up by the defendants in their application for leave to defend is sham, illusory and practically moonshine and their contentions are contrary to the material on record and hence the learned trial Court has rightly declined to grant leave to defend the suit by rejecting the application under Order 37, Rule 3, Civil Procedure Code thereby has also rightly decreed the suit for recovery of outstanding loan amount under the credit facility. The findings

recorded by the learned trial Court do not warrant any interference by this Court in this first appeal, because they are based on due appreciation of the material on record and is supported by cogent reasons.

16. I have carefully perused the decisions cited by the learned counsel for the parties 'at the bar. In *Nemi Chand v. Shantilal* (1990 (2) Raj LW 120) (supra), the trial Court on the application of the defendants granted leave to defend provided they deposited the suit amount or in the alternative if they furnished an unconditional bank guarantee, after recording a finding that the defendants had a plausible case. Against that order, the defendants preferred revision petition and this Court allowing the said petition while partly setting aside the conditions regarding the deposit of the amount or furnishing of the unconditional bank guarantee and instead directed the defendants to furnish a solvent security. Similarly, in *Renuka Parihar v. Bank of Baroda* (1988 (2) Rajasthan LR 804) (supra), the defendants preferred revision petition against the order of the trial Court whereby it granted permission to the defendants to defend the suit under Order 37, Civil Procedure Code on furnishing bank guarantee of Rs. one lac. However, this Court while accepting the revision, set aside the impugned order and the defendants were permitted to defend the suit unconditionally. In the matters cited above, the facts and circumstances being entirely different than those involved in the instant case, in my considered view, the ratio of above decisions without disputing the principles of law laid down therein, do not help the defendants in advancing their case in any manner.

17. Thus, applying the guidelines and principles quoted above and keeping in view the provisions relevant to the issue, I am of the opinion that the trial Court was perfectly justified in declining leave to defend to the defendant appellants as they had failed to set up any triable issue by raising plausible pleas in their application, which would have justified grant of leave to defend the suit on any of the conditions as may appear to the Court to be just and proper. As already held above, since the facts in the application of the defendant for leave to defend do not disclose justifiable defense muchless a substantial defense and the defense intended to be put up was frivolous and vexatious, in my view no ground is made out by the appellants which would warrant interference with the impugned judgment of the trial Court and the same is valid and legal having been passed in accordance with the provisions of law and the principles as discussed above.

18. As a result of the above discussion, this appeal fails and is hereby dismissed and the impugned judgment and decree, referred to above, are upheld. No order as to costs.

Appeal dismissed.

Cases Referred.

1. AIR 1977 SC 577
2. (1988) 2 RajLR 804
3. (1990) 2 Raj LW 120
4. (1945) 49 Cal WN 246