

RAJASTHAN HIGH COURT

Murari Lal Rathore

Vs.

M/s. Jagdamba Traders

Revn. Petn. No. 586 of 2003

(Harbans Lal, J.)

30.04.2003

ORDER

Harbans Lal, J.

1. The instant civil revision petition under Section 115, C.P.C. is directed against the order dated 13-2-2003 passed by the learned Addl. Sessions Judge, Baran in Civil Original Suit No. 19/2002 whereby the application of defendants-non-petitioners under Order 37, Rule 3(5), C.P.C. has been allowed and they have been granted leave to defend in the suit.

2. The relevant facts, in brief, are that plaintiff-petitioner instituted a civil suit before the learned Court below under Order 37, C.P.C. with the averments that he sold Coriander seed worth Rs. 2,44,406/- to non-petitioners-defendants on 4-12-2001 and supplied the same in 250 bags through a truck and also issued a bill No. 1423 dated 4-12-2001 in respect thereof and the same was received by non-petitioners on 5-12-2001. As per the contract of sale executed between the parties on 1-12-2001, the payment was to be made within 20-25 days of receipt of goods. Petitioner requested non-petitioners vide telegram dated 9-1-2002 to make payment of the amount of goods supplied vide bill No. 1423 dated 4-12-2001, in reply to which they denied their liability to make the payment on the ground that the goods supplied were sub-standard. Thereafter, petitioner sent a legal notice to them through his counsel calling upon them to make payment, but non-petitioners neither made the payment of the goods nor returned the goods and instead sent a false, vague and frivolous reply to the notice stating that the goods supplied were sub-standard for which they could not make any payment and further informed him to take back the goods within a period of 7 days otherwise, the same would be sold through auction. Non-petitioners after

service of summons on them filed an application under Order 37, Rule 3(5), C.P.C. seeking leave to defend the case unconditionally which was contested by and on behalf of petitioner-plaintiff by filing a reply thereto. After hearing the parties, learned Court below vide its impugned order dated 13-2-2003 allowed the application and granted leave to defend unconditionally which is under challenge in this revision petition.

3. I have heard learned counsel for petitioner-plaintiff and have also perused the impugned order.

4. Learned counsel for petitioner has contended that this suit under Order 37, C.P.C., the facts involved in the case do not warrant the impugned order because the defense raised by non-petitioners is not plausible and does not raise any triable issue. According to him the defense set-up by non-petitioner is illusory or sham or practicably moon-shine which does not entitle him to leave to defend un-conditionally and, therefore, the order is liable to be set aside.

5. It would be apposite to extract Order 37, Rule 3(5), C.P.C. under which leave to defend purports to have been granted unconditionally which is as under:-

'The defendant 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:

Provided further 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.'

6. The aforesaid provision has been considered by the Hon'ble Apex Court time and again and in *Santosh Kumar v. Bhai Mool Singh*, ¹ after considering its earlier judgments particularly in *Sangram Singh v. Election Tribunal, Kotah*, ² it has been held that too technical a construction of a provision of the Code may not leave any

room for reasonable elasticity of interpretation. The procedure which is designed to facilitate Justice, should be interpreted for the purpose of furtherance of justice and not to frustrate it and in case once the defense is raised raising a triable issue, truthfulness thereof is to be tested by going into the evidence. The leave should be granted in a case where defense is plausible as the defense can come only if the defendant is permitted to defend the suit. The Court must determine if the facts alleged by the defendant are duly proved, they will afford a good or even a plausible answer to the plaintiff's claim and once the Court reaches that conclusion, the leave cannot be withheld and no question of imposing condition can arise and once leave has been granted, the normal procedure of a suit, so far as evidence and proof go, obtains.

7. In *Milkhi Ram (India) Pvt. Ltd. v. Chamanlal Bros.*,³ a similar view has been reiterated holding that if the Court is of the opinion that the case raises a triable issue then leave should ordinarily be granted unconditionally. On the other hand, if the Court is of the opinion that the defense raised is frivolous or false or sham, it should refuse leave to defend altogether.

8. In *M/s. Mechalec Engineers and Manufacturers v. M/s. Basic Equipment Corporation*,⁴ which authority has been relied upon by the learned counsel for the petitioner, the Hon'ble Apex Court considered a number of its earlier judgments and reiterated the principles relevant for this purpose laid down by the Calcutta High Court in *Smt. Kiranmoyee Dassi v. Dr. Chatterjee*,⁵ which are as under :-

(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 the 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 possibly and immediately make it clear that he had a defense, 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 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 conditions, and thereby show mercy to the defendant by enabling him to try to prove a defense.

9. Now, the instant case requires to be considered in view of the aforesaid settled legal position taking also into account the limitation of exercise of revisional jurisdiction under Section 115 of the Code. As indicated above, the suit has been filed for the recovery of the price of Coriander seed supplied by petitioner-plaintiff to non-petitioners- defendants through bill No. 1423 dated 4-12-2001. The defendants have in their application for leave to defend set up a defense that the goods supplied were sub-standard and they were not taken back despite notice and, therefore, they were not liable to make any payment in this regard. At this stage in these facts and circumstances of the case, it cannot be said that the defense set up by non-petitioners-defendants is illusory or sham or practicably moonshine and intended for the purpose of prolonging the litigation. Learned Court below has found that the defendants have been able to raise triable issue and, therefore, it has granted leave to defend unconditionally. In doing so, the learned Court below cannot be said to have committed any jurisdictional error or material irregularity in exercise of its jurisdiction. The order of the Court below cannot be said to be arbitrary, uncalled for and unwarranted. Therefore, there does not appear to be any valid and cogent reason to interfere in the impugned order in exercise of limited revisional jurisdiction of this Court.

10. In the result, this revision petition deserves to be and is hereby dismissed summarily.

Petition dismissed.

Cases Referred.

1. AIR 1958 SC 321

2. AIR 1955 SC 425
3. AIR 1965 SC 1698
4. AIR 1977 SC 577
5. (1945) 49 Cal WN 246