

RAJASTHAN HIGH COURT

Mukesh Kumar

Vs.

Bhopal Singh.

S.B.Civil Writ Petition No.5695 of 2007

(Vineet Kothari, J.)

23.07.2008

JUDGMENT

Vineet Kothari, J

1. Heard the learned counsel.

2. The learned counsel for the petitioner-defendant has submitted that while granting leave to defend by the impugned order decided on 21.08.2007, the learned trial Court erred in imposing condition of furnishing security for decree passed in summary trial under Order 37 Civil Procedure Code He relied upon the judgment of this Court in the case of *Har Narain v. Nagami Lal*,¹ wherein relying upon the decision of Hon'ble Supreme Court in the case of *M/s. Machalee Engineers and Manufacturers v. M/s. Basic Equipment Corporation*,² the Court held that unless the trial Court comes to the conclusion *prima facie* that the defense sought to be raised by the defendant under Order 37 Rule 5 Civil Procedure Code is sham or moonshine, the learned trial Court cannot impose condition of furnishing solvent security while granting leave to defend.

3. The learned counsel for the petitioner also relied upon the decision of the Hon'ble Supreme Court in the case of *M/s. Sunil Enterprises and another v. SBI Commercial and International Bank Ltd.*,³ wherein the Hon'ble Supreme Court relying upon the five propositions laid down in aforesaid case of Basic Equipments (supra) held that where the leave to defend is sought on the ground of fraud, collusion and connivance in between the bank employees and the drawee, the condition of security could not be imposed.

4. The five propositions laid down by the Hon'ble Supreme Court in the aforesaid case are following:

- (a) If the defendant satisfies the Court that he has a good defense to the claim on merits, the defendant is entitled to unconditional leave to defend.
- (b) If the defendant raises a tribal issue indicating that he has fair or *bona fide* or reasonable defense, although not a possibly good defense, 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 if the affidavit discloses that at the trial, he may be able to establish a defense to the plaintiff's claim, the Court may impose conditions at the time of granting leave to defend - the conditions being as to time of trial or mode of trial but not as to payment into Court or furnishing security.
- (d) If the defendant has no defense, or if -the defense is sham or illusory or practically moonshine, 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, the Court may show mercy to the defendant by enabling him to try to prove a defense but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.

5. The learned counsel for the petitioner has thus, submitted that in the present suit filed by the plaintiff on the basis of promissory note, the defendant has denied execution of the promissory note and, therefore, while granting leave to defend, the learned trial Court could not impose the aforesaid condition.

6. The learned counsel for the petitioner also relied upon the judgment of this Court in the case of *Mahesh Chandra v. Buda Ram*,⁴ wherein this Court held in para 13 of the judgment that where the defendant came up with defense disputing the amount and also executing the pronote with further averment that the amount of loan had already been repaid in addition to many other pleas including deficiency of stamp on the pronote, not having the valid license of money lending by the revisionist etc., the learned trial Court was justified in allowing leave, to defend unconditionally. The said case arose upon the revision petition filed by the plaintiff challenging the grant of leave to defend to the defendant.

7. Order 37 Sub-Rule (5) Civil Procedure Code reads 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."

8. The said provision clearly mandates that leave to defend may be granted to him unconditionally or upon such conditions as may appear to the Court 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 and vexatious.

9. In the present case, the plaintiff has filed the suit on the basis of promissory note. The leave to defend was sought by the petitioner- defendant merely with the averments that execution of pronote was denied by him. The suit was filed for a sum of Rs. 60,000/- with interest of Rs. 22,800/- on the basis of said pronote. The defendant in his application Annex.2 also stated that the stamp on the receipt along with the said pronote was crossed afterwards and, therefore, the same was material alteration in the receipt. The learned trial Court by the impugned order D.21.06.2007 has held that the validity of the said defense could be examined only during the course of trial. However, on the basis of denial of execution of pronote, the learned trial Court has granted leave to defend of course subject to condition of adequate security for said sum of Rs. 85,000/-.

10. Of course, the learned trial Court has not made any comment upon the validity of the defense sought to be raised by the defendant, but in the opinion of this Court, it is not necessary for the learned trial Court to closely and fully examine the merit of the defense while deciding the application under Order 37 Rule 5 Civil Procedure Code. In the present case, the defendant himself has come up before this Court though being satisfied with the grant of leave to defend, but aggrieved by the condition of imposition of security, which goes without saying will be of course subject to final decision of the trial by the learned trial Court. Imposition of condition while granting leave to defend is within the domain of the learned trial Court as provision itself indicates. How far the learned trial Court should go to examine the merit of the

defense cannot be delineated in water tight compartment otherwise comments made at threshold of trial are bound to effect the trial itself. A *prima facie* satisfaction about nature of defense put up in the applications is all that is required. The judgments cited at bar lay down the broad propositions of law, about which there is no dispute, but the impugned order clearly shows that mere denial of execution of promissory note is not enough to grant leave to defend without imposition of condition of security. Thus, the case could fall in proposition (e) laid down by the Hon'ble Supreme Court in Basic Equipment's case (supra). This court, therefore, does not feel inclined to interfere with the condition of giving security. In the present case, no allegation of fraud etc. has been made by the defendant in the said application while seeking leave to defend. Therefore, this Court is satisfied that imposition of this condition by the learned trial Court is not required to be interfered with.

11. The writ petition is accordingly dismissed. No order as to costs. The defendant shall deposit the said security within a period of two weeks from today.

Petition dismissed.

Cases Referred.

1. 1987(2) RLR 202
2. AIR 1977 (SC) 577
3. 1998(2) Apex Court Journal 01 (S.C.) 1998 DNJ (SC) 205
4. 2002(2) DNJ (Raj.) 580