

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Judgment: 12.03.2012

+ C.R.P. 160/2011

GP BHATIA Petitioner
Through Mr. Manish Makhija, Adv.
versus

DEE KAY INC & ORS Respondents
Through Mr. P.L. Malik, Adv.

**CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR**

INDERMEET KAUR, J. (Oral)

1 The petitioner is aggrieved by the impugned order dated 29.09.2011 whereby the application filed by the defendant seeking leave to defend had been allowed; leave to defend had been granted to the defendant in the pending suit filed by the plaintiff under Order XXXVII of the Code of Civil Procedure (hereinafter referred to as the 'Code').

2 Record shows that the present suit has been filed by the plaintiff seeking recovery of ₹12,65,044/-. Contention of the plaintiff was that the parties had business dealings with one another; the plaintiff was a wholesale dealer of various products including push buttons and



cordless phones for reputed companies; the director of defendant No. 1 was purchasing goods from the plaintiff for and on behalf of defendant No.1; the parties had business dealings; plaintiff was maintaining a running account. In March, 2007, the defendant started defaulting in payment. Certain amounts were paid thereafter; balance confirmations were executed by the defendant on 15.07.2006 and 01.06.2009. Legal notice dated 22.12.2009 was sent by the plaintiff to the defendants calling upon them to pay the aforementioned amount of ₹12,65,044/- along with interest. Reply to the legal notice is relevant. This is dated 15.01.2010. Paras 2 & 4 of the reply have admitted the liability on the part of the defendants; contention being that the amounts have been paid; further contention in para 4 of the reply being that apart from the amount of ₹12,65,044/-, no further amount of ₹10 lacs as claimed by the plaintiff is to be paid by the defendants; contention being that this amount has been mentioned in the legal notice only to put pressure upon the defendant. Further contention in para 5 of the reply being that the details of the bills and vouchers have not been given. From a perusal of this reply sent by the defendant to the plaintiff, it is clear that the defendant has admitted his liability of ₹12,65,044/-; his contention is

that no additional amount apart from ₹12,65,044/- as has been claimed in the legal notice is due.

3 Thereafter, the present suit had been filed by the plaintiff; this was accompanied by a ledger account of the plaintiff wherein a sum of ₹12,65,044/- has been noted in his ledger books as amounts due from the defendant. This was a suit under Order XXXVII of the Code.

4 Application seeking leave to defend was filed. In para 3, the defendants had denied that there was any transaction with the plaintiff; further contention being that he had not signed the letters of acknowledgement dated 01.06.2009 and 15.07.2006. There were noted by the trial Court to have raised triable issue entitling the defendants for leave to defend as the defendants in his application seeking leave to defend had denied the acknowledgement having been made by him on 15.07.2006 and 01.06.2009.

5 The petitioner is aggrieved by this finding and rightly so. The Courts have time and again held that if the defences sought to be raised by the defendant are sham, moonshine and illusory, leave to defend should not be granted in a routine manner; the very purpose and import of the summary procedure contained in Order XXXVII of the Code



would be defeated.

6 The Apex Court in AIR 1998 Supreme Court 2317 M/s Sunil Enterprises and another Vs. SBI Commercial and International Bank Ltd., have enunciated certain guidelines in dealing with suits under this statutory provision. This judgment has been heavily relied upon by the learned counsel for the respondent to support his submission that there has to be some kind of a defence and in such eventuality leave to defend should be granted. In fact the judgment of the trial Court was based on this judgment. This judgment has noted the propositions which have been laid down by the courts over a period of time in dealing with an application seeking leave to defend which inter-alia as follows:-

- "a) If the defendant satisfies the Court that he has a good defence to the claim on merits, 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 possibly good defence, 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 defence 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 made of trial but not as to payment into Court or furnishing security.*

d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured. "

7 There is no dispute that if a triable issue is raised, leave to defend should be granted; what is a triable issue; if a prima-facie case has been disclosed by the defendant entitling him to leave to defend; leave to defend should not be refused; it is also well settled that if the defendant has raised the defences which are merely imaginative and superfluous, leave to defend should not be granted.

8 Keeping in view these parameters and the fact as noted hereinabove, it is clear that the defendant in his reply to the legal notice (dated 15.01.2010) had not disputed his liability of ₹12,65,044/-; he had in fact admitted it; this liability had been premised on the acknowledgement dated 15.07.2006 & 01.06.2009; legal notice had clearly specified that as on date i.e. on 27.12.2009 a sum of ₹12,65,044/- was due and payable to which there was an admission by the defendant; the only contention having been raised in the reply that apart from this

amount of ₹12,65,044/-, the additional sum of ₹10 lacs has been added to create a pressure upon the defendant as also another submission that the bills and vouchers have not been sent. However, the clear fact cannot be lost sight of which was to the effect that the liability of ₹12,65,044/- stood admitted by the defendant in this reply. In the subsequent application seeking leave to defend contention raised by him was that he had not signed the letters of acknowledgement; this defence was contrary to the earlier stand where the defendant had admitted his liability. In this circumstances the impugned order granting leave to defend has committed an illegality.

9 A Bench of this Court in 2006 I AD (Delhi) 396 Bush Boake Allen (India) Ltd. Vs. M/s Metajee and Company & Others had dealt with such a situation where the Court had noted inter-alia as follows:-

“The only stand taken that the letter dted 17th November, 2001 is not signed by the defendant. The signatures on the letter appear quite to be that of the defendant if compared to the signatures of the defendant on the application for leave to defend, at least to the naked eye. The stand taken by the defendant appears to be more imaginative and is base on falsehood. The counsel appearing for the plaintiff/non-applicant while relying upon another judgment of this Court in the case of M/s Aganail Traders Ltd. Vs. Shyam Ahuja AIR 1999 Delhi 369, Minerals and Metals Trading Corporation Ltd. Vs. Dimple Overseas Ltd. 2001 V AD (Delhi) 206 = AIR 2001 Delhi 427 and Reliance Industries Ltd. Vs. Imperial Pigments (P) Ltd. CRP 160/2011

2003 III AD (DELHI) 278= 104 (2003) DLT 651 argued that the defence put forward by the defendant is totally frivolous, false and practically a moonshine. The transactions are purely commercial and the normal conduct of the party in such commercial transaction should be taken into consideration. Further it was contended that in the facts of the present case, the supply of the goods were admitted and the disputes raised with regard to the quality of the goods by the defendant is an afterthought for avoiding the payment as no such endorsement was even made on the invoices which were received by the defendant over a long period. The defendants having acknowledged their liability in the letter dated 17th November, 2001 and the invoices where material was received, no penumbra for speculation remains and the plaintiff would be entitled to the decree. The stand taken by defendant No.2 is not trustworthy and in fact is not supported by any correspondence between the parties. The defendant, in fact, has not cared to place single letter on record over these long years questioning the quality of the material received by him. In face of a specific admission of specific material, the acknowledgment dated 17th November, 2001 cannot be stated to be a fabricated or forged document. More so when reference to the meeting and the document was made by the plaintiff in the notice dated 30th March, 2002 while the present suit was filed by the plaintiff immediately thereafter in April, 2002, it was obligatory on the part of the defendant to react to the said notice or at least give his explanation in his application for leave to defend. The Supreme Court in the case of Mechalec Engineers & Manufacturers Vs. Basic Equipment Corporation AIR 1977 Supreme Court 577 clearly held where the defendant sets up a defence which is illusory or sham or practically a moonshine, then ordinarily the plaintiff is entitled to leave to sign judgment. The stand of defendant NO.3 in her application for leave to defend is very limited one. She has shown ignorance about the receipt of the material. She has further stated that whether the material was received or not, whether the firm was liable to pay the amount or not; are the questions which have to be examined and proved during trial and as such no liability can be fastened upon her. However,

in the proceedings paragraph, she herself had stated "it is also pertinent to mention that due to dishonest intention of the defendant No.1, the applicant/defendant No.3 was constrained to send a notice dated 11.7.2002 through her advocate for dissolution of partnership firm and for rendition of accounts of the firm". It is further stated that thereafter a compromise deed has been entered into wherein defendant NO.2 and one Smt.Shanti Seth has agreed to liquidate the entire liability after absolving the applicant/defendant no.3. In fact, there is nothing in the application for leave to defend which require any further discussion in view of the findings recorded above. The liability of partners of the partnership is unlimited and qua the third party, the partners are bound to discharge the liability of the partnership concern and their internal management would not be a defence to a third party's claim. If nothing else, the averments made by this applicant, against defendant NO.2 are indicate of the correctness of the stand taken by defendant No.2 in his application for leave to defend.

5. *In reply to IA NO.3421/2002, defendant No.2 has already made a statement in the Hon'ble Court stating therein that defendant No.2 will not transfer, alienate, part with or create any third party interest in respect of property NO.1484, S.P.Mukherjee Marg, Delhi, as such the application is not maintainable. In view of this statement made by defendant No.2 nothing survives in this application and the same can be disposed of by binding the respondent/defendants to their statements and no further orders are called in this application."*

10 In this background, petition deserves to be allowed. The whole case of the petitioner is bordered upon the acknowledgements purported to have been signed by the defendant which were never disputed by the defendant in the reply to the legal notice wherein he has admitted his liability. In this background, the impugned judgment suffers from an

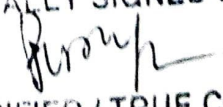
illegality. It is accordingly set aside. The suit of the plaintiff is decreed in the sum of ₹12,65,044/- is decreed. Plaintiff is also entitled to pendente lite and future interest @ ₹9% per annum till realization.

11 Petition is disposed of.

MARCH 12, 2012

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INDERMEET KAUR, J

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 CRP 160/2011