

THE HONOURABLE SMT. JUSTICE M.G. PRIYADARSINI

City Civil Court Appeal No.35 OF 2022

JUDGMENT:

Aggrieved by the judgment and decree dated 14.12.2021 in O.S.No.453 of 2021 (hereinafter will be referred as 'impugned judgment') passed by the learned I Senior Civil Judge, City Civil Court at Hyderabad (hereinafter will be referred as 'trial Court'), the defendant preferred the present appeal to set aside the impugned judgment.

2. For the sake of convenience, the parties hereinafter are referred to as they are arrayed before the trial Court.

3. The brief facts of the case, which necessitated the appellant to file the present appeal is that, the plaintiff filed suit for recovery of Rs.45,66,000/- by invoking Order XXXVII of the Civil Procedure Code. The averments of the plaint in brief are as under:

a) The defendant is the client of plaintiff, who is an advocate, and the defendant has entrusted 46 cases to be handled by the plaintiff in respect of his property situated at Ammuguda Village, Kapra Municipality and various other cases. Out of such acquaintance, in the month of December, 2017 the

defendant has requested the plaintiff for a short hand loan of Rs.20,00,000/-. Hence, the plaintiff transferred an amount of Rs.20,00,000/- on 28.12.2017 by way of RTGS from his Bank Account bearing No.62479766296 in the State Bank of India, City Civil Court Branch, Hyderabad to the bank account of defendant i.e., IDBI Bank. The defendant promised to repay the said amount along with interest @ 3% per month. The defendant paid interest for the month of January, 2018 and thereafter failed either to pay interest or towards principal amount.

b) On the request of the defendant, the plaintiff has returned all the case bundles on 25.08.2018. The defendant issued two cheques bearing Nos.786709 and 786710 drawn on IDBI Bank, Mahaveer House, Basheerbagh Square, Hyderabad on 19.09.2018. Cheque No.786709 was issued towards repayment of Rs.20,00,000/- and cheque bearing No.786710 was issued for Rs.4,64,000/- towards interest. When the plaintiff presented two cheques, they were dishonoured on 03.10.2018 on the ground that the drawers signature differs in so far as first cheque is concerned and funds insufficient in so far as second cheque is concerned. The plaintiff has issued legal

notice dated 15.10.2018 and the same was served on the defendant on 17.10.2018 and 20.10.2018. As the amount covered under the cheques was not paid by the defendant, the plaintiff constrained to file calendar case vide C.C.No.358 of 2018 on the file of II ACMM, Manoranjan Complex and the same is coming up for cross examination of PW1 and at that stage the case was transferred to Nampally, Criminal Courts.

c) While C.C.No.358 of 2018 was pending, the defendant has approached the plaintiff and signed a Memorandum of Understanding dated 03.08.2019 stating that he will pay an amount of Rs.27,44,000/- on or before 31.08.2019. The defendant has also filed a petition in the concerned criminal court on 05.08.2019 but the same was not recorded by the Court in view of the fact that NBWs are pending against the defendant, who was not present. The defendant has presented a petition on 09.08.2019 before the Criminal Court on 09.08.2019 stating that he will pay Rs.33,40,000/- or on before 20.08.2019 but the said petition was also returned. The defendant has executed an undertaking that he will pay Rs.32,60,000/- on or before 31.10.2019 but he did not pay the same. The defendant has also served a copy of the petition

dated 06.11.2019 agreeing to pay the amount of Rs.34,70,000/- on or before 21.11.2019 but the said petition was also not taken into consideration by the criminal court. The plaintiff is entitled to recover Rs.20,00,000/- with interest @ 3% per month from the month of February, 2018 till the date of filing of the suit i.e., 23.08.2021 for a period of 42 months and 23 days which amounts to Rs.25,66,000/- and the principal amount of Rs.20,00,000/- totally Rs.45,66,000/-. Hence, this suit.

b) After receipt of summons, the defendant filed petition vide I.A.No.828 of 2021 under Order XXXVII Rule 3 (5) read with Section 151 of the Code of Civil Procedure to grant leave to defend the suit. The brief averments of the affidavit filed in support of the petition in I.A.No.828 of 2021 are as under:

i) The plaint averments are silent and do not plead or state that the plaintiff has lent the alleged transactions with the defendant. The defendant denied about his request to plaintiff to lend Rs.20,00,000/- as short hand loan.

ii) The plaintiff has submitted Xerox copies and there is no single original document. There are no pleadings as to on which dates the defendant approached the plaintiff for want of money.

There are no specific dates mentioned in the pleadings to show as to when the defendant approached the plaintiff for hand loan. The plaintiff has not mentioned about the nature of the business of the defendant.

c) In response to the above petition, the plaintiff filed counter denying the petition averments and contended as under:

i) It is specifically mentioned in the plaint in paragraph Nos.3 and 4 of the plaint that the defendant has approached the plaintiff in the month of December, 2017 and that at the request of the defendant, the plaintiff transferred an amount of Rs.20,00,000/- on 28.12.2017 by way of RTGS from the bank account bearing No.6249766296 in State Bank of India, City Civil Court branch to the bank account of the defendant i.e., IDBI Bank account.

ii) The original documents were not filed with the plaint, as all the document were filed in a Criminal Case vide C.C.No.358 of 2018 on the file of XI Special Magistrate Court and the said case was transferred to VIII Additional Chief Metropolitan Magistrate, certified copies of the said documents were filed.

iii) The defendant did not plead that he has not taken any personal loan from the plaintiff. The defendant has issued cheques calculating interest @ 3% per month and also executed Memorandum of Understanding that he will clear the loan with interest @ 3% per month. The leave to defendant does not disclose or indicate that he has substantial defence to raise in the suit. The defence intended to be put up by the defendant is frivolous and vexatious and thus, prayed to decree the suit.

4. During the course of inquiry, the plaintiff relied upon Exs.R1 to R15 and whereas the defendant did not adduce any documentary evidence in support of his contentions. The learned trial Court after considering the rival contentions, dismissed the petition on 14.12.2021 and also decreed the suit in favour of plaintiff on the same day vide judgment dated 14.12.2021. Aggrieved by the same, the defendant has preferred the present appeal.

5. Heard both sides and perused the record including the grounds of appeal.

6. The first and foremost contention of the defendant is that suit requires proper filing of original documents, proper

pleadings and proper evidence to come to a judicial conclusion and whereas the plaintiff has filed Xerox copies of documents. It is further contended that the trial Court failed to see that liability cannot be proved by Xerox copies. On the other hand, the learned counsel for the plaintiff submitted that as all the document were filed in a Criminal Case vide C.C.No.358 of 2018 on the file of XI Special Magistrate Court (transferred to VIII Additional Chief Metropolitan Magistrate) certified copies of the said documents were filed before the trial Court. As can be seen from the record, the documents relied upon by plaintiff were marked in I.A.No.828 of 2021.

7. As can be seen from the record, the plaintiff relied upon Ex. R1 is the certified copy of statement account of plaintiff dated 02.11.2018, Ex.R2 is the certified copy of return of case bundles of the defendant dated 19.09.2018, Exs.R3 and R4 are the certified copies of two cheques i.e., for Rs.20,00,000/- and Rs.4,64,000/- respectively, Exs.R5 and R6 are the certified copies of cheque returns memos, Ex.R7 is the certified copy of legal notice, Ex.R8 to R10 are the postal receipts/acknowledgments, Ex.R11 is the memorandum of understanding between the parties, Exs.R12, R13 and R15 are

the petitions, Ex.R14 is the undertaking alleged to have been executed by the defendant. All these documents, which are material in establishing the transaction between the plaintiff and defendant, are certified copies of the said documents. Since the plaintiff has filed original documents before the criminal Court, the plaintiff could not file the very same original documents in the present suit and thereby, the plaintiff constrained to file secondary evidence i.e., certified copies, which is admissible in law. Thus, the contention of the learned counsel for the defendant that the plaintiff filed Xerox copies of the documents is not sustainable.

8. The next contention of the learned counsel for the defendant is that there is no pleading as to when the defendant approached the plaintiff and sought for a short hand loan of Rs.20,00,000/-. As rightly contended by the learned counsel for the plaintiff and as observed by the trial Court in the order dated 14.12.2021 in I.A.No.282 of 2021, at paragraph Nos. 3 and 4 of the plaint, the plaintiff has clearly mentioned that the defendant has approached the plaintiff in the month of December, 2017 and sought for a short hand loan of Rs.20,00,000/- and on such request, the plaintiff has

transferred an amount of Rs.20,00,000/- from his account (SBI) to the account of the defendant (IDBI) through RTGS method. In support of this contention, the plaintiff relied upon Ex.R1 i.e., statement account of the plaintiff and the said document discloses that the plaintiff has transferred an amount of Rs.20,00,000/- from his account (SBI) to the account of the defendant (IDBI) on 28.12.2017. Exs.R3 and R4 discloses that the defendant has drawn two cheques from IDBI Bank in the name of the plaintiff, who has presented the said cheques, which were returned vide cheque returned memos under Exs.R5 and R6. The defendant is not disputing all the above aspects, except contending that the plaintiff has relied upon Xerox copies but in fact the documents relied upon by the plaintiff were all certified copies but not Xerox copies.

9. It is the specific contention of the plaintiff that the defendant has agreed his liability payable to plaintiff by filing petitions, memorandum of understanding and undertaking before the trial Court vide Exs.R11 to R15. Since NBWs were pending against the defendant before the criminal court, the petitions filed by the defendant before the trial Court undertaking to pay the amount to the defendant were returned

and not accepted by the trial Court. Though the defendant has been executing undertakings and memorandum of understandings, he is not coming forward to discharge the suit claim. All these documents coupled with the plaint averments clearly discloses that the defendant has obtained short hand-loan from the plaintiff and failed to repay the said amount and thereby the plaintiff is entitled for suit claim.

10. The other contention of the learned counsel for the defendant is that petition filed by him ought to have been allowed by the trial Court and an opportunity to contest the suit ought to have been given to him but as a result of dismissal of his petition under Order XXXVII Rule 3 (5) read with Section 151 of the Code of Civil Procedure, irreparable loss and injury was caused to him. It is further contended that the trial Court failed to appreciate the scope of the petition to defend under Order XXXVII. On the other hand, the learned counsel for the plaintiff contended that the defence intended to be put up by the defendant is frivolous and vexatious.

11. The learned trial Court by relying upon the decision of the

High Court of Delhi in **Avtar Kaur v. Zuleikha Karnik**¹ observed that leave to defend petition has to be dismissed if the defence raised by the defendant is moonshine, sham, illusionary and raises no triable issue. Per contra, the learned counsel for the defendant contended that if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend. In support of the above said contention the learned counsel for the defendant relied upon a decision in **Sudin Dilip Talaulikar v. Polycap Wires Private Limited and others**² wherein the Honourable Supreme Court observed as under:

“11. In a summary suit, if the defendant discloses such facts of a prima facie fair and reasonable defence, the court may grant unconditional leave to defend. This naturally concerns the subjective satisfaction of the court on basis of the materials that may be placed before it. However, in an appropriate case, if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend. In contradistinction to the earlier subjective satisfaction of the court, in the latter case there is an element of discretion vested in the court. Such discretion is not absolute but has to be judiciously exercised tempered with what is just and proper in the facts of a particular case. The ultimate object of a

¹ AIR Online 2019 Delhi 2451

² MANU/SC/0908/2019

summary suit is expeditious disposal of a commercial dispute. The discretion vested in the court therefore requires it to maintain the delicate balance between the respective rights and contentions by not passing an order which may ultimately end up impeding the speedy resolution of the dispute.”

12. Further, the learned counsel for the defendant relied upon a decision in **B.L. Kashyap and Sons Limited v. JMS Steels and Power Corporation and others**³, wherein the Honourable Supreme Court observed that if the defendant raises triable issues, particularly concerning its liability, such defence cannot be said to be frivolous or vexatious altogether.

13. On the other hand, the learned counsel for the plaintiff relied upon a decision in **Sapna Saree Centre and others v. Bank of Rajasthan Limited**⁴, wherein the High Court of Rajasthan observed as under:

“8. The provisions in Order 37, CPC 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 CPC is to prevent unreasonable delay and obstruction by a defendant from advancing sham or illusory defences which if allowed to do so, in facts, the very purpose of legislature incorporating Order 37 in the CPC would stand frustrated. That apart, the very object by insertion of such provision in Order 37, CPC 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 honour the spirit of the agreements at the cost of public exchequer and also with intent to

³ MANU/SC/0048/2022

⁴ AIR 2001 Raj 67

keep control over financial institutions over excessive charge of interest from the helpless borrower. If sham and illusory defences are allowed to be advanced by the defendants then no institution such as nationalised Banks would be to safe in advancing the loan to any party in difficulty. Therefore, provisions of summary trial of suits under Order 37, CPC has been envisaged with a view to safeguards 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.

14. The learned counsel for the plaintiff further relied upon a decision of the High Court of Delhi in **Sh.Vipin Gupta v. Sh. Prem Singh**⁵, wherein it was held as under:

“5. Under Order 37 Rule 3 Sub-clause (5), the appellant had moved an application for leave to defend the suit but the learned Trial Court dismissed the application for leave to defend and delivered the judgment in favor of the plaintiff/respondent. The plea taken by the appellant in the application for leave to defend the suit is that he had lost the two cheques which appeared to have been stolen by the plaintiff/respondent and have used the same for filing the present suit against the appellant. We have perused the record and we find that the appellant/defendant has not denied his signatures on any of the documents which have been annexed and relied upon by the plaintiff/respondent in filing the present suit. Both these cheques in question bear the signatures of the appellant. We have also perused the non judicial stamp paper placed on record by the appellant/defendant in which the appellant/defendant has given an undertaking in writing that he will return the sum of Rs. 3,00,000/- by 13.06.2001. The appellant has put his signatures on this undertaking on non judicial stamp paper and besides that, he has also put his thumb impression on the said undertaking. We have also gone through the receipt placed on record by the plaintiff/respondent. The receipt has also been duly executed by the appellant for having received Rs. 3,00,000/- in cash. This receipt is also duly signed by the appellant. After perusing all these documents, it appears that the appellant has taken a false defense that he had lost these two cheques in question which have been stolen by the plaintiff/respondent and has filed a false suit against the appellant. We do not find any force in the plea taken by the appellant in this case. The other documents which

⁵ LAWS (DLH) 2006 – 8 - 60

have been signed by the appellant are the undertaking given by the appellant on a non judicial stamp paper in which he has stated that he will refund the amount of Rs. 3,00,000/- by 13.06.01 and the appellant has also put his signatures as well as the thumb impression on the undertaking. The appellant has also executed a receipt duly signed by him for having received a sum of Rs. 3,00,000/- in cash. So, we are of the opinion that all these documents cannot be created by the plaintiff/respondent. In our opinion, the plea taken by the appellant is a sham and has got no force. The appeal filed by the appellant is without any merit and the same is, therefore, dismissed. The parties are left to bear their own costs. Trial court record be sent back. File be consigned to record room.”

15. In view of the above decisions it is apparent that the leave to defend in a summary suit can be granted to the defendant only when he raised defences, which are not vexatious and frivolous and that the defence raised by the defendant shall lead to triable issues. Thus, the question that needs to be adjudicated at this juncture is whether the defendant while filing petition under Order XXXVII Rule 3 (5) read with Section 151 of the Code of Civil Procedure has raised proper defence leading to triable issues.

16. As seen from the petition averments in I.A.No.828 of 2021, the only defence adopted by the defendant is that the plaintiff filed Xerox copies of the documents, there are no specific dates mentioned in the plaint as to when the defendant approached the plaintiff for a hand loan and also details about the nature of business of the defendant. It is to be seen that

non mentioning of the specific date of defendant approaching the plaintiff in money recovery suit is not fatal to case of the plaintiff, until and unless the defendant denies his liability to pay the amount to the plaintiff. It is not the case of the defendant that amount has not been credited from the account of the plaintiff to the account of the defendant. It is not event the case of the defendant that he has not issued cheques to the plaintiff towards discharge of legally enforceable debt. It is not even disputed by the defendant that the cheques issued by him in favour of plaintiff were not dishonoured. The defendant is not denying about the filing of the criminal case against him by the plaintiff. The defendant is not even denying his signature on the cheques. The defendant is not denying about the undertakings, memo of understanding and the petitions promising to pay the amount covered under two cheques issued by him to the plaintiff with the interest. The defendant is not even in a position to explain as to why the cheques issued by him were in possession of the plaintiff. In this regard, the learned counsel for the plaintiff relied upon a decision in **M/s. Delhi Book Store v. K.S. Subramaniam**⁶, wherein the High Court of Delhi observed that the onus is on the defendant to

⁶ AIR 2006 Delhi 206

explain as to he had issued cheques in favour of the plaintiff. In such circumstances, the defence raised by the defendant against the plaintiff in the petition filed under Order XXXVII Rule 3 (5) read with Section 151 of the Code of Civil Procedure appearing to be vexatious, moonshine, sham, illusionary and not leading to any triable issues. The grounds urged by the defendant in the petition vide I.A.No.828 of 2021 are not worthy enough to shatter the case of the plaintiff.

17. The learned counsel for the plaintiff relied upon a decision of the High Court of Calcutta in **Darshan Mekani v. Aman Khema**⁷ wherein it was observed as under:

“18. The Hon'ble Supreme Court in Ajay Bansal v. Anup Mehta and Others reported in (2007)2 SCC 275, considering on Order 37 Rule 3(5) held that a decree passed in a summary suit where leave to defend the suit has been refused is almost automatic. The consequence of passing a decree cannot be avoided.” In view of the aforesaid, this application stands dismissed. However, there shall be no order as to costs.”

18. Even in the case on hand, on considering the rival contentions, the trial dismissed the petition vide I.A.No.828 of 2021 on 14.12.2021 and even decreed the suit in favour of plaintiff on the very same day vide judgment dated 14.12.2021. A perusal of the judgment dated 14.12.2021 read with the order dated 14.12.2021 in I.A.No.828 of 2021, wherein the certified

⁷ GA No.174/2016 with CS No.294/2015 decided on 22.08.2017

copies of the documents relied upon by the plaintiff were marked as Exs.R1 to R15, this Court is of the opinion that the plaintiff could succeed in establishing his case that the defendant is liable to pay the amount covered under two cheques with interest towards legally enforceable debt. On the other hand, the defendant failed to establish any of the grounds enabling the trial Court to grant leave to him to defend his case.

19. In view of the above facts and circumstances, this Court is of the considered opinion that the trial Court on considering all the aspects in a proper perspective has decreed the suit in favour of the plaintiff against the defendant and thereby there is no necessity to interfere with the judgment passed by the trial Court. Therefore, there are no merits in this appeal and the same is liable to be dismissed.

20. In the result, this appeal is dismissed. There shall be no order as to costs.

As a sequel, pending miscellaneous applications, if any, shall stand closed.

JUSTICE M.G. PRIYADARSINI

Date: 05.07.2024

Note: LR copy to be marked.
B/o. AS