

If Any Part Of Amount Claimed Is Admitted, Leave To Defend In Summary Suit Can't Be Granted Unless Admitted Amount Is Deposited: J&K&L High Court

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IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

SANJAY DHAR; J.

CM(M) No.216/2022; 11.11.2022

ABDUL RASHID DAR & ANR. versus REYAZ AHMAD KUCHAY

Petitioner(s) through Mr. Adil Parray, Advocate.

Respondent(s) Through Mr. S. N. Ratanpuri, Advocate.

J U D G M E N T

1) The petitioners have invoked the jurisdiction of this Court under Section 104 of the Constitution of J&K, which is in *pari materia* with Article 227 of the Constitution of India, for challenging order dated 30.08.2018 passed by learned Additional District Judge, Srinagar, in a suit filed by respondent against the them. By virtue of the impugned order, the petitioners (hereinafter referred to as the defendants) have been granted conditional leave to defend the suit filed by the respondent (hereinafter referred to as the plaintiff) and they have been directed to deposit an amount of Rs.11,50,000/ in the Court or to furnish cash security in the shape of bank guarantee for the aforesaid amount.

2) The record would reveal that the plaintiff has filed a suit for recovery of Rs.12.00 lacs from the defendants under the provisions of Order 37 of the Civil Procedure Code. It is the case of the plaintiff that defendant No.1 (petitioner No.1 herein) approached him and asked him to invest money in setting up of a poultry farm for which defendant No.1 was to provide the land. According to the plaintiff, he paid an aggregate amount of Rs.12.00 lacs to the defendants out of which an amount of Rs.9.70/ lacs was paid in cash to defendant No.1 whereas an amount of Rs.2.30 lacs was transferred into the accounts of defendant No.2 and defendant No.3, who was later on deleted from the array of defendants. The plaintiff further submitted that defendant No.1 executed a promissory note for an amount of Rs.12.00 lacs as guarantee. According to the plaintiff, he asked the defendants to execute partnership deed for the purpose of setting up of poultry business but they failed to do so. It is further alleged that the defendants failed to adhere to the agreed terms and conditions and the poultry farm was not set up nor they returned the money advanced by the plaintiff.

3) It appears that the plaintiff has filed the suit as a 'pauper/indigent person' and permission to file the suit as an 'indigent person' was granted by the trial court vide order dated 30.01.2018 after holding enquiry through Tehsildar concerned, whereafter summons in the prescribed form were issued to the defendants including the petitioners herein, who filed an application for leave to defend the suit in terms of sub-rule (5) of Rule 3 of Order 37 of the CPC.

4) In their application, the defendants submitted that even as per the case of plaintiff, defendant No.2 has not executed any document that would warrant filing of a suit under Order 37 of the CPC as he is neither alleged to have executed any hundi or promissory note nor he is alleged to have executed any written agreement etc. It was further contended that defendant No.2 has neither issued any hundi nor has he executed the

promissory note on the basis of which the suit has been filed by the plaintiff. The defendants went on to contend that the suit has been filed for recovery of Rs.12.00 lacs but the promissory note, on the basis of which the suit has been filed, is only for an amount of Rs.10.00 lacs, therefore, the suit under the provisions of Order 37 of the CPC is not maintainable. It has been further contended that if contention of the plaintiff that he had advanced a sum of Rs.9.70 lacs to defendant No.1, is accepted, then there was no occasion for the said defendant to execute promissory note for an amount of Rs.12.00 lacs, as has been claimed in the plaint. The defendants have also objected to the grant of leave to the plaintiff to file suit as an 'indigent person' on the ground that the plaintiff earns sufficient income for paying the court fees.

5) The learned trial court, after hearing the parties and considering the defence put up by the defendants in their application for leave to defend, came to the conclusion that the plea raised by the defendants that they have not executed the hundi and that the same is fabricated, is illusory and not real. According to the learned trial court, the application seeking leave to defend the suit appears to be wholly misplaced and based on false and fabricated facts. After making these observations, the learned trial court concluded that the defence put up by the defendants is illusory and sham and, as such, the defendants cannot be granted unconditional leave to defend. Accordingly, vide the impugned order, the learned trial court granted leave to the defendants to defend the suit subject to the condition that they shall deposit Rs.11,50,000/ in the Court or subject to the condition of furnishing of bank guarantee for the aforesaid amount.

6) The petitioners/defendants have challenged the impugned order on the grounds that the learned trial court has overlooked the parameters laid down for grant of leave to defend and that it has exercised its jurisdiction illegally and with material irregularity causing failure of justice. It has been contended that the conditional leave to defend granted by the trial court to the petitioners/defendants is causing grave injustice to them, particularly when the petitioner No.1 has clearly denied the execution of hundi/promissory note.

7) I have heard learned counsel for the parties and perused the record of the case including the trial court record.

8) Before dealing with the contentions raised by the petitioner in the instant petition, it would be apt to examine the nature and scope of jurisdiction of this Court under Article 227 of the Constitution of India. Under the aforesaid Article, the High Court is vested with the supervisory power to ensure that all subordinate courts and Tribunals exercise their powers vested in them within the bounds of their authority. The nature and scope of power of the High Court under Article 227 of the Constitution has been a subject matter of discussion in several judgments of the Supreme Court. It would be apt to notice some of these judgments to have an idea about the nature and scope of the supervisory power of the High Court under Article 227.

9) The Supreme Court in the case of *Jai Singh and others vs. Municipal Corporation of Delhi and another*, (2010) 9 SCC 385, while considering the aforesaid aspect, has observed as under:

"15. We have anxiously considered the submissions of the learned counsel. Before we consider the factual and legal issues involved herein, we may notice certain well recognized principles

governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well-established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints. It cannot be exercised like a 'bull in a china shop', to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. The High Court cannot lightly or liberally act as an appellate court and reappreciate the evidence. Generally, it cannot substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi-judicial tribunals. The power to re-appreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice.

10) In a recent judgment in the case of *Garment Craft vs. Prakash Chand Goel*, (2022) 4 SCC 181, the Supreme Court while explaining the power of the High Court under Article 227 of the Constitution, relied upon its earlier judgment in the case of *Estralla Rubber vs. Dass Estate (Pvt) Ltd.* (2001) 8 SCC 97 and quoted with approval the following observations of the aforesaid judgment:

“6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.”

11) From the foregoing analysis of law on the subject, it is clear that the High Court while exercising its powers under Article 227 of the Constitution has not to act as an appellate court and substitute its own judgment in place of the subordinate courts to correct an error. The High Court has to exercise its supervisory power with great care and caution and this jurisdiction can be exercised where there is any flagrant abuse of fundamental principles of law or justice and not otherwise. It is in the light of these principles that the instant case is required to be examined.

12) In the instant case, the plaintiff/respondent claims that he had advanced a sum of Rs.9.70 lacs to defendant No.1 and a sum of Rs.2.30 lacs to other defendants out of which an amount of Rs.1.80 lacs was transferred to the account of defendant No.2 and a sum of Rs.50,000/ was transferred into the account of erstwhile defendant No.3, against whom the plaintiff has abandoned his claim during the pendency of the suit. The plaintiff claims that the aforesaid amount was paid by him to the defendants for setting up of poultry business with them.

13) In the application for leave to defend filed by the defendants before the trial court, they have not denied the receipt of money from the plaintiff. The only contention that has been raised by the defendants is that the promissory note, on the basis of which the suit has been filed, is for an amount of Rs.10.00 lacs whereas only an amount of Rs.9.70 lacs was advanced by the plaintiff to defendant No.1. Defendant No.1 has not, in clear terms, denied execution of the promissory note in the application for leave to defend. What the said defendant has averred in the application is that the hundi, on the basis of which the suit has been filed, is wrong and incorrect, though the defendant No.1 has denied his signatures on the said hundi. The other ground urged by the defendants in their application is that the suit under Order 37 of the CPC to the extent of amount having been paid into the account of defendant No.2 is not maintainable as the said defendant has not executed any document contemplated under the aforesaid provision in favour of the plaintiff.

14) As already noted, the receipt of money by the defendants is not disputed in the application for leave to defend. It is correct that the promissory note alleged to have been executed by defendant No.1 is for an amount of Rs.10.00 lacs whereas, according to the plaintiff, only an amount of Rs.9.70 lacs was paid to the said defendant. Merely because the promissory note is for an amount which is more than what was advanced by the plaintiff to defendant No.1 does not make his case doubtful as the said promissory note, according to the plaintiff, was executed by defendant No.1 as a guarantee. In the face of these facts that have emerged from the record, prima facie, it appears that the defence put up by the defendants in the application for leave to defend borders on peripheral issues and not on main issue relating to the question as to whether they owe money to the plaintiff. In this regard, the defendants have kept a mysterious silence in their application for leave to defend. Therefore, the trial court is right in observing that the defence put up by the defendants in their application for leave to defend appears to be illusory.

15) The grant of leave to defend in a summary suit filed under Order 37 of the CPC is governed by the principles as enumerated by the Supreme Court in the case of IDBI Trusteeship Services Limited vs. Hubtown Limited, (2017) 1 SCC 568. Para (17) of the said judgment is relevant to the context and the same is reproduced as under:

17. Accordingly, the principles stated in para 8 of Mechele's case will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case as follows:

i. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

ii. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

iii. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

iv. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

v. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

vi. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

As is clear from Clause (vi) of the aforequoted judgment, if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit cannot be granted unless the amount so admitted to be due is deposited by the defendant in the court.

16) In the instant case, as already noted, the defendants have not specifically raised any dispute with regard to the receipt of money from the plaintiff nor have they claimed that after receipt of the money, they have repaid the same to the plaintiff. In view of this position, the aforesaid principle laid down by the Supreme Court clearly applies to the instant case. Therefore, the learned trial court has rightly refused to grant unconditional leave to defend to the defendants/petitioners.

17) The judgments passed by this Court in the cases of Ikhlaq Ahmad Wani vs. Ghulam Nabi Pandith (CFA No.33/2018 decided on 12.12.2018) and Mukhtar Ahamd & anr. Vs. Mehraj-ud-din & anr. 2003 (2) JKJ 68, relied upon by learned counsel for the petitioners, are not applicable to the facts of the instant case for the reason that the facts of the aforesaid cases are entirely on a different footing.

18) For the foregoing reasons, I do not find any illegality, much less a gross illegality, having been committed by the learned trial court while passing the impugned order. The petition lacks merit and is dismissed accordingly.

19) A copy of this order be sent to the learned trial court for information.