

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

RFA No. 35/2019

Reserved On: 18th of December, 2023
Pronounced On: 29th of December, 2023.

Mohammad Altaf Mir
S/O Mohammad Jamal Mir
R/O Pushroo, Tehsil Shangus,
District Anantnag.

... Appellant

Through: -

Mr Rizwan-u-Zaman Bhat, Advocate.

V/S

Firdous Ahmad Mir
S/O Ab. Rehman Mir
R/O Nai Basti, Khanabal,
Anantnag, Kashmir.

... Respondent

Through: -

Mr Syed Sajad Geelani, Advocate.

CORAM:

HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE

(JUDGMENT)

01. This Civil First Appeal is directed against the Judgment and Decree dated 25th of September, 2018 passed by the Court of learned Principal District Judge, Anantnag (hereinafter referred to as the 'Trial Court'), in a Suit titled '**Firdous Ahmad Mir v. Mohammad Altaf Mir**', in terms of which the Suit of the Plaintiff/ Respondent herein was decreed in his favour and against the Defendant/ Appellant herein with a direction to him to pay the Suit amount of Rs.30,00,000/- along with interest @ 2 percent from the date of filing of the Suit till final realization of the decretal amount.

02. The Judgment and Decree was passed in the Suit filed in terms of Order XXXVII of the Code of Civil Procedure (CPC), by the learned

Trial Court, by rejecting the application moved by the Defendant/ Appellant herein to seek leave to defend the Suit, holding that the defence set up appears to be moonshine and, as such, does not fall within the category of plausible defence and also appears to be trivial and does not appear to the Court for giving benefit to the Defendant and the application was, thus, turned down.

03. The Appellant is aggrieved of the impugned Judgment and Decree dated 25th of September, 2018 and has challenged the same through the medium of this Civil First Appeal, *inter alia*, on the ground that the Trial Court has failed to appreciate the important aspects of the matter that were agitated and reflected by the Appellant in his application seeking leave to defend, as it had been asserted that the outstanding amount payable to the Plaintiff/ Respondent herein did not exceed Rs.30,000/- and this fact had not been refuted by the Respondent while filing his Objections to the application moved by the Appellant-Defendant and which can be construed to be an admission of such fact on the part of the Respondent; that the Trial Court has also erred in law by ignoring a very vital aspect of the matter with regard to the dispute about the execution of the *Hundi*, as the Appellant had categorically denied execution of any such *Hundi* on his part willingly and the averments made in Paragraph Nos. 6 and 7 of the application seeking leave to defend had not been denied by the Respondent in his Objections and has evaded any specific admission or denial about the same, as such, the Trial Court was under an obligation to dismiss the Suit on account of deemed admission on part of the Respondent regarding non-existence of debt as prayed for in the Suit.

04. It is further pleaded that it was imperative upon the Trial Court to grant an unconditional leave to the Appellant to defend the Suit in question on account of the fact that the defense pleaded by the Appellant was: (a) triable issue regarding non-existence of any debt to the tune of Rs.30.00 lacs; and (b) non-execution of the *Hundi* (negotiable instrument), on the strength of which the entire Suit was based; that once a triable issue

is raised in a Suit of summary nature indicating that there exists fair or *bonafide* or reasonable defence in favour of the Defendant, he has to be granted leave to defend the Suit; that the Appellant, as Defendant, had raised a reasonable defence, even if, for the sake of arguments, not a positively good defence, he was entitled for unconditional leave to defend; that it is a settled position of law that in an extreme situation when the Defendant had no defence or the defence is sham, illusory or practically moonshine, even then the Defendant is entitled for leave to defend by imposing certain conditions; that, while deciding the case, the Trial Court arrived at a conclusion that the defence set up by the Appellant in the application seeking leave to defend is moonshine, the Appellant was entitled for leave to defend in view of the law laid down by the Hon'ble Apex Court in various landmark Judgments; that the Trial Court has not come to a conclusion and had not returned a finding that the defence was vexatious and, therefore, not granting leave and the consequent decretal of the Suit is bad in law and the impugned Judgment and Decree deserves to be set aside.

05. Learned Counsel for the Appellant argued that the Appellant, as Defendant, on being issued notice, appeared before the Trial Court and, on being issued a summon for Judgment, he had applied for seeking leave to defend, raising the defence that he had borrowed an amount of Rs.8.00 lacs from the Plaintiff/ Respondent herein and same was paid back to him way back in March, 2008; that the parties were in friendly relations and the Appellant-Defendant, being a contractor, had been borrowing money from the Plaintiff and was liquidating the same, along with interest from time to time; that the Appellant/ Defendant had last time borrowed an amount of Rs.3.00 lacs from the Plaintiff/ Respondent herein, out of which he had liquidated Rs.2.70 lacs in three instalments and was only indebted to the Plaintiff for an amount of Rs.30,000/-. It was alleged in the application filed by the Appellant-Defendant that in the month of February, the Plaintiff with one more person took the Defendant forcibly in a car and reached to the residence of an old-aged person and got his signatures on some documents

against his will and, on receiving notice from the Plaintiff's Counsel, he came to know that the Plaintiff had got his signatures forcibly on the *Hundi* in question.

06. The learned Counsel also argued that the impugned Judgment and Decree is liable to be set aside on both the counts of no liability, except that of Rs.30,000/-, and that his signatures having been obtained on a *Hundi* which has been used as a negotiable instrument by the Plaintiff, as his signatures on the *Hundi* had been obtained forcibly by the Plaintiff. He also argued that by raising triable issues it was imperative on the Trial Court to grant unconditional leave to the Defendant, however, neither conditional nor unconditional leave was granted and the Appellant has been denied this remedy of a full-fledged trial detrimental to the substantial justice. The learned Counsel for the Appellant, in support of his case, has relied upon the following two judgments: (i) **IDBI Trusteeship Services Ltd. v. Hubtown Ltd.**, (2017) 1 SCC 568; and (ii) **Sudin Dilip Talaulikar v. Polycap Wires Private Limited & Ors.**, (2019) 7 Supreme Court Cases 577.

07. Learned Counsel for the Respondent, on the other hand, argued that the contention raised by the Appellant with regard to registration of a case at the Police Station concerned is an afterthought, inasmuch as, he had neither pleaded the same in his application seeking leave to defend nor any document has been placed on record. He further argued that the Appellant has raised trivial aspects of the case to set up the defence which had been rightly turned down by the Trial Court, as the Appellant had raised a loan of Rs.30,00,000/- from the Respondent and had not paid the same despite the issuance of the *Hundi*. The learned Counsel for the Respondent has supported his arguments with the Judgement passed by the Hon'ble Supreme Court in case titled '**M/S V. K. Enterprises & Anr. v. M/S Shiva Steels**', passed in Special Leave Petition (C) No. 25144 of 2009, decided on 4th of August, 2020.

08. Heard learned Counsel for the parties, perused the record of the Trial Court and considered the matter.

09. The Apex Court in a case titled '**IDBI Trusteeship Services Ltd. v. Hubtown Ltd.**', reported as '**(2017) 1 SCC 568**', laid down the following principles for the discretion to be exercised by the Trial Courts in such cases:

“17.1. 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.

17.2. 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.

17.3. 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.

17.4. 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.

17.5. 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.

17.6. 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.”

10. The Hon'ble Supreme Court, again, in case titled '**Sudin Dilip Talaulikar v. Polycap Wires Private Limited & Ors.**', reported as '**(2019) 7 Supreme Court Cases 577**', held that the ultimate objective of a summary Suit is expeditious disposal of commercial disputes and, when

the defence discloses facts of *prima facie* fair and reasonable defence, unconditional leave has to be granted and it relates to the subjective satisfaction of the Court on the basis of the material that may be placed before it and when the Court is satisfied that the defence is plausible or probable and is not sham or moonshine, but still it has some doubt over the defence, then conditional leave may be granted to the Defendant. It was further observed by the Hon'ble Supreme Court in the aforesaid Judgment that in case of unconditional leave, subjective satisfaction of Court is involved, whereas in conditional leave, element of discretion vests with the Court. This discretion is not absolute, but is required to be exercised judiciously, tempered with what is just and proper in the facts and circumstances of the case by maintaining delicate balance between the respective rights and contentions by not passing an order which may ultimately impede speedy resolution of dispute.

11. The Apex Court, in a case titled '**M/S V. K. Enterprises & Anr. v. M/S Shiva Steels**', passed in Special Leave Petition (C) No. 25144 of 2009, decided on 4th of August, 2020, at Paragraph No.8, has held as under:

“8. Order XXXVII CPC has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted. What is required to be examined for grant of leave is whether the defence taken in the application under Order XXXVII Rule 3 CPC makes out a case, which if established, would be a plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence would have been plausible had it not been for the fact that the allegations relating to the interpolation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the issuance of the cheque had never been disputed on behalf of the Petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means.”

12. Looking at the instant case in the perspective of the law laid down above by the Hon'ble Apex Court, it is noticed that the Trial Court, while passing the impugned Judgment, had rejected the application of the Appellant/ Defendant, holding that the defence wished to be set up by the Appellant/ Defendant with regard to his forcible signatures on the *Hundi* and lodging of a police case were held to be trivial and, as such, the defence set up was recorded by the Trial Court to be moonshine, without calling for any plausible defence.

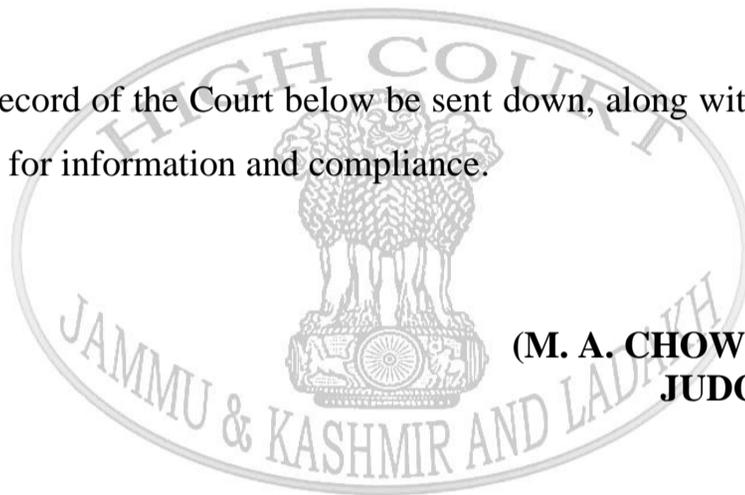
13. In the considered opinion of this Court, though the Appellant had not raised a clear-cut defence, however, the defence raised by him also did not seem to be moonshine and appeared to be a plausible defence, inasmuch as, he had raised the triable issues by submitting that he had been returning the loans raised from the Plaintiff/ Respondent herein, along with interest and that, lastly, against the loan of Rs.3.00 lacs that he had raised, he had made payment of Rs.2.70 lacs, meaning thereby that only an amount of Rs.30,000/- was outstanding towards the Plaintiff/ Respondent herein. The Appellant/ Defendant has also disputed the execution of the *Hundi* and alleged that his signatures had been obtained forcibly on this document by the Respondent/ Plaintiff and that he had lodged a police report in this behalf. All these contentions raised by the Appellant/ Defendant before the Trial Court, in the considered opinion of this Court, were plausible and, as such, he had raised triable issues. Insofar as the nature of permission is concerned, the Appellant, as Defendant, was entitled to a conditional leave, instead of unconditional leave, and it was within the competence of the Trial Court to grant him the said conditional leave. That being so, it appears that the Trial Court, while passing the impugned Judgment, has erroneously taken the view that there was no triable issue raised by the Appellant/ Defendant in his defence and, therefore, the same calls for interference by this Court, while exercising Appellate jurisdiction.

14. Having regard to the observations made hereinabove, coupled with the mandate of law as enunciated by the Hon'ble Supreme Court, the

instant appeal is **allowed** and the impugned Judgment and Decree passed by the learned Trial Court is set aside. The case is remanded back to the Trial Court for trying the Suit afresh, as a regular Suit. The Trial Court, however, shall grant a conditional leave to the Defendant/ Appellant herein, subject to its satisfaction, before proceeding further in the matter. Parties through their Counsel are directed to cause appearance before the Trial Court on 15th of February, 2024.

15. **Disposed** of, along with any connected CM(s) pending therewith.

16. Record of the Court below be sent down, along with a copy of this Judgment, for information and compliance.



(M. A. CHOWDHARY)
JUDGE

SRINAGAR

December 29th, 2023

"TAHIR"

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| i. | Whether the Judgment is speaking? | Yes. |
| ii. | Whether the Judgment is reporting? | Yes. |