

Devendra Kumar Jain Vs. G.N. Goyal

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Court : Madhya Pradesh

Decided On : Oct-14-2005

Reported in : AIR2006MP25; 2006(2)MPHT313; 2006(1)MPLJ472

Judge : K.K. Lahoti, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 14 - Order 37, Rules 2, 3, 3(5) and 3(6)

Appeal No. : W.P. No. 4236 of 2004

Appellant : Devendra Kumar Jain

Respondent : G.N. Goyal

Advocate for Def. : Rohit Arya, Sr. Counsel and ;Sanjay Lal, Adv.

Advocate for Pet/Ap. : Arvind Shrivastava, Adv.

Judgement :

ORDER

K.K. Lahoti, J.

1. Petitioner has assailed order dated 4-10-2004 passed by the 1st Additional District Judge, Bhopal in regular Civil Suit No. 3-B/2004 by which learned Judge has directed the petitioner to deposit Rs. 2,50,000/- in the Court.

2. This order has been assailed by the petitioner on following grounds :--

(i) That, the suit was filed under Order 37 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') and while granting leave to defend in the case, no such condition was imposed by the trial Court. Then, at the time of hearing of summons for judgment, the trial Court cannot direct the petitioner to deposit the suit amount.

(ii) That, in the case the stage of passing such an order was under sub-rule (6) of Rule 3 of Order 37 CPC which provides only furnishing of security and not payment of suit amount. In these circumstances, impugned order deserves to be quashed.

3. Learned Counsel appearing for respondent supported the order and submitted :--

(a) That, though under sub-rule (5) of Rule 3 of Order 37 CPC, the trial Court granted leave to defend unconditionally even then at the time of hearing of summons for judgment, the Court is empowered to direct the defendant to deposit the amount. The suit is filed under Order 37 CPC which is a summary suit and the trial Court was empowered at that stage to direct the defendant to deposit the amount.

(b) The power has been exercised under Order 37 C.P.C. and the Court is to see whether there is any triable issue. If the Court at the time hearing of summons for judgment finds that there is any triable issue, it can direct the defendant to deposit entire suit amount. The defendant has challenged the order just to delay the proceedings and if the amount is not deposited as directed by the trial Court, filing of suit under Order 37 CPC will be frustrated.

4. To consider the rival contentions of the parties, facts of the case may be seen. The petitioner is a practising advocate at Bina, District Sagar. Respondent was judicial officer, holding an office as Additional District Judge and has retired from the service in the year 1994. Thereafter, he started practising at Bhopal. Respondent filed a suit under Order 37 CPC against the petitioner. It is registered

as Civil Original Suit No. 2-B/2004 and is pending before 9th Additional District Judge, Bhopal. A summons, as required in form No. 4 in Appendix B was issued to the petitioner and the petitioner caused his appearance. Thereafter, plaintiff served on the defendant a summons /or judgment in form No. 4A in Appendix B. The defendant within time prescribed under sub-rule (5) of Rule 3 filed ground of defence and sought leave of the Court to defend the suit. The trial Court by order dated 16-7-2004 Annexure P/5 found that the defendant has shown a plausible defence and granted leave to defend unconditionally and the case was fixed for filing written statement on 29-7-2004. Thereafter, plaintiff filed an application under sub-rule (6) of Rule 3 of Order 37 CPC praying to the Court that the defendant be directed to deposit decretal amount by way of a security in the Court. The trial Court by the impugned order allowed the application on the ground that the defendant who is senior advocate has admitted his signature on the promissory note and relying on the judgment of the Apex Court In Rajesh Ahuja v. Manoj Mittal AIR 1998 SC 2931 directed the defendant to deposit Rs. 2,50,000/-, the amount of two promissory notes, in the trial Court. This order is under challenge in this case.

5-6. To appreciate rival contention of the parties, it is necessary to look into the relevant provisions, sub-rules (5) & (6) of Rule 3 of Order 37 C.P.C. which are quoted as hereinunder :

Rule (5) -- 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 defence to raise or that the defence 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.

Rule (6) At the hearing of such summons for judgment--

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

7. Under sub-rule (5), on seeking leave to defend, on disclosing such facts as may be sufficient to defend the suit, the trial Court is empowered to grant, leave unconditionally or on such terms as may appear to the Court to be just. This rule further provides 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. In this case it is not in dispute that prayer for leave to defend was considered by the trial Court and unconditional leave was granted. The said order dated 16-7-2004 (Annexure P/5) was not challenged by the plaintiff. After that stage, plaintiff filed an application under sub-rule (6) of Rule 3 of Order 37 CPC for directing the defendant to deposit the amount of promissory notes by way of security. Clause (b) of sub-rule (6) provides that if defendant is permitted to defend as to the whole or any part of the claim, Court may direct him to give such security within such time as may be fixed by the Court, and on failure to give such security within the time specified by the Court, the plaintiff shall be entitled to judgment forthwith. Now the question remains whether the defendant may be directed to deposit the amount of promissory note by way of security.

8. The Apex Court in *Mrs. Raj Duggal v. Ramesh Kumar Bansal* AIR 1990 SC 2218 considering the scope of Rule 2 of Order 37 CPC held thus :--

3. Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.'

4. On a consideration of the material in this case -- we have looked into the defence sought to be raised and the criminal complaint earlier lodged -- we think that a triable issue arises. In the analogous provisions of Order 14 of the Rules of Supreme Court in England it was held that where the defence can be described as more than 'shadowy' but less than 'probable' leave to defend should be given (See pages 146 and 147 of the Supreme Court Practice, 1988).

In the present case the leave to defend was granted by the trial Court unconditionally and the plaintiff has not challenged the said order. In *Rajesh Ahuja's case*, : AIR 1998 SC2931 (supra), the Apex Court held :--

2. Having heard the learned Counsel for the parties we are not inclined to interfere with the grant of leave to defendant, but we are of the opinion that the terms on which leave has been granted should be modified. We are informed that the sum of Rs. 10 lacs has already been deposited in case by the respondent herein with the High Court against the entire claim in the suit while security has been offered for the amount of Rs. 10 lacs. We modify the condition of grant of leave and direct the defendant/respondent to deposit a further sum of Rs, 10 lacs in the High Court.

The entire amount of Rs. 20 lacs would be kept in fixed deposit so that it is available for being paid to the successful party as a result of the decision of the trial Court. On deposit of the balance amount of Rs. 10 lacs in the High Court within 8 weeks, the documents for the purpose of security furnished by the defendant/ respondent in the High Court would be returned to the defendant/respondent. The appeals are disposed of accordingly.

Aforesaid judgment also relates to the stage where leave to defend was prayed by the defendant and it was granted conditionally on depositing Rs. 10 lacs and giving security for a similar amount. The Apex Court modified the order of furnishing security of Rs. 10 lacs and directed that the entire amount of Rs. 20 lacs be deposited which shall be kept in fixed deposit. But the facts of the present case are different. In this case the stage of leave to defend has already passed and the Court has passed the aforesaid order under sub-rule (6) of Rule 3 of Order 37 CPC. Under sub-rule 16) of Rule 3, the Court is empowered to direct the defendant to furnish security of the suit amount. But in this case the trial Court has directed to deposit amount of two promissory notes by way of security in the case. The Court while granting leave to defend has considered the merits of defence and had permitted the defendant to defend the case unconditionally. In aforesaid circumstances, if the Court directed the defendant to deposit entire amount of two promissory notes by way of security, it is to be seen whether it is within the purview of sub-rule (6) or not? The word 'security' which is used in Order 37 relates to the security of the amount. This word cannot be stretched to the extent that in the garb of security, defendant may be directed to deposit the suit amount. When the legislature used the word security only without any qualification or giving any option to the Court to direct the defendant to deposit the amount then the security has to be constituted in restricted sense. If the word security is stretched to the extent of direction to deposit the amount by way of security, then the entire purpose of sub-rule (6) of Rule 3 of Order 37 CPC shall be frustrated. The Court examined the case of the defendant at the time while the Court was granting leave to defend to the defendant. On second occasion when the Court was considering the application filed by the plaintiff cannot go back to 'the stage of granting leave to defend and only has to consider the case in respect of the direction to furnish security. In this case the word security has to be interpreted in the reference,

which can be explained only security is in respect of the suit amount and not beyond it. If at the stage when the Court has already granted leave to defend then at the time of considering the case for judgment if the defendant is directed to deposit the entire suit amount or the amount of promissory notes, then grant of leave to defend unconditionally shall become redundant. In these circumstances, security can be considered only in respect of securing payment of suit amount and not beyond it./In these circumstances, the trial Court erred in directing the petitioner to deposit the entire amount of promissory notes by way of security in the case. Impugned order passed by the trial Court deserves to be modified.

9. Consequently, this petition is allowed in part. It is directed that the petitioner shall furnish security to the satisfaction of the trial Court for Rs. 2,50,000/-. The order of the trial Court directing to deposit; the amount of promissory notes is hereby set aside. Accordingly, impugned order passed by the trial Court is modified/No order as to costs.

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