

inderjit Sehdev Vs. Ram Singh

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Court : Delhi

Decided On : Jan-22-1980

Reported in : AIR1980Delhi97; 18(1980)DLT82; 1980RLR410

Judge : Charanjit Talwar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 37

Appeal No. : Civil Revision Appeal No. 380 of 1979

Appellant : inderjit Sehdev

Respondent : Ram Singh

Advocate for Pet/Ap. : A.K. Mata and; M.L. Bhargav, Advs

Judgement :

Charanjit Talwar, J.

(1) In this revision petition the petitioner challenges the order of the learned Subordinate Judge refusing leave to the defendant to defend the suit filed by the plaintiff for recovery of Rs. 3,100.00. The suit had been filed under O. 37 of the Civil P.C. on the plea that the defendant issued a cheque for Rs. 3000.00 on 7/07/1978, in full and final settlement to the plaintiff who is a building contractor, after the completion of the house of the defendant which cheque, on presentation on 15/07/1978 was dishonoured and as per the endorsement by the bank it was

referred to the drawer. The defense taken on merits by the defendant in his application was that on 7/07/1978 when the cheque in question was issued to the plaintiff he had still to complete the building work to the tune of about Rs. 4,000.00. The said cheque for Rs. 30,000.00 had been paid on account by the defendant to the plaintiff on the undertaking that the unfinished work would be completed by 15/07/1978 and that the cheque was not to be presented till the work was completed. -In support of his plea that some work was still outstanding, an agreement giving the details of the outstanding work signed on 15/07/1978 had been annexed with the application seeking grant of leave.

(2) The learned Trial Court, while rejecting the application seeking leave to defend the suit, had found that the cheque in question was issued by the defendant for the work already done by the plaintiff. On the defense raised in the application, it has been observed :

'I find that the story made by the defendant-applicant is an afterthought and merely just to avoid the payment as there is no substance or merit in it and therefore the application is liable to be dismissed'.

(3) Only two questions arise for consideration in this revision petition. Firstly, whether the order refusing leave to defend in a suit filed under O. 37 of the Civil P. G. can be revised under S. 115 of the Civil P. G. and secondly whether the Trial Court has exercised its jurisdiction illegally or with material irregularity in refusing to give leave to the defendant.

(4) In *Shri Krishan Bhardwaj v. Manohar Lal Gupta*, : AIR 1977 Delhi 226 , a Division Bench of this Court has answered the first question in the affirmative. The conflict of opinion in this Court has now been authoritatively resolved. Prakash Narain, J., speaking for the Division Bench, after analysing the amended provisions of S. 115 of the Civil P.C., held that revision petition was competent against an order refusing to grant leave to appear and defend the suit although consequent to the impugned order a decree had to follow. It was further held that the view of D.K. Kapur, J. in Civil Revn.No. 355 of 1973 (Delhi) (*Ramesh Chander Jain v. Sarvedeshik Arya Pratinidhi Sabha*), that a decree having been passed, the order refusing to appear and defend could not be revised, was not correct.

(5) It has been brought to my notice that D.K. Kapur, J. in a judgment reported in *Khem Chand v. Hari Singh*, : AIR 1979 Delhi 7, has held that the provisions of Sub-section (2) of S. 115 of the Code prohibit interference in Revision if an appeal against order or decree sought to be reversed lies to the High Court or any Court Subordinate thereto. In the said case also leave had been refused to the defendant to defend the suit filed under O. 37 of the Code and consequently a decree for Rs. 7,000.00 with costs had been passed. A revision petition had been filed challenging the composite order decreeing the suit while refusing to grant leave to the defendant to appear and defend the suit. It appears from the reported judgment of D. K. Kapur, J. that the Division Bench authority of this Court had not been brought to his notice. I am bound to follow the Division Bench authority and accordingly hold that the present revision petition is maintainable.

(6) The principles which have to be followed while considering an application seeking leave to appear and defend the suit, are well-settled. Their Lordships of the Supreme Court in *Mechalec Engineers & Manufacturers v. Basic Equipment Corporation*, 0043/1976 : [1977] 1 SCR 1060 have re-affirmed them in paragraph 8 of their judgment. One of the propositions approved by their Lordships is as under :

'(E) If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to judgment, the Court, may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defense.'

(7) The finding by the Trial Court that the story put forth by the defendant was an afterthought and merely to avoid payment and that the defense raised had no substance or merit in it, even if upheld, is a defense which is covered by the proposition quoted above. The defense may seem to be illusory or sham or practically moonshine still the defendant can be granted leave on terms. I agree with Mr. Bhargava, learned counsel for the defendant, that on dishonouring of the cheque no reply to the notice sent by the plaintiff had been given by the defendant. The cheque was obviously dishonoured as the defendant did not have sufficient

funds in the bank and that is why the endorsement on the memo by the bank is, 'Referred to drawer.' Nevertheless, the defense being put forth that the amount of the cheque was on account and the writing of 15/07/1978 is a proof of the said fact, may seem to be illusory but the defendant in the facts of the present case ought to be enabled to prove it. I accordingly grant leave to the defendant to appear and defend the suit on the condition that he furnishes a bank guarantee for Rs. 3,000.00 in the Trial Court within a month from today.

(8) The result is that the impugned order dated the 5th of May, 1979 consequent decree for Rs. 3,000.00 in favor of the plaintiff (respondent herein) and against the defendant (petitioner herein), are set aside but with no order as to costs. Parties to appear before the Trial Court on 7th Feb., 1980.

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