

Neeta Agarwal Vs. R.L. Gupta

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Court : Delhi

Decided On : Aug-31-2001

Reported in : 95(2002)DLT167

Judge : Mahmood Ali Khan, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 37, Rules 3 and 3(5); Sales of Goods Act - Sections 41 and 42; Industrial Disputes (Central) Rules, 1957 - Rule 76A(2); [Industrial Disputes Act, 1947](#)

Appeal No. : C.R. No. 1012/2001 and CM 2134/2001

Appellant : Neeta Agarwal

Respondent : R.L. Gupta

Advocate for Def. : Nemo

Advocate for Pet/Ap. : B.L. Wali and T.R. Kukreja, Advs

Disposition : Petition dismissed

Judgement :

Mahmood Ali Khan, J.

1. This civil revision is directed against an order of a Civil Judge dated 20.7.2001 by which he has allowed the application of the respondent/defendant and has

granted him leave to defend the suit unconditionally.

2. Briefly the facts are that the petitioner/plaintiff filed a civil suit for recovery of money under the Summary Procedure under Order 37 CPC. The summons was served on the defendant who put in appearance in time. The petitioner submitted an application for judgment. In response, the defendant submitted an application for leave to defend the suit which has been allowed unconditionally by the order impugned in this petition.

3. The averment of the petitioner in the suit is that he supplied fabric to the respondent/defendant and the respondent issues six cheques of various denominations as mentioned in para-2 of the plaint to discharge his liability. The first four cheques were presented to the bank but only one of them had been encased and the remaining three were returned on account of insufficiency of funds. The petitioner informed the respondent about the dishonour of the cheques. The respondent then approached the petitioner for grant of one month's time for making the payment. After one month when the petitioner tried to encash the cheque, she learnt that there was no sufficient balance in the account of the respondent. The petitioner again informed the respondent and demanded payment but to no effect. As a result a notice of demand dated 19.8.2000 was served on the respondent which had not been complied with. Even personal contact did not bear fruit. She filed suit for recovery of Rs. 2,75,000/- as the balance price of the goods supplied with pendente lite interest @18% per annum from the date of the filing of the suit to the date of recovery of the decretal amount.

4. The respondent filed an application for leave to defend under Order 37 Rule 3 CPC duly supported by an affidavit. The respondent admitted the supply of the fabric by the petitioner and issuance of six cheques by him. But he contended that the goods was defective and of inferior quality, therefore, he returned the goods to the petitioner against challans, as such, the cheques issued by him were without consideration. He gave the details of the challans by which the fabrics supplied by the petitioner was returned to the petitioner. He further alleged that after the return of the fabric, the petitioner assured that all the six post-dated cheques would be returned but the fraudulently and illegally encased one of those

cheques for Rs. 75,000/-. The respondent orally requested the petitioner for return of the cheques but to no effect. The respondent by letter dated 30.11.1999 demanded the return of the cheques and also the amount of Rs. 89,080/-. The letter was sent under certificate of posting to the petitioner.

5. The learned Civil Judge considered the defense raised in the application and the affidavit filed by the defendant and came to the conclusion that the case set up in defense raises triable issues and if the allegations made are proved, they would non-suit the plaintiff. So, he granted leave to defend unconditionally.

6. The petitioner is aggrieved and has filed the present petition.

7. The argument of the counsel for the petitioner is that the defense raised by the respondent was sham and bogus and even if he was granted leave to defend, it should have been granted conditionally on deposit of the amount claimed in the suit. Against the supply of the fabric six cheques were given by the respondent one of which encased and remaining five could not be encased because the respondent had no sufficient funds in the account. The notice of demand was also served on the respondent but no reply was given by him. Issue of letter dated 30.11.1999 and its service on the petitioner is not proved since only a certificate of posting has been submitted and that the certificate of posting is not a reliable document. The respondent had filed the copies of the challans by which he allegedly returned the goods but it did not bear the signature of the petitioner or any employee of the petitioner and therefore, they are false and fabricated documents. The respondent could not have remained silent all through this period and as a prudent man he should have informed the petitioner that the goods was defective or was of inferior quality immediately after the goods was received by him. The counsel for the petitioner lastly contended that he had referred to case law but the same was not discussed by the court in its order. He cited *Shah Mohanlal Manilal v. Firm running in the name of style of Dhirubhai Bavajibhai* : AIR1962 Guj56 ; *Shiv Kumar and Ors. v. State of Haryana and Ors.* : (1995)ILLJ 1162 SC ; *M.D. International Inn and Anr. v. K.L. Sethi* : 44(1991)DLT439 ; *Premier Exports v. Hindustan Cold Storage and Ors.* 89 (2001) DLT 2012; *Maruti Udyog Limited v. Hi-Q International* : 63(1996)DLT481 ; *KIG Systel Ltd. v. Fujitsu*

ICIM Ltd. : AIR2001 Delhi357 in support of his argument.

8. The counsel for the petitioner has also contended that what should be examined at the stage of the grant of leave to defend is whether there was a real or a sham defense and whether the facts alleged by the petitioner, if established, would be a good defense and not sham and vexatious and raised in order to prolong the litigation. It is submitted that a condition as to the security at least should be imposed by the court in the facts and circumstances of the case so that an unscrupulous person does not get premium by raising false defense.

9. The provision which is relevant for the grant of leave to defend is contained in order 37 Rule 3(5) which is reproduced as under:-

'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 be 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 defense to raise or that the defense 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.'

10. Recently the Hon'ble Supreme Court in Sunil Enterprises and Anr. v. SBI Commercial & International Bank Ltd. : AIR 1998 SC2317 examined the judgment of the Apex Court in Santosh Kumar v. Bhai Mool Singh : [1958]1SCR1211 , Milkhiram (India) (P) Ltd. v. Chamanlal Bros. : AIR 1965 SC1698 and Mechelec Engineers & Manufacturers v. Basic Equipment Corporation 0043/1976 : [1977]1SCR1060 in which the position in law on the question of leave to defend

under this provision was explained. The Supreme Court then summarised the propositions laid down in these judgments as follows:-

'(a) If the defendant satisfies the court that he has a good defense to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense, although not a possibly good defense, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defense to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend - the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defense, or if the defense is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defense but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.'

11. The defendant is, as such entitled to leave to defend unconditionally if he has a good defense, a fair or bonafide or reasonable defense, or raises a triable issue. But if the defendant has (1) no defense at all; or (2) defense is sham; or (3) illusory and practically moonshine he will not be entitled to the leave. In case the defense raised is plausible and may be established by evidence adduced during trial the leave may still be granted putting conditions as to time of trial or mode of trial but not on deposit of such amount or furnishing security. Even where the defense put forward by the defendant seems illusory or sham or practical moonshine, in appropriate cases depending upon the peculiar facts the leave may be granted to the defendant to prove his case imposing condition as to the security either by deposit of the amount claimed in the suit in the court or it is otherwise secured.

12. In the light of the principles of law enunciated by the Supreme Court, let us now examine whether the defense put forward by the defendant in this case is no defense at all or it is so illusory and sham and vexatious that he should be deprived of his right to prove his defense by producing evidence. In the affidavit filed for leave the respondent has pleaded that the goods on examination was found to be of inferior quality, so, it was not accepted by him. It was returned by him to the petitioner under challans and receipt of goods was duly acknowledged by signature on the challans made on behalf of the petitioner. He also deposed in affidavit that the petitioner in breach of the understanding between them got one cheque of Rs. 75,000/- encased and illegally withheld the remaining five cheques. He also pleaded that the petitioner was duly informed of the defective nature of the goods and she was also asked to return and cheques to the petitioner by letter dated 30.11.1999, instead she filed this suit. Can on the basis of the facts pleaded by the respondent it be said that he had no defense against the claim of the petitioner. At this stage the court will not scrutinise the case of the respondent minutely in the manner it examines the case after the parties are afforded full opportunity to adduce their evidence. The defense which has been set up by the respondent to the claim of the petitioner is substantial and it cannot be by any stretch of reasoning be considered to be sham or vexatious or frivolous or no defense at this stage. The petitioner, therefore, cannot be denied opportunity to defend the suit. In fact, the counsel for the petitioner has only half-heartedly pleaded that the leave should be refused. His argument, in substance, is that it should have been granted by the trial court with condition of deposit of suit amount in the court or on furnishing bank guarantee.

13. The principles of law which has been evolved in various judgments of the Supreme Court and which have been summarised by the Apex Court in the above cited case of Sunil Enterprises and Another(supra) when applied to the facts of the present case leave in no doubt that the petitioner was entitled to leave to defend in this case unconditionally. The contention of the petitioner that the goods were not returned and also the fact the challan by which the goods is alleged to have been returned are forged and fabricated document and do not bear signatures of his employee are the questions which needs evidence before decision thereon.

14. Counsel for the petitioner has drawn my attention to Sections 41 and 42 of the Sales of Goods Act and *Shah Mohanlal Manilal v. Firm running in the name of style of Dhirubhai Bavajibhai* (supra) while advancing argument that the respondent did not return the goods promptly and allowed one of the six cheques issued by him as sale consideration encased and he also did not serve notice on the petitioner immediately regarding the defect in the goods supplied or its non-acceptance by it, thereforee, the petitioner shall be deemed to have accepted the goods and now cannot turn around and plead that the goods was not accepted by him. Section 41 gives right to a buyer of goods to examine the goods in order to ascertain whether it is in conformity with the contract. Section 42 is a deeming provision which says that the goods shall be deemed to have been accepted by the buyer if the buyer does any which is inconsistent with the ownership of the seller. The judgment in *Shah Mohanlal Manilal* (supra) has explained the scope and ambit of these provisions. The question whether the petitioner did some act which is inconsistent with the ownership of the petitioner is a matter of evidence. The effect of Section 41 and 42 of Sale of Goods Act on the transaction between the parties may be examined only after the full facts are proved on the record in view of the pleas of respondent and documents filed bin support. thereforee, the judgment cited does not help the petitioner at this stage.

15. Counsel for the petitioner has argued that the certificate of posting is a very weak proof of the dispatch of the letter which the respondent had allegedly sent to the petitioner on 30.11.1999. He sought support from the observation made in by the Supreme Court in *Shiv Kumar and Ors. v. State of Haryana* (supra). The case cited was under [Industrial Disputes Act, 1947](#). A notice of retrenchment was sent by the management under postal certificate. The Apex Court observed that Rule 76A(2) of Industrial Disputes (Central) Rules, 1957 required that the application shall be made in Tribunal and the copy of the same shall be served by the employee on the workmen concerned and 'proof to that effect shall also be submitted by the employer along with the application'. It was noticed that the said application had not mentioned anything about 'proof of the service to the workmen concerned'. It was in these circumstances that the court held that it was not safe to rely upon the certificate of posting because it was not difficult to get such postal seals at any point of time. thereforee, the observations about postal certificate

made in the cited judgment were in the peculiar facts of that case and they can be extended to the present case without the respondent being given a chance to prove the service of the notice dated 30.1.1999.

16. Regarding other case law cited by the counsel for the petitioner M/s. M.D. International Inn & another (supra), Premier Exports (supra), Maruti Udyog Limited (supra) had taken into consideration the principles of law enunciated by the Apex Court in its various judgments, in particular Mechelec Engineers & Manufacturers v. Basic Equipment Corporation (supra) and, therefore, need not be discussed in detail as the judgment of Apex Court in Sunil Enterprises and Another (supra) has summarised all these judgments.

17. For the reasons stated above, I do not find any error of jurisdiction or illegality or material irregularity in exercise of the jurisdiction by the trial court warranting interference to the impugned order. The petition is accordingly dismissed in limine.

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