

M.D. Overseas Ltd. Vs. Uma Shankar Kamal Narain and ors.

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Court : Delhi

Decided On : Jan-09-2006

Reported in : AIR2006Delhi361; 127(2006)DLT482; 2006(86)DRJ769

Judge : Badar Durrez Ahmed, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 6 and 138; Indian Penal Code (IPC) - Sections 406, 409 and 420; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 37, Rules 1, 1(2) and 3(5)

Appeal No. : CS (OS) No. 1040/2000

Appellant : M.D. Overseas Ltd.

Respondent : Uma Shankar Kamal Narain and ors.

Advocate for Def. : Dveep Ahuja, Adv.

Advocate for Pet/Ap. : Mahinder Rana, Adv

Judgement :

Badar Durrez Ahmed, J.

IA No. 3710/2003

1. This is an application filed under Order xxxv II Rule 3(5) of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') on behalf of defendants No.

1 & 2 seeking leave to defend. The plaintiff had filed this suit under Order xxxv II Rule 1 based upon four cheques which had been issued by the defendant No. 2 in favor of the plaintiff. The averments contained in the plaint disclose that the plaintiff is engaged in the Import & Export of Precious metals. The defendants No. 1 and 2 are in the jewellery business. It is averred that the plaintiff and the said defendants have had dealings for some time and they have a running account between them. Defendant Nos. 3 & 4 were directed to be deleted from the array of parties by an order of this Court on 14.11.2005. The reason being that the defendant No. 1 is not a partnership firm as alleged in the plaint but a proprietorship concern of which the defendant No. 2 is the sole proprietor.

2. It is the plaintiff's case that the defendant Nos. 1 & 2 placed an order upon the plaintiff for supply of gold bars totaling 700 tolas. According to the plaintiff, these 700 tolas of gold bars were supplied to the defendants No. 1 & 2 in terms of their Bill No. MDO/Gold/1426/1999-2000 dated 28.09.1999 and Bill No. MDO/Gold/1427/1999-2000 dated 28.09.1999. The first bill was in respect of 500 tolas of gold and the amount of the bill was Rs. 26,05,738/-. The second bill was in respect of two sets of 100 tolas of gold each for a total amount of Rs. 10,47,310/- (Rs.5,24,180/- for one lot of 100 tolas and Rs. 5,23,130/- for the other lot of 100 tolas.). In respect of the said transaction some additional expenses were also charged for amounting to Rs. 350/- only. Upon receipt of the said gold the defendants and, in particular, defendant No. 2, issued four cheques all dated 28.09.1999 drawn on Central Bank of India, Chandni Chowk, New Delhi. The cheque numbers and the amounts are as under:-

S.No.	Cheque No.	Amount
1.	793865	26,05,738/-
2.	793866	5,24,180/-
3.	793867	5,23,130/-
4.	793877	350/-
Total: 36,53,398/-		

3. From the above table it becomes clear that the four cheques issued by the said defendants were for a total amount of Rs. 36,53,398/-. The plaintiff presented these cheques to its bankers. However, all these cheques were returned by the bank to the plaintiff with the remark 'Payments stopped by drawer' vide the Bank Memo dated 01.10.1999. The present suit is based upon these four cheques. The

plaintiff has claimed a sum of Rs. 39,30,856/- on account of recovery of the total amount of the said four cheques being Rs. 36,53,398/- plus a sum of Rs. 2,77,458/- by way of interest from 29.09.1999 to 29.02.2000 @18% per annum. The plaintiff has also prayed for pendente lite interest and future interest as well as costs of the present suit.

4. In the leave to defend application filed under Order XXVII Rule 3(5) as well as the affidavit of defendant No. 2 filed along with the said application, the defendants have come up with a case that the present suit is a counter blast to a recovery Suit No. 291/2000 and a complaint under Sections 406, 409 and 420 of the Indian Penal Code filed on 30.01.2000 by the defendant No. 2 against the plaintiff. It is also the case of the defendants that this entire story of supply of gold by the plaintiff to the defendants has been pleaded for the first time in the suit and does not find mention in the complaint case under Section 138 of the [Negotiable Instruments Act, 1881](#) initiated by the plaintiff in respect of these very four cheques which form the subject matter of the present suit. It is contended by the defendants that the defendant No. 2 issued four postdated cheques (dated 28.09.1999), in advance, on 27.09.1999 to bind the plaintiff at the settled rates as per their earlier practice. It is then contended by the defendants that there was an unexpected steep hike in gold prices after 27.09.1999 and as a result of the steep hike, the plaintiff back - tracked from its commitment for supplying the gold at the settled rates. As the supply of the gold had not been affected by the evening of 27.09.1999, the defendant No. 2 was compelled to issue 'Stop Payment' instructions to its bank, allegedly under intimation to the plaintiff. It is further contended by the defendants that far from the said amount of Rs. 36,53,398/- being recoverable from the defendants, it was the defendants who were entitled to recovery of a sum of Rs. 16,05,738/- on account of a demand draft issued by the defendants on 05.10.1999 to the plaintiff on the alleged intervention of well wishers of the parties when the plaintiff assured to supply the gold at settled rates. As the plaintiff, allegedly, did not supply the gold to the defendant No. 2, the latter was constrained to file the recovery suit No. 291/2000 and the present suit is a counter blast to that suit. thereforee, according to the defendants a clear case for the grant of unconditional leave to defend has been made out by them. The learned counsel for the defendants referred to the decision of the Supreme Court

in the case of Sunil Enterprises and Anr. v. SBI Commercial & International Bank Ltd. : AIR 1998 SC2317 . In that case, the Supreme Court, after considering its earlier decisions in Santosh Kumar v. Mool Singh (1958) SCR 211; Milkhiram (India) Private Ltd. v. Chaman Lal Bros. : AIR 1965 SC1698 , and Michalec Eng. & Mfg. v. Bank Equipment Corporation 0043/1976 : [1977]1SCR1060 , summed up the position with regard to the question of grant of leave to defend as under:-

(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 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.

5. The learned counsel for the plaintiff, however, submitted that the entire case as attempted to be set up by the defendants is sham and illusory and, therefore, the defendants were not entitled to the grant of leave to defend and the suit is required to be decreed straightaway. In support the learned counsel for the plaintiff relied upon the following decisions:-

1. Hindustan Apparel Industries v. Fair Deal Corporation, New Delhi AIR 2000 Guj 261 (Full Bench)

2. Universal Music India Limited v. Subodh Garg : 111(2004)DLT239

3. Hindustan Wires Ltd. v. Ralson Industries Ltd. : 90(2001)DLT747

6. Before I examine the merits and demerits of the arguments advanced by the learned counsel for the parties, it would be necessary so examine the provisions. Order xxxv II Rule 1(2), subject to the provisions of sub-rule (1), applies to the following classes of suits namely:-

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising, _

(i) on a written contract, or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

7. Examining the above provision carefully one finds that there are two classes of suits, one based upon bills of exchange, hundies and promissory notes and the other, where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest. The latter class of suits is also not open ended and it is restricted to suits where the debt or liquidated demand arises (1) on a written contract or (2) on an enactment or (3) on a guarantee. Examining the facts of the present case in the light of this provision, it becomes clear that the present suit does not fall within the second class of suits. There is no written contract, there is no debt recoverable or liquidated demand based upon an enactment nor is there any debt or liquidated demand based upon a guarantee. The present suit, therefore, clearly, falls within the first class of suits i.e., suits upon bills of exchange, hundies and promissory notes. Section 6 of the [Negotiable Instruments Act, 1881](#) makes it clear that a cheque is a bill of exchange. The present suit is based entirely on the four cheques referred to above

and, therefore, is covered in the first class of suits referred to in Order xxxv II Rule 1(2).

8. The next provision that needs some consideration is sub rule 5 of Rule 3 of Order xxxv II. The same reads as under:-

(3) Procedure for the appearance of defendant:

(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 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.

9. Upon a bare reading of the aforesaid Rule, it becomes clear that in order to entitle the defendant to the grant of leave to defend, the defendant must, by affidavit or otherwise, disclose such facts as may be deemed 'sufficient' to entitle him to defend. It is also clear 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'. The exact principles for the grant of leave, conditional and unconditional, and refusal of leave to defend have been summarized by the Supreme Court in the case of Sunil Enterprises (Supra) as already indicated above. The question, therefore, is whether the defendants have a defense and if they have disclosed facts raising a defense, such defense is not

frivolous or vexatious. Examining the claim by the plaintiff and the defense sought to be raised by the defendants two things are absolutely clear. One, the defendant No. 2 issued the said four cheques dated 28.09.1999 for a total amount of Rs. 36,53,398/- in favor of the plaintiff; two, the plaintiff did not get the payment represented by the said four cheques inasmuch as the cheques were returned with the bank memo of 01.10.1999 indicating that the payment had been stopped by the drawer. If matters were to rest here, the plaintiff would have an open and shut case inasmuch as the defendant had issued the four cheques in favor of the plaintiff and that before the payments could be realised by the plaintiff, the defendant had issued instructions stopping payment under the four cheques. But, one has to examine the Explanationn given by the defendant for stopping the payment to the plaintiff. The defendants have built up a story that these cheques were actually issued on 27.09.1999 and to that extent were postdated to bind the plaintiff to the settled rates of gold. However, allegation goes further, there was an unexpected hike in gold prices on 27.09.1999 and, thereforee, the plaintiff's intentions turned bad. As the plaintiff did not supply the gold by the evening of 27.09.1999, the defendant No. 2 was compelled to issue stop payment instructions. This story does not appear to be plausible. If the cheques were postdated as alleged by the defendants how could the defendants expect delivery on 27.09.1999 itself? What is even more intriguing is the defendants' claim for recovery of Rs. 16,05,738/-. I am not making any comments on that claim inasmuch as it is the subject matter of a suit being Suit No. 291/2000 but I am unable to understand as to why the defendant No. 2 would have issued a demand draft of an additional amount of Rs. 16,05,738/- in favor of the plaintiff when, as per the defendants, no gold whatsoever had been supplied by the plaintiff to the defendants. Moreover, the gold that was supposedly not supplied was to an extent of 700 tolas whereas the sum of Rs. 16,05,738/- was against two sets of gold bars of 250 tolas and 50 tolas respectively as indicated in Bill No. MDO/Gold/1427/1999-2000 dated 01.10.1999. This alleged payment of Rs. 16,05,738/- has no connection whatsoever with the gold weighing 700 tolas which was earlier transacted between the parties. thereforee, the entire story as set out in the application and the affidavit in support of the application for leave to defend purports to set up a defense which, I am satisfied, is frivolous and vexatious.

Keeping in view the principles as laid down by the Supreme Court in the case of Sunil Enterprises (Supra) and the express provisions contained in Order xxxv II Rule 3(5) of the Code of Civil Procedure, I am of the view that the defendants are not entitled to the grant of leave to defend.

10. The defense that is raised by the defendants is a moonshine defense and the same is raised only for the purposes of delaying payment of the amount which is due and payable to the plaintiff. As I have refused to grant leave to defend to the defendants, the plaintiff is entitled to a decree in its favor straightaway for recovery of the amount of Rs. 39,30,856/- along with interest @ 12 % per annum thereon from the date of the suit till realisation. The plaintiff is also entitled to costs. The decree sheet be prepared accordingly.

11. This application as well as the suit stand disposed of.

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