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M.P. No. 1850/2017

**HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE**

**Misc. Petition No.** : 1850/2017

**Parties Name** : M/s Rajsai Traders & others  
-Versus-  
Vinod

**Bench Constituted** : Hon'ble Shri Justice J.K.Maheshwari

**Judgment delivered by** : Hon'ble Shri Justice J.K.Maheshwari

**Whether approved for reporting** : Yes

**Name of counsel for the parties:**

**For the appellant :**

Shri Paresh Joshi, Advocate for the appellants.

**For the respondent/State :**

Shri Vishal Baheti, Advocate for the respondent.

**Law laid down:**

- After the stage of Order XXXVII Rule 3(4) of the CPC, first stage is to seek leave from the Court under Rule 5 and if the said leave is granted permitting the defendants to defend unconditionally or on such terms as appear to be just, sub-rule (6) of Rule 3 of Order XXXVII of the CPC would attract "at the hearing of such summons for judgment". In case leave not applied or refused at the stage of hearing of such summons, the judgment forthwith may be pronounced but in case leave to defend is permitted for whole or part of the claim, the Court or Judge may direct him to give such security within such time as may be fixed. In case of violation of the same, the plaintiff shall be entitled to the judgment forthwith.
- Grant of leave to defend unconditionally or upon such terms and conditions may be ordered under sub-rule (5) of Rule 3 as appear to the Court or Judge as just but in case, it is required to be refused then the Court ought to specify that the defence as disclosed by the defendant cannot be said to be substantial defence to raise or the defence intended to be put by the defendant is frivolous or vexatious.
- The application for furnishing the security may be tenable but it ought to be granted at the time of hearing of the summons for judgment when the Court is satisfied that the claim of the plaintiff shall be defeated if the order of furnishing the security is not passed indicating the circumstances to exercise such discretion or the defendants would abscond to satisfy the decree which may be granted in the case.

**Significant Paragraph Nos. : 13, 17, 19, 20, 21**

**HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE**

**(Single Bench : Hon'ble Shri Justice J.K.Maheshwari)**

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**Miscellaneous Petition No. 1850/2017**

M/s Rajsai Traders & others

-Versus-

Vinod

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Shri Paresh Joshi, Advocate for the appellants.

Shri Vishal Baheti, Advocate for the respondent.

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**Arguments heard on : 20.02.2018**

**Order passed on : 02.04.2018**

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**ORDER**

1. Invoking the jurisdiction under Article 227 of the Constitution of India and challenging the order dated 1.12.2017 passed by the Eighth Additional District Judge, Indore in Civil Suit No. 10B/2016 directing the defendants/petitioners to furnish the security to the tune of Rs.1,16,00,000/- for satisfaction of the Court, this petition has been preferred.

2. The facts leading to file the present case are, plaintiff/respondent filed a suit under Order XXXVII Rule 1 & 2 of the Code of Civil Procedure (hereinafter referred to as the CPC) seeking recovery to the tune of Rs.1,16,00,000/- against the defendants/petitioners. The said suit was based upon business transactions showing sale and purchase of certain goods of the worth Rs.3,13,30,471/- to which payments of Rs.2,70,19,461/-

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M.P. No. 1850/2017

have been made in the year 2011-12. In the year 2012-13, the purchase of goods worth Rs.6,65,92,473/- were made to which payments of Rs.6,63,27,755/- were made. For the year 2013-14, the purchase of goods worth Rs.33,13,250/- were made to which payments of Rs.31,04,999/- were made. It is not in dispute that the summons under Order XXXVII Rule 2 in Form No. 4 in Appendix B was served on the defendants.

**3.** On service of the summons to appear, the defendants tendered their appearance and applied to the Court for leave to defend. The trial Court vide order dated 28.8.2017 granted unconditional leave under Order XXXVII Rule 3(5) of the CPC. On grant of such leave, the defendants have filed the written statement on 6.10.2017.

**4.** In the meantime, the plaintiff filed an application under Order XXXVII Rule 3(6)(b) of the CPC asking security equivalent to the value of the suit. Reply to the said application was filed by the defendants denying all the averments contending that after granting unconditional leave in the facts of the case, there is no occasion to the Court to pass the order asking security, however, contested the application filed by the plaintiff. The trial Court by the order impugned directed to furnish the security relying upon a judgment of this Court in **Devendra Kumar Jain Versus**

**G.N.Goyal** reported in **2006(1) MPWN 75**, however, this petition is filed.

5. Learned counsel for the petitioners/defendants submits that looking to the scheme of Order XXXVII, after grant of unconditional leave, without any change of the situation, order directing to furnish security is not tenable and the suit ought to be decided as per Order XXXVII Rule 7 of the CPC. It is urged that the present suit is not based on bill of exchange, Hundies or Promissory Note or a suit filed by the plaintiff to recover a debt or liquidated demand of money payable by the defendants based on a written contract or a guarantee as specified under Order XXXVII Rule 1(2). In absence thereto the looking to the facts and nature of suit under the provision of Order XXXVII Rule 3(6) (b) direction to furnish security is not warranted. In support of the said contention reliance has been placed on the judgment of Delhi High Court in **M/s A.R. Electronic Private Limited Versus M/s R.K. Graphics Private Limited** reported in **ILR 2002 (I) Delhi 659** to contend that invoice giving description of the goods on which no terms and conditions of the contract are printed over, would not constitute a contract, therefore, the suit based on such invoice, order directing security is not tenable in law. It is further contended that as per Order XXXVII Rule 3(6)(b) of the CPC after granting leave to defend, it is the discretion of the Court or Judge to direct to furnish the security. It does not

postulate that as and when an application has been filed asking security, the Court ought to pass an order to furnish the security. In such circumstances, the discretion as exercised by the Court is arbitrary and non judicious merely relying upon the case of **Devendra Kumar Jain (supra)**, though the facts of the said case are not applicable to the facts of the present case, however, the order impugned passed by the trial Court may be set aside.

6. On the other hand learned counsel appearing for the respondent/plaintiff has heavily placed reliance on the judgment of **Devendra Kumar Jain (supra)** and also on the judgments of Apex Court in case of **Rajesh Ahuja Versus Manoj Mittal & another** reported in **AIR 1998 SC 2931** and **Mrs. Raj Duggal Versus Ramesh Kumar Bansal** reported in **AIR 1990 SC 2218** and urged, in case discretion has been exercised by the Court directing to furnish security by the defendants, interference in this petition may be declined.

7. Upon hearing learned counsel for the parties and in the facts of the present case, the moot question arises for consideration is “Whether the trial Court in the facts of the case was justified to direct the defendants to furnish the security in view of the judgment of this Court in **Devendra Kumar Jain (supra)**”?

**8.** To advert the arguments as advanced by learned counsel for the parties, first of all the scope of Order XXXVII of the CPC is required to be seen. Sub-Rule 1 of Order XXXVII Rule 1 applies to the High Court, City Civil Court and Courts of Small Causes and other Courts as specified. Sub-Rule 2 of Order XXXVII Rule 1 makes it clear, in which class of suits, this order would apply, however, it is relevant looking to the subject matter and the pleadings of the parties in suit and written statement, therefore, it is reproduced as under:-

**(2)** - Subject to the provision of sub-rule (1), the Order 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.

**(iv)** Suit for recovery of receivables instituted by any assignee of a receivable.

**9.** Order XXXVII Rule 2 specifies that on institution of a suit by the plaintiff, what averments are required to be made and to

bring the suit within the ambit of Order XXXVII filing those documents to support the relief claimed, thereafter the Court is required to issue summons in Form No. 4 in Appendix B for appearance. The said summons is for entering the appearance of the defendants in the Court and in case of default, the procedure specified under Order XXXVII, Rule 2(3) may be followed.

**10.** In case the defendants on service of summons entered their appearance on the date so fixed or within 10 days, the summons for judgment in Form 4A in Appendix B or as prescribed, may be given, returnable not less than 10 days. After service of the said summons, the defendants at any time within 10 days may apply for leave to defend. The facts of the present case relate to the issue of furnishing the security after granting leave to defend, however, it is relevant, therefore, reproduced as under:-

**3. Procedure for the appearance of defendant.- (1)**

In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

**(2)** Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have

been duly served on him if they are left at the address given by him for such service.

**(3)** On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

**(4)** If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

**(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.

**(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)** The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

**11.** Bare perusal of the above makes it clear that the plaintiff along with the summons under Rule 2 shall supply a copy of the suit and other relevant documents, to which within ten days appearance has to be made by the defendant in person or through pleader. Sub-Rule 4 of Rule 3 contemplates that after entering the appearance by the defendants, the plaintiff shall serve upon the defendant a summons for judgment in Form No.

4A in Appendix B returnable not less than 10 days from the date of service, supported by an affidavit verifying the cause of action and amount claimed having belief that there is no defence to the suit. On filing such an affidavit, the defendant within ten days from the service of such summons for judgment by affidavit or otherwise disclosing the facts as may deem sufficient to entitle him to defend, may apply to the Court seeking leave to defend in such suit. On such an application, the leave may be granted to the defendant unconditionally or on such terms as may appear to the Court or Judge to be just. The first proviso Order XXXVII Rule 3 (5) makes it clear that the leave to defend shall not ordinarily be refused unless the Court is satisfied that on the facts so disclosed substantial defence is not available to the defendant or the defence as put forth is frivolous or vexatious. The second proviso makes it clear that in case a part of the total amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend shall not be granted unless the admitted amount is deposited by the defendant in the Court.

**12.** Sub Rule (6) of Rule 3 starts with the wordings "At the hearing of such summons for judgment", if the leave is refused, the judgment shall be pronounced forthwith but in case the defendant is permitted to defend, "the Court or Judge may direct to give such security within such time as may be specified by the Court and if such direction or order is not complied, the plaintiff

would be entitled to the judgment forthwith". The Order XXXVII Rule 7 starts with the wording "Save as provided by this order, the procedure in suit hereunder shall be the same as the procedure in suits instituted in the ordinary manner".

**13.** Thus after going through the aforesaid, it can safely be concluded that after the stage of Order XXXVII Rule 3(4) of the CPC, first stage is to seek leave from the Court under Rule 5 and if the said leave is granted permitting the defendants to defend unconditionally or on such terms as appear to be just, sub-rule (6) of Rule 3 of Order XXXVII of the CPC would attract "at the hearing of such summons for judgment". In case leave not applied or refused at the stage of hearing of such summons, the judgment forthwith may be pronounced but in case leave to defend is permitted for whole or part of the claim, the Court or Judge may direct him to give such security within such time as may be fixed. In case of violation of the same, the plaintiff shall be entitled to the judgment forthwith. The present case relates to Order XXXVII Rule 3(6)(b) of the CPC after granting unconditional leave without specifying any terms and conditions in the order of grant of leave.

**14.** The term "security" relates to the security of the claim as gathered from Order XXXVIII Rule 2 of the CPC but otherwise it

also relates to the security of a person as gathered from Order XXXVIII Rule 1 of the CPC to which the attachment before judgment may be directed. As per language of Order XXXVII Rule 3(6)(b), in the matter of furnishing the security, the legislative intent is clear by which the discretion has been conferred to the Court or the Judge using the term “Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge”, therefore, looking to the scheme as discussed above, it can safely be crystallized that grant of leave to defend unconditionally or upon such terms and conditions may be ordered under sub-rule (5) of Rule 3 as appear to the Court or Judge as just but in case, it is required to be refused then the Court ought to specify that the defence as disclosed by the defendant cannot be said to be substantial defence to raise or the defence intended to be put by the defendant is frivolous or vexatious. In the present case, the said stage has become over and after granting the leave, the defendants have put their defence by filing written statement.

**15.** In the meantime the plaintiff filed an application for furnishing the security of the amount claimed in the suit. Indeed such an application may be filed under the Scheme of Order XXXVII and it may be considered and granted by the Court to furnish the security to the claim made in the plaint but the question may be under what circumstances such a discretion

ought to be exercised by the Court. In this regard, the guidance can be taken from Order XXXVIII wherein the word “security” has been defined and the said order applies at any stage of a suit other than the suit of the nature referred to in Section 16 Clause (a) to (d) of the CPC. The present suit do not come within the purview of Section 16 (a) to (d) of the CPC, therefore, the provision of Order XXXVIII would apply to a suit filed under Order XXXVII. In case the Court is satisfied by affidavit or otherwise, may pass an order. Under Rule 2 of Order XXXVIII the word “security” has been specified wherein if defendants fail to show such cause to the Court, the Court may order them either to deposit money or other property sufficient to answer the claim against him or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, therefore, it clarifies the security of the claim as well as the security against appearance. In case of security against appearance if the Court found that defendants absconded or left the local limits of the jurisdiction or about to abscond or left the local limits of the jurisdiction or disposed of or removed from the local limits of the jurisdiction of his property or any part thereof then the security may be obtained. In this regard, the constitutional Bench judgment of the Supreme Court in the case

of **Santosh Kumar Versus Bhai Mool Singh** reported in **AIR 1958 SC 321** in Para 12 the Apex Court has observed as under:-

“(12) The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether “if the facts alleged by the defendant are duly proved” they will afford a good, or even a plausible, answer to the plaintiff’s claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains.”

**16.** The aforesaid judgment though based on unamended provision but it has further been considered in the case of **State Bank of Hyderabad Versus Rabo Bank** reported in **(2015) 10 SCC 521**. In the said case the Court narrated the circumstances in which direction to furnish the security may be ordered. Those circumstances are reproduced as under:-

“As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled that:

**(i)** If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign the judgment; the defendant is entitled to unconditional leave to defend.

**(ii)** If the defendant raised a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign

judgment; the defendant is entitled to unconditional leave to defend.

**(iii)** If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet shows such a stage of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment; the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

**(iv)** If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment; the defendant is not entitled to leave to defend.

**(v)** If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence 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 defence.

Thus, in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is granted to defend even in cases where the defendant upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, is the plaintiff entitled to leave to sign judgment.

**17.** The trial Court has considered the judgment of **Devendra Kumar Jain** (supra) wherein after granting leave to defend the Court directed to deposit some amount which has been converted by the Court into furnishing the security but in the said judgment it has not been considered what may be the circumstances in which the order furnishing the security may be passed by the Court after granting leave to defend. It is not out of place to mention here that the said judgment was passed in a suit based on a promissory note while the present suit has been filed showing the business transaction based on year to year basis wherein the defence of grant of concession in three heads have been claimed, which have been denied by the plaintiff, therefore, it cannot be said to be a suit based upon bill of exchange, hundies and promissory notes. It is also not a suit based upon a document on the basis of which the amount was paid and the recovery of a debt is sought for. It is also not a suit of liquidated demand in money payable by the defendants. It is also not a suit on a written contract or on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt. It is also not a suit on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand has been made, therefore, in the facts of the present case, the ratio of the said judgment do not apply.



**18.** The Supreme Court in its recent judgment in **IDBI Trusteeship Services Limited -Versus- Hubtown Limited** reported in **AIR 2016 SC 5321**, has considered all the judgments particularly the judgment of **Milkhiram (India) (P) Ltd. Versus Chamanlal Bros.** reported in **AIR 1965 SC 1698** and in Paragraphs 17 and 18 held as under:-

**17.** It is thus clear that Order XXXVII has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that **Milkhiram's case** is a direct authority on the amended Order XXXVII provision, as the amended provision in Order XXXVII Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to Sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order XXXVII to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseh's multi-coloured coat-a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the

spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

**18.** Accordingly, the principles stated in paragraph 8 of **Mechele's case** will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in **Milkhiram's case, as follows:**

- a. 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;
- b. 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;
- c. 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;
- d. 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.

e. 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;

f. 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.

**19.** In view of the foregoing, it is to be examined, after granting unconditional leave to defend without imposing any terms and conditions, what are the circumstances prevalent at the stage of hearing of the summons for judgment whereupon passing of the order of furnishing the security appears to be necessary to the Court, is required to be seen from the facts of the case. In this regard, as per order dated 28.8.2017, leave to the defendants was granted by the Court in the following terms:-

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वर्तमान प्रकरण में तर्क के दौरान उभयपक्षों ने वर्ष 2011-12, 2012-13, 2013-14 में क्रय-विक्रय का संव्यवहार उभयपक्षों के मध्य होना स्वीकार किया है। प्रतिवादीगण ने स्वीकार किया है

कि कुल कीमत पर 03 प्रतिशत डिस्काउन्ट एवं लॉरी फेट का 03 प्रतिशत अतिरिक्त डिस्काउन्ट काट कर तथा सेटलमेंट (खराब माल/वेट शार्टेज बाबद् राशि का सेटलमेंट) कर प्रतिवादी क्रमांक 1 व 3 द्वारा वादी को भुगतान किया गया है जिसे वादी ने मिथ्या व मूनशाईन होना बताया है।

अतः प्रथम दृष्टया यह प्रतीत होता है कि प्रतिवादीगण के पास प्रतिरक्षा करने के लिये प्रथमदृष्टया सारवान तथ्य उपलब्ध है और प्रतिवादीगण द्वारा प्रस्तावित प्रतिरक्षा तुच्छ प्रकृति की अथवा तंग करने वाली नहीं है।

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अतः उपरोक्त संपूर्ण विश्लेषण के आधार पर प्रतिवादीगण द्वारा प्रस्तुत आवेदन अंतर्गत आदेश 37 नियम 3 उपनियम 5 व्य.प्र.सं. स्वीकार करते हुये प्रतिवादीगण को इस प्रकरण में बिना शर्त प्रतिरक्षा प्रस्तुत करने की अनुमति प्रदान की जाती है।

**20.** Thereafter, the defendants filed their written statement. In the meantime, an application has been filed by the plaintiff. In the said application referring the order of grant of unconditional leave to the defendants and the provision of Order XXXVII Rule 3(6)(b) of the CPC, it is said that the defendants have not furnished any security, therefore, the order to furnish the security equivalent to the value of the suit, is required to be passed. The plaintiff has contested the said application but without any reason or rhyme, the trial Court directed to furnish the security relying upon the judgment of **Devendra Kumar Jain (Supra)**.

**21.** After detailed discussion of the spirit of Order XXXVII and the facts of the case, it can safely be concluded that the

application for furnishing the security may be tenable but it ought to be granted at the time of hearing of the summons for judgment when the Court is satisfied that the claim of the plaintiff shall be defeated if the order of furnishing the security is not passed indicating the circumstances to exercise such discretion or the defendants would abscond to satisfy the decree which may be granted in the case. In absence of indicating any such circumstances, the discretion exercised by the Court in the present case is not judicious and it has been exercised merely on demand by the plaintiff. In view of the discussion made hereinabove, it is apparent that the present suit is not a suit either based on a bill of exchange, Hundies or promissory note or for recovery of a debt or liquidated demand in money payable by the defendants. The suit is also not based on written contract or some recovery is to be made in the nature of a debt by virtue of an enactment or on account of guarantee of a debt or liquidated demand. The present suit has been filed based on the business transactions of the year 2011-12 to 2014-15. The plaintiff claimed that some of the amount has not been paid while the defendants have stated that the amount payable has been paid and the remaining amount is for adjustment towards compensation under various heads, therefore, the said amount is not payable. In that view of the matter, in the facts of the case without showing any circumstances, in which the suit if any

decreed after granting leave to defend, the recovery of the amount may prejudice the decree either towards claim or towards presence of the defendants, discretion exercised by the Court directing security without any basis cannot be termed as judicious, therefore, in my considered opinion, the trial Court while passing the order impugned has committed error of jurisdiction which warrants interference in this petition under Article 227 of the Constitution of India.

**22.** Accordingly, this petition succeeds and is hereby allowed. The order dated 1.12.2017 passed by the Eighth Additional District Judge, Indore in Civil Suit No. 10B/2016 is hereby set aside. The trial Court is directed to decide the suit filed by the plaintiff applying the procedure as contemplated under Rule 7 of Order XXXVII of the CPC. In the facts of the case, the parties are directed to bear their own costs.

The record of the trial Court be sent back by the Registry.

**(J.K.Maheshwari)**  
**Judge**

PB