

**IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE  
BEFORE**

**HON'BLE SHRI JUSTICE SUBODH ABHYANKAR**

**ON THE 15<sup>th</sup> OF MARCH, 2023**

**MISC. PETITION No. 6328 of 2022**

**BETWEEN:-**

**KAMAL MAITHIL S/O SHRI BRIJLALJI  
MAITHIL, AGED ABOUT 65 YEARS,  
OCCUPATION: BUSINESS SHRIAM  
AUTOMOBILES 32-C ADARSH MACHENIC  
NAGAR, DISTRICT INDORE (MADHYA  
PRADESH)**

**.....PETITIONER**

***(BY SHRI V. K. JAIN, SENIOR ADVOCATE WITH SHRI VAIBHAV JAIN,  
ADVOCATE )***

**AND**

**AJAY SHARMA S/O SHRI MADANLAL SHARMA,  
AGED ABOUT 59 YEARS, OCCUPATION:  
BUSINESS 02- AMVID NAGAR, KANADIA ROAD.  
DISTRICT INDORE (MADHYA PRADESH)**

**.....RESPONDENT**

***(BY SHRI YASHPAL RATHORE, ADVOCATE )***

.....  
*This petition coming on for admission this day, the court  
passed the following:*

**ORDER**

- 1] Heard finally with the consent of the parties.
- 2] This miscellaneous petition has been filed under Article 227 of

the Constitution of India against orders dated 18.02.2022, and 14.12.2022. Vide order dated 18.02.2022, on an application filed by the defendant under Section 151 of CPC for leave to defend has been allowed with a direction to the defendant to furnish a security to the tune of Rs. 2 crores, and vide order dated 14.12.2022 the review of the said order dated 18.02.2022 has been rejected.

**3]** In brief, the facts of the case are that the respondent/plaintiff has filed a summary suit under Order 37 Rule 1 and 2 of CPC for recovery of Rs.1,80,20,000/- from the petitioner/defendant. In the aforesaid suit, an application under Order 38 Rule 1 and 2 of CPC was also filed by the plaintiff for attachment of the property of the defendant before judgement. Allowing the aforesaid application, vide order dated 17.01.2022, the learned Judge of the trial Court has directed the defendant to maintain the *status quo* in respect of its properties and should not alienate the same in any manner.

**4]** In the suit, as defendant had become ex-parte, subsequently, an application under Order 9 Rule 7 of CPC for setting aside the ex-parte order alongwith an application under Section 151 of CPC for leave to defend was filed by the defendant and while allowing the application filed under Order 9 Rule 7 of CPC vide order dated 18.02.2022, a cost of Rs.500/- was imposed and the defendant was allowed to participate in the proceedings. So far as the application filed for leave to defend is concerned, the same has also been allowed by the learned Judge of the Trial Court by the same order dated 18.02.2022 directing the defendant to furnish a security of Rs.2 crores and a bond to the effect

that if the decree is passed against him, he shall comply with the same immediately. The review of the order has also been rejected by the learned Judge of the trial Court vide order dated 14.12.2022.

5] Shri V. K. Jain, Senior counsel appearing for the petitioner/defendant has submitted that the defendant was arrested in connection with the FIR, which was lodged by the plaintiff and other persons in the month of February, 2022 and prior to that, the learned Judge of the trial Court had already passed the order on 17.01.2022 restraining the petitioner from transferring the properties till the final disposal of the suit and once the defendant was directed not to alienate the property, there was no reason for the learned Judge of the trial Court to further impose a condition to furnish a security to the tune of Rs.2 crores, especially when the petitioner had filed his written statement through Jail only.

6] In support of his submission, Shri V. K. Jain, Senior counsel for the petitioner has also relied upon a decision rendered by the Supreme Court in the case of **IDBI Trusteeship Services Limited Vs. Hubtown Limited** reported as **(2017) 1 SCC 568** wherein the Supreme Court has held that leave to defend can be granted unconditionally under certain conditions. Reliance is also placed on another decision rendered by the Supreme Court in the case of **State Bank of Hyderabad Vs. RABO Bank** reported as **(2015) 10 SCC 521**. Thus, it is submitted that there was no occasion for the learned Judge of the trial Court to impose such onerous condition on the defendant as the furnishing of security to the tune of Rs.2 crores is

also difficult for the defendant as for that also he is required to incur substantial expenses. Thus, it is submitted that the impugned orders be set aside and the defendant be directed to defend the suit without furnishing any additional costs as he is already bound by the order passed by the trial Court not to alienate the properties.

7] On the other hand, Shri Yashpal Rathore, learned counsel appearing for the respondent has vehemently opposed the prayer and it is submitted that no case for interference is made out as the defendant had obtained the money by playing fraud and the cheques issued by him, have also been dishonoured. Counsel has also drawn the attention of this Court to the FIR registered against the defendant and it is submitted that if the aforesaid condition is not imposed, then serious prejudice would be caused to the plaintiff.

8] Heard counsel for the parties and perused the record.

9] So far as the requirement of conditions, to be imposed on the defendant to defend his case is concerned, the Supreme Court in the case of **IDBI Trusteeship Services Limited** (supra) has held as under:-

“15. xxxxxxxxxxxxxxxxxxxx

15.1. In *Defiance Knitting Industries (P) Ltd. v. Jay Arts*, (2006) 8 SCC 25, this Court, after setting out the amended Order 37 and after referring to Mechelec case, laid down the following principles : (*Jay Arts case*, SCC p.31, para 13)

“13. While giving leave to defend the suit the court shall observe the following principles:

(a) If the court is of the opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally. See *Milkhiram (India) (P) Ltd. v. Chamanlal Bros.* [AIR 1965 SC 1698 : 68

Bom LR 36] The question whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties.

(b) If 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 it may refuse leave to defend altogether. *Kiranmoyee Dassi v. Dr. J. Chatterjee* [AIR 1949 Cal 479 : 49 CWN 246] (noted and approved in *Mechelec* case).

(c) In cases where the court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the court may impose conditions in granting leave to defend.

15.2. xxxxxxxxxxxxxxxxxxxxxxxx

16. xxxxxxxxxxxxxxxxxxxxxxxx

17. xxxxxxxxxxxxxxxxxxxxxxxx

17.1 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;

17.2 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;

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17.6. xxxxxxxxxxxxxxxxxxxx.”

(emphasis supplied)

**10]** Similarly in the case of **State Bank of Hyderabad** (supra) the Supreme Court has held as under:-

“15. As regards the entitlement of a defendant to the grant of leave to defend, the law is well settled long back in the year 1949 in *Kiranmoyee Dassi Vs. Dr. J.*

*Chatterjee*, in the form of the following propositions:  
(SCC OnLine Cal para 42)

“(1) 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 and the defendant is entitled to unconditional leave to defend.

(2) 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 and the defendant is entitled to unconditional leave to defend.

(3) 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 made 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 and 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.

(4) 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 and the defendant is not entitled to leave to defend.

(5) 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.

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20. We are in total agreement with the view taken by this Court in *Raj Duggal Vs. Ramesh Kumar Bansal*, 1991 Suppl.(1) SCC 191 that leave to defend the

Summons for Judgment shall always be granted to the defendant when there is a triable issue as to the meaning or correctness of the documents on which the claim is based or the alleged facts are of such nature which entitle the defendant to interrogate or cross-examine the plaintiff or his witnesses.

21. xxxxxxxxxxxxxxxxxxxxxxx

22. Apart from these, the substantial revelations of the defendant (appellant) in the affidavit coupled with the views expressed by the Division Bench of the High Court makes it clear that there are certain triable issues for adjudication and the defendant/appellant is entitled to defend the Suit. The appellate side of the High Court ought to have taken into consideration the factual matrix of the case before recording its finding. Taking into consideration the totality of the facts and circumstances of the case, we are of the opinion that the defendant/appellant has made out a prima facie case of triable issues in the Suit which needs to be adjudicated. Therefore, the defendant is entitled to grant of unconditional leave to defend the Suit.

23. xxxxxxxxxxxxxxxxxxxxxxx

24. Accordingly, we allow the appeal by setting aside the judgment and decree passed by the Courts below. The appellant/defendant is granted unconditional leave to defend the Summons for Judgment in Summary Suit No. 1586 of 2001. The learned Single Judge of the High Court has to deal all the issues raised by the parties afresh and any observation made by this Court while dealing with this appeal should not be construed as an expression of this Court. There shall, however, be no order as to costs.”

*(emphasis supplied)*

11] On perusal of the aforesaid judgements and testing the facts of the case on hand on the anvil of the aforesaid decisions rendered by the Supreme Court, this Court finds that the trial Court has already held that the defendant is entitled to contest the matter vide order

dated 18.02.2022 and while imposing the condition of furnishing the security to the tune of Rs.2 crores, the learned Judge of the trial Court has also held that the defendant's defence is that the documents filed by the plaintiff are forged and the defence appears reasonable and in such circumstances, on the ground of principles of natural justices, he is entitled to defend the suit, but in the same breath, the learned Judge of the trial Court has also imposed the aforesaid condition of furnishing a security to the tune of Rs.2 crores, which, in the considered opinion of this Court was uncalled for, especially when the trial Court has already held that the defendant has raised a tribal issue.

**12]** In view of the same, the impugned orders dated 18.02.2022 and 14.12.2022 are hereby set aside and the defendant is hereby allowed to defend his suit without furnishing any security.

**13]** With the aforesaid, the petition stands **allowed** and **disposed of**.

**(Subodh Abhyankar)**  
**Judge**

**Pankaj**