

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 15th OF APRIL, 2024

MISC. PETITION No. 5665 of 2023

BETWEEN:-

- M/S J.K. BROTHERS THROUGH
PARTNERS SHRI LALIT KUMAR SHAH
1. R/O 48 M.T. CLOTH MARKET INDORE
(MADHYA PRADESH)
LALIT KUMAR S/O LATE SHRI
KESHAVLAL SHAH OCCUPATION:
2. BUSINESS 107, TILAK NAGAR EXT.,
INDORE (MADHYA PRADESH)
JAYENDRA KUMAR S/O LATE SHRI
KESHAVLAL SHAH OCCUPATION:
3. BUSINESS 107, TILAK NAGAR EXT.,
INDORE (MADHYA PRADESH)
MAHENDRA KUMAR S/O LATE SHRI
KESHAVLAL SHAH OCCUPATION:
4. BUSINESS 107, TILAK NAGAR EXT.,
INDORE (MADHYA PRADESH)

.....PETITIONER

(*SHRI AYUSHYAMAN CHOUDHARY, ADVOCATE*)

AND

RANCHOOD KASHAP S/O SHRI
BALMUKUDH KASHAP, AGED ABOUT 90
YEARS, OCCUPATION: FARMER R/O 112
SANVINDH NAGAR KANADIYA ROAD
INDORE (MADHYA PRADESH)

.....RESPONDENTS

(*SHRI NITIN NANOREYA, ADOCATE*)

MISC. PETITION No. 5629 of 2023

BETWEEN:-

- M/S J.K. BROTHERS THROUGH
PARTNER SHRI LALIT KUMAR SHAH
1. R/O 48 M.T. CLOTH MARKET INDORE
(MADHYA PRADESH)
LALIT KUMAR S/O LATE SHRI
KESHAVLAL SHAH OCCUPATION:
 2. BUSINESS 107, TILAK NAGAR EXT.
INDORE (MADHYA PRADESH)
JAYENDRA KUMAR S/O LATE SHRI
KESHAVLAL SHAH OCCUPATION:
 3. BUSINESS 107, TILAK NAGAR, TILAK
NAGAR EXT. INDORE (MADHYA
PRADESH)
MAHENDRA KUMAR S/O LATE SHRI
KESHAVLAL SHAH OCCUPATION:
 4. BUSINESS 107, TILAK NAGAR, TILAK
NAGAR EXT. INDORE (MADHYA
PRADESH)

.....PETITIONER

*(SHRI AYUSHYAMAN CHOUDHARY, ADVOCATE)***AND**

ARVIND S/O SHRI RANCHOOD KASHYAP,
AGED ABOUT 58 YEARS, OCCUPATION:
FARMER R/O 112 SANVINDH NAGAR
KANADIYA ROAD INDORE (MADHYA
PRADESH)

.....RESPONDENTS

*(SHRI NITIN NANOREYA, ADOCATE)***MISC. PETITION No. 5737 of 2023****BETWEEN:-**

- M/S J.K. BROTHERS THROUGH
PARTNER SHRI LALIT KUMAR SHAH
1. 48, M.T. CLOTH MARKET, INDORE
(MADHYA PRADESH)
LALIT KUMAR S/O LATE SHRI KESHAV
LAL SHAH OCCUPATION: BUSINESS 107,
 2. TILAK NAGAR EXT. INDORE (MADHYA
PRADESH)

- JAYENDRA KUMAR S/O LATE SHRI
KESHAVLAL SHAH OCCUPATION:
3. BUSINESS 107, TILAK NAGAR EXT.
INDORE (MADHYA PRADESH)
MAHENDRA KUMAR S/O LATE SHRI
4. KESHAVLAL SHAH OCCUPATION:
BUSINESS 107, TILAK NAGAR EXT.
INDORE (MADHYA PRADESH)

.....PETITIONER

(SHRI AYUSHYAMAN CHOUDHARY, ADVOCATE)

AND

ABHINAY KASHAP S/O SHRI ARVINDJI
KASHAP, AGED ABOUT 31 YEARS,
OCCUPATION: FARMER 112, SANVINDH
NAGAR, KANADIYA ROAD, INDORE
(MADHYA PRADESH)

.....RESPONDENTS

(SHRI NITIN NANOREYA, ADVOCATE)

*These miscellaneous petition coming on for order this day, the
court passed the following:*

ORDER

1. This order shall also govern the disposal of M.P.No.5665 of 2023, M.P 5629 of 2023 and M.P.5737 of 2023, as in all these cases, identical issues are involved. For the sake of convenience, the facts as narrated in **M.P.No.5629 of 2023**, have been taken into consideration.
2. These miscellaneous petitions have been filed under Article 227 of the Constitution of India against the order dated 04.09.2023

passed in Summary Suit no.193B/2022 by Third, Civil Judge, Class-I, Indore; whereby, the application filed by petitioners/defendants under Order 37 Rule 3(5) read with section 151 of Civil Procedure Code, 1908 (herein after referred to as “CPC”) has been partly allowed and while allowing the leave to defend to petitioners/defendants, it has also ordered to deposit the entire claim of the respondent/plaintiff by way of furnishing solvent surety.

3. Counsel for the petitioners has drawn attention of this Court to the finding recorded by the learned judge of the civil Court wherein it is held that the defendants have raised certain grounds which can only be decided after the evidence is led by the parties and thus, it is submitted that the petitioners have already made a ground for their entitlement to leave to defend, hence the conditions to furnish the guarantee deserves to be set aside.

4. In support of his submissions, counsel for the petitioners has relied upon an order passed by this Court in the case of **Kamal Maithil vs. Ajay Sharma reported as 2023(3) MPLJ 383**

wherein this Court has also relied upon the decision rendered by the Supreme Court in the case **IDBI Trusteeship services Limited Vs. Hubtown Limited reported as 2016 MPLJ Online (SC) 132=(2017) 1 SCC 568**, and has held that where the defendant is able to demonstrate that he/she has a reasonable defence which requires leading of the evidence, in that case the condition of furnishing any security does not arise.

5. Counsel for the respondents/plaintiffs on the other hand has opposed the prayer, and it is submitted that no case for interference is made out as the learned judge of the Civil Court has rightly imposed the condition as it is the discretion of the Court while allowing the leave to defend to petitioners/defendants and to file the written statement.

6. Heard. On due consideration, and on perusal of the documents filed on record, this Court finds that so far as findings of the civil Court is concerned, the same reads as under :-

“ इसी प्रकार जहां एक ओर परिसीमा अधिनियम के बिन्दु पर साक्ष्य प्रस्तुत होना आवश्यक है वहीं दूसरी ओर वादी द्वारा न्यायालय के समक्ष स्वच्छ हाथों से उपस्थित न होकर गलत तथ्यों के आधार पर प्रकरण प्रस्तुत किए जाने के बिन्दु पर भी प्रकरण के इस प्रक्रम पर कोई निष्कर्ष नहीं दिया जा सकता है। उपरोक्त बिन्दुओं का प्रभावी निराकरण उभयपक्ष की साक्ष्य के उपरांत ही संभव है एवं उक्त

उद्देश्य बावत यह आवश्यक है कि प्रतिवादी को साक्ष्य प्रस्तुती का अवसर दिया जावे। चूंकि उक्त राशि वादी के द्वारा ब्याज पर दिया जाना बताया जा रहा है ऐसी स्थिति में साहूकारी अधिनियम के अधीन लायसेंस होने संबंधी विधिक बिन्दु पर भी विचार किया जाना है।

उपरोक्त परिस्थितियों में प्रतिवादी को प्रतिरक्षा का अवसर दिया जाना उचित प्रतीत होता है, किन्तु चूंकि प्रतिवादी को प्रतिरक्षा का अवसर दिये जाने की अनुमति बिना किसी शर्त के दिये जाना उचित प्रतीत नहीं होता है।

न्यायदृष्टांत बी.एल. कश्यप विरुद्ध जे.एम.एस. स्टील्स एंड पावर कार्पोरेशन 2022 उस.सी.सी. ऑनलाईन एस.सी. 59 में माननीय सर्वोच्च न्यायालय द्वारा यह व्यक्त किया गया है कि प्रतिरक्षा संबंधी निवेदन अपवादीक स्थिति में ही खारिज किया जाना चाहिए तथा उचित परिस्थितियों में प्रतिरक्षा का अवसर प्रदान किया जाना चाहिए।

अतः उभयपक्ष की ओर से प्रस्तुत तर्क एवं विधिक सिद्धांतों तथा हस्तगत प्रकरण के विशिष्ट तथ्य एवं परिस्थिति के आलोक में प्रतिवादी से वसूली योग्य राशि 6,75,000/- रुपये के संबंध में सक्षम जमानत प्रस्तुत किये जाने की शर्त पर प्रतिवादी की ओर से प्रस्तुत आवेदन पत्र स्वीकार किया जाकर प्रतिरक्षा की अनुमति प्रदान की जाती है।

प्रकरण उपरोक्तानुसार जमानत प्रस्तुत किये जाने/ जवाबदावा प्रस्तुति हेतु दिनांक 07/11/2003 को पेश हो। ”

7. On perusal of the aforesaid finding, it clearly reveals that the Court has already formed an opinion that the defendants have made out a triable case, and in such circumstances, the civil Court was not justified in imposing such condition of furnishing the solvent surety as aforesaid. This Court in the case of **Kamla Maithil (supra)** has held as under:-

“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 *Milkhram (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. xxxxxxxxxxxxxxxxxxxxxxxxx

16. xxxxxxxxxxxxxxxxxxxxxxxxx

17. xxxxxxxxxxxxxxxxxxxxxxxxx

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 positive 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. xxxxxxxxxxxxxxxxxxxxx.”

(emphasis supplied)”

8. In view of the aforesaid decision, if the facts of the case and the impugned order as reproduced herein above are considered, this Court is of the considered opinion that the learned judge of the trial

Court has erred in directing the petitioners/defendants to furnish the solvent surety of the entire claim, of the respondent/plaintiff, *i.e.*, of Rs.6,75,000/-, which also comes at price, this is despite the fact that a triable case has been found by the trial court.

9. In view of the same, **the miscellaneous petitions stand allowed**, and the impugned order so far as it relates to furnishing of the solvent surety, is hereby set aside. The learned judge of the trial court is directed to proceed further in accordance with law.

10. Let a copy of this order be placed in the files of other connected M.P.5665 of 2023 and M.P.5737 of 2023.

(SUBODH ABHYANKAR)
JUDGE

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