

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 922/2018**

% **13th November, 2018**

NITIN AGGARWAL Appellant

Through: Mr. Manish Kumar Singh,
Advocate (M. No.9911277043).

versus

PRAVEEN SHARMA Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.46737/2018(exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

**C.M. Nos.46735/2018(for condonation of delay in filing) &
46736/2018(for condonation of delay in re-filing)**

2. For the reasons stated in the applications, delay of 27
days in filing and 31 days in re-filing the appeal is condoned.

C.M.s stand disposed of.

RFA No. 922/2018 and C.M. No. 46734/2018(stay)

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the Trial Court dated 26.03.2018 by which trial court has dismissed the Leave to Defend application filed by the appellant/defendant under Order XXXVII Rule 3(5) CPC and has decreed the suit filed by the respondent/plaintiff under Order XXXVII CPC for recovery of Rs.4.38 lakhs on the basis of a dishonored cheque.

4. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that the appellant/defendant took a friendly loan of Rs.3 lakhs from the respondent/plaintiff on 05.10.2014. The loan amount was secured by a Post-Dated Cheque dated 18.04.2015 of the appellant/defendant in favor of the respondent/plaintiff bearing no. 047032 drawn on IDBI Bank. The appellant/defendant had also, in addition to giving a post dated cheque, executed Receipt-cum-Acknowledgment on the same date of 05.10.2014 for the loan amount of Rs. 3 lakhs. Since the cheque was dishonored on presentation on 06.05.2015, the subject suit for recovery was filed.

5. The appellant/defendant in the leave to defend application contended that the cheque no doubt bears the signatures of the appellant/defendant but this cheque was not given for a loan taken by appellant/defendant from respondent/plaintiff. This cheque was infact paid as security for a loan taken by one Mr. Rajan @ Krishan Sisonia from the respondent/plaintiff. i.e. the loan amount was in fact taken by Mr. Rajan from respondent/plaintiff and the appellant/defendant had only given his cheque as security to respondent/plaintiff. It was also pleaded in the leave to defend application that for one other loan by Mr. Rajan from respondent/plaintiff, Mr. Rajan had got the appellant/defendant and his brother Mr. Jatin Aggarwal to execute some documents on his behalf. In lieu of the said loans some blank cheques were issued by the appellant/defendant and his brother Mr. Jatin Aggarwal which were given to respondent/plaintiff as security for loans taken by Mr. Rajan. It was further pleaded that in the proceedings under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'N.I. Act'), the respondent/plaintiff when was cross-examined on 10.04.2017, he could not give proper answers as to how he had arranged the amount of Rs. 3 lakhs for being

given as loan by respondent/plaintiff to the appellant/defendant. Accordingly, the appellant/defendant prayed for unconditional leave to defend.

6. The principles with respect to grant of leave to defend are stated by the Supreme Court in its recent judgment in the case of ***IDBI Trusteeship Services Ltd. v. Hubtown Limited, (2017) 1 SCC 568*** and the relevant paras of which judgment read as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec* case will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in *Milkhiram* case, as follows:

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.

17.3 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.

17.4 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.

17.5 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.

17.6 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."

7. It is therefore seen that in case the defence is found to be frivolous or vexatious or not raising a triable issue, thus leave to defend cannot be granted.

8. Trial court in my opinion has rightly held that leave to defend has to be refused i.e. the defence is frivolous and vexatious raising no triable issues, inasmuch as, besides the appellant/defendant not denying his signatures on the subject cheque, it is found that the appellant/defendant has also executed a Receipt dated 05.10.2014

under his signatures acknowledging the receipt of loan of Rs. 3 lakhs. Also, the appellant/defendant was served with a Legal Notice dated 08.09.2016 and the appellant/defendant has never denied the receipt of the Legal Notice in the leave to defend application. The trial court has also held that cross-examination under Section 138 of N.I. Act case cannot be relied upon because that aspect is still *sub judice* as the case under Section 138 of N.I. Act is still pending.

9. In my opinion, trial court has committed no error in giving the aforesaid reasoning and conclusions for dismissing the leave to defend application. In fact, I would like to add that in case a fraud has been committed by respondent/plaintiff and Mr. Rajan upon the appellant/defendant for loans allegedly granted to Mr. Rajan by respondent/plaintiff, and that respondent/plaintiff was found to have misused the subject cheque, there was no reason why the appellant/defendant would not have issued a legal notice to Mr. Rajan or the respondent/plaintiff for a fraud having been perpetuated upon the appellant/defendant for misusing the cheque given by the appellant/defendant. Also, no complaint to any authority, much less a criminal complaint, has been filed by the appellant/defendant that the

subject cheque has been illegally misused or was illegally retained by the respondent/plaintiff. I would also like to give an additional reason, that besides the fact that the case under Section 138 of the N.I. Act is pending, in view of the provision of Section 118 of the N.I. Act there is a presumption of cheque being given for consideration and a person who takes a loan and gives his cheque to secure the loan, cannot argue that the respondent/plaintiff who gave the loan must prove that he had the financial capacity to give the loan. In any case, the respondent/plaintiff has stated in the cross-examination in the case under Section 138 of N.I. Act that he had arranged amount by himself and also that he borrowed some amounts from his father and a close friend, and which in my opinion is sufficient justification for the respondent/plaintiff to have moneys for being granted as a loan to the appellant/defendant. In fact the appellant/defendant seems to have a belief that money borrowed is money earned.

10. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

NOVEMBER 13, 2018
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VALMIKI J. MEHTA, J