REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. …….. OF 2022
(ARISING OUT OF SLP (C) NO. 19413 OF 2018)

B.L. KASHYAP AND SONS LTD. …. APPELLANT(S)

VERSUS

M/S JMS STEELS AND POWER CORPORATION & ANR. .... RESPONDENT(S)

J U D G M E N T

DINESH MAHESHWARI, J.

Preliminary

Leave granted.

2. This appeal is directed against the judgment and order dated 11.05.2018 in Regular First Appeal No. 402 of 2018, whereby the High Court of Delhi at New Delhi has dismissed the appeal filed by the present appellant and has affirmed the judgment and decree dated 18.09.2017 passed by the Additional District Judge-05: West, Tis Hazari Court, New Delhi, in the money recovery summary suit, being CivDj/611333/2016, filed by the plaintiff-respondent No. 1, wherein the present appellant was arrayed as defendant No. 2 and the present respondent No. 2 was arrayed as defendant No. 1.

2.1. It may be noticed at the outset that the Trial Court had passed the judgment and decree dated 18.09.2017 with its finding that no triable issues had been raised by the defendants and hence, they were not entitled to the leave to defend. In the impugned judgment and order dated 11.05.2018, the High Court has affirmed the decree in relation to the appellant-defendant No. 2. Hence, the questions involved in the present appeal are confined to the prayer for leave to defend sought for by the appellant. However, it is also relevant to notice that the other defendant (who is respondent No. 2 herein) had also filed an appeal against the said judgment and decree dated 18.09.2017 (being RFA No. 743 of 2018), which was dismissed by the High Court by its separate judgment and order dated 05.09.2018. The said judgment and order dated 05.09.2018 is not under challenge before us but, we shall refer to the same at the relevant juncture and in relation to the implications of the findings therein.

2.2. For the purpose of continuity of narration and discussion, the parties shall also be referred herein with reference to their status in the suit.

Relevant factual and background aspects

3. The relevant factual and background aspects of the matter are as follows:

3.1. The plaintiff-respondent No. 1 filed the subject suit in terms of Order XXXVII of the Code of Civil Procedure, 1908 ('CPC') while stating itself to be a registered partnership firm manufacturing and supplying a

wide variety of iron and steel products. According to the plaintiff, the defendant No. 1 represented itself as a real estate and infrastructure development firm while the defendant No. 2 (appellant herein) represented itself as a contractor working with the defendant No. 1 for the construction work of its project namely 'MIST', being developed at Plot No.1, Sector 143-B, Noida.

3.2. The plaintiff asserted that in relation to the said construction work, it had supplied 200 tons of steel at the site address of the defendant No. 1; and this supply was made in terms of two purchase orders dated 06.02.2015 and 20.03.2015, as raised by the appellant-defendant No. 2. The plaintiff further asserted that payment for the goods so supplied was to be made by the defendant No. 1 and in that regard, various invoices were raised, as detailed in paragraph 7 of the plaint. It was also submitted that an amount of Rs. 89,50,244/- remained due against the supplies so made and invoices so raised.

3.3. The plaintiff further averred that for payment against the said invoices, the defendant No. 1 issued two cheques drawn on Axis Bank, Sector-44 Noida Branch, being cheque No. 037274 dated 04.05.2015 for a sum of Rs.14,72,269/- and cheque No. 037272 dated 09.05.2015 for a sum of Rs. 13,34,319/- while asking the plaintiff to present the cheques only after receiving intimation but no such intimation was received. Later on, the plaintiff issued a legal notice dated 28.01.2016 to the defendants demanding the dues and, upon their failure to make the requisite payment,

filed the subject suit under Order XXXVII CPC, while asserting joint and several liability of the defendants. The plaintiff, *inter alia*, averred that the suit was based on written contract inasmuch as written purchase orders were issued by the appellant-defendant No. 2 on the instructions, and on behalf of, defendant No. 1.

3.4. In the summary suit so filed, the defendant No. 1 sought leave to defend with the contentions, *inter alia*, that it had no privity of contract with the plaintiff because the purchase orders were issued only by the defendant No. 2; that the invoices in question were raised by the plaintiff in the name of the defendant No. 2; that neither the purchase orders nor the invoices were bearing the signatures of the defendant No. 1; and that all the dealings were between plaintiff and defendant No. 2, where no legal liability was to be discharged by defendant No. 1. It was contended that the defendant No. 1 was rather a stranger to the contract in question.

3.5. In opposition to the contentions sought to be urged by the defendant No. 1, the plaintiff contended, *inter alia*, that the application filed by defendant No. 1 was an attempt to shy away from its responsibility by shifting the same on the defendant No. 2. In support of this contention, the plaintiff placed its ledger account as also the statement of account of defendant No. 1 which, according to the plaintiff, demonstrated that the payment of goods delivered to the defendant No. 2 had been made by the defendant No. 1. It was contended by the plaintiff that if there was no agreement between the plaintiff and the defendant No. 1, there was no

reason for the defendant No. 1 to issue the cheques in the name of plaintiff. It was also submitted that though the invoices were addressed to the defendant No. 2 but, they also mentioned "C/o Mist", which substantiated the stand of the plaintiff.

3.6. The appellant-defendant No. 2 moved a separate application seeking leave to defend. It was contended in this application that the appellant had been working as civil contractor under the defendant No. 1; that the purchase orders were issued only on behalf of the defendant No. 1; and that the material supplied by the plaintiff was for the construction of project undertaken by defendant No. 1, who was the beneficiary of the said project. The appellant submitted that under the contract, it was the duty of owner, i.e., defendant No. 1, to supply the material for construction and defendant No. 2 was to be paid for the quantities supplied by it. Further, the copies of statements of accounts showing the purchase orders placed by defendant No. 2 at the instance of defendant No. 1 were placed on record; and it was submitted that the bills for such supplies were liquidated in due course. In substance, case of the appellant had been that it had no liability towards the plaintiff.

3.7. The plaintiff also opposed the prayer of the appellant for leave to defend with the submissions that the appellant-defendant No. 2 had failed to raise any substantial defence and he was rather trying to confuse the issue. It was asserted that the goods were supplied on the purchase orders raised by the defendant No. 2 while acting as an agent for the defendant

No. 1; and it was agreed between the parties that the defendant No. 1 would make payment for the goods supplied to the defendant No. 2. It was also submitted that the role of the appellant-defendant No. 2 was "important" in the present suit as the transaction of goods indeed involved this defendant.

Trial Court declined leave to defend to both the defendants

4. In its impugned judgement dated 18.09.2017, the Trial Court considered both the applications moved by the respective defendants seeking leave to defend together; and rejected the same while observing that the defendants were merely attempting to shift the burden upon each other.

4.1. The Trial Court observed that the defendant No. 2 was a contractor working under defendant No. 1 by virtue of the construction agreement; and as per Clause 10 of this agreement, defendant No. 1 was liable to pay the costs of goods, material or articles procured and arranged for by the contractor. The Trial Court further observed that the purchase orders had been placed by defendant No. 2 on plaintiff at the instance of defendant No. 1 and the goods were indisputably supplied at the site address of defendant No. 1, who was the ultimate beneficiary of the transaction. It was also noted that the bills raised for such supplies had been liquidated by the defendant No. 1. The contention urged on behalf of the defendant No. 1 that there was no privity of contract was rejected with reference to the facts that the defendant No. 1 had been making payments to the plaintiff; and

reference was made to various payments made through cheques and demand drafts from time to time. The Trial Court observed that the transactions clearly indicated that the materials were being supplied by the plaintiff to the site address of defendant No.1 and the defendant No. 1 had been making payments directly to the plaintiff. Hence, the Trial Court held that the defence sought to be raised by the defendant No. 1, of want of privity of contract, was without any substance and was not giving rise to any triable issue. The Trial Court also rejected the contention that the summary suit under Order XXXVII CPC was not maintainable as the plaintiff did not present the aforementioned cheques for encashment while observing that the suit was not merely based on the two cheques issued by the defendant No. 1, but was also based on the purchase orders and invoices raised for supply of materials; and the invoices were a complete contract, as contemplated by Order XXXVII CPC.

4.2. Having rejected the case of the defendant No. 1, the Trial Court also proceeded to deny the prayer of the appellant-defendant No. 2 for leave to defend while observing that the goods were received by the defendant No. 2 as an agent of the defendant No. 1 and, therefore, both the defendants were under obligation to make payment. The Trial Court said,-

> "15. The invoices issued by the plaintiff have been addressed to the site address of defendant no.- 1 and the goods have been received by defendant no.- 2 acting as an agent of defendant no.- 1. Therefore, both the defendants are under an obligation to make payments of the goods supplied by the plaintiff."

5. Thus, the Trial Court concluded that no triable issues were raised by the defendants and declined their applications seeking leave to defend. Consequently, the suit was decreed in favour of the plaintiff for a sum of Rs. 89,50,244/- together with interest at the rate of 10% per annum with joint and several liability of the defendants to pay the decreetal amount.

High Court dismissed the appeal filed by appellant

6. The appellant-defendant No. 2 challenged the judgement and decree so passed by the Trial Court by way of regular first appeal, being RFA No. 402 of 2018. The High Court, however, rejected the contentions urged on behalf of the appellant and dismissed the appeal.

6.1. The High Court, *inter alia*, observed that merely for the delivery address of the goods in question having been that of the site of defendant No. 1, it would not mean that the purchase orders were those of the defendant No. 1, when it was *ex facie* evident that the purchase orders had been issued only by defendant No. 2; the invoices were raised by the plaintiff upon defendant No. 2 and not upon defendant No. 1; and the defendant No. 2 was specifically mentioned as the buyer in those invoices.

6.2. The High Court further observed that the appellant-defendant No. 2 was liable and the suit was maintainable under Order XXXVII CPC because the invoices for their total value were written contracts, containing specified amount of liability of the appellant-defendant No. 2 for payment to the plaintiff-respondent No. 1. As regards the cheques in question, the High Court observed that though the cheques were issued by the

defendant No. 1, yet a suit under Order XXXVII of CPC would lie against the defendant No. 2 because there was no such requirement in Order XXXVII CPC that the cheques which are issued for payments ought to be of the person against whom the liability is claimed. The High Court further observed that as per Section 2 (d) of Indian Contract Act, 1872 consideration under a contract need not flow/pass only between the parties to a contract. The High Court also observed that even if the cheques were not presented, the suit would be maintainable under Order XXXVII CPC because there was no such requirement that the cheque ought to be dishonored for filing a summary suit. The High Court further observed on the maintainability of the summary suit even when there was a joint and several liability of the defendants in the following words: -

> "9. The fact that there is a joint and several liability of the appellant/defendant no.2 with the respondent no.2/defendant no.1 will not mean that to enforce this joint and several liability, the subject suit could not have been filed both against the appellant/defendant no.2 and the respondent no.2 herein. Once liability is joint and several of the appellant/defendant no.2 with the respondent no.2/defendant no.1, and as stated above Section 2(d) of the Indian Contract Act permits passing/payment of consideration by a person who is not a party to the contract, therefore merely because respondent no.2/defendant no.1 had agreed to be liable to make the payment of the goods purchased by the appellant/defendant no.2, this would not mean that the appellant/defendant no.2 would no longer be liable and liability will only be of the respondent no.2/defendant no.1."

6.3. The High Court further observed that the principles governing the issue were not those of the decision of this Court in the case of ***Mechelec Engineers and Manufacturers v. Basic Equipment Corporation*: AIR 1977 SC 577**, as referred to by the Trial Court; but the applicable principles were contained in the later decision of this Court in ***IDBI Trusteeship***

***Services Ltd. v. Hubtown Ltd.*: (2017) 1 SCC 568**. While reproducing the principles so laid down by this Court, the High Court held that the appellant-defendant No. 2 was not entitled to leave to defend because the defences raised by it do not give rise to genuine triable issues; and the defences were frivolous and vexatious, raised only in order to deny the just dues of the seller of goods, being the plaintiff.

High Court also dismissed the appeal filed by defendant No. 1

7. Before proceeding further, we may take note of the fact that the defendant No. 1 had also filed an appeal, being RFA No. 743 of 2018, in challenge to the judgment and decree of the Trial Court dated 18.09.2017. The appeal so filed by the defendant No. 1 (respondent No. 2 herein) was considered and decided by the High Court by its separate (and later) judgment and order dated 05.09.2018 with the finding that the defence sought to be raised by the defendant No.1 was frivolous or vexatious and, in support of this finding, the High Court specifically gave the reason in following words: -

> "The defence of the appellant/defendant no. 1 was clearly frivolous or vexatious, and it did not raise a genuine triable issue, because if there was no liability of the appellant/defendant no. 1 then, where was the question of making payments regularly by the appellant/defendant no.1 to the respondent no.1/plaintiff."

Rival Contentions

8. Reverting to the case at hand, which pertains to the appellant-defendant No. 2, we may briefly take note of the rival submissions in this appeal.

9. Learned senior counsel for the appellant-defendant No. 2 has contended that liability for payment against the material supplied by the plaintiff was not that of the appellant-defendant No. 2 but had been of the defendant No. 1, which was evident from the fact that the plaintiff itself had pleaded that the liability to pay for the supplies made by it was that of the defendant No. 1. Thus, according to the learned counsel, the impugned decree proceeds rather contrary to the plaintiff's own case and cannot be sustained.

9.1. Learned counsel for the appellant has further submitted that the appellant was only acting as an agent of the defendant No. 1, as the agreement for supply of steel was between plaintiff and defendant No. 1; and the appellant, having issued the purchase orders only on behalf of the defendant No. 1, cannot be held liable for payment to the plaintiff, in terms of Section 230 of the Indian Contract Act, 1872 which provides that an agent cannot be held liable for the contract executed on behalf of the principal. The learned counsel has referred to the decision of this Court in the case of ***Prem Nath Motors Limited v. Anurag Mittal*: (2009) 16 SCC 274.** The learned counsel has yet further submitted that the defendant No. 1 had issued two cheques bearing Nos. 037274 and 037272 towards part payment to the plaintiff against the supplies made; and when the High Court has observed that a cheque is a written agreement containing a liquidated amount as per Order XXXVII Rule 1(2) of the CPC, the said

cheques would only constitute a liability of the defendant No. 1 and not that of the appellant-defendant No. 2.

9.2. Learned counsel would further submit that the plaintiff's summary suit was not maintainable against the appellant under Order XXXVII CPC in the absence of a legally enforceable debt and, in support of this contention, would rely on the decision of this Court in case of ***V.K. Enterprises v. Shiva Steels*: (2010) 9 SCC 256.**

10. *Per contra*, learned counsel for the plaintiff-respondent No.1 would submit that the present appeal, being only an attempt to avoid the legal liability, deserves to be dismissed.

10.1. The learned counsel has contended that both the appellant-defendant No. 2 and the defendant No. 1 are merely trying to evade the liability, by shifting the burden upon each other. As regards the liability of the appellant-defendant No. 2, learned counsel would submit that the appellant had raised purchase orders; that on the basis of the said purchase orders, goods were supplied and the invoices were raised in the name of the appellant; and that the goods were received by the appellant. In this fact situation, according to the learned counsel, merely because delivery address of the goods was that of the site owned by the defendant No. 1, the appellant cannot avoid its liability and, in fact, the defendants had been standing in joint and several liability to liquidate the amount due against the said invoices.

10.2. The learned counsel would argue that the invoices for their total value constituted written contracts and hence, the suit has rightly been filed in terms of Order XXXVII CPC where the defendants cannot get away by shifting the liability upon each other.

11. In different dimensions to the above, the learned counsel appearing for the defendant No. 1 (respondent No. 2 herein) has contended that under the construction agreement executed between the defendant No. 2 and defendant No. 1, the payments toward supply of material by the plaintiff were to be made by the defendant No. 2. The learned counsel would submit that the appellant-defendant No. 2 had placed purchase orders with the plaintiff and invoices were raised by the plaintiff in the name of defendant No. 2 and hence, there was no privity of contract between the plaintiff and defendant No. 1. The mere fact that the defendant No. 2 was carrying out the work of the defendant No. 1 and the invoices mentioned the name of the project where the goods were to be delivered would not make the defendant No. 1 liable to make payment to the plaintiff. It has also been submitted that there was no role of the defendant No. 1 because neither its consent was taken at the time of execution of agreement for the supply of goods nor the rates of steel were discussed; and the purchase orders and invoices also do not bear the name of the defendant No.1 or any signatures on its behalf. As regards the payments earlier made by the defendant No. 1, the submission has been that such payments were made on the request of the defendant No.

2 when it had shown deficiency in cash flow and requested to make payment to the vendors including the plaintiff.

11.1. On behalf of the defendant No. 1, reference has also been made to the judgment dated 05.09.2018 passed by the High Court in its appeal (RFA No. 743 of 2018) while contending that the said appeal came to be dismissed without adverting to the relevant facts. It has also been pointed out that there were other disputes between the appellant and the defendant No. 1 for which, other litigation is pending in Delhi High Court.

12. We have given thoughtful consideration to the rival submissions and have examined the record of the case with reference to the law applicable.

Analysis

13. For what has been noticed hereinbefore, two principal points call for determination in this appeal: one, as to whether the plaintiff was entitled to maintain a summary suit under Order XXXVII CPC for the claim in question; and second, as to whether the appellant-defendant No. 2 has rightly been declined the leave to defend?

14. The question concerning maintainability of the suit filed by the plaintiff as a summary suit under Order XXXVII CPC need not detain us much longer. This is for the simple reason that as per the plaint averment, the matter is based on written contract arising out of written purchase orders issued by the appellant on the instructions and on behalf of defendant No. 1; and the plaintiff had raised the invoices against such

supplies under the purchase orders. The plaintiff has further pointed out that two cheques were issued by the defendant No. 1 towards part payment against the invoices, being cheque No. 037274 dated 04.05.2015 in the sum of Rs. 14,72,269/- and No. 037272 dated 09.05.2015 in the sum of Rs. 13,34,319/-.

14.1. The assertion of plaintiff had been of joint and several liability of the defendants. The question as to whether the appellant was acting only as an agent of defendant No. 1 in relation to the supplies in question and had no monetary liability, as sought to be raised by the appellant, could be a matter of his defence. This aspect, relating to the nature of defence shall be examined in the next question but, such a proposition of defence by the appellant cannot take away the entitlement of the plaintiff-respondent No. 1 to maintain the summary suit in terms of Order XXXVII CPC. This is apart from the fact that while asserting joint and several liability of the defendants, the plaintiff has also relied upon the cheques said to have been issued by defendant No. 1, which were allegedly not presented as per the request of the said defendant No. 1.

14.2. In the overall facts and circumstances of the case, the contention against maintainability of the summary suit in terms of Order XXXVII CPC cannot be accepted and to that extent, we find no reason to consider any interference in the decision of the High Court. However, the question still remains as to whether the appellant is not entitled to leave to defend?

15. In regard to the question of leave to defend, as noticed, the High Court has observed that the appellant would not be entitled to such leave because no triable issues were arising out of the defence sought to be taken by the appellant. The High Court has also observed that the defences were frivolous and vexatious; and were raised only in order to deny the just dues of seller of the goods, i.e., the plaintiff. According to the High Court, while applying the principles for grant of leave to defend, as delineated in the case of ***IDBI Trusteeship*** (supra), the appellant was not entitled to the leave to defend.

16. The High Court took note of the fact that the Trial Court relied upon the decision in ***Mechelec Engineers*** (supra) and observed that the applicable principles were those contained in the later decision of this Court in ***IDBI Trusteeship*** (supra). Having regard to the question at hand, it shall be worthwhile to read together the principles stated in the said two decisions of this Court.

16.1. In the case of ***Mechelec Engineers*** (supra), the principles for consideration of a prayer for leave to defend in a summary suit were laid down by this Court in the following terms: -

> "**8.** In *Kiranmoyee Dassi Smt* v. *Dr J. Chatterjee* [AIR 1949 Cal 479 :49 CWN 246, 253 : ILR (1945) 2 Cal 145.] Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions (at p. 253):
> "(*a*) 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 judgment and 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 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.

(*c*) 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, shews such a state of facts as leads to the inference that at the trial of the action be 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.

(*d*) 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.

(*e*) 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."

16.2. In the case of ***IDBI Trusteeship*** (*supra*)**,** this Court modulated the aforementioned principles and laid down as follows: -

"**17.** Accordingly, the principles stated in para 8 of *Mechelec case* [*Mechelec Engineers & Manufacturers* v. *Basic Equipment Corpn.*, (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in *Milkhiram case* [*Milkhiram (India) (P) Ltd.* v. *Chamanlal Bros.*, AIR 1965 SC 1698 : (1966) 68 Bom LR 36] , 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.
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> **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."

17. It is at once clear that even though in the case of ***IDBI Trusteeship***, this Court has observed that the principles stated in paragraph 8 of ***Mechelec Engineers'*** case shall stand superseded in the wake of amendment of Rule 3 of Order XXXVII but, on the core theme, the principles remain the same that grant of leave to defend (with or without conditions) is the ordinary rule; and denial of leave to defend is an exception. Putting it in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the Court.

17.1. As noticed, if the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is

entitled to unconditional leave to defend. In the second eventuality, where the defendant raises triable issues indicating a fair or bonafide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the Trial Court is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the Trial Court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, where the proposed defence appear to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.

17.2. Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing

security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.

17.3. Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious.

18. When we apply the principles aforesaid to the facts of the present case and to the impugned orders, it is at once clear that after finding the suit to be maintainable under Order XXXVII CPC because of assertion of the plaintiff about joint and several liability of the defendants, the High Court concluded that the defences were frivolous and vexatious. The Trial Court had observed that the defendants failed to raise any triable issues. It appears that while recording such conclusions, the Trial Court as also the High Court totally omitted to consider that the appellant-defendant No. 2 has been contesting its liability with the assertion that it had only been the contractor executing the work of defendant No. 1. Even as per the plaint averments and plaintiff's assertions, the defendant No. 1 had made various payments from time to time against the supplies of the building material. The cheques, allegedly towards part payment against the supplies made by the plaintiff, had been issued by the defendant No. 1. In the given set of circumstances, the conclusion of the High Court that the defence raised by the appellant was frivolous or vexatious could only be treated as an assumptive one and lacking in requisite foundation.

19. At this juncture, we may also refer to a significant feature of the case that the defendant No. 1 (respondent No. 2 herein) had questioned the same judgment and decree of the Trial Court dated 18.09.2017 by way of a separate appeal, being RFA No. 743 of 2018, that was considered and dismissed by the High Court by the judgment and order dated 05.09.2018. Interestingly, the High Court dismissed the said appeal

with the finding that the defence raised by defendant No. 1 was frivolous or vexatious and, in support of this finding, the High Court specifically gave the reason in the form of a query that if at all there was no liability of the defendant No. 1, where was the question of making payments regularly by the defendant No. 1 to the plaintiff?

19.1. It is at once noticeable that in contradistinction to the reasons stated qua the defendant No. 1 in the judgment and order dated 05.09.2018, the High Court has merely observed in the impugned judgment and order dated 11.05.2018 concerning the present appellant, i.e., defendant No. 2, that the defences were frivolous or vexatious and were raised only to deny the just dues of the seller of goods. No reason has been assigned as to why and how the defence of the present appellant (defendant No. 2) was treated as frivolous or vexatious. The effect and impact of an admitted position of the plaintiff, that payments were indeed made from time to time by the defendant No. 1, seems not to have gone into consideration of the Trial Court and the High Court while denying leave to the appellant. The same considerations, which weighed with the Courts to deny the leave to defend to the defendant No. 1, could not have been applied *ipso facto* to the case of the appellant; rather those considerations, in our view, make out a case of triable issues qua the appellant.

20. In the totality of the circumstances of this case, we are clearly of the view that the appellant has indeed raised triable issues, particularly

concerning its liability and the defence of the appellant cannot be said to be frivolous or vexatious altogether.

20.1. In the aforesaid view of the matter, we are inclined to hold that the appellant-defendant No. 2 ought to have been granted the leave to defend the claim made in the suit concerning its liability; and to this extent, the impugned decree deserves to be set aside.

21. For what has been observed hereinabove, we would have considered granting unconditional leave to defend to the appellant but then, it is noticed that by the order dated 17.08.2018, this Court granted stay over execution of the decree on the condition of the appellant depositing a sum of Rs. 40,00,000/- (Forty Lakhs). Thereafter, by the order dated 24.09.2018, this Court noticed the fact of such deposit and condoned the delay of four days in making the deposit. Taking these factors into account and, looking to the nature of claim and the nature of defence sought to be raised as also the fact that the appeal filed by the defendant No. 1 had been dismissed by the High Court, we find it just and proper to grant leave to defend to the appellant-defendant No. 2 while leaving it open for the Trial Court to pass appropriate orders regarding treatment of the said amount of Rs. 40,00,000/- deposited by the appellant in terms of the order passed by this Court.

21.1. As the appellant is being granted leave to defend, we are not dealing with other contentions urged on behalf of the appellant

concerning its liability; and all the relevant aspects are left open for consideration of the Trial Court.

22. Accordingly, this appeal succeeds and is allowed in the manner that impugned judgment and order dated 11.05.2018 as passed by the High Court and the impugned judgment and decree dated 18.09.2017 as passed by the Trial Court, insofar relating to the present appellant (defendant No. 2), are set aside; the appellant is granted leave to defend; and the amount of Rs. 40,00,000/- deposited by the appellant shall be treated to be a deposit towards the condition for leave to defend. The Trial Court shall pass appropriate orders for treatment of the said amount of Rs. 40,00,000/- and then shall proceed with trial of the suit only qua the appellant-defendant No. 2 in accordance with law.

22.1. No order as to costs of the present appeal.

……..……..J.
(VINEET SARAN)

…… J.
(DINESH MAHESHWARI)

New Delhi;
Date: January 18, 2022