

- A** HELD: A bare reading of the order of High Court on the earlier occasion shows that the High Court took the view on the consent of parties that Rs.20 lakhs was to be deposited and on deposit being made certain follow up action were to be taken. The fact that the High Court wanted the quantum to be pinned at Rs.20 lakhs and not more than that is clear from the fact that the High Court directed refund in case the trial court on consideration of merits came to conclusion that the amount to be deposited was less than Rs.20 lakhs. There is no indication that in case the amount was to be more, then the appellant would pay the differential amount. The stand of the appellant that the maximum deposit that could have been directed was fixed at Rs.20 lakhs is on a sound footing. The order of the trial court as well as that of the High Court cannot be maintained. However, this Court has stayed the operation of High Court's order subject to deposit of Rs.20 lakhs. The amount already deposited need not be refunded. [633-B-E]

Mechalec Engineers and Manufactures v. Basic Equipment Corporation, AIR (1977) SC 577 and Mrs. Raj Duggal v. Ramesh Kumar Bansal, AIR (1990) SC 2218, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3846 of 2006.

From the Final Judgment and Order dated 20.4.2005 of the High Court of Judicature at Bombay in Writ Petition No. 2521/2005.

E C.A. Sundaram, Mahesh Agarwal, Rishi Agrawal, E.C. Agarwala and Dhrupad Kashyap for the Appellant.

V.A. Bobde, Nikhil M. Sakhardande, Niranjan Pandit and Rekha Palli for the Respondents.

F The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Leave granted.

G Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Bombay High Court dismissing the writ petition No. 2521 of 2005 filed by the appellant. By the impugned judgment the High Court upheld the view of the trial court in Summary Suit No.10 of 2001 that the appellant has not made out a case for unconditional leave to defend in terms of Order XXXVII Rule 2 of the Code of Civil Procedure, 1908, (in short the 'CPC').

H The factual background in a nutshell are as follows:

Summary Suit No.10 of 2001 has been filed by the respondent before A the learned Civil Judge (Senior Division) at Kalyan for recovery of an amount of Rs.98,81,426.63. In addition, the plaintiff has claimed interest from the date of filing of the suit till the realisation of the amount. The suit was filed on 05.07.2001. After issuing notice, the writ petitioner-defendant filed an application under Order XXXVII Rule 3(5) of C.P.C. for leave to defend unconditionally and the said application was rejected by the trial Court. The writ Petitioner, therefore, approached the High Court in Civil Revision Application No. 659 of 2002 and in terms of the consent orders, it was disposed of on 02.05.2002. The said order was to the effect that the writ petitioner was to deposit an amount of Rs. 20,00,000/- with the trial Court within four months to show his bonafides and was entitled to take out an application for leave to defend which was required to be heard on merits. If he succeeded in his application for leave to defend, he was allowed to withdraw the amount deposited. The trial Court heard the parties afresh and by order dated 11.03.2005 allowed the application (Ex. 34) on the condition that the writ petitioner was to deposit an additional amount of Rs.50,00,000/- in two instalments. The said order was challenged before the High Court. D

Before the High Court, by referring to the numerous correspondence between the parties right from 05.11.1997 onwards, writ petitioner submitted that the summary suit raised several disputed questions which needed trial and at no point of time, the writ petitioner had accepted the claim made by the plaintiff. It was also pointed out that the writ petitioner had taken up the issue with its Architect and all the bills submitted by the plaintiff were returned to the Architect. Thus, the writ petitioner had not accepted the payments as claimed by the plaintiff. It was further submitted that the trial court failed to give proper reasonings and a cryptic order has been passed rejecting the application for leave to defend unconditionally. F

The High Court noted that after issuing notice in the trial court, the defendant has not filed its written statement. In the application, the defendant has disputed the contents and in fact denied the claim made by the plaintiff. However, the plaintiff has set out its case to point out that the work as per the tender was completed some times in March, 1999, the final bills submitted by it were certified by the Architect of the defendant and certificate to that effect was issued on 19.04.1999. The Architect had forwarded the bills to the defendant for clearance and the final bill amount was Rs. 2,07,11,475/-, out of which, an amount of Rs.1,08,29,989/- was received. The correspondences brought on record show that the meeting was held between the parties and H

A the issue regarding incomplete work, payments and final settlement were discussed by them in the meeting as is clear from the letter addressed by the writ Petitioner dated 20.11.1998 to its Architect Mr. Qutub Mandviwala. Reference was made to possible dates for final discussion and settlement of the dues. During this period, the contractor and the Architect should discuss and settle all the payments etc. after completing the jobs as agreed.

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According to the High Court, the correspondence thereafter, between the writ petitioner and its Architect goes to show that there were some defective jobs which were to be completed. The final bills submitted by the plaintiff were certified on 19.04.1999 by the Architect of the defendant and thereafter, vide letter dated 27.04.1999, the defendant took up the issue with its Architect.

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All this correspondence goes to show that the claim made by the plaintiff is not totally denied and there may be some subtractions in terms of the interest or defective work but there is nothing on record to show that the Architect of the writ petitioner has finally worked out the figure, quantified the payment to be made to the plaintiff and in any case less than the amount

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certified by the said Architect on 19.04.1999.

The trial court passed the following order:

E "After hearing arguments of the parties, I am of the opinion that defendant has no defence, but it is moon shine defence. Therefore, a permission can be granted to leave defence to the deserves to be allowed on condition, I pass the following order:

1. The application Exh.34 is allowed for leave to defence to the defendant on following conditions: -

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(i) The defendant shall deposit an amount of entire Rs.50 Lacs in the Court in a two instalments on or before next date, in addition to earlier deposited amount of Rs 20 Lacs.

2. Cost shall be cause in the suit".

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The High Court felt that the trial court ought to have given proper reasons in support of the impugned order. But it was observed that the correspondences between the parties does show that the application submitted by the writ petitioner could not be allowed and the discretion exercised by the trial court granting leave to defend conditionally i.e. on total deposit of Rs.70,00,000/- cannot be termed to be perverse or totally erroneous. Four

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years had passed from the filing of the claim before the trial court and the

original claim was Rs.98,81,426.63/- As noted above writ petition was A dismissed.

Learned counsel for the appellant submitted that both the trial court and the High Court completely lost sight of the earlier order passed by the High Court which in no uncertain terms laid down that the quantum of deposit to be directed could not be more than Rs.20,00,000/- Without noticing these relevant aspects, the trial court directed deposit of Rs.70,00,000/- and High Court upheld it. B

Per contra, learned counsel for the respondent submitted that even according to the correspondences and the statements filed by the appellant the admitted amount was more than Rs. 90,00,000/- and, therefore, after taking note of the deposit of Rs.20,00,000/- made earlier, the trial court and the High Court had directed deposit of Rs.50,00,000/- more. In essence, his submission was that in the earlier order in the Civil Revision the amount to be fixed was let to be decided by the trial court. C

Order XXXVII Rules 2 and 3 so far as relevant reads as follows: D

2. Institution of Summary Suits.(1) A suit, to which this Order applies, may if the plaintiff desires to proceed thereunder, be instituted by presenting a plaint which shall contain,
 - (a) a specific averment to the effect that the suit is filed under this Order;
 - (b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and
 - (c) the following inscription, immediately below the number of the suit in the title of the suit, namely

- (2) The summons of the suit shall be in Form No. 4 in Appendix B or in such other form as may, from time to time, be prescribed.
 - (3) The defendant shall not defend the suit referred to in sub rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules G H

- A made in that behalf and such decree may be executed forthwith.]
- B 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.
- C (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.
- D (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.
- E (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:
- F 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:
- G 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.
- H This Court in *Mechalec Engineers and Manufactures v. Basic Equipment Corporation*, AIR (1977) SC 577 has laid down the principles to be followed in granting leave to defend the suit under Order XXXVII, rule 3 of the Code. One of the aforesaid principles is, that 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. It has also been laid down therein that 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. A B

While giving leave to defend the suit the Court shall observe the following principles:

- (a) If the Court is of opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally. See *Milkhiram (India) Pvt. Ltd v. Chaman Lal Bros.*, AIR (1965) SC 1698. The question whether the defence raises a triable issue or not has to be ascertained by Court from the pleadings before it and the affidavits of parties. C
- (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 put by the defendant is frivolous or vexatious it may refuse leave to defend altogether. *Kiran Mryace Dassi v. Dr. J. Challrae*, AIR (1949) Cal. 479. (noted and approved in *Mechalec's* case (supra). D E
- (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. F

In *Mrs. Raj Duggal v. Ramesh Kumar Bansal*, AIR (1990) SC 2218 it was held as follows:

“3. Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the H

- A amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency".
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- In the instant case much would depend upon the effect of the order passed by the High Court in the earlier case i.e. Civil Revision no. 659 of 2002. C The operative portion reads as follows:

"The applicants in order to establish their bonafides agree and undertake that they shall deposit before the Trial Court in amount of Rs. 20 lacs within a period of four months from today.

- D Upon deposit of the aforesaid amount of Rs.20 lacs by the Applicants, the impugned order of the learned Civil Judge, Senior Division, Kalyan dated, 7th March, 2002 declining to grant unconditional leave to defend and the consequential decree passed on 8th March, 2002 shall stand quashed and set aside.

- E The learned Trial Judge shall dispose of the summons for Judgment after hearing the parties, uninfluenced by the earlier order dated 7th March, 2002, which is with the consent of the parties quashed and set aside. The learned Trial Judge will proceed to deal with the matter in accordance with the directions as aforesaid and keeping in view the requirements of order 37, of the Code of Civil procedure, 1908.
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- G In the event that the deposit of an amount of Rs.20 lacs as aforesaid is made, it shall be without prejudice to the right of the Applicants to contend that they are entitled to the grant of unconditional leave to defend the suit. In the event that the learned Trial Judge comes to the conclusion that the Applicants are entitled to unconditional leave to defend, the Applicants would be at liberty to make an application before the Trial court for refund of the amount which has been deposited by them of Rs.20 lacs, in pursuance of the statement which has been made herein above, similarly, in the event of leave being granted to defend the suit subject to deposit of an
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amount less than Rs.20 lacs, the Applicants would be at liberty to A move an application for the refund of the balance amount of Rs.20 lacs. The Respondents would similarly be at liberty to move an application for the withdrawal of the amounts deposited after the application for leave to defend has been disposed of and subject to the outcome of the application".

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A bare reading of the order shows that the High Court in the earlier occasion took the view, on the consent of parties, that Rs.20,00,000/- was to be deposited and on deposit being made certain follow up action were to be taken. The fact that the High Court wanted the quantum to be pinned at Rs.20,00,000/- and not more than that is clear from the fact that the High Court directed refund in case the trial court on consideration of merits came to conclusion that the amount to be deposited was less than Rs.20,00,000/-. There is no indication that in case the amount was to be more, then the appellant would pay the differential amount.

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The stand of the appellant that the maximum deposit that could have been directed was fixed at Rs.20,00,000/- is on a sound footing. The order of the trial court as well as that of the High Court cannot be maintained. However, as an interim measure by order dated 26.9.2005 this Court has stayed the operation of the High Court's order subject to deposit of Rs. 20,00,000/-. It is stated that the deposit has already been made. Though we have held the trial Court's order and the High Court's order are not sustainable, the amount deposited pursuant to this Court's order need not be refunded. The trial Court is directed to proceed with the matter and make effort for its expeditious disposal.

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Appeal is allowed but without any order as to costs.

N.J.

Appeal allowed.