

22.12.2022

ORDER

1. Vide this common order, the court shall decide the application of defendant under Order XXXVII Rule 3 (7) and Section 5 of Limitation Act r/w section 151 CPC for condonation of delay in filing the application seeking leave to defend and under Order XXXVII rule 3 (5) r/w section 151 CPC seeking leave to defend the present suit.

2. **Following arguments were submitted on behalf of defendant :**

2.1) After receiving the summons for appearance, defendant entered his appearance through his counsel before the Court within stipulated period. Thereafter, on receiving summons for judgment under Order XXXVII Rule 3 CPC on 05.02.2021, defendant applied for grant of leave to defend on 05.04.2021.

2.2) There is delay in applying for leave to defend the present suit. The delay may kindly be condoned in the interest of justice as defendant has a good prima-facie case and likely to succeed in it. In case, the delay is not condoned, defendant shall suffer irreparable loss and injury which cannot be compensated in any manner whatsoever. On the other hand, no prejudice would be caused to plaintiff if delay is condoned.

2.3) During 2017-2018, plaintiff and defendant were working together from the office of defendant. All the documents such as accounts book, signed and blank cheques were kept in the office of defendant.

Plaintiff was aware about keeping of these documents in the office and in the absence of defendant, plaintiff stole some cheque books.

2.4) There was no financial transactions between plaintiff and defendant as claimed in the plaint. Plaintiff had neither given Rs.25,00,000/- in cash nor had he any liability to repay the same to plaintiff. Plaintiff misused the cheques in question. When defendant came to know of the same on 31.10.2019, defendant immediately lodged a complaint against plaintiff before the DCP, North-East, Commissioner of Police. Summons of the present suit was received by defendant on 16.11.2019 whereas complaint was filed by defendant prior to receiving the summons on 31.10.2019.

2.5) The suit of plaintiff is without any cause of action and based on false and fabricated documents.

2.6) Plaintiff had transferred the amount of Rs.5,00,000/-, Rs.2,85,000/- and Rs.15,000/- which are not towards friendly loan. Defendant, in the first week of March, 2019, had not issued a cheque of Rs.500,000/- in favour of plaintiff and other cheque in favour of plaintiff.

2.7) Plaintiff has no source of income. Plaintiff is not capable to advance huge amount of Rs.25,00,000/- as a friendly loan. Plaintiff has not shown the said loan amount in the ITR for the relevant financial year. Defendant never received any demand notice from plaintiff.

2.8) The suit of plaintiff in its present form is not maintainable under Order XXXVII of CPC ; plaintiff has not come to this Hon'ble Court with clean hands.

2.9) There are various triable issues raised in the affidavit filed alongwith the application seeking leave to defend which are required to be

adjudicated by leading evidence.

3. **Following arguments were submitted on behalf of plaintiff :**

3.1) Defendant had not come with clean hands before this Hon'ble court and suppressed the material facts from this Hon'ble Court, therefore, there is no ground for condonation of delay in applying for leave to defend the suit.

3.2) Defendant has not put forth any triable issue in the affidavit in order to be entitled to leave to defend the present suit, therefore, plaintiff is entitled for a decree forthwith as claimed in the plaint.

3.3) Defendant has made a vague submission that plaintiff had stolen the cheques in question ; said cheques were signed ; there was a partnership between plaintiff and defendant without there being any proof.

3.4) Defendant had not lodged any complaint before any authority regarding theft of the cheques in question. Defendant filed the complaint for the first time only on 31.10.2019 despite claiming in para no.2 that his two cheque books, one of HDFC Bank Yamuna Vihar and of another Bank were missing from the office ; since July, 2019, plaintiff had been threatening defendant to implicate in false case, however, no complaint was made prior to 31.10.2019.

3.5) Cheques in question were dishonored on 06.06.2019 and legal notice dated 28.06.2019 was served upon defendant on 12.06.2019. Plaintiff filed a complaint case against defendant Under Section 138 NI Act and pursuant to the same notice was issued to defendant by the order of

concerned Court. So, there arose no question that defendant came to know about the theft of the cheques in question on 31.10.2019.

3.6) On 07.02.2020, summons for judgment issued in the present suit, was duly served upon defendant through his wife Smt. Neetu which is also reflected from the service report but defendant filed the application seeking leave to defend only on 05.04.2021, therefore, the said application is hopelessly time barred.

3.7) The applications alongwith affidavits were typed on 14.01.2020 and affidavit was verified at Mumbai and attested on 14.01.2020 by Sh. Sudhir Kumar Sharma, Adv. Whose Oath Commissioner-ship was going to expire on 20.02.2020, the date mentioned on the list of documents is also 14.01.2020, all the above-mentioned documents have been typed on legal size pages but the said size of the paper was discontinued from 01.04.2021 vide Notification/Circular of Hon'ble High Court of Delhi and the name of the Ld. Presiding Officer of this Court is mentioned as Sh. Brijesh Garg, ADJ, North-East, KKD Courts, Delhi, however at the time of filing the said application, the Court was succeeded by the present Successor. This clearly shows that although the said application was ready on 14.01.2020 but it was not filed till 05.04.2021. Hence, this leave to defend cannot be considered.

3.8) Defendant has not given any reason for the delay caused, explained the delay for each day and also failed to specifically mention the number of days for which he is seeking to condone the delay by this Hon'ble Court. The said application lacks essentials ingredients of the application under Section 5 of limitation Act.

3.9) On 15.09.2020, the proceedings of this Hon'ble Court were

conducted online but none was present for the parties on that day, therefore, this Hon'ble Court was pleased to issue fresh summons for judgment for 08.12.2020 inadvertently and defendant is trying to take advantage of the same. As per law, the limitation starts from the first service of summons, once the limitations starts to run, it cannot be stopped. Defendant was served on 07.02.2020, a month before 15.03.2020, hence, cannot take advantage of judgment of the Hon'ble Supreme court of India regarding the limitations.

3.10) Defendant cannot be allowed to take advantage of his own wrongs as defendant has taken a loan of Rs.28,00,000/- from plaintiff and now, cannot be allowed to take plaintiff for a ride and is liable to make a payment of a sum of Rs.25,00,000/- as prayed by plaintiff.

4. **Findings of the Court**

4.1) Before adverting to the facts and circumstances of the case, let us first discuss the relevant legal provisions and settled legal principles for consideration on the application seeking condonation of delay in filing the appearance and leave to defend the suit.

4.2) The court may for sufficient cause shown by defendant, excuse the delay of defendant in entering an appearance or in applying for leave to defend the suit. The court finds that though no reason has been assigned for delay in filing the application seeking leave to defend the suit, however, since liberal interpretation is to be given as per settled legal proposition, therefore, exercising its discretionary power, for proper adjudication of the present suit on its merits and in the interest of justice, the application

seeking condonation of delay in filing the application seeking leave to defend the present suit is allowed and the delay is condoned subject to cost of Rs.2,000/- to be paid to plaintiff.

4.3) The principles relating to the test whether or not leave to defend the suit should be granted are mentioned as under :-

(A) The leave to defend will be granted only if the affidavit filed by the defendant disclose such facts as deemed sufficient to entitle him to defend. (Ref: **Mechalec Engineers Vs. Basic Equipment Corporation, (1976) 4 SCC 687**).

(B) Leave to defend should 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 by him is frivolous or vexatious.

(C) The test whether leave to defend should be granted or not is to see whether the defence raises a real, honest and bonafide dispute and raises a triable issue or not. If the court is satisfied that the defence has raised a triable issue or a fair dispute has arisen, leave to defend should not be refused. (Ref: **Raj Duggal Vs. Ramesh Kumar, 1991 Supp. (1) SCC 191**).

4.4) Let us now examine whether or not defendant is entitled to leave to defend the suit in the light of aforesaid legal provisions and settled legal principles.

4.5) On perusal of materials placed on record by the parties, it is

found that there are several triable issues. Plaintiff has claimed to have take Rs.10,00,000/- and Rs.8,00,000/- in cash at his residence in the presence of his family members on 16.06.2015 and 27.07.2015 respectively ; part payment of Rs.5,00,000/- each to defendant on 16.06.2015 and 27.07.2015 through RTGS ; issuance of cheques in question in discharge of liability by defendant ; defendant's claim of theft of cheques in question by plaintiff need to be proved by leading evidence. In the opinion of this court, these disputed facts need to be adjudicated by holding full-fledged trial in the present suit, in accordance with law. The grounds taken are sufficient to entitle defendant to defend the present suit unconditionally. The application for the leave to defend the suit is, therefore, allowed unconditionally.

The applications are disposed off accordingly.

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ADJ-01/NE/KKD/DELHI
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