

CS No. 11490/16
Sh.Gurdayal Vs. M/s.ONS Infratech Pvt.Ltd. and Anr.

**IN THE COURT OF VIKAS DHULL: ADDITIONAL
DISTRICT JUDGE-01 (WEST), Tis Hazari Courts, Delhi**

CS No. 11490/16

In the matter of :

**Sh.Gurdayal
Prop.of M/s.Gurdayal Enterprises
At 2151/8A1, New Patel Nagar
Gali No.5, Near Shadipur Post Office
New Delhi.**

... Plaintiff

Versus

- 1. M/s. O.N.S. Infratech Pvt.Ltd.
G-49, Kirti Nagar
New Delhi**
- 2. Sh.Udit Bhasin
Authorized Signatory of cheque
M/s. O.N.S. Infratech Pvt.Ltd.
G-49, Kirti Nagar
New Delhi**

**Also at:
A-2/282, Janakpuri**

New Delhi

Also at:

**36/5, 3rd Floor, East Patel Nagar
New Delhi-110008.**

... Defendants

**Date of filing of application : 15.04.2017
Date on which order reserved : 22.05.2019
Date on which order pronounced : 22.05.2019**

ORDER

1. Vide this order, I shall dispose of an application under Order XXXVII Rule 3(5) CPC of the defendants seeking leave to defend.
2. The brief facts which are relevant for deciding the present application are that plaintiff had filed a suit under Order XXXVII CPC for recovery of Rs.5.5 Lacs based upon a cheque.
3. In the suit, it was averred that plaintiff was in the business of doing construction job on contract

basis and defendants had given him the job of construction work of the properties bearing Nos. G-49, Kirti Nagar, Delhi and A-2/282, Janakpuri, New Delhi.

4. It was further averred by plaintiff that he had done the job of the construction of the aforementioned properties to the satisfaction of defendants and had placed bills from time to time and defendant no.2 was making payment to the plaintiff on behalf of defendant no.1.
5. It was further averred that after the completion of work of aforementioned properties, an amount of Rs.5.5 Lacs was due upon defendants and defendant no.2 on behalf of defendant no.1 had issued a cheque of Rs.5,50,000/-dated 20.06.2014 favouring the plaintiff. However, the said cheque on presentation was dishonoured due to reason of “payment stopped”. Thereafter, plaintiff had filed a criminal complaint against defendants under

Section 138 of the Negotiable Instruments Act, 1881 which is still pending disposal.

6. In the present case, plaintiff had issued a legal notice demanding his payment but despite service, payment was not made. Hence, the present suit was filed for recovery of amount of Rs.5.5 Lacs under Order XXXVII CPC.
7. The defendants on being served with the summons under Order XXXVII CPC, had filed their appearance on record and thereafter, summons for judgment were served upon defendants.
8. Pursuant to service of summons for judgment, the present application has been filed by defendants under Order XXXVII Rule 3(5) CPC seeking leave to defend.
9. Notice of the said application was issued to plaintiff, who had filed a detailed reply.
10. I have heard Sh.Deepak Rao, Ld.counsel for plaintiff and Sh.Digvinay Singh, Ld.counsel for

defendants.

11. It was submitted by Ld.counsel for defendants that in the present case, lot of triable issues have been raised by defendants in their application. Therefore, defendants ought to be granted an unconditional leave to defend the present suit.
12. It was further submitted that defendants had availed the services of plaintiff on day-to-day and not on the basis of any kind of contract and plaintiff has not filed on record any contract to have been executed between the parties.
13. It was further submitted that plaintiff did not complete the job assigned to him and had left the work mid-way and, therefore, defendants had to engage some other person to complete the work left by plaintiff and all legitimate dues of plaintiff were cleared by defendant no.1.
14. It was further submitted that defendant no.2 is not authorized signatory of defendant no.1

company and even cheque in question has not been issued by defendant no.1 company but is issued in the personal capacity of defendant no.2.

15. It was further submitted that cheque of defendant no.2 was misplaced from his office and accordingly, he had issued instructions to his bank to stop the payment.

16. It was further submitted that in the present case, cheque has been dishonoured due to payment stopped and this supports the defence of the defendants that the cheque was not issued for discharge of any liability by defendant no.1 company.

17. It was further submitted that in para 4 of the plaint, plaintiff has asserted that after completion of work, cheque of Rs.5.5 Lacs was issued on 20.06.2014 but plaintiff had himself filed on record invoice of 25.07.2014 and 17.07.2014 which shows that invoices were manipulated by

plaintiff to falsely claim the cheque amount from the defendants.

18. It was further submitted that in the legal demand notice dated 09.10.2014 and 05.05.2016 there are material contradictions regarding the liability of defendants. It was submitted that in the legal notice dated 09.10.2014, it was stated by plaintiff that cheque of Rs.5.5 Lacs was issued in discharge of part liability whereas in the legal notice dated 05.05.2016, it was stated that it was issued against discharge of entire liability.
19. It was further submitted that plaintiff had also issued a notice dated 21.02.2015 to Sh.Arjun Bhasin wherein it was asserted that the work of two properties in question was given to plaintiff by Sh.Arjun Bhasin on behalf of defendant no.1 company and with regard to same liability as against defendant no.1 company, a cheque of Rs.50,000/- was given by Sh.Arjun Bhasin to the

plaintiff. However, the entire plaint is silent with regard to liability of Sh.Arjun Bhasin with regard to alleged contract given by plaintiff with regard to aforementioned two properties. Therefore, lot of triable issues have been raised in the present leave to defend application for which defendants deserve to be granted an unconditional leave to defend. Accordingly, a prayer was made to allow the application for leave to defend.

20. On the other hand, Ld.counsel for plaintiff has opposed the application on the ground that in the application, no triable issues have been raised.
21. It was denied that plaintiff was engaged on day-to-day basis and his engagement was not on the basis of contract.
22. It was further submitted that the original contract is with the defendants.
23. It was denied that defendant no.2 is not the signatory of defendant no.1 company.

24. It was further denied that there was any contradiction with regard to issuance of cheque with regard to liability of defendant no.1 company in the legal notices issued by plaintiff.
25. It was further submitted that no reply was sent by defendants to any of the legal notices issued by plaintiff raising the defence that cheque was misplaced by them and was not issued in discharge of liability. Therefore, no reply to the legal notices is deemed admission on the part of defendants. Accordingly, a prayer was made to dismiss the application of the defendants.
26. I have considered the rival submissions of the respective parties.
27. The circumstances in which leave to defend has to be granted or refused has been detailed out in the judgment of the Hon'ble Supreme Court of India delivered in *M/s.Michalec Engineers and Manufacturers Vs. M/s.Basic Equipment*

Corporation, AIR 1977 SC 577. The conditions are reproduced as under:--

(a) If the defendant satisfies the Court that he has a good defence to the claim on the merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence, although not a possibly good defense, 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, if the affidavit discloses that at the trial he may be able to establish a defense to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend- the conditions being as to time of trial or mode of trial but not as to payment into "Court or furnishing security."

(d) If the defendant has no defence , or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

28. Applying the law to the facts of the present case, then it is apparent that lot of triable issues have been raised.
29. In the present case, as per assertion made by plaintiff, liability with regard to payment was that of defendant no.1 company. However, the cheque in question filed on record has not been issued by the defendant no.1 company but in the personal capacity of defendant no.2.
30. Further, defendants have disputed defendant no.2 to be authorized signatory of defendant no.1 company. Therefore, it is a triable issue as to whether cheque was issued in discharge of liability of defendant no.1 company or not by defendant no.2.
31. Secondly, as per averments made in para 4 of the plaint, plaintiff had stated that cheque in question was issued after the work was completed of both the properties in question. However, the

invoices dated 17.07.2014 and 25.07.2014 filed on record by plaintiff himself shows that they were issued after the issuance of cheque of Rs.5.5 Lacs dated 20.06.2014.

32. Further, there is a material contradiction in the legal notices dated 09.10.2014 and 05.05.2016 with regard to issuance of cheque in discharge of part liability or entire liability. Therefore, it is a triable issue as to whether cheque in question was issued in discharge of entire liability or for part liability which can only be established during the course of trial.

33. Further, plaintiff has stated about the execution of a work contract but the copy of the same has not been filed on record. Defendants had denied execution of any contract. Therefore, it is a triable issue as to whether any contract was executed between the parties and what was the terms of settlement and the value of the contract.

34. Therefore, in the light of aforementioned discussion, lot of triable issues have been raised by defendants in the said leave to defend application which if proved during the course of trial, may non-suit the plaintiff. Hence, **the application filed is allowed and defendants are granted an unconditional leave to defend the case.**

Announced in the Open Court

Dated: 22.05.2019

(Vikas Dhull)

Additional District Judge -01

THC/West/Delhi