

**IN THE COURT OF THE I ADDITIONAL DISTRICT AND
SESSIONS JUDGE, VELLORE, VELLORE DISTRICT.**

PRESENT: Tmt. J. Shanthi, B.Sc.,B.L.,
I Additional District and Sessions Judge,
Vellore.

Monday, the 13th day of February, 2023

I.A.No.2/2023 in O.S.No.178/2022

Zuber Ahmed Petitioner/1st Defendant

/vs/

1. A.Mohamed Nizamuddin 1st Respondent/ Plaintiff

/vs/

2. S. Mohamed Ashraf2nd Respondent/2nd Defendant

This Interlocutory Application is coming on 13.02.2023 before this court for final hearing in the presence of Thiru.V.Ranjithkumar, Advocate for the Petitioner and Thiruvalargal.M.Sathish Kumar and S.Raja Ravi Varma, Advocates for the 1st Respondent/Plaintiff and on hearing the arguments of both sides and upon perusing the entire case records and having stood over for consideration till this day, this court doth delivered the following:-

ORDER

Petition filed on behalf of the Petitioner under Order 37 Rule 5 and Section 151 C.P.C. to leave to defend the case as regular suit proceedings by let in oral and documentary evidence.

2. Brief averments in the affidavit:

The Petitioner is the 1st defendant in the above said suit. The 1st respondent/ plaintiff filed the suit against the petitioner and the 2nd respondent for recovery of money Rs.37,53,125/- with future interest of 7.5% is not at all maintainable either in law or on facts. The allegations made in the plaint namely on 31.01.2015 borrowed Rs.10,00,000/- on 24.01.2015 Rs.5,00,000/- and on 03.06.2015 Rs.10,00,000/- by executing promissory note along with HDFC bank Vellore branch cheque to pay the interest on 13.01.2015 Cheque No.000422 for Rs.20,000/- towards interest for the amount of Rs.10,00,000/- dated 24.01.2015 cheque No.000423 for Rs.10,000/- towards interest of Rs.5,00,000/- and dated 06.05.2015 cheque No.000470 for Rs.20,000/- towards interest for the amount of Rs.10,00,000/- is totally false and imaginary. Apart from that the allegations made in the plaint that the petitioner went along with the 2nd respondent in the month of October 2015 while the sales tax ride and he demanded Rs.5,00,000/- and the 1st respondent had paid Rs.5,00,000/- and he had already owe due in total Rs.30,00,000/- along with interest is false. The petitioner never borrowed any amount from the 1st respondent by assurance for repayment of interest. The petitioner paid Rs.9,00,000/- only towards interest amount on various dates is also false. The said amount is paid as part of the principal amount. The plaint averments are all false. The petitioner never gave any cheque as alleged in the plaint. The 1st respondent issued demand notice through his advocate on 23.08.2022 by demanding principal along with interest and the 1st respondent

restricted his claim to the Cheque amount of Rs.21,00,000/- as full and final settlement and the 1st respondent waiving the amount, but it is false to state that the petitioner never settle the above said amount inspite he gave complaint before Gudiyatham Town Police and enquiry had been conducted and he accepted the said liabilities. After issuance of legal notice the petitioner gave complaint for misuse of the cheque with an intention to grab money from him. At that time the police officials are directed both to get remedy through legal process. Therefore the petitioner issued reply notice to the 1st respondent advocate on 19.09.2022 by denying his liabilities. Therefore the plaintiff filed the suit before this Court in summary proceedings. The petitioner already paid entire amount due to the 1st respondent on various dates and he wantonly suppressed all the facts and filed this suit. The suit promissory notes dated 13.01.2015, 24.01.2015 and 06.05.2015 are barred by limitation. The HDFC bank, Vellore branch cheque's Nos.000422, 000423, 000470 and Syndicate bank, Vellore branch Cheques Nos.791740 and 924703 are obtained by the 1st respondent while borrowed amount in the year of 2015. The said amount has been paid by the petitioner and he demanded the said unfilled instrument but the 1st respondent assured to give the same. The 1st respondent filed this suit for Rs.37,53,125/- but he produced document with in limitation only for Rs.21,00,000/-. Hence the suit is not maintainable. The said two cheques also fabricated by the 1st respondent with an intention to wreck vengeance upon the petitioner. The 1st respondent is colluding with the 2nd respondent and filed this suit only to the instigation of 2nd respondent. The suit is

clearly abuse of process of law and it is to be dismissed. The petitioner has to defend the case with valuable documentary and oral evidence. He has good defence. Hence, the petition. If the petition is not allowed, the petitioner will be put to great hardship and loss.

3. Brief averments in the counter filed by the 1st Respondent/Plaintiff:

The 1st respondent is the plaintiff in the main suit and the petitioner is the 1st defendant and the 2nd respondent is the 2nd defendant in the main suit. The averments made in affidavit are all denied. The petitioner had produced the original promissory note executed both by the petitioner and the 2nd respondent and also bank receipts in evidence of the repayment of the interest. The averments made in para No.4 of the affidavit is admitted to the extent that the petitioner/ 1st defendant had issued two cheques in the 2nd week of July 2022 for the total amount of Rs.21,00,000/- and the same was dishonoured with endorsement as at "par validation failed" the other averments that the denial of the issuance of the cheque by the petitioner is entirely denied. With regard to the averments made in para No.5 of the affidavit that the issuance of the legal notice dated 23.12.2022 demanding to pay the cheque amount waiving the balance amount in case paid within 15 days and preferring the complaint and appearance for the enquiry are admitted, the other averments with regard to the complaint of misuse of the documents is entirely denied and issuance of the reply notice by the petitioner through his counsel on 19.09.2022 is admitted. The petitioner had not paid the entire amount due.

Both the petitioner and the 2nd respondent had borrowed the hand loan from the petitioner for their emergency business needs as follows: - on 13.01.2015 Rs.10,00,000/-, on 24.01.2015 Rs.5,00,000/-, on 06.05.2015 Rs.10,00,000/- and on 09.10.2015 Rs.5,00,000/- to the total tune of Rs.30,00,000/-. On receipt of the hand loan the petitioner along with the 2nd respondent had made payments jointly to the 1st respondent by way of cash and bank transfers, on perusing the Doc.No.8 the series of the receipts and Doc.No.9 Bank Statement, from the year 2018 to 2021 it is evident clear that the petitioner and the 2nd respondent for interest amount, though the bank transactions is only to the tune of Rs.2,07,000/- but the 1st respondent had bonafidely admitted that the petitioner along with the 2nd respondent had paid the interest to the tune of Rs.9,00,000/-. In the 2nd week of July 2022 in discharge of the part liability the petitioner had issued two cheques in Cheque No.791740 for an amount of Rs.15,00,000/- dated 23.07.2022 and cheque No.924703 for an amount of Rs.6,00,000/- dated 01.08.2022 drawn on Syndicate Branch, Vellore, Vellore District, on the promising words and the instructions of the petitioner, the 1st respondent had presented the above cheques for encashment through his banker Axis Bank, Vellore Branch on 08.08.2022 and the same was dishonoured with endorsement as at "par validation failed" which was communicated to him through the return memo. On 23.08.2022 the petitioner had issued the demand notice through his counsel demanding to pay the cheque amount of Rs.21,00,000/- (Rs.15,00,000/- + Rs.6,00,000/-) as a full and final settlement if paid within 15 days from the receipt of the notice, but the petitioner

and the 2nd respondent even after the receipt of the notice had not come forward to discharge the cheque amount, in spite of the same the petitioner had preferred the complaint before the Gudiyatham Taluk Police Station and when he was called for the enquiry, the petitioner had accepted the liability but failed to repay the same. The petitioner is not having any valid defence to deny claim the 1st respondent's claim. On pursuing the reply notice dated 19.09.2022 issued by the petitioner through his counsel in para No.11 he had stated that after the receipt of the amount along with the 2nd respondent had jointly made payments from the receipts of the hand loan each and every month by cash and through bank deposit and made payments even during Covid-19 pandemic which are all false and vague. With regard to the ground of limitation raised by the petitioner, though the hand loan was borrowed both by the petitioner and the 2nd respondent jointly in the year 2015 by executing the promissory note along with the issuance of the cheque accepting to repay on demand, and made payments towards the interest on various dates through cash and bank deposits, and in discharge of the part liability, the petitioner had issued two cheques in cheque No.791740 for Rs.15,00,000/- dated 23.07.2022 and cheque No.924703 for Rs.6,00,000/- dated 01.08.2022 and when the same was presented for encashment on 08.08.2022 and the same was dishonoured, and the bank transfers made by the petitioner and the 2nd respondent was lastly on 30.09.2021 for the amount of Rs.10,000/- towards the interest for the liability and the issuance of the demand notice by the 1st respondent through his counsel on 23.08.2022 and reply notice issued by the

petitioner through his counsel on 19.09.2022 and the cause action arises from the date of the reply notice issued by the petitioner and the suit for the recovery was filed on 29.09.2022 and the same was filed within the period of limitation. There was no collusion by the 1st respondent since the demand notice dated 23.08.2022 was issued both to the petitioner and the 2nd respondent and the suit was also filed arraying the petitioner and the 2nd respondent as defendants in the suit. There is no valid defence or triable issues raised by the petitioner on pursuing the documents filed by 1st respondent along with the plaint in support of the recovery of the money and on pursuing the affidavit filed by the petitioner, the petitioner had not established his case and he had not having any valid defence nor triable issues were raised to grant the leave to defend the suit. Hence, the petition is liable to be dismissed.

4. No oral evidence was let in by both sides. But, by consent, Ex.R1 to R13 were marked on the side of the 1st respondent/plaintiff. No document was marked on the side of the petitioner.

5. Points for consideration is whether the petition is to be allowed?.

6. Heard. Records perused.

POINT:

7. The Petition was filed on behalf of the Petitioner under Order 37 Rule 5 and Section 151 C.P.C. to leave to defend the case as regular suit proceedings by let in oral and documentary evidence.

8. The Petitioner is the 1st defendant in the above said suit. The 1st respondent/ plaintiff filed the suit against the defendants 1&2 for recovery of money Rs.37,53,125/- with future interest at 7.5% per annum.

9. According to the petitioner, the allegations made in the plaint as the defendants have borrowed Rs.10,00,000/- on 31.01.2015 and on 24.01.2015 Rs.5,00,000/- and on 03.06.2015 Rs.10,00,000/- by executing promissory note and given 3 cheques of HDFC Bank, Vellore branch for the interest, Cheque No.000422 dated 13.01.2015 for Rs.20,000/- for the amount of Rs.10,00,000/-, cheque No.000423 dated 24.01.2015 for Rs.10,000/- towards interest of Rs.5,00,000/- and cheque No.000470 dated 06.05.2015 for Rs.20,000/- toward interest for the amount of Rs.10,00,000/- are totally false and imaginary.

10. The petitioner further denied that he went along with the 2nd respondent/2nd defendant in the month of October 2015 while the sales tax ride and demanded and get Rs.5,00,000/- from the 1strespondent/plaintiff. The petitioner/1stdefendant denied the promissory note and the cheques stated in the plaint.

11. According to the petitioner, the 1strespondent/plaintiff issued demand notice through his advocate on 23.08.2022 by demanding Rs.21,00,000/- as full and final settlement and so he gave a complaint for misuse of the cheque with an intention to grab money from him and at that time, the police officials directed to get legal remedy and so he issued reply notice to the 1strespondent/plaintiff on 19.09.2022 by denying his liabilities.

12. The petitioner/1st defendant stated that he had already paid the entire amount due to the 1strespondent/plaintiff on various dates and the 1st respondent/plaintiff agreed to return the documents, but wantonly suppressed all the facts and filed this suit and also the suit promissory notes are dated 13.01.2015, 24.01.2015 and 06.05.2015 and the cheques are also in the year of 2015, but the suit was filed in the year 2022 which is barred by limitation and thus, the suit is not maintainable.

13. According to the petitioner/1st defendant the two cheques are fabricated by the 1st respondent with an intention to wreck vengeance upon the petitioner and now the 2ndrespondent/2nd defendant colluded with him and this suit was filed at the instigation of 2ndrespondent/2nd defendant and so, to defend the case with valuable documentary and oral evidence, he has filed this leave to defend petition.

14. According to the 1strespondent/plaintiff he filed all the original promissory notes executed both by the petitioner and the 2nd respondent as Ex.R1 to R3 and also bank receipts as evidence that both the petitioner and the 2nd respondent had borrowed the hand loan from the petitioner for their emergency business needs on 13.01.2015-Rs.10,00,000/-, on 24.01.2015-Rs.5,00,000/-, on 06.05.2015-Rs.10,00,000/-and on 09.10.2015-Rs.5,00,000/- to the total tune of Rs.30,00,000/- and he has paid the said amount by way of cash and bank transfers Ex.R8 the series of the receipts and Ex.R9 Bank Statement, from the year 2018 to 2021.

15. The 1strespondent/plaintiff further stated that even though the petitioner/1st defendant and the 2nd respondent/2nd defendant had paid Rs.2,07,000/ interest amount, as per the bank transactions, the 1st respondent/plaintiff admitted that the petitioner along with the 2nd respondent had paid the interest to the tune of Rs.9,00,000/-.

16. The 1strespondent/plaintiff also stated that in the 2nd week of July 2022 to discharge of the part liability the petitioner had issued two cheques Ex.R4&R5 Cheque No.791740 for an amount of Rs.15,00,000/- dated 23.07.2022 and cheque No.924703 for an amount of Rs.6,00,000/- dated 01.08.2022 drawn on Syndicate Branch, Vellore, Vellore District and they were presented for encashment through his banker Axis Bank, Vellore Branch on 08.08.2022 and the same was dishonoured with endorsement as at "par validation failed" which was communicated to him through the return memo Ex.R6.

17. So, according to the 1strespondent/plaintiff, on 23.08.2022 the petitioner had issued the demand notice Ex.R10 through his counsel demanding to pay the cheque amount of Rs.21,00,000/- (Rs.15,00,000/- + Rs.6,00,000/-) to come forward to discharge the cheque amount, in spite of the same the petitioner had preferred the complaint before the Gudiyatham Taluk Police Station.

18. With regard to the ground of limitation raised by the petitioner, the 1strespondent/plaintiff further stated that though the hand loan they borrowed jointly in the year 2015 by executing the promissory note along with the issuance of the cheque accepting to repay on demand, and made payments towards the

interest on various dates through cash and bank deposits, and in discharge of the part liability, the petitioner had issued two cheques on 23.07.2022 and 01.08.2022 and the 2nd respondent paid lastly on 30.09.2021 for the amount of Rs.10,000/- towards the interest for the liability and the issuance of the demand notice by the 1st respondent through his counsel on 23.08.2022 and reply notice issued by the petitioner through his counsel on 19.09.2022 and the cause action arises from the date of the reply notice issued by the petitioner and the suit for the recovery was filed on 29.09.2022 and the same was filed within the period of limitation and so no valid defence or triable issues raised by the petitioner.

19. On the side of 1st respondent/plaintiff for the point of limitation relied two judgments of *Honorable High Court of Madras in 1) S. Jahaber Kassim Vs Sukhversha in AS. No. 460/2018 dated 15.7.2021* -The suit which was relating to mortgage deed in which it was held that the repayment made to the amounts borrowed covers limitation.

2) *Honorable High Court of Madras in Johrilal Chowdhary and others Vs Suresh Chand and others in AS. No. 895&896/2010 dated 11.6.2021* In which it was held that a fresh period of limitation shall be computed from the time when payment was made.

The above said two relied judgments are relating to limitation. But as far as this case is concerned, since the petitioner denied the transactions, the relied judgments will not help the respondent.

20. Further as far as leave to defend cases are concerned the Honorable Supreme Court clarifying the law on leave to defend, held that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions could be imposed while granting leave to defend 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. It was further held that 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 and framed the following rules:

1. 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.
2. Where the defendant raises triable issues indicating a fair or bonafide defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend.
3. 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 may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security to balance the requirements of expeditious disposal of commercial causes and of not shutting out triable issues.

4. 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.

5. 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.

21. Conditions for grant of leave to defend may be imposed by the Court in all other cases except cases where no triable issue is raised or where the defence is, to use the classical expression, "moonshine". In so far as imposition of conditions for leave to defend is concerned, there are two categories. The first category, in which conditions would be less rigid or stringent, applies to cases where, though triable issues are raised, a doubt remains as to whether the issues have been raised in good faith or whether they are genuine, which would require a trial to be positively determined.

22. The second category of case in which conditional leave to defend may be granted would be those in which the defence raised is plausible, but is improbable. The dividing line, to apply this test, is thin and difficult to discern. The distinction between "plausibility" and "probability" has to be borne in mind.

23. But as far this petition is concerned the petitioner/1st defendant hasnot accepted the subsequent cheques Ex.R4&R5. In such case the two cheques have

to be proved through evidence and so there are triable issues to be decided. Further the 1st respondent/plaintiff stated that through 3 promissory notes in the year 2015, the defendants borrowed money, but he further stated that even though they paid only Rs.2,07,000/-, the plaintiff is accepting that the defendants have paid Rs.9,00,000/-. But the petitioner stated that he paid entire amount. In such case how much amount already paid and how much amount is yet to be paid is also to be decided and so there is triable issue to be decided. Further the petitioner raised the issue that the suit is barred by limitation since the 3 promissory notes are in the year 2015 and the suit was filed in the year 2021.

24. In such circumstances, there are many issues to be decided in this case and so opportunity to be given for the petitioner to defend his case by way of filing written statement and so this leave to defend petition is allowed and the point is answered accordingly.

In the result, this petition to leave to defend the case as regular suit proceedings by let in oral and documentary evidence, is allowed. No costs.

Dictated by me to the Steno-typist, typed by her in computer, corrected and pronounced by me in the Open Court, this, the 13th day of February 2023.

**I Additional District and Sessions Judge,
Vellore.**

Witnesses examined on the side of the Petitioner:

Nil.

Exhibits marked on the side of the Petitioner:

Nil.

Witnesses examined on the side of the 1st Respondent/Plaintiff:

Nil.

Exhibits marked on the side of the 1st Respondent/Plaintiff:

Ex.R1	13.01.2015	Original Promissory Note executed by the defendants in favour of the plaintiff annexed with Cheque bearing No.000422 for Rs.10,00,000/-.
Ex.R2	24.01.2015	Original Promissory Note executed by the defendants in favour of the plaintiff annexed with Cheque bearing No.000423 for Rs.5,00,000/-.
Ex.R3	06.05.2015	Original Promissory Note executed by the defendants in favour of the plaintiff annexed with Cheque bearing No.000470 for Rs.10,00,000/-.
Ex.R4	23.07.2022	Original cheque bearing No.791740 for Rs.15,00,000/-.
Ex.R5	01.08.2022	Original cheque bearing No.924703 for Rs.6,00,000/-.
Ex.R6	08.08.2022	Return Memo (2 Nos.) issued by Axis Bank.
Ex.R7	----	Xerox copy of Bank Pass Book of the Plaintiff.
Ex.R8	----	Xerox copies of Receipts for payment made by the defendants.
Ex.R9	2018-2021	Online copy of Plaintiff's Bank Account Statement.
Ex.R10	23.08.2022	Copy of Legal Notice sent by the plaintiff to the defendants.
Ex.R11	24.08.2022	Postal Acknowledgement Cards (2 Nos.)
Ex.R12	29.08.2022	Postal Acknowledgement Card (1 No.)
Ex.R13	19.09.2022	Office copy of Reply Notice issued by the 1st defendant to the plaintiff.

I ADJ., Vellore.