

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

RFA 91/2024 CM(7580/2024)

FARUKH JEHANZEB ...Petitioner(s)/appellant(s)

Through: Mr. Shuja-ul-haq Advocate.

Vs.

MUZAFFAR ALI KAPRA AND ANR ...Respondent(s)

Through: Mr. Shakir Haqani, Advocate.

CORAM:

HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
01.03.2025

1. In the instant appeal, the appellant herein has challenged judgment and decree dated 21.08.2024 passed by the Court of 4th Additional District Judge, Srinagar, (for short, the Trial Court) in case titled as “*Muzaffar Ali Kapra Vs. Zeb Farukhjehan Bhat and Anr.*”
2. Facts giving rise to the filing of the instant appeal would reveal that the respondent 1 herein filed a suit under Order 37 CPC impleading the appellant herein as defendant 1 and proforma respondent 2 as defendant 2. The suit was filed on the premise that the plaintiff, respondent 1 herein, being a businessmen by profession run under the name and style of M/S M.K. Brothers, having its principle place of business at Khankah-e-Molla, Srinagar, approached the defendants in the suit for purchase of a piece of land situated at Awantipora, Pulwama, as the said defendants as partners were jointly dealing with the business of sale and purchase of immovable properties and that the defendant 2, proforma respondent 2 herein, showed

him a piece of land at Awantipora, Pulwama, which the plaintiff agreed to buy whereupon the plaintiff paid an amount of Rs. 10.00 lacs as token money thereof towards the defendants, however, despite receiving the said token money, the defendants did not sell the land in question to the plaintiff and instead avoided him on one pretext or the other and that subsequently, the plaintiff came to know that the land shown to him by the defendants does not belong to them and that the defendants in fact had cheated him and deceitfully extracted Rs. 10.00 lacs from him, whereupon, the plaintiff approached the defendants for return of the token money of Rs. 10.00 lacs, as a consequence whereof, the defendant 1, appellant herein, issued a cheque bearing No. 000301 dated 17.04.2021 amounting to Rs. 10.00 lacs, drawn at ICIC Bank, Branch Unit Pampore, which cheque, however, upon its presentation before his banker, Jammu and Kashmir Bank, Branch Unit Nowhatta, Srinagar, got bounced and came to be returned back with a memo containing an endorsement of “insufficient funds” issued by the Bank, whereafter, the plaintiff approached the defendants and requested them for payment of the amount covered by the cheque, but the defendants avoided him on one pretext or the other and after waiting for some time upon their assurance, the defendants ultimately failed to pay the amount in question to the plaintiff, the plaintiff whereafter maintained the suit before the Trial Court.

3. The Trial Court upon entertaining the suit under the Provisions of Order 37 of the Code of Civil Procedure summoned the defendants whereupon both the defendants appeared and subsequently filed independent applications seeking leave to defend the suit.

4. The defendant 1 in the suit, being appellant herein, in the said application, pleaded that the allegations leveled against him by the plaintiff have no roots and that the cheque in question was never issued by him in favour of the plaintiff and that in fact the defendant 2 is his close friend, and on his request, the cheque in question came to be furnished by him to the said defendant 2, as the Bank account of the defendant 2 was not in operation and that Defendant 2 had requested him that he will get the account operational by some amount by depositing the cheque, while stating further, he, the defendant 1, is not related to the plaintiff by any means or business, and that the plaintiff is, in fact, harassing him for his personal reasons, and consequently on the basis of said pleas sort an unconditional leave to defend the suit.

5. In the application seeking leave to defend filed by defendant 2, proforma respondent 2 herein, it came to be stated that the plaintiff has concealed material facts, as, in fact, the cheque in question stands issued by defendant 1 and not by him, and that he has been unnecessarily arrayed as party defendant in the suit by the plaintiff, and the plaintiff has completely misled the court by false assertions, thus, the application needs to be allowed for allowing the defendant 2 to defend the suit.

6. Before the Trial Court, both the applications filed by the defendants came to be opposed by the plaintiff by filing objections thereto.

7. The Trial Court, upon considering the applications as also after hearing the appearing counsel for the parties, opined that since the cheque in question has been admitted to have been issued by defendant 1, though claimed to have been issued by him to defendant 2, yet did not deny that it bears his signature, and consequently, declined the grant of leave to the

defendants in the suit, and in furtherance thereof, decreed the suit in favour of the plaintiff in terms of the judgment and decree dated 21-08-2024.

8. The appellant herein being defendant 1 before the Trial Court in the suit has maintained the instant appeal while throwing challenge to the impugned judgment and decree almost on same and similar grounds which have had been urged by the appellant before the Trial Court in the application seeking leave to defend the suit. Besides, the appellant herein has also contended in the appeal that the defense set up by him before the Trial Court in the application seeking leave to defend was plausible and credible, however, same has not been taken into consideration or cognizance of by the Trial Court without any lawful justification and that the Trial Court grossly erred while rejecting the application of the appellant for seeking leave to defend the suit in breach of the law contained in Order 37, passed the impugned judgment and decree, which suffers from vices of judicial impropriety and unsoundness.

Heard learned counsel for the parties and perused the record.

9. Before proceeding to advert to the case set up by the appellant herein, in the instant appeal against the impugned judgment and decree, a brief reference to the provisions of Order 37 CPC as also law laid down by the Apex Court in this regard would be advantageous and appropriate, hereunder.

10. The provisions of Order 37 of the Code deal with Summary Procedure declaring the Courts and Classes of Suits to which the Provisions of Order 37 CPC would apply, besides providing that the said provisions would apply to all Suits on Promissory Notes, Bills of Exchange, and Hundis, even if they are made non-negotiable. The term “Promissory Note”

has been defined in Section 4 of the Negotiable Instruments Act of 1881, so has also been defined the Bill of Exchange. The term “Cheque” is also defined under Section 6 of the Act of 1881 as follows: Section 6: “A Cheque is a Bill of Exchange drawn on a specified Banker and not expressed to be payable otherwise than on demand.”

11. Order 37, Rule 2 CPC lays down a procedure to be followed in the summary suit contemplating that after the summons of the suit has been issued to the defendant, the defendant must appear whereupon the plaintiff will serve a summon for judgment upon the defendant, while providing further, that the defendant is not entitled to defend the summary suit unless he enters appearance as in default, the plaintiff will be entitled to a decree which is executable forthwith.

Sub Rule (1) of Rule 2 of Order 37 CPC requires particulars to be stated in the plaint in a summary suit, whereas Sub Rule (2) prescribes the form of summons and Sub Rule (3) provides for consequences of non-appearance of the defendant.

It is consistent view of the courts that the provisions of Order 37, Rule 2 CPC are enabling in nature, vesting a choice in the plaintiff of taking the advantage of summary procedure, if he intends to avail of such procedure.

It has also been laid down by the courts that the object underlying the Rule 2 of Order 37 CPC is to apprise the defendant that the suit has been filed under Order 37 CPC as a summary suit, thus necessitating substantial compliance with the provisions of the Rule.

12. Sub Rule (3) of Rule 2 of Order 37 CPC has used the expressions/words “the allegations in the plaint shall be deemed to have

been admitted” to mean that the court will accept the statement in the plaint as correct and on that basis pass a decree in favour of the plaintiff.

It is the consistent view of the courts that the said words/expressions appearing in Sub Rule (3) embody an exception to the fundamental and basic principle of law that a plaintiff must prove the case with which he comes to court and dispense with such proof in view of special nature of document/s in Rule 1 of Order 27.

The Apex Court in case titled as “*Ramkarandas Radhavallabh v. Bhagwandas Dwarkadas*” reported in A.I.R. 1965 SC 1144, in this regard has held that the provisions of Sub Rule (3) of Rule (2) Order 27, contemplates that the Court will accept the statement in the plaint as correct and on those statements pass such decree as the plaintiff may in law be entitled to.

13. Rule 3 of Order 37 CPC lays down a procedure for appearance of defendant and consequence of non-appearance, while as Sub Rule (5) of Rule 3 of Order 37 CPC confers discretionary power on the court to grant leave to the defendant to defend the suit, it also provides that such leave may be granted by court, unconditionally or conditionally, upon such terms as may appear to be just and appropriate.

The Apex Court in case titled as *Milkhiram (India) Private Ltd. and Ors v. Chamanlal Bros*, reported in A.I.R. 1965 SC 1698 has held that such discretionary power entrusted upon the court must be exercised legally, reasonably and on sound judicial principles in consonance with principles of natural justice that form foundations of our legal system.

In *UBS AG vs State Bank of Patiala* reported in 2006 (5) SCC 416, the Apex Court has also held that where the defendant appears and raises

tribal issues, leave should be granted and whenever the defense raises a tribal issue, unconditional leave should be granted otherwise the leave would be illusory and that the test is to see whether the defense 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 plausible defense on those facts.

In case titled as “*Mechelec Engineers and Manufacturers Vs. M/S Basic Equipment Corporation*” reported in 1976 for SCC 687, the Apex Court has also held that the High Court should not interfere with the discretionary order passed by the Trial Court in the matter of grant of leave by entering into questions of fact, however, it is only in cases where the defense is patently dishonest or so unreasonable that it could not reasonably be expected to succeed, that exercise of discretion by the Trial Court to grant leave unconditionally may be questioned and interfered with.

It has been further held by the Apex Court in case titled as *M/S Fixity Packaging Indus. P. Ltd. VS. Udyen Jain (HUF)*, reported in 2009-08 SCC 761, that the leave to defend should not be granted to the defendant on the ground of sympathy or mercy if he has no defense.

14. Keeping in mind the aforesaid position of law and reverting back to the case in hand, it has not been disputed by the defendant 1, appellant herein, that the cheque stands issued by him and that same bears his signatures. It has also not been disputed by the defendant 1, appellant herein, that the name of the plaintiff entered in the cheque has been either wrongfully, fraudulently, or by deceitful means. Instead what is being denied by defendant 1, appellant herein, is that the cheque in fact stands

provided by him to defendant 2, proforma respondent herein, being his close friend in connection with the operation of his bank accounts.

15. Perusal of the record available on the file tends to show that the plaintiff, respondent 1, herein specifically pleaded in the suit that the cheque stands issued to him by the defendant 1, appellant herein, in order to pay back him the amount of Rs. 10 lakhs paid to the defendants in connection with the purchase of the piece of land at Awantipora after the defendants failed to provide him the piece of land on sale. There has been no evidence much less a documentary one placed on record by the defendants including appellant herein in the application seeking leave to defend the suit except a vague plea that the cheque in question in fact stands issued by him, the defendant 1, appellant herein, to defendant 2, proforma respondent 2 herein. No corroborative material has been placed on record with the application seeking leave to defend by the defendant 1, appellant herein, to support such plea. Thus, in presence of the aforesaid position, obtaining in the matter, the Trial Court cannot be said to have committed any fault, error, or perversity in declining leave to defend the suit to the defendant 1, appellant herein, and consequently, to pass decree in favor of the plaintiff, respondent 1 herein, in terms of the provisions of Order 37 CPC, in terms whereof if leave to defend is declined, the passing of decree in favor of the plaintiff becomes indispensable, and the plaintiff becomes entitled to such decree thereto. A reference in this regard to the judgment of Apex Court passed in case titled *M/S V.K. Enterprises and Anr Vs. Shiva Steel*, reported in 2019 SCC 256.

16. Viewed thus, for what has been observed, considered and analyzed herein above, the impugned judgment and decree passed by the Trial Court does not call for any interference.

17. Resultantly, the appeal fails and is dismissed.
18. The amount stated to have been deposited before this court by the appellant herein is directed to be returned back to the appellant along with interest.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR
01.03.2025
Junaid

