

10<sup>th</sup> May, 2022

# LEAVE TO DEFEND UNDER ORDER XXXVII RULE 3 OF CPC IS A RULE AND ITS' DENIAL IS AN EXCEPTION: A CASE STUDY OF B.L. KASHYAP & SONS LTD. V. JMS STEELS & POWER CORPN.

## Introduction

The general rule permits leave to defend (with or without conditions) and an exception to that is its denial. This observation was made by the Hon'ble Apex Court recently in *B.L. Kashyap & Sons Ltd. v. JMS Steels & Power Corporation*, [2022 SCC OnLine SC 59] (for short '**JMS Steel Case**') wherein the Court discussed the scope of Rule 3 of Order XXXVII of the Code of Civil Procedure 1908 (for short '**CPC**').

It was observed by the Bench comprising of Justice Vineet Saran and Justice Dinesh Maheshwari that a prayer for leave to defend is to be denied where the defendant has practically no defence and where he could not provide any triable issues before the Court.

## ORDER XXXVII of CPC: Summary suit

Order XXXVII of CPC deals with summary suit wherein the proceedings are conducted summarily. Summary procedure is a legal procedure that is used to enforce a right that takes effect faster and more efficiently than ordinary methods.

Order XXXVII (37) of CPC deals with Summary Procedure and Rule 3 of

Order XXXVII contains the procedure for appearance of the defendant. According to the rule, a defendant who enters appearance has to seek leave to defend such suit, and it may be granted either unconditionally or upon imposing certain conditions as appear just to the Court.

The provision further states that the 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.

## JMS Steel Case: Facts in brief

i The plaintiff (respondent no. 1) filed a summary suit in terms of Order XXXVII of the CPC. It contended that it was a registered partnership firm engaged in manufacturing and supplying of a wide variety of iron and steel products.

ii It was contended by the plaintiff that the defendant no. 1 represented itself as a real estate and infrastructure development firm while the defendant no. 2 (appellant herein) represented itself as a contractor working with the defendant no. 1 for the construction work of its project namely 'MIST'.

iii Two cheques were issued by defendant no. 1 and the plaintiff was asked to present these cheques only after intimation, however, no such intimation was given to him.

iv A legal notice dated 28.01.2016 was issued by the plaintiff to the defendants demanding the outstanding dues and, upon their failure to make the requisite payment, the plaintiff filed the summary suit under Order XXXVII of CPC.

v Both the defendants in the suit prayed for leave to defend which was rejected by the Lower Court observing that the defendants were trying to shift the burden upon each other.

vi The judgment of the Lower Court was challenged which was dismissed by the Hon'ble High Court. An appeal was filed before the Supreme Court against the order of the High Court.

## Issue before the Supreme Court

- Whether the plaintiff is entitled to maintain a summary suit under Order XXXVII CPC for the claim in question?
- Whether the appellant (originally defendant No. 2) has rightly been declined the leave to defend?

## Issue 1: Maintainability of the Summary Suit

The Apex Court held that the contention against maintainability of the summary suit in terms of Order XXXVII of CPC could not be accepted as the matter was based on a written contract arising out of written purchase orders.

## Issue 2: Law on Leave to Defend

The Bench opined that it would not be a correct approach to proceed as if denying the leave is the rule



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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.

#### **Leave to defend: Rules and Guidelines**

In *Kiranmoyee Dassi Smt. v. Dr J. Chatterjee*, AIR 1949 Cal 479, after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered for leave to defend:

- 1 Defendant must satisfy the Court that he has a substantial defence and that he is entitled to unconditional leave to defend.
- 2 Defendant raising triable issues indicating a fair or bonafide defence, albeit not a positively good defence, would ordinarily be entitled to unconditional leave to defend.
- 3 Defendant raising triable issues, however, depending on whether it is raised in good faith or not, 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 appears 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.

#### **Decision of the Court**

- 1 The Lower Court and the High Court did not consider that the appellant (originally defendant no. 2) had been contesting its liability based on the assertion that it was only the contractor executing the work of defendant no. 1.
- 2 The conclusion about the defence raised by the appellant being frivolous or vexatious would be treated as assumptive and lacks requisite foundation.
- 3 That the Lower Court and the High Court failed to consider the effect and impact of an admitted position of the plaintiff (in the original suit), that payments were made on a timely basis by the defendant no. 1.
- 4 The considerations made by the Courts to deny the leave to defend to defendant no. 1, could not apply ipso facto to the case of the appellant (originally defendant no.2).
- 5 The Apex Court directed the Trial Court to pass appropriate orders and proceed with the trial of the suit only qua the appellant (originally defendant no. 2) by law.

#### **Conclusion**

The decision of the Apex Court as discussed above may be interpreted to lead to the following conclusions-

- a The issues raised by the appellant are triable issues, specifically regarding its liability and the defence.
- b While allowing the appeal, the Apex Court set aside/ quashed the impugned judgments of the Trial Court and High Court relating to the appellant.
- c Leave to defend was granted to the appellant; and the amount of Rs. 40, 00,000/- was directed to be deposited by the appellant which was to be treated as a deposit towards the condition for leave to defend.