

SMT. KAMLESH KOHLI AND ANR.

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v.

ESCOTRAC FINANCE AND INVESTMENT LTD. AND ORS.

OCTOBER 5, 1999

[K.T. THOMAS AND M.B. SHAH, JJ.]

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Civil Procedure Code, 1908—Order XXXVII Rule 4, Order I Rule 6, Order VIII Rules 5 and 10, Order IX Rule 11 and Order XV Rule 2—Leave to defend—Grant of—Suit for recovery of debts—Application by defendants for grant of leave to defend unconditionally—Dismissed—On appeal, court granting leave to defend to one of the defendants and denying to others—Validity of—Held, courts not obliged to grant leave to defend to all defendants merely because it was granted to one of the defendants.

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Respondent-companies filed a summary suit for recovery of debts against defendants. Defendant no. 2, sole proprietor of defendant no. 1 firm and defendant No. 3, son of defendant no. 2 filed an application for grant of leave to defend unconditionally. Single Judge of High Court dismissed the application and decreed the suit. Being aggrieved, defendant nos. 2 and 3 filed separate appeals before the Division Bench of the High Court. Appeal filed by defendant no. 2 contending that her son was only attorney for prosecuting the writ petition and had no authority to enter into agreement was dismissed by the court holding that the plea was wholly misconceived, *malafide* and abuse of process of law. However, in the appeal filed by defendant no. 3, the court granted leave to defend unconditionally as it was averred by the respondents that he was arrayed only as a proforma party and no relief was claimed against him personally. Hence the present appeal by defendant nos. 1 and 2.

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On behalf of appellants it was contended that the suit was for recovery of composite amount and therefore when leave to defend was granted to defendant no. 3, it ought to have been granted to them also, otherwise there would be inconsistent decrees.

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Dismissing the appeal, the Court

HELD : 1. Civil Procedure Code nowhere prescribes that decree

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A against some of the defendants to a suit cannot be passed or that if the suit is dismissed qua one defendant it is required to be dismissed against other defendants too. Order 1 Rule 6 makes the position clear by providing that plaintiff may at his option join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract including parties to bills of exchange, hundis and promissory notes. Therefore, even presuming that defendant no. 3 was jointly and severally liable to pay the amount specified in the memorandum of agreement, it was optional for the plaintiff to join him as party defendant. In the instant case, however, that is not the situation because plaintiff has specifically averred that defendant no. 3 is joined as formal party. Further Order VIII Rules 5 and 10, Order IX Rule 11 and Order XV Rule 2 makes the position clear by providing that decree can be passed against the defendant who has not filed the written statement or who remains absent or who is not at issue with the plaintiff on any question of law or of fact. [377-B; E]

D 2. The High Court rightly arrived at the conclusion that defence is, on the face of it, dishonest and *mala fide*. The reason is not too far to find out because in a writ petition filed by the plaintiffs, a memorandum of agreement was arrived at, which was duly signed by the plaintiffs and defendant no. 2 as well as defendant no. 3 as attorney of defendant no. 2.

E The Division Bench of the High Court, after recording the presence of constituted attorneys of the parties and considering the memorandum of agreement accompanied by application containing the necessary documents, permitted the plaintiffs to withdraw the writ petition. The plaintiffs acted upon the said agreement and withdrew the petition. The defendant also acted upon the said agreement and paid the first instalment to the plaintiffs. In view of these facts it is unreasonable to permit the defendant to raise an illusory contention that the said settlement is not binding on her. Therefore, the court rightly rejected the application of defendant nos. 1 and 2 for grant of leave to defend. [378-F-H; 379-A; B]

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5725 of 1999.

H From the Judgment and Order dated 24.3.98 of the Delhi High Court in F.A.O. No. 197 of 1997.

Manoj Swarup and Ms. Lalita Kohli for M/s. Manoj Swarup & Co. A
for the Appellants

H.N. Salve, (Ms. Pratibha Singh) for Maninder Singh for the Respondents.

The Judgment of the Court was delivered by B

SHAH, J. Respondent-Companies filed civil suit against Kamlesh Kamal & Company (defendant no. 1), Smt. Kamlesh Kohli, wife of Shri J.N. Kohli (defendant no. 2) and Shri Rajiv Kohli, son of Shri J.N. Kohli (defendant no. 3) for recovery of Rs. 85,62,500 on the basis of Memorandum of Agreement dated 19th November, 1992. It was alleged that Smt. Kamlesh Kohli had been holding a membership ticket of Delhi Stock Exchange and had been carrying on business in the name of Kamlesh Kamal & Company (defendant no. 1). She approached the plaintiffs to provide finance for 'Badla' transactions in or about March/April, 1992. As on 10th September, 1992 a sum of Rs. 3.02 corer was due and payable by the defendants. On 21st September, 1992, plaintiffs filed Writ Petition no. 3324 of 1992 in the Delhi High Court against Delhi Stock Exchange impleading defendant no. 2 and J.N. Kohli, her husband as party respondents. The matter was settled between the parties by an agreement dated 19th November, 1992. In view of the agreement between the parties, the Court permitted withdrawal of the said petition. It is stated that payment of Rs. 65 lakhs was made to the plaintiffs on the basis of the said agreement. As the defendants after payment of first instalment did not pay any amount, the plaintiffs issued notice dated 6th July, 1993 calling upon defendant Nos. 2 and 3 to pay the remaining amount with interest within 15 days of the receipt of the notice. As the defendants repudiated their liability, the summary suit under Order XXXVII C.P.C. was instituted on 5th November, 1993. C D E F

In the said suit, defendants filed IA No. 10145 of 1994 under Order XXXVII Rule 4 C.P.C. to grant leave to defend unconditionally. The learned Single Judge arrived at the conclusion that the contentions that defendants have absolutely no defence; that they have put forth the plea of no consideration; and that the second defendant was not a party to the agreement and that there were other circumstances to be established and, H

A therefore, leave should be granted, are without any substance. The Court, therefore, dismissed the application for leave to defend by judgment and order dated 1st May, 1997 and decreed the suit for a sum of Rs. 85,62,500 with simple interest @ 15% p.a. from the date of the suit till the date of the payment.

B Against the said judgment and decree, Appeal no. FAO (OS) 197 of 1997 was filed by the mother, Smt. Kamlesh Kohli and Appeal no. FAO (OS) 160 of 1997 was filed by the son, Rajiv Kohli. Before the Division Bench of the High Court, it was not disputed that mother was the sole proprietor of defendant no. 1 firm and that Memorandum of Agreement was signed by Rajiv Kohli as constituted attorney of defendant nos. 1 and 2. It was also not disputed that mother and son were living together. It was also admitted that in pursuance of the Memorandum of Agreement Smt. Kamlesh Kohli had signed the cheque in the sum of Rs 65 lakhs which was given to the plaintiffs. In the appeals, it was contended before the Court on behalf of Smt. Kamlesh Kohli that her son was only attorney for prosecuting the writ petition and that he had no authority to enter into the agreement dated 19th November, 1992. The Court rejected the said contention by holding that, to say the least, the plea is wholly misconceived, *mala fide* and abuse of the process of law and may even amount to contempt of the Court. The Court further observed that such dishonest and convenient pleas deserve to be severely condemned. Accordingly, appeal no. FAO (OS) 197 of 1997 filed by Smt. Kalmlesh Kohli was dismissed with costs quantified at Rs. 22,000 payable to plaintiffs.

F In appeal no. FAO (OS) 160 of 1997 filed by Rajiv Kohli (son), the Court granted unconditional leave to defend as it was averred by the plaintiffs in reply to the application for leave to defend that he was arrayed only as a proforma party and no relief was claimed against him personally.

G Against the said judgment and decree, the defendant nos. 1 and 2 have preferred this appeal.

H Learned Counsel for the appellant submitted that when leave to defend was granted to defendant no. 3, it ought to have been granted to the appellants otherwise there would be inconsistent decrees. He submitted that the suit was for recovery of composite amount and, therefore, once

leave to defend was granted to defendant no. 3, the Court ought to have granted leave to defend, to the remaining defendants, i.e., the present appellants. He further submitted that considering the defence raised by defendant no. 2, this was a fit case for grant of leave to defend. A

There is no substance in the contentions raised by the learned counsel for the appellant. Civil Procedure Code nowhere prescribes that decree against some of the defendants to a suit cannot be passed or that if the suit is dismissed against one defendant it is required to be dismissed against other defendants too. Order 1 Rule 6 makes the position clear by providing that plaintiff may at his option join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract including parties to bills of exchange, hundis and promissory notes. Therefore, even presuming that defendant no. 3 was jointly and severally liable to pay the amount specified in the Memorandum of agreement, it was optional for the plaintiff to join him as party defendant. In the present case, however, that is not the situation because plaintiff has specifically averred that defendant no. 3 is joined as formal party. Further Order VIII Rules 5 and 10, Order IX Rule 11 and Order XV Rule 2 make the position clear by providing that decree can be passed against the defendant who has not filed the written statement or who remains absent or who is not at issue with the plaintiff on any question of law or of fact. The said provisions are clear and unambiguous requiring no further elucidation, which read thus : B C D E

ORDER VIII RULE 5

Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability : F

Proviso..... G

ORDER VIII RULE 10

Procedure when party fails to present written statement called for by Court H

A Where any party from whom a written statement (is required under rule 1 or rule 9) fails to present the same within the time (permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit (and on the pronouncement of such judgment, a decree shall be drawn up).

ORDER IX RULE 11

C Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

ORDER XV RULE 2

D (1) Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

E (2) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and the decree shall bear the date on which the judgment was pronounced.

F Learned Counsel further submitted that this is a fit case in which Court ought to have granted leave to defend. In our view, the High Court rightly arrived at the conclusion that defence, is on the face of it, dishonest and *mala fide*. The reason is not too far to find out because in a writ petition filed by the plaintiffs, a memorandum of agreement was arrived at, which was duly signed by the plaintiffs and Smt. Kamlesh Kohli as well as Rajiv Kohli as attorney of Smt. Kamlesh Kohli. The Division Bench of the High Court, after recording the presence of constituted attorneys of the parties and considering the Memorandum of agreement accompanied by application containing annexures A and B, permitted the plaintiffs to withdraw the writ petition. The plaintiffs acted upon the said agreement

and withdrew the petition. The defendant also acted upon the said agreement and paid Rs. 65 lakhs to the plaintiff. In view of these facts it is unreasonable to permit the defendant to raise an illusory contention that the said settlement is not binding on her. Therefore, the Court rightly rejected the application of defendant nos. 1 and 2 for grant of leave to defend.

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In the result, the appeal is dismissed with costs quantified at Rs. 10,000.

S.V.K.

Appeal dismissed.