

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Reserved on: 9th July, 2021

Pronounced on: 30th July, 2021

+ **CM (M) 148/2020**

SARVESH BISARIA

.....Petitioner

Through: Mr. Vivek Kumar Tandon,
Advocate

Versus

ANAND NIROG DHAM HOSPITAL PVT LTDRespondent

Through: Mr. Sanchit Garga, Advocate

CORAM:

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

CM (M) 148/2020 and CM APPLs.4803/2020 (by the petitioner u/S 151 CPC for ex-parte stay), 16711/2020, 9007/2021 & 9198/2021 (by the petitioner u/S 151 CPC for directions and orders)

1. This petition under Article 227 of the Constitution of India has been filed with the following prayers:

“It is therefore most respectfully prayed that your lordship graciously be pleased to quash / set aside the orders dated 18.01.2020 and 24.01.2020 in C.S. No.836 of 2019 passed by Ms.Chetana Singh, ADJ-03/PHC/New Delhi in the case titled as Sarvesh Bisaria Vs. Anand Nirog Dham Hospital Pvt. Ltd. or may pass any other order and

directions as may deem fit and proper in the interest of justice and also award costs in favour of petitioner.”

2. The brief facts as are relevant for the disposal of the present petition are that the petitioner filed a suit for recovery of Rs.1,65,75,000/- under Order XXXVII of the Code of Civil Procedure, 1908 (“CPC” for short). The petitioner/plaintiff averred in the plaint that the respondent/defendant was known to him for a long period of 20 years and had family relations with each other and were close friends (sic).

3. The Managing Director and other Directors of the respondent/defendant persuaded the petitioner/plaintiff to give friendly loans to them at an interest @ 18% per annum. The petitioner/plaintiff and his wife gave Rs.18,00,000/- from the bank account to Shri Hari Om Anand as the Managing Director of the respondent/defendant, who was also the sole proprietor of Anand Medical Store, on 06th November, 2015. On the request of Shri Hari Om Anand, the petitioner/plaintiff also started looking after the legal consultation work of the respondent/defendant and the Managing Director and other Directors. Subsequently, the petitioner/plaintiff gave another friendly loan of Rs.3,20,00,000/- from his bank account to Shri Hari Om Anand and continued to take care of the legal work.

4. He claimed he used to raise bills for his fees and expenses which were paid by the Managing Director and other Directors from their personal accounts as also from the account of the respondent/defendant. One such bill towards fees for consultation, legal work, etc., was submitted by him on 17th March, 2017 for a sum of Rs.30 lacs, which had

been paid to him. Since he had a running account with the respondent/defendant, the petitioner/plaintiff submitted a bill towards his fees etc. on 28th December, 2018 for a sum of Rs.1.50 crores, which was duly acknowledged by the respondent/defendant.

5. The further case of the petitioner/plaintiff is that six cheques were issued by Shri Hari Om Anand after deducting TDS. Those cheques were dishonoured on presentation due to funds being insufficient and the petitioner/plaintiff filed a criminal case under Section 138 of the Negotiable Instruments Act, 1881 ("N.I. Act", for short). This was preceded by a notice dated 6th April, 2019, to which no reply was sent. The learned Magistrate had summoned the respondent/defendant to face trial and the case was pending.

6. Thereafter, the petitioner/plaintiff issued a Demand Notice on 10th August, 2019 claiming Rs.1,50,00,000/- along with the unpaid TDS of Rs.15,00,000/- and interest. No reply was sent by the respondent/defendant and the suit for recovery was filed under Order XXXVII CPC. The respondent/defendant was served, but though no appearance was entered by it, no decree was passed. The petitioner/plaintiff then approached this court in CM(M) 1787/2019, which was disposed of vide order dated 17th December, 2019 directing fresh service of the respondent/defendant under Form 4 Appendix B and in the meantime, restrained it from operating the bank accounts listed in the order to the extent of Rs 1.5 crores. This order was subsequently modified on 24th December, 2019 after the respondent/defendant entered appearance and offered to furnish a corporate guarantee duly signed by the Managing Director and duly authorized by the Board Resolution,

along with documents relating to immovable properties, for securing the suit amount, and the restraint order was lifted.

7. The present petition has been filed against two orders of the learned Trial Court dated 18th January, 2020 and 24th January, 2020. The order dated 18th January, 2020 has been challenged on the ground that the learned Trial Court allowed the respondent/defendant to place on record photocopies of the immovable property furnished as security. This, the petitioner/plaintiff contended, was against the tenor of the order passed by this court dated 24th December, 2019 in Review Petition No. 540/2019 in CM (M) 1787/2019 against the order dated 17th December, 2019. Vide orders dated 28th July, 2020, this court observed that the learned Trial Court had erred in not securing the amount of Rs. 1.5 crores as directed in the order dated 24th December, 2019 and ought to have asked the respondent/defendant to submit documents of a property of which the title was clear or a bank certificate recording a no objection to the creation of a second charge on the property to the extent of Rs.1.5 crores ought to have been furnished.

8. Vide orders dated 4th December, 2020, this Court had after noting the letter of the Punjab National Bank, Gymkhana Branch, Meerut, U.P. that a lien had been created in the sum of Rs.1.50 crores, directed that the said amount of Rs.1.50 crores be deposited in an interest-bearing fixed deposit initially for a period of six months with auto renewal facility. This FDR was not to be encumbered further or released without the leave of the Court and was further subject to orders of this Court. This FDR has since been deposited in the Registry of this Court as has been noted in the orders of this Court dated 5th March, 2021 and 8th March, 2021. In these

circumstances, Mr. Vivek Kumar Tandon, learned counsel for the petitioner/plaintiff has submitted that the relief sought against the order dated 18th January, 2020 has been satisfied.

9. With regard to the order dated 24th January, 2020, the learned counsel for the petitioner/plaintiff has submitted that the learned Trial Court had wrongly granted leave to defend to the respondent/defendant in a case where the respondent/defendant had raised no triable issues. Learned counsel for the petitioner/plaintiff submitted that the learned Trial Court had proceeded in a wrong direction as the loan transactions between the petitioner/plaintiff and the respondent/defendant were different transactions and had nothing to do with the payment of Rs.1.50 crores, which was towards the legal fees of the petitioner/plaintiff and for which the invoice had been raised. There is no dispute that the petitioner/plaintiff had acted as a legal advisor to the respondent/defendant. An earlier bill for Rs.30 lacs had also been paid by the respondent/defendant.

10. It is further submitted by the learned counsel for the petitioner/plaintiff that as regards the cheques in respect of which proceedings under Section 138 of the N.I. Act are still pending, the signatures thereon have not been disputed. Since the cheques were issued in the year 2019, they were presented that year and it is not relevant whether the cheques were taken from a cheque book that was issued to the respondent/defendant in the year 2013. Reference was also made to the orders passed by the learned Chief Metropolitan Magistrate dated 3rd September, 2019 (Annexure-G) and, it was urged that as cognizance had been taken, and Notice under Section 251 Cr. P.C. served, a presumption

had to be drawn against the respondent/defendant and the suit ought to have been decreed under Order XXXVII CPC. Instead, unconditional leave to defend was granted.

11. Reliance has been placed on the judgment of this Court in ***Lakshmi Builders v. Devinder Lakra***, 2016 SCC OnLine Del 1453 and the judgment in ***Hari Om Gupta v. IFB Industries Ltd.***, 2014 SCC OnLine Del 2055 and the judgment in ***Shri Colonizers & Developers Pvt. Ltd. v. Felicia Realcon India Pvt. Ltd.***, 2019 SCC OnLine Del 11106.

12. Mr. Sanchit Garga, learned counsel for the respondent/defendant submitted that the learned Trial Court had rightly granted leave to defend the suit as it was replete with incorrect facts. A single invoice for a sum of Rs.1.5 crores had been raised apparently, towards fees for legal opinion and assistance. However, the petitioner/plaintiff in the plaint had himself referred to business transactions, namely, loans of vast amounts being given to the respondent/defendant and the receipt of interest @ 18% per annum. The cheque book was issued in the year 2013 and the six cheques were clearly lying in the possession of the petitioner/plaintiff for several years is indicative of the fact that they were given, not towards any legal liability but only as security. There is no document to establish a lawyer-client relationship, no retainership agreement had been filed and therefore, the claim of the petitioner/plaintiff was suspicious that he was entitled to a sum of Rs.1.50 crores towards such legal assistance.

13. As regards the payment of Rs.30 lakhs on account of legal advice, the learned counsel has submitted that this was drawn from the personal account of Shri Hari Om and not from the account of the hospital and therefore, the respondent/defendant has never acknowledged having

availed of legal services. In the background of these facts, the respondent/defendant had raised triable issues. Learned counsel submitted that now that an FDR of Rs. 1.50 crores has been furnished, the leave to defend is clearly conditional and the petitioner/plaintiff's claim has been fully secured. As regards the judgments relied upon by the learned counsel for the petitioner/plaintiff, it was submitted that they are all related to delivery of goods and were not applicable to the facts of the present case.

14. In the light of the orders already passed in this case, whereby an FDR has been furnished for a sum of Rs.1.50 crores, the grievance of the petitioner/plaintiff against the orders dated 18th January, 2020 does not survive any longer and no further directions on the said aspect are called for.

15. As regards the question whether leave to defend has been rightly granted to the respondent/defendant or not, the facts that prevailed upon before the learned Trial Court were that the petitioner/plaintiff himself has referred to loans having been given to the respondent/defendant by way of bank transfer. The petitioner/plaintiff had also accepted that the respondent/defendant had been paying interest for some time after which it defaulted. In fact, the plaint record reflects this position. The existence of some business transactions is, therefore, made out even from the plaint. Though the petitioner/plaintiff has claimed now that those loan transactions were something different, that would be a matter to be seen during trial.

16. When the respondent/defendant has challenged the claim of the petitioner/plaintiff that he had acted as legal advisor to them and,

therefore, the invoice raised was for a fee, this fact too will have to be proved. In fact, in the application for leave to defend, the respondent/defendant has averred that the petitioner/plaintiff had claimed to have been providing legal assistance to the respondent/defendant since the year 2000, yet the invoice had been raised only in December, 2018, and therefore, the amounts raised in the invoice would also be time-barred.

17. With regard to the submissions made by the learned counsel for the petitioner/plaintiff, that, on taking cognizance of an offence by the learned MM under Section 138 of the N.I. Act automatically a decree against the respondent/defendant should follow, cannot be accepted, as cognizance leads to trial and the accused can also get acquitted. Secondly, on the one hand the petitioner/plaintiff claims that the cheques were towards loans which were separate transactions and on the other hand, wants this Court to draw conclusions on that basis, that the signatures on the cheques were admitted and the learned MM had taken cognizance of the case to decree this suit.

18. In the light of these submissions, it is indeed a matter of trial as to what was the liability of the respondent/defendant towards the petitioner/plaintiff and towards what transaction or service rendered by the petitioner/plaintiff, that is, as a lender or as a legal advisor, would he be entitled to the suit amount.

19. The learned Trial Court was, therefore right in observing that the defence taken was not moonshine and disclosed triable issues which required inquiry. Leave to defend had to be granted in the light of these varying stands taken by the petitioner/plaintiff in different proceedings.

20. The judgments relied upon by the petitioner/plaintiff have no relevance to the facts of the present case and do not require detailed discussions.

21. Though in the impugned order, it has not been so recorded that any condition was attached to the grant of leave to defend, however, in the light of the previous orders of this Court and the deposit of the FDR for a sum of Rs.1.5 crores with the Registry of this Court, the leave to defend granted to the respondent/defendant is not unconditional and does not work to the disadvantage of the petitioner/plaintiff.

22. However, it is reiterated that the respondent/defendant is bound by the earlier orders of this Court that the said FDR shall not be encumbered in any fashion and nor shall the Registry release the FDR to the respondent/defendant till further orders of this Court.

23. The petition is devoid of merit and is dismissed along with the pending application

24. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

JULY 30, 2021

ak/ms