

(2012) 11 MAD CK 0284

Madras High Court

Case No: C.R.P. (NPD) No. 1826 of 2005

Praveenkumar

APPELLANT

Vs

M/s. The Hongkong and
Shanghai Banking Corporation
Limited

RESPONDENT

Date of Decision: Nov. 20, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 29 Rule 1, Order 37 Rule 1, Order 37 Rule 2, Order 37 Rule 3, Order 37 Rule 3(3)
- Constitution of India, 1950 - Article 227

Citation: (2013) 1 LW 747

Hon'ble Judges: T. Mathivanan, J

Bench: Single Bench

Advocate: J.R.K. Bhavanantham, for the Appellant; K.S. Natarajan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T. Mathivanan, J.

Impugning the fair and decretal Order dated 03.03.2005 and made in I.A. No. 19268 of 2004 in O.S. No. 3206 of 2004, on the file of the City Civil Court. Chennai, this memorandum of civil revision is filed by the revision petitioner. The respondent herein has filed a suit in O.S. No. 3206 of 2004, under Order XXXVII Rule 1 of the Code of Civil Procedure, as against the revision petitioner herein on the file of the City Civil Court, Chennai claiming a sum of Rs. 4,19,761/- together with interest at the rate of 24% per annum on the said amount, from the date of plaint till the date of realisation.

2. The revision petitioner herein has filed an interlocutory application in I.A. No. 19268 of 2004, under Order XXXVII Rule 3 C.P.C., on the file of the above said Court

seeking the relief of granting leave to defend in the suit.

3. The respondent herein has also contested the above interlocutory application by filing a detailed counter affidavit.

4. On considering the submissions of both sides and on evaluating the related facts and circumstances based on the documents produced on behalf of the respondent, the learned II Assistant Judge, who was placed in additional charge of I Assistant Court, has dismissed the above petition on 03.03.2005 and on the same date itself has decreed the suit as prayed for with suits.

5. Being aggrieved by the Order dated 03.03.2005 and made in I.A. No. 19268 of 2004, the revision petitioner, being the defendant has preferred the present revision petition.

6. In the suit in O.S. No. 3206 of 2004, which appears to have been filed under Order XXXVII Rule 1 C.P.C., the respondent being the plaintiff has alleged that on the application made by the revision petitioner, the plaintiff had sanctioned a Credit Card Globally valid Master Card bearing No. 5548 5120 0529 4824 on 28.07.2000.

7. Subsequently, the revision petitioner/defendant had also applied for two more cards and the plaintiff had also issued one credit card bearing No. 4567 1989 3847 2536 on 23.10.2000 and the another card bearing No. 4384 5914 0101 1635 on 28.09.2002.

8. It is apparent from the averments of the plaint that the defendant used the credit card for purchase of goods and other items and that the defendant was not regular in repaying the amount to the plaintiff as per the bills forwarded to him and has become a defaulter. According to the respondent/ plaintiff a sum of Rs. 4,19,761/- is due from the defendant and interest thereon as on 24.09.2003.

9. Therefore, the plaintiff was constrained to file the above suit under summary procedure as contemplated under Order XXXVII Rule 1 C.P.C.,

10. In his petition under Order XXXVII Rule 3 C.P.C., for granting leave to defend in the suit, the revision petitioner being the defendant has raised the following grounds:

i. The Manager is not competent to represent plaintiff-Bank as he was not duly authorised by the Board of Directors to verify and present the plaint as contemplated under Order XXIX Rule 1 C.P.C.,

ii. The credit card does not come under the category of bills of exchange, hundis or promissory notes;

iii. The suit claim is not a liquidated demand in money payable by the defendant with or without interest arising on a written contract;

- iv. The goods were purchased long ago. But, the petitioner (defendant) did not keep the invoices of the goods purchased;
- v. The respondent failed to produce the charge slips regarding every purchase of goods by the petitioner;
- vi. The burden of proof is on the respondent/plaintiff to prove the amount of Rs. 4,19,761 /- representing the principal and interest as on September 2003;
- vii. The copy of statement of accounts is disputed as it is not based on the charge slips and the statement of accounts referred as microfilm reference relating to the card does not reflect the charge slip number and other particulars.
- viii. The petitioner had made payments to the tune of Rs. 4,50,000/-. But, the respondent had suppressed the facts, Nevertheless, these grounds were not accepted by the Trial Court.

11. In the counter affidavit, the respondent/plaintiff has raised the following grounds:

- i. As per Order XXXVII Rule 3(3) C.P.C., the petitioner/defendant shall give notice of entering appearance to the respondent/ plaintiff on the very same day the petitioner/defendant enters appearance in the summary suit. However, though he had entered appearance in the above suit on 20.09.2004, the petitioner/defendant gave notice of entering appearance to the respondent/plaintiff only on 15.10.2004 after a delay of 35 days, which is in total negation of the principles laid down under Order XXXVII Rule 3(3) C.P.C.,
- ii. As contemplated under Order XXXVII Rule 3(4) C.P.C., the respondent/plaintiff had served summons for Judgment on the petitioner/defendant immediately on 15.10.2004 itself (the date on which the notice of appearance was served on the respondent/plaintiff).
- iii. As per Order XXXVII Rule 3(5) C.P.C., the petitioner/defendant shall file the leave to defend petition within ten days from the date of receipt of the summons for Judgment. But, he had filed the interlocutory application in I.A. No. 19268 of 2004 for granting leave to defend the suit, only on 02.11.2004.
- iv. Despite there is delay, no petition was filed by the petitioner under Order XXXVII Rule 3(7) C.P.C., to condone the delay in filing the leave to defend petition.

12. It is apparent, from the grounds stated above, that the revision petitioner has not complied with the mandatory requirement of serving notice of appearance on the respondent/plaintiff on the date of entering appearance. It is also apparent that he did not file the application in I.A. No. 19268 of 2004 within a period of ten days from the date of receipt of summons for Judgment.

13. Further it is crystal clear that he did not file any petition to condone the delay in filing the leave to defend petition as contemplated under Sub-rule 7 to Rule 3 of Order XXXVII C.P.C.
14. Considering the above latches on the part of the petitioner/respondent, among other facts, the learned Trial Judge has dismissed the application in I.A. No. 19268 of 2004 on 03.03.2005.
15. Now, Mr. J.R.K. Bhavanantham, learned counsel appearing for the revision petitioner has argued that the credit card was neither bills of exchange nor hundi and promissory note and that the credit card was not covered under the Negotiable Instruments Act and that the suit was not at all maintainable under Order XXXVII Rule 1 C.P.C.,
16. He has also adverted to that the declaration given by the revision petitioner in the credit card application form could not be construed as a written contract.
17. Further, he has argued that the respondent/plaintiff had deliberately suppressed the payments made by the revision petitioner to the extent of Rs. 4,50,000/- and that the revision petitioner never committed default in payment as alleged by the respondent/ plaintiff.
18. In support of his contention, he has placed reliance upon the following decisions:
- i. [M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd.,](#)
 - ii. [Central Bank of India Vs. Manipur Vasant Kini,](#) and
 - iii. N. Prabhakaran vs. Manager, Citibank N.A., Chennai, reported in (2001) 3 MLJ 540.
19. In the first decision viz., [M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd.,](#) , a suit was brought by the respondents on the basis of bills of exchange in respect of which the appellants were the acceptors. M/s. Khanna Sales Corporation were the drawees of the bill, who had local bill discounting facility with the respondents. Under the said facility, M/s. Khanna Sales Corporation had discounted the bills of exchange. The respondent-Bank made payments to M/s. Khanna Sales Corporation on the basis of the bills of exchange. Since the amounts under the bills of exchange were not paid and received by the respondent-Bank when they had presented within the time stipulated and since demand did not come forth despite notice of demand, the respondent-Bank had filed a summary suit as aforestated.
20. The appellants had sought leave to defend themselves contending that the bills of exchange were executed without consideration as neither the goods were sold nor supplied in the transaction in question. The learned Trial Judge had refused the leave to defend the suit.

21. On appeal, the Division Bench of the High Court had considered the matter and held that the undisputed position was that there was no logic in the submission made on behalf of the appellants and ultimately held that the pleas raised by the appellants were frivolous and had no substance and merits in their defence.

22. Under this circumstance, the Hon"ble Supreme Court of India has held that the bills of exchange were accepted by the defendant even though they had already discharged earlier bills of exchange as and when they were due and the Bank had continued to pay out such large amounts of bills of exchange accepted by the party who was already a defaulter. It was also contended that some of the bills of exchange were mere secondary documents and, therefore, these matters required examination. It cannot be said that the defence raised by the appellants was totally defenceless or moonshine or illusory as noticed earlier in the course of this Order. Therefore, The view taken by the High Court that the appellants have absolutely no prima facie case, may not be correct. Therefore, unconditional leave to the defendant to defend the suit was granted.

23. This Court has given it's careful consideration to the above cited case and is of view that the facts and circumstances narrated therein are not in fair congruence with the facts and circumstances of the present case on hand and therefore the above cited decision cannot form basis to support the case of the revision petitioner.

24. In the second decision viz [Central Bank of India Vs. Manipur Vasant Kini](#), it is held that the summary suit based on credit card facility brought by the Bank is very well maintainable and in paragraph No. 7 it has been observed that:

...To maintain a suit as a Summary Suit it must be based on a Negotiable Instrument and/or it must be to recover debt or liquidated money payable by the defendant arising on a written contract or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt. As set out earlier the holder of a card when he uses the card agrees to comply with the conditions and terms when he appends his signature to the application. In most of the cases he agrees to make payments. In the event there are disputes he has to raise such a dispute as is contemplated by the provision for settling dispute under the terms and conditions. In some cases such conditions may not exist. The question, however, is whether this would constitute a contract in writing between the plaintiff and the defendant. To my mind it is clear that there is a contract in writing in existence between the bank and the holder of credit card by which he agrees to pay the amounts in respect of the use of the card for which he has signed the voucher. In the first instance by applying for a card and signing the form he agrees to abide by the terms and conditions for the use of a card. Secondly, when he signs the slip at the seller he acknowledges the amounts due and payable. Thirdly, by using the card he does not pay the seller but in terms of the accepted conditions whilst applying for the card agrees to pay the said amount to the bank with other charges which may be levied.

In paragraph No. 9, it has been observed that:

9. As pointed out earlier, even if it is construed that the terms and conditions themselves may not spell out a written contract for a debt or liquidated amount nevertheless on the holder of the card, using and signing the voucher/slip at the sellers results in a contract in writing under which an ascertained or liquidated amount becomes due and payable. Once this be so, under the terms and conditions of the use of the Credit Card the card holder has agreed to pay the amount payable, on notice being served. If there be a dispute regarding the user of a card that dispute will not be in respect of maintainability of the suit as Summary Suit, but at the highest would be an issue as to whether the defendants are entitled to conditional leave or unconditional leave. That does not determine the character of the suit...

However, the learned Single Judge of Bombay High Court has granted conditional leave to defend the suit.

25. With regard to the maintainability of the suit, under Order XXXVII Rule 2 C.P.C., this decision is very much made applicable and supported the case of the respondent/plaintiff, instead of supporting the case of the revision petitioner.

26. In the third case, viz., N. Prabhakaran vs. Manager, Citibank N.A., Chennai, reported in (2001) 3 MLJ 540. the learned Single Judge of this Court has held that:

What the Court must do is to find out whether the applicant has raised triable issues and whether defence is not sham or illusory and whether the petitioner has raised such issues which if proved at the time of trial, will result in dismissal of the suit. If so, he is entitled to be given leave to defend.

27. On the other hand, Mr. K.S. Natarajan, learned counsel appearing for the respondent/plaintiff has argued that once a customer expresses his/her desire to have the facility of having a credit card, the customer is required to fill-in an application form for obtaining a credit card and while filling-in the application form, the customer signs his/her name promising to abide by the terms and conditions mentioned in the application form. The credit card is issued only on the basis of the credit worthiness of the customer and on the basis of the written contract entered into between the bank and the customer. Even if the customer is found to be credit worthy, unless the customer affixes his/her signature promising to abide by the terms and conditions meant for issuance of credit card, the application form will be rejected and no credit card will be issued to the customer. Thus, the written contract is the condition precedent for issuance of credit card to the customer.

28. The learned counsel has also submitted that when the credit card is used for any financial transaction, it is not a barter and on the contrary, the burden of payment of the price for the consumable, household items, services etc., is shifted to the Bank, which in turn, pays the money to the shopping mall for the goods purchased. On the

basis of the customer's promise to pay the price to the Bank as per the terms and conditions of the written contract entered into between both the customer and the Bank in the application form and therefore the suit being filed as a summary suit is very well within the purview of Order XXXVII Rule 2 C.P.C.,

29. He has also argued that all transactions effected by using a credit card are liquidated money transactions performed on the basis of the written contract between both the parties because before the issuance of the credit card the customer fills in an application and signs his/her name promising to abide by the terms and conditions of the application form.

30. He would further submit that while entering into a financial transaction with any shopping mall the credit card is used to cover the liquidated expenses incurred by the customer for the purchase of goods.

31. This Court has perused the averments of the interlocutory application in I.A. No. 19268 of 2004 as well as the counter affidavit and the grounds of the revision petition along with the averments of the plaint in the suit in O.S. No. 3206 of 2004.

32. The revision petitioner has not disputed the utilization of the credit card in purchasing the goods. What he would contend is that he had made payments to the tune of Rs. 4,50,000/- and this was deliberately burked by the respondent/ plaintiff.

33. In this connection, he would contend that he had purchased goods long ago, but did not keep the invoice of the goods purchased and that the charge slips signed by him at the time of purchasing of goods would have been forwarded to the respondent Bank on the basis of which his accounts were prepared.

34. From the contention put forth by the revision petitioner, this Court is able to infer that the revision petitioner is not in possession of invoices and slips and therefore he wanted the respondent-Bank to produce the charge slips and he would contend that the suit itself is not maintainable as the credit card is neither bills of exchange nor hundies or promissory notes.

35. It is also his prime contention that the suit claim is not a liquidated demand in money payable by the defendant with or without interest arising on a written contract. This contention is not discernible and liable to be rejected.

36. Based on the decision in [Central Bank of India Vs. Manipur Vasant Kini](#), this Court also finds that the suit is very well maintainable under Order XXXVII Rule 2 C.P.C., as the revision petitioner had availed the credit card facility and liable to pay the suit claim as he had failed to repay the same for having purchased the goods.

37. On a cursory perusal of the affidavit filed in support of the application in I.A. No. 19268 of 2004, this Court finds that nowhere the revision petitioner has stated that he is in possession of charge slip in his custody. It is also implied that he does not have both the invoices and charge slips in his possession.

38. As rightly argued by the learned counsel appearing for the respondent/plaintiff, at the time of availing the credit card facility, the holder of the credit card is required to fill-in an application form and while fill-in the application form, he signs his name promising to abide by the terms and conditions specified in the application form.

39. It is also significant to note here that the credit card is issued only on the basis of the written contract entered into between the card holder and the Bank, Therefore, the written contract is the condition precedent for the issuance of credit card to the customer and only on the basis of the binding nature of contract between the Bank and the customer the Bank is bound to pay the merchants for the goods purchased by the card holder. If there is no privity of written contract between the card holder and the Bank there is no necessity for the Bank to bind itself to the merchants to pay the appropriate price for the goods purchased by the card holder.

40. It is also pertinent to note here that at the time of purchasing of goods the credit card holder is required to sign in the voucher/slip at the instance of the seller, under which an ascertained or liquidated amount becomes due and payable by the Bank to the seller.

41. As rightly observed in [Central Bank of India Vs. Manipur Vasant Kini](#), once this be so, under the terms and conditions of the use of the Credit Card the card holder has agreed to pay the amount payable, on notice being served. If there be a dispute regarding the user of a card that dispute will not be in respect of maintainability of the suit as Summary Suit, but at the highest would be an issue as to whether the defendants are entitled to conditional leave or unconditional leave. That does not determine the character of the suit.

42. As observed earlier, although the revision petitioner/defendant had entered appearance in the above suit on 20.09.2004, he gave notice of entering appearance to the respondent/plaintiff only on 10.10.2004 after a delay of 35 days, which is in total negation of the principles laid down under Order XXXVII Rule 3(3) C.P.C.

43. It is also obvious to note here that the respondent/plaintiff had served summons for Judgment on the revision petitioner immediately on 15.10.2004 as contemplated under Order XXXVII Rule 3(4) C.P.C.

44. As envisaged under Order XXXVII Rule 3(5) C.P.C., the revision petitioner has to file the petition to grant leave to defend the suit within ten days from the date of receipt of summons for Judgment. However, it is manifested from the records that he had filed the leave to defend petition belatedly only on 02.11.2004. But, he did not file any petition to condone the delay as contemplated under Order XXXVII Rule 3(7) C.P.C., The Trial Court has, after the dismissal of the petition in I.A. No. 19268 of 2004 (Leave to defend), pronounced the Judgment on the same date i.e., on 03.03.2005 decreeing the suit as prayed for with costs.

45. In this connection, it may be significant to note here that as contemplated under Order XXXVII Rule 6(a) C.P.C., refusal of grant of leave to defend the suit would be ended automatically in passing of decree.

46. As observed in [Shah Babulal Khimji Vs. Jayaben D. Kania and Another](#), an order refusing to grant leave is a judgment.

47. In [Ajay Bansal Vs. Anup Mehta and Others](#), while speaking on behalf of the Division Bench of the Hon"ble Supreme Court of India, the Hon"ble Mr. JUSTICE S.B. SINHA has observed that:

A decree passed in a summary suit where leave to defend the suit has been refused is almost automatic. The consequence of passing a decree cannot be avoided.

Further, His Lordship has observed that:

Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree u/s 96 of the Code. When an appeal could be filed, ordinarily, an application under Article 227 of the Constitution of India would not be entertained.

48. It is also relevant to note here that even if the Order of dismissal of the leave to defend the suit petition is set aside, the decree that has been passed in the suit cannot be set aside automatically. The defendant has to go back to the Court, which passed the decree and move an application under Order XXXVII Rule 4 of the CPC to set aside the decree.

49. In [V.S. Saini and Another Vs. D.C.M. Ltd.](#), it is held that in summary suits no revision is maintainable against the Order of refusing to grant leave to defend the suit.

50. It may also be relevant to refer the proviso to Section 105 of the Code of Civil Procedure. It reads as follows: 105. Other orders.

(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as ground of objection in the memorandum of appeal.

51. In *Ajay Bansal vs. Anup Mehta and others* (cited supra) the Division Bench of the Hon"ble Supreme Court of India has also held that:

The defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section 105(1) of the Code.

52. In view of the ratio laid down in the above cited decision, when the appeal is maintainable against the dismissal of the leave to defend the suit petition u/s 96 C.P.C., the revision petition u/s 115 C.P.C., is not maintainable.

53. From the above facts, this Court finds that the revision petitioner is not deserved to get the relief of leave to defend the suit. Even on merits, the interlocutory application in I.A. No. 19268 of 2004 is deserved to be dismissed as the revision petitioner has miserably failed to comply with the provisions of Order XXXVII Rule 3 Sub-rules 3, 4, 5 & 7 C.P.C., and accordingly the application was rightly dismissed by the Trial Judge.

54. Keeping in view of the above facts, this Court finds that this revision petition is also liable to be dismissed on the ground of devoid of any merits. Accordingly, this revision petition is dismissed. Consequently, connected miscellaneous petition is closed. No costs.