

Equivalent Citation: 2007 (6) BomCR 539, (2007) 109 BOMLR 1930

IN THE HIGH COURT OF BOMBAY

Appeal Lodging No. 563 of 2007

Decided On: 21.08.2007

Appellants: Neolite Polymer Industries Pvt. Ltd. a company incorporated under the Companies Act, 1956

Vs.

Respondent: Standard Chartered Bank a company incorporated in England by Royal Charter [Alongwith Appeal Lodging Nos. 455, 564, 567, 568, 570 and 571 of 2007]

Hon'ble Judges:

Swatanter Kumar, C.J. and Ranjana Desai, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Janak Dwarkadas Sr. Adv. and Vivek Kantawala, Adv. in all Appeals except Appeal (L) No. 567 of 2007 and Prateek Saksera, Adv., i/b., Vivek Kantawala, Adv. and Co. in Appeal Lodging No. 567 of 2007

For Respondents/Defendant: Virag Tulzapurkar Sr. Adv. and Zubin Behramkamdin, and Vivek Vashi, Advs., i/b., Amarchand, Mangaldas and S.A. Shroff, Adv. and Co.

Subject: Civil

Catch Words

Mentioned IN

Acts/Rules/Orders:

Indian Stamps Act, 1899 - Sections 2(3), 2(14), 2(15), 3, 4, 33, 35, 36, 40, 42(1) and 42(2) - Schedule - Articles 13 and 45; Bills of Exchange Act, 1882 - Sections 51, 51(1), 52, 52(3) and 57; Negotiable Instruments Act, 1881 - Sections 80, 104 and 134; Finance Act, 2006; Civil Procedure Code (CPC), 1908 - Order 37

Cases Referred:

Chiranji Lal by LRs v. Hari Das by LRs AIR 2005 SC 2564; Defence Knitting Industries (P) Ltd. v. Jay Arts (2006) 8 SCC 25; Hindustan Steel Ltd. v. Dilip Construction Co. AIR 1969 SC 1238 : (1969) 1 SCC 597; International Computers Consultants v. Home Computers Services (P) Ltd. 1977 (3) PLR 10; Mechalec Engineers and Manufacturers v. Basis Equipment Corporation AIR 1977 SC 577 : (1976) 4 SCC 687; Milkhiram (India) (P) Ltd. v. Chamanlal Bros AIR 1965 SC 1698; Mrs. Ramesh Rani v. Mr. Harsh Malhotra and Ors. Civil Revision No. 3962 of 1997; Mst. Bittan Bibi v. Kuntu Lal ILR (1952) 2 All 984 : AIR 1952 All 996; Raj Duggal v. Ramesh Kumar Bansal AIR 1990 SC 2218; Santosh Kumar v. Mool Singh (1958) SCR 1211; State Bank of Saurashtra v. Ashit Shipping Services (P) Ltd. and Anr. JT 2002 (4) SC 85; Sunil Enterprises and Anr. v. SBI Commercial and International Bank Ltd. JT 1998 (3) SC 641

Citing Reference:

Chiranji Lal by LRs. v. Hari Das by LRs.	Discussed
Defence Knitting Industries (P) Ltd. v. Jay Arts.	Discussed
Hindustan Steel Ltd. v. Messrs Dilip Construction Company.	Discussed
International Computers Consultants v. Home Computers Services (P) Ltd.	Mentioned
M/s Sunil Enterprises and Anr. v. SBI Commercial and International Bank Ltd.	Discussed
Mechalec Engineers and Manufacturers v. Basis Equipment Corporation.	Mentioned
Milkhiram (India) (P) Ltd v. Chamanlal Bros.	Mentioned
Mst Bittan Bibi v. Kuntu Lal.	Discussed
Raj Duggal v. Ramesh Kumar Bansal.	Discussed
Santosh Kumar v. Mool Singh.	Mentioned
State Bank of Saurashtra v. M/s Ashit Shipping Services (P) Ltd and Anr.	Discussed

#### Case Note:

Civil - Maintainability of Suit - Section 35 of Indian Stamp Act, 1899 - Plaintiff filed a suit for recovery of amounts against Defendant alleging that bills of exchange drawn by a third party Defendant was dishonoured - Single Judge declined to grant unconditional leave to Defendant - Hence, present appeal - Defendant contended that suit not maintainable as the two bills of exchange not stamped in accordance with the provision of Stamps Act, 1899 - Held, because of amendment to Clause (a) of the proviso to Section 35 of the Stamp Act by Finance Act of 2006, bill of exchange and promissory

note, which were stamped or which were insufficiently stamped earlier, were made admissible and the embargo stood lifted - Such documents would be admissible in evidence - Therefore, no error of jurisdiction in the reasoning given by the learned Judge

Banking - Dishonour of Bills of Exchange - Section 51 of the Bills of Exchange Act, 1882 - Defendant contended that bills were not protested and being foreign bills of exchange have to be compulsorily noted hence, the suit is not maintainable as it is violative of Section 51 of the Act - Held, in the plaint specific averments have been made with regard to the acceptance of bills of exchange upon presentation and dishonour upon presentation - Further, specific dates have been given when the documents were protested as well as when the claimants were called upon to discharge their liability - Therefore, contention raised that the bill of exchange had not been presented/protected in accordance with law is without merit

Civil - Discretion of - Court to grant - Unconditional leave to defend - Held, it is settled principle of law that grant or refusal to grant leave to defend, conditionally or otherwise, would depend upon the facts and circumstances of each case - Applicant was able to show that triable issue arises from the application for leave to defend and the defence taken by the Applicants was bona fide, nor illusory or moonshine, the Court would grant leave to defend - Further, if the application for leave to defend, in addition to facts, raises a legal issue and give rise to triable issue of specific nature, the Court may even grant unconditional leave to defend - In the present case, the learned Judge has come to the conclusion that no serious triable issues arise as far as the principal amount is concerned and thus, was justified in granting conditional leave - Thus, discretion exercised by the learned Judge does not suffer from any error of jurisdiction

Civil - Discretion of - Court to grant - Unconditional leave to defend - Scope of Interference by Appellate or Revisional Court - Held, where discretion has been exercised by the learned Single Judge, it should not be interfered with lightly, unless and until the Impugned Order suffers from patent, factual or legal infirmity and merely because the finding, at this stage, is a prima facie finding as to whether or not a triable issue arises for adjudication - Thus, the scope of interference by the Appellate or Revisional Court necessarily should be construed to be a limited one

Ratio Decidendi:

“The bill of exchange and promissory note, which were stamped or insufficiently stamped earlier were admissible as evidence and the embargo stood lifted because of amendment to Clause (a) of the proviso to Section 35 of the Stamp Act by Finance Act of 2006.”

“In cases where specific dates have been given when the Bills of Exchange were protested as well as when the claimants were called upon to discharge their liability, it cannot be claimed that Bills of Exchange were not presented or protested in accordance with law.”

“Grant or refusal to grant leave to defend, conditionally or otherwise, would depend upon the facts and circumstances of each case and is at the discretion of the Court.”

“Appellate Court cannot interfere with order of Lower Court unless the impugned order suffers from patent, factual or legal infirmity.”

## JUDGMENT

Swatanter Kumar, C.J.

1. The Standard Chartered Bank filed a suit under the provisions of Order 37 of the Code of Civil Procedure for recovery of different amounts against different defendant-companies. In Summary Suit No. 1339 of 2006 filed against Neolite Polymer Industries Pvt. Ltd. the Bank claimed US \$ 502,437.00 being the principal amount of two Bills of Exchange which are annexed to the plaint at Exhibits B1 and B2 respectively along with the interest of US \$ 267,226.03 being calculated at the rate of 18% p.a. from the due date until institution of the suit and also claimed same interest till realisation.

2. In terms of the averments made in the plaint, the Bank pleaded that Ransat PLC, a company incorporated under the Laws of England and Wales with its office at 137, Regent Street, London, W14 7LD United Kingdom, drew two bills of exchange on the defendant company in respect of certain supplies made by Ransat to the defendants. Each bill was payable 60 days after the acceptance of the order of the Bank. Each bill, when presented, was accepted by the defendant company in the suit. However, when presented for payment, the bill was dishonoured. The details of the two bills are as follows:

No of the bill	Due date	Amount of the bill
RPLC PC 3952	April 28, 2003	US \$ 148,297.50
RPLC PC 3961	May 20, 2003	US \$ 354,139/50

3. The Bank had presented the bills through their A.B.N. Amro Bank, N.V. Sakhar Bhavan, Nariman Point, Mumbai 400021, which Bank acted as the collecting bank, and finally on 17th June 2005, each bill was caused to be protested through one D.D. Damodar, Notary, Union of India. In this manner the defendant company, after accepting the bills, became unconditionally liable to pay to the Bank the principal amount of each bill, which was not paid. Vide letter dated 22nd November, 2005, through its advocates, the Bank called upon the defendant company to make payment of the principal amount with interest. Another notice dated 7th April 2006 was sent to the defendant company which was returned, according to the Bank, with postal remarks "Left, addressee not known". Having failed to recover its money, the Bank instituted this suit under the provisions of Order 37 of C.P.C. for recovery of the amounts.

4. An application for leave to defend was filed by the defendant in response to the summons for judgment. The defendant company took the defence that the suit under the provisions of Order 37 of C.P.C. was not maintainable as also that the two bills of exchange had not been stamped in accordance with the provisions of the Indian Stamps Act, 1899. The deficiency in the stamping was not curable and as such the suit was liable to be dismissed on that count alone. The defendant company also took a plea that the bills were not presented for acceptance through ABN Amro Bank, nor were the bills protested and they being foreign bills of exchange, have to be compulsorily noted and/or protested. This action of the Bank is stated to be in violation of Section 51 of the Bills of Exchange Act, 1882 read with the provisions of the Negotiable Instruments Act, and thus the summary suit was stated to be not maintainable. Another ground taken by the defendant company

for unconditional leave to defend was that no notice of dishonour was given and the plaintiff Bank could not claim any interest.

5. Another suit, being Summary Suit No 1692 of 2006, was filed by the Bank under Order 37 of C.P.C. against Hazel Mercantile Ltd. for recovery of US \$ 64,800.00 with interest on the basis of a bill of exchange which was accepted by the defendant company. The distinguishing feature of this suit was that according to the Bank the bill was payable on order of Ransat at 90 days from the date of acceptance and vide assignment deed dated 9th March 2006 the debt and all other rights and securities under the said bill of exchange No. RPLC-TA 3968/9 dated March 8, 2003, were assigned to the plaintiff Bank. The bill, when presented for payment on 27th June 2003, was dishonoured. The advocate on behalf of the Bank served a letter/notice dated 16th March 2006 on the defendant company for clearing its liability. This notice was responded to by the defendant company by their letter dated 17th April 2006 denying their liability on the basis of the purported settlement with Ransat PLC. On 12th May 2006 the plaintiff Bank refuted the said allegation of adjustment and claimed the amount. The amounts were not paid resulting in institution of the present suit.

6. In both the above suits the learned Single Judge declined to grant unconditional leave to the defendant company in its entirety, but with regard to the principal amount, the defendants were granted conditional leave to defend subject to their depositing principal amount of the bill. As regards the amount claimed on account of interest, unconditional leave was granted to the defendants. The Bank was permitted to withdraw the principal amount subject to furnishing security to the satisfaction of the Prothonotary and Senior Master, in default thereof, Registry was directed to invest the said amount in nationalised bank. The impugned order, which was passed in Summons for Judgment No371 of 2006 in Summary Suit No. 1339 of 2006, reads as under:

1. The suit has been instituted under Order 37 of the Code of Civil Procedure, 1908 for the recovery of an amount of US \$ 502,437.00 being the principal amount of two Bills of Exchange, namely, Exhibits 'B1' and 'B2' to the Plaint, together with interest in the amount of US \$ 267,226.03 being interest computed at the rate of 18% per annum from the due date until the date of the suit. Interest has also been claimed from the date of the institution of the suit until payment or realisation.

2. The Bills of Exchange were drawn by an entity by the name of Ransat PLC and were accepted by the Defendant. The Bills of Exchange were drawn in London and were payable at 60 days from the date of acceptance at the order of the Standard Chartered Bank. Notices of demand were issued by the Plaintiff on 22nd November 2005 and on 7th April 2006. Apart from a letter dated 9th May 2006 stating that the notice dated 25th November 2005 had not been received, there was no further communication. Eventually, the suit has been instituted for the recovery of the outstanding dues under the Bills of Exchange together with interest.

3. Four defences have been urged at the hearing of the Summons for Judgment, these being : (i) The Bills of Exchange have not been duly stamped; (ii) The Bills of Exchange were not noted or protested; (iii) There was no notice of dishonour; and (iv) The Plaintiff is not entitled to claim interest under Section 80 of the Negotiable Instruments Act, 1881 which is only applicable to Indian Bills of Exchange. Each of the defences can be taken up for consideration seriatim.

4. In so far as the defence that the bills have not been duly stamped is concerned, Section 3 of the Indian Stamp Act, 1899 provides for a charge of stamp duty inter alia on every Bill of Exchange payable otherwise than on demand. Article 13 of the Schedule to the Stamp Act provides for various rates of stamp duty in respect of Bills of Exchange which are payable otherwise than on demand. Section 2(3) of the Stamp Act contains a definition of a Bill of Exchange payable on demand and the definition is to the following effect:

(3) Bill of exchange payable on demand. - "Bill of exchange payable on demand" includes

(a) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;

(b) an order for the payment of any sum of money weekly, monthly, or at any other stated period; and

(c) a letter of credit, that is to say, any instrument by which one person authorises another to give credit to the person in whose favour it is drawn;

Under Clause (b) a Bill of Exchange continues to remain one payable on demand where it contains an order for the payment of any sum of money weekly, monthly, or at any other stated period. Section 35 of the Act provides that an instrument chargeable with duty shall not be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, unless such instrument is duly stamped. Clause (a) of the proviso prior to its amendment by the Finance Act of 2006 was to the following effect:

(a) any such instrument not being an instrument chargeable with a duty not exceeding ten naye paise only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

Bills of Exchange and promissory notes were excluded from the coverage of Clause (a) of the proviso to the Indian Stamp Act as it earlier stood. The Finance Act of 2006 amended the provisions of Section 35 by deleting the words "not being an instrument chargeable with a duty not exceeding ten naye paise only or a Bill of Exchange or a promissory note, shall, subject to all just exceptions". Instead of the aforesaid words, the word "shall" was substituted. The net consequence, therefore, of the amended provisions of the Indian Stamp Act is that all instruments are now capable of being admitted in evidence on the payment of the duty with which an instrument is chargeable or the deficit stamp duty in the case of deficiently stamped instrument together with penalty as prescribed. In the present case, the Bills of Exchange have admittedly been stamped subsequently in 2006. The effect of the amendment of Section 35 by the Finance Act of 2006 is to remove the bar on the admission of Bills of Exchange and promissory notes which have not been stamped or which were insufficiently stamped subject to due stamp duty and penalty being paid. Upon the payment of the

requisite stamp duty, the embargo which is imposed by the substantive provisions of Section 35 is lifted and the Bills of Exchange are admissible in evidence.

5. The next defence which needs to be addressed is that the Bills of Exchange were not noted or protested. Section 104 of the Negotiable Instruments Act, 1881 provides that a foreign Bill of Exchange must be protested for dishonour when such protest is required by the law of the place where the Bill of Exchange is drawn. The Bills of Exchange in the present case, were drawn in London. Sections 51 and 52 of the Bill of Exchange Act, 1882 in England are the relevant statutory provisions which govern. Sub-section (1) of Section 51 provides that where an inland bill has been dishonoured it may, if the holder thinks fit, be noted for non-acceptance or nonpayment, as the case may be; but it shall not be necessary to note or protest any such Bill in order to preserve the recourse against the drawer or indorse. An inland Bill of Exchange is defined by Section 4 inter alia as one which is both drawn and payable within the British Isles. In the present case, it is undisputed that both the bills were drawn in London as is evident from the tenor of the Bills. The Bills do not stipulate that they would be payable outside the British Isles. The Bills of exchange are "inland bills" for the purpose of the Bills of Exchange Act, 1882 in England. Sub-section (1) of Section 52 of the English Act provides that when a Bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable. Sub-section (3) of Section 52 provides that in order to render the acceptor of a Bill liable, it is not necessary to protest it, or that notice of dishonour should be given to him. In view of this specific provisions, there is no merit in the second defence.

6. The third defence that there was no notice of dishonour is again answered by the provisions of Section 52(3) of the Bills of Exchange Act, 1882 to which a reference has already been made. Under the English Law, in order to render the acceptor of the bill liable, it is not necessary that notice of dishonour should be given to him.

7. The first three defences are wholly lacking in any merit whatsoever.

8. The fourth defence is that the provisions of Section 80 of the Negotiable Instruments Act, 1881 would not be available to a suit which has been instituted on a foreign Bill of Exchange. Section 80 provides that when no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument be calculated at the rate of eighteen per cent per annum from the date at which the same ought to have been paid by the party charged, until tender or realization. However, it would be material to note that Section 134 of the Negotiable Instruments Act, 1881 provides that in the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorse by the law of the place where the instrument is made payable. The attention of the Court is drawn to the provisions of Section 57 of the Bill of Exchange Act 1882 under which provision is made for a measure of damages which shall be deemed to be liquidated damages. The holder is empowered to recover from any party liable on the Bill, interest thereon from the time of presentment for payment if the Bill is payable on demand and from the maturity of the Bill any other case.

9. The Defendant has absolutely no defence to the suit in so far as the claim for the principal sum due under the Bills of Exchange is concerned. However, with a view to affording the Defendant an opportunity to contest the suit as regards the claim for the principal sum due, it would be

appropriate and proper to grant leave to defend to the Defendant subject to a condition of deposit of the principal amount of the Bills. Having regard to the nature of the defence on the issue of interest, unconditional leave to defend is grant confined to the claim for interest.

10. Hence, the following order:

(i) Conditional on the Defendant depositing the equivalent in Indian rupees of an amount corresponding to US \$ 502,437.00 (being the principal amount due under the Bills) within a period of eight weeks from today, the Defendant would be entitled to leave to defend the suit in so far as the claim to the principal amount due under the Bills is concerned;

(ii) Upon deposit of the aforesaid amount, the Plaintiff would be entitled to withdraw the amount so deposited, subject to furnishing solvent security to the satisfaction of the Prothonotary & Senior Master;

(iii) In the event that the Plaintiff fails to furnish solvent security to the satisfaction of the Prothonotary & Senior Master within 12 weeks from the date of deposit, the amount shall be invested in a Nationalized Bank to abide by the result of the suit;

(iv) The Defendant is granted unconditional leave to defend the suit on the question of interest.

The Summons for Judgment is disposed of.

7. While adopting the reasoning given in the order dated 4th May 2007 in Summons for Judgment No. 371 of 2006 in Summary Suit No 1339 of 2006, the Bank was granted same reliefs, as per the following details:

Suit No.	Name of parties	Amount	claimed	Relief granted
2390/06	Eben Trade Impex Pvt. Ltd.	US \$ 47,600.00	with interest	For principal amount conditional leave and for inter estun conditional leave granted.
1629/06	Indian Fintrade Pvt. Ltd.	US \$ 443.118.18	with interest	For principal amount conditional leave and for interest unconditional leave granted.
137/06	Hazel Mercantile Pvt. Ltd.	US \$ 743.520.00	with interest	For principal amount conditional leave and for interest uncondi- tional leave granted.

2168/06 Sanman Trade Impex US \$ 47,775.00 For principal For principal amount

Pvt. Ltd. conditional leave and  
for interest unconditional  
leave granted.

1343/06 Sanman Trade Impex US \$ 761.928.56 with interest For principal amount

Pvt.Ltd. conditional leave and  
for interest unconditional  
leave granted.

8. The defence raised on behalf of the applicants were found to be not giving rise to a triable issue and while rejecting the stand taken by them, the Court granted unconditional leave to defend in relation to the question of interest, while in relation to the principal amount, the above directions were issued by the learned Single Judge. The argument that the bills of exchange were not duly stamped, was rejected by the learned Single Judge, relying upon Section 3 of the Indian Stamp Act, 1899. It was noticed that under Clause (b), a bill of exchange continues to remain to be one payable on demand where it contains an order for payment of any sum of money weekly, monthly, or at any other stated period. While noticing amendment to Clause (a) of the proviso to Section 35 of the Stamp Act by Finance Act of 2006, the learned Single Judge came to the conclusion that because of the amended provisions, the bill of exchange and promissory note, which were stamped or which were insufficiently stamped earlier, were made admissible and the embargo stood lifted. Such documents would be admissible in evidence. We are unable to find any error of jurisdiction in the reasoning given by the learned Judge. Equally, without merit was the contention raised on behalf of the applicants that the bill of exchange had not been presented/protested in accordance with law. While accepting the reasoning given by the learned Judge, we may further add that in the plaint specific averments have been made with regard to the acceptance of bills of exchange upon presentation and dishonour upon presentation. Specific dates have been given when the documents were protested as well as when the claimants were called upon to discharge their liability.

9. It is settled principle of law that grant or refusal to grant leave to defend, conditionally or otherwise, would depend upon the facts and circumstances of each case. In the event the applicant is able to show that triable issue arises from the application for leave to defend and the defence taken by the applicants is bona fide, nor illusory or moonshine, the court would grant leave to defend. Further, if the application for leave to defend, in addition to facts, raises a legal issue and give rise to triable issue of specific nature, the court may even grant unconditional leave to defend. It will be useful at this stage to refer to the consistent law on the subject. In the case of Mrs Ramesh Rani v. Mr. Harsh Malhotra and Ors. Civil Revision No. 3962 of 1997 decided on 12.8.1999, the Division Bench of Punjab and Haryana High Court held as under:

This rule vests pervasive judicial discretion in the court to grant, refuse or grant conditional leave to defend the suit by the defendant. This discretion, of course, has to be exercised in accordance with settled principle of law. Where the court exercises its discretion either way, it must have direct

nexus and relation to the contents and specific pleadings of the parties. Leave has to be granted in relation to the subject matter of the claim in the suit and normally not in relation to part thereof, unless such severance is called for in the given facts and circumstances of each case;

For example, where the Court finds that part of the claim raised in the suit by the plaintiff at least prima facie seems to be satisfied on the basis of a valid counter claim or other documentary evidence, which would show partial satisfaction of the amount.

Obviously there is dual purpose sought to be served under the specific provisions of Order 37 of the Code of Civil Procedure. One is to provide expeditious disposal of the claim of the party by adopting recourse to summary procedure, while the other is to provide a safeguard to the interest of the plaintiff by granting or refusing or granting additional leave to defend to the other party. In other words, if the court is satisfied with the claim of the plaintiff and the fact that the defendant has only sham or moonshine defence, the court may refuse to grant leave to defend and pass the decree forthwith. But in some cases depending on the nature of the defence, the court may grant leave with or without condition. This would obviously depend on the facts and circumstances of each case. The court strikes a balance between the case of the plaintiff and the defence raised by the defendant. The interest of justice demand that interest of no party should be jeopardised. Where the interest of the plaintiff is to be secured there defendant should also have a fair chance to prove his defence.

In a case titled as Sunil Enterprises and Anr. v. SBI Commercial and International Bank Ltd. JT 1998 (3) SC 641 the Hon'ble Supreme Court reiterated the principles enunciated in the case of Santosh Kumar v. Mool Singh MANU/SC/0013/1958 : [1958]1SCR1211 and spelt out the factors and circumstances which the court must consider while granting leave to defend the suit.

In the case of International Computers Consultants v. Home Computers Services (P) Ltd. 1977 (3) PLR 10, a Division Bench of took the view that once triable issues are raised with bona fide and firm defence, leave should be granted. But if the defence is frivolous or vexatious, leave should be refused. Where there is reasonable doubt and the court feel it just reasonable, the court may impose such condition while granting the leave, as it may deem fit and proper.

Applying the said principle to the present case, I have no hesitation in affirming the view taken by the learned trial court though not dealt with in detail in the impugned judgment, that the defendant may have raised triable issue but it lacks bona fide. It was for the defendant-applicant to explain and show that the claim of the plaintiff in relation to the giving of loan by cheque was fictitious and as such cheques were not encashed in their account.

Judicial discretion to be exercised by the court has to create a balance so that none of the parties to the lis suffer avoidable prejudice. The learned trial court had granted conditional leave to the defendant-applicant in which I see no error of jurisdiction. But a question that remains to be answered is whether the condition imposed while granting the leave is just fair and equitable. Answer to this has to be in the negative in the facts and circumstances of the present case.

10. In the case of State Bank of Saurashtra v. Ashit Shipping Services (P) Ltd. and Anr. JT 2002 (3) SC 85, the Supreme Court reiterated the principle and held as under:

The law on the subject is well settled in the case of *Mechalec Engineers and Manufacturers v. Basis Equipment Corporation* MANU/SC/0043/1976 : [1977]1SCR1060 it has been held that the question of granting leave to defence has to be considered in the light of following principles:

a) If the defendant satisfies the court that he has a good defence the claim on its merits, the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend;

b) If the defendant raised a triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend;

c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows; such a state of facts as leads to the inference that at the trial of the action, he may be able to establish a defence to the plaintiffs claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case, the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security;

d) If the defendant has no defence or that defence set up is illusory or sham or practically moonshine then ordinarily, the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend;

e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

In the case of *Raj Duggal v. Ramesh Kumar Bansal* reported in MANU/SC/0393/1990 : AIR1990SC2218 it has been held that leave to defend must be declined where the court is of the opinion that grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. It has been held that the test is to see whether the defence raises a real issue and not a sham one. It has been held that when there is a plausible defence, leave to defend must be granted. It has been held that if there is a dispute as to the meaning of a document or uncertainty as to the amount actually due or the facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross examine his witness, leave should not be denied.

11. In the case of *Defence Knitting Industries (P) Ltd. v. Jay Arts* MANU/SC/3668/2006 : (2006)8SCC25 , the Supreme Court, while dealing with a summary suit for recovery of money, where leave to defend had been declined by the trial court and the High Court and in which the applicant took up a plea that in view of the earlier orders passed by the High Court the quantum of deposit could not be more than Rs. 20 lacs and based on triable issue, accepting the condition partially, allowed the appeal, but clearly stated the enunciated principle, with approval, as established in the case of *Milkhiram (India) (P) Ltd. v. Chamanlal Bros.* MANU/SC/0376/1965 : AIR1965SC1698 that where triable issues arise, leave may be granted, but specifically noticed that where the applicant does not have substantial defence to raise or raised frivolous or vexatious defence, leave may be

refused altogether. In cases where the court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the court may even impose conditions while granting leave to defend.

12. Even in other cases the Supreme Court as well as various High Courts have applied the above principle to the facts of a given case. Thus, these are the principles which squarely have to be applied to the cases relating to grant and/or refusal to grant leave to defend.

13. Another aspect which should be noticed is that where discretion has been exercised by the learned Single Judge, it should not be interfered with lightly, unless and until the impugned order suffers from patent, factual or legal infirmity and merely because the finding, at this stage, is a prima facie finding as to whether or not a triable issue arises for adjudication. Thus the scope of interference by the appellate or revisional court necessarily should be construed to be a limited one.

14. It is an appeal against an order and not against a decree. The right of the defendant, unless completely shut and a decree is passed, it cannot be equated to a regular first appeal so as to vest the appellate or revisional court with much wider powers. Reliance is also placed on the judgment of the Supreme Court in the case of Mechelec Engineers & Manufacturers v. Basic Equipment Corporation MANU/SC/0043/1976 : [1977]1SCR1060 . In the present case, the learned Judge, after a detailed discussion, has come to the conclusion that no serious triable issues arise as far as the principal amount is concerned and thus was justified in granting conditional leave and granted conditional leave for that amount and unconditional leave in relation to the payment of interest. The discretion exercised by the learned Judge, in our opinion, does not suffer from any error of jurisdiction or otherwise as far as the grant of conditional leave is concerned except to the limited extent, which we shall shortly proceed to discuss.

15. We have already noticed that due to amended provisions of the Stamp Act, the contentions of the applicants would hardly have any merits. Wherever the bills were made in favour of a commercial bank, stamp duty would not be attracted as contemplated in the schedule to the Stamp Act. Even if for the sake of argument it is to be presumed that there was a liability upon the respondents in appeal to pay the stamp duty then it would not be a technicality, which will defeat the suit or is not redeemable or should go to the benefit of the appellants to the extent of granting unconditional leave. In the case of Hindustan Steel Ltd. v. Dilip Construction Co. AIR 1969 SC 1238, when the provisions of the Stamp Act had not been amended and the law was treated to be quite stringent, still the Supreme Court held as under:

The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments; it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded, Sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and Sub-section (2) of Section 42 enacts the consequences resulting from such certification.

Our attention was invited to the statement of law by M.C. Desai, J., in *Mst. Bittan Bibi v. Kuntu Lal* MANU/UP/0386/1952 : AIR1952All996 that:

A court is prohibited from admitting an instrument in evidence and a court and a public office both are prohibited from acting upon it. Thus a court is prohibited from both admitting it in evidence and acting upon it. It follows that the acting upon is not included in the admission and that a document can be admitted in evidence but not be acted upon. Of course it cannot be acted upon without its being admitted, but it can be admitted and yet be not acted upon. If every document, upon admission, became automatically liable to be acted upon, the provision in Section 35 that an instrument chargeable with duty but not duly stamped, shall not be acted upon by the court, would be; rendered redundant by the provision that it shall not be admitted in evidence for any purpose. To act upon an instrument is to give effect to it or to enforce it.

In our judgment, the learned Judge attributed to Section 36 a meaning which the Legislature did not intend. Attention of the learned Judge was apparently not invited to Section 42(2) of the Act which expressly renders an instrument, when certified by endorsement that proper duty and penalty have been levied in respect thereof, capable of being acted upon as if it had been duly stamped.

16. Even in a recent judgment in the case of *Chiranjil Lal by LRs v. Hari Das by LRs*. MANU/SC/0396/2005 : AIR2005SC2564 , a larger Bench of the Supreme Court, approving the principles enunciated in *Hindustan Steel Ltd. (supra)*, held as under:

24. Such an interpretation is not permissible having regard to the object and scheme of the Indian Stamp Act, 1899. The Stamp Act is a fiscal measure enacted with an object to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of initial defect in the instrument *Hindustan Steel Ltd. v. Dilip Construction Co.* MANU/SC/0474/1969 : [1969]3SCR736 . Section 2(14) of the Indian Stamp Act defines an "instrument" as including every document by which any right or liability is, or purported to be created, transferred, limited, extended, extinguished or recorded. Section 2(15) defines "instrument of partition" as any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any civil court and an award by an arbitrator directing partition. Section 3 provides a list of instruments which shall be chargeable with duty of the amount indicated in schedule I, of the Indian Stamp Act. Article 45 of Schedule I prescribes the proper stamp duty payable in case of an instrument of partition. Section 33 provides for the impounding of the instrument not duly stamped and for examination of the instrument for ascertaining whether the instrument is duly stamped or not. Section 35 provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties, authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Section 40(b) provides for payment of the proper duty, if the instrument impounded is not duly stamped. Section 42(1) provides for certifying that proper duty has been paid on the impounded instrument. Sub-section (2) provides that after such certification the instrument shall be admissible in evidence, and may be registered, acted upon and authenticated as if it had been duly stamped.

25. A decree in a suit for partition declares the rights of the parties in the immovable properties and divides the shares by metes and bounds. Since a decree in a suit for partition creates rights and liabilities of the parties with respect to the immovable properties, it is considered as an instrument liable for the payment of stamp duty under the Indian Stamp Act. The object of the Stamp Act being securing the revenue for the State, the scheme of the Stamp Act provides that a decree of partition not duly stamped can be impounded and once the requisite stamp duty along with penalty, if any, is paid the decree can be acted upon.

17. In light of the amended provisions and the principles of law aforesaid, it is not possible for us to accept the contentions raised on behalf of the appellants that the grounds taken by them in their application for leave to defend would entitle them to get unconditional leave.

18. It was also contended on behalf of one of the appellants that the debt had extinguished before 9.3.2006 by virtue of the understanding between the parties and thus in fact and in law no assignment could be effected. In the plaint it had been categorically averred that Ransat PLC, vide assignment deed dated 9.3.2006 had assigned to the plaintiff Bank all the rights and securities including the bill of exchange bearing No. RPLC-TA 3968/9 and all legal and equitable interest. They had also relied upon the relinquishment deed. There is no dispute that under the bill of exchange the amount was payable to Ransat, which obviously, in face of the assignment deed, stood assigned to the Bank. Firstly, according to the respondents this issue was not raised before the learned Single Judge and secondly no material has been placed on record to show that Ransat has given up the claim in favour of the appellants. It is also argued that the Members of the Management of Ransat and the appellants are related to each other as is evident from para 9 of the affidavit in support of the Summons for Judgment No. 368 of 2006 taken out in Summary Suit No. 1692 of 2006 filed by the defendants. There it is specifically stated that the appellants have business relationship with Ransat PLC since 2990 (in view of close relationship between the Directors of the defendants and the Ransat PLC). Despite the relationship of business or otherwise there is no justification on record as to why no document has been produced on record to show that debts stood settled prior to 9.3.2006. The vague plea has been taken that these two companies had agreed to settle their accounts by setting off payment towards import by the receivable against exports. In the application for leave to defend, it has also been stated that in view of the failure on the part of the Ransat PLC to pay the outstanding despite having settled the account, the appellants filed the suit for recovery against them, which is being contested. It is obvious from this pertinent fact appearing on record that this issue has been raised only to frustrate the claim of the plaintiff's Bank. This in fact appears to be an afterthought as Ransat has not executed any document accepting the alleged set off or adjustment. Even otherwise it does not stand to common reasoning that if Ransat, which is stated to be a Limited Company and doing fairly well in the business, would execute assignment deed, which is based upon incorrect facts to their knowledge. This plea, at the face of it, is a sham one and an afterthought on the part of the appellants. It is interesting to note that while replying to this notice, the appellants, through their counsel on 17.4.2006 did not make any mention about the settlement of accounts and adjustment between the Ransat PLC and themselves. On the contrary it was stated that various disputes are pending with Ransat PLC and the assignment had not been made in accordance with law and no notice of assignment was given to them. The stand taken in the said notice is contrary to the stand taken in the present suit. No documents have been placed by any of the appellants on record to substantiate the plea of extinguishment of debt prior to the execution of the assignment deed and set off. The bill of exchange clearly states "At 90 days from date of acceptance pay against

this second bill of exchange (first being unpaid) at the order of Ransat PLC". The bill of exchange was protested and then presented for presentation which was dishonoured on or about 25.6.2003, as informed to the appellants by the advocate of the Bank on 16.3.2006.

19. Having analysed the facts of the cases, the subject matter of the present appeals, in light of the backdrop of the principles of law afore discussed, we are of the considered view that the impugned judgment(s) do not call for any interference, except to the extent that while furnishing securities to the satisfaction of the Prothonotary and Senior Master of this Court, they shall specifically file an undertaking that in the event of the dismissal of the suit in favour of the present appellants, the respondents shall provide for restoration of the amount with interest at the same rate, which has been claimed by the plaintiffs in the suit. The contentions raised on behalf of the appellants are without any merit. Accordingly, the appeals are disposed of with the above modification. In the facts and circumstances of the case the parties are left to bear their own costs.