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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 2497/2000

Reserved on 11th February, 2008

Date of decision : 22nd February, 2008

FINCAP FINANCIAL CORPORATION LTD. Plaintiff

Through Mr. Rajesh Bhardwaj, Mr. Rajeev Ranjan
Kumar, Advocates

versus

EURO COTSPIN LTD. Defendant

Through none.

CORAM:

Mr. Justice S. Ravindra Bhat

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| 1. | Whether reporters of local papers may be allowed to see the judgment.? | Yes. |
| 2. | To be referred to the Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

Mr. Justice S. Ravindra Bhat

1. This is a suit under Order 37 of the Code of Civil Procedure, 1908 seeks recovery of Rs. 21,15,068.50 through a summary judgment, against the defendant. Initially, several defendants were made parties to the proceedings; later all others, save defendant No. 1

were deleted from the array of parties.

2. The facts relevant for the case are as follows. The Plaintiff is a duly registered company under the Companies Act, 1961, having its registered office at 222-223, “Ashirwad”, D-1, Green Park, New Delhi – 110 016. The Plaintiff avers that the Defendant company and its officers issued advertisements from time to time from February, 1999, in newspapers and other Dailies including the various Journals, Magazines etc and also printed pamphlets inviting and enticing the public at large to invest in their “Fixed Deposit” scheme for a lucrative and handsome returns on the money invested with the company.

3. That defendants company’s Chairman & Managing Director, Directors, Secretary and Principal Officers Directors in the brochure advertised about the various schemes and did propaganda to accumulate the funds by showing and painted a rosy picture about the scheme. It is averred that the defendant secured, from the plaintiff, fixed deposits aggregating Rs. 20,00,000/- (Rupees twenty lakhs only), through receipt numbers. FNO1/DEL/000021, FNO1/DEL/000022 and FNO1/DEL/000023, for Rs.5,00,000/- (Rupees Five Lakhs), Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand) and Rs.7,50,000/- (Rupees Seven Lakhs Fifty Thousand) respectively dated 1st July, 1999 for one year on an average return of 14% i.e. on a interest rate of 14% per annum.

4. It is averred that pursuant to acceptance of Fixed Deposits the officers of the defendants company Shri Rajeev Khandelwal and Ghanshyam Gupta signed cheques dated 30th June,2000, which were issued to the plaintiff in discharge of Fixed Deposit amount held by the defendants company. Further to acceptance of the Fixed Deposit the Defendant Company issued various Cheques for discharge of debt and liability towards the interest accrued up-to various dates on the those fixed deposits. The cheques were returned unpaid from the defendant company's bankers.

5. It is averred that all officers including the Chairman, Managing Director, Directors, Secretary of the defendants company at the time of issue of cheques had assured and undertaken to the plaintiff that the said cheques issued pursuant to discharge of the Fixed Deposit liability were good for payment and would be encashed as and when presented on the respective due dates. Details of the said cheques, mentioned in the suit are as below:

S.No.	Cheque Number	Date of Cheque	Amount in Rs.
1.	349261	30.06.2000	7,50,000.00
2.	349262	30.06.2000	7,50,000.00
3.	349263	30.06.2000	5,00,000.00
Total Amont			20,00,000.00

S.No.	Cheque Number	Date of Cheque	Amount in Rs.
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1.	032478	01.06.2000	5,945.21
2.	032479	01.07.2000	5,753.42
3.	032490	01.06.2000	8,917.81
4.	032491	01.07.2000	8,630.14
5.	032502	01.07.2000	8,917.81
6.	032503	01.07.2000	8,630.14
7.	032487	01.03.2000	8,054.79
8.	032499	01.03.2000	8,054.79
9.	032475	01.03.2000	5,369.86
10.	032488	01.04.2000	8,917.81
11.	032500	01.04.2000	8,917.81
12.	032476	01.04.2000	5,945.21
13.	032501	01.05.2000	8,630.14
14.	032489	01.05.2000	8,630.14
15.	032477	01.05.2000	5,753.42
Total Amount 1,15,068.50			

6. The plaintiff further avers that when the cheques were presented, the collecting bank returned them, unpaid. It is alleged that the plaintiff caused legal notice, dated 26th July 2000 to be issued to the defendant, demanding payment of the amount for Rs. 21,15,068.50 but the defendant did not make the payment. The plaintiff has, in the circumstances sought the decree in this summary suit; it is alleged that the sums are due on a written contract, for a liquidated amount; the plaint is also based on negotiable instruments, i.e the cheques which were returned dishonoured by the plaintiff's bank upon advise by the bank on which they were drawn.

7. The defendant entered appearance and filed an application, IA No. 8123/2002, claiming that the suit could not be proceeded as it was declared “sick” under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). This court, by order dated 24-9-2003 adjourned the present suit, *sine die*. Thereafter, the plaintiff filed an application before the Board for Industrial Financial Reconstruction (BIFR) and secured permission from that Board, through its order dated 5-3-2004 to proceed against the defendant for recovery of the fixed deposit amounts, which are subject of the present suit. The proceedings were accordingly revived, after the plaintiff filed an application IA 2264/2004, which was allowed on 13-1-2005.

8. The defendant sought leave to defend this suit, by filing IA 8103/2005; it took various pleas. In the grounds, it has again adverted to the pendency of proceedings before BIFR and its being a sick company. In addition, the defendant avers that an application being CP No. 324/2002, under Section 391 of the Companies Act, 1956 for compromise and arrangement of the company, is pending before the Punjab and Haryana High Court. It further relies upon an order made on 17-10-2002 whereby suits filed by unsecured creditors against it (i.e the present defendant) were adjourned to 9-1-2003. It is averred that the plaintiff falls within the description “unsecured creditors” whose suits have been stayed and that the order of the said High Court is still in force. The defendant's

application also avers that the petition is fixed for 22-9-2005. It is lastly averred that the jurisdiction for the cause of action asserted in the present case lies exclusively with the Company Law Board, by virtue of Section 58-A of the Companies Act.

9. The plaintiff, in its reply to the application for leave to defend, avers that the defendant applicant has not adverted to any order after 17-10-2002 in the company proceedings before the Punjab and Haryana High Court. It is also averred that the defendant has not disclosed what happened on the next date of hearing, i.e 9-1-2003, or produced any material concerning the proceedings under Section 391 of the Companies Act.

10. While giving leave to defend the suit the Court has to observe the following principles:

(a) If the Court is of opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally - The question whether the defense raises a triable issue or not has to be ascertained by Court from the pleadings before it and the affidavits of parties;

(b) If the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to put by the

defendant is frivolous or vexatious it may refuse leave to defend altogether;

(c) 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 impose conditions in granting leave to defend.

(Ref. *Defiance Knitting Industries Pvt. Ltd. Vs Jay Arts* 2006(4) Civil Court Cases 259 (S.C.) and *UBS AG Vs State Bank of Patiala* 2006(3) Apex Court Judgments 324 (S.C.)).

11. The defendant, in the application for leave to defend, has not indicated any substantial defense which could be called a “triable issue”, in the opinion of this court. It has merely averred that the present proceedings are stayed by the order of the Punjab and Haryana High Court in some petition, under Section 391 of the Companies Act. Reliance is placed upon an order dated 17th October, 2002, for the purpose. That order itself indicates that it was to be in force till 9-1-2003. Moreover, the defendant does not appear to have disclosed about this when it had sought stay of the present suit on the ground of pendency of proceedings under SICA. Another aspect is that the application for leave to defend was filed on 30th September, 2005; yet the defendant does not disclose what transpired on the previous date of hearing in the pending proceedings for

compromise/ arrangement.

12. As far as the question of bar of jurisdiction, the second question raised in the leave to defend application, is concerned, Section 58-A of the Companies Act reads as follows:

“58A. Deposits not to be invited without issuing an advertisement.

(1) The Central Government may, in consultation with the Reserve Bank of India, prescribe the limits up to which, the manner in which and the conditions subject to which deposits may be invited or accepted by a company either from the public or from its members.

(2) No company shall invite, or allow any other person to invite or cause to be invited on its behalf, any deposit unless –

(a) such deposit is invited or is caused to be invited in accordance with the rules made under sub-section (1), and

(b) an advertisement, including therein a statement showing the financial position of the company, has been issued by the company in such form and in such manner as may be prescribed.

(3) (a) Every deposit accepted by a company at any time before the commencement of the Companies (Amendment) Act, 1974, (41 of 1974). in accordance with the directions made by the Reserve Bank of India under Chapter IIIB of the Reserve Bank of India Act, 1934, (2 of 1934) shall, unless renewed in accordance with clause (b), be repaid in accordance with the 2[terms and conditions of such deposit.]

(b) No deposit referred to in clause (a) shall be renewed by the company after the expiry of the term thereof unless the deposit is such that it could have been accepted if the rules made under sub-section (1) were in force at the time when the deposit was initially accepted

by the company.

(c) Where, before the commencement of the Companies (Amendment) Act, 1974 (41 of 1974), any deposit was received by a company in contravention any direction made under Chapter IIIB of the Reserve Bank of India Act, 1934(2 of 1934), repayment of such deposit shall be made in full on or before the 1st day of April, 1975 and such repayment shall be without prejudice to any action that may be taken under the Reserve bank of India Act, 1934 for the acceptance of such deposit in contravention of such direction.

[(3A) Every deposit accepted by a company after the commencement of the Companies (Amendment) Act, 1988, shall, unless renewed in accordance with the rules made under subsection (1), be repaid in accordance with the terms and conditions of such deposit.]

(4) Where any deposit is accepted by a company after the commencement of the Companies (Amendment) Act, 1974(41 of 1974), in contravention of the rules made under sub-section (1), repayment of such deposit shall be made by the company within thirty days from the date of acceptance of such deposit or within such further time, not exceeding thirty days, as the Central Government may, on sufficient cause being shown by the company, allow.

(5) Where a company omits or fails to make repayment of a deposit in accordance with the provisions of clause (c) of sub-section (3), or in the case of a deposit referred to in sub-section (4), within the time specified in that sub-section –

(a) the company shall be punishable with fine which shall not be less than twice the amount in relation to which the repayment of the deposit has not been made, and out of the fine, if realised, an amount equal to the amount in relation to which the repayment of deposit has not been made, shall

be paid by the Court, trying the offence, to the person to whom repayment of the deposit was to be made, and on such payment, the liability of the company to make repayment of the deposit shall, to the extent of the amount paid by the Court, stand discharged;

(b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to five years and shall also be liable to fine.

(6) Where a company accepts or invites, or allows or causes any other person to accept or invite on its behalf, any deposit in excess of the limits prescribed under sub-section (1) or in contravention of the manner or condition prescribed under that sub-section or in contravention of the provisions of subsection (2), as the case may be –

(a) the company shall be punishable –

(i) where such contravention relates to the acceptance of any deposit, with fine which shall not be less than an amount equal to the amount of the deposit so accepted,

(ii) where such contravention relates to the invitation of any deposit, with fine which may extend to one lakh rupees but shall not be less than five thousand rupees;

(b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to five years and shall also be liable to fine.

(7) (a) Nothing contained in this section shall apply to –

(i) a banking company, or

(ii) such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.

(b) Except the provisions relating to advertisement contained in clause (b) of sub-section (2), nothing in this section shall apply to such closess of financial companies as the Central Government may after consulationwith the

Reserve Bank of India, specify in this behalf.

- [(8) The Central Government may, if it considers it necessary for avoiding any hardship or for any other just and sufficient reason by order issued either prospectively or retrospectively from a date not earlier than the commencement of the Companies (Amendment) Act, 1974 (41 of 1974), grant extension of time to a company or class of companies to comply with, or exempt any company or class of companies from, all or any of the provisions of this section either generally or for any specified period subject to such conditions as may be specified in the order:*

Provided that no order under this sub-section shall be issued in relation to a class of companies except after consultation with the Reserve Bank of India.]

- (9) Where a company has failed to repay any deposit or part thereof in accordance with the terms and conditions of such deposit, the Company Law Board may, if it is satisfied, either on its own motion or on the application of the depositor, that it is necessary so to do to safeguard the interests of the company, the depositors or in the public interest, direct, by order, the company to make repayment of such deposit or part thereof forthwith or within such time and subject to such conditions as may be specified in the order:*

Provided that the Company Law Board may, before making any order under this sub-section, give a reasonable opportunity of being heard to the company and the other persons interested in the matter.

- (10) Whoever fails to comply with any order made by the Company Law Board under sub-section (9) shall be punishable with imprisonment which may extend to three years and shall also be liable to a fine of not less than rupees fifty for every day during which such noncompliance continues.”*

13. Apart from baldly averring that the civil courts’ jurisdiction in regard to claims

for return of amounts deposits with companies are barred, the applicant defendant has not sought to substantiate it in any manner. A textual reading of the provision in Section 58-A nowhere bars jurisdiction of this court; such a construction also does not arise out of necessary implication. The position may have altered due to enactment of the Companies (Second Amendment) Act, 2002 and introduction of Section 10-GB. Yet, the Tribunal which has to adjudicate such claims has not been constituted. More importantly, that provision envisages adjudication of such future claims; the amendment does not bar adjudication of pending suits, seeking recovery of the amounts deposited, in terms of Section 58-A. Therefore, this objection, or defense has no merit.

14. The plaintiff has produced certified copies of the 18 cheques, described in the previous part of the judgment. It had filed a criminal complaint, alleging commission of offences under Section 138 of the Negotiable Instruments Act due to dishonour of the said instruments. The certified copies of the return memos concerned are also filed along with the plaint. The plaintiff avers, in its application filed in 2001, that the originals of those documents were with the trial court; it has therefore sought leave to file and rely upon the certified copies of the said documents. It has however, not produced certified copies of the fixed deposit receipts for the amounts said to be deposited by it; instead, it has relied upon photocopies to say that the defendant took the amounts in fixed deposit

and agreed to pay 14% interest.

15. In view of the above discussion, the court is of opinion that the grounds raised by the defendant in the application seeking leave to defend do not raise any triable issue. On the other hand, the plaint and documents produced in its support establish that the plaintiff has a justified claim to the extent of Rs. 21,15,068.50. However, its claim for interest is not supported by any valid written agreement, as the original fixed deposit receipts or certified copies of the said documents are not on the record. However, the plaintiff would be entitled to pendente lite and future interest @ 10% per annum. For these reasons, IA 8103/2005 is liable to be dismissed. The plaintiff is entitled to summary judgment for the amount of Rs. 21,15,068.50 (Rupees twenty one lakhs, fifteen thousand and sixty eight, paise fifty only) pendente lite and future interest @ 10% per annum, and costs.

16. The suit is decreed with costs, in the above terms; let a decree be drawn.

DATED: 22nd February, 2008

S. RAVINDRA BHAT, J