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

+ IA No. 7089/2010 (u/O 37 R 3(5) r/w Sec. 151 of the Code of Civil Procedure, 1908) in CS(OS) 1912/2006

Decided on 27th April, 2012

SH. RINKU AGGARWAL Plaintiff
Through :Mr. Manu Bansal and Mr.
Ankit Jain, Advs.

versus

SMT. KANTA KUMARI Defendant
Through :

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J. (ORAL)

1. Plaintiff has filed this suit under Order 37 of the Code of Civil Procedure, 1908 ("CPC", for short) against the defendant for recovery of ₹21 lacs together with future interest @ 18% per annum and costs.

2. After service of summons under Order 37 CPC, defendant entered appearance within the prescribed period. Thereafter, summons for judgment were issued. Upon service of summons, defendant has filed this application under Order 37 Rule 3(5) CPC,

seeking 'leave to defend' the suit.

3. Perusal of record shows that the defendant has been avoiding to argue the matter for quite some time. On 29th August, 2011 matter had to be adjourned as counsel for the defendant was stated to be down with viral fever. On 27th February, 2012 also adjournment was sought on the ground that counsel was unwell. Again on 7th March, 2012 adjournment was taken by the defendant on the ground of illness of the counsel. Again on 26th March, 2012 adjournment was taken by the defendant on the ground that counsel was busy in Supreme Court. It was made clear in the order dated 26th March, 2012 that in case matter is not argued by the defendant, appropriate orders would be passed. Today counsel for the defendant submits that he would be seeking discharge from the brief. I am convinced that defendant is only interested in dragging on the matter. Adjournment is declined I proceed to dispose of the matter after hearing counsel for the plaintiff and perusing the record.

4. Case of the plaintiff is that vide an Agreement to Sell dated 25th March, 2006 (hereinafter referred to as "Agreement") defendant had agreed to sell a plot of land bearing No. C-7, Sector CS(OS) 1912-2006

Swarn Nagri, Greater Noida, Gautam Budh Nagar (hereinafter referred to as “suit property”) to the plaintiff for a total sale consideration of ₹67,68,000/- (Rupees Sixty Seven Lacs and Sixty Eight Thousand Only). ₹15,00,000/- (Rupees Fifteen Lacs Only) was paid by the plaintiff to defendant towards advance money. ₹10,00,000/- (Rupees Ten Lacs Only) was paid in cash; whereas ₹5,00,000/- (Rupees Five Lacs Only) was paid through a cheque bearing no. 099541 drawn on Urban Co-operative Bank, Suraj Pur, Greater Noida. Balance sale consideration of ₹52,68,000/- (Rupees Fifty Two Lacs Sixty Eight Thousand Only) was agreed to be paid on or before 4th May, 2006. Plaintiff arranged this amount, approached the defendant on 2nd May, 2006 and requested her to execute the documents. Defendant represented that she wanted to alter the terms of agreement as she wanted higher price for the suit property, inasmuch as, she misbehaved with the plaintiff. Plaintiff filed a complaint with Police Station Seema Puri in this regard. On 4th May, 2006 defendant called the plaintiff at her residence and requested him to grant some more time to her for completing the transaction. On 9th May, 2006 plaintiff again approached the defendant with remaining amount of ₹52,68,000/- (Rupees Fifty

Two Lacs and Sixty Eight Thousand Only) but defendant showed her reluctance. She requested plaintiff to wait till 15th May, 2006 and thereafter upto 19th May, 2006. On 19th May, 2006 plaintiff finally asked the defendant to make up her mind as to whether she was willing to sell the suit property or not and requested her to fix a date for completing the formalities of sale. Defendant agreed to complete the sale transaction by 15th June, 2006. She further agreed to hand over possession by 15th June, 2006 failing which she undertook to pay ₹22 lacs, that is, ₹15 lacs advance plus ₹7 lacs as penalty to the plaintiff. An agreement to this effect was executed on 19th May, 2006. Defendant failed to fulfill her promise, thus, issued four postdated cheques totaling to ₹22 lacs, on 15th June, 2006, details whereof are as under:-

S.No.	Cheque No.	dt.	Amount	Drawn on
1.	402914	19.6.2006	₹100000/-	Corporation Bank, Dilshad Garden, Delhi
2.	402919	25.6.2006	₹400000/-	- Do-
3.	402920	5.7.2006	₹1000000/-	- Do-
4.	402910	25.7.2006	₹700000/-	-Do-

First cheque was encashed on presentation. However, remaining cheques, on presentation, were returned dishonored with the remarks “Insufficient Funds”.

5. Plaintiff served a legal notice dated 11th August, 2006 on the defendant through his counsel, calling upon her to make payment within the statutory period. But defendant did not make any payment. It is stated in the plaint that no relief which does not fall within the ambit of Order 37 CPC has been claimed in the suit.

6. In her ‘leave to defend’ application, defendant has not denied execution of Agreement to Sell as also receipt of earnest money. It has also not been denied that the deal was to be concluded on or before 4th May, 2006. Defendant has alleged that the plaintiff has failed to pay the balance sale consideration on or before 4th May, 2006. On 4th May, 2006 one Mr. Ankur Mittal and Mr. Arora visited her residence and sought extension of time, inasmuch, as showed a photocopy of agreement dated 25th March, 2006 signed by the defendant. Defendant agreed to extend the date of payment of balance sale consideration till 9th May, 2006. The above named two persons obtained endorsement and signatures of defendant on the photocopy of agreement, to this effect. Even on

9th May, 2006 balance sale consideration was not paid, instead plaintiff took extension of time till 15th May, 2006. Balance sale consideration was not tendered even on 15th May, 2006. At the request of plaintiff, time was further extended by the defendant till 19th May, 2006. In the morning of 19th May, 2006, plaintiff along with five other persons including Mr. Ankur Mittal came to the house of defendant and sought further extension of time to make payment. They represented that balance amount would positively be paid on or before 15th June, 2006. However, they wanted assurance from the defendant that on tendering of balance sale consideration defendant would hand over possession of the suit property and in case, she fails to do so she would pay ₹7 lacs. On the basis of this understanding, a fresh agreement was executed on the stamp paper of ₹100/- which was signed by the defendant and plaintiff. Plaintiff along with said five persons again came to defendant's residence, in the evening of 19th May, 2006 itself and forced her to sign four postdated cheques amounting to ₹22 lacs by extending threats. They assured that cheques were being taken towards security so as to see that defendant hands over possession of the plot to them by 15th June, 2006. Defendant was assured that

cheques will not be encashed. Even on 15th June, 2006 plaintiff failed to pay the balance sale consideration, thus, earnest money stood forfeited in terms of the agreement. However, plaintiff got encashed the cheque bearing No. 402914 dated 19th June, 2006 for ₹1 lac, in the meanwhile. He also took ₹1 lac from the defendant in cash on 7th July, 2006, on the pretext that his wife was unwell and was hospitalized. In nutshell, defence of the defendant is that plaintiff had failed to fulfill his part of obligation, as contained in Agreement to Sell and did not tender balance sale consideration, resulting in forfeiture of earnest money. Cheques were given towards security, regarding handing over of the possession of suit property, on receipt of balance sale consideration. It is further alleged that a criminal complaint being complaint case no. 503/2006 was filed by the plaintiff but has been rejected by the Additional Chief Metropolitan Magistrate-1 (East) on 27th August, 2009 since the plaintiff admitted in the said case that he did not approach the defendant after 19th May, 2006 for making balance payment and executing the Sale Deed. Whole case of the defendant is that the cheques in question were taken by the plaintiff

from the defendant by exercising force and threat, inasmuch as, cheques were issued towards security.

7. Before ‘leave to defend’ can be granted to the defendant, she has to satisfy the Court that she has a good defence to claim on merits. Defendant has to raise triable issues indicating that she has a fair or bona fide or reasonable defence though it may not be positively a good defence. In case defendant discloses triable issues by raising plausible and reasonable defence, she is entitled to leave to defend the suit conditionally or unconditionally. However, if defendant sets up an illusory or sham or vexatious defence, she would not be entitled to ‘leave to defend’ the suit. In *Mechelec Engineers & Manufacturers v. M/s. Basic Equipment Corporation* (1976) 4 SCC 687 Supreme Court quoted with approval a decision of Calcutta High Court in *Smt. Kiranmoyee Dassi v. Dr. J. Chatterjee Das, J.*, AIR 1949 Cal 479 in the following terms:-

“24. (a) If the defendant satisfies the court that he has a good defence to 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 raises a triable issue indicating that he has a fair or bona fide 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 defense, 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 plaintiff's 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 the 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.”

8. In *Milkhiram India (P.) Ltd. v. Chamanlal Bros.*, AIR 1965 SC 1698, Apex Court has held that if Court is of the opinion that a case raises a triable issue, then leave to defend should ordinarily be granted unconditionally. On the other hand, if the Court is of the opinion that the defence raised is frivolous or false or sham, he should refuse leave to defend altogether. Though no strait-jacket formula can be formulated on the issue, however, Court may entertain a genuine doubt whether the defence is genuine or sham or whether, in other words it raises a triable issue or not. Such an opinion is to be formed by the Court from the pleadings and affidavit of the parties placed before it.

9. In the backdrop of above settled legal position, if defence of the defendant is considered in this case, same appears to be frivolous, baseless, vexatious and moonshine. Defendant has alleged that plaintiff had obtained cheques in question by threatening her. However, it is also a fact that no complaint was lodged by the defendant with the police authority that plaintiff had forcibly taken cheques worth ₹22 lacs from her by pressurizing and threatening her. Her this conduct is quite unnatural. No prudent person would sit idle without taking any action in such

circumstances. Not only this, she did not even take any steps to inform her bankers in this regard. One cheque has even been encashed. Other cheques have been returned unpaid for the reason “Insufficient Funds” and not on the ground of “stop payment”. That apart, defendant is not sure of her defence. On one hand she has alleged that the cheques had been taken by extending threats; on the other she has claimed that cheques were issued as security. Not only this, defendant claims that plaintiff had taken ₹1 lac in cash from her on 7th July, 2006, that is, after about 2 months on the pretext that he needed money as his wife was hospitalized. Had plaintiff obtained the cheques by exercising force and relations between them were strained, defendant was not expected to pay ₹1 lac to the plaintiff. Accordingly, defence taken by her does not appear to be plausible, in the facts and circumstances as narrated hereinabove. Defence raised by the defendant in this case falls within clause (d) of the principles culled out in *Kiranmoyee Dassi* (supra), that is, if the defendant has no defence or the defence set up is an 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.

10. Defence set up by the defendant, in my view, is baseless, frivolous, moonshine and defendant is not entitled to leave to defend the suit. Application is, thus, dismissed.

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11. Defendant has already been refused leave to defend the suit. Thus, plaintiff is entitled to a decree of ₹21,00,000/- (Rupees Twenty One Lacs Only). However, rate of interest claimed appears to be on the higher side. In my view interest @ 9% would meet the ends of justice.

12. Accordingly, a decree is passed in favour of the plaintiff against the defendant in the sum of ₹21,00,000/- (Rupees Twenty One Lacs Only) together with interest @ 9% per annum from the date of filing of the suit till realization of decretal amount. Plaintiff is also awarded costs of proceedings. Decree-sheet be drawn.

A.K. PATHAK, J.

APRIL 27, 2012

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