

\$~ IN THE HIGH COURT OF DELHI AT NEW DELHI

+CS(OS) 1754/2010

SANJAY KOHLI

..... Plaintiff

**Through: Mr.Ashish Bhagat with
Mr. Abdhesh, Adv.**

versus

VIKAS SRIVASTAVA & ORS

..... Defendant

**Through: Mr.Mukesh Sharma with
Mr.Manish, Advocate**

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

O R D E R

%

20.04.2012

IA No.7043/2011

1. By this application filed under Order XXXVII Rule 3 of the Code of Civil Procedure, 1908 the defendant no.1 seeks grant of leave to defend the present suit.

2. The plaintiff has filed the present suit under Order XXXVII of the Code of Civil Procedure for the recovery of an amount of Rs. 60,85,000/-. Initially, the suit was filed by the plaintiff against defendant no. 1 to 3 and later vide order dated

21.3.2011, the names of defendant no. 2 and 3 were directed to be deleted at the instance of the plaintiff, the same being unnecessary parties to the present suit. Earlier this court vide order dated 21.12.2010 had passed a decree for recovery of an amount of Rs. 60,85,000/- with costs and pendente lite and future interest @ 12 % p.a. against the defendant no.1 as the defendant no.1 had failed to enter appearance as per the mandatory requirement of Order XXXVII Rule 2(3) of the Code of Civil Procedure. The said order dated 21.12.2010 was later on set aside by this court vide order dated 21.3.2011 on the application moved by the defendant no.1 seeking setting aside of the ex-parte order dated 21.12.2010.

3. The case as set up by the plaintiff in the plaint is that he has been running a printing press under the name and style of M/s. Kohli Printers at Lucknow. It is the case of the plaintiff that he met the defendant no.1 at a hotel in New Delhi on 7.7.2007 and in the said meeting the defendant no.1 had represented that he was in the business of selling and/or importing of second hand offset printing machines and spare parts in Delhi. Thereafter, the defendant no.1 had also

introduced him to defendant no.2, (his father) and defendant no.3 (brother) and all of them represented to the plaintiff that they have a very strong base in Czech Republic and through their good contacts they have been procuring second hand and even new offset machines from the said country. The plaintiff disclosed his budget for importing the offset printing machines and the defendants had assured the plaintiff that they would not have any difficulty in supplying the required offset machines from Czech Republic in a time bound manner. The deal was finalized after negotiation for Rs. 50 lacs and against the said amount the plaintiff had paid a sum of Rs. 3 lacs on 13.8.2007 and thereafter an amount of Rs. 15 lacs on 19.10.2007 and both the said payments were duly received by the defendant No.1 in his own hand writing in the transaction sheet. It is also the case of the plaintiff that on the advise of the defendants no. 1 and 2 the plaintiff had applied for a certificate of Importer-Exporter Code (IEC) which was issued to the plaintiff on 21.8.2007 for the import of the said printing machine. It is also the case of the plaintiff that he had applied for a loan of Rs.25 lacs from the Union Bank of India and for

which the defendant no.1 had sent an invoice although for a lesser amount of Rs.25 lacs so as to facilitate the plaintiff to obtain the loan of the said amount from the bank. The said loan amount was also sanctioned by the Union Bank of India in favour of the plaintiff and the plaintiff gave two cheques for a sum of Rs. 18 lacs and Rs.7 lacs in the name of defendants' firm M/s Format International and both the said cheques were also encashed by the defendant no.1. As per the case of the plaintiff, the defendant no.1 informed the plaintiff about arrival of the machine at Mumbai Port and that it would take about two days time for the machine to reach Lucknow. The plaintiff was also told to arrange the remaining amount of Rs. 7 lacs and in response the plaintiff told the defendant no.1 that once the machine reaches Lucknow he would be ready with the said balance amount. Later on the plaintiff came to know that no such machine was imported by the defendant no.1 and he was informed by one Mr. Vijay Jain who was in the same business that the plaintiff was duped of the amount already paid by him to the defendant no.1. The plaintiff lodged an FIR bearing No. 62/2008 on 11.4.2008 against the defendant no.1 under

Section 406,420,120(B) of IPC and in consequence of the same, the defendant no.1 remained behind bars for a considerable period of time and despite registration of the said case against him and even after the defendant being out on bail, no payment was made by him to the plaintiff. Feeling aggrieved with the said act of the defendant no.1, the plaintiff has filed the present suit for the recovery of amount of Rs.43,00,000/- towards the principal amount and Rs. 15 lacs which was duly acknowledged by the defendant in the transaction receipt and also the amount of Rs. 25 lacs paid by the plaintiff through two cheques of Rs. 18 lacs and Rs. 7 lacs. The plaintiff has also claimed an amount of Rs.19,35,000/- towards the interest calculated @18% p.a. from the month of February 2008 till 31st July 2010. The plaintiff has adjusted the amount of Rs.1.50 lacs which was paid by the defendant no.1 to the plaintiff and in this manner the plaintiff has claimed a decree for an amount of Rs. 60.85 lacs from the defendant no.1 with pendent lite and future interest @ 18% p.a. on the said amount.

4. In the leave to defend application filed by the defendant under Order XXXVII Rule 3, the main defence raised

by the defendant is that the alleged transaction receipt i.e. has been forged and fabricated by the plaintiff. The defendant no.1 has also disputed his signatures and even his hand writing on the said receipt. It is also the defense of the defendant that the said receipt was sent to the CFSL and the CFSL in their report dated 17.4.2009 have not confirmed the hand writing of the defendant no.1 on the said receipt. It is also the defense of the defendant that an amount of Rs. 1.5 lacs was paid by the defendant through D.D. while an amount of Rs.23,50,000/- was paid in cash by the wife of the defendant no.1 when the plaintiff had assured the wife of the defendant no.1 that he will not oppose the bail application of the defendant no.1 if the said amount is paid to him. Based on such defense, the defendant no.1 has claimed grant of unconditional leave to defend the present suit.

5. Arguing the present application for the grant of leave to defend Mr.Mukesh Sharma, learned counsel for the defendant submitted that the defendant had received a sum of Rs.25 lacs from the plaintiff towards price of the machine through cheques and the said amount was paid back by the

defendant through demand draft for a sum of Rs.1.5 lacs and the balance amount of Rs.23,50,000/- in cash through his wife. Counsel also submitted that the said amount of Rs.23,50,000/- was paid by the wife of the defendant to the plaintiff on the assurance by the plaintiff that he will not oppose the bail application of the defendant. Counsel further submitted that with the abovesaid payment, nothing remained due against the defendant. Counsel also submitted that so far the alleged transaction receipt on which the plaintiff has placed reliance is concerned, the same does not constitute a written contract between parties as neither the same is in the handwriting of the defendant nor the same has been received by the defendant. Counsel further submitted that even in the CFSL report, the concerned officer has not given any report so far the handwriting on the said receipt is concerned. Counsel further submitted that the present case does not fall within the ambit and scope of Order XXXVII as the plaintiff has also claimed interest along with the principal amount. The contention of the counsel was that there is no contract entered into between the parties to pay the said interest to the plaintiff and in the absence

of any such contract between the parties, the plaintiff cannot claim interest in a summary suit. In support of his arguments, counsel for the defendant has placed reliance on the judgment of this court in the case of *M/s Hindustan Zinc Ltd. Vs. Punjab National Bank*, VI AD(Delhi) 256.

6. Opposing the present leave to defend application, learned counsel for the plaintiff submitted that the defense raised by the defendant is a sham, bogus and fictitious and therefore the defendant no.1 is not entitled for the grant of leave to defend and the suit is required to be decreed straightway. Counsel also submitted that the stand of the defendant no.1 denying his signatures on the said transaction receipt is an outrageous attempt on the part of the defendant no.1 to state false facts on affidavit thus inviting an action under Section 340 of Cr.P.C. against the defendant no.1. Counsel also submitted that the transaction receipt is in the handwriting of the defendant no.1 himself and the same has also been signed by the defendant no.1 and the same constitutes a written contract between the parties. The counsel further submits that the signatures of the defendant no.1 on the said receipt have also been proved and

certified to be his genuine signatures as per the report submitted by the CFSL to the police. Counsel further submitted that the malafide of the defendant no.1 is apparent from the fact that although he had admitted the receipt of Rs. 25 lacs, which payment was made through two separate cheques, but clearly denied payment of Rs. 3 lacs and Rs. 15 lacs received by him through a transaction receipt. The counsel further submitted that the allegation of the defendant that Rs. 23.5 lacs has been returned by the wife of the defendant no.1 on the assurance of the plaintiff that he would not oppose the bail of her husband is false on the very face of it. The contention of the counsel was that no person would make the payment in cash and that too without obtaining a receipt in a case where already an FIR was registered by the plaintiff and the defendant no.1 was behind bars. Counsel thus stated that the defence raised by the defendant no.1 denying his liability to make the said payment is absolutely imaginary, bogus and baseless besides being false and fictitious. Counsel also refuted the contention raised by the counsel for the defendant no.1 that interest amount cannot be claimed in a summary suit.

Placing reliance on Section 80 of the Negotiable Instruments Act, counsel submitted that even if there was no contract between the parties for claiming a specified rate of interest, yet the plaintiff is entitled to claim the interest as prevailing in the market in a summary suit. In support of his arguments, counsel has placed reliance on the following judgments:-

1. Secretary, Irrigation Department, Government of Orissa & Ors. vs. G.C Roy AIR 1992 SC 732
2. S.K Malhotra Vs. Manmohan Modi 166(2010)DLT 723
3. M.D Oversees Ltd. vs. Uma Shankar Kamal Narain & Ors. 127(2006) DLT482
4. Sineximco Pte vs Dinesh International Pvt Ltd. 174(2010)DLT422
5. The New India Assurance Co.Ltd. vs.State Trading Corporation of India AIR 2007(NOC) 517(GUJ.)
6. Mrs. Sushila Mehta vs. Shri Bansilal Mehta ILR(1982)I Delhi 320

7. I have heard the learned counsel for the parties at considerable length and gone through the documents placed on record by both the parties.

8. Before I examine the merits of the arguments advanced by the counsel for the parties, it would be appropriate to reproduce sub-para 5 of Rule 3 of Order 37 as under:

“ORDER XXXVII. SUMMARY PROCEDURE

3. Procedure for the appearance of defendant

- 5) The defendant may, at any time within ten days from service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend,

apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court."

Upon a bare reading of the aforesaid provision, it is evident that leave to defend shall not be refused by the court unless and until the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up the defendant is frivolous or vexatious in nature. However, the grant of leave or unconditional leave is not a matter of right. In a leave to defend application, the defendant has to come out with a substantial defense and not a weak defence based on which the court is satisfied that triable issues have been raised by the defendant. Undoubtedly, the defendant is not required to make out a case as should warrant success in the end but where he has a good defence against the claim of the plaintiff, he is

entitled to get unconditional leave to defend the suit. Raising of strong and good defence is one thing and raising of false, frivolous or fictitious defence on the other hand is another thing. If the court on appreciation of material on record reaches a conclusion that the defence raised by the defendant is false, frivolous or fictitious on the very face of it, then certainly the defendant is not entitled to grant of leave, not even the conditional leave. Here it would be relevant to refer to the decision of the Apex Court in the case of ***Sunil Enterprises & Anr vs. SBI Commercial & International Bank Ltd. (1998)5SCC354*** wherein the court enunciated the principles for the grant of leave to defend in the following words:

"The position in law has been explained by this Court in Santosh Kumar vs . [Mool Singh](#): [1958]1SCR1211 , Milkhiram (India) Private Ltd. vs . Chaman Lal Bros. : AIR1965SC1698 and Michales Enc. & Mfg. vs . Bank Equipment Corporation : [1977]1SCR1060 . The propositions laid down in these decisions may be summed up as follows:-

a) If the defendant satisfies the Court that he has a good defence to the claim on merits, 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 possibly good defence, 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, if the affidavit

discloses that at the trial he may be able to establish a defence to the plaintiff's claim, the court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or made of trial but not as to payment into Court or furnishing security.

d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend. (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured."

9. Hence, in the light of the above stated legal position, advertng to the facts of the present case at hand, the defendant no.1 had admitted the fact that he was paid an amount of Rs. 25 lacs through two separate cheques, one for an amount of Rs. 18 lacs and the other for an amount of Rs. 7 lacs. With the said admission of the payment of Rs. 25 lacs by the defendant no.1, it is quite evident that the said payment was made by the plaintiff to the defendant no.1 towards the price of the offset machine which was to be imported by the defendant no.1 for the plaintiff. The plea of the defendant no.1 that his wife had made a payment of Rs. 23,50,000/- in cash to the plaintiff when the plaintiff had extended assurance of not opposing the bail of the defendant

no.1 is totally inexplicable as in such circumstances no person would make payment of any amount without obtaining a receipt when such a person is already behind bars in a case involving the same transactions.

10. The other defence set up by the defendant no.1 that the signatures on the transaction receipt were not his is *per se* false as already the CFSL in their report dated 17.4.2009 has confirmed the genuineness of the signatures of the defendant no.1 on the transaction receipt. The said transaction receipt clearly constitutes a written contract between the parties and mere fact that the CFSL has not given any report on the hand writing of the transaction receipt would not create any doubt on the existence of the transaction receipt. It is for the defendant no.1 to have given explanation as to how and in what circumstances he had put his signatures on the said transaction receipts. The defence thus raised by the defendant no.1 is a moonshine, illusionary besides being false, frivolous and fictitious. Hence, this court is of the considered view that the defendant is not entitled to the grant of leave to contest the present suit.

11. The other contention raised by the counsel for the defendant no.1 is that the amount of interest cannot be claimed in a summary suit under Order XXXVII is also devoid of any merit. This issue is no more res integra as the settled legal position is that even if there is no agreement between the parties to claim any specified interest, the plaintiff is entitled to include the interest amount in a summary suit in terms of Section 80 of the Negotiable Instrument Act read with Order XXXVII of CPC. It will be relevant here to refer to the judgment of this court in the case of ***S.K Malhotra vs. Man Mohan Modi*** ***166(2010)DLT723*** wherein the court while granting the interest in a summary suit held as under:

"4. In the case of Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy reported as : AIR 1992 SC 732, the Supreme Court held that a person is entitled to the payment of interest on the principal amount and the security deposit illegally retained, on the ground that the person deprived of the use of money to which he is legitimately entitled, has a right to be compensated for the deprivation, call it by any name. Even in the present case, it cannot be disputed that the appellant was deprived of the use of the money to which he was legitimately entitled and thus he had a right to be compensated for the period of deprivation at least from the date of institution of the suit till the date of passing of the decree."

As manifest from above, the plaintiff would be entitled to the amount of interest even if there is no term regarding payment of

interest stipulated between the parties.

12. In the light of the above discussion, this court does not find any merit in the present application and the same is hereby dismissed.

13. The suit of the plaintiff is accordingly decreed for a sum of Rs. 60,85,000/- with pendent lite and future interest @12 % from the date of filing of the suit till its realization.

14. Let the decree sheet be drawn up accordingly.

KAILASH GAMBHIR, J

APRIL 20, 2012