

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

Reserved on : 18.07.2013

Pronounced on: 25.07.2013

+ I.A.10790/2011 & CS(OS) 574/2011

FIRST LUCRE PARTNERSHIP CO ..... Plaintiff

Through Mr. Karan Jain, Advocate

versus

ABHINANDAN JAIN ..... Defendant

Through Mr. Tarun Kumar Bedi, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J.**

**I.A.10790/2011 (O.37 Rule 3(5))**

1. This is an application filed by the defendant under Order 37 Rule 3(5) of the Code of Civil Procedure seeking leave to defend. The Suit is filed by the plaintiff under Order 37 of the Civil Procedure Code claiming recovery of a sum of Rs.25,72,000/-.

2. As per the plaint, the plaintiff is a partnership firm and submits that it is engaged in the business of money lending. It has a licence granted by the Collector Money Lending, Delhi under Section 4 of The Punjab Registration of Money-lender's Act, 1938 as extended to Delhi. The suit transaction it is submitted consists of loan of Rs,20 lacs which was availed of by the defendant. It is further claimed that the defendant is liable to pay interest at the rate of 15.6 % per annum which is the agreed rate of interest. It is

submitted by the plaintiff that that the defendant has been availing loans from the plaintiff since 2005 when the defendant was introduced to the plaintiff by one Mr. S.K.Surana who acted as an intermediary/broker. It is submitted that the a practice adopted by the defendant was of availing loan from the plaintiff for a fixed time and simultaneously executing agreement/letter acknowledging his liability to make the payment and also handing over a cheque towards repayment of the principal loan amount as well as the interest for the period as decided at the time of execution of the agreement. Often the loan was renewed and taken for another fixed period by executing similar documents. It is further submitted that the defendant entered into a number of transactions with the plaintiff as prescribed above.

3. It is submitted by the plaintiff that the present suit pertains to a loan of Rs.20 lacs which was availed of by the defendant from the plaintiff on 15.6.2006. The plaintiff advanced the money through cheque No.208958 dated 15.06.2006 drawn on Axis Bank, Barakhamba Road, New Delhi-110001. It is stated that the said loan was subsequently renewed on 13.10.2006, 11.01.2007, 1.4.2007 and 29.7.2007 accordingly. On 26.10.2007 it is stated that while renewing the loan the defendant instead of handing over one cheque towards the principal amount and one towards payment of interest handed over two cheques of 10 lacs each towards payment of the principal amount and two separate cheques towards interest accruing thereby splitting the loan of Rs.20 lacs into two parts. The said loan of the two amounts respectively were also renewed on various dates. The last renewal was of 1.2.2009 for a period of two months till 31.3.2009 by executing two letters/agreements and also handing over two cheques for a

sum of Rs.10 lacs each bearing No.376279 and 376282 both dated 31.3.2009 both drawn on ICICI Bank Ltd., Sadar Bazar, Delhi-110006. In addition, two cheques for a sum of Rs.24,,975/- were drawn on ICICI Bank limited towards interest for the period 25.1.2009 to 31.3.2009 @ 15.6% per annum. The admitted fact is that the cheques, for the principal amount were not presented for encashment by the plaintiffs.

4. It is further submitted that on 30.8.2009 communication was sent to the defendant demanding repayment of the principal and interest. A legal notice was also sent by the counsel for the plaintiff and the same was dispatched on 2<sup>nd</sup> June, 2010. It is stated that both the communications were duly received by the defendant but there has been no reply to the same. It is submitted that the defendant has defaulted in repayment of the loan. On the basis of the above, it is urged that the plaintiff is entitled to recover the amount as stated in the plaint along with the accrued interest. It is stated that the claim in the suit is for recovery of an amount arising out of a written contract payable by the defendant under the bill of exchange besides recovery of debts of a liquidated sum of money payable by the defendant.

5. The defendant on the other hand after having entered appearance and after having been served with the Summons of Judgment has filed the present application seeking leave to defend the Suit. The defendant in his application seeks leave to defend on the following main grounds:-

(i) that the defendant never visited the office of the plaintiff and has never met the officials of the plaintiff firm and transactions were executed through the said broker Mr. S.K. Surana. It is claimed that all the accounts were

settled through Shri S.K.Surana, the broker. It is also stated that on account of this, the post dated cheques given to the plaintiff on the basis of which the present suit is filed, were not encashed/sent for encashment by the plaintiff. It is stated that the cheques given for interest were presented and duly honoured like earlier occasions.

(ii) that the present Suit is filed on the basis of stale cheques and that it is settled law laid down by this Court that the cheques which were not presented cannot be the basis for a Suit under Order 37 of the CPC. 8.

Learned counsel for the defendant relies upon a judgment of this Court in *BDPL Investments (Pvt.) Ltd. versus Maple Leaf Trading International (Pvt.) Ltd.* to state that a suit under Order 37 cannot be maintained on the basis of stale cheques.

(iii) It is argued that the present Suit is not maintainable under the provisions of The Punjab Registration of Money-lender's Act, 1938, as the plaintiff is not having a valid registration and licence at the time of filing the present Suit. Hence the suit is barred under Section 3 of the said Act.

6. In response to the first submission of the defendant the learned counsel for the plaintiff submitted that there is no denial of the fact that the defendant availed of the loan of Rs.20 lacs. There is only a vague submission in this application that the amount has been settled with the broker. No details as to how the account was settled with the broker and also about the authority of the broker to accept amounts on behalf of the plaintiff have been explained or pleaded in the present application. It is further submitted that had the defendant repaid back the amount to the plaintiff he would have taken the two cheques back or at least would have

demanding the return of the said cheques. It is submitted that there is no averment in the present application pointing out that these cheques were ever demanded by the defendant to be returned. It is further stated that despite receipt of communication dated 30.08.2009 and the legal notice dated 2.6.2010 there was no response from the defendant.

7. In reply to the second contention of the defendant, the learned counsel for the plaintiff has pleaded that the present Suit is based on the cheques which are an acknowledgement of the debt and the defendant has also separately acknowledged the debt in writing. Hence, it is stated that the present suit would lie under Order 37 CPC.

Learned counsel for the plaintiff also relies upon observations of the Hon'ble Supreme Court in the case of *Shri Ishar Alloy Steels Ltd. versus Jayaswals Neco Ltd.*, (2001) 3 SCC 609 where it is said that non-presentation of the cheque to the drawee bank may absolve the person issuing the cheque of his criminal liability under Section 138 of the Act but he may otherwise be liable to pay the cheque amount to the payee in a civil action initiated under the law.

8. Regarding the third argument of the defendant of the suit being barred under The Punjab Registration of Money-lender's Act, 1938, it is stated that in response to the plea taken by the defendant in the present application, the plaintiff has placed on record its application for renewal of its registration. Learned counsel for the plaintiff relies on the explanation to Section 5 of the said Act which provides that in case an application for renewal of licence has been received from a money lender before the expiry of his licence, the

existing licence will be deemed to continue in force till orders on the application have been issued.

9. In the context of grant of leave to defend, the principles of law applicable are well known. The basic judgment in this regard, namely, *M/s Mechalec Engineers & Manufacturers v. M/s Basic Equipment Corporation AIR 1977 SC 577*, may be looked into for the said purpose. In para 8, the Hon'ble Supreme Court has held as follows:

“In *Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246*, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :

(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 defence, yet, shews 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.”

In the light of the above, I may now consider the submissions of the defendant.

10. As far as first submission of the defendant is concerned, it is argued that their accounts have been settled with Mr.S.K.Surana and that the defendant had never visited the office of the plaintiff and had never met the officials of the plaintiff firm. It is stated that the accounts were settled and that is why the plaintiff has not presented the cheques for encashment.

11. If one takes a look at the pleas raised in the present application, it is obvious that the defendant does not deny receipt of the sum of Rs.20 lacs as a loan. He, however, pleads that the accounts have been settled through the broker Mr.Surana. There are no details given as to how and when the

settlement was made, namely, by payment of cash/cheque etc. There are no averments as to explain as to why the defendant had sought to settle the matter through Mr.S.K.Surana. There is no plea that the said S.K.Surana is authorised on behalf of the plaintiff either expressly or impliedly to discharge the debts or amounts payable to the plaintiff. There is also merit in the submission of learned counsel appearing for the plaintiff that had the defendant settled the accounts, as claimed by him he would have surely taken back the signed cheques which were lying in the possession of the plaintiff or would have demanded at least return of the same.

12. One cannot help noticing that a specific averment is made in the plaint that a letter of demand dated 3.8.2009 and a legal notice have been sent to the defendant which have been duly received. There is no denial of receipt of these communications by the defendant in the present application. It is to be noted that the plaintiff has placed on record proof of dispatch of letter dated 3.8.2009 which is a postal receipt and for legal notice which is said to have been sent by courier on 2.6.2010, courier receipt is placed on record. In addition, registered A.D. Post receipt and UPC receipt is also on record. It is obvious that despite receipt of these communications demanding return of the loan amount the defendant has chosen to remain silent. The explanation of the defendant appears to be highly improbable.

13. In contrast, if one were to see the case of the plaintiff, the plaintiff has placed on record two cheques duly stating the sum of Rs.10 lacs as a payment to be made in favour of the plaintiffs. There are also two acknowledgements executed by the defendant which clearly state that the

defendant owes the said sum to the plaintiff. The said two acknowledgements are reproduced as follows:-

“To  
First Lucre Partnership Co.  
18/56 Ajmal Khan Road  
New Delhi-110005.

Respected Sir,

I Abhinandan Jain, am prop. of Textile Machinery Traders, a firm having its office at Plot No 1 Gali No 1 Anand Parbat Indl. Area New Rohtak Road New Delhi-110005 do hereby renewal of Rs.10,00,000/- [Rs. Ten Lac Only]

Enclosed ch. No.376277 Dated 18-03-2009 of Rs.24975/- [Rs. Twenty four Thousand nine hundred seventy five Only] drawn on ICICI Bank Ltd. Sadar Bazar Delhi-110006 towards the interest for the period of twenty eight days.

i.e. From 25-01-2009 to 31-3-2009 rate of interest 15.6% p.a.

We are also enclosing herewith cheque no.376279 dated 31-3-2009 for Rs.10,00,000/- [Rs. Ten Lac Only] drawn on ICICI Bank Ltd. Sadar Bazar Delhi-110006 as full & final payment of your loan to you.

I am fully aware that the bouncing of either of the above submitted cheque towards interest/loan amount due to in insufficient fund or any reason will attract the provisions of section 138 of negotiable instruments act. In case any such litigation is initiated against me. I undertake to bear the cost of the same.

Thanking You  
Yours Truly,

Textile Machinery Traders (Stamp)

Sd/-

Sd/-

S.K. Surana

S/o Late Sh. Chandan Mal Surana

[Sole witness and brother]

The second acknowledgement reads as under:-

“To

First Lucre Partnership Co.

18/56 Ajmal Khan Road

New Delhi-110005.

Respected Sir,

I Abhinandan Jain, am prop. of Textile Machinery Traders, a firm having its office at Plot No 1 Gali No 1 Anand Parbat Indl. Area New Rohtak Road New Delhi-110005 do hereby renewal of Rs.10,00,000/- [Rs. Ten Lac Only]

Enclosed ch. No.376280 Dated 18-03-2009 of Rs.24975/- [Rs. Twenty four Thousand nine hundred seventy five Only] drawn on ICICI Bank Ltd. Sadar Bazar Delhi-110006 towards the interest for the period of twenty eight days.

i.e. From 25-01-2009 to 31-3-2009 rate of interest 15.6% p.a.

We are also enclosing herewith cheque no.376282 dated 31-3-2009 for Rs.10,00,000/- [Rs. Ten Lac Only] drawn on ICICI Bank Ltd. Sadar Bazar Delhi-110006 as full & final payment of your loan to you.

I am fully aware that the bouncing of either of the above submitted cheque towards interest/loan amount due to in insufficient fund or any reason will attract the provisions of section 138 of negotiable instruments act. In case any such litigation is initiated against me. I undertake to bear the cost of the same.

Thanking You  
Yours Truly,

Textile Machinery Traders (Stamp)

Sd/-

Sd/-  
S.K. Surana  
S/o Late Sh. Chandan Mal Surana  
[Sole witness and brother]

These two communications/acknowledgments are undated and use extremely bad English. However, unequivocal intent of executing these communications is but obvious that the defendant is acknowledging its liability to pay a sum of Rs.10 lac and is mentioning about enclosing the cheques in question for the said amounts as full and final payment for the loan amount. By these two communications, the defendant has clearly acknowledged its liability for the said amount of Rs.10 lac respectively payable as on 31st March, 2009.

14. In view of the above, it is not possible to accept a bald plea/contention of the defendant that the accounts were settled with Mr. Surana. The said contention is a contention without merits and has to be rejected.

15. The second contention of the defendant is that the present Suit is based on stale cheques and hence a Suit under Order 37 CPC would not lie.

16. Learned counsel for the defendant has relied upon the judgment of this Court in the case of ***BDPL Investments (Pvt.) Ltd. (supra)*** to state that a suit under Order 37 cannot be maintained on the basis of stale cheques.

17. A perusal of the said judgment shows that in paragraph 6 this Court had relying on earlier two judgments of this Court held that a suit based on two cheques which were never presented would not be maintainable under Order 37. The said judgment of this Court relies on an earlier judgment in the case of ***Goyal Tax Fab Pvt. Ltd. versus Anil Kapoor***, 91(2001) DLT 616. The said judgment of ***Goyal Tax Fab Pvt. Ltd (supra)*** in paragraph 9 held as under:-

“9. Moreover, this Court in the case of *Suri and Suri Private Limited (supra)*, has held that when the suit is filed on the basis of several dishonoured cheques not presented at all for encashment, relief claimed would be outside the scope of Order XXXVII and suit would not be maintainable under Order XXXVII of the Code of Civil Procedure. In that case plaintiff will have to be dealt with in ordinary way. No doubt there may be some justification in the stand taken by the plaintiff that when four cheques on presentation by the plaintiff several times were dishonoured on the ground of insufficient fund in the account of the defendant, and plaintiff, therefore, did not present remaining cheques. But for filing the suit under Order XXXVII of the Code of Civil Procedure it was still necessary for the plaintiff to present these cheques to the bank. Admittedly, 7 cheques out of 11 cheques given by the defendant were not presented for payment. Therefore, the suit under Order XXXVII would not be maintainable.”

18. In view of the above pronouncements of this Court on the issue that a Suit under Order 37 CPC does not lie on a stale cheque, I would be bound by the said pronouncements. Though in my view the judgment may at proper stage require reconsideration as no reasons have been given in the said judgment as to why a cheque which is not presented for encashment to the bank, cannot be the basis of a Suit under Order 37 of the Civil Procedure Code specially keeping in view the provisions of Section 6 of the Negotiable Instruments Act, 1938 which holds that the cheque is a Bill of exchange. There are observations of the Hon'ble Supreme Court in the case of *Shri Ishar Alloy Steels Ltd.(supra)* that when a cheque is not presented, the drawer may still be liable to pay the cheque amount in a civil action.

19. However, in my view, the present Suit is based not only on a stale cheque but is also based on a written contract/acknowledgement of the defendant. The stale cheques only reiterate the acknowledgement of debt as made by the defendant. As already reproduced above, the defendant, while giving these two cheques to the plaintiffs, acknowledged his liability as reproduced above by separate acknowledgements. The acknowledgements of debt are clearly an agreement signed between the parties. These two communications create an implied obligation to pay a debt or liquidated amount in money and would be a good cause of action for enforcing a Summary Suit.

20. In the above context, reference may be had to the judgment of the

Bombay High Court in the case of ***R.Kumar and Co. Versus Chemicals Unlimited***, AIR 2001 Bombay 116. Relevant portion of para 9 and 10 are reproduced as follows:-

“9..... In my humble opinion, the Supreme Court has considered the similar point which is urged before me. It is held that an unconditional acknowledgement implies a promise to pay because that is the natural inference, if nothing is said to the contrary, The Supreme Court has further gone on to say “It is what every honest man would mean to do.” Nothing more is required to be stated as the judgment is a complete reply to the contention raised on behalf of the defendants

10. According to me, to take any other narrow, pendantic or technical view of the matter would be to encourage dishonesty and immorality in life. I fail to understand how the defendants having written to the plaintiffs that certain amounts were shown payable by the defendants to the plaintiffs, can now turn about and say that no suit will lie for recovery of the said amounts shown to be the liability of the defendants towards the plaintiff. To accept such contention would amount to encourage and accept dishonesty and immorality. Times have changed. Courts of law have to watch with utmost care that the social life is not drifted to dishonesty and immorality and the people are not driven to anti-social elements and parallel machinery of muscle power for recovery of genuine claims of honest people. The law is based on morals and if the foundation of the law is shaken or removed, there will be utter chaos in the society and in life. I may add here that such dishonest contentions by the debtors have given rise to parallel machinery of muscle power for recovery of the debts by the creditors.”

21. Similarly, in the case of ***Sun N Sand Hotel Limited versus V.V.Kamat HUF***, AIR 2003 Bombay 168 the following observations were

made:-

“30. The question really is whether the present suit filed on the balance confirmation letters is maintainable as a Summary Suit?

The above judgements furnish an answer to this question. They hold that an account stated or accepted, implies a promise to pay. Thus, the cause of action is based on a written agreement containing and implied promise to pay.”

33.The judgments squarely apply to the present case. The authorities have uniformly held that an unconditional acknowledgement implies a promise to pay because that is the natural inference, if nothing is said to the contrary. In the present case there is no express agreement by the defendant to pay any amount to the plaintiff. The unconditional confirmation/acknowledgement of the closing balance constitutes an implied promise by the defendant to pay the same. The suit is maintainable as a Summary Suit.”

22. Hence, in my opinion, the legal position is quite clear. The acknowledgment of debt made by the defendant which has been reproduced in the two communications above would constitute an unconditional confirmation of the amount due and payable by the defendant to the plaintiff. The present Suit under Order XXXVII CPC is maintainable under the written contract/acknowledgement that have been issued by the defendant.

23. I, now, come to the third objection of the defendant in the present application that the present Suit is barred under Section 3 of the Registration of Punjab Money Lenders' Act, 1938. Section 3 of the said Act states that a Suit by a money lender for recovery of a loan should be dismissed unless the

money lender holds a valid licence in such form and manner. The learned counsel for the defendant has contended that the licence placed on record by the plaintiff under Section 5 of the said Act was valid up to 11.5.2008 and has now expired. Hence, it is submitted that the present Suit would not lie. He further submits that documents now filed by the plaintiff after filing of the plaint cannot be looked into.

24. A perusal of the additional documents filed by the plaintiff shows that the plaintiff has on 15.2.2008, namely, before the expiry of licence made an application for renewal of the licence. The said licence application is stated to be pending and for this reliance is placed on the reply to an RTI application filed by the plaintiff where the office of Deputy Commissioner Central has confirmed that the decision of the higher Authority in this regard is still awaited. These documents have not been denied by the defendant.

Section 5 of The Punjab Registration of Money-lenders Act, 1938 reads as under:

**5. Licensing of money-lenders.** – Every money-lender may apply to the Collector for a licence which shall be granted for such period, in such form, and on such conditions, and on payment of such fees, as may be prescribed.

*Explanation.* – When an application for the renewal of a licence has been received from a licensed money-lender before the expiry of his licence, the existing licence, shall be deemed to continue in force until orders on the application have been issued.”

25. In view of the explanation to Section 5 of The Punjab Registration of Money-lender’s Act, 1938 which states that where an application for renewal of a licence is pending the licence shall be deemed to continue, the

present contention of the defendant has to be rejected.

26. There is also no force in the submission of learned counsel for the defendant that these documents have been filed after the plaint was instituted. Learned counsel for the defendant has been unable to point out any legal provisions which debar the plaintiff from filing additional documents after having presented the plaint. Further he has not been able to show any prejudice caused to the defendant on the filing of the documents after the presentation of the plaint. The additional documents were filed on 16.8.2012. The defendant had adequate opportunity to make a response to the same in case he so desired. No objection of any sort has been filed against the additional documents nor has any time been sought for the same. The only objection that was raised was on 12.12.2007 before the Joint Registrar that additional documents cannot be filed without leave of the Court. Rules of Procedure are the hand maid of Justice. The additional documents filed by the plaintiff cannot be ignored merely on technical grounds, when the defendant fails to show any prejudice by the plaintiff relying on the documents or he fails to challenge the documents. The need and occasion to file the additional documents arose as the defendant raised specific pleas in the application. In view of Order VII Rule 14 (3) CPC, in my view there are enough reasons to grant leave to place on record the additional documents.

27. In view of the above, it is obvious that the documents in question, namely, the two stale cheques dated 31.3.2009 for Rs10 lacs each, the two acknowledgments which clearly point out that a total of Rs.20 lacs is

payable along with interest @ 15.6% per annum and the absence of any response by the defendant to the communication dated 3.8.2009 sent by the plaintiff and to the legal notice issued by the counsel for the plaintiffs unequivocally show acknowledgment of indebtedness on the part of the plaintiff. These facts if cumulatively taken into consideration show that there is no scope of any sort or any question to be decided on the strength of evidence. The documents undoubtedly point out towards categorical admissions on the defendants part. The defence that accounts have been settled with Mr.Surana is a complete sham defence. There is total absence of any plausible defence. The contentions claiming availability of defence are illusory.

28. In view of the above, the present application fails to disclose any plausible fact which may be deemed sufficient to entitle the defendant for leave to defend the present Suit. In view of the above, the present application is dismissed.

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The application for leave to defend has been dismissed. The present Suit is decreed for a sum of Rs.25,72,000/- along with interest in favour of the plaintiff and against the defendant with costs. The plaintiff shall also be entitled to interest as accrued upon @ 15.6% per annum pendente lite.

**JAYANT NATH, J**

**JULY 25, 2013**  
**n**