

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

%

Date of decision: 18th December, 2013

+

RFA No.153/2013

VED PRAKASH

..... Appellant

Through: Mr. Madan Lal Sharma & Mr. Varun
Nishcal, Advs.

Versus

MANGROVE INTERNATIONAL LTD.

..... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 23.01.2013 of the Court of Additional District Judge (ADJ)-03, (South District), Saket Courts, New Delhi in CS No.548/2010 filed by the respondent / plaintiff for recovery of Rs.14,07,067/- from the appellant / defendant) of recovery of Rs.14,00,000/- from the appellant / defendant with costs and interest, consequent to the dismissal of the application under Order 37 Rule 5(3) of the CPC filed by the appellant / defendant for leave to defend the suit filed by the respondent / plaintiff under Order 37 of the CPC.

2. Notice of the appeal was issued and vide *ex parte* ad-interim order dated 20.03.2013, subject to the appellant / defendant depositing the decretal amount in this Court, execution was stayed.

3. The notice of the appeal sent to the respondent / plaintiff remained unserved with the report that the respondent / plaintiff had shifted from the address given by the appellant / defendant in the appeal. The appellant / defendant was accordingly permitted to serve the respondent / plaintiff by publication, which was effected. None appeared for the respondent / plaintiff thereafter also. However, finding that the respondent is a company and further finding that the appellant / defendant claims to be a Promoter Director of the respondent / plaintiff company, the appellant / defendant was vide order dated 23.10.2013 directed to find out the present address of the respondent / plaintiff company and its Directors and to file an affidavit. Upon being told that Section 138 Negotiable Instruments Act, 1881 proceedings initiated by the respondent / plaintiff company against the appellant / defendant were listed next on 07.11.2013 in the Court of Sh. Sunil Kumar, Metropolitan Magistrate, Rohini Courts, New Delhi, the appellant / defendant was also requested to intimate the representative of the respondent / plaintiff company appearing in the said proceedings of the next

date of hearing in this appeal and the learned Metropolitan Magistrate was requested to, in his order, if such intimation is given by the appellant / defendant, record the said fact.

4. The appellant / defendant filed an affidavit confirming that the respondent / plaintiff still exists at the address given in the memorandum of appeal and yet further confirming intimation having been given to the respondent / plaintiff company and a copy of the order dated 07.11.2013 of the Court of Sh. Manish Khurana, Metropolitan Magistrate (North), Rohini Courts, Delhi in this regard was also filed.

5. Notwithstanding the aforesaid, none appeared for the respondent / plaintiff on 11.12.2013. However in the interest of justice, adverse orders were deferred and the matter posted for today. Today also none appears for the respondent / plaintiff inspite of passover. The counsel for the appellant / defendant has been heard.

6. Though the Trial Court record is not available but the counsel for the appellant / defendant states that copies of the relevant records have been filed.

7. The respondent / plaintiff instituted the suit from which this appeal arises, pleading:

- (a) that the appellant / defendant was appointed as the First Director of the respondent / plaintiff company on 07.12.2006 and continued to be a Director till he resigned on 28.11.2008;
- (b) that the appellant / defendant in or about the months of February-March, 2007 took a personal loan of Rs.13,50,000/- and advance of Rs.50,000/- from the respondent / plaintiff company by cheque dated 19.02.2007 for Rs.6,00,000/- and cheque dated 09.03.2007 for Rs.8,00,000/-;
- (c) that the appellant / defendant besides the aforesaid amounts had taken other advances also from the respondent / plaintiff company and which were duly reflected in the account of the appellant / defendant maintained by the respondent / plaintiff company;
- (d) that the appellant / defendant in discharge of his said liability, issued cheques, both dated 16.03.2009, bearing No.215697 for

Rs.6,00,000/- and cheque bearing No.215698 for Rs.8,00,000/- in favour of the respondent / plaintiff company but both the said cheques were dishonoured for the reason of 'Insufficiency of Funds' in the account of the appellant / defendant; and,

- (e) that the appellant / defendant inspite of notice did not pay the amount and accordingly a complaint of offence under section 138 of the Negotiable Instruments Act, 1881 was filed.

Accordingly, the suit from which this appeal arises, for recovery of Rs.14,00,000/- on the basis of dishonoured cheques was filed.

8. The suit was entertained under Order 37 of the CPC and summons for appearance and thereafter summons for judgment issued to the appellant / defendant.

9. The appellant / defendant sought leave to defend on the grounds:

- (i) that the appellant / defendant on 31.03.2009, by intimation to his banker had stopped payment of the subject cheques but notwithstanding the same, the cheques had been dishonoured for the reason of 'Insufficiency of Funds';

- (ii) that no amount is due from the appellant / defendant to the respondent / plaintiff;
- (iii) that subject cheques were in the custody of the respondent / plaintiff for security of loan;
- (iv) that subject two cheques and another cheque were lying with the respondent / plaintiff without date since 08.05.2007; and,
- (v) that subject cheques were not handed over by the appellant / defendant to the respondent / plaintiff for discharge of any debt.

10. The counsel for the appellant / defendant states that along with the leave to defend application, copy of an e-mail dated 08.05.2007 of another Director of the respondent / plaintiff to the appellant / defendant acknowledging receipt of the subject two cheques and the third cheque bearing No.215696 for Rs.6,00,000/- in the name of eSys Services & Technologies Pvt. Ltd., was also filed. It is informed that the respondent / plaintiff company was earlier known as eSys Services & Technologies Pvt. Ltd.

11. The counsel further states that the appellant / defendant had also filed before the suit Court, copies of the communication to its banker to stop payment of the subject cheques.

12. The respondent / plaintiff filed a reply to the leave to defend application.

13. The counsel for the appellant / defendant has at the outset stated that the leave to defend application is not very happily worded. He has however contended that the present is not a case where the appellant / defendant should be condemned unheard and has stated that the appellant / defendant is willing to keep the amount of Rs.17,61,000/- deposited in this Court till the adjudication of the suit. It is thus contended that conditional leave to defend be granted to the appellant / defendant.

14. I am inclined to accept the aforesaid request for the following reasons:

(A) the subject cheques are drawn in favour of eSys Mangrove India Pvt. Ltd.;

(B) the suit was filed by M/s Mangrove (India) Household Pvt. Ltd. and it was the averment in para No.3 of the plaint that in

February and March, 2007, the name of the respondent / plaintiff company was eSys Mangrove India Pvt. Ltd. Though the date of change of name is not written anywhere but the counsel for the appellant / defendant states that the name of the respondent / plaintiff was changed from eSys Mangrove India Pvt. Ltd. to M/s Mangrove (India) Household Pvt. Ltd. on 13.03.2008. It is thus evident that the cheques in the name of eSys Mangrove India Pvt. Ltd. were issued prior to 13.03.2008 and were not issued on 16.03.2009, the date which they bear;

- (C) though for the reason of the appellant / defendant having not mentioned about the e-mail dated 08.05.2007 in the leave to defend application, no response thereto is contained in the reply to the leave to defend application but the name in which the cheques are drawn, supports the said e-mail;
- (D) the cheques were returned by the banker of the appellant / defendant for two reasons. Firstly, of the funds being insufficient and secondly, of the drawers signatures being incomplete / different / required;

- (E) the counsel for the appellant / defendant points out that the cheques though of the personal account of the appellant / defendant are signed besides by the appellant / defendant also by Ms. Swati Bahl, who was not the account holder along with the appellant / defendant and there were no instructions to the banker of the appellant / defendant of the cheques to be signed by her also;
- (F) it has been held in *Canara Bank Vs. Canara Sales Corporation* (1987) 2 SCC 666 that if the signature on the cheque are not of the customer of the Bank, the document carries no mandate to the Bank to pay and is not a cheque and is a nullity; a question would thus arise whether a suit under Order 37 of the CPC is at all maintainable on the basis thereof;
- (G) though the appellant / defendant had not taken the said plea in the leave to defend application but has before this Court also filed an e-mail dated 16.12.2008 sent by him to the respondent / plaintiff company complaining that the agreement which the respondent / plaintiff company had sent to the appellant /

defendant for signatures was not as had been settled / agreed between the parties; the appellant / defendant has also filed a copy of the memorandum of understanding dated 28.11.2008 forwarded by the respondent / plaintiff company to the appellant / defendant and in which it is *inter alia* recorded that all accounts had been settled; and,

- (H) the respondent / plaintiff in the plaint has admitted that the appellant / defendant resigned on 28.11.2008; it thus requires to be adjudicated whether the loan, even if any taken by the appellant / defendant, had been settled at the time when the appellant / defendant parted with from the respondent / plaintiff company.

15. All the aforesaid questions cannot be adjudicated without recording of the evidence.

16. Accordingly, the impugned judgment and decree is set aside and the appellant / defendant is granted conditional leave to defend the suit i.e. on the condition that the amount of Rs.17,61,000/- deposited by the appellant / defendant in this Court shall remain deposited in this Court till the

adjudication of the suit and in the event of the respondent / plaintiff succeeding in the suit, the respondent / plaintiff shall be entitled to the said amount together with interest if any accrued thereon in accordance with the decree. Needless to state, that if the respondent / plaintiff fails, the appellant / defendant after 60 days from the judgment shall be entitled to withdraw the said amount with interest accrued thereon from this Court. The Registry is directed to keep the subject amount in the maximum interest bearing deposit.

17. The respondent / plaintiff having not contested the suit, no costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

DECEMBER 18, 2013

‘gsr’