

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

% *Order delivered on: December 19, 2013*

+ **C.R.P. 87/2011 & CM No. 12360/2011 (for stay)**

UTOPIAN BUILDERS PVT LTD Petitioner
Through Mr. Atul Sahi, Advocate.

versus

RAKESH GANDHI Respondent
Through Mr. Ram Mehar, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present petition under section 115 CPC has been filed by the petitioner against the order dated 18th February, 2011 passed by Additional District Judge (Central), Delhi, whereby the leave to defend application of respondent was allowed.

2. Brief facts for adjudication of the present matter are that petitioner filed a suit for recovery under Order XXXVII CPC against the respondent. It was stated that respondent offered his services to the petitioner company for searching and finalizing a collaboration deal for construction of residential flats in R block, New Rajinder Nagar, New Delhi and demanded ₹4 lac for his services as a temporary deposit. It was also stated that the respondent issued a promissory note to the petitioner of an amount of ₹2 lac as penalty in case the respondent failed to return the amount immediately on expiry of one month from the date of receipt of the said amount of ₹4 lac from the petitioner. It was also averred that

the respondent had further promised to pay interest @24% per annum in case the amount of ₹4 lac was not returned within the stipulated period of time of one month. Since the respondent could not offer any suitable deal to the petitioner as agreed with the stipulated time frame, he issued a cheque of ₹4 lac in favour of the petitioner, however, the same was dishonoured and after regular persuasive requests of the petitioner, the respondent handed over 4 cheques of ₹1 lac each to the petitioner, which also were returned by the bank and it was informed that the payment had been stopped by the respondent. Thereafter the petitioner served a legal notice dated 15th April, 2009 upon the respondent calling upon him to make payment to the petitioner, however, having failed to do so, the petitioner filed the suit for recovery against the respondent.

3. In the application for leave to defend filed by the respondent, it was averred that the petitioner had not come before the court with clean hands and was guilty of suppression of material facts. It was contended that the relief claimed was beyond the scope of Order 37 CPC and also that the suit was barred under Section 29, 32, 35 and 23 of the Indian Contract Act. It was also further stated that the suit was filed on the basis of alleged promissory note dated 10th March, 2006 and subsequent cheque dated 10th April, 2006, so the same is barred by limitation.

4. The respondent averred that the promoter/Director of the petitioner company, Mr. M.J. Kumar introduced him with late Mr. Mohan Lal Madnani, who was his relative and was desirous of reconstructing his property but did not have resources. Acting in good faith, the respondent entered into the property development agreement without verifying the ownership of the property. It was stated that after the demise of Mr. M.L. Madnani, Mr. M.J. Kumar started creating problems stating that he would

not allow the respondent to construct the property unless and until the second floor portion of the proposed building is sold to him. Consequently, the respondent orally agreed to sell the same at a throw away price of ₹21,25,000/-. It was stated that even on being asked to get a fresh agreement signed from the legal heirs of late Mr. M.L. Madnani, Mr. M.J. Kumar kept on delaying the matter. It was averred that Mr. Kumar made various payments to the respondent totaling a sum of ₹15,05,000/- out of which ₹11,05,000/- was from his personal account and ₹4 lac was paid from the account of the petitioner company. Thereafter MCD sealed the property and the same was de-sealed after paying regularization charges.

5. The respondent further stated that he requested Mr. M.J. Kumar that the property be got mutated in the MCD and fresh agreement be executed as the respondent was facing tremendous loss, however, Mr. M.J. Kumar and son of Mr. Madnani started troubling respondents' labour due to which the respondent was unable to carry on the construction. Accordingly, vide letter dated 17th April, 2009, the respondent informed Mr. M.J. Kumar that he cannot sell the second floor of the property at a throw away price and returned the entire payment of ₹15,05,000/-, however, the same was not received by him.

6. Mr. M J Kumar issued the legal notice to the respondent which was replied to alongwith the annexed letter dated 17th April, 2009 alongwith the cheque for ₹15,05,000/- and the same was received by the counsel of Mr. M.J. Kumar. It was pleaded by the respondent that all these issues raised cannot be decided without trial so the application for leave to defend be allowed.

7. The petitioner in the reply to the application stated that the suit was filed on the basis of dishonoring of the cheque issues by the respondent for the amount of ₹4 lac towards repayment of amount taken as temporary loan for a period of one month. It was stated that this a simple case of debt recovery with interest arisen out of written contract and falls within the scope of summary procedure. The respondent had admittedly borrowed ₹4 lac from the petitioner company and issues cheques but the same were dishonored. It was stated that on pressure of the petitioner, the respondent agreed to pay the actual borrowed money but refused to pay the interest. In lieu of cheque dated 10th April, 2006, the respondent issued four cheques of ₹1 lac each dated 1st March, 2009 but the same were not encashed. The respondent's contention of having paid ₹15,05,000/- was denied.

8. On hearing both the parties, the learned Trial Court observed that though the suit was filed under Order XXXVII CPC, the petitioner had on record neither filed original documents or certified copies thereof on the basis of which the suit was filed and that filing of the same is an essential ingredient of the suit under Order XXXVII CPC. Furthermore, the petitioner had not made any declaration as required under Order XXXVIII Rule 2 (b) CPC. It was further opined by the learned trial court that the issue of whether the respondent had paid the entire amount to the petitioner or that the cheques as claimed were already in possession of the petitioner or its director or were handed over by the respondent in the year 2009, all required trial. Also, the fact whether the petitioner is entitled to any interest on the amount of damages or not is a triable issue which cannot be decided without affording an opportunity to the respondent to contest the suit on merit.

9. With these observations the learned Trial Court allowed the leave to defend application of the respondent vide the impugned order and aggrieved thereof, the petitioner has filed the present petition.

10. The Supreme Court in *M/s Mechalec Engineers & Manufacturers Vs. M/s. Basic Equipment Corporation*, 1977 SC 577 has evolved following principles after comprehensive review of the authorities on the subject :-

- 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 sign judgment and the defendant is entitled to unconditional leave to defence.
- b) If the defendant raises a triable issue indicating that he has a fair or bonafide 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 had a defence, 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.

11. The plaintiff has filed the present suit under Order 37 CPC, however, it has not placed on record the original documents on the basis of which the present suit has been filed.

12. A perusal of the record shows the defendant has taken a plea that four cheques bearing No.411343 to 411346 were already in the possession of the Director/Promoter of the plaintiff company since 2007. In order to substantiate his averment the defendant has placed on record a legal notice dated 7th May, 2007 sent to Sh. M.J. Kumar, Director/Promoter of the plaintiff company. Para 17 of the notice stipulates as under :

“That you have been playing very shrewd through out and at the time of giving cheque of Rs.4,00,000/-, you took four blank undated cheques of Rs.1,00,000/- each from our client in favour of your firm M/s Utopian Builders Pvt. Ltd. vide cheque no.411343 to 411346 drawn on State Bank of India, New Rajinder Nagar, New Delhi.”

Perusal of the averment of Para 17 of the legal notice shows that Mr. M.J. Kumar was called upon by the defendant on 7th May, 2007 regarding the fact that those cheques were in his possession. Once the cheque bearing No.411343 to 411346 were already in the possession of the plaintiff or its director in the year 2007, then, how those cheques

could have been delivered to the plaintiff again by the defendant in the year 2009.

The question that whether defendant paid the entire amount to the defendant or that cheques were already in the possession of the plaintiff or its director or was handed over by the defendant in the year 2009 requires trail.

As per the plaintiff a sum of ₹4 lac was obtained by the defendant as a temporary debt for one month. However, in the present suit the plaintiff has claimed a sum of ₹10,64,350/-. The plaintiff has stated that the suit amount includes the agreed interest @24% p.a. In para 10 of the plaint the plaintiff has calculated the interest @ 24% p.m. on the amount of damages of ₹2 lac from 10th April, 2006 to 30th June, 2009 which comes to ₹1,54,783/-. The said amount is also a part and parcel of the entire suit amount.

Plaintiff has claimed interest as per the terms of the receipt and promissory note. Perusal of the receipt shows that interest @ 24% has been mentioned on ₹4 lac. Alongwith receipt plaintiff has also filed copy of the promissory note in the said promissory note it is mentioned that the defendant has promised to pay a sum of ₹4 lac towards the principal amount and ₹2 lac towards the damages besides the interest @ 24% p.a. accrued on ₹4 lac from 10th April, 2006 onwards. In the entire promissory note it has not been mentioned that the amount of damages would also carry interest @ 24% p.a. which has been claimed by the plaintiff in the present suit. From the perusal of the above, it is amply clear that no interest was agreed between the parties on the sum of damages of ₹2 lac, however, the plaintiff has claimed interest on the said amount as well, however, the plaintiff has claimed interest on the said

amount as well. The fact that whether plaintiff is entitled for any interest on the amount of damages or not is a triable issue which cannot be decided without affording an opportunity to the defendant to contest the suit on merit.

13. It is settled position in law that once leave to defend in the cases of Order 37 is allowed, the said order is not an appealable order the provision of Order 43 Rule 1 CPC.

14. As far as present revision is concerned, the same is also not maintainable in view of principles laid down in the case of *Shiv Shakti Co-operative Housing Society, Nagpur v. M/s. Swaraj Developers*, AIR 2003 SC 2434. The Apex Court analysed the position both prior as well as post Amendment Acts of 1976 and 1999 and very well reiterated the difference between an appeal and a revision in the following paragraphs:

“13...It is fairly well-settled position in law that the right of appeal is a substantive right. But there is no substantive right in making an application under Section 115.

15. ..Language of Sections 96 and 100 of the Code which deal with appeals compared with Section 115 of the Code. While in the former two provisions specifically provide for right to appeal, the same is not the position vis-à-vis Section 115. It does not speak of an application being made by a person aggrieved by an order of subordinate court. As noted above, it is a source of power of the High Court to have effective control on the functioning of the subordinate courts by exercising supervisory power.”

The court summed up the present legal position in the following paragraphs :

“14.... Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the

subordinate court to approach the High Court for relief. The scope for making a revision under Section 115 is not linked with a substantive right.”

“32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. Suit on the contrary, if the answer is 'no' then the revision is not maintainable. Therefore, if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. There is marked distinction in language of Section 97(3) of the Old Amendment Act and Section 32(2) (i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered the parties are to proceed according to the altered made, without exception, unless there is a different stipulation.”

“33...Section 6 of the General Clauses Act has no application because there is no substantive vested right available to a party seeking revision under Section 115 of the Code.”

15. For the abovesaid reasons, I am of the considered view that the impugned order does not require any interference. The present petition and pending application are accordingly dismissed.

16. No costs.

(MANMOHAN SINGH)
JUDGE

DECEMBER 19, 2013