

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

Date of decision: 23rd May, 2013.

+ **CS(OS) 2168/2010**

M/S PRADYUMAN OVERSEAS LTD Plaintiff
Through: Mr. Sanjay Poddar with Ms. Navlin
Swain, Advocate.

Versus

SANJEEV JINDAL Defendant
Through: Mr. Bhagat Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

% **23.05.2013**

I.A. No.3483/2012 (of defendant for leave to defend).

1. The plaintiff has instituted this suit under Order XXXVII of Civil Procedure Code (CPC), 1908 for recovery of principal amount of Rs.41,66,895/- together with interest at 18% per annum till the date of institution of the suit of Rs.2,65,083.02p, total, Rs.44,31,978.02p pleading:

- (i) that the defendant is the sole proprietor of M/s. Bhagwati Trading Company and M/s. Apaar Enterprises;
- (ii) that the plaintiff sold, supplied and delivered goods to the defendant as per the orders placed by the defendant on the plaintiff from time to time;
- (iii) that the plaintiff raised the following invoices on the defendant:

Date	Particulars	Amount
19.05.10	Bill No.:004	8,33,166.00
20.05.10	Bill No.:012	6,41,010.00

22.05.10	Bill No.:017	7,43,909.00
24.05.10	Bill No.:018	3,96,000.00
24.05.10	Bill No.:019	1,79,375.00
25.05.10	Bill No.:031	4,63,625.00
27.05.10	Bill No.:039	9,09,810.00
	Total	41,66,895.00

(iv) that the defendant in discharge of his liability under the aforesaid invoices issued the following cheques in favour of the plaintiff:

Date	Cheque No./Particulars	Amount
03.06.10	CH. No.690743 (Punjab National Bank)	8,33,166.00
04.06.10	CH. No.690744 (Punjab National Bank)	6,41,010.00
06.06.10	CH. No.690745 (Punjab National Bank)	7,43,909.00
08.06.10	CH. No.690746 (Punjab National Bank)	5,75,375.00
09.06.10	CH. No.690747 (Punjab National Bank)	4,63,625.00
11.06.10	CH. No.690748 (Punjab National Bank)	9,09,810.00
	Total	41,66,895.00

- (v) that all the aforesaid cheques were returned unpaid;
- (vi) that upon the defendant being informed thereof, asked the plaintiff to represent the cheques;
- (vii) that the cheques were again returned dishonoured;
- (viii) that the defendant acknowledged his liability in writing on 25th June, 2010 and agreed to liquidate the amount along with interest at

the earliest and offered his property No.S-13. ad- measuring 58 sq. yds. situated in Village-Abadi Madipur, Shivaji Park on Rohtak Road, New Delhi as collateral security and gave photocopies of the title documents of the said property to enable the plaintiff to get the same evaluated;

(ix) that the defendant also issued another post dated cheque bearing No.216459 dated 31st August, 2010 drawn on Union Bank of India, Ashok Vihar, New Delhi for a sum of Rs.43,33,342.48 paise which includes the principal amount and the interest till then @ 18% per annum;

(x) that however the plaintiff subsequently learnt that the defendant had closed the said account;

(xi) hence this suit.

2. Summons for appearance were issued to the defendant and vide *ex-parte* ad interim order dated 26th October, 2010 which continues to be in force, the defendant was directed to maintain *status quo* with respect to the title and possession of the property No.S-13 situated in Village-Abadi Madipur, Shivaji Park, New Delhi.

3. The order dated 20th September, 2011 records that summons for appearance sent by ordinary process were refused by Smt. Suruchi Jindal, wife of the defendant and the defendant was permitted to be served by affixation. The defendant was so served by affixation on 18th October, 2011 and entered appearance. Thereafter, summons for judgment were served on the defendant and the defendant has sought leave to defend on the following grounds:

(a) that the suit is based on forged and fabricated documents; there

is no written contract between the parties and the written agreement relied upon by the plaintiff is a forged and fabricated document;

(b) that the alleged invoices, cheques and acknowledgement are all forged and fabricated;

(c) that no purchase orders were placed by the defendant on the plaintiff or have been placed by the plaintiff on record;

(d) that none of the invoices/bills bear any acknowledgement and/or signature of the defendant;

(e) that there are no delivery challan(s) showing any supply being made by the plaintiff to the defendant;

(f) that cheque No.216459 drawn on Union Bank of India, Ashok Vihar, New Delhi for a sum of Rs.43,33,342.48 paise has neither been issued by the defendant nor signed by the defendant—the said cheque does not even bear defendant's writing;

(g) that the defendant is a transporter having transport business in the name and style of M/s. Jindal Auto House;

(h) that in the year 2006, Mr. Bhaskar Kedia of the plaintiff Company approached the defendant with a proposal to be a front man of the plaintiff Company in reducing its tax liability and in consideration thereof the defendant will get continuous business from the plaintiff Company as transporter of goods of the plaintiff;

(i) that in pursuance to the aforesaid arrangement the plaintiff Company through Mr. Bhaskar Kedia got the defendant's signatures on various papers and blank cheques on the ground that these documents were required to create fictitious entries and save tax liability;

- (j) that the alleged acknowledgement/agreement is nothing but a forged and fabricated document got prepared by misusing the blank paper so got signed from the defendant;
- (k) that the said understanding/arrangement proceeded smoothly till June, 2010 when the plaintiff breached the trust of the defendant and misused few cheques;
- (l) that the defendant also lodged a complaint with Police Station-Punjabi Bagh vide DD No.26B dated 27th September, 2010;
- (m) that the present suit is nothing but manipulated by forged and fabricated documents.

4. The plaintiff has filed reply to the leave to defend application pleading *inter alia* that the last transaction in respect of transport business between the plaintiff and the defendant was in the month of June, 2008 and the bank account on which dishonoured cheques were issued by the defendant in favour of the plaintiff was opened in the latter part of the year 2009.

5. The counsel for the defendant on 25th April, 2012 sought time to file rejoinder and which was granted but no rejoinder was filed and on 29th May, 2012, the counsel for the defendant stated that rejoinder was not necessary.

6. On 29th May, 2012, the parties also sought reference to Mediation Cell of this Court which was allowed. Mediation however remained unsuccessful.

7. Arguments on this leave to defend application were partly heard on 18th February, 2013 and further arguments have been heard today.

8. The counsel for the defendant has argued, that the affidavit preceding the summons for judgment is not in compliance with Order XXXVII of

CPC; that the invoices filed by the plaintiff are for sale of *bidis* but the plaintiff Company as per its Memorandum of Association is not authorized to carry on the business of *bidis*; that though in the plaint reference is made to invoices, dishonoured cheques and written contract but in para 11 of the plaint, the suit is stated to be based only on written Agreement; that as far as the cheques are concerned, the same were given by the defendant to the plaintiff as security as a transporter of the goods of the plaintiff; that the invoices are computer generated and no certificate, as required with respect thereto under Section 65B of the Indian Evidence Act, 1872, has been filed; that no purchase orders or delivery challans have been filed; that the invoices relied upon are not acknowledged; that the affidavit accompanying the reply to the leave to defend application is not properly verified and thus there is deemed to be no reply to the leave to defend application. It is further urged that the language of Order XXXVII of CPC has been picked up from United Kingdom (UK) Code and though the counsel for the defendant stated that judgment of the UK Court on the effect of defect in the language of the affidavit preceeding the summons for judgment shall be handed over but copy of no such judgment has been handed over or cited. Reliance is however placed on *Harprashad & Company Ltd., New Delhi Vs. Allahabad Bank* AIR 1983 Delhi 280 reiterating the principles while considering the application for leave to defend and on *M/s. Sunil Enterprises Vs. SBI Commercial and International Bank Ltd.* AIR 1998 SC 2317 also reiterating the principles as originally laid down in *Michalec Eng. & Mfg. Vs. Basic Equipment Corporation* AIR 1977 SC 577. On attention of the counsel for the defendant being invited to the Memorandum of Association of the plaintiff, authorizing the plaintiff to deal in tobacco

and hemp, copy of P. Ramanatha Aiyar's 'The Law Lexicon' describing 'hemp' has been handed over in the Court.

9. Per contra, the senior counsel for the plaintiff has read the affidavit preceeding the summons for judgment to contend that the same satisfies the requirements of Order XXXVII of CPC. He has further contended, that the suit under Order XXXVII of CPC is not only on the basis of written contract contained in the invoices and the acknowledgement executed by the defendant but also on the basis of dishonoured cheques; that the leave to defend application does not controvert that the defendant had offered his property as security and handed over photocopy of the documents of title to enable the plaintiff to have the same evaluated. It is argued that the copies of the documents were filed along with plaint; that it is not as if the said fact escaped the defendant inasmuch as the plaint was accompanied with an application under Order XXXVIII Rule 5 of CPC and on which a restraint order against the defendant had also been made and confirmed vide order dated 29th May, 2012. It is yet further contended that though the defendant highlighted the said fact in its reply to the leave to defend application and the plaintiff sought time to rejoin but did not rejoin—the only inference can be that the defendant has nothing to say with respect thereto; that the defendant having not offered any explanation as to how the plaintiff came into possession of the copies of the title documents of the property of the defendant, the version of the plaintiff has to be accepted. It is yet further argued that though the defendant claims to have lodged a complaint, to the Police Station-Punjabi Bagh against the plaintiff of misuse of cheques, as far back as in July, 2010 but inspite of no action having been taken thereon by the police, the defendant chose not to follow up the matter. The writing

and the language on the acknowledgement dated 25th June, 2010 is argued to be the same as in the complaint dated 27th September, 2010 filed by the defendant to the Police. It is contended that the dishonoured cheques are of two firms in the name and style of which the defendant is carrying on business and not of the firm in the name and style of which the defendant was carrying on transport business. It is yet further argued that the reason given by the defendant in the complaint to the Police against the plaintiff and in the leave to defend application for handing over cheques to the plaintiff are inconsistent and thus not believable. It is shown from the documents filed by the defendant that the transactions in the transport business between the parties were of the year 2006-2007 with the last payment of 1st June, 2008; it is thus contended that the reason of the cheques being given as security for transport business is wrong. Reliance is placed on *Rakesh Gupta Vs. Khoday India Ltd.* 2012 (10) AD (Delhi), *V.K. Enterprises Vs. Shiva Steels* 2009 (165) DLT 549 and on *Sangeeta Jewels Pvt. Ltd. Vs. Ajay Kumar Jain* 2012 (189) DLT 635.

10. It has specifically been enquired from the counsel for the defendant in rejoinder, whether the defendant admits his signatures on the document dated 25th June, 2010 acknowledging the liability in the sum of Rs.41,66,895/-.

11. The counsel for the defendant states that the signatures are admitted.

12. Since, the said signatures are on a letterhead of M/s. Apaar Enterprises and under the stamp of the authorized signatory of the said M/s. Apaar Enterprises, it has been enquired from the counsel for the defendant whether the said stamp was there at the time of the defendant signing the document and if so, why.

13. It is stated that since the plaintiff for the purposes of managing its tax had made the defendant open the bank account in the name of M/s. Apaar Enterprises, the plaintiff had so obtained the said signatures of the defendant on the letterhead of M/s. Apaar Enterprises as authorized signatory thereof.

14. In the aforesaid state of affairs, it needs to be adjudicated, whether the defendant satisfies this Court that he has a good defence to the claim and whether his defense raises a triable issue or that the defense raised by him is fair or *bona fide* or reasonable.

15. As far as the technical objections of the counsel for the defendant, of the affidavit preceeding the summons for judgment and the verification of the affidavit accompanying the reply to the application for leave to defend being not as per the form required, is concerned, though an error is found in the verification of the affidavit accompanying the reply to the leave to defend, no error even is found in the affidavit preceeding the summons for judgment. The counsel for the defendant also is unable to specify any error. Even otherwise, the said errors cannot be fatal as held by the Supreme Court in *Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh* (2006) 1 SCC 75 and *Vidyawati Gupta Vs. Bhakti Hari Nayak* (2006) 2 SCC 777 and the only effect thereof has to be to give the erring party an opportunity to rectify the same.

16. I am also not impressed with the argument, of the suit under Order XXXVII of CPC being only on the basis of written contract. The suit is clearly based on invoices, dishonoured cheques and document acknowledgement of liability. The effect of error in drafting on the part of the Advocate for the plaintiff of missing out reference to all the three in one of the paragraphs cannot be of deprivation of the substantive right of the

plaintiff to on the basis of the documents finding reference in the plaint and filed along with the plaint maintaining a suit under the summary procedure.

17. This Court in *Punjab Pen House Vs. Samrat Bicycles Ltd.* AIR 1992 Del 1, *Corporate Voice Pvt. Ltd. Vs. Uniroll Leather India Ltd.* (1995) 60 DLT 321, *Beacon Electronics Vs. Sylvania & Laxman Ltd.* (1998) 45 DRJ 439 & *M/s. KIG Systel Ltd. Vs. Fujitsu ICIM* AIR 2001 Del 357, has held invoices to form a written contract within the meaning of Order XXXVII of the CPC.

18. As aforesaid would show, the defendant has not disputed his signatures on the six cheques corresponding with the amounts of the seven invoices for the total amount of Rs.41,66,895/- and his signatures on the letterhead of M/s. Apaar Enterprises acknowledging the liability in the said amount. The defendant has further admitted having opened bank accounts in the name of M/s. Bhagwati Trading Company, Delhi and M/s. Apaar Enterprises, as sole proprietor thereof.

18. There is a presumption in law of liability of a person signing a cheque and when the said person pleads that the cheque was signed in blank and handed over to another, there is a presumption of the person to whom blank signed cheque is delivered/handed over being authorized to fill up the same. Reference in this regard can be made to *Purushottam Maniklal Gandhi Vs. Manohar K. Deshmukh* MANU/MH/1188/2006, *MOJJ Engineering Systems Ltd. Vs. A.B. Sugars Ltd.* 154 (2008) DLT 579, *Vijender Singh Vs. Eicher Motors Ltd.* MANU/DE/2021/2011 and *Puneet Kumar Agarwal Vs. M/s Imaginations Agri Exports* MANU/DE/0822/2013. Of course, the presumption is a rebuttable one but to be entitled to an opportunity to lead evidence to rebut the said presumption, facts with

particulars have to be pleaded. Merely pleading that the cheques were signed in blank and handed over is not sufficient to be entitled to an opportunity to lead evidence, else Order XXXVII of CPC shall become a dead letter. The same presumption rule applies to the pleas of having signed and delivered papers in blank.

19. When we look at the pleas of the defendant in the said light, the same are not only found to be vague and bereft of all particulars but also unbelievable. The counsel for the defendant inspite of being specifically asked has been unable to explain as to why a transporter would be required to give security in the form of signed blank cheques to its clients. The documents filed by the defendant pertaining to the transportation transactions between the parties are clearly of the year 2006-2007. It is the plea of the plaintiff in its reply that the bank account on which the cheques have been issued was opened thereafter. The defendant, as aforesaid, has not rejoined and is thus deemed to have not controverted the said plea in the reply. The fact that the defendant has filed documents of transportation transactions of the year 2006-2007 implies that there were no transactions pertaining to the transportation business thereafter. If the defendant had given cheques by way of security for the said transactions, the defendant in the natural course of business would have taken back the said cheques on cessation of the said business and if the plaintiff had not done so, would have issued legal notice demanding the said cheques or stopped the payment of the said cheques; nothing of the sort was done. The only inference can be that such pleas are unbelievable.

20. The other explanation given by the defendant is of having opened the bank accounts in the name and style of M/s. Bhagwati Trading Company

and M/s. Apaar Enterprises as sole proprietor thereof at the behest of the plaintiff, to help the plaintiff in avoiding tax and as consideration for the plaintiff continuing to give transportation business to the defendant. No dates whatsoever have been given as to when the said accounts were opened. As aforesaid, the last transaction in the transportation business is of the year 2006-2007. Ordinarily, if the plaintiff had stopped giving transportation business to the defendant and in consideration of which the defendant claims to have agreed to aid and abet the plaintiff in avoiding its taxation liability, the defendant would have immediately reneged from the said assistance to the plaintiff also. Moreover, this Court cannot take into consideration any such pleas of illegality and the principles of *pari delicto* will apply.

21. There is thus no explanation or no plausible explanation of the defendant for the document dated 25th June, 2010 acknowledging liability and for the dishonoured cheques. The same in my opinion is sufficient for denying leave to defend to the defendant. The argument of the senior counsel for the plaintiff, of inconsistency in the version in the Police complaint filed and in the leave to defend, also has weight cannot be ignored.

22. In that view of the matter, the plea, of the plaintiff having not filed proof of delivery of goods and/or of the invoices being not acknowledged, pales into insignificance.

23. The defence raised in the leave to defend application is indeed a moonshine and vexatious. The defendant is thus not entitled to leave to defend and his application therefor is dismissed.

24. Though the defendant had in the document dated 25th June, 2010

acknowledging liability agreed to pay interest @ 18 % per annum but still I am not inclined to grant interest on the said rate for the period during the pendency of the suit.

25. Axiomatically, a decree is passed in favour of the plaintiff and against the defendant for recovery of Rs.44,31,978.02 together with interest on the principal amount of Rs.41,66,895/- @ 9% per annum being the average rate at which interest is paid by Nationalized Banks on fixed deposits, from the date of institution of the suit and till three months after the date of this decree and with future interest thereafter @ 18% per annum.

26. The plaintiff shall also be entitled to costs of this suit as per schedule.
Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

MAY 23, 2013

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(corrected and released on 25th July, 2013)