

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ **IA No.7848/2012 (O.37 R.3(5) CPC) in CS(OS) 2858/2011**

% Reserved on: 27<sup>th</sup> September, 2013  
Decided on: 23<sup>rd</sup> October, 2013

GE CAPITAL SERVICES INDIA ..... Plaintiff  
Through: Ms. Worthing Kasar with Ms. P.S.  
Thamthingla, Advocates.

versus

SRIHARI RAO ..... Defendant  
Through: Mr. A.Rama Subbaiah, Advocate.

**CORAM:**  
**HON'BLE MS. JUSTICE MUKTA GUPTA**

1. By this application the Defendant seeks leave to defend under Order XXXVII Rule 3(5) CPC. The contention of learned counsel for the Defendant/applicant is that this Court has no territorial jurisdiction to try the present suit as the agreement between the parties was entered into at Tirupati and the defendant is also residing at Tirupati. Thus, no cause of action has arisen at Delhi. Thus, the present suit is liable to be dismissed. Further, the suit is also barred by limitation as the installments were realized till December, 2005 and thereafter the cheques were not realized. Hence, for a cause of action which accrued in 2005, the plaintiff cannot file a suit in 2011. Even the promissory note was executed on 12<sup>th</sup> April, 2004 and, thus, even the suit based on the said promissory note is also beyond the period of limitation. Even taking the documents of the plaintiff on their face value, the contracted amount was Rs.31 lacs, however, the claim of the plaintiff is Rs.75 lacs in the present suit. Thus, claim not being on the basis of a written

contract or an acknowledged liability, the provision of Order XXXVII CPC is not attracted and, hence, the defendant is liable to be granted leave to defend as triable issues are made out. Reliance is placed on *Machelec Engineers and Manufacturers vs. M/s. Basic Equipment Corporation*, (1977) 1SCR 1060.

2. Learned counsel for the plaintiff contends that the cause of action of the plaintiff is based on a written contract, the promissory note and the accounts of department. Since the last payment was due on 15<sup>th</sup> April, 2010, the present suit was filed in November, 2011 thus it cannot be held to be barred by limitation. The claim in the suit is based on the liquidated claim as the defendant was liable to pay interest @ 36% after the last payment. Further, the promissory note is an acknowledgment and a part of cause of action. Reliance is placed on *GE Capital Services India vs. G. Neuromed Diagnostic Centre Pvt. Ltd.* (2007) 98 DRJ 74, *H.B. Leasing & Finance Co. Ltd. vs. Mahavir Spinning Mills Ltd.* 153 (2008) DLT 293 and *M/s. GE Capital Services India vs. Dr. Mohan Chaturbhuj Jhamvar & Ors.*, CS(OS) 203/2011 decided on 1<sup>st</sup> July, 2013.

3. Heard learned counsel for the parties.

4. By the present suit under Order XXXVII CPC, the plaintiff which is a Non-Banking Financial Company seeks a decree for a sum of Rs.75,51,296/- against the defendant qua their liability jointly and severally with interest pendente lite and future interest on the decretal amount and costs of the suit. The case of the plaintiff is that in the year 2004, the defendant approached the plaintiff requesting for financing medical equipments. The defendant assured and represented to the plaintiff that the defendant had good standing and sufficient means. Thus, the plaintiff company entered

into Equipment Master Security and Loan Agreement bearing No.W11229 (now agreement No.A120556) dated 12<sup>th</sup> April, 2004 (hereinafter called the 'loan agreement') with the defendant. Under the loan agreement, the amount of Rs.31,45,000/- was financed by the defendant for the medical equipment Volusion 730.

5. Under the said loan agreement, the defendant also executed a promissory note for an amount of Rs.31,45,000/- which stipulated 10.50% rate of interest per annum. The amount financed under the agreement was to be repaid along with interest in 72 monthly installments starting from May, 2004 till April, 2010. The first twelve installments for the month of May, 2004 to April, 2005 were for Rs.50,000/- each and the remaining 60 installments were for Rs.61,512/- each. However, defendant failed to fulfill his part of the obligation and defaulted in payment of installments in accordance with the schedule under the agreement. Despite follow ups and reminders by the officers of the plaintiff, the defendant did not pay the outstanding amount and finally through a notice of termination-cum-demand dated 3<sup>rd</sup> March, 2011 issued on 9<sup>th</sup> March, 2011 the plaintiff called upon the defendant to pay a sum of Rs.71,45,736.71/-. The notice was delivered to the defendant on 11<sup>th</sup> March, 2011. However, the defendant did not pay the said amount and, thus, a further demand notice dated 19<sup>th</sup> July, 2011 for a sum of Rs.75,51,296/- was issued to the defendant. In reply to the notice, the defendant admitted the liability that the equipment was purchased by him and the loan was financed by the plaintiff company but took a false defence that though he paid 18 installments but the machine purchased on finance was not functioning properly and alleged the same to be a defective piece. Since the agreement was concluded and executed in terms of clause 10(g),

the Court at Delhi had the jurisdiction to try the suit. Further, the promissory note was payable at the registered office of the plaintiff company at AIFACS Building, 1 Rafi Mag, New Delhi-110001.

6. The plaintiff in support of its contention has placed on record a copy of the original Equipment Master Security and Loan Agreement dated 12<sup>th</sup> April, 2004, which according to the defendant was entered into at Tirupati. However, clause 10(g) of the agreement provides that the debtor and secured party hereby agree that this agreement at any collateral schedule shall not be effective until and unless executed by an authorized representative of the secured party in Delhi and on dispute arising out of this agreement or any collateral schedule, the same shall be subject to the exclusive jurisdiction of the Courts at Delhi. It is, thus, apparent that the defendant agreed to the final execution of the agreement and the collateral schedule at Delhi and that any dispute arising out of the agreement or the collateral schedule shall be subject to exclusive jurisdiction of the Courts of Delhi. Further, the promissory note executed by the defendant also unconditionally promises to pay the payee at its registered office located at AIFACS Building, 1 Rafi Marg, New Delhi, thereby demonstrating that the payment was also to be made at Delhi. In view of the fact that the part of cause of action has arisen at Delhi and the parties to the contract agreed to submit to the jurisdiction of the Courts at Delhi, I find no merit in the contention of learned counsel for the defendant qua lack of territorial jurisdiction of this Court to entertain the suit.

7. This brings me to the second limb of argument with regard to the suit being barred by limitation. Indisputably, the promissory note has been executed on 12<sup>th</sup> April, 2004 for the repayment of the principal sum of

Rs.31,45,000/-, the repayment schedule was for a period of 72 monthly installments starting from May, 2004 till April, 2010. Thus, the same being recurring cause of action lastly arising on April, 2010, it cannot be said that the present suit is barred by limitation.

8. As regards the plea of claim amount being enhanced from Rs.31 lacs to Rs.75,51,296/-, it may be noted that the agreement fixed the interest rate at Rs.10.5%. In view of the admitted interest @10.5 % pa on the loan amount by the defendant, the suit is based on liquidated damages.

9. Learned counsel for the defendant has strenuously relied upon *Machelec* (supra) wherein the Hon'ble Supreme Court noted the decision in *Smt. Kiranmoyee Dassi & Anr. V. Dr. J. Chatterjee* 49 C.W.N. 246, laying down the criteria for grant of leave to defend as under:-

“(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 moon shine 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.”

10. In the present case the defendant has not been able to show such facts which would lead to an inference that at the trial he would be able to establish a defence to the plaintiff’s claim. The defence set up by the defendant is illusory. This Court in a similar situation in *G.E. Capital Services India* (supra) held:-

“I find no force in the last submission of the defendant that the suit is based on a statement of account and not on the written agreement and the documents executed along with it. The basis of the claim in the suit is the written loan agreement, the promissory notes executed by defendant nos.1 to 4 and the individual guarantees executed by

defendant nos.2 to 4. The statement of account merely sets out the outstanding amounts along with overdue interest computed by the plaintiff.”

11. Further similar pleas were taken in *G.E. Capital Vs. Dr. Mohan Chaturbhuj Jhamvar & Ors. CS(OS) 2031/2011 decided on 1<sup>st</sup> July, 2013*, and it was held as under:-

“7. As far as the objection to the territorial jurisdiction is concerned, Clause 10(g) of the Agreement admittedly executed by the defendants records the execution thereof by the authorized representative of the plaintiff at Delhi; there is no contravention of the said fact in the application for leave to defend; it thus cannot be said that no part of cause of action has accrued at Delhi for the agreement of the parties also contained in the Agreement dated 31.01.2007 as to the exclusive jurisdiction of the Courts at Delhi to be of no avail. Not only so, the address of the plaintiff in the Agreement is of Delhi only and the plaintiff is correct in relying on the principle of debtor must seek the creditor for vesting the Courts at Delhi with territorial jurisdiction over the matter. Similarly, the defendant no.2 also has addressed the personal guarantee to the plaintiff at Delhi and thus undertaken to make the payments thereunder to the plaintiff at Delhi. Thus the grounds urged by both the defendants of this Court lacking territorial jurisdiction have no merit.

8. Mere ordering, by the Court of the Judicial Magistrate at Pune, Maharashtra, of investigation on the complaint being presented by the defendant no.1 also does not persuade this Court to grant leave to defend. It is not as if any findings have been returned by Court in favour of the defendant no.1.

9. The ground urged by the defendants no.1 and 2 of the claim being barred by limitation also has no substance. The date of signing of the Agreement is of no relevance. The defendants in the application for leave to defend have expressly admitted the loan of Rs.1.20 crores being repayable in 60 installments commencing from February, 2007 and to run till January, 2012; it is further not disputed that installments were paid till December, 2008. The suit has been instituted within three years therefrom, on 12.08.2011.

12 Consequently, the leave to defend application is dismissed.

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Thus, the suit is required to be decreed and consequently a decree is passed in favour of the plaintiff and against the defendant for the recovery of a sum of Rs.75,51,296/- along with interest @ 10.5% from the date of filing of the suit till realization. The plaintiff shall also be entitled to cost of the suit of Rs.25,000/-

Decree sheet be prepared accordingly.

**(MUKTA GUPTA)  
JUDGE**

**OCTOBER 23, 2013  
'RB'**