

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) No. 2890 of 2011

Reserved on: July 30, 2013

Decision on: August 27, 2013

RAVI SHARMA

..... Plaintiff

Through: Mr. Sanjeev Puri, Senior Advocate with
Mr. Sanjay Sarin and Mr. Tarun Rana,
Advocates along with Plaintiff in
person.

versus

SHUBH MARKETING PVT LTD & ORS

..... Defendants

Through: Mr. Feroze Ahmad, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

27.08.2013

IA No. 468 of 2013 [u/O XXXVII Rule 3 (5) CPC]

1. This is an application by the Defendants under Order XXXVII Rule 3(5) CPC seeking leave to defend the aforementioned suit filed by Mr. Ravi Sharma for recovery of a sum of Rs. 7,72,09,219 together with *pendente lite* and future interest at 36% per annum as agreed between the parties.

2. The case of the Plaintiff is that one Mr. Alok Gupta approached the Plaintiff in January 2009 along with one Mr. Jogesh Jerath (Defendant No. 2), Mrs. Anu Jerath (Defendant No. 3) and Mr. Ishwar Rohal (Defendant No. 4) requesting him to invest, along with Defendants 2 to 4, in a Shimla

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project of Shubh Marketing Pvt. Ltd (Defendant No. 1) comprising of residential apartments and a commercial complex which was to come up on 4 bigha (3840 sq. mts.) of land located in Village Badai, Tehsil & District Shimla. In May 2009, Defendants 2 to 4 informed the Plaintiff that they had since purchased the said land and were in need of funds for construction. The case of the Plaintiff is that upon the aforementioned request, the Plaintiff, on behalf of the Astute Real Estate Private Limited (AREPL), in which the Plaintiff is a Director and shareholder, agreed to invest in the said project.

3. The Plaintiff states that he advanced a sum of Rs. 4.90 crores to the Defendants which was secured by a loan agreement ('agreement') dated 28th January 2010 entered into with Defendant No. 1, through its Directors Defendants 2 and 3, and Defendant No. 4 as the borrowers. Article I of the said agreement provided that the rate of interest would be floating at 36% per annum computable on the basis of 365 days in a year. As security for the loan advanced, a mortgage by deposit of title deeds as described in Article 5 of Schedule I of the agreement was created in favour of the Plaintiff. Personal guarantees of Defendants 2 and 4 jointly and severally were given. Further post-dated cheques were issued in favour of the Plaintiff. The schedule of repayment was set out in Clause 6 of Schedule I of the Agreement. An indenture of the mortgage and a deed of guarantee by Defendants 2 to 4 was also executed on 28th January 2010. Post-dated cheques dated 29th January 2010 for an aggregate of Rs. 4.90 crores were issued from the account of the Plaintiff in favour of the Defendants. It is stated that the Defendants 2 and 3 as Directors of Defendant No. 1 issued

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four post-dated cheques dated 15th February 2010 , 15th March 2010, 15th May 2010 and 16th May 2010 for an aggregate sum of Rs. 5,22,73,264.

4. The Plaintiff states that while the first cheque dated 15th February 2010 for Rs. 61,06,251 was encashed, the second cheque dated 15th March 2010 for Rs. 2,09,07,397 when presented for payment, was dishonoured. The Plaintiff states that by a letter dated 1st June 2010, the Defendant No. 2 regretted the dishonour of the said cheque and assured that further cheques dated 10th June 2010 and 30th June 2010 amounting to Rs. 1 crore each, which were being issued, would be honoured. On 30th June 2010, the Defendants 2 and 4 once again requested the Plaintiff for extension of time for repayment till 15th October 2010 and issued one more cheque dated 15th October 2010 for Rs. 1,21,50,957. According to the Plaintiff, Defendants 1 to 4 had, till 15th October 2010 acknowledged that they owed the Plaintiff a sum of Rs. 5,74,10,573.

5. When the Plaintiff presented the five cheques for encashment on 20th October 2010, the said cheques were dishonoured. By a letter dated 28th October 2010, Defendants 2 to 4 expressed regret and acknowledged their liability to pay Rs. 5,74,10,573 and requested extension of time for repayment till 31st January 2011. Accordingly, a post-dated cheque dated 31st January 2011 for Rs. 5,74,10,573 and another post-dated cheque for Rs. 60,28,110 were issued in favour of the Plaintiff. When the Plaintiff presented both cheques for encashment, they were dishonoured on 29th April 2011. The Plaintiff then sent a legal notice dated 21st May 2011 which was refused to be received by the Defendants. The Plaintiff states that

he later learnt that the change of the land use for commercial purpose had still not been obtained by the Defendants and no construction has been raised. The market value of the land as projected by the Defendants was also exaggerated. In the aforementioned circumstances, the present summary suit for a recovery of Rs. 7,72,09,219, which was due to the Plaintiff as on 30th September 2011, was filed.

6. In response to the summons issued in the suit, the Defendants appeared before the Court on 14th December 2011 on which date they were directed to maintain *status quo* in respect of the title and possession of the land in question. The Defendants filed a memo of appearance on 17th December 2011. The order dated 18th January 2012 passed by the Court noted that "the learned counsel for the Plaintiff has no objection if the fresh notice in Form No. 4 in Appendix-B in the prescribed manner" is issued to the Defendants. The Court then noted that the counsel for the Defendants accepted notice and therefore service of notice was dispensed with. He informed the Court that Defendants will be taking necessary steps under Order XXXVII CPC to file appearance. The interim orders were directed to continue.

7. I.A. No. 2037 of 2012 was then filed by the Defendants under Order XXXVII Rule 3 CPC for permission to note the appearance of the Defendants. The Court noted that the appearance had been filed on 28th February 2012. The Plaintiff then filed I.A. No. 5016 of 2012 under Order XXXVII Rule 3(4) CPC for issuance of summons for judgment. The said application was listed before the Court on 25th April 2012 on which date

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counsel for Defendants requested for an adjournment. I.A. No. 4146 of 2012 under Order XXXVII Rule 3 CPC was also listed on that date.

8. On 31st May 2012, the Defendants were granted time to file a rejoinder in the said application subject to the costs of Rs. 5000 being paid to the Plaintiff within four weeks. Interim orders were directed to continue.

9. On 8th October 2012, the Court disposed of I.A. Nos. 2037 and 5016 of 2012 filed by the Defendants as the appearance has been taken on record. I.A. No. 5016 of 2012 filed by the Plaintiff was disposed of since summons for judgment had already been issued. I.A. No. 1097 of 2012 was also disposed of since the Defendant has already entered appearance. It was noted that although the application for leave to defend was stated to have been filed, and a counter affidavit thereto was already filed by the Plaintiff, the said application was not on record.

10. It is only on 14th January 2013 that the application for leave to defend, i.e. IA No. 468 of 2013, filed by the Defendants under Order XXXVII Rule 3(5) CPC was listed. On that date notice in the said application was directed to be issued. On 20th February 2013, the Court noted that the notice in the application was not issued as the process fee was not filed. A copy of the said application was directed to be supplied to the Plaintiff.

11. On 23rd May 2013, at the request of Defendant No. 2, an adjournment was granted subject to the payment of costs of Rs. 15000. On 26th July 2013, another adjournment was sought stating that the counsel for the

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Defendants was unwell. The Court then directed that the application for leave to defend will be listed on 30th July 2013 on which date it will be finally heard.

12. The Court has heard the submission of Mr. Sanjeev Puri, learned Senior counsel for the Plaintiff and Mr. Feroze Ahmad, learned counsel for Defendants.

13. Mr. Puri first pointed out that the application for leave to defend was time barred. The application had been first filed on 26th March 2012. When the matter listed before the Court on 21st October 2012, the said application was not listed, and the Defendants sought adjournment. Admittedly the application for leave to defend was numbered much later and was listed in the Court for the first time only on 14th January 2013. Learned counsel for the Defendants, on the other hand, submitted that when the Defendants first filed the application for leave to defend, it was well within time. The Registry pointed out unnecessary defects despite Defendants curing the defects on each and every occasion. Ultimately, the application was listed before the Court on 14th January 2013 since by then not only had the reply been filed but rejoinder had also been filed by the Defendants.

14. The Court finds that the application for leave to defend was first filed on 26th March 2012. However, a series of defects were pointed out by the Registry. These defects were not inconsequential. Many of these defects remain to be cured despite repeated re-filing of the said application for leave to defend. From the date stamps on the front page of the application, it is seen that the application was re-filed on 9th April, 20th April, 4th May, 10th

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July, 24th July, 9th August, 20th September, 8th October 2012 and 5th January 2013. The defect sheets show that a number of objections raised by the Registry were simply not removed although counsel for Defendants appears to have repeatedly made the endorsement "objections removed" when refilling the matter. Finally, when counsel for Defendants appears to have insisted on listing of the application before the Court, the following endorsement was made by the Registry while listing the application before the Court on 14th January 2013:

"About objections for statements, court fees, fair typed copy, left side margin and condonation delay application, the counsel has insisted in writing to place as it is at his risk subject to office objections."

15. The fact remains that till the above date, i.e., 5th January 2013, neither were the defects removed nor was any application filed for condonation of delay in re-filing. A properly constituted leave to defend application free of defects is expected to be filed within the time prescribed under the CPC for that purpose. With that object in view, a limited time is granted to a counsel or a party as the case may be, to remove the defects if any in the application and re-file it. In the present case, it is seen that despite more than ten re-filings of the same application, the Defendants failed to remove the defects. In the process, over nine months elapsed after the filing of the leave to defend application in the first instance. Worse still, the counsel for the Defendants did not even bother to file an application for condonation of delay in re-filing the leave to defend application. This has resulted in the very purpose of a restricted time limit prescribed by Order XXXVII Rule 3(5), which is unique to summary suits, being defeated.

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16. Consequently this Court holds that the application for leave to defend is time barred.

17. Nevertheless since counsel for parties have also been heard on the merits, the court proceeds to deal with the merits of the Defendants' application for leave to defend.

18. The case of the Defendants is that entire transaction was fraudulent. According to the Defendants, one Mr Satyendra Jain, a Chartered Accountant (CA) advised the Defendants that he could arrange for a private loan through one of his clients, i.e., the Plaintiff. It is stated that the Defendants were induced by the said CA and the Plaintiff to enter into the agreement dated 28th January 2010 for availing the loan through private funding from AREPL and that they were induced to handover the original registration papers of immovable property owned by Defendant No. 4, who had entered into a joint venture agreement for the development of the said land. It is admitted that the sum of Rs. 1.75 crores was disbursed in two instalments of Rs. 1.25 crores by cheque dated 8th May 2009 and Rs. 50 lakhs by cheque dated 25th May 2009.

19. According to the Defendants, the property papers had been retained in an escrow account. It is stated that the CA then asked Defendant No. 2 to get a current account opened in the name of Defendant No. 1 and advised that Defendant No. 4 should be made a signatory for operating the current account. It is stated that the said account was opened with an initial amount of Rs. 10,000. It is stated that within fifteen minutes of the account being

opened, two cheque books were issued and handed over along with the authorized signatory rubbery stamp for safe keeping and convenience of repayment to AERPL of the loan amount. According to the Defendants, the cheques were signed only by one of the Directors and the remaining signatures were to be obtained as and when the payments fell due. The Defendants state that Rs. 65 lakhs were paid through Real Time Gross Settlement (RTGS) on 23rd February 2010 into the current account towards repayment of the loan. Defendants found that a sum of Rs. 61,06,521 had been transferred to the personal account of Ravi Sharma by a cheque dated 23rd February 2010 and to another account by a cheque dated 26th February 2010. According to the Defendants five entries of 29th January 2010 in the accounts of the Defendants did reflect that the monies came from Ravi Sharma. It is stated in para 13 of the application as under:

"13. That the abovementioned entries on 29.01.2010 were circular in nature in so far as it came from the account of Ravi Sharma (A/c number 32030100000011) at Bank of Baroda, Lajpat Nagar, New Delhi to Shubh Marketing Pvt. Ltd. account (a/c number 32030200000098) i.e. Defendants' account at Bank of Baroda, Lajpat Nagar, New Delhi and then through those signed and blank cheques which were lying with Satyendra Jain in his safe custody and trust and on which Satyendra Jain had dominion and control, to Astute Real Estate Pvt. Ltd. (a/c number 32030200000011) whose account is also maintained at Bank of Baroda, Lajpat Nagar Branch, New Delhi and then finally again back into Ravi Sharma's (A/c number 32030100000011) at Bank of Baroda account in Lajpat Nagar Branch, New Delhi). It is worthy (*sic* 'worth') mentioning that Ravi Sharma through his wife Anshoo Sharma, Smita Mahesh (a relative of Ravi Sharma) and Main Raj Singh an employee of Satyendra Jain, controls the activities of Astute Real Estate Pvt. Ltd. which is actually a front company meant for the purposes of committing fraud and

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cheating in the nature of the one done in this case. Details of the abovementioned circular entries are set out in a tabular form in the annexed herewith as Annexure - 1."

20. Defendant No. 2 alleged that the blank cheques issued to the CA were misused by him in the given manner and that actually no monies had been received by the Defendants by the aforementioned cheques issued by the Plaintiff. According to the Defendants certain entries attracted the provisions of Prevention of Money Laundering Act. The details of the cheques purportedly misused by the CA are set out in para 18 of the application. In para 24, it is stated that "someone has impersonated" the Defendants and committed forgeries to open an account in connivance with the CA, Plaintiff and others and that a complaint has been lodged with the competent authorities for investigation and necessary action. Accordingly it is submitted that since the case raises a large number of triable issues, unconditional leave to defend should be granted.

21. In the reply filed to the aforementioned application, the Plaintiff has vehemently denied the aforementioned contentions. It is denied that the CA had any role in the alleged transaction except to the extent pleaded by the Plaintiff in para 3 of the plaint. It is pointed out that the Defendants have concealed the fact that they had excluded further documents to secure the loans advanced by the Plaintiff. It is pointed out that Defendant No. 2 has deliberately made a wrong statement as regards the multiple entries in the account of the Defendants on 29th January 2010. The fact that cheques earlier issued to the Defendants were replaced with cheques that were then dishonoured was conveniently omitted to be countered by the Defendants.

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On none of the occasions were the cheques dishonoured on the ground that they were signed by the unauthorised persons or had been forged. It is pointed out that the letter issuing stop payment instructions in relation to the dishonoured cheques was in fact written on 8th July 2011, after issuance of the notice dated 21st May 2011 by the Plaintiff. Even in that letter, it was not stated that the cheques were not signed by the authorised persons. It is pointed out that the Defendants have in fact not denied the loan agreement dated 28th January 2010, the creation of mortgage or even the dishonour of the cheques. They further have not denied issuing the letters dated 1st June 2010 and 28th October 2010. The fact that on 18th February 2010 Defendant No. 2 sought re-scheduling of the repayment of the loan agreement and issued further cheques dated 15th February 2010 and 17th March 2010 was also not denied. The Plaintiff has placed on record the orders passed by the Metropolitan Magistrate in the criminal complaint filed by the Plaintiff arising out of the dishonour of the cheques.

22. The Court finds that the Defendants have not offered any plausible explanation for the dishonour of the cheques issued by them. The story now put forth by the Defendants about the CA misusing the cheques appears to be an afterthought. The documents on record do not support such an explanation. The Defendants repeatedly sought rescheduling of the repayment of the loan. The letters addressed to the Plaintiff regarding dishonour of cheques have been placed on record. The memos issued by the banks giving the reasons for the dishonour of the cheques are also placed on record. Not even in one of the memos is it stated that the dishonour was due to the cheques not being signed by the authorised signatories. It is

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impossible to believe that the bank is in connivance with the Plaintiff as has been sought to be suggested by the counsel for the Defendants during the course of arguments. The defence appears to be a sham one and not worthy of consideration. The Defendants have in fact no defence whatsoever to the suit. Therefore, on merits, the Court finds that no case has been made out for grant of leave to defend much less an unconditional leave to defend.

23. Consequently, I.A. No. 468 of 2013 is dismissed and the defence is struck off. The suit is decreed as prayed for with costs of Rs. 10,000. Decree sheet be drawn up accordingly. The pending application is disposed of.



S. MURALIDHAR, J.

AUGUST 27, 2013

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