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

% *Date of Decision: 15.04.2014*

+ **CS(OS) 1062/2011**

ANIL TYAGI

..... Plaintiff

Through : Ms.Rachna Agrawal and Ms.Surbhi
Sharma, Advs.

versus

S.D. INFOSYS & ORS

..... Defendants

Through : Ms.Charu Dalal, Adv. for defendants
no.1 to 4.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (Oral)

CS(OS) No.1062/2011, I.A.No.1085/2014 and IA No.1086/2014

1. Plaintiff has filed the present suit under the provisions of Order XXXVII of the Code of Civil Procedure, 1980, for recovery of Rs.1,00,00,000/- (Rupees One Crore).
2. I.A. 1085/2014 has been filed by defendant no.2 and IA 1086/2014 has been filed by defendants no. 1, 3 and 4 under Order XXXVII Rule 3 (5) CPC seeking leave to defend.
3. The necessary facts, to be noticed which have led to the filing of the present suit and as stated in the plaint, are that the plaintiff is stated to be carrying on the business in the name and style of M/s Binary Computers Systems and is dealing in Computer Hardware and Software of various brands including Hewlett-Packard, Lenovo and Microsoft. Defendant no.1 is a partnership firm and defendants no.2 to 4 are its partners. Defendant no.5 is the manufacturer of

computers and laptops and defendant no.1 was the registered distributor of defendant no.5.

4. As per the plaint, the plaintiff and defendant no.1 used to purchase computers from each other based on their requirement and issue post dated cheques once the goods were delivered. Between December, 2010 and February, 2011 defendant no.1 had placed purchase orders with plaintiff and subsequently issued cheques to the plaintiff for the value of goods so purchased. The plaintiff has filed on record copies of 23 invoices issued by defendants no.2 to 4 duly signed by the representatives of the defendants. The plaintiff has also placed on record the original cheques, which were handed over by defendants no.2 to 4 to the plaintiff along with the corresponding original Return memos issued by HDFC Bank to the plaintiff. The plaintiff has also placed on record the communication dated 17.3.2011 by defendant no.2, which is stated to be in the handwriting of Mr. Manish Chawla, defendant no.2, and also an undated communication issued by defendant no.2 to H.P. Inida (P) Ltd., 6th Floor, Global Business Park, 'D' Tower, Gurgaon, whereby defendant no.2 has authorised the plaintiff to collect all pending claims/cheques on behalf of defendant no.2.

5. Communication dated 17.3.2011 issued by defendant No.2 reads as under:

“Dear Anil Ji

Thanks for all the things that you have done for me. I never find such kind of nice person in my whole life. I have to owe

you the money but after my all efforts I am not successful so I find the easiest way due to Ajay Chug. Pls take care of my relative and friends after me so that nobody can hassle them.

For your money kindly take it from HP. Over their you have to contact Mr.Arun Sood 9811148584, Suraj Dixit 09871097999 and Sunil Dutt 9810053115.

I am enclosing the Authorization Letter and few cheques of S.D. Infosys.

I told you that I will never cheat you.

Your friend

Sd/-
Manish Chawla
17.3.2011”

6. The undated communication also placed on record reads as under:

“To,
HP India (P) Ltd.
6th Floor Global Business Park
'D' Tower
Gurgaon.

I (Manish Chawla) authorizing Mr.Anil Tyagi (Binary Computers Systems : Laxmi Nagar) to collect my all pending claims cheques of HP on my behalf.

Thanks & Regds

Sd/- & Seal
Manish Chawla”

7. Learned counsel for the plaintiff submits that the present suit is based on invoices and dishonour of the cheques issued by defendants no.2 to 4 in favour of the plaintiff. Counsel has placed reliance on a judgement rendered by this Court in the case of M/s Harkaran Dass Deep Chand vs. Viren Agrotech Pvt. Ltd.

CS(OS) 2377/2010 wherein this Court has recognised invoices to be a written contract.

8. Reliance is also placed by counsel for the plaintiff on the dishonoured cheques to show that the present suit is maintainable under the provisions of Order XXXVII of CPC.
9. Counsel for the plaintiff also relies on **G.P. Bhatia vs. Dee Kay Inc. & Ors.** reported at 188 (2012) DLT 721, wherein reliance has in turn been placed on the case of **M/s.Sunil Enterprises vs. SBI** reported at AIR 1998 SC 237 wherein the Apex Court has drawn up the parameters to be considered by the court while dealing with the application for leave to defend. Relevant paras of the judgment of the Supreme Court reads as under:

“4.....

(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, 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."

10. Reliance is also placed by counsel for the plaintiff on **V.K. Enterprises Vs. Shiva Steels** III (2010) Banking Cases 718 (SC).

Paragraphs 3,4 and 8 to 10 of the judgment read as under:

"3. In the said application for leave to defend the suit, the Petitioner contended that the cheque in question had been handed over by the Petitioner to the Respondent-firm by way of security only and not for presentation. Furthermore, the said cheque was issued by the Petitioner on 11th October, 2000, but the date of the cheque was, thereafter, interpolated and altered from 11.10.2000 to 11.10.2006, and presented to the Bank. It was also indicated that apart from the signature on the face of the cheque and the date mentioned therein, the rest of the cheque was blank and an attempt was made by the Respondent to misuse the same with the intention of withdrawing or misappropriating the amount subsequently inserted in the cheque. A specific allegation was also made to the effect that the date of the cheque issued on behalf of the Petitioner firm for the month of October was always written with the Roman numerical 'X', which was altered and shown in ordinary numerals, which clearly establish the fact that the cheque in question had been doctored to obtain the benefit thereof six years after the same had been issued.

4. In the said application, it was also denied that any cheque of such a large amount had been issued to the Respondent after 1992 in order to bolster the case of the Petitioner that the cheque in question had been forged. It was ultimately stated in the complaint that the Respondent had concocted the story and the Bills placed on record by the Respondent were also forged as the Petitioner had neither purchased any material nor counter-signed the last 4 bills as per the details provided.

8. Order XXXVII C.P.C. has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted. What is required to be examined for grant of leave is whether the defence taken in the application under Order XXXVII Rule 3 C.P.C. makes out a case, which if established, would be a plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence would have been plausible had it not been for the fact that the allegations relating to the interpolation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the issuance of the cheque had never been disputed on behalf of the Petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means.

9. Against such cogent evidence produced by the plaintiff/respondent, there is only an oral denial which is not supported by any corroborative evidence from the side of the Petitioner. On the other hand, the ledger book maintained by the Respondent and settled by the Petitioner had been produced on behalf of the Respondent in order to prove the transactions in respect of which the cheque in question had been issued by the Petitioner.

10. In our view, the defence raised by the Petitioner does not make out any triable issue and the High Court, has dealt with the matter correctly and has justifiably rejected the Petitioner's application under Order XXXVII Rule 3 C.P.C. and the same does not call for interference by this Court. The Special Leave Petition is, therefore, dismissed, but without any order as to costs."

11. Leave to defend is sought by defendant no.2 on the ground that the plaintiff has taken advantage of the financial conditions of the defendants. It is submitted by counsel for defendants no.1 to 4 that 5 cheques were issued by the defendants to the plaintiff only as a collateral security with the condition that the same would not be presented for encashment without the consent of defendants no.1 to 4. It has further been submitted in the leave to defend application that the additional cheques sought to be relied upon by the plaintiff over and above the five cheques issued by defendants as security are forged and have not been signed by the defendants or any authorized signatory of the defendant no.1. It is further submitted by the counsel that the case of the defendants no.1 to 4 is that the goods, which were supplied by the plaintiff to defendants, were defective and not as per the specifications and thus defendants no.1 to 4 are claiming money from the plaintiff. Counsel further submits that defendant no.2 has not been able to file documents on record as the plaintiff made a complaint before the EOW Cell pursuant to which defendant no.2 was arrested and his books of accounts are not available with him anymore.

12. I have heard learned counsel for the parties and considered their

rival submissions. The present suit is based on invoices and dishonour of cheques issued by defendants no.2 to 4 in favour of the plaintiff.

13. The application for leave to defend filed by the defendant is to be decided on the touch stone of the law laid down by the Apex Court. In order to succeed the defendant must raise a triable issue. The application must disclose a good, fair, bonafide or reasonable defence.
14. The Apex Court in the case of **M/s.Sunil Enterprises (Supra)** has held that the Court must consider grant of unconditional leave in such cases where the defendant is able to raise a triable issue or raises a bonafide defence. The Court can consider grant of conditional leave in such cases where the defendants are able to show a reasonable defence unaffected by whether the defendant would finally succeed or not but where the defence raised by the defendant is sham or moonshine, in such cases, the plaintiff is entitled to a decree forthwith and the application for leave to defend is to be dismissed.
15. In the present case, in the light of original documents placed on record, which evidence that the goods were supplied to the defendants, post-dated cheques were handed over by the defendants to the plaintiff, which raises a presumption under Section 118 of the Negotiable Instruments Act in favour of the holder of the cheque, in view of the communication dated 17.3.2011 and the

undated communication wherein defendant no.2 admits the claim of the plaintiff, and also taking into consideration that not a single document has been placed on record by the defendants to support the stand taken by the defendants in the leave to defend application, I am of the view that the defence, sought to be raised by the defendants, is sham, moonshine and not bonafide, and the same is not borne out from the record. On the other hand the plaintiff has been able to establish, based on documents on record that the claim of the plaintiff is clear and undisputed.

16. In view of above, IA No.1085/2014 and IA No.1086/2014 seeking leave to defend are dismissed. Suit is decreed in favour of the plaintiff and against defendants No.1 to 4 in the sum of Rs.1 crore. Let the amount deposited by defendant no.5 in this Court be released in favour of the plaintiff, through counsel, together with interest accrued thereon without any further notice to the defendant. Plaintiff would be entitled to the balance amount together with *pendente lite* and future interest @8% per annum from the date of filing of the suit till realisation.
17. Decree sheet be drawn up accordingly.

APRIL 15, 2014
msr

G.S.SISTANI, J