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

% ***Judgment dated 18.12.2014***

+ **CS(OS) 1280/2014**

SONU Plaintiff

Through : Mr.Akil Rataeeya, Adv.

versus

PRITIKA FASHIONS PVT LTD & ORS Defendants

Through : Mr.Atul Shahi, Adv. for defendant no.2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

I.A. 14404/2014

1. Plaintiff has filed the present suit under the provisions of Order XXXVII of the Code of Civil Procedure for recovery of Rs.31,00,000/- together with *pendente lite* and future interest. The present suit is based on five cheques total amounting to Rs.31,00,000/-, which were dishonoured on presentation due to insufficient funds.
2. Despite the order dated 7.11.2014 passed by the learned Joint Registrar, the defendants have failed to trace and place the application stated to have been filed by the defendants no.1 and 2 under Order XXXVII of the Code of Civil Procedure seeking leave to defend on record. A carbon copy of this application has been handed over in Court today. According to this application, the present suit is liable to be dismissed as it is not maintainable under the provisions of Order XXXVII of the Code of Civil Procedure.
3. Learned counsel for the defendants submits that the defendants are

entitled to unconditional leave to defend as the plaintiff did not comply with the terms and conditions of the Agreement dated 1.8.2011 and on this ground the present suit is not maintainable and, thus, no amount is payable by the defendants to the plaintiff. It is also contended that the present suit is an abuse and misuse of the process of law and the plaintiff is not entitled to any relief. Learned counsel for the defendants has placed reliance on the Memorandum of Understanding signed between the parties, the original of which has been handed over in Court today. It is also contended that the Memorandum of Understanding filed by the plaintiff is fabricated and the plaintiff has intentionally erased certain clauses from the Memorandum of Understanding.

4. It is also submitted by the counsel for the defendants that the plaintiff has failed to return goods worth Rs.10 lacs to the defendants. Reliance is placed by counsel for the defendants on a legal notice dated 29.5.2013 issued by the defendants to the plaintiff calling upon the plaintiff to return the goods worth Rs.10.00 lakhs, which were illegal withheld by the plaintiff and the plaintiff did not respond to the legal notice and, thus, a triable issue has been raised by the defendants as the defendants would be entitled to adjustment of Rs.10.00 lakhs, if at all the plaintiff is able to prove that he is entitled to a sum of Rs.31.00 lakhs from the defendants.
5. Learned counsel for the plaintiff submits that the defendants had approached the plaintiff and offered the plaintiff to become their selling agent. The defendants had shown the plaintiff some of their showrooms and informed the plaintiff that their showrooms were earning huge profits. Pursuant to the discussion and negotiations, the parties entered into a Memorandum of Understanding dated 1.8.2011. The plaintiff was appointed as their selling agent in respect of the defendants company i.e. M/s Pritika Fashions. Counsel further submits that the defendants had

taken a showroom at Shop No.209, Gandhi Nagar, Ghaziabad, Uttar Pradesh, on lease from Mr.Shivam Goel and Mrs.Shika Goel, for the purpose of selling ready made garments, accessories, leather garments, shoes, watches, etc.

6. Counsel also contends that pursuant to the said Agreement, the plaintiff vide Cheque Nos.174227 and 17423 dated 6.6.2011 and 3.9.2011, respectively, made payment of Rs.25,00,000/- to the defendants towards refundable security. It is further submitted that a minimum payment of Rs.50,000/-, per month, was guaranteed to the plaintiff from 1.6.2011. Since the defendants did not pay the agreed sum of Rs.50,000/-, the defendants in discharge of its admitted debts, handed over following five cheques to the plaintiff, as detailed in para 11 of the plaint, however, the said cheques were dishonoured on account of insufficient funds:

- (i) Cheque No.10001 dated 1.5.2013 for a sum of Rs.20,00,000/-, drawn on Axis Bank Limited, Karkardooma Branch, New Delhi.
- (ii) Cheque No.10002 dated 1.5.2013 for a sum of Rs.5,00,000/-, drawn on Axis Bank Limited, Karkardooma Branch, New Delhi.
- (iii) Cheque No.200396 dated 1.5.2013 for a sum of Rs.50,000/-, drawn on Axis Bank Limited, Karkardooma Branch, New Delhi.
- (iv) Cheque No.200397 dated 1.5.2013 for a sum of Rs.50,000/-, drawn on Axis Bank Limited, Karkardooma Branch, New Delhi.
- (v) Cheque No.200395 dated 5.6.2013 for a sum of Rs.5,00,000/-, drawn on Axis Bank Limited, Karkardooma Branch, New Delhi.

7. Learned counsel for the plaintiff submits that the defence sought to be raised with regard to the alleged goods handed over is false as the defendant was in possession of the shop, in question and, thus, he had full control over the goods and stocks. Counsel for the plaintiff has drawn the attention of the Court to various clauses of the Memorandum of Understanding in support of his arguments. It is further submitted that as per the terms of the Memorandum of Understanding the defendant company was to remain in exclusive possession of the showroom and the plaintiff being the selling agent had no role to claim tenancy over the premises in terms of Clause 1 of the Agreement. The plaintiff also had no right over the stock, which was to be provided by the defendants in terms of Clause 4 of the Agreement. Counsel further submits that the legal notice sought to be relied upon by the defendants was not received by the plaintiff nor the defendants have not placed any proof to show that either the said legal notice was dispatched to the plaintiff or the same was received by the plaintiff.
8. Learned counsel for the plaintiff submits that in the proceedings initiated under Section 138 of the Negotiable Instruments Act the defendants did not lead evidence and the only defence raised by the defendants was that the Memorandum of Understanding between the parties had not been terminated and the security amount was to be paid only after the termination of the Memorandum of Understanding, besides the fact that the plaintiff has misused the blank cheques, which was handed over to them and, thus, the argument was rejected by the trial court. Reliance is placed by counsel for the plaintiff on para 6, 10, 11, 14 and 15 of the judgment of the trial court, which reads as under:

“6. Complainant’s evidence was followed by the statement of accused U/s 313 CrPC, wherein, the entire incriminating evidence was put to the accused. During the statement, the accused stated that refundable security amount was to be repaid after termination of the agreement and the agreement was not terminated. Further stated, the complainant misused the security cheques before the payment became due. Accused also stated that cheque Ex.CW1/4 to Ex.CW1/6 were issued for payment of minimum guarantee amount but allegedly minimum guarantee amount was paid in cash. Accused opted to lead evidence in his defence. But the defence was not lead despite given sufficient opportunities. Hence, the opportunity was closed.

10. The first defence pleaded by the accused is that cheques Ex.CW1/2 and Ex.CW1/3 were issued undated on 4.10.2012 as a security towards the refundable amount of Rs.25,00,000/-. The contention of the accused is that the undated security cheques were presented by the complainant before the agreement was terminate and before the payment became due. In simple words, defence is that security cheques were misused.

11. To support of the above contention, the complainant was confronted with the photocopies of the impugned cheques (Ex.CW1/2 and Ex.CW1/3) during his cross examination. The same were admitted by him, hence, the photocopies were Ex.CW1/X-1 & Ex.CW1/X-2. By producing these photocopies, Id. Counsel for the accused sought to establish that cheques were issued undated and same were for security. Now, the legal question is that whether this fact alone is sufficient to arrive at a finding that cheques Ex.CW1/2 & Ex.CW1/3 were issued for purpose of security.

14. Now, the termination of agreement. Second part of the defence put forth by the Id. Counsel for the accused is that agreement was not terminated and the presentation of impugned cheques was premature and not valid. Firstly, the issuance of cheques on 04.10.2012 is itself corroborating the termination of agreement. Secondly, it is averred in the complaint that the accused was not making the payment of the minimum guarantee amount as per the agreement. This fact is apparently not disputed as no question or suggestion was put to the complainant in this regard during his cross examination. The non payment of minimum guarantee amount by the accused is also the proof of the fact that

the terms of agreement were not being complied with by the accused and accordingly the agreement was terminated.

15. As far as cheques Ex. CW1/4 to Ex. CW1/6 are concerned, the accused has stated that same were issued for payment of minimum guarantee amount but explained that guarantee amount was paid in cash. However, no statement of account or receipt was produced for proving the alleged payment. Mere statement u/s. 313 CrPC is not sufficient to prove the alleged payment and accordingly also not sufficient to rebut the statutory presumptions u/s. 118 and 139 N.I.Act.”

9. I have heard counsel for the parties and also perused the plaint and supporting documents, which have been placed on record.
10. The parameters for deciding an application for leave to defend are well settled by the Apex Court in the case of *M/s.Mechalee Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation* AIR 1977 SC 577. 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 read as under:

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246 , Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 37 C.P.C. in the form of the following propositions (at p. 253):

- (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 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. In the case of *V.K. Enterprises Vs. Shiva Steels* reported at (2010) 9 SCC 256 it was observed by the Apex court as follows:

“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.”

12. In the case of *Defiance Knitting Industries (P) Ltd. v. Jay Arts* reported at (2006) 8 SCC 25, the court observed that "if the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious, it may refuse leave to defend altogether."
13. The present application for leave to defend is to be decided on the touch stone of the law laid down by the Supreme Court of India.

14. In this case, a Memorandum of Understanding was executed between the parties on 1.8.2011, pursuant to which the plaintiff was appointed defendants' selling agent in respect of defendants company i.e. M/s Pritika Fashions. The plaintiff made a payment of Rs.25,00,000/- to the defendants towards refundable security deposit vide cheques dated 6.6.2011 and 3.9.2011. Plaintiff was assured minimum guaranteed amount of Rs.50,000/-, per month, from 1.6.2011. Since the defendants defaulted in making the payment of minimum guaranteed amount, the plaintiff requested to the defendant to refund the security deposit and also sought recovery of Rs.6,00,000/-, which was due and payable by the defendants. The defendants, in discharge of their liability, issued five cheques, as detailed above, which were dishonoured on account of insufficient funds.
15. Reading of the Memorandum of Understanding between the parties more particularly, Clauses 1, 3, 4, 5, 6 and 9 of the Agreement, shows that there is no room for doubt that the entire stock belonged to the defendants and the defendants was in absolute control of the shop as well as all the entire stocks. More so, defence sought to be raised with regard to the defendants appears to be an afterthought as the same was not raised by the defendants in the proceedings under Section 138 of the Negotiable Instruments Act. Further the defendants have failed to place on record any proof that the legal notice was issued to the plaintiff or the same was duly received by the plaintiff.
16. While considering the application for leave to defend, the Court must consider as to whether the defendant has been able to raise a strong and bona fide defence or whether the defence sought to be raised by the defendant is sham, moonshine and mala fide. In case it is seen that the defence is sham, moonshine and mala fide, the application for

leave to defend is to be dismissed and the suit is to be decreed. On the other hand, in case a triable issue is raised indicating a fair and bonafide defence, the Court must consider granting conditional leave; and in case a strong defence is raised by the defendant, the defendant would be entitled to unconditional leave.

17. The present leave to defend application does not disclose any triable issue. Not even a single document has been placed on record by the defendants to substantiate the defence, sought to be raised in the present application for leave to defend. The defendants had issued five cheques in favour of the plaintiff, which were dishonoured due to insufficient funds. At no stage, the defendant wrote to the plaintiff informing him of the acts of fabricating and interpolating the Memorandum of Understanding, which is sought to be raised in these proceedings.
18. It may also be noticed that the application for leave to defend is not on record. Despite opportunities having been granted to the defendants on 15.12.2014 and 16.12.2014 to have the said application traced and placed on record, the same has not been placed on record. Even today the leave to defend application is not on record. No diary number of filing the leave to defend application has been provided and the arguments have only been addressed on the basis of photocopy of the application supplied by counsel for the defendant in Court. Even otherwise, in the absence of any application for leave to defend and in the absence of any efforts by the defendants to have the same traced and placed on record, leave to defend application is dismissed.
19. In my view, the defence raised by the defendant in this application is sham and moonshine and is not *bona fide*. Resultantly, the plaintiff must succeed. The plaintiff would be entitled to a decree in the sum of

Rs.31.00 lakhs with *pendente lite* and future interest at the rate of 8%,
per annum. Let a decree sheet be drawn up accordingly.

I.A. 14403/2014 (O 39 R 5 CPC)

20. Application stands disposed of in view of the order passed in the suit.

DECEMBER 18, 2014
msr

G.S.SISTANI, J