

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

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Date of decision: 4th March, 2014

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CS(OS) No.977/2010

SRI BALAJI FINANCER

..... Plaintiff

Through: Mr. Anish Shrestha with Mr. Sudhir
Kumar, Mr. Ajay Kumar & Mr. Vikas
K. Jha, Advs.

Versus

SURAJ PRAKASH

..... Defendant

Through: Mr. Maninder Jeet Singh, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

IA No.13973/2010 (of the plaintiff for issuance of summons for judgment)

1. Summons for judgment already stand issued and leave to defend application filed.

2. This application is accordingly disposed of.

IA No.1959/2011 (of the plaintiff for issuance of notice of the application for summons for judgment)

3. This application also has become infructuous and is disposed of.

IA No.8712/2011 (of the defendant for leave to defend)

4. The plaintiff has instituted this suit under Order 37 of the Code of Civil Procedure, 1908 (CPC) for recovery of Rs.33,24,000/- with interest at the rate of 24% per annum, *pendente lite* and future, pleading:

- (i) that the plaintiff advanced a loan of Rs.18,00,000/- to the defendant on various dates in the year 2007 vide account payee cheques issued to the credit of the account No.532202010002767 of the bank of the defendant and amount of which cheques was credited to the bank account of the defendant;
- (ii) that the defendant agreed to pay a compound interest at the rate of 24% per annum with monthly rests;
- (iii) that as on 31.12.2009, a sum of Rs.15,23,764/- was due towards interest and thus the defendant as on that date owed a total sum of Rs.33,24,000/- to the plaintiff;
- (iv) the defendant also executed demand promissory notes in favour of the plaintiff in lieu of the said loan;
- (v) that the defendant towards part payment of interest, issued 26 cheques to the plaintiff for a total sum of Rs.4,80,000/- and particulars of which cheques are given in the plaint;

- (vi) that all the aforesaid cheques were however returned dishonoured on account of insufficiency of funds in the bank account of the defendant and complaints of offence under Section 138 of the Negotiable Instruments Act, 1881 have been filed; and,
- (vii) that the plaintiff inspite of demand vide legal notice, has neither replied nor re-paid the money.

5. The plaintiff along with the suit has filed Form-A & Form-B issued by the Registrar of Firms, Delhi, 19 original Promissory Notes all dated 14.12.2009 on the basis of which the suit has been filed and copy of the legal notice issued prior to the institution of the suit along with proof of delivery thereof.

6. The defendant seeks leave to defend on the grounds:

- (a) that the Promissory Notes on which the suit is based are forged and fabricated documents, which do not bear the signatures of the defendant;
- (b) that there was never any agreement between the plaintiff and the defendant for payment of any interest, much less compound interest or at 24% per annum or with monthly rests;

- (c) that the Promissory Notes on which the suit is based are without any consideration;
- (d) that the application filed by the plaintiff under Order 37 Rule 3(4) of the CPC for issuance of the summons for judgment does not confer to or meet the basic mandatory requirement of law; the leave to defend is however filed without prejudice to the said objection.

7. The plaintiff has filed reply to the application for leave to defend and to which a rejoinder has been filed by the defendant. However need is not felt to advert thereto as the plaintiff in its reply has merely reiterated the contents of the plaint and the defendant in the rejoinder has not stated any new fact and the counsels also have not in the hearing referred thereto.

8. The counsels have been heard.

9. The counsel for the applicant / defendant has argued:

- (I) that once the defendant, in the leave to defend application, has disputed his signatures, leave to defend has axiomatically to be granted. Reliance in this regard is placed on ***Gurbachan Singh, Maksudanlal Vs. Sudershan Trading Co.*** 1980 Rajdhani Law Reporter (Note) 68;

- (II) that all the 19 pro-notes on which the suit is based are of the same date i.e. 14.12.2009 and no reasonable person would on the same day execute as many as 19 pro-notes and a prudent person would have executed a single pro-note for the entire amount due;
- (III) that the suit filed in the year 2010 is barred by time; in this regard, attention is invited to the bank statement filed by the plaintiff subsequent to the filing of the suit and which was permitted to be taken on record with the consent of the defendant vide order dated 12.09.2013, to show that the cheques issued by the plaintiff in favour of the defendant were of the year 2007 and the suit has been filed after three years therefrom;
- (IV) attention is invited to the application filed by the plaintiff for issuance of summons for judgment to show that the plaintiff therein has not verified the cause of action as is mandatorily required to be done; reliance in this regard is placed on *Shri Satish Kumar Vs. Prism Ceme Ltd.* 107 (2003) DLT 36.

10. Per contra, the counsel for the plaintiff has argued that the defendant has not denied receipt of Rs.18,00,000/- from the plaintiff and issuance of cheques in December, 2009 as pleaded in the plaint for Rs.4,80,000/- in favour of the plaintiff in part payment of interest owed by the defendant to the plaintiff and both of which are an admission of the liability of the defendant and the defendant is thus not entitled to leave to defend.

11. The counsel for the defendant in rejoinder has argued that the cheques for a total sum of Rs.4,80,000/- were issued for a separate transaction and the plaintiff has filed a separate suit for recovery of the said amount of Rs.4,80,000/-. However the counsel for the defendant admits that no such plea has been taken in the leave to defend. No cognizance thereof can thus be taken. The counsel for the defendant has also generally referred to *Mechalec Engineers & Manufacturers Vs. M/s. Basic Equipment Corporation* AIR 1977 SC 577.

12. I have weighed the rival contentions.

13. In my view, no case for grant of leave to defend is made out for the following reasons:

- (a) As rightly contended by the counsel for the plaintiff, in the entire application for leave to defend, the defendant has not

controverted the plea in the plaint of the plaintiff, in the year 2007, having advanced a loan of Rs.18,00,000/- to the defendant by issuing cheques to the credit of the bank account of the defendant. The defendant has also not disputed the account number pleaded in the plaint and to the credit of which the cheques were issued by the plaintiff and in which the monies under the said cheques was received.

- (b) The defendant has not given any other explanation for the receipt of Rs.18,00,000/- in his bank account by cheques drawn by the plaintiff and has not pleaded refund thereof.
- (c) Rather, the counsel for the defendant, during the hearing, in support of his contention that the suit claim is barred by time, referred to the bank statements which were taken on record with the consent of the counsel for the defendant, which show credit from the account of the plaintiff to the account of the defendant in the year 2007 of the aforesaid sum of Rs.18,00,000/-.
- (d) Though the plaintiff has in the plaint expressly pleaded that the 26 cheques for a total amount of Rs.4,80,000/- were issued by the defendant in favour of the plaintiff towards part payment of

the interest on the aforesaid loan amount of Rs.18,00,000/- but the said fact has also not been controverted by the defendant in the application for leave to defend and no other explanation for issuance of the said cheques been furnished.

- (e) Order 37 Rule 3 (6)(a) of the CPC provides that if the defendant has not applied for leave to defend, the plaintiff shall be entitled to judgment forthwith. The defendant, by not controverting the material averments in the plaint of grant of loan by the plaintiff to the defendant and issuance of cheques by the defendant in part payment of the interest on the said loan, is deemed to have admitted the said facts and to have no defence thereto.
- (f) Once the defendant has admitted the transaction of loan, the onus is on the defendant to show that such loan amount has been repaid or is otherwise not due. The defendant in the present case has not stated anything whatsoever in this regard also.
- (g) In the aforesaid state of affairs, the bare denial by the defendant of the pro-notes for a total sum of Rs.33,24,000/- is found to be frivolous and vexatious. A comparison with the naked eye, of

the signatures of the defendant on the application and affidavit for leave to defend and on the said pro-notes and receipts, show the same to be identical.

- (h) The argument of the defendant, of execution of 19 different pro-notes on one day instead of a consolidated pro-note for the entire amount being contrary to the normal course of human conduct and being suspicious, is also not found to have any merit. The amount of Rs.18,00,000/- advanced by the plaintiff to the defendant, also was on different dates and the different pro-notes have been made for each of such transaction and with interest computed separately on each transaction.
- (i) The judgment of this Court in ***Gurbachan Singh, Maksudanlal*** (supra) in the circumstances aforesaid has no application. In fact, the said judgment also holds that notwithstanding the denial of execution of a document, leave can be refused if the denial is found to be *mala fide*. The denial by the plaintiff of the signatures on the pro-notes and receipts, on which the suit is based, for the reasons aforesaid is indeed *mala fide*.

- (j) The argument raised during the hearing, of the suit claim being barred by time has no basis in the pleadings in the application for leave to defend. Else, on the averments in the plaint and the documents, the suit claim is found to be within time.
- (k) I also do not find any merit in the argument of the counsel for the defendant, of the defendant being entitled to leave to defend for the reason of the application for issuance of summons for judgment being not in strict compliance with the language of Order 37 of the CPC. Though undoubtedly, this Court in *Shri Satish Kumar* (supra) held the application for issuance of summons for judgment to be defective if does not verify the cause of action, but in the context of a proceeding under Order 37 Rule 4 of the CPC where the plea of the defendant was of being not served with the summons for judgment in accordance with law and being thus not able to apply for leave to defend. On the contrary, here, even if it were to be held that the application for issuance of summons for judgment filed by the plaintiff was defective, the fact remains that summons for judgment were issued and served and the defendant in response

thereto has sought leave to defend, though without prejudice to his plea of the application for issuance of summons for judgment being defective. In spite of my repeated asking, the counsel for the defendant has been unable to tell as to what prejudice has been caused to the defendant by the defect even if any in the application for issuance of summons for judgment. I have during the hearing in fact also put to the counsel for the defendant that even if a finding in this regard were to be returned in his favour, the same would still not entitle the defendant to leave to defend and the only consequence thereof would be, directing the plaintiff to file a fresh application for issuance of summons for judgment and issuance of fresh summons for judgment to the defendant. The counsel for the defendant has not been able to tell as to what other defences / grounds need to be taken by the defendant, if given an opportunity to apply afresh for summons for judgment.

14. The application for leave to defend is accordingly dismissed.

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15. Axiomatically, the plaintiff has become entitled to a decree forthwith.

16. The suit is decreed in favour of the plaintiff and against the defendant, for recovery of Rs.33,24,000/-. As far as interest, *pendente lite* and future is concerned, though the counsel for the plaintiff has contended that the plaintiff is entitled to interest for the said period also at the agreed rate as mentioned in the pro-notes but it is deemed appropriate to award interest, *pendente lite* and future at the rate of 12% per annum.

17. The plaintiff is also entitled to costs of the suit.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

MARCH 04, 2014

‘gsr’..