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

+ **CS(OS) 1377/2012**

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Judgment dated 12.03.2014

M/S GOLDSQUARE SALES INDIA PVT LTD Plaintiff

Through : **Mr.Sanjeev Sindhwani, Sr. Adv. with
Mr.Khalid Arshad, Adv.**

versus

RAHUL NARVEKAR Defendant

Through : **Mr.Rakesh Kumar, Adv.**

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

I.A. 21227/2013.

1. Plaintiff has filed the present suit under the provisions of Order XXXVII of the Code of Civil Procedure for recovery of Rs.50.00 lakhs.
2. As per the plaint, the present suit is based on an Agreement entered into between the parties on 1.7.2011 wherein the defendant has admitted the receipt and his liability to repay Rs.50.00 lakhs, which was received by him as a loan from the plaintiff.
3. Summons in the suit were issued in the prescribed form.
4. The present application, being I.A.No.21227/2013, has been filed by defendant seeking leave to defend.
5. Before dealing with the rival submissions of counsel for the parties, it would be necessary to notice the brief facts of the case.
6. The plaintiff is a company incorporated under the Companies Act, 1956,

and is engaged in the business of wholesale trading of branded luxury fashion goods and accessories. The defendant was employed with the plaintiff company on 3.11.2009 to look after the brand sourcing work of the plaintiff company. The employment of the defendant ceased in the month of March, 2011. At the initial stage of his employment, the defendant was allotted 1184 shares of the plaintiff company with a precondition that in case the defendant leaves the employment of the plaintiff company then his shares would be repurchased by the company at a price paid by the defendant. The shares were allotted to the defendant at a par value of Rs.10/-, per share, amounting to Rs.11,840/-.

7. In the month of April, 2011, as the defendant had stopped coming to the office of the plaintiff company, he had ceased to be in their employment. The defendant informed the plaintiff that he was in urgent need of money as his wife was unwell. The defendant had agreed that notwithstanding the Share Subscription Agreement dated 21.10.2010, wherein his shareholding would be acquired at the par value, his shares should be bought at a higher value and pursuant thereto he requested for a loan of Rs.50.00 lakhs from the plaintiff company. The plaintiff extended an interest free loan in the aforesaid sum of Rs.50.00 lacs vide cheque bearing no.003592, dated 22.4.2011, drawn on Kotak Mahindra Bank Limited.
8. Appreciating the personal difficulty of the defendant, the plaintiff also entered into a Buy Out Agreement with the defendant on 1.7.2011, as per which the defendant, by his own free will, agreed to sell his shares to the plaintiff company at an agreed price of Rs.14,780.40, per share, total amounting to Rs.1.75 crores for 1184 shares. In effect, the shares, which were purchased by the defendant for the value of Rs.11840/-, were being repurchased from him for Rs.1.75 crores. Under the aforesaid agreement,

it was also agreed that Rs.1.00 crore would be paid to the defendant by the plaintiff on the closure of the Buyback Scheme, under which the company was repurchasing the shares of the defendant and Rs.75.00 lakhs would be paid once the interest free loan amount of Rs.50.00 lakhs was returned to the plaintiff by the defendant.

9. According to the plaint, the defendant not only retained the said sum of Rs.50.00 lakhs but also vide email dated 10.11.2011 terminated the Agreement dated 1.7.2011.
10. In the present application, the ground taken by the defendant for seeking leave to defend is that the present suit is not maintainable under the provisions of the Order XXXVII of CPC, as the defendant has not admitted his liability to pay to the plaintiff.
11. It was further argued by Mr.J.P. Singh, learned Senior Advocate that since there is no admitted liability on the part of the defendant, the matter can only be decided on the basis of evidence.
12. It has further been averred in the present application for leave to defend that the suit of the plaintiff is vexatious as the plaintiff has not approached this Court with clean hands and it has suppressed material facts from the Court. The present application has also given details as to how the defendant was involved in the incorporation of the plaintiff company and the active role played by him. This application also describes in detail how Mr.Harish Behl, one of the Directors of the plaintiff company, with a view to gain unfair advantage of the defendant's wife being ill, played a fraud upon the defendant and induced him to sell shares for a minimum of Rs.1.75 crores and how the defendant was made to sign the Agreement dated 1.7.2011 under pressure.
13. *Per contra*, it is the case of the plaintiff that the present suit is based on a written contract. The agreement dated 1.7.2011 has been relied upon by

learned senior counsel for the plaintiff to show that the agreement was entered into between the parties and this agreement acknowledges an interest free loan of Rs.50.00 lakhs paid by the plaintiff to the defendant and also acknowledges the fact that the loan was to be repaid by the defendant to the plaintiff. Learned senior counsel has also relied upon the communication dated 10.11.2011 wherein the defendant has, while cancelling the Agreement dated 1.7.2011, enclosed a cheque bearing no.000193, drawn on Kotak Mahindra Bank, South Extension Branch, dated 10.11.2011 for repayment of loan. Learned senior counsel for the plaintiff contends that although no cheque was in fact enclosed by the defendant with the communication dated 10.11.2011 yet he had mentioned in the said communication that he was returning the amount of Rs.50,00,000/- vide the aforesaid cheque, which would show acknowledgement of an admitted liability.

14. Mr. Sidhwani, learned senior counsel for the plaintiff further contends that assuming, without admitting, that the present suit is not maintainable under the provisions of Order XXXVII of CPC, the suit can still be decreed on the basis of admission made by the defendant in the agreement dated 1.07.2011 and in the communication date 10.11.2011.
15. I have heard learned counsel for the parties and considered their rival submissions. In my view the plaintiff is entitled to a decree based on admission as also on the ground that the leave to defend application does not disclose any triable issue. The defence of the defendant is sham and moonshine. To appreciate the rival submissions of learned counsel for the parties and since the present suit is based on the agreement dated 1.7.2011, I deem it appropriate to reproduce relevant clauses of the Agreement. Clauses B, C and D read as under:

- “B. Rahul is desirous of offering his entire shares in the Company under the buyback scheme to be initiated by the Company. The price per share for the buyback scheme of the Company shall be Rs.14,780,40/- (Rupees Fourteen Thousand Seven Hundred Eighty Rupees and forty paisa) (“**Buyback Price**”). The total consideration to be paid by the Company to Rahul under the buyback scheme would be Rs.17,500,000/- (Rupees One Crore Seventy Five Lacs) (**Buyback Consideration**).
- C. Further, the Company has given an interest free loan of Rs.5,000,000/- (Rupees Fifty Lacs) to Rahul (“**Loan Amount**”).
- D. Furthermore, Rahul acknowledges that the Company has stopped paying salary to him since 1st of April, 2011 as he is not rendering any services to the Company.

NOW THEREFORE, in consideration of the premises and mutual covenants and agreements herein contained, and other goods and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. PROCESS

- 1.1 Rahul hereby agrees to unconditionally offer his entire shares in the Company under the buyback scheme at the Buyback Price.
- 1.2 On closure of the buyback offer, the Company will pay Rs.10,000,000/- (Rs.One Crore) to Rahul as a part of the Buyback Consideration by way of bank draft or payorder.
- 1.3 Simultaneous with the action contained in clauses 1.1 and 1.2 above, Rahul shall return the Loan Amount to the Company.
- 1.4 Upon receipt of the Loan Amount, the Company will release the balance of the Buyback Consideration, i.e. Rs.7,500,000/- (Seventy Five Lacs) to Rahul.”

[Emphasis added]

16. It is also the case of the plaintiff that the defendant has admitted his liability in the letter dated 10.11.2011 by which defendant terminated the buyout agreement dated 1.7.2011. This communication is reproduced below:

“To,

The Director,
Goldsquare Sales India Pvt. Ltd.
136A, Vishal House, Opp. LSR College,
Zamrudpur, New Delhi-110048.

BY HAND

Dated : 10 November 2011

Dear Sir,

Sub: Termination of Buy Out Agreement dated 1 July 2011

An agreement dated 1 July 2011 titled as “But Out Agreement” (hereinafter referred to as “Agreement”) was executed between me and the Company based on certain representations including that there was a buy back scheme in progress. These representations have subsequently been found to be incorrect.

Further, the Agreement was done at a time of service personal crisis and in a moment of extreme weakness brought about by my personal crisis.

I am terminating this Agreement with immediate effect, I am also returning the amount of Rs.50,00,000/- (Rupees Fifty Lakhs only) interest free loan advanced to me by the Company Please find enclosed cheque number (000193) drawn on (Kotak Mahindra Bank, South Extension Branch, New Delhi) dated (10th November 2011) towards this amount. Please provide acknowledgement of the same by the Company as an unequivocal acceptance of the immediate termination of the Buy Out Agreement by the Company.

This letter issues without prejudice to all rights available to me in law to take further action as deemed fit.

With Regards,

Rahul Narvekar”

Emphasis added

17. Execution of the agreement dated 1.7.2011 has not been disputed; the factum of payment of Rs.50.00 lakhs to the defendant is also not in dispute; and the same has in fact been reiterated by the defendant himself in the communication dated 10.11.2011. What has been disputed is that the defendant was made to sign the Agreement by playing a fraud upon him and not giving him a fair price of his shares. The issue with regard to buyout of the shares of the defendant by the plaintiff is not a subject matter of the present suit as the defendant has terminated this agreement and admittedly the plaintiff has not taken any step to have the Agreement specifically enforced. Since the fate of the Agreement is not the subject matter of the present suit no observations with regard to the said Agreement are required except that the Agreement acknowledges Rs.50.00 lakhs received by the defendant and so does the communication dated 10.11.2011.
18. In my view, the admission made by the defendant is not only reflected in the aforesaid two documents but is also reflected in various paragraphs of the present application for leave to defend. Para 20(d), para 21 and para 22 read as under:

“20 (d) In the mean time, the Defendant/Applicant’s wife fell ill for which the Defendant/Applicant was in need of money for getting his wife operated. The Defendant/Applicant approached the Plaintiff for obtaining loan. The Defendant/Applicant was informed that a loan of Rs.50 lacs was agreed to be given to the Defendant/Applicant. The

Defendant/Applicant was informed that the said loan was interest free loan as the Defendant/Applicant was a Director in Plaintiff.

21. That it is pertinent to mention herein that no date of repayment of the said loan was ever decided between the parties and as per clause 1.4 of the Buy-out agreement it was mutually agreed between the parties that upon receipt of the loan amount, the Company will release the balance of the buy-back consideration to the Defendant.
22. That this clause of the Agreement raises a genuine question that when the plaintiff company alleges that it has purchased the shares of the Defendant, though not admitted by the Defendant and definitely has not paid any amount to the Defendant on that account then there is no question of any repayment of loan amount of Rs.50,00,000/- as the Plaintiff company was already in the possession of its loan amount and no loss whatsoever, the Plaintiff company is suffering from. It is submitted that being one of the Directors of the company, the Defendant had a right to obtain an interest free loan from the Plaintiff company and since there was no time limit for returning the same and in the meanwhile the development of buying out of the purchase of the shares of the Defendant also took place which gave a new turn to the transaction, if any, entered into between the parties, therefore, the Plaintiff company has no right, whatsoever, to ask for a return of loan, if any, from the Defendant, because, on the one side the Plaintiff company is showing its intention of buying the shares of the Defendant at a throw away prices, which the Plaintiff has clearly alleged in its suit that they have already started the process of buying out the shares of the Defendant and are ready to pay the mutually agreed amount as per the buy out agreement to the Defendant and to the contrary, on the other hand the Plaintiff company has filed the present suit for recovery of Rs.50,00,000/- against the Defendant, which is absolutely paradoxical things to each other, because the Plaintiff is not clear about its demand from the Defendant. Therefore, the present suit of the Plaintiff does not stand in the present form being not maintainable and deserves to be dismissed.”

19.Law with respect to judgment on admission has been discussed in the case of

Uttam Singh Duggal and Company Ltd. Vs. United Bank of India & Ors,

reported at (2000) 7 SCC 120, the Apex Court has held as under:

12. As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that “where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled”. We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed.”

20. It was also observed in the case of ***Rajiv Sharma and Another Vs. Rajiv Gupta***, reported at (2004) 72 DRJ 540, that the purpose of Order XII Rule 6 of the CPC is to enable the party to obtain speedy justice to the extent of relevant admission, which according to the admission, if the other party is entitled for. Admission on which judgment can be claimed must be clear and unequivocal. In the case of ***Ms. Rohini V R.B.Singh***, reported at **155 (2008) DLT 440** it has been held as under; “*it is trite to say that in order to obtain judgment on admission, the admissions must be clear and unequivocal.*”

21. A careful reading of the agreement, letter dated 10.11.2011 and paragraphs 20(d), 21 and 22, which form part of the application for leave to defend, leaves no room for doubt that the defendant has admitted his liability of Rs.50.00 lakhs received by him as a loan from the plaintiff.

22. The parameters to be considered by the court while dealing with an application for leave to defend have been discussed in the case of ***Mechelec Engineers and Manufacturers v. Basic Equipment Corporation***, reported at

1977 AIR (SC) 577, the Apex Court has discussed. Relevant portion of the judgment reads as under:

8. In *Kiranmoyee Dassi Smt v. Dr J. Chatterjee*, (1945) 49 Cal WN 246, 253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC 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.”

23.It would also be useful to reproduce paragraphs 10 and 11 of **V.K. Enterprises And Another v. Shiva Steels**, reported at (2010) 9 Supreme Court Cases 256:

10. Order 37 CPC 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.
11. What is required to be examined for grant of leave is whether the defence taken in the application under Order 37 Rule 3 CPC 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.

24.A Division Bench of this court in **Bank of India and Anr. v. Madura Coats Ltd.**, reported at 157 (2009) DLT 240 (DB), has also discussed the law on leave to defend and has held as under:

18. It is settled law that in a summary suit, in order to entitle the defendants for leave to defend, it would be incumbent upon them to show that they have a substantial defence and triable issue to raise and their defence is not frivolous or vexatious. AIR 1988 Delhi 308(310).

20. It is also well settled law that at the stage of granting leave to defend, parties rely on affidavits in support of the rival contentions. Assertions and counter-assertions made in affidavits may not afford safe and acceptable evidence so as to arrive at an affirmative conclusion one way or the other unless there is a strong and *prima facie* material available to show that the facts disclosed in the application filed by the applicant seeking leave to defend were either frivolous, untenable or most unreasonable. No hard and fast rule or strait-jacket formula can be laid down for judging this question.

21. The Supreme Court in *Defiance Knitting Industries Pvt. Ltd. v. Jay Arts*, (2006) 8 SCC 25, reiterated the abovesaid position while holding that:

“While giving leave to defend in the suit the Court shall observe the following principles:

- ‘(a) If the Court is of the opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally. The question whether the defence raises a triable issue or not has to be ascertained by the Court for the pleadings before it and the affidavits of parties.
- (b) 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.
- (c) In cases where the Court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the Court may impose conditions in granting leave to defend.’”

22.

23. In *Raj Duggal v. Ramesh Kumar Ms. Prem Lata Bansal, Adv.*, AIR 1990 SC 2218, it was observed as follows:

“Leave is declined where the Court is of the opinion that the grant to leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about the leave it must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a *bona fide* defence, he ought to have leave. Summary judgments under order 37 should not be granted where serious conflict as to the matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.”

24. Learned Senior Counsel for the plaintiff has referred to the case of *Hira Lal & Sons & Others v. Lakshmi Commercial Bank*, 25 (1984) DLT 33 (SN) (DB) where the principles for grant or refusal of leave to defend have been laid down in the following words:

“The principles on which Courts should grant or refuse leave to defend the suit are not in doubt. Thus—

- (a) 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.
- (b) 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 of furnishing security'."

25. The only triable issue, which is sought to be raised by the defendant, is that the present suit is not maintainable, as buy-back agreement cannot be the basis of a suit under Order 37 CPC. It has been averred that the suit of the plaintiff is vexatious, as the plaintiff has not approached this court with clean hands and that the plaintiff has suppressed the vital role played by the defendant in the incorporation of the plaintiff company and further the defendant was forced to sign the buy-back agreement, taking advantage of the defendant's wife's illness and a faint argument has also been raised by the counsel for the defendant that no date for repayment was fixed between the parties.
26. The submission of counsel for the defendant that since no date of return of the loan amount was fixed leave should be granted is without any force.
27. In my view, issuance of a notice and filing of the suit is to be considered as the date from which the loan amount is to be returned.
28. As far as the other grounds raised in the application for leave to defend are concerned, in my considered opinion no triable issue or a plausible defence has been raised to show that the defendant is not liable to pay a sum of Rs.50.00 lacs to the plaintiff. The defence which is sought to be raised is sham, moonshine and not reasonable.
29. The communication dated 10.11.2011 and the Agreement dated 1.7.2011, would clearly show that the defendant had acknowledged receipt of Rs.50.00 lacs from the plaintiff as interest free loan which he was liable to return to the plaintiff. The agreement is duly signed by the parties, although the agreement

has not been acted upon. The present suit is also liable to be decreed based on the admission made by the defendant with respect to receipt of Rs.50.00 lacs from plaintiff in the agreement itself, as well as in the letter dated 10.11.2011, which has been reproduced above.

30. Thus in my view the present suit is maintainable under Order 37 of the Code of Civil Procedure. There is no merit in the application for leave to defend and the same is accordingly, dismissed.

31. During the course of hearing, senior counsel for the plaintiff had stated that plaintiff is willing to forego the *pendente lite* interest keeping in view the previous relationship amongst the parties in case the defendant agrees to pay the amount within a reasonable period of time.

32. In fact this was also one of the reasons why the matter was adjourned on the previous date but no favourable response was received from the defendant.

CS(OS) 1377/2012

33. In view of the order passed in the application for leave to defend, present suit is decreed. The plaintiff would be entitled to *pendente lite* and future interest at the rate of 8%, per annum, from the date of filing of the suit till realisation. Decree-sheet be drawn up accordingly.

(G.S.SISTANI)
JUDGE

MARCH 12, 2014
msr