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

+ **CS(OS) 217/2011**

% ***Judgment dated 20.05.2014***

M/S HOUSING DEVELOPMENT FINANCE
CORPORATION LTD Plaintiff
Through: Mr.Ajit Kumar Singh, Advocate

versus

VIKAS GARG Defendant
Through: Mr.Jinendra Jain and Mr.B.N.
Gaur, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

IA. No.1704/2013

1. This is an application seeking condonation of 13 days' delay in re-filing the application for summons for judgment.
2. Heard. For the reasons stated in the application, the application is allowed. Delay in re-filing the application for summons for judgment is condoned.
3. Application stands disposed of.

IA. No.1703/2013

4. This is an application for summons for judgment. Since the leave to defend application has already been filed, the present application stands disposed of.

IA. No.5765/2013

5. This is an application for condonation of 22 days' delay in filing the application for leave to defend.
6. Heard. For the reasons stated in the application, the application is allowed. Delay in filing the leave to defend application is condoned.
7. Application stands disposed of.

IA. No.5764/2013

8. Plaintiff has filed the present suit under the provisions of Order 37 CPC and the application, IA. No.5764/2013, has been filed by the defendant seeking leave to defend.
9. Before the rival submissions of the counsel for the parties can be considered, it would be useful to notice the facts of the case as set out in the plaint. As per the plaint, the defendant approached the plaintiff for grant of a 'home equity loan' in the sum of Rs.1.50 crores against the property i.e., Ground floor, Plot bearing No.N-202, Greater Kailash-I, New Delhi. It has further been averred that after the due verification of all the property papers, as well as papers concerning repayment capacity of defendant i.e. ITR, Bank Statement and business activities of defendant, the loan amount of Rs1.50 crores was sanctioned. The defendant signed sanction letter in token of acceptance of the terms and conditions contained therein. The defendant also signed a loan agreement dated 11.9.2009 in favour of the plaintiff. It is also the case of the plaintiff that subsequently it was learnt that the property did not belong to defendant, but in fact belonged to one Mr.Ajay Chopra. It is also averred in the plaint that Mrs.Seema Malhotra, sister of Mr.Ajay Chopra, forged and fabricated a Power of Attorney dated 29.9.2008 in her own name and the defendant in connivance with Mrs.Seema Malhotra got a fake sale deed registered in his name from Mrs.Seema Malhotra, on the basis of the alleged forged Power of Attorney. The plaintiff has also lodged a

criminal complaint to the Economic Offence Wing of the Delhi Police, against the defendant and Mrs.Seema Malhotra and the same is still pending and a FIR has been registered.

10. As per the terms of the loan agreement, the defendant was to re-pay the loan amount along with interest by way of equated monthly instalment, spread over 180 months. The loan was to carry an interest @ 12.75% per annum and as per clause 2.7(b) of the loan agreement, in case of default or delay in repayment of interest, penal interest @18% was to be paid.
11. The loan amount was disbursed to the defendant through cheque bearing No.977732 dated 11.9.2009 in the sum of Rs.1.50 crores in favour of the defendant, which was credited in the account of the defendant bearing No.30852926674 with the State Bank of India.
12. It is also the case of the plaintiff that the initial three instalments were paid by the defendant to the plaintiff and the defendant defaulted in making payment thereafter.
13. It is also the case of the plaintiff that despite repeated requests and reminders including legal notice dated 16.4.2010 issued by Registered AD post, the defendant failed to pay the outstanding dues. The suit is based on a written loan agreement and a promissory note, originals of which have been placed on record.
14. The defendant has filed the present application [IA. No.5764/2013] for leave to defend. The defendant seeks unconditional leave to defend on the ground that the suit has not been filed by a duly authorized person; no verification of the documents was carried out; the plaintiff has suppressed and withheld material facts from the court; the officers of the plaintiff were in active connivance with each other and they have forged and fabricated the signatures of the defendant; and with a view to harass the defendant, all the alleged documents containing the said forged signatures

have been filed by the plaintiff.

15. According to the defendant the suit has been filed in sheer violation of the rule of law, as no cause of action has arisen in favour of the plaintiff. It has also been argued that the officials of the plaintiff got the blank performa documents signed from the defendant by exercising misrepresentation, commercial duress and coercion and without giving an opportunity to the defendant to read the papers. The defendant was made to sign the blank papers and particulars were filled in subsequently. It is also submitted that the documents relied upon by the plaintiff are fabricated and manufactured documents and the defendant would be able to demonstrate during trial that the said documents are false and fabricated.
16. It has also been alleged that the suit is barred by limitation and the plaintiff cannot be allowed to take benefit of its own wrong. It is also submitted that there is no liquidated debt due to the plaintiff.
17. In support of his submission counsel for the defendant has placed reliance on *M/s.K.K. Health Care Pvt. Ltd. Vs. M/s. Pehachan Advertising* [RFA 202/2011 decided on 23.1.2012] and on *GE Capital Services India. Vs. May Flower Healthcare Pvt. Ltd. & Ors.* [CS(OS)No.2859/2011 decided on 31.8.2012].
18. The application is opposed by counsel for the plaintiff, non-applicant. At the very outset counsel for the plaintiff submits that the defendant has not disputed that a sum of Rs.1.50 crores as a loan was granted in his favour by the plaintiff. It has also not been disputed that this amount was credited to the bank account of the defendant bearing No.30852926674 with State Bank of India.
19. It is further submitted that three instalments were paid by the defendant which would show that the defendant was well aware of the terms of the

agreement and since 2009, till date at no point of time did the defendant ever raise the objection of fabrication of documents or that he signed some blank documents or that the plaintiff did not grant loan to the defendant. It is submitted that the objections which are being raised are vague, stereotype and are liable to be rejected as the defendant has not been able to raise a plausible and a bonafide defence. The defence of the defendant is imaginary, sham and moonshine and thus the plaintiff, is entitled to a decree and the application for leave to defend is liable to be dismissed.

20. I have heard counsel for the parties and considered their rival submissions and also perused the loan agreement and the pro-note, which has been signed by the defendant.
21. Learned counsel for the defendant has relied upon *M/s Mechelec Engineers & Manufacturers v. M/s Basic Equipment Corporation*, reported at AIR 1977 SC 577, more particularly para 8 in support of his argument that since the defendant has raised triable issues, the defendant should be granted unconditional leave to defend.
22. Before dealing with the rival submissions of counsel for the parties, it would be useful to re-visit the law laid down by the Apex Court with regard to dealing with an application for leave to defend. The Apex Court in the case of *M/s.Mechelec Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation* AIR 1977 SC 577 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.”

23. It would also be useful to refer to the case of *V.K. Enterprises Vs. Shiva Steels* (2010) 9 SCC 256, wherein the Supreme Court had, in a matter with

somewhat similar facts, upheld the order passed by the trial court where leave was rejected. Paragraphs 8 to 10 of the judgment read as under:

“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.”

24. A careful reading of the application for leave to defend would show that the defendant has not disputed that loan in the sum of Rs.1.50 crores was sanctioned by the plaintiff; and the amount was deposited in the account of the defendant. It has also not been disputed that three instalments were paid by the defendant to the plaintiff towards repayment of the loan amount. The signatures on the loan document have not been disputed, although a submission has been made that the documents were filled in later and thus they are forged and fabricated. This submission of counsel for the defendant is unacceptable, as the documents were signed in the year 2009 and till date there is not a single document placed on record to show that any objection was raised by the defendant before the plaintiff with respect to any of the document being filed upon or that any complaint was made to the police that the plaintiff coerced and forced the defendant to sign the document or that the defendant's signatures were obtained on the basis of any misrepresentation, as alleged in the application for leave to defend.
25. Counsel for the plaintiff has also submitted that post dated cheques were handed over to the plaintiff, all of which were dishonoured and proceedings under Section 138 of the Negotiable Instruments Act are also pending, in which defendant has been declared as a Proclaimed Offender.
26. Counsel for the defendant has placed strong reliance on the case of M/s.K.K. Health Care (Supra) and on GE Capital Services India (Supra), in support of his argument that the present suit is not maintainable under the provisions of Order XXXVII of the Code of Civil

Procedure in the absence of a liquidated debt. This submission of counsel for the defendant / applicant is without any force, as the judgments sought to be relied upon by the counsel are not applicable to the facts of this case. In the case of **M/s.K.K. Health Care (Supra)**, a learned Single Judge of this Court observed that the suit could not have been filed under order XXXVII of the Code of Civil Procedure, as the amount claimed in the suit was not the amount, as mentioned in the bills which was stated to be written contracts containing the liquidated demands of money payable. In the case of **GE Capital Services India (Supra)** the earlier judgment in the case **M/s.K.K. Health Care (Supra)** was followed by the learned Single Judge. In the present case the suit is not based on invoices and the suit is based on a written contract, which is home equity loan agreement together with a promissory note. This loan agreement is an exhaustive document and contains various terms and conditions including, with regard to payment of interest, the schedule of payments, receipts evidencing loan disbursed by the plaintiff to the defendant. The defendant has neither denied receipt of the loan nor it is the case of the defendant that the plaintiff has not truly reflected the number of instalments paid by them, but a stereo-typed defence has been raised that the documents were blank and collusion between officers of the plaintiff, which are without any substance. Against the cogent evidence produced by the plaintiff, there is only oral denial which is not supported by any corroborative evidence by the defendant.

27. Having regard to the loan agreement which has been placed on record and the promissory note, I am satisfied that this suit is maintainable under the provisions of Order 37 CPC, and the defence of the defendant is sham and moonshine as no triable issue has been raised.

28. It would be useful to refer to a recent judgment rendered by another Single Judge of this Court, where a similar plea as raised in the present suit i.e. "Suit for a balance amount due on a loan account does not fall under Order XXXVII of CPC" was raised. Following observations were made by the Court in the case of **Jindal Steel & Power Limited v. N.S. Atwal**, CS(OS) 713/2010:

"13. As far as the plea of the maintainability of the suit under Order 37 of the CPC is concerned, though undoubtedly there is no document on the basis whereof, the defendant can be said to have admitted the liability in the balance principal amount of Rs. 2,98,39,060/- towards the plaintiff but in my opinion, in view of the subsequent admission by the defendant of the liability in the principal amount claimed in the suit, the same pales into insignificance. This Court, if were to, inspite of such admission by the defendant, go into technicalities as to the maintainability of the suit under Order 37 of the CPC, would be lending credence to the perception "the law is an ass - an idiot" echoed by Mr. Bumble in Charles Dickens 'Oliver Twist'. Justice cannot be frustrated by legalistics. It is the duty of every court to prevent its machinery from being made a sham, thereby running down the rule of law itself as an object of public ridicule. It will and must prove any stratagem self defeating if a party indulges in making the law a laughing stock, for the court will call him to order. Justice Krishna Iyer in *Bushing Schmitz Private Limited v. P.T. Menghani* (1977) 3 SCR 312 quoted with approval Lord Erskine "there is no branch of the jurisdiction of this Court more delicate than that, which goes to restrain the exercise of a legal right". He further held "But the principle of unconscionability clothes the court with the power to prevent its process being rendered a parody". Once it is clear that there is no dispute of the sum of Rs. 2,98,39,060/- being due from the defendant to the

plaintiff in the loan account, the Court will not enter into an academic exercise and pronounce on technicalities. The Supreme Court in T. Arvindandam Vs. T.V. Satyapal, AIR 1977 SC 2421, Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I (2004) 9 SCC 512 and ITC Limited Vs. Debts Recovery Appellant Tribunal, (1998) 2 SCC 70 has held that the Courts are not to prolong litigations, the fate whereof is otherwise clear and at the expense of other cases requiring adjudication. Even if not under Order 37 of the CPC, the plaintiff under Order 12 Rule 6 CPC or under Order 15 is entitled to a decree in the principal sum of Rs. 2,98,39,060/-. Recently also, in Krishna Devi Malchand Kamathia v. Bombay Environmental Action Group, (2011) 3 SCC 363, the Supreme Court observed that justice is only blind or blindfolded to the extent necessary to hold its scales evenly; it is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.”

29. In the present case neither the defendant has disputed the receipt of the loan amount in the sum of Rs.1.50 crores, which was deposited by the plaintiff in the defendant's account nor deposit of the three instalments paid by the defendant in part repayment/discharge of the loan amount have been disputed. Moreover, even the signatures on the loan agreement have not been disputed by the defendant. In view of the above, such technical pleas of non-maintainability of the suit under Order XXXVII CPC cannot be entertained by this Court.
30. Having regard to the fact of the case, written agreement, the pronote signed by the defendant and taking into consideration the fact that no triable issue has been raised by the defendant, the present leave to defend application filed by the defendant is dismissed.

CS(OS) 217/2011

31. The suit is decreed as per the statement of accounts filed by the plaintiff with the reply to the leave to defend application, with pendente lite and future interest @8% per annum. Decree-sheet be drawn up accordingly.

G.S.SISTANI, J

MAY 20, 2014

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