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

+ **FAO(OS) 12/2017**

Date of decision: 8th August, 2017

M/S ABI OVERSEAS & ANR Appellant
Through Mr. M. Dutta, Advocate.

versus

ASHWANI KUMAR Respondent
Through Mr. Manish Makhija, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (ORAL)

Counsel for the appellant prays for and is granted permission to correct typographical error in the memo of parties and initial the same in today's date. Appellant No.1 by mistake was described as ABI Overseas instead of ABI Overseas Ltd. The appellant No. 1 who is defendant No. 1 in the suit has been described as ABI Overseas Ltd. in the plaint.

2. The present appeal by the defendants, namely, ABI Overseas Ltd. and Vipen Kumar Parwanda, impugns the order dated 24th November, 2016, whereby OA No.58/2014, I.A. Nos. 6574/2014, 10989/2014 and 19203/2014 filed by them have been dismissed.

Appellant No. 2 Vipen Kumar Parwanda is the director of appellant No. 1, ABI overseas Ltd.

3. In order to decide the appeal, we had called for the records of CS (OS) No. 1497/2011, titled ***Ashwani Kumar Vs. M/s ABI Overseas Ltd. & Anr.*** and have perused the same.

4. The aforesaid suit filed under Order XXXVII of the Code of Civil Procedure, 1908 (Code, for short) is for recovery of Rs.4,57,60,440/- and *pendente lite* and future interest. The suit is based on the dishonoured cheque for Rs.4,25,00,000/-.

5. The appellants-defendants filed the application for leave to defend, which was allowed vide order dated 30th April, 2013, relevant portions of which are reproduced below:-

“2. The counsel for the plaintiff has at the outset clarified that the claim of the plaintiff is against the defendant no.1 Company and the defendant no.2 is impleaded in his capacity as Chairman-cum-Managing Director of the defendant no.1 Company and the recovery of money is not sought from the defendant no.2.

4. As far as the merits of the case are concerned, it is the case of the plaintiff that he is a shareholder of the defendant no.1 Company; that a Memorandum of Understanding (MoU) dated 04.07.2006 was executed by the defendant no.1 Company, the plaintiff and certain other shareholders of the defendant no.1 Company and under which MoU, (a) the plaintiff and the said other shareholders disassociated from the affairs of the defendant No.1 Company without

any liability/obligation in respect of past or future transactions of the defendant No.1 Company; (b) the plaintiff undertook the liability to clear the dues of the defendant No.1 Company to Syndicate Bank in the sum of Rs.2.25 crores and the liability to settle the claims of other two shareholders against the defendant No.1 Company of Rs.20 lakhs—the plaintiff thus took over the liability to the tune of Rs.2.45 crores of the defendant No.1 Company; and, (c) that in consideration of the above, the defendant No.1 Company transferred, stocks/goods worth of Rs.1.08 crores belonging to the defendant No.1 Company and assigned book debts to the tune of Rs.1.37 crores i.e. amounts recoverable by the defendant No.1 Company from others, to the plaintiff. To effect such assignment of book debts, the defendant No.1 Company also executed a Transfer Deed and a General Power of Attorney (GPA) transferring the book debts of the defendant No.1 Company in favour of the plaintiff and empowering the plaintiff to recover such book debts.

5. It is further the case of the plaintiff that in pursuance to the aforesaid, the plaintiff has been repaying the liability of the defendant No.1 Company to the Syndicate Bank and has paid a sum of approximately Rs.1.08 crores till date to the said Bank. The plaintiff however claims that he was unable to recover any amount whatsoever either of the book debts of the defendant No.1 Company assigned to him or from the stocks/goods transferred by the defendant No.1 Company to the plaintiff. The plaintiff claims, to have thus represented to the defendant No.1 Company for being compensated, and a meeting in this regard was held on 31st March, 2009 and in which the defendant No.1 Company agreed to compensate the plaintiff if the plaintiff in the next twelve months also was unable to make any recoveries against the book debts or the stocks/goods, and issued the post dated cheque for Rs.4.25 crores for so compensating the plaintiff.

9. The question which arises is whether the grounds taken by the defendants in the leave to defend can be said to be raising a substantial defense.

10. Though the grounds so taken by the defendants are more in the nature of denial of the Oral Agreement in pursuance to which the plaintiff claims the cheque to have been delivered to him but I am of the view that the consideration pleaded by the plaintiff, for which the cheque is stated to have been issued, is such which even on a bare denial by the defendants raises a substantial defense.

11. The transaction evidenced by the MoU, Transfer Deed and GPA is undisputed. The plaintiff himself admits that he took over the liability of the defendant No.1 Company to Syndicate Bank, since he had also furnished personal guarantee to the said Bank. What thus appears is that though the dues towards Syndicate Bank, though of the defendant No.1 Company, were in any case recoverable from the plaintiff owing to the plaintiff having furnished personal guarantee to the said Bank. Still, the defendant No.1 Company, in consideration of the plaintiff taking over liability towards Syndicate Bank and other shareholders, transferred to the plaintiff stocks/goods worth Rs.1.08 crores and book debts worth Rs.1.37 crores i.e. total Rs.2.45 crores. The plaintiff at the time of execution of the MoU, Transfer Deed and GPA took a business decision to discharge the liability of the defendant No.1 Company towards Syndicate Bank and in consideration thereof, took over from the defendant No.1 Company stocks/goods worth Rs.1.08 crores and book debts of Rs.1.37 crores. Even if it were to be believed that the said business decision of the plaintiff turned out to be a bad one, with the plaintiff being unable to sell the stocks/goods and realize value thereof or to recover the book debts, it defies logic that the defendant No.1 Company with whom the plaintiff had disassociated admittedly owing to differences with the defendant No.2, would so readily agree to 'reversal' of the transaction. It is illogical that the book debts which the plaintiff as

assignee/power attorney holder of the defendant No.1 Company could not recover, would be taken over again by the defendant No.1 Company and that too at the risk of the same having already become time barred.

12. I have enquired from the counsel for the plaintiff, whether the plaintiff has transferred back the stocks/goods valued at Rs.1.08 crores and book debts of Rs.1.37 crores to the defendant No.1 Company.

13. The counsel for the plaintiff fairly admits that the plaintiff has not done so and the same are still in possession and custody of the plaintiff.

14. I am of the opinion that the plaintiff, while continuing to retain the stocks/goods and book debts, cannot recover compensation as alleged therefor. The consideration, stated by the plaintiff in the plaint, for issuance of cheque to him, is for return by the plaintiff to the defendant No.1 Company of stocks/goods and the book debts. The consideration for the cheque thus was akin to an advance consideration for sale. Such advance consideration for sale translates into consideration only on transfer back by the plaintiff to defendant No.1 Company of stocks/goods and book debts and which has admittedly not happened.

15. Though Order XXXVII of Civil Procedure Code (CPC), 1908 permits a suit on the basis of a cheque but that cheque has to be for consideration. Again, though a cheque carries with it, the presumption of consideration but such presumption is a rebuttable one. The present case, in the face of the denial by the defendants of the averment of the plaintiff of 'reversal' of the admitted transaction, requires an opportunity to be given to the defendants to lead evidence to rebut the presumption arising from the cheque. The Supreme Court in **Neebha Kapoor Vs. Jayantilal Khandwala** (2008) 3 SCC 770 has held that the CPC does not put any embargo on the Courts exercising a *suo moto* power in granting leave and that only if a Court goes into evidence, presumptive evidence can be taken into

consideration and although the burden is on the defendant, he may discharge it only if it is raised.

16. It cannot also be lost sight of that the plaintiff was earlier admittedly associated with the defendant No.1 Company and thus the possibility of the plaintiff being in possession/custody of a cheque drawn by the defendant No.1 Company cannot be ruled out.

17. I am therefore of the view that a case for grant of leave to defend is made out.”

6. We have deliberately reproduced the aforesaid paragraphs to highlight contours and facts which arise for consideration and decision in the suit.

7. By order dated 30th April, 2013, the appellants-defendants were granted four weeks time to file written statement. It may be recorded that the appellants-defendants were represented by a legal aid counsel, who had been appointed on their request.

8. Written statement was not filed till 12th August, 2013, when the matter was listed before the Joint Registrar. The Joint Registrar noticed the aforesaid position and that more than 90 days had lapsed. However, the suit for completion of service was listed on 18th November, 2013 (sic 18th September, 2013) and also in view of the

application I.A. No. 12654/2013 filed by the respondent-plaintiff for correction of the order dated 30th April, 2013.

9. On the next date of hearing i.e. 18th September, 2013, the Joint Registrar noted that written statement had not been filed. Right to file written statement was closed after recording that the appellants-defendants had stated that the written statement was ready and had been sent for signatures. The order also records that the appellants-defendants had not filed any document and the counsel appearing for the appellants-defendants was not having instructions to conduct admission/denial of documents.

10. On 30th September, 2013, the suit was listed before the single Judge, who noticed that written statement had not been filed and the right to file the same was closed. The appellants-defendants were proceeded *ex-parte*, as none had appeared for the appellants-defendants on 30th September, 2013. Application I.A. No.12654/2013, it was directed would be taken up along with the Suit.

11. The respondent- plaintiff filed affidavit by way of evidence on 19th November, 2013. Exhibit numbers were marked by the Joint Registrar on 6th December, 2013. This order records that the

appellant-defendant No.2 was present for himself and the company. The legal aid counsel appointed was not present.

12. On 11th December, 2013, request for adjournment was made by the legal aid counsel on behalf of the appellants-defendants on the ground that an application for setting aside the ex-parte order had been moved.

13. Thereafter, the appellants-defendants had filed I.A. No.488/2014 for taking the written statement on record. This application was listed before the Joint Registrar on 13th January, 2014, who had recorded that the written statement was not available on record. This was factually incorrect for the reason written statement was filed on 3rd January, 2014. Advance copy of the written statement had already been served on the counsel for the respondent-plaintiff on 16th December, 2013. The written statement filed on 3rd January, 2014 is on record in the Civil Suit.

14. Application I.A. No. 488/2014 was directed to be listed before the single Judge vide order of the Joint Registrar dated 20th February, 2014.

15. On 11th March, 2014, the single Judge had noticed that I.A. No.488/2014 had been filed for setting aside the order dated 18th September, 2013, and condoning delay filing written statement. However the order dated 30th September, 2013, by which the appellants-defendants were proceeded ex-parte had not been challenged. At request, the application was adjourned to 13th August, 2014.

16. On 11th March, 2014 the legal aid counsel for the appellants-defendants had not appeared and the appellant-defendant No.2 had appeared in person.

17. Counsel for the appellants-defendants thereafter filed O.A. No.58/2014 for setting aside the order dated 30th September, 2013 by which the appellants-defendants' right to file written statement was closed.

18. The appellants-defendants moved another application under Order IX, Rule 7 of the Code being I.A. No.10989/2014 for setting aside the ex-parte order dated 30th September, 2013. Notice on this application was issued vide order dated 29th May, 2014.

19. On 13th August, 2014, this application I.A. No.10989/2014 was dismissed by the single Judge for non-prosecution as the counsel for the appellants-defendants was not present. This order records that the order dated 30th September, 2013 does not stand in the way of the appellants-defendants in joining the proceedings, but the order dated 18th September, 2013, whereby the appellants-defendants' right to file written statement was closed, was coming in their way.

20. The appellants-defendants thereafter moved an application I.A. No.19203/2014 for restoration of I.A. No.10989/2014, on which notice was issued vide order dated 29th September, 2014. These applications could not be taken up for hearing by the Court on 5th December, 2014.

21. The applications I.A. Nos. 6574/2014, 10989/2014, 19203/2014 and OA No. 58/2014 were dismissed in default and for non-prosecution on 20th April, 2015. Ex-parte decree in the sum of Rs.4,25,00,000/- along with *pendente lite* and future interest @ 15% per annum was passed.

22. Thereupon, the appellants-defendants filed I.A. No.9976/2015 and 9977/2015 for recall of the ex-parte decree dated 20th April, 2015.

These applications have been allowed vide order dated 24th November, 2016, accepting the plea of the appellants-defendants that their counsel had wrongly noted the next date of hearing as 24th April, 2015 instead of 20th April, 2015. In other words, the ex-parte decree has been set aside and the matter has been fixed for arguments. We have upheld this order dated 24th November, 2016, recalling the ex-parte decree by dismissing the appeal, FAO(OS)No.12/2017, filed by the respondent-plaintiff.

23. However, the same order dated 24th November, 2016 dismisses I.A. Nos. 6574/2014, 10989/2014, 19203/2014 and OA No. 58/2014. The primary reason given by the single Judge for rejecting the said applications is that the written statement was not filed in time.

24. We have intentionally referred to different orders of the single Judge and the Joint Registrar. What is perceptible and apparent to us is that the legal aid counsel was unable to keep track of the matter and handle the case. On many dates, the legal aid counsel was not present. We have also referred to and deliberately quoted from the order dated 30th April, 2013, by which the leave to defend was granted. By then certainly the appellants-defendants had revealed and stated their

defence which prima facie appeared to be plausible/credible and one which required consideration. We have also noted that the counsel was not fully aware and conscious of the remedy and provision which should be invoked and whether the order dated 18th September, 2013 or order dated 30th September, 2013 should be challenged. The manner in which the said order should be challenged was not ascertained and proper remedy was not invoked. The appellants-defendants necessarily had to rely upon their counsel. Written statement was filed on record on 3rd January, 2014 and advance copy of the same was served earlier on 16th December, 2013.

25. Noticing the aforesaid facts and the confusion which had prevailed, we are inclined to allow the present appeal and permit the appellants-defendants to place the written statement on record and set aside the orders dated 18th September, 2013 and 30th September, 2014, by which the appellants' right to file written statement was closed and they were proceeded ex-parte. However, the appellants-defendants will have to pay costs for the delay occasioned. The appellants-defendants have agreed to pay costs of Rs.25,000/- to the respondent-plaintiff, which we feel is justified and proper. The quantum of costs,

which the appellants-defendants have agreed to pay, reflects the financial position of the appellants-defendants who at one time had engaged a legal aid counsel. Costs would be paid within four weeks from today. In case costs is not paid within the said period, the appeal will be treated as dismissed.

26. List before the single Judge on 7th September, 2017, the date already fixed.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

AUGUST 08, 2017
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