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

% *Judgment Reserved on : 04.12.2017*
Date of Judgment: 09.02.2018

+ **R.F.A. 828/2015**

SUSHILA GIRI Appellant/Defendant.
Through: Mr.Dinesh Kumar Gupta, Mr.Vidit
Gupta and Ms. Harleen Singh, Advs.

versus

NITISH KAUSHIK.
.. Respondent/Plaintiff.
Through: Mr. Manish Sharma, Mr. Sanjeev
Sharma and Mr. Sharad Arya, Advs.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. Challenge in this Regular First Appeal is the impugned judgment and decree dated 01.09.2015 in Civil Suit No.459/2014 passed by the Court of learned Additional District Judge-02 (North-East), Karkardooma Courts, Delhi (in short 'learned ADJ') by which the application of the appellant/defendant to grant him leave to defend under Order XXXVII Rule 3 (5) of the Code of Civil Procedure, 1908 (in short 'CPC') was dismissed and consequently the suit of the respondent/plaintiff was decreed against the appellant/defendant

for recovery of Rs.7,00,000/- with cost and *pendente lite* interest @ 6% p.a. from the date of filing the suit till the date of decree.

2. The brief facts of the case are that the respondent/plaintiff filed a summary suit under Order XXXVII of the CPC for recovery of Rs.7,00,000/- against the appellant/defendant alleging therein that the appellant/defendant has been residing in his neighbourhood along with her husband Sh. Jaiprakash, who is working as a constable with Uttar Pradesh Police and work as tout with several colleges/institutions for the purpose of admissions. The respondent/plaintiff also claimed that the relations between the father of the plaintiff and the defendant were like brother and sister and they were on visiting terms. In the month of July, 2012 the respondent/plaintiff intended to have his admission in MBBS course and for that purpose the father of the plaintiff had spoken to the appellant/defendant for help. The appellant/defendant and her husband visited the house of the respondent/plaintiff and told his father that they will get the respondent/plaintiff admitted in the medical college. The appellant/defendant informed the father of the respondent/plaintiff that the expenses would be approximately Rs.7,00,000/- which includes college fees and transportations, etc. The respondent/plaintiff and his father had agreed to bear all the expenses. In July, 2012, the father of the respondent/plaintiff paid a sum of Rs.1,00,000/- to the appellant/defendant and in the month of October, 2012 further a

sum of Rs.6,00,000/- was handed over to the appellant/defendant.

3. It is further alleged that in the month of November, 2012, when the respondent/plaintiff asked the appellant/defendant about his admission and the receipt of the expenses of Rs.7,00,000/-, he found that the appellant/defendant did not deposit the aforesaid amount with the medical college. On making several requests and visits by the respondent/plaintiff and his father, the appellant/defendant on 07.06.2013 issued a cheque No.585247 dated 07.06.2013 for Rs.7,00,000/- drawn on HDFC Bank, Shahdara, Delhi in favour of the respondent/plaintiff. However, the said cheque on its presentation was dishonoured on 18.06.2013 vide Memo dated 21.06.2013 for the reason “payment stopped by drawer”. The respondent/plaintiff immediately informed the appellant/defendant about the dishonour of the cheque and asked her to refund his money, who did not pay the said amount on one pretext or another. The respondent/plaintiff had filed a criminal complaint under Section 138 of Negotiable Instrument Act, 1881 (in short ‘N.I. Act’) before the court of learned Chief Metropolitan Magistrate, Karkardooma Courts, Delhi.
4. After her appearance, the appellant/defendant filed an application under Order XXXVII Rule 3 (5) of CPC seeking leave to defend on 19.02.2015. The appellant/defendant in the said application pleaded that she had not issued the cheque in question to the respondent/plaintiff at any point of time. It is

further pleaded that the cheque in question as well as the entire Cheque Book had been missing/stolen and the appellant/defendant had given the information to the police on 08.10.2012 and had also filed a complaint case under Section 156 (3) of the Criminal Procedure Code, 1908 (in short 'Cr.P.C.') against the respondent/plaintiff and his father. It is also pleaded that a FIR No.355/2014, P.S. Gokal Puri, Delhi was registered against the respondent/plaintiff, his father and uncle. She also pleaded that respondent/plaintiff being a student had no source of income and it was not possible for him to arrange and pay her huge amount of Rs.7,00,000/-. On these grounds, the appellant/defendant sought leave of the Court to defend the suit.

5. In his reply to the leave to defend, the respondent/plaintiff has denied the allegations of the appellant/defendant and it is pleaded that the cheque in question was properly signed by the appellant/defendant and was delivered to him at his residence by the appellant in the presence of her husband. It is denied that any complaint dated 08.10.2012 is pending against the respondent/plaintiff, his father and uncle.
6. The respondent/plaintiff has placed on record a certified copy of the complaint under Section 138 of N.I. Act and copy of the legal notice, which was issued by him through Sh. Pradeep Kumar, Advocate on 02.07.2013 and copy of reply dated 12.07.2013 received from the appellant/defendant through her counsel Sh. Ajay Kumar Sharma, Advocate. The

respondent/plaintiff had withdrawn his complaint under Section 138 of N.I. Act and thereafter placed on record the said original Cheque and the Cheque Return Memo.

7. After hearing learned counsel for the parties, the learned ADJ found that the appellant/defendant has failed to raise the triable issues indicating any fair or bona fide or reasonable defence. The learned ADJ found the defence taken by the appellant/defendant to be sham and practically a moonshine. The learned ADJ dismissed the application for leave to defend and decreed the suit.
8. It is submitted by learned counsel for the appellant/defendant that the learned ADJ has failed to appreciate that the appellant/defendant has lodged a complaint about theft of her cheques in the month of October, 2012. He submitted that the cheque in question was stolen by the respondent/plaintiff. He submitted that no transaction took place between the parties and the respondent/plaintiff has not placed on record any document to support his claim. He argued that the respondent had withdrawn his complaint under Section 138 of the Negotiable Instrument Act for dishonour of the said cheque and cannot pursue the suit for recovery on its basis.
9. Per contra, it is submitted by learned counsel for the respondent/plaintiff that the learned ADJ has rightly dismissed the application for leave to defend as the defence taken by the appellant/defendant has been sham and practically a moonshine. He argued that the appellant/respondent has not disputed her

signature and filling of the amount of cheque and date in her application for leave to defend. He further argued that she has not explained as to why she has signed the cheque in advance by filling the huge amount of Rs.7 lacs and kept it in her house.

10. I have heard learned counsel for the parties and carefully perused the record. In order to appreciate the rival contentions of the parties it would be necessary to refer Order XXXVII Rule 3 (5) of CPC which reads as under:-

“ORDER XXXVII Rule 3 (5)

3. Procedure for the appearance of defendant.

(5) The **defendant may**, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise **disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit**, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that **leave to defend shall not be refused unless** 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.”**

11. The basic judgment laying down the principles of dealing with the application for leave to defend delivered by the **Hon’ble Supreme Court** is **M/s Mechalec Engineers and Manufactures Vs. M/s Basic Equipment Corporation, AIR 1977 Supreme Court 577**. In para 8, the **Hon’ble Supreme Court** has held as follows:-

“In Smt. Kiranmoyee Dassi Vs. Dr. J. Chaterjee, (19545) 49 Cal WN 246 at p. 253, 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 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 plaintiffs 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 plaintiffs 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.”

12. From the law laid down by **the Hon’ble Supreme Court** it can be discerned that while deciding application for grant of leave to defend under Order XXXVII Rule 3 (5) of CPC, the Court is required to see the facts brought to the notice by the defendant by way of affidavit or otherwise as to whether disclosed facts are sufficient to entitle him to defend the suit. If the defendant is able to satisfy the court that he has a good defence on merits then the plaintiff is not entitled to leave to sign the judgment and an unconditional leave to defend can be granted to the defendant. Where the defendant raises a triable issue indicating that he has a fair, bona fide or reasonable defence although not a positive good defence, the defendant can still be granted unconditional leave to defend. However, where the defendant has no defence or defence set up is illusory, sham and practically a moonshine the plaintiff would be entitled to leave to sign the judgment and leave to defend can be refused to the defendant.
13. The learned ADJ has noted that the appellant/defendant did not challenge or dispute that she has not signed the cheque or filled up the amount therein. He also noted that the alleged complaint made by the appellant/defendant against the respondent/plaintiff

has been drawn by making statement to the police that she does not want to initiate any action against the respondent/plaintiff for missing of cheque. He also noted that the relations between the parties have been admitted by the appellant/defendant.

14. Even during the course of the arguments, the learned counsel for the appellant/defendant did not dispute the signature and filling of the amount of the cheque by the appellant/defendant. Friendly relations between the parties have also not been disputed. In her reply dated 12.07.2013 to the legal notice, the appellant/defendant has admitted that her cheque in question, which was blank, was duly signed by her. However, she claimed that it was misplaced and she had never issued the cheque in question in favour of the respondent/plaintiff. She has not claimed that the cheque was stolen by the respondent/plaintiff. In her application for leave to defend, the appellant/defendant claimed contrary/exaggerated stand that entire cheque book has been missing/stolen. Even in her application for leave to defend she has not pleaded that the cheque in question was stolen by the respondent/plaintiff. Copy of alleged complaint for missing/theft of the cheque lodged on 08.10.2012 has not been placed on record by the appellant/defendant. She has also not filed the copy of the complaint under Section 156 (3) Cr.P.C and copy of FIR No.355/2014, P.S. Gokal Puri, Delhi.
15. In the normal course, the person whose cheque is lost or misplaced is expected to lodge an information/complaint with

his banker. Admittedly, the appellant/defendant has not lodged any complaint with her banker about loss/misplacement of cheque or theft of her cheque/cheque book. It is not explained as to why the appellant did not give information to her banker. Admittedly, the cheque in question was dishonoured for the reason “payment stopped by the drawer”. However, the appellant/defendant has not placed on record copy of the application given to her banker showing the reason as to why she had stopped the payment. This vital information and evidence has been withheld by the appellant/defendant for the reasons best known to her. She has failed to explain as to why she kept a signed cheque of huge sum of Rs.7,00,000/- in her home. The contentions of the appellant/defendant that a blank signed cheque filled with amount of Rs.7,00,000/- was kept in almirah and was misplaced, appears to be unbelievable particularly when the appellant/defendant had not taken any step to inform or lodge a complaint with her banker and has not placed on record the copy of application given to banker to stop payment of said cheque. Further, even if the bare statement of the appellant that the cheque in question bearing a signature and date was misplaced is taken as gospel truth then all the defendants in summary suit under Order XXXVII CPC for recovery on account of dishonour of cheque can easily get away from their legal enforceable liability by taking such sham and false defence. Even, if the cheque was misplaced, the appellant/defendant cannot be believed as it is highly

improbable that the cheque would have landed up in the hands of the respondent/plaintiff. The defence taken by the appellant/defendant appears to be evasive and does not inspire confidence at all.

16. In the circumstances, the learned ADJ has rightly found that the defence put forth by the appellant/defendant was illusory, sham and practically a moonshine and dismissed the application.
17. Here it is noted that the learned ADJ has decreed the suit for recovery of Rs.7,00,000/- with costs of the suit and *pendente lite* interest @ 6% p.a. from the date of filing of the suit till the date of decree. However, the learned ADJ has not assigned any reason as to why the interest has not been granted for the period from the date of decree till realization of the decretal amount.
18. The restriction to grant interest only till the date of decree is provided under Order XXXVII Rule 2 (3) of CPC where the defendant does not put in his appearance. There is no such restriction when defendant has put in his appearance and seeks leave to defend. As such, there is no reason as to why the interest on the decretal amount should not be granted to the respondent/plaintiff from the date of decree till realization of the decretal amount. The appellate court is empowered under Order XLI Rule 33 to pass any decree or order which ought to have been passed/made notwithstanding the respondent may not have filed any appeal or cross objections against such decree. Order XLI Rule 33 of the Code of CPC reads as under:-

“ORDER XLI Rule 33

APPEALS FROM ORIGINAL DECREES

.....
33. Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection ² [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order”

19. Admittedly, neither any appeal nor cross objections have been filed by the respondent/plaintiff for claiming interest from the date of decree till realization of the decretal amount. The appellant/defendant has been enjoying the fruits of amount of Rs.7,00,000/- of the respondent/plaintiff and therefore, to meet the ends of justice while exercising the power conferred under Order XLI Rule 33 of CPC, it is directed that the respondent/plaintiff shall also be entitled to interest @ 6% p.a.

against the appellant/defendant from the date of decree passed by the learned Trial Court till realization of the decretal amount.

20. The appeal is disposed of accordingly.

(VINOD GOEL)
JUDGE

FEBRUARY 9th, 2018
"sandeep"

