

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

Reserved on: 30.10.2015
Pronounced on: 23.12.2015

+ CS(OS) 624/2011
AMIT KHERA Plaintiff

Through: Mr. S.N.Choudhri with
Ms. Shruti Choudhri, Advs.

versus

ASHWANI KUMAR GUPTA & ANR Defendants

Through: Mr. Rakesh Kapur, Adv. for D-1 & 2.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

IA Nos. 17769/2011 & 17832/2011

1. The learned counsel for the applicant submits that the suit is not maintainable because (i) no cause of action arose in Delhi; (ii) the suit property is situated outside the territory of Delhi; (iii) there are a number of triable issues such as the signatures of defendant Nos.1 & 2 on the Agreement to Sell executed on 17.01.2008 is denied by the said defendants; (iv) the defendants have not taken any money as mentioned in the alleged Agreement to Sell; (v) the Agreement to Sell has not been executed on proper stamp paper; (vi) the Agreement to Sell has not been attested or registered before any authority hence it lacks authenticity in the eyes of law and cannot be relied upon and accepted in evidence; (vii) the said document is forged and fabricated and inadmissible in evidence, therefore, the suit

should be rejected, and (viii) the plaintiff would have to establish admissibility of the documents, which in turn would require leading of evidence, hence the leave to defend should be allowed.

2. The learned counsel for the applicant further submits that, no case is made out for grant of a decree under Order XXXVII of the CPC as the plaint is contradictory in parts: the Agreement to Sell, which forms the basis of this suit, cannot be relied upon because it was allegedly witnessed on 16.01.2008 although it was executed on 17.1.2008; that there can be no witness to a document or an act unless the document has been executed in the presence of the witness, therefore, the attestation of the signature of the witness on the Agreement to Sell is itself contradictory; the veracity of documents would need to be established in trial. Furthermore, he submits that the Agreement to Sell mentions two sellers, i.e. defendant Nos.1 & 2, whereas the plaintiff has recognised only defendant No.1 as the owner of the property; that the documents which have been filed by the plaintiff show that the NOIDA Authority records the ownership of the property in the name of three companies, viz., (a) Two Brothers, (b) Two Brothers Polymers Private Limited and Two Brothers Filaments Private Limited. He submits that therefore, the Agreement to Sell could not have been entered into by private parties unless it is recorded that they have due authority on behalf of those entities whose names are mutated or recognised by NOIDA Authority to be the owners of the said properties. He further submits that neither the plaint nor any document show as to how the amount of Rs.60 lacs was paid to the defendants; that the document filed as 'Receipt' purporting to evidence receipt of monies by the defendants too is doubtful because it does not bear a Revenue Stamp; that according to the documents filed by the plaintiff the

suit property was already mortgaged with the NOIDA Authority, hence, it could not have been dealt with in the manner clarified by the plaintiff and that the necessary parties such as the NOIDA Authority has not been impleaded although the documents of the said Authority are sought to be relied upon.

3. In reply the learned counsel for the plaintiff submits that the suit seeks refund of the monies paid to the defendants and it does not seek specific performance of the Agreement to Sell; therefore all that the plaintiff needs to show is whether the monies paid the plaintiff and received by the defendants were pursuant to the Agreement to Sell. He relies upon an Agreement to Sell and a Receipt filed by the plaintiff clearly evidences the signature of defendant No.1 acknowledging that Rs.15.00 lacs was received by him on 27.6.2009 as part payment of Rs.60.00 lacs against the purchase made on 17.1.2008. The learned counsel submits that this document is good enough for the suit to be decreed. Additionally, he submits that the defendants have tried to mislead the Court by a bald denial of the existence of the Agreement although they had written a letter to the Regional Manager, UPFC on 12.11.2007 wherein they have acknowledged that the plaintiff was the purchaser of the suit property and they wanted to settle the mortgage with the UPFC. However, the said document is not on record. The learned counsel for the plaintiff has handed over a copy of the same to the Court. He submits that there is no specific denial of the document. Instead the receipt acknowledges the acceptance of monies by the defendants, therefore the suit ought to be decreed. He relies upon a judgement of this Court in ***M/s. Delhi Book Store v. K.S. Subramaniam* AIR 2006 Delhi 206**, which inter alia, held:

“5. The pleadings of the parties afore-noticed indicate that the defendant has not in its entirety disputed the case of the plaintiff. The transaction between the parties is admitted and even the printed books worth Rs. 5 lacs is admitted, while there is denial of receipt of material for a sum of Rs. 18,24,000/-. Out of the admitted amount of Rs. 5 lacs, the defendant has stated that a sum of Rs. 3 lacs was paid to the plaintiff, which it may be noticed, is also admitted by the plaintiff, thus, leaving an admitted balance of more than Rs. 2 lacs. This is in relation to the invoice no. 020248 dated 9th May, 1998 and the cheques which were issued by the defendant and have been noticed on the same invoice and were for the period 20th July, 1998 to 30th September, 1998. The real dispute is with regard to invoice dated 19th May, 1998 for a sum of Rs. 18,24,000/-. This invoice not only acknowledges the material received, but also mentions the 15 cheques which were issued. The agreement dated 8th May, 1998 has been placed on record which is signed by the plaintiff and the defendant. Of course, the defendant has disputed the signatures on this agreement. To the bare naked eye, if these signatures are compared with the signatures on the affidavit filed with the leave to defend except with its normal variations, they appear to be of the same person. Another letter dated 25th June, 1998 has been placed on record, signed by the defendant which reads as under:-

Dear Mr. Vijai Ahuja, I am very sorry for the delay in sending the payment to you.

As informed I have yet to realize the payment from the party. Hope the matter will be settled within a week.

I am sending the photocopy of the cheques.

With Good Wishes,

*Yours faithfully,
C.K. S. Subramaniam*

6. The parties had meetings, which were held at Delhi, in

regard to the outstanding amounts for settling their disputes, the record of which has also been placed on record. In addition to the above letter, which remains totally unexplained in the leave to defend application filed by the defendant, there is another letter dated 23rd December, 1998 which again reads as under:-

Coimbatore 23/12/98

Dear Vijay Ahuja,

Keeping fine. Hope all are fine at Delhi.

Sorry VIJAY I was not in a position to sent the payment immediately.

There are 3 cheques worth Rs. 7 lakhs was returned form my customer. (copy enclosed) Please kindly wait for another 15 days. I am sure I can arrange few payments for you.

Since we know each other for a long time, I am sure you will co-operate with me for this genuine reason.

With Good Wishes & HAPPY NEW YEAR'

*Yours faithfully
(K.S. Subramanian)''*

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“8. The learned counsel appearing for the plaintiff while relying upon the judgment in the case of M/s. Aganall Traders Ltd. v. Shyam Ahuja and Messrs. Tailors Priya, a firm v. Messrs. Gulabchand Danraj, a firm argued that a decree should be passed in favor of the plaintiff and against the defendant as the defendant has not made out any triable issue. On the other hand, the learned counsel appearing for the defendant relied upon the case of Dentsply India Pvt. Ltd. v. Excel International and Ors , Goyal Tax Fab Pvt. Ltd. v. Anil

Kapoor , Corporation Bank v. M/s. Montana International and Ors. 1995 1 AD (Delhi) 629, International Computers Consultants v. Home Computers Services (P) Ltd. (DB), Kasim Ali v. M.L. Wadhawan and Anr. , Chandradhar Goswami and Ors. v. Gauhati Bank Ltd. and M/s. Mechalec Engineers and Manufacturers v. M/s. Basic Equipment Corporation to contend that the defendant/applicant would be entitled to unconditional leave to defend. It is a settled principle of law that the defendant should be able to establish his bonafides and triable issue on the basis of the defense taken by him in the application for leave to defend. In the case of M/s. Mechalec Engineers and Manufacturers (supra) the Supreme Court itself spelled out the principles which will govern exercise of discretion under the provisions of Order 37 of the Code of Civil Procedure. The case of the present defendant would squarely fall in the set of cases which has been indicated by the Supreme Court in the said judgment in Clause 'D'. In a recent judgment of this Court in CS(OS) No. 630/2004, Car-O-Liner AB v. TTC Laser Machines Pvt. Ltd. decided on 4th August, 2005, the court held as under:

In the present case the defense of the Defendant in the application for leave to defend may not be a moonshine but certainly is not a defense which in its entirety is bonafide and would give rise to triable issues on all aspects of the issues taken up by the Defendant/applicant in the application for leave to defend.

In the case relied upon by the Defendants the Trial Court had granted leave to defend which was interfered by the High Court in granting unconditional leave to defend. In that case the Plaintiff had denied the liability in its entirety and in fact had even denied the receipt of the goods. The Trial Court had in that case formulated 7 issues which require consideration. The facts of the case has no application to the present case. The triable issues that would arise in the present case would be limited to the question of interest and the defective material. Rest claims of the Plaintiff in regard to receipt of the goods and

its price and commission being regulated by a written contract between the parties even in view of the stand taken by the Defendant would not be open to much doubt. In accordance with the principle enunciated in the case cited by the Defendant itself, it will be a fit case where the Defendant should not be granted unconditional leave to defend. The case of the Defendant squarely falls in the category where the affidavit does not make out positively and immediately a case for grant of unconditional leave. Court shows such a state of fact has led to the inference that a trial of action may be able to establish a defense partly to the claim of the Plaintiff. In that case the Plaintiff may not be entitled to the judgment and Defendant would be entitled to leave to defend subject to conditions. Such principles are well enunciated, reference can be made to the Judgment of this Court in the case of Harprasad v. Allahabad Bank, and in the case of Kiranmoyee Dassi v. J. Chatterjee AIR 1949 Calcutta 479. For grant of unconditional leave to defend, it is necessary for the applicant to show that the defense taken by him is not sham but is bonafide. Reference can also be made to the judgment of the Supreme Court in the case of M/s. Gujarat Lease Financing Ltd. v. M/s. Abdulla Akbarali and CO. and Ors., where the Court held that even if the injunction was operating against the Defendant from transferring shares of the Company, it would be no ground for grant of unconditional leave. The applicant should show triable issues which would fairly demand a trial and must not appear to be a mere pretence of a triable issue.

The learned Counsel for the Plaintiff has not been able to show as to on what written contract or term of the invoices the Plaintiff claims the interest. This amount claimed by the Plaintiff in absence of such specific stipulation may not even fall under the category of the claim which could be raised strictly within the ambit of Order 37 of the CPC prior to the institution of the Suit. To this extent the Defendant could be entitled to leave to defend unconditionally.

In view of my above discussion the application for leave to

defend of the Defendant is allowed, subject to the Defendant furnishing security to the extent of principal amount claimed by the Plaintiff in the Suit.

The application is accordingly disposed of in the above terms.

All the three IAs No. 4644/2004, 5720/2005 and IA ____/2004 stands disposed of.

9. When the above settled principles are applied to the facts of the present case, there can hardly be any doubt that the defense taken by the defendant is not only illusory but is in apparent contradiction to its own documents which have not been denied in the reply, except the agreement dated 8th May, 1998.”

4. In this case, the learned counsel for the defendants denies the veracity of the aforesaid letter. He contends that if the plaintiffs, by their own averment, have accepted defendant No.1 to be the absolute owner of the property, as mentioned in para 3 of the alleged Agreement to Sell, then there was no requirement for the signature of defendant No.2. In reply, the learned counsel for the plaintiff submits that the same could well be attributed to extreme caution so as to obviate any likelihood of disputes between the partners of the partnership firm and shareholders of the three companies; he further submits that if defendant No.2 had nothing to sell, then his signature on the document would be of no consequence and he could not have legitimately received the money for transfer of property and hence he ought to return it. The learned counsel relies upon the dicta of the Supreme Court in ***M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation* AIR 1977 SC 577** where the principles applicable to cases covered by Order 37 CPC were enumerated, it reads as under:

“(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 (sic) 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 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.”

5. The learned counsel for the applicant states that his case falls within

the ambit of clauses a & b of the aforesaid judgement. The learned counsel further submits that the plaintiff has failed to show as to how the amount of Rs.15.00 lacs was paid to them in June, 2008 especially given the fact that defendant No.1 was himself under severe financial constraints.

6. On a query put to the learned counsel for the applicant/defendant on whether there is a specific denial of the receipt dated 27.6.2008 which records that an amount of Rs.15 lacs was paid in advance for purchase of the suit property, the learned counsel answers in the negative. However, he submits that there is a denial of the same in the rejoinder. There is no averment to this effect in the leave to defend.

7. The learned counsel for the plaintiff submits that the averment in the rejoinder is not a part of the main defence. He relies upon the dicta of the Supreme Court in **Anant Construction (P) Ltd. vs. Ram Niwas, 1994 (31) DRJ**, which inter alia, held:

“(7) Sitting on the original side, I have experienced bottlenecks being created in smooth progress of cases by this practice. Replications are being filed by the plaintiffs to every written statement filed by the defendants. These replications are nothing but mere denials of the averments made in the written statements. Mostly they reproduce and restate several averments of the plaint. These replications do not serve any utility. They merely add to the bulk of the file and increase the job of the Judge going through the pleadings. Then there are some cases where unscrupulous plaintiffs exploit the opportunity of filing replication for the purpose of introducing a case inconsistent with the case set out in the plaint, to illustrate, while the plaint seeks to challenge a transaction as vitiated by fraud, the replication introduces a case of the transaction having been vitiated by misrepresentation. While the plaint alleges title in the plaintiff by virtue of succession, the replication sets out a case of acquisition of title under a will.

This results in confusion and serious embarrassment at the trial. All this is over and above the adjournments perpetuated for the purpose of filing the rejoinder/replication.

7.1 In court proceedings, the terms - rejoinder and replication - are being loosely used as interchangeable terms or synonyms, which they are not.

7.2 Strangely enough, not only replications are filed by the plaintiffs to the written statements, even simple interlocutory applications such as those under Order 6 Rule 17, Order 13 Rule 2, Order 26 Rule 9 Civil Procedure Code are insisted on being supplemented by replications by the applicants on replies being filed by the opposite parties. Ordinarily such applications are supposed to be disposed off on the first date of hearing even without awaiting for a reply unless it be considered necessary by the court.

7.3 These rejoinders/replications perpetrate adjournments, avoidable otherwise and contribute colossal delay in hearing and disposal of matters, far from expediting the trial. More often than not distinction between introducing a plea by way of amendment of pleading and introducing plea by rejoinder/replication is being lost sight of. Opportunity of filing rejoinder/replication is being exploited to avoid the necessity of amending the plaint, even if necessary. This deprives the defendant of an opportunity of filing his counter to the plea raised by the plaintiff. If the plaint is amended, the defendant would have a right of incorporating pleas by way of consequential amendment in his written statement or by filing additional written statement to the plea introduced in the plaint by way of amendment. The defendant does not have any opportunity of joining additional pleadings to the pleas introduced for the first time by the plaintiff in his replication.

(8) Order 6 of the Code of Civil Procedure deals with pleadings generally. Pleading shall mean plaint or written statement. The pleadings are supposed to set out material facts. They are to be verified. 8.1 Order 7 deals with the plaint. Order 8 deals with written statement. Rule 3 of order 8 enjoins the defendant to

deny specifically such of the averments of the plaint which he does not admit. An averment made in the plaint if not specifically denied or only evasively denied in the written statement would be deemed to have been admitted. Rule 2 enjoins the defendant to specifically plead new facts. 8.2 Order 8 Rule 9 provides that no pleadings subsequent to the written statement of a defendant other than by way of defense to a set off or counter claim shall be presented except by leave of the court and upon such terms as the court thinks fit. The Court may any time require a written statement or additional written statement from any of the parties and fix a time for presenting the time. 8.3 Pleadings by way of rejoinder/replication are not to be found statutorily contemplated by the Code of Civil Procedure.

(9) It is basic concept of pleadings that a defendant has to deny specifically every averment made in the plaint if he choses to dispute the same. As already stated, a non specific or evasive denial in written statement may be taken as an admission of plaint facts. A failure to file Ws would enable the Court pronouncing judgment against the defaulting defendant. However, a plaintiff is not to be treated similarly. Every material averment made in the written statement is presumed to be denied by the plaintiff and for that purpose he need not file a replication.

(15) A replication is not to be permitted to be filed ordinarily, much less in routine. A replication is permissible only in three situations: (1) when required by law; (2) when a counter claim is raised by the defendant; (3) when the Court directs' or permits a replication being filed. The Court may direct filing of a replication when the court having scrutinised the plaint and the written statement feels the necessity of asking the plaintiff to join specific pleadings to a case specifically and newly raised by the defendant in the written statement. The plaintiff may also feel the necessity of joining additional pleading to put forth his positive case in reply to the defendant's case but he shall have to seek the leave of the court by presenting the proposed replication along with an application seeking leave to file the

same. The court having applied its mind to the leave sought for, may grant or refuse the leave. Ordinarily the necessity of doing so would arise only for 'confession and avoidance'.`

24(5) Court would direct or permit replication being filed when having scrutinised plaint and written statement the need of plaintiff joining specific pleading to a case specifically and newly raised in written statement is felt. Such a need arises for the plaintiff introducing a plea by way of 'confession and avoidance.'`

8. From the aforesaid discussion, what emerges is that there is no clear admission of the receipt of the Rs.15.00 lacs from the plaintiff by the defendant. On the contrary, there is denial of the same by the defendant albeit in the rejoinder to the application for leave to defend. For a decree in a money suit under Order XXXVII of the CPC, the Court would need to see if there is a clear admission on record of such monies having been received by the defendant. Even the letter written by the defendant to the UPFC on 02.11.2007 refers to Mr. Amit Khera, i.e., the present plaintiff, only as a probable/prospective buyer. There is no clear admission of the property either having been sold or of any monies having been received by the defendant with regard to any sale transaction. Furthermore, the Agreement to Sale dated 17.01.2008 has too many blank spaces in the body of its text, in any case, it has been denied by the applicant, therefore, it would have to be proven through evidence. The purported receipt of Rs.60.00 lacs in cash by respondent No.1 is on less than half a sheet of paper and does not bear a Revenue Stamp on it.

9. The Court is of the view that the plaintiff has raised a number of triable issues, mentioned in para 1 and 2 hereinabove and accordingly, the

Court finds sufficient grounds to grant the leave to defend.

10. In the circumstances, the application is allowed, the suit shall be treated as a regular suit. Let Written Statement be filed in four weeks and Replication, if any, in four weeks thereafter.

11. In view of this Court's Notification No.27187/DHC/Orgl. dated 24.11.2015, the case is to be transferred to the appropriate Court having pecuniary jurisdiction.

12. Accordingly, list the case before the District Judge, South (Saket District Courts) on 26.02.2016.

NAJMI WAZIRI, J.

DECEMBER 23, 2015/acm