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

Date of Pronouncement: August 14, 2015

\+ CS(OS) 1008/2013

KRISHAN LAL ARORA ..... Plaintiff

Through: Dr. N. K. Khetarpal, Adv.

Versus

GURBACHAN SINGH AND ORS ..... Defendants

Through: Mr. S. Rao and Ms. Suman Gupta, Adv. for D-1

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.19632/2013 (for leave to defend)

1. This is an application filed by defendant No.1 under Order 37 Rule 3(5) CPC for grant of leave to defend the suit.

2. The suit is filed by the plaintiff for recovery of Rs.20,90,000/-. It is averred in the plaint that the defendants represented to the plaintiff to be owners of built up property at Municipal No.173, measuring 948 sq.yards in Khasra No.322 situated in Extended abadi of (Lal-Dora) Village, Neb Sarai, Tehsil-Hauz Khas, New Delhi. The defendants agreed to sell flat No. D-7 & D-8 on the third floor vide Agreement to Sell dated 8.6.2010. Defendant No.1 was stated to be the owner of 75% undivided share and defendant No.2 of the balance 25%. The agreed consideration was Rs.30 lacs and the plaintiff paid a sum of Rs.25 lacs in advance. It is

averred that the balance sum of Rs.5 lacs was payable in 240 days.

3. It is further stated that the plaintiff requested the defendants to complete the transaction and execute the sale deed but they refused to do so. The defendants backed out. After much pursuation it is averred that the defendants issued four cheques in favour of the plaintiff to the tune of Rs.25 lacs with interest as refund of money received. The defendants shared the refund i.e. the share of 75% was of defendant No.1 and 25% of defendant No.2. These cheques were issued on 23.01.2013 and 25.01.2013 respectively. However when the plaintiff presented the cheques same were dishonoured with the comment "Account stands closed"/"funds are insufficient".

4. A legal notice dated 20.2.2013 was sent demanding the said sum of Rs.25 lacs. In response to the legal notice defendant No.2 sent a reply dated 1.4.2013, admitting his liability of Rs.6.5 lacs, as he stated that he was owner of only 25% share in the property and had received the said amount. He sent one cheque of Rs.1,25,000/- and promised to pay the balance. Thereafter defendant No.2 has made another payment of Rs.3,75,000/. Hence, it is urged that a total of Rs.5 lacs has been paid by defendant No.2 out of his total liability of Rs.6,25,000/- and balance of only Rs.1,25,000/- is payable by defendant No.2. Hence, the present suit has been filed under Order 37 CPC for recovery of Rs.20,90,000/-. Defendant No.2 has not been appearing.

5. The defendant No.1 has filed the present application for leave to defend. The application is a short two page application. Relevant portion of the same reads as follows:-

"2. The defendant No.1, Gurbachan Singh deserves leave to defend the suit instituted by the plaintiff because the so called cheques on the basis of which the plaintiff is seeking reliefs under Order 37 of the CPC have never been issued by the defendant No.1 in favour of the plaintiff. The cheques in question bearing no.119555, 119599 belong to HDFC Bank, have neither been issued by the defendant No.1 in favour of the plaintiff nor the defendant No.1 was mainitaining any such bank account with M/s HDFC Bank, Malviya Nagar. Therefore, the plaintiff be put to strict proof for the averments made by him in the plaint filed under Order 37 of the CPC.

3. In so far as the purported legal notices dated 20.02.2013 issued by M/s Khetrapal and Associates have never been received by the defendant No.1 as such furnishing reply to such notice by the defendant No.1 won't arise. That the plaintiff be put to strict proof to support his contentions made under the plaint.

4. In so far as purported agreement dated 8th June 2010 has never been entered in to by the defendant No.1, Gurbachan Singh as such the plaintiff be put to strict proof for the same. The defendant No.1 was not actual party to the alleged agreement dated 8th June 2010".

6. Hence the leave to defend is sought by defendant No.1 on the following contentions:-

(a) The cheques relied upon by the plaintiff were never issued by defendant No.1 in favour of the plaintiff;

(b) Defendant No.1 is not maintaining any bank account with HDFC Bank, Malviya Nagar, Delhi;

(c) Defendant No.1 never entered into an agreement dated 8th June, 2010 with the plaintiff.

7. The plaintiff has filed his reply. In the reply he has relied upon a written statement filed by defendant No.1 in a suit filed before the District Judge, Delhi for recovery of Rs.6,40,000/- from defendant Nos. 1 and 2 being the interest payable by the said defendants on the sum of Rs.25 lacs received as advance by them. Interest is claimed for the period 8th June, 2010 to January, 2013. The plaintiff contends in the said written statement filed in that suit the defendant No.1 claims that the cheques were stolen and hence it is averred that the defendant No.1 is only misleading this court by taking contradictory pleas in different courts.

8. I have heard learned counsel for the parties and perused the record.

9. Learned counsel appearing for the applicant/defendant No.1 has reiterated his contention in the present application. He submits that if he may be given a chance to lead evidence he would show that the account did not belong to defendant No.1 and that the cheque has not been issued in his handwriting.

10. I may see the merits of the contentions of defendant No.1 as stated in the present application.

11. The first two contentions of defendant No.1 are that the cheques in question relied upon in the plaint bearing cheque nos.119555 and 119599 are not issued by defendant No.1 and that the defendant No.1 has no account in HDFC Bank, Malviya Nagar.

12. The plaintiff filed the present suit on 15.05.2013. Along with suit he has filed an application under Order 2 Rule 2 CPC seeking permission to file a separate suit for the interest component on the advance of Rs.25 lacs paid to defendants for a period of two years and eight months. This application was allowed on 25.08.2014. The plaintiff has filed a second suit for recovery of Rs.6,40,000/- against the defendants being the interest on the advance received by the defendants. In the said suit defendant No.1 filed his written statement. In the written statement he states that the said suit and the present suit in this court have been filed on the basis of stolen cheques. It is averred that the son of the plaintiff was working with defendant No.1 as Chartered Accountant. It is further averred that certain cheques, signed and unsigned were reported missing for which a police complaint was registered. It is further averred that defendant No.1 is baffled to see the same stolen cheques being used by the plaintiff. Hence it is further averred in the said written statement that defendant No.1 has filed a police complaint against the plaintiff and his son for using the stolen cheques.

13. There is no rejoinder filed by defendant No.1 to the reply of the plaintiff to the present application. It is obvious that the copy of written statement as filed by the defendant No.1 before the District Court as placed before this Court is not denied.

14. It follows that the contention of defendant No.1 that defendant No.1 is not maintaining any bank account with HDFC Bank,Malviya Nagar is false and contrary to the stand taken in the suit before the Distrirct Court. From the written statement filed by defendant No.1 in the District Court it is obvious that defendant No.1 was maintaining a bank

account in the bank concerned and some cheques on that account were stolen. Hence the defence about there being no such bank account of defendant No.1 is patently false.

15. The above defence of defendant No.1 also cannot be believed for other reasons. I may look at the return memos of the cheques which are in issue. The returning memos issued by HDFC Bank, Malviya Nagar, states that account is closed. It does not state that there is no account in the name of Mr. Gurbachan Singh i.e. defendant No.1. The return memos hence show that the account in question was there, but has now been closed by defendant No.1.

Regarding the stand of defendant No.1 that he never issued any such cheques, reference may again be had to the written statement filed before the District Court. There defendant No.1 has argued that the cheques were lost and have been misused by the plaintiff. In the written statement it is also stated that a police complaint has been lodged. However, the present application does not mention anything about lost cheques or about any police complaint having been lodged. No copy of any complaint has been filed by defendant No.1. The version of defendant No.1 cannot be believed in this background. Defendant No.1 is taking contradictory stands in different proceedings. It is clear that the cheques were issued by defendant No.1.

16. I now deal with the third contention of defendant No.1, namely, that there is no agreement between the plaintiff and defendant No.1.

17. Again the falsity of this contention is apparent from a perusal of the written statement filed before the District Court. In the said written statement it has been urged that the defendant did not back out from the

agreement to sell as the plaintiff was given alternative plots/flats at Begum Pur, Malviya Nagar, Delhi as per his choice. No further details are given in the said written statement about which plot was given. No such averment is made in the present application seeking leave to defend. The stand taken in the written statement clearly shows that defendant No.1 has accepted the execution of the agreement to sell. It is noteworthy that the plaintiff has in the reply to the application for leave to defend clarified that the transaction did take place with defendant No.1 for purchase of the property at Begum Pur which is an independent transaction for which the payment has been made separately and has no concern with the present transaction. There is no rebuttal to this contention.

18. Further, the stamp paper of the agreement to sell dated 8th June, 2010 is in the name of defendant No.1.The agreement to sell states that the defendants have received cheque no.049127 for a sum of Rs.8,25,000/- and 049129 for Rs.8,10,000/- apart from other payments. The plaintiff has also placed on record the statement of account of his bank account in HDFC Bank which shows that cheque No.049127 issued in favour of Mr. Gurbachan Singh for Rs.8,25,000/- was debited to his account on 05.05.2010 and cheque No.049129 also in favour of Mr. Gurbachan Singh for Rs.8,10,000/- was debited to his account on 13.05.2010. Defendant No.1 has received the payments pursuant to cheques which are mentioned in the agreement to sell dated 8th June, 2010. There is hence no merit in the contention of the defendant No.1. An agreement to sell dated 8th June, 2010 was executed between the parties.

19. Apart from the submissions stated above, there is another reason as to why I am persuaded not to accept the defence of defendant No.1. The parties entered into an agreement to sell dated 8th June, 2010. The agreement is between defendant Nos. 1 and 2 and the plaintiff. The four pages agreement is signed by the parties on each page. It is attested by two witnesses. The plaintiff states to have sent a legal notice to the defendants on 20.02.2013. The defendant No.2 Mr. Vinod Kumar Grover on 01.04.2013 sent a reply. In the reply he admits execution of agreement to sell dated 8th June, 2010. He admits that the defendants could not complete their terms of the agreement to sell as the property prices had increased. He admits receipt of two cheques issued in his name for Rs.3,12,500/- each being a total of Rs.6,25,000/- inasmuch as he has stated that he was 25% owner of the said property and got only 25% of the sale consideration. He admits of having issued two cheques for Rs.6,25,000/- to the plaintiff which were returned on account of 'insufficient funds'. He states that he has some funds and that he has issued cheque no.218727 dated 18.4.2013 drawn on HDFC Bank, Malviya Nagar for Rs.1,25,000/-. He undertakes to pay the balance sum of Rs.5 lacs with interest at the rate of 12% per annum in four equal monthly instalments.

20. Essentially, defendant No.2 who is a partner of defendant No.1 has admitted the entire case of the plaintiff. The reply of defendant No.2 further fortifies the case of the plaintiff that the defence which is sought to be raised by defendant No.1 is absolute make belief and has no merit.

21. I may also refer to Section 139 of the Negotiable Instruments Act, which reads as follows:-

> "**139. Presumption in favour of holder.-** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."

22. In my opinion, defendant No.1 has failed to rebut the presumption on account of cheques which are in the possession of the plaintiff and have been returned unpaid by the bankers.

23. As to when leave to defend is to be granted the basic judgment in this regard is ***M/s Mechalec Engineers & Manufacturers v. M/s Basic Equipment Corporation AIR 1977 SC 577*** where in para 8, the Hon'ble Supreme Court has held as follows:

> "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 17 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."

24. The case of defendant No.1 would fall in Clause (d) of the above judgment of the Hon'ble Supreme Court. The defendant No.1 has failed to raise any bonafide or reasonable defence. The defence is moonshine. In my opinion, there is no likelihood that in case the matter is sent to the Trial Court any triable issue would arise. In this background, I dismiss the present application.

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24. In view of the fact that the application for leave to defend has

been dismissed the suit is decreed in favour of the plaintiff and against defendant No.1 for the sum of Rs.19,59,375/-. The plaintiff would be entitled to interest @ 7.5% per annum from the date of filing of the suit till recovery.

25. As far as defendant No.2 is concerned, he has not filed any application for leave to defend. The plaintiff has sought a decree for a sum of Rs.1,30,625/- against the defendant No.2.

26. A decree is passed in favour of the plaintiff and against defendant No.2 for Rs.1,30,625/- along with interest at the rate of 7.5% p.a. from the date of filing of the suit till recovery.

The plaintiff shall also be entitled to costs.

(JAYANT NATH)
JUDGE

AUGUST 14, 2015
n/an