

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

+ CS(OS) 3184/2011

Decided on: 06.05.2015

IN THE MATTER OF:

M/S DELHI STRUCTURES

..... Plaintiff

Through: Mr. Parveen Kumar Aggarwal, Advocate

versus

M/S GULATI HOSPITALITY AND ORS

..... Defendants

Through: Mr. Anshul Garg and Mr. Abhishek
Goyal, Advocates with D-2 in person.

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J.(Oral)

I.A. 11737/2012 (by the defendant No.1 & 2 u/O XXXVII R3(5) CPC)

1. The present leave to defend application has been filed by the defendants in a summary suit instituted by the plaintiff for recovery of a sum of ₹54,45,000/-, being the value of three cheques issued in its favour by the defendant No.1, towards payment of construction work with material that was undertaken by it for the defendants.

2. As per the averments made in the plaint, the plaintiff/firm is a building contractor and has undertaken a number of projects in and outside Delhi. The defendant No.1 is a private limited company and

the defendant No.2 is a Director of the defendant No.1.

3. The plaintiff claims that in the month of March, 2008, the defendants had approached it for undertaking construction of a hotel on a plot of land owned by them and situated at Gurgaon and had asked for a quotation for the said work. The plaintiff had forwarded its quotation on 01.03.2008 and it had quoted the rate of ₹600/- per square feet for the actual slab casted area. On 07.06.2008, the defendants had executed a work order in favour of the plaintiff for undertaking construction of the hotel building @ ₹600/- per square feet, including steel and the plaintiff had successfully constructed the hotel which is presently being run under the name, "Hotel Tulip Inn".

4. After the plaintiff had concluded the construction work, it raised a bill on the defendants that was duly certified and verified on 29.01.2009, by Mr. Vimal Bajaj, an Architect and Interior Designer appointed for the project by the defendants. In support of the said submission, learned counsel for the plaintiff has drawn the attention of the Court to page 8 of the documents filed under index dated 15.12.2011, which shows that a sum of ₹2,73,50,950/- had been certified by the Architect on 29.1.2009 for being released in favour of the plaintiff. Further, vide letter dated 05.12.2009, the Architect had informed the defendants that the total extra items executed by the

plaintiff had been verified for a sum of ₹95,41,080/-.

5. Though it has not been so averred in the plaint, learned counsel for the plaintiff submits that the defendants had released the amounts payable in terms of the bills raised and certified by their Architect on 29.01.2009 and 05.12.2009, except for an amount of ₹85 lacs. Out of the said outstanding amount of ₹85 lacs, the following three cheques totalling to a sum of ₹54,45,000/- had been issued by the defendants :

S.No.	Cheque No.	Drawn on	Date	Amount
1.	603087	UCO Bank, Civil Lines, Gurgaon.	24.06.2010	₹19,80,000/-
2.	603088	UCO Bank, Civil Lines, Gurgaon.	24.06.2010	₹19,80,000/-
3.	603089	UCO Bank, Civil Lines, Gurgaon.	24.06.2010	₹14,85,000/-
Total				₹54,45,000/-

6. Counsel for the plaintiff submits that when the aforesaid cheques were presented by the plaintiff to its banker for encashment, they were returned vide memo dated 02.07.2010 with the remarks, "effect not cleared, present again". When the plaintiff had re-presented the said cheques, the defendants' banker had returned them vide memo dated 06.10.2010, with the remarks, "payment stopped by the drawer".

7. Aggrieved by the dishonour of the three cheques, the plaintiff had served a legal notice dated 16.11.2011 on the defendant. Despite

receiving the aforesaid notice, the defendants had failed to respond, thus compelling the plaintiff to institute the present summary suit, based on the three cheques. Counsel for the plaintiff states that over and above the value of the three cheques totalling to ₹54,45,000/-, the plaintiff has also claimed interest on the said amount @ 18% per annum, from the date of issuance of the said cheques, till realization.

8. In the leave to defend application filed by the defendants, they have raised a defence to the effect that while undertaking the construction of the hotel, the plaintiff had used poor quality of material and had caused the death of a labourer at the site, due to which, a case was registered against it. It has been further stated that the construction of the project had got delayed on account of the plaintiff and the hotel could not be completed before the Commonwealth Games had commenced due to which the defendants had suffered monetary losses.

9. The defendants have denied that the plaintiff had executed any extra work at the site or that any amount was payable to it for the same. As for the certification of the plaintiff's bills by Mr. Vimal Bajaj, Architect and Interior Designer appointed the defendants for the project, they have baldly denied the said certification, but have not denied the authority vested in the said Architect to certify the bills

raised by the plaintiff. Nor have the defendants stated anywhere that the bills, though certified by their Architect, had been disputed by them and returned to the plaintiff.

10. Coming to the three cheques that were issued by the defendants, they have stated that at the time when the said cheques were handed over to the plaintiff, they were blank and were given only to gain the plaintiff's confidence and that the plaintiff had not been authorised to deposit the said cheques for encashment. Learned counsel for the defendant contends that the plaintiff has misused the cheques to cause wrongful gain to itself and wrongful loss to the defendant No.1. He argues that the plaintiff has failed to demonstrate as to how would a sum of ₹85 lacs or even a sum of ₹54,45,000/-, being the value of the three cheques, be payable by the defendants.

11. It is pertinent to note that though no such plea was taken by the defendants in their leave to defend application, learned counsel for the defendants had orally submitted before the Court on 19.12.2014 that the three cheques in question were issued by the defendants in the year 2008 as security amount and they had been misused by the plaintiff in the year 2010 in order to file the present suit. To substantiate the said submission, he had sought time to obtain a certificate from the defendants' banker to the effect that the particular

cheque book containing the disputed cheques at Sr.No. 60387 to 60389, had actually been issued in the year 2008.

12. At the request of the counsel for the defendants, the case was adjourned to enable him to produce a certificate from the defendant's Bank but the said certificate was not filed by the next date of hearing, i.e., 10.02.2015. On 10.02.2015, counsel for the defendants had expressed the defendants' inability to produce certificate on the ground that his clients had misplaced the cheque book in question. This Court had then observed that assuming that the defendants had misplaced the cheque book in question, they could still approach their banker for obtaining a certificate with regard to utilization of the said cheque book. Accordingly, the defendants were granted another opportunity to file a certificate issued by UCO Bank, Civil Lines, Gurgaon in respect of the utilization of the cheque book in question.

13. The aforesaid certificate has not been filed. However, counsel for the defendants states that he had filed some documents on 02.05.2015 but they are lying under objections. A copy of the documents have been handed over across the board with a copy to the other side and taken on record. A perusal of the details of the cheques issued between 16.6.2010 to 18.6.2010 from the defendant's account and enclosed by the defendants under index dated 02.05.2015 reveals

that the cheque book in question was not issued by the defendants' banker in the year 2008 as claimed by the counsel for the defendants. The cheque book starting from Sr.No.603083 and ending at Sr.No.6038100 which includes the three cheques in question was apparently issued by the Bank in the month of June, 2010. Pertinently, the three cheques, subject matter of the present suit, bearing Sr.No.603087, 603088 and 603089 are all dated 24.06.2010. The statement of the defendants' Bank account as filed by them reflects that the cheque at Sr.No.603083 which is three leaves before the cheque at Sr.No. 603087, was issued by the defendants on 16.06.2010 and the cheque at Sr.No.603090 which is one after the cheque at Sr. No.603089, was issued on 19.06.2010.

14. It is manifest from the above that the defendants' banker had not issued the cheque book in question in the year 2008 as had been urged by the counsel for the defendants. Rather, the said cheque book was issued in the year 2010 and was utilized by the defendants in the very same year. Further, a perusal of the statement of account maintained by the defendants with UCO Bank, Civil Lines Branch, Gurgaon for the period w.e.f. 15.06.2010 to 16.08.2010 reveals that most of the cheques out of the aforesaid cheque book had been duly encashed on being presented. In fact, one of the cheques at

Sr.No.603098 happens to be a self drawn cheque for a sum of ₹50,000/- that was duly encashed by the defendants. Thus the entire edifice sought to be raised by the defendants to justify the dishonour of the three cheques crumbles to the ground, being a sham defence.

15. The law on the subject is well settled and has been duly explained by the Supreme Court in several cases, including, the decisions in the cases, Santosh Kumar vs. Bhai Mool Singh, **(1958) 1 SCR 1211**; Milkhiram (India) Pvt. Ltd & Ors. vs. Chamanlal Bros., **AIR 1965 SC 1698**; M/s Sunil Enterprises & Anr. vs. SBI Commercial & International Bank Ltd., **AIR 1998 SC 2317** and Mechelec Engineers & Manufacturers vs. Basis Equipment Corporation, **(1977) 1 SCR 1060**, wherein it has been held that the question of granting leave to defence has to be considered in the light of the following principles:

- 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 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 condition 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 set up 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.

16. In the case of Raj Duggal vs. Ramesh Kumar Bansal, reported at **AIR 1990 SC 2218**, the Supreme Court had added a word of caution and observed that if there is a triable issue, in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or an uncertainty as to the amount actually due or where the alleged facts are of such a nature that would entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses, leave should not be denied. Thus, summary judgment under Order XXXVII CPC ought not to be granted where there is a serious conflict as to the matter of facts or where any defence or issues relating to law arise, nor should the court reject the defence of the defendant only on account of the inherent implausibility or its inconsistency.

17. Coming to the defence raised by the defendants in the instant case, it may be noted that they have not denied the fact that they had issued three cheques in favour of the plaintiff, nor have they denied the fact that when the said cheques were presented by the plaintiff for encashment, they had directed their banker to stop the payment of

the said cheques and at that point in time, they do not deny that they had insufficient funds in their account.

18. The plea of the defendants that they had handed over the said cheques to the plaintiff only to gain their confidence and the plaintiff was not authorized to deposit the said cheques for encashment, rings hollow. It is unheard of that a holder of a negotiable instrument issued in due course, is prohibited from presenting it for encashment, unless and until there is a clear stipulation of this nature in the contract governing the parties. So, the defendants' version that they had issued the cheques in favour of the plaintiff for gaining their confidence, is found to be rather implausible particularly when they had already issued a work order for the project in favour of the plaintiff. In a contract of this nature, where a contractor has agreed to undertake construction work for the owner of the land, the question of the owner offering any security by issuing cheques in favour of the contractor as a confidence building measure for him to undertake the work at the site, is unheard of. The said defence is complete moonshine.

19. The second plea taken by the defendants that the plaintiff had used poor quality of material and had caused the death of a labourer

at the site due to which, a case was registered against it, is also not of any assistance to the defendants since it does not raise a triable issue, as it is an undisputed position that the incident of death of a labourer at the site had occurred much prior to the completion of the project. Further, the defendants have not filed any document to demonstrate that they had returned the bills raised by the plaintiff for the work undertaken and had refused to make the payment on the ground that inferior material had been used in the construction work; nor can the delay in completion of the project be a plausible defence for the defendants for seeking leave to defend the suit, particularly, when they have failed to demonstrate from the contract executed between the parties that there was any such stipulation imposed on the plaintiff that the hotel project had to be completed before the inauguration of the Commonwealth Games.

20. Lastly, having regard to the bald denial made by the defendants in respect of the certification of the plaintiff's bills undertaken by their own Architect, without disputing his authority to do so and in the absence of taking a plea that the bills certified by their Architect had been returned for any plausible reason, their stand that they have raised triable issues, is devoid of merits. The defence raised by the defendants is chimerical and delusive.

21. Even at this stage, learned counsel for the defendants has been requested to obtain instructions from Mr. Manmohan Singh Gulati, the Director of the defendant No.1/company if they are ready and willing to offer a FDR/bank guarantee or the title deed of an immovable property as security, for the Court to consider granting them conditional leave to defend. He, however, expresses his unwillingness to offer any such security. It is also relevant to note here that it was at the request of the counsel for the defendants that the parties had been referred to mediation vide order dated 01.11.2012, but the matter was returned as unsettled.

22. For the reasons stated above, this Court is of the opinion that the defendants have not raised any triable issue. Resultantly, the leave to defend application filed by them has to be rejected. The application is accordingly dismissed.

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1. At the outset, counsel for the plaintiff states that the defendant No.3 has been wrongly impleaded as a party in the suit and requests that the suit may be confined to the defendants No.1 and 2 alone.

2. For the reasons recorded in the order passed in I.A. 11737/2012, the leave to defend application filed by the defendant No.1 & 2 has been dismissed. In view of the aforesaid submissions

made by the counsel for the plaintiff, defendant no.3 is permitted to be deleted from the memo of parties.

3. The present suit is decreed against the defendant No.1 & 2 and the plaintiff is held entitled to recover a sum of ₹54,45,000/- from them w.e.f. the date of issuance of the cheques in question, i.e., 24.06.2010, alongwith *pendente lite* and future interest payable @ 10% per annum. If the defendant No.1 & 2 pay the decretal amount to the plaintiff within three months from today, then the interest payable on the principal amount will be maintained @ 10% p.a., failing which the interest on the principal amount shall be raised to 12% per annum, till realization. The plaintiff is also awarded costs of the suit.

4. Decree sheet be drawn accordingly.

5. The suit is disposed of.

MAY 06, 2015
rkb/sk/mk

(HIMA KOHLI)
JUDGE