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

% *Date of Decision: 15.09.2016*

\+ CM(M) 222/2016

ICICI BANK LTD ..... Petitioner

Through Mr.Punit K.Bhalla Advocate

versus

ASTHA KUMAR & ANR ..... Respondents

Through Mr.M.S.Kaushik, Adv. for R-1 & R-2

**CORAM:**
**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J. (Oral)**

**CM No. 8413/2016 (exemption)**

Allowed subject to all just exceptions.

**CM(M) 222/2016**

1. By the present petition, the petitioner seeks to impugn the order dated 21.12.2015 passed by the trial court.

2. The plaintiff has filed a suit for recovery of Rs.3,00,936.56 stating that the respondents are the borrowers of the bank and have availed loan facility from the plaintiff under its Car Loan Scheme. It is averred in the plaint that total sum of Rs.5 lac was disbursed for the purchase of the vehicle and the said loan was to be repaid in 60 equated monthly instalments of Rs.11315 each.

3. It is averred that the defendants failed to discharge their liability and

defaulted in making the regular equated monthly instalment. The plaintiff issued a notice on 13.01.2015 recalling/foreclosing the entire loan agreement and in spite of receiving notice, the defendants have failed to make the payment of the termination amount. Hence, the said amount of Rs.3,00,936.56 has been claimed as per statement of account dated 04.02.2015.

4. It is also averred that the court has territorial jurisdiction to try the present suit as the agreement was executed between the parties at ICICI Bank Limited having its office at 2$^{nd}$ Floor, Videocon Tower, Block-E1, Jhandewalan Extn, New Delhi.

5. When the matter was filed, the trial court without issuing summons in the case vide order dated 16.04.2015 held that this court has no territorial jurisdiction to try the suit and directed the plaintiff to file the same before the court of competent jurisdiction.

6. In an appeal being FAO No.214/2015 dated 06.11.2015, this court set aside the aforesaid order of the trial court holding that at this stage a cause of action is shown to arise within the territorial jurisdiction of this court and that the trial court has erred in concluding and observing that the loan agreement and the attendant documents do not appear to have been executed at Videocon Tower, Jhandewalan Extn., New Delhi. This court held that this aspect was a matter for trial and the trial court could not have, at the threshold, returned the plaint on a mere impression. The matter was remanded back. The trial court has now passed the impugned order.

7. Instead of proceeding with the adjudication of the suit and issuing summons to the defendants, the trial court has now passed the following order:

> "..........Hence, the suit filed by the plaintiff for recovery of aggregate amount of Rs.2,83,075.69p without service of the Recall Notice would be premature. I may note that what has been placed on record is only the photocopy of the Bulk Dispatch Register of the plaintiff and not the original dispatch proof of the Postal Department alongwith the Tracker Report. The plaintiff is directed to place on record the dispatch proof and the service report i.e. Tracker Report of the Indian Post and Telegraph Department confirming the service upon the department since only thereafter the total amount of Rs.2,83,075.69p become due, failing which the default liability of the defendant qua the plaintiff is limited to Rs.27,865/- only (below Pecuniary Jurisdiction of this Court) and not the entire aggregate amount of Rs. Rs.2,83,075.69p.
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> Lastly the Statement of Account filed by the plaintiff which is an electronic from does not appear to be compatible with the demand being raised so as to create jurisdiction (pecuniary) within this court. The overdue charges have been levied multiple times on the same cheque not only in the same month but are also reflected multiple times in each succeeding month. It is also not clear as to how the interest on the future EMIs which contain the principle as also the basic interest could have been claimed. On the face of it, there is some confusion which needs to be cleared and hence the Authorised Representative of the plaintiff shall file an affidavit and inform this court as to how many instalments have already been received and how many instalments have been fallen due till the date of filing of the suit and the amount thereof. He shall also inform whether the instalment/EMI amount which have been fallen due, contains only the principal amount or the added interest as per the loan agreement and further in case if it includes only the interest, then how the interest on the future instalments which were yet to fall due, have been included at this stage."

8. The learned counsel appearing for the respondents submits that the respondents had paid the entire loan amount. However, for the purpose of

adjudication of the present petition, this contention does not help the respondents. This is an issue which has to be gone into by the trial court.

9. A perusal of the impugned order shows that the said order has been passed after the appeal filed before this court was disposed off. The purpose why the direction has been given is not valid.

10. The Civil Procedure Code has been enacted to govern the procedure of the Civil Court. The code is exhaustive on all matters specifically dealt with by it. Normally, a judge cannot disregard the said enactment. The code binds all courts so far as it goes.

11. The Privy Council in the case of ***Gokul Mandar v. Pudmanund Singh, (1902) ILR 29 Calcutta 707*** held as follows:

> "They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

12. Similarly, the Supreme Court in ***Rasiklal Manikchand Dhariwal & Anr. v. M.S.S.Food Products, (2012) 2 SCC 196***, held as follows:

> "93. The doctrine of proportionality has been expanded in recent times and applied to the areas other than administrative law. However, in our view, its applicability to the adjudicatory process for determination of 'civil disputes' governed by the procedure prescribed in the Code is not at all necessary. The Code is comprehensive and exhaustive in respect of the matters provided therein. The parties must abide by the procedure prescribed in the Code and if they fail to do so, they have to suffer the consequences. As a matter of fact, the procedure provided in the Code for trial of the suits is extremely rational, reasonable and elaborate. Fair procedure is its hallmark. The courts of civil judicature also have to adhere to the procedure

> prescribed in the Code and where the Code is silent about something, the court acts according to justice, equity and good conscience. The discretion conferred upon the court by the Code has to be exercised in conformity with settled judicial principles and not in a whimsical or arbitrary or capricious manner. If the trial court commits illegality or irregularity in exercise of its judicial discretion that occasions in failure of justice or results in injustice, such order is always amenable to correction by a higher court in appeal or revision or by a High Court in its supervisory jurisdiction."

13. Order 4 Rule 1 CPC provides that a suit is to be instituted by presenting a plaint. Order 5 Rule 1 CPC provides that when a suit has been duly instituted, summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence. Issues are framed under Order 14 CPC, based on material propositions of facts and law where parties are at a variance and on which the right decision of the case appears to depend. A suit cannot normally be rejected at the initial stage except as stated under Order 7 Rule 11 CPC which provides for rejection of a plaint where, it does not disclose a cause of action; relief claimed is undervalued; relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped or where the suit appears from a statement in the plaint to be barred by any law.

14. In the present case, the trial court instead of issuing summons to the respondents, has gone into an exercise which normally a defendant would perform. It seeks to adjudicate upon issues other than which fall under Order 7 Rule 11 CPC. It has questioned the statement of account filed by the petitioner and also sought an affidavit of the competent officer explaining as to how overdue charges have been imposed and also sought other details. It

directed the petitioner to place on record the dispatch proof of the recall notice. Personal presence of the officer is also sought.

15. The procedure so adopted is unknown to law. As held by the Supreme Court in the case of ***Anil Rishi v. Gurbakash Singh, (2006) 5 SCC 558,*** the burden of proving the facts lies on the party who substantially asserts the affirmative of the issue and not the party who denied it. The court held as follows:

> "8. .........The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side."

16. The impugned order has gone into a roaming inquiry on the merits and demerits of the facts and averments made by the petitioner in the plaint. It is for the petitioner to prove its case. The procedure adopted is illegal and irregular. The order occasions failure of justice.

17. The impugned order is set aside. Summons be issued to the defendants returnable for a date to be fixed forthwith by the trial court. Thereafter, the trial court may proceed with the adjudication of the suit in accordance with the procedure stated in Civil Procedure Code. The petition stands disposed of.

**JAYANT NATH, J.**

**SEPTEMBER 15, 2016/v**