

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

% *Judgment Reserved on: November 10, 2016*
Judgment Delivered on: November 16, 2016

+ **RFA(OS) 31/2016**

SHAIENDRA GARG Appellant
Represented by: Mr.Amit Agrawal, Advocate with
Ms.Tejaswita, Advocate

versus

K-7 IMPEX PVT LTD Respondent
Represented by: Mr.Ravi Sikri, Sr.Advocate instructed
by Mr.Deepak Yadav, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. IA No.14316/2014 filed by the appellant under Order XXXVII Rule 3 of the Code of Civil Procedure, 1908 seeking leave to defend the suit filed by the respondent has been dismissed vide impugned order dated February 16, 2016. The result is the suit being decreed in sum of ₹1,75,79,000/- (Rupees One Crore Seventy Five Lakh and Seventy Nine Thousand only) together with interest @ 36% per annum from August 13, 2013 (when the notice of demand was sent) till date of filing the suit and pendente lite interest @ 9% per annum on the sum of ₹1,75,79,000/- (Rupees One Crore Seventy Five Lakh and Seventy Nine Thousand only).
2. Highlighting, that to invoke Order XXXVII of the Code of Civil

Procedure, the claim has been founded on the plea that loan in sum of ₹2.2 crores was given by the respondent to the appellant, in tranches, and for which not only receipts were executed acknowledging receipt of the amount but even promissory notes and cheques were executed as collateral securities. In the promissory notes it has been recorded that the sum mentioned therein would be paid with interest @ of 36% per annum. Thus, two documents on which the suit could be brought within Order XXXVII of the Code of Civil Procedure have been specifically referred to. As per the plaint, the respondent, a company registered under the Companies Act, of which Kamal Bajaj is a Director, had at the asking of the appellant, stated to be a known friend of Kamal Bajaj, advanced by way of loan a sum of ₹2.2 crores to him as under:-

- (i) ₹50 lakh by cheque on October 05, 2012
- (ii) ₹50 lakh by cheque on October 18, 2012
- (iii) ₹60 lakh by cheque on November 05, 2012
- (iv) ₹28 lakh by cheque on November 19, 2012
- (v) ₹20 lakh in cash on November 20, 2012
- (vi) ₹12 lakh by cheque on April 30, 2013

3. As per the plaint, while receiving aforesaid sums, the appellant not only executed a receipt but even a promissory note i.e. in all executed six receipts and six promissory notes, dated October 05, 2012, October 18, 2012, November 05, 2012, November 19, 2012, November 20, 2012 and April 30, 2013. The receipts in sum of ₹50 lakhs, ₹50, lakhs, ₹60 lakhs, ₹28 lakhs ₹20 lakhs and ₹12 lakhs acknowledge the loan amount received and the promissory notes record the undertaking to pay the sum mentioned

in the receipts together with interest @ 36% per annum. Simultaneously, cheques in same amount were issued by the appellant and at the rear of the promissory note the said fact was noted with further writing that the cheque was as a guarantee. Pleading that the appellant had paid ₹44.21 lakhs to the respondent, and adjusting the same from the loan amount, the balance loan came to ₹1,75,79,000/- (Rupees One Crore Seventy Five Lakh and Seventy Nine Thousand only) and the same remained outstanding, the suit was filed pleading further that the cheques were dishonoured on account of either signatures not tallying or insufficient funds or payment stopped. The suit claimed pre-suit interest in sum of ₹58,65,269/-.

4. Seeking leave to defend, the appellant did not dispute having received ₹2.2 crores as pleaded in the plaint nor disputed the six cheques issued by him on the six different dates, when different amounts were received by him from the respondent. Regarding the receipts and the promissory notes it was pleaded that he signed the same blank, without any agreement for rate of interest. The writing at the rear of each promissory note to the effect that the cheque was received as a guarantee cheque, was pleaded as an insertion in the promissory note; and not the recording by the appellant or acknowledgment by the appellant. As per the appellant there was no loan transaction. As per him, his mother was carrying on business of manufacturing and selling carpets under the name K.K.Concepts which was later on converted into a company in August 10, 2012 named K.K.Concepts Pvt. Ltd. The money was received by him from the respondent for supply of carpets by the said company : K.K.Concepts Pvt.Ltd. That, and we quote para 3(vi) of the application seeking leave to defend : *'The monies were given by the plaintiff in various tranches. The monies was received by the*

defendant for supply of carpets to be made by K.K.Concepts Pvt.Ltd. The monies were transferred directly by the plaintiff to the bank account of K.K.Concepts Pvt. Ltd. after its bank account came to be open on November 20, 2012'. The appellant pleaded, that in October 2012, K.K.Concepts Pvt. Ltd. supplied carpets worth ₹83.89 lakhs to the respondent and in January 2013 supplied carpets worth ₹31.11 lakhs. In June 2013, the company supplied carpets worth ₹1.54 crores but at the asking of the respondent made delivery to one Sandeep Rathi. He pleaded that on February 26, 2013, February 28, 2013 and March 07, 2013 the respondent transferred ₹20 lakhs, ₹10 lakhs, and ₹2.58 lakhs respectively in the account of K.K.Concepts Pvt.Ltd. He pleaded that on March 26, 2013, K.K.Concepts Pvt.Ltd. paid ₹10 lakhs to the respondent by transferring the money through RTGS. The appellant admitted having paid, from his account, ₹44.21 lakhs to the respondent. Qua the delivery made on March 26, 2013, the appellant pleaded that pursuant to an understanding between him and Kamal Bajaj, carpets worth ₹1.54 crores (and we find that the actual figure is ₹1,54,20,775/-) were delivered to one Mr.Sandeep Rathi at 758, Udyog Vihar, Phase-V, Gurgaon, and in respect of which deliveries of carpets by K.K.Concepts Pvt.Ltd. on October 2013, January 2013 and June 2013, the appellant relied upon e-mails exchanged in the month of April, 2013.

5. In the reply filed to the application seeking leave to defend, the respondent admitted first two transactions with K.K.Concepts Pvt. Ltd., but denied the third, pleading that it had no concern with Sandeep Rathi. The respondent highlighted that K.K.Concepts Pvt.Ltd. was a juristic entity and the appellant had a human personality. It highlighted that the suit was based on a loan transaction between the appellant and the respondent and

thus any dealings inter-se K.K.Concepts Pvt.Ltd. and the respondent were irrelevant. On facts, admitting that carpets worth ₹83.89 lakhs were delivered by K.K.Concepts Pvt. Ltd. to it, the respondent pleaded rejection of the goods on account of deficiencies and defects and that whether the carpets were upto the specifications would be an issue between the respondent and K.K.Concepts Pvt. Ltd. and said issue could not be brought for adjudication in the suit filed by it was the case projected in the reply. Concerning carpets received on January 2013, in sum of ₹31.11 lakhs, respondent pleaded that ₹20 lakhs, ₹10 lakhs and ₹2.58 lakhs paid by it to K.K.Concepts Pvt.Ltd. on February 26, 2013, February 28, 2013 and March 07, 2013 respectively totalling ₹32.58 lakhs were to clear the invoice raised with some additional payments. Admitting that K.K.Concepts Pvt. Ltd. paid it ₹10 lakhs on March 26, 2013, without throwing any light as to why said sum was received by it, it was once again highlighted that the transactions between the respondent and K.K.Concepts Pvt. Ltd. were distinct and had no concern with the loan disbursed by it to the appellant.

6. On aforesaid pleadings, it becomes apparent that two issues were projected by the appellant as triable issues. The first : Whether the plea that the promissory notes were signed blank and there being no agreement to pay interest @ 36% per annum, the writing thereon, in the six promissory notes would attract Section 87 of the N.I.Act, 1881, i.e. render the promissory notes void; warranting trial on the disputed question of fact : Whether the promissory notes were contemporaneously filled-up or not. The plea regarding the acknowledgment at the rear of the promissory notes was also to said effect. The second issue was : Whether the facts pleaded in the application seeking leave to defend concerning supply of carpets, two

concededly admitted by the respondent to it, and the third to Sandeep Rathi by K.K.Concepts Pvt. Ltd., in light of the e-mails exchanged, would constitute sufficient facts, which if established would disentitle the respondent to the decree claimed; and especially keeping in view the reply filed by the respondent to the appellant's application seeking leave to defend.

7. With reference to the first issue the respondent pressed in aid Section 20 of the N.I.Act, 1881. On the said issue, with reference to the difference in the ink and the pen used by the appellant to pen his signatures on the receipt(s) and the promissory note(s) and the one used to fill up the blanks in the receipt(s) and the promissory note(s), the learned Single Judge has held that being an experienced businessman it would be difficult to accept that the appellant signed the receipts and promissory notes without filling up the blanks and merely because different pen and ink was used and somebody else scribed the receipt(s) and the promissory note(s) to fill-up the blanks, would not be a ground to assume that the blanks were filled up later on. The learned Single Judge has thereafter referred to Section 20 of the N.I.Act, 1881 to hold that an inchoate negotiable instrument could be made choate. Judgments cited by the appellant have been distinguished on the ground that in said judgments trial had taken place and the defendant therein had proved that the writing in the promissory note concerning rate of interest recorded therein was a subsequent insertion in the promissory notes.

8. On the second issue, the learned Single Judge has opined that the transactions between the respondent and K.K.Concepts Pvt. Ltd. had no concern with the dispute relating to the amounts received by the appellant by way of loan and in respect of which the learned Single Judge has highlighted

that the non-explanation by the appellant as to why he paid ₹44.21 lacs to the respondent from his personal account, was also a factor to prove that the story set up by the appellant : that payments received by him were actually for supply of carpets by K.K.Concepts Pvt. Ltd. was a ruse. The learned Single Judge has also found a mismatch in the dates pleaded concerning delivery of the carpets to Sandeep Rathi as pleaded in paragraph 3(xi) of the application seeking leave to defend, wherein the date of delivery of the consignment is stated to be June 03, 2013 viz-a-viz the Road Receipt issued by the transporter which was dated June 04, 2013. The learned Single Judge has with reference to the e-mails projected by the appellant, to which the respondent never responded, held the same to be self-serving documents. In essence, the learned Single Judge has held that issues raised by the appellant pertaining to sale of carpets by K.K.Concepts Pvt. Ltd. to the respondent could not be tried in the suit filed by the respondent because the loan transaction between the respondent and the appellant was distinct from the sale transaction and that whether the first lot of carpets sold by K.K.Concepts Pvt.Ltd. to the respondent were rightly or wrongly rejected and whether the third lot of carpets which were delivered to Sandeep Rathi were at the instructions of the respondent or not, could not form the subject matter of adjudication in the suit filed by the respondent.

9. Two triable issues have been projected in the application seeking leave to defend. Are they worthy to defeat the claim of the respondent.

10. The suit, as noted in paragraph 2 above, rests on two kinds of documents to bring it within the scope of a summary suit. The first is a promissory note(s) when the amounts were disbursed in six tranches and receipts were executed acknowledging receipt of the payment and

simultaneously six cheques were issued in the same amount i.e. the sum received. Assuming that there was no agreement for rate at which interest would be paid on the amounts received by the appellant from the respondent and that the interest was filled in later on, meaning thereby on this factual aspect the appellant would be entitled to lead evidence, for if the interest element was inserted in the promissory note(s) later on, on the same being signed blank, in view of the judgments reported as AIR 1982 Karnataka 227 N.Narayanaswamy Vs. Madan Lal, (ILR) 1968 Mad 646 Seth Tulidoss Lalichand Vs. G.Rajagopal, AIR 1925 All 282 (1) Sunder Khatik Vs. Mahaddeo Pande and AIR 1974 Mad 4 Verco Pvt. Ltd. Vs. Newandram Naraindas arguably case would be made out warranting a trial. The reason given by the learned Single Judge is, that being a season businessman it would not be possible to accept that the appellant signed the promissory note(s), which we find are on a printed proforma, blank and allowed the same to be filled up later on. A matter of conduct would be a matter of evidence and thus qua the promissory note(s) the appellant has a case for leave to defend being granted, but conditionally. However, the appellant also has to overcome the suit being premised on the six cheques which appellant gave.

11. The defence projected qua these cheques is common with the second issue projected i.e. that the respondent paid the money to the appellant as advanced for supply of carpets by K.K.Concepts Pvt. Ltd. and not by way of a loan. As per him the cheques were a security for fulfilling obligations by K.K.Concepts Pvt. Ltd.

12. Concededly, K.K.Concepts Pvt. Ltd. was incorporated on August 17, 2012 and a bank account was opened in the name of the company on

November 22, 2012. Prior to its incorporation, appellant concedes that K.K.Concepts was the sole proprietary firm of its mother. The business, assets and liabilities, of the sole proprietary firm were taken over by the company. In para 3(vi) of the application seeking leave to defend, contents whereof have been noted in paragraph 4 above, it is pleaded that after the bank account became operational on November 20, 2012, all moneys were received from the respondent in the account of K.K.Concepts Pvt. Ltd. The appellant has not explained as to why the money was not received directly in the account of K.K.Concepts when it was a sole proprietary firm because as per the stand taken by the appellant the agreement to supply carpets was between K.K.Concepts, then a sole proprietary firm and the respondent. Further, why was the cheque dated November 19, 2012 and the two cash payments dated November 20, 2012 and April 13, 2013 not taken in the name of K.K.Concepts Pvt. Ltd. which had not only been incorporated by said date but opening of a bank account was in process and the bank account was opened on November 22, 2012.

13. Section 92 of the Indian Evidence Act reads as under:-

“92. Exclusion of evidence of oral agreement –

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1) - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality,

want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law:

Proviso (2) - The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3) - The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso (4) - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5) - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract:

Proviso (6) - Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

14. As per Section 91 of the Indian Evidence Act, 1872, where the terms of a contract are reduced into writing, and in the instant case it would be the receipts, no evidence in proof of the terms of such contract is permissible except the document itself. As per Section 92 where the terms of such contract are proved according to Section 91, no evidence of oral agreement

or statement shall be admitted contradicting, varying, adding to or subtracting from its terms except when a case is made out under any one of the six provisos. The six receipts are identical except the amount acknowledged therein as having been received. The receipts have been signed by the appellant. Though the receipts may not be the written agreement between the parties, but we see no reason as to why the analogy of a written contract be not drawn. In any case the respondent has two more strings in its bow to disentitle the appellant leave to defend on the second issue and thus in the next paragraph we discuss the said two strings in the bow and find the target reached by the arrows shot therefrom.

15. Transactions between the respondent and K.K.Concepts Pvt. Ltd. are entirely different. The appellant took the money from the respondent in his own name and the four cheques were deposited in his personal account. He has neither pleaded nor filed any document that he transferred said money to the account of K.K.Concepts Pvt. Ltd. He executed receipts for two cash payments in his name and issued two cheques as collateral security for refund of the said amounts. It is not his case that he transferred these monies to the account of K.K.Concepts Pvt. Ltd. This aspect we note to bring home the moonshine nature of the second defence. That apart, the learned Single Judge has rightly noted contrivance in documents created which also show the moonshine nature of the second defence. We do not relist said contrivance which have been noted by the learned Single Judge in paragraphs 31 to 36 of the impugned order; recording that said factual aspect be treated as our reasoning too. There is yet another aspect to the matter. As per the appellant the oral agreement was that K.K.Concepts which was to be converted into a company would supply carpets to the respondent

and the ₹2.2 crores received by him was an advance payment. The first consignment of carpets worth ₹83.89 lakhs was made and as per the respondent the goods were rejected. Second lot of consignment of carpets was in January 2013 and the value thereof was ₹31.11 lakhs. By said date ₹2.02 crores had already been received by the appellant from the respondent. Where was the question then for the respondent to pay to K.K.Concepts Pvt. Ltd. ₹20 lakhs, ₹10 lakhs and ₹2.58 lakhs on February 26, 2012, February 28, 2013 and March 07, 2013 respectively. The appellant had to explain said payments made to K.K.Concepts Pvt. Ltd. Further, on what account the appellant repaid ₹44.21 lakhs to the respondent. The appellant had to explain the same. None have been explained.

16. We therefore terminate discussion on the second point giving two reasons. Firstly, transactions inter-se the respondent and K.K.Concepts Pvt. Ltd. cannot form the subject matter of a defence by the appellant. Secondly, facts pleaded qua said transactions are full of glaring loopholes and the defence even in respect thereto is moonshine.

17. Since the suit was based on distinct sets of documents on which Order XXXVII could be attracted and for the reason we have held that qua promissory notes a triable issue was raised concerning whether the blanks were filled up later on, the same would not hold true for the six cheques issued. The learned Single Judge has decreed pre-suit interest from the date of the notice i.e. April 13, 2013. The pre-suit interest has been decreed @ 36% per annum. This was on the basis of the promissory notes. But since the suit is being decreed by us with reference to the cheques, we reduce the rate of interest as per statute to 18% per annum reckoned from April 13, 2013 till date of decree and thereafter at the rate awarded by the learned

Single Judge.

18. Appeal is disposed of modifying the judgment and decree dated February 16, 2016 decreeing suit filed by the respondent against the appellant in sum of ₹1,75,79,000/- (Rupees One Crore Seventy Five Lakh and Seventy Nine Thousand only) together with interest @ 18% per annum from August 13, 2013 (when the notice of demand was sent) till date of filing the suit and pendente lite interest @ 9% per annum on the sum of ₹1,75,79,000/- (Rupees One Crore Seventy Five Lakh and Seventy Nine Thousand only) from the date of the suit till realization. Cost awarded in favour of the respondent by the learned Single Judge is maintained.

19. In appeal parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

NOVEMBER 16, 2016
skb/mamta