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

Judgment reserved on: 27.01.2016

% **Judgment delivered on: 16.02.2016**

\+ **CS(OS) 1866/2013**

K-7 IMPEX PVT. LTD. ..... Plaintiff

Through: Mr. Ravi Sikri, Senior Advocate along with Mr. Deepank Yadav, Advocate.

versus

SHAILENDRA GARG ..... Defendant

Through: Mr. Amit Agrawal & Ms. Tejaswita, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

I.A. No. 14316/2014 (under Order XXXVII Rule 3 CPC)

1. The aforesaid application has been filed by the defendant to seek unconditional leave to defend the present summary suit filed by the plaintiff under the provisions of Order XXXVII CPC.

2. The case of the plaintiff is that the defendant Shailendra Garg was known to the plaintiff for a couple of years. He was in need of finances and approached the plaintiff in his personal capacity, seeking loan in the month

of September 2012. After meetings with the defendant at the registered office of the plaintiff company, the plaintiff agreed to advance finance to the defendant as a loan, to be refunded by the defendant with interest thereon @ 36% per annum. The defendant executed promissory notes in favour of the plaintiff agreeing to repay the loan along with interest, on demand made by the plaintiff company. The plaintiff, in all, advanced an amount of Rs.2.20 Crores to the defendant as loan by six installments, the details whereof are stated as follows:

(i) On 05.10.2012, the Plaintiff Company gave an amount of Rs.50 lakh as loan to the Defendant/ Mr. Shailendra Garg from their Canara Bank Account vide cheque No.002261 paid against RTGS CNRBH 1227981.

(ii) On 18.10.2012, the Plaintiff Company gave an amount of Rs.50 lakh as loan to the Defendant/ Mr. Shailendra Garg from their Canara Bank Account vide cheque No.002276 paid against RTGS CNRBH 12292631.

(iii) On 05.11.2012, the Plaintiff Company gave an amount of Rs.60 lakh as loan to the Defendant/ Mr. Shailendra Garg from their Deutsche Bank Account vide cheque No.573782 paid against RTGS.

(iv) On 19.11.2012, the Plaintiff Company gave an amount of Rs.28 lakh as loan to the Defendant/ Mr. Shailendra Garg from their Canara Bank Account vide cheque No. 012112 paid against RTGS CNRBH 1325500.

(v) On 20.11.2012, the Plaintiff Company gave an amount of Rs.20 lakh as loan to the Defendant/ Mr. Shailendra Garg by cash.

(vi) On 30.04.2013, the Plaintiff Company gave an amount of Rs.12 lakh as loan to the Defendant/ Mr. Shailendra Garg by cash.

3. The defendant, upon receiving the loan amount in six installments acknowledged its receipt by executing receipts, signed by him. The defendant also executed cheques for the loan amount, which were handed over by the defendant in order to discharge his liability. The defendant repaid an amount of Rs.44.21 Lakhs to the plaintiff, which was adjusted towards refund of the principal amount. The said amount was adjusted towards the first installment of loan advanced to the defendant on 05.10.2012 of Rs.50 Lakhs.

4. The plaintiff further states that the plaintiff banked the cheques issued by the defendant on the due dates, which were dishonoured upon presentation for reasons such as drawer signatures differ; payment stopped by drawer; funds insufficient and; drawer signatures differ. Despite notice issued to the defendant for dishonour of the cheques, the amount was not paid. Consequently, the plaintiff has also initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) in respect of the said six cheques, which are still pending. After adjustment, the plaintiff claims that the principal amount outstanding is Rs.1,75,79,000/- together with interest thereon amounting to Rs.58,65,269/-.

5. In the defence disclosed by the defendant in the present application, the defendant does not dispute the factum of having received Rs.2.2 Crores

from the plaintiff. The defence of the defendant is that the plaintiff advanced the monies towards purchase of goods and the goods were, in fact, supplied to the plaintiff. The cheques and promissory notes were issued only for security, rather than for any kind of repayment. The plaintiff did not advance any loan to the defendant, and the story set up by the plaintiff is false.

6. The defendant states that the plaintiff is engaged in the business of trading, exporting and distributing fabrics, textile items and carpet rugs. It is not engaged in the business of advancing loans on interest, and it has not obtained license from the RBI for the said purpose. The defendant is a Director of M/s K.K. Concepts Pvt. Ltd., incorporated in August 2012. Earlier the business was carried out in a proprietary concern called K.K. Concepts, and the mother of the defendant was the proprietor thereof. The business of the proprietary concern was taken over by the aforesaid company of the defendant. The defendant is engaged in the business of manufacturing and dealing in carpets, furnishings, fabrics, etc.

7. The defendant claims that in September-October 2012, the plaintiff requested for supply of carpet items. The parties thereafter engaged in dealings with each other. The plaintiff indicated that it wanted to purchase goods for approximately Rs.2.6 Crores. The defendant claims that it was agreed that monies would be paid by the plaintiff much in advance, and the goods shall be delivered thereafter. The transactions were to take place in tranches, and no fixed time schedule was drawn up initially. The defendant states that the monies transferred by the plaintiff to the account of the defendant were for supply of carpets. The transactions were not entered into

by the defendant in his personal capacity. The cheques/ promissory notes were given to the plaintiff towards security for the amounts advanced by the plaintiff for the goods/ carpets. He states that the amount received by the defendant from the plaintiff was transferred by him to the bank account of M/s K.K. Concepts Pvt. Ltd. and adjusted appropriately. The defendant has given the following details of monies transferred by the plaintiff to the bank account of the defendant; monies transferred by the plaintiff to the bank account of M/s K.K. Concepts Pvt. Ltd. and the value of the goods/ monies supplied to the plaintiff:

DATE	MONIES TRANSFERRED BY PLAINTIFF TO THE BANK ACCOUNT OF DEFENDANT	MONIES TRANSFERRED BY PLAINTIFF TO BANK ACCOUNT OF K K CONCEPTS PVT LIMITED	SUPPLY OF GOODS / MONIES TO THE PLAINTIFF
05.10.2012	50 Lakhs	-	-
18.10.2012	50 Lakhs	-	-
October 2013	-	-	Goods worth Rs.83.89 lakhs delivered to the plaintiff
06.11.2012	60 Lakhs	-	-
20.11.2012	28 Lakhs	-	-
20.11.2012	Rs. 20 Lakhs (Cash)		-
January 2013	-	-	Goods worth Rupees 31.11 Lakhs delivered to the plaintiff

26.02.2013	-	20 Lakhs	-
28.02.2013	-	10 Lakhs	-
07.03.2013	-	2.58 Lakhs	-
26.03.2013	-	-	K K Concepts Private Limited transferred Rs.10 Lakhs to the plaintiff through RTGS.
30.04.2013	Rs 12 Lakhs (Cash)	-	
June 2013	-	-	Goods worth Rs.1.54 crore were given to the plaintiff
			Plaintiff admits having received Rs.44.21 lakhs from the account of defendant in the plaint.

8. The further case of the defendant is that he only signed and wrote the amount, besides his signature on the promissory notes. The interest rate has been fraudulently entered into the promissory notes subsequently without the consent and knowledge of the defendant. The defendant did not agree to any rate of interest. Further, the writing on the back side of the promissory notes has been made by the plaintiff fraudulently, without the knowledge

and consent of the defendant. No writing existed on the back side of the promissory notes at the time of obtaining the defendant's signatures thereon. The cheques given were undated. He had no knowledge of, and had given no consent, to write anything on the back side of the cheques.

9. The defendant claims that in October 2012, he/ M/s K.K. Concepts Pvt. Ltd. supplied the material/ carpets for an amount of Rs.83,89,469.92. He further supplied in January 2013, carpets/ materials for an amount of Rs.31,11,584.16 to the plaintiff. The defendant states that upon demand by the plaintiff, the defendant in good faith transferred an amount of Rs.44.21 Lakhs into the account of the plaintiff from his own account. Additionally, Rs.10 Lakhs were transferred from the account of M/s K.K. Concepts Pvt. Ltd. into the account of the plaintiff on 26.03.2013.

10. The defendant states that at the request of the plaintiff, he delivered goods/ materials at 758, Udyog Vihar, Phase-5, Gurgaon – premises of one Mr. Sandeep Rathi. A consignment of carpets of the value of Rs.1,54,20,775/- was sent by M/s K.K. Concepts Pvt. Ltd. on 03.06.2013 and delivered at the said address in Gurgaon. The defendant states that he was duped by the plaintiff into transferring monies to the plaintiff from his account, even after the plaintiff had received goods in June, on the pretext that monies were needed by the plaintiff and on the assurance that the same would be accounted for appropriately along with the goods. The defendant states that the plaintiff falsely raised the issue of non-delivery of the consignment at the Gurgaon address. He further states that FIR No. 710 was lodged by the defendant at Vaishali Nagar, Jaipur City (South) Police Station against the plaintiff company and others, and upon direction by the

Magistrate, the FIR has been registered. Thus, the defendant submits that the defendant has raised several triable issues entitling the defendant to unconditionally defend the present suit.

11. The plaintiff has filed a reply, opposing the present application.

12. The submission of learned counsel for the defendant/ applicant, firstly, is that a perusal of the promissory notes would *per se* show that they have been tempered with, and material alterations have been made therein. Learned counsel for the defendant submits that the ink and handwriting relating to the signature of the defendant on the six promissory notes is different from that found in the body of the promissory notes. He states that the same had been filled up by the plaintiff subsequently, without the consent of the defendant and contrary to the agreement of the parties. The rate of interest has been mentioned as 36% per annum and in some of the promissory notes, there is overwriting as the rate of interest was initially mentioned as "36% per month", which has been changed to 36% per annum. Learned counsel submits that there was no question of the defendant agreeing to pay interest at the exorbitant rate of 36% per annum, when, under the law, the default rate under Section 80 of the NI Act is 18% per annum.

13. Learned counsel further submits that the material alterations carried out by the plaintiff in the promissory notes renders them void. In this regard, he placed reliance on Section 87 of the NI Act, which, *inter alia*, provides:

> "*Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;*
>
> *Alteration by indorsee.—And any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of sections 20, 49, 86 and 125.*"

14. He also placed reliance on several decisions on the aforesaid aspects, namely:

(i) ***N. Narayanaswamy Vs. Madan Lal***, AIR 1982 Karnataka 227;

(ii) ***Seth Tulsidoss Lalchand Vs. G. Rajagopal & Others***, ILR (1968) Mad 646;

(iii) ***Sunder Khatik Vs. Mahadeo Pande***, AIR 1925 All 282(1);

(iv) ***Lala Tulsi Ram Vs. Ram Saran Das***, AIR 1925 PC 80;

(v) ***BPDL Investments (Pvt) Ltd Vs. Maple Leaf Trading International (P) Ltd***, 2006 (87) DRJ 761; and

(vi) ***S. Perumal Reddiar Vs. Bank of Baroda, Madras-2 and Others***, (1981) ILR Mad 190.

15. The further submission of Mr. Agrawal, learned counsel for the defendant is that in respect of the supplies made by the defendant, invoices were raised. He has made specific reference to the invoice dated 22.10.2012 towards supply of carpets of the value of Rs.83,89,469.92, and the invoice

dated 12.10.2013 of the value of Rs.31,11,584.16. He also refers to the e-mail communication sent by the defendant to the plaintiff on 22.01.2013, whereby the invoices, packaging list and bilty were forwarded to the plaintiff. He has also referred to the e-mail received from the plaintiff on 30.05.2013, wherein the plaintiff alleged that carpets supplied were defective (under Invoice No.25 dated 22.10.2013). He submits that this communication establishes that carpets were indeed supplied to the plaintiff. He also refers to the e-mail communications sent by the defendant on 01.06.2013 and 04.06.2013, wherein the defendant, *inter alia*, stated that a truck containing 525 carpets of the value of Rs.1,54,20,755.69 has already arrived at Udyog Vihar, and the carpets have been unloaded. He has also referred to subsequent e-mails sent by the defendant to the plaintiff in respect of removal of some carpets by the defendant to show them to the buyer's agent. Learned counsel submits that the plaintiff did not respond to the said e-mails, as carpets were indeed delivered to the plaintiff at its Udyog Vihar, Gurgaon destination.

16. On the other hand, the submission of Mr. Sikri, learned senior counsel for the plaintiff is that the defendant's own documents demonstrate that the loan transaction was with the defendant personally, and was not connected to the purchase of carpets from the company M/s K.K. Concepts Pvt. Ltd. He submits that the two transactions were not connected in any manner. The defendant sent a communication on 30.05.2013 at 17:22:13 to the effect that:

> "*As discussed in case quality of supplied goods is being rejected we shall not seek payments for the same.*"

17. The plaintiff did not agree to the aforesaid communication of the defendant, and by an e-mail of the same day, *inter alia*, stated:

> *"Dear, Mr Shailender Garg, this is in continuation of our verbal discussions regarding defected carpets being supplied by your company (K K concepts pvt ltd) to our company (K7 impex pvt ltd, N delhi) against your invoices no 25 dt 22/10/13. It (quality) has been discussed several times with you for which you have agreed to not demand any payments for the same, hence we request your good self to kindly issue us this understanding by you for not demanding of payments against the said bill by sending us an a email and also by sending it thru a letter on your companies letter head with your companies stamp and your signatures @ earliest. Regards, Kamal Bajaj, Director – K7 impex pvt ltd."*

18. Mr. Sikri submits that if the amount of Rs.2.20 Crores had been received by the defendant towards the cost of the carpets, there was no question of the plaintiff requiring the defendant to assure the plaintiff that no amount shall be demanded for the defective carpets by the defendant – as the money had allegedly been paid in advance. He submits that even the defendant did not respond by claiming that the money for the carpet supplied (allegedly defective) had already been received, and that there was no question of giving an assurance that the defendant shall not seek payment for the supplied goods. Mr. Sikri submits that the e-mail dated 04.06.2013 claimed to have been sent by the defendant to the plaintiff in respect of the alleged supply of 525 carpets of the value of Rs.1,54,20,755.69 at Udyog Vihar is a self-serving mail. He submits that there is nothing placed on record to show that the said premises at Udyog Vihar had any connection with the plaintiff whatsoever.

19. He further submits that the invoices above referred to by the defendant are also of no avail, as there is nothing to show that the goods were delivered to the plaintiff, and its receipt was acknowledged by the plaintiff. Mr. Sikri has referred to the Bilty/ transporter's document relied upon by the defendant, filed at page 24 of the documents file. The said document is allegedly issued by M/s Silverwing Roadways (North). The consignee's name has been mentioned as "*M/s GAC Logistics Pvt. Ltd. A/c (K-7 Impex Pvt. Ltd)*". He submits that the plaintiff had no concern with M/s GAC Logistics Pvt. Ltd. and a bare perusal of this document shows that the words, "*A/c (K-7 Impex Pvt. Ltd.)*" have been added subsequently in a different handwriting. The original of this document has also not been filed by the defendant. He further submits that the document filed at page 26 also shows that in the said document, the consignee's bank name and address has also been shown as M/s K.K. Concepts (P.) Ltd., which is the company of the defendant himself, and it has no concern with the plaintiff.

20. Mr. Sikri submits that there is no explanation furnished by the defendant as to why he repaid an amount of Rs.44.21 Lakhs to the plaintiff from his personal account. If the amount of Rs. 2.20 crores had been paid by the plaintiff as advance for supply of goods, there was no reason or occasion for the defendant to refund an amount of Rs.44.21 Lakhs from the said alleged advance. Pertinently, the defendant has paid Rs.5,21,000/- to the plaintiff on 18.06.2013, i.e. after the dishonour of the first two cheques of Rs.12 Lakhs and 20 Lakhs (both dated 30.05.2013) and an amount of Rs.5 Lakhs was paid by the defendant to the plaintiff on 18.07.2013. There would have been no occasion for the defendant to make payment to the

plaintiff if, according to the defendant, the plaintiff had banked the cheques in breach of the understanding that the said cheques were not meant to be encashed by the plaintiff, as the amount of Rs.2.2 Crores was, allegedly, given as advance towards supply of goods.

21. Mr. Sikri further submits that the bank account statement filed by the defendant himself (at page 13 A of the documents file), in relation to the account of M/s K.K. Concepts Pvt. Ltd. shows that the said account was opened on 24.08.2011. Thus, if the plaintiff had to advance any amount towards purchase of goods, the same would have been advanced to M/s K.K. Concepts Pvt. Ltd., and not to the defendant personally.

22. The principles on which the Court examines the issue as to whether, or not, the defendant should be granted leave and if so, whether the leave should be conditional, or not, in a summary suit under Order XXXVII CPC are well-settled by the Supreme Court in ***Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation***, AIR 1977 SC 577.

23. In ***M/s.Sunil Enterprises Vs. SBI***, AIR 1998 SC 237, the parameters to be considered by the Court while dealing with an application seeking leave to defend have been set out by the Supreme Court in the following words:

> "*4………*
>
> *(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 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. Reliance may also be placed on the judgment reported as ***V.K. Enterprises Vs. Shiva Steels***, III (2010) Banking Cases 718 (SC). In this decision, the Supreme Court, *inter alia*, observed as follows:

"*3. In the said application for leave to defend the suit, the Petitioner contended that the cheque in question had been handed over by the Petitioner to the Respondent-firm by way of* *security only and not for presentation. Furthermore, the said cheque was issued by the Petitioner on 11th October, 2000, but the date of the cheque was, thereafter, interpolated and altered from 11.10.2000 to 11.10.2006, and presented to the Bank. It was also indicated that apart from the signature on the face of the cheque and the date mentioned therein, the rest of the cheque was blank and an attempt was made by the Respondent to misuse the same with the intention of withdrawing or misappropriating the amount subsequently inserted in the cheque. A specific allegation was also made to the effect that the date of the cheque issued on behalf of the Petitioner firm for the month of October was always written with the Roman numerical 'X', which was altered and shown in ordinary numericals, which clearly establish the fact that the cheque in question had been doctored to obtain the benefit thereof six years after the same had been issued.*

4. In the said application, it was also denied that any cheque of such a large amount had been issued to the Respondent after 1992 in order to bolster the case of the Petitioner that the cheque in question had been forged. It was ultimately stated in the complaint that the Respondent had concocted the story and the Bills placed on record by the Respondent were also forged as the Petitioner had neither purchased any material nor counter-signed the last 4 bills as per the details provided.

8. Order XXXVII C.P.C. has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted. What is required to be examined for grant of leave is whether the defence taken in the application under Order XXXVII Rule 3 C.P.C. makes out a case, which if established, would be a *plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence would have been plausible had it not been for the fact that the allegations relating to the interpolation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the issuance of the cheque had never been disputed on behalf of the Petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means.*

9. Against such cogent evidence produced by the plaintiff/respondent, there is only an oral denial which is not supported by any corroborative evidence from the side of the Petitioner. On the other hand, the ledger book maintained by the Respondent and settled by the Petitioner had been produced on behalf of the Respondent in order to prove the transactions in respect of which the cheque in question had been issued by the Petitioner.

10. In our view, the defence raised by the Petitioner does not make out any triable issue and the High Court, has dealt with the matter correctly and has justifiably rejected the Petitioner's application under Order XXXVII Rule 3 C.P.C. and the same does not call for interference by this Court. The Special Leave Petition is, therefore, dismissed, but without any order as to costs."

25. In the present case, the first submission of learned counsel for the defendant/ applicant is that the promissory notes, admittedly signed by the defendant, have been tempered with by the plaintiff and material alterations have been made therein, *inter alia*, in relation to the rate of interest, and therefore, the same are null & void. A perusal of the said promissory notes does not lead to the inference that they have filled up after the defendant had

signed the same. There is nothing to show that the said promissory notes were not filled up when they were so signed by the defendant. The defendant appears to be an experienced businessman, and it is difficult to accept that the defendant would sign the promissory notes in blank, leaving all the particulars to be filled therein blank. The defendant has not disclosed any circumstance which could lead the Court to the plausible conclusion that the promissory notes were blank – in any respect, at the time of their being signed by the defendant. Merely because the handwriting, or the ink used in respect of the some of these promissory notes may be different from the handwriting and ink of the defendant/ used by the defendant, it does not follow that they were not so filled up at the time of the signing of the promissory notes by the defendant. Pertinently, in the promissory note dated 05.11.2012 for the amount of Rs.60 Lakhs, the rate of interest appears to have been filled in the same ink, and with the same handwriting, as that found on the signatures of the defendant. The rate of interest even in this promissory note is the same, i.e. 36% p.a. as is found in the other promissory notes.

26. The attention drawn by learned counsel for the defendant to the endorsement on the reverse of the promissory notes is insignificant. These endorsements merely record the details of the cheque issued as guarantee against the loan amount advanced to the defendant. There is no signature of either the plaintiff or the defendant on the said endorsement. This endorsement cannot be said to be on the face of the promissory note, and is not even relied upon by the plaintiff. The endorsement appears to be merely one made by the plaintiff/ his employees with a view to keep a record as to

which particular cheque has been issued against which installment of loan. Certainly, the same cannot be called as a material alteration.

27. The cases relied upon by the defendant premised on Section 87 of the NI Act are cases where material alterations in the negotiable instrument had been duly established. Apart from the mere *ipsi dixit* of the defendant that material alteration has been carried out by the plaintiff in the promissory notes after the same had been signed and executed by him – in blank, there is no material brought on record by the defendant even to, prima facie, indicate that the said promissory notes were executed in blank by the defendant. It is also pertinent to note that Section 87, in terms, states that the provisions of this section are subject to those of Sections 20, 49, 86 and 125. Section 20 of the Act, *inter alia*, provides that "*Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp*". It was for the defendant to dislodge this presumption by bringing forth documents and circumstances, so as to throw a doubt on the conduct of the plaintiff and to suggest that the plaintiff had subsequently filled up the blank promissory notes. The defendant has miserably failed in this regard. Pertinently, it is not a case where the rate of interest has been changed from the lower rate to a higher rate by effacing the lower rate. Thus, the argument of the defendant premised on Section 87 of the NI Act, in my view, is of no avail.

28. The stand taken by the defendant in his application seeking leave to defend with regard to the business dealings appears to be too good to be true. If the defendant is to be believed, the plaintiff made payment of Rs.2.2 crores to the defendant for the purpose of procuring carpets from the defendants business outfit M/s K.K. Concepts/ K.K. Concepts Pvt. Ltd. It has not been explained as to why the monies would be paid to the defendant, and not in the name of the business entity, if the same were given – not as a loan, but to procure goods, even though the account of K.K. Concepts Pvt. Ltd. had been opened on 24.08.2011. Secondly, if the defendant is to be believed, the transaction itself was open ended, i.e. there was no fixed time schedule as to when and how many carpets; of what value, would be delivered by the defendant to the plaintiff. The defendant has also not explained, as to why, a buyer would pay such a large amount as consideration in advance, without even entering into a contract for supply of goods. If the amount was advanced for purchase of goods/carpets, the parties would have so recorded their contract, rather than recording a different transaction-as reflected in the promissory notes and the cheques. The situation is not that the parties did not make any recording at all. They have recorded the same and reduced it in writing. Thus, there is no reason to accept that they recorded a transaction contrary to, or different from what they intended. No reason for doing so has been disclosed.

29. The defendant claims that K.K. Concepts Pvt. Ltd. supplied material/carpets for an amount of Rs.83,89,469.92 in October 2012 and further supplied carpets of the amount of Rs.31,11,584.16 in January 2013. He claims that K.K. Concepts Pvt. Ltd. sent a consignment of carpets of

value of Rs.1,54,20,775/- on 03.06.2013, which was delivered at the plaintiffs address in Gurgaon. Pertinently, the defendant has not provided any cogent documents with regard to the supply of the so called goods to the plaintiff. The defendant has relied upon self serving emails stated to have been sent to the plaintiff, informing the plaintiff with regard to the despatch of the goods at 758, Udyog Vihar, Phase V, Gurgaon – the premises of one Mr. Sanjeev Rathi. However, no connection has been established, even, prima facie, between the said Mr. Sanjeev Rathi and the plaintiff.

30. The defendant has not been able to explain as to why – in respect of rejected goods, the defendant stated that "*in case quality of supplied goods is being rejected, he shall not seek payment for the same*", when, according to the defendant, the payment had already been received in advance. As pointed out by Mr. Sikri, the defendant has not filed a shred of paper to show delivery and receipt of carpets to, and by the plaintiff, in October 2012 for Rs.83,89,469.92, and delivery and receipt of carpets to, and by the plaintiff in January 2013 for Rs.31,11,584.16. The invoice/document of Best Roadways Limited dated 22.10.2012 does not bear any endorsement of receipt by the plaintiff. Even the invoices/packing lists prepared by K.K. Concepts on 22.10.2012 do not bear any endorsement or receipt by the plaintiff.

31. Similarly, the invoice and packing list dated 12.01.2013 do not bear any endorsement of acknowledgment by the plaintiff. The bill prepared by the transporter Silver Wing (North) notes the name of the consignee as M/s GAC Logistics Pvt. Ltd., Account-K-7 Impex Pvt. Ltd. It is not explained as to how the plaintiff has any connection with M/s GAC Logistics Pvt. Ltd.,

to whom the goods were purportedly delivered. Even otherwise, the photocopy placed on record appears to be, prima facie, tampered and the original has not been placed on record.

32. So far as the goods allegedly delivered at Udyog Vihar are concerned, the trail of emails sent by the defendant do not support the plea that the goods allegedly delivered were to the plaintiff, or on the plaintiffs account. On 01.06.2013, the defendant purportedly sent an email stating that they are "*trying to load and send the carpets today itself to Gurgaon, Udyog Vihar, 758, Phase-V, New Delhi*". This email does not claim that the said address at Udyog Vihar, Gurgaon was that of the plaintiff. In fact, K.K. Concepts sought a confirmation from the plaintiff by stating "*Kindly confirm to send the carpets to the address above*". The defendant has not placed on record any email or other communication from the plaintiff confirming that carpets be sent to the plaintiff at Udyog Vihar address. On 04.06.2013, K.K. Concepts claims to have sent an email to the plaintiff stating: "*The truck already arrived at Udyog Vihar, carpets are unloaded ! Attached is the final and updated list of the goods, in total 525 carpets on the amount of 1,54,20,755,69 INR !"*

33. Once again, K.K. Concepts in this email does not even claim that the said address at Udyog Vihar is of the plaintiff, or that the carpets have been sent at the instance of the plaintiff to the said address/consignee. The defendant has also placed on record an email from K.K. Concepts dated 29.06.2013 stating that: "*We need to take 8 carpets from the goods that are at Udyog Vihar! Please confirm if we can send our people to collect them on Monday/ 01.07.2013?*"

34. However, no confirmation from the side of the plaintiff has been placed on record. Another email dated 02.08.2013 purportedly from K.K. Concepts to the plaintiff states that K.K. Concepts "*would like to show the carpets at Udyog Vihar to a buyers agent*". K.K. Concepts required the plaintiff to "*Kindly inform convenient for you time, when we can plan the visit ! In addition we require to take few carpets, kindly confirm your ok !*".

35. However, there is no alleged confirmation by the plaintiff placed on record by the defendant. It is also surprising that on the one hand, the defendant claimed to have supplied the carpets for which monies had already been received-meaning thereby that the carpets stood sold to the plaintiff, on the other hand the defendant claims to have casually demanded back "*few carpets*" on one occasion, and "*8 carpets*" on another occasion from those allegedly delivered at Udyog Vihar, allegedly to the plaintiff.

36. The defendant has also placed on record another transporters document issued by Star Wing Roadways (North). Pertinently, the consignees name is shown in this document as that of the consignor i.e. K.K. Concepts Pvt. Ltd. at Gurgaon. This also belies the defendants claim that the goods were delivered at Gurgaon either at the plaintiffs address, or at the plaintiffs instance. There is also a serious contradiction in the defence disclosed by the defendant with regard to the repayment of the amount of Rs.44.21 lacs by the defendant from his personal account to the plaintiff. According to the defendant, the goods had to be supplied for the advance amount of Rs.2.2 crores by K.K. Concepts/ K.K. Concepts Pvt. Ltd. If that were so, there was no occasion for the defendant to refund the amount of

Rs.44.21 lacs to the plaintiff. Pertinently, a part of the amount i.e. Rs.5,21,000/- had been returned on 18.06.2013 i.e. after dishonour of two cheques of Rs.12 lacs and Rs.20 lacs, both dated 30.05.2013. If the said cheques had been issued only as a "security", and had been banked by the plaintiff contrary to the agreement of the parties, there would have been no occasion for the defendant to make payment of Rs.5.21 lacs, despite the plaintiffs breach of the so called understanding not to deposit the cheques. In fact, the defendant went on to make yet another payment of Rs.5 lacs to the plaintiff on 18.07.2013.

37. The defence disclosed by the defendant is riddled with serious contradictions and does not inspire confidence. It cannot be said that the defendant either has a good defence, or that he has raised any triable issue. The defence disclosed by the defendant does not indicate that he has a fair or a bonafide or a reasonable defence. It also cannot be said that if the defendant is allowed to defend the suit, at the trial, he would be able to establish a defence, and the plaintiff may not be entitled to judgment. In fact, the defence set up by the defendant is simply illusionary and sham. It is evident that the defendant has only tried to cook up a defence when, in fact, none exists. There is nothing to suggest that the rate of interest stipulated in the promissory notes is so high, as no businessman would have agreed to service in respect of a personal loan. The loan had not been secured with any tangible security of an immovable property or goods. Being an unsecured loan, it was expected that the rate of interest would be much higher, as the risk involved for the plaintiff in advancing such a loan was higher. Thus, the fact that the default rate specified under the Act is

18% per annum is of no avail. There is no bar to parties agreeing that a higher rate of interest would be payable than the default rate of 18% per annum as specified in the Act.

38. Consequently, I am of the view that there is absolutely no merit in the present application seeking leave to defend, and the defendant is not entitled to even conditional leave to defend in the facts and circumstances of the case. Accordingly, the present application is dismissed.

CS(OS) 1866/2013

39. The relevant facts have already been taken note of herein above while dealing with the defendant's application under Order 37 Rule 3 CPC being I.A. No.14316/2014. They are, therefore, not being repeated. The plaintiff has filed the present suit under Order 37 CPC on the basis of the promissory notes executed by the defendant, as well as the dishonoured cheques issued by the defendant. The defendant has not disputed his signatures on the promissory notes, and has also not disputed the factum of his issuing the dishonoured cheques. The defence set up by the defendant qua the promissory notes and the cheques issued stands rejected, as aforesaid. Admittedly, the defendant had received an amount of Rs.2.2 crores from the plaintiff. The defendant has not been able to establish that the said amount had been received as a part of a commercial transaction for supply of carpets by K.K. Concepts/ K.K. Concepts Pvt. Ltd. to the plaintiff. On the other hand, the plaintiff has been able to establish that the said amount had been advanced to the defendant in his personal capacity as an interest bearing loan.

40. The defendant, admittedly, has refunded an amount of Rs.44.21 lacs, thereby leaving a principal liability of Rs.1,75,79,000/-. The agreed rate of interest under the promissory notes is 36% p.a. Accordingly, the suit is decreed for the principal amount of Rs.1,75,79,000/- along with interest from 13.08.2013, when the notice of demand was sent to the defendant, @ 36% p.a. till the date of filing of the suit. For the period *pendente lite* and till realization, the plaintiff shall be entitled to receive interest on the principal amount of Rs. 1,75,79,0000/- @ 9% per annum. The plaintiff shall also be entitled to costs.

(VIPIN SANGHI)
JUDGE

FEBRUARY 16, 2016
B.S. Rohella /sr