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

\+ CS(OS) 846/2015

MANJU JAIN ..... Plaintiff

Through: Mr. Jinender Jain, Advocate

versus

KARTAR TYRE HOUSE & ORS ..... Defendant

Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

% **01.06.2016**

None appears for the defendant when the matter is called out. I may observe that the present suit for recovery was filed by the plaintiff by invoking the summary procedure set out in Order 37 CPC. When the summons were issued in the suit on 26.03.2015, the Court directed issuance of summons through ordinary process, speed post and courier, "returnable before the Joint Registrar on 30.07.2015 for completion of pleadings." The record shows that the summons issued to the defendants were issued as in an ordinary suit and not as required to be issued in Form IV in Appendix B CPC. Thus, for all intents and purposes, the present suit has to be treated as an ordinary suit for recovery and not as a summary suit under Order 37 CPC.

2. Be that as it may, despite service, the defendants have till date not filed their written statement. The defendant Nos. 1 and 2 were served before

30.07.2015 as the order-sheet of 30.07.2015 records that they were represented through counsel. The order dated 05.01.2016 shows that appearance was put on behalf of defendant No. 3 as well by counsel.

3. The parties sought a reference of their dispute to mediation and, accordingly, the matter was sent to Delhi High Court Mediation and Conciliation Centre. The mediation has failed. Despite the said failure, written statement was not filed and no application to seek condonation of delay in filing the written statement has been filed. The defendants are, therefore, proceeded ex parte and their right to file the written statement stand closed.

4. Counsel for the plaintiff has pressed for passing of a decree by invoking Order 8 Rule 10 CPC. Accordingly, I have heard the submission of learned counsel for the plaintiff and proceed to judgment.

5. The case of the plaintiff as set out in the plaint is that defendant No. 1 is a partnership concern of defendant Nos. 2 and 3. The defendants had been obtaining financial assistance from the plaintiff since May, 2005 to run their business of tyres and tubes. Initially, the plaintiff got open a letter of credit in favour of defendant No. 1 for a sum of Rs. 96,60,000/-. Thereafter, further sums of Rs. 56,40,000/- were advanced by cheques, details whereof, are mentioned in para 3 of the plaint. The plaintiff states that the defendants agreed to pay consideration/incentives of Rs. 13,60,000/- till 31.03.2009. Thus, the balance outstanding as on 31.03.2009 payable by defendants to the plaintiff was Rs. 1,66,60,000/-. The plaintiff states that during the period April, 2009 to March 2010, the defendants took further

advances from the plaintiffs by way of four cheques amounting to Rs. 66,50,000/-, details whereof are mentioned in para 8 of the plaint. Thus, the total outstanding balance payable by the defendants as on 31.03.2010 was Rs. 2,45,10,000/- including an amount of Rs. 1 lakh per month as remuneration. The plaintiff states that the defendants took further advances/loans of Rs. 52,90,000/- by way of four cheques, details whereof are mentioned in para 10 of the plaint. The outstanding liability of the defendants, thus, swelled to Rs. 3.1 crores. The defendants made repayment through different modes amounting to Rs. 90 lacs reducing the liability to Rs. 2.20 crores as on 30.06.2011. Since the amounts were not being repaid, the plaintiff initiated a civil suit being Suit No. 169/2011 against the defendants in the court of Civil Judge, Tis Hazari Courts, Delhi, titled, 'M/s Shubham Agencies Vs. M/s Kartar Tyre House & Anr.'. The said suit was to seek an injunction against the defendants from dealing with their property bearing No. 1695, Arya Samaj Road, Karol Bagh, New Delhi – 05, till the dues of the plaintiff are paid. In the said suit, the defendants gave their undertaking that they shall not dispose of the said property without paying the dues of the plaintiff. This undertaking was furnished on 01.11.2011 and the suit came to be disposed of in terms thereof.

6. The further case of the plaintiff is that one Shri Gagandeep Singh and Mr. Rajinder Singh preferred a civil suit in 2012 against the defendants wherein the plaintiff was also impleaded as a party defendant. The case of the said Gagandeep Singh and Rajinder Singh was that they had agreed to purchase the aforesaid property No. 1695, Arya Samaj Road, Karol Bagh, New Delhi, from the defendants herein. The plaintiff was impleaded as a

party defendant on account of the order dated 01.11.2011 passed in suit No. 169/2011. They sought the annulment of the said decree passed in favour of the plaintiff herein. Subsequently, they deleted the plaintiff herein from the array of defendants in the said suit and gave up their relief against the plaintiff.

7. The further case of the plaintiff is that defendants jointly issued a cheque for Rs. 2,82,50,000/- bearing No. 192034 dated 30.04.2012 drawn on State Bank of India, Commercial Branch Community Centre, Naraina Vihar, Delhi, in respect of their accumulated liability of Rs. 2.2 crores as principal amount and Rs. 18,50,000/- on account of arrears of rent due for the period 01.04.2009 to 30.04.2012 for 37 months @ Rs. 50,00,000/- and Rs. 44,00,000/- on account of interest accumulated from 01.07.2011 to 30.04.2012 for 10 months @ 2% per month in respect of the pending amount in favour of the plaintiff. Ms. Poonam Chawla, the guarantor of the defendants also issued cheque for Rs. 2,82,50,000/- in favour of the plaintiffs, bearing cheque No. 857444 dt. 30.04.2012 drawn on Vijay Bank, Krishna Park Branch, New Delhi. The plaintiff states that the said cheque was dishonoured upon presentation. The cheque issued by the defendant Nos. 2 and 3 aforesaid, dated 30.04.2012 was also dishonoured upon presentation. The same was returned vide return memo dated 23.05.2012.

8. The further case of the plaintiff is that the plaintiff issued a statutory notice under Section 138 of the Negotiable Instruments Act on 19.05.2012 to the defendants but to no avail. Consequently, the plaintiff preferred a complaint under Section 138 of the Negotiable Instruments Act before the court of Ms. Gomti Manocha, MM, Patiala House Courts, Delhi. Counsel

for the plaintiff states that the said proceedings are now pending in the court of the learned Metropolitan Magistrate, Saket. The plaintiff further states that during the pendency of the said complaint, the parties arrived at a settlement on 07.10.2013. The plaintiff agreed to receive in full and final settlement of the said outstanding liability of Rs. 2,82,50,000/-, an amount of Rs. 1 crore from the defendants. When the settlement was arrived at, defendant made payment of Rs. 1,10,000/- vide pay order No. 076012 dated 05.10.2013 drawn on Axis Bank. The remaining amount of Rs. 98,90,000/- was to be paid in four instalments i.e. Rs. 25 lacs on 20.01.2014, Rs. 25 lacs on 20.02.2014, Rs. 25 lacs on 20.03.2014 and remaining amount of Rs. 23,90,000/- on 20.04.2014. The parties also agree that in case the said amount was not paid, the plaintiff would be entitled to double the amount of the cheque amount of Rs. 2,82,50,000/- without any dispute. On 07.10.2013, the learned Metropolitan Magistrate in view of the said settlement, passed the following order:

> "Present: Complainant along with Ld. Counsel
> Accused along with Ld.Counsel.
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> Matter amicably settled between the parties. They have placed on record MoU pertaining to the settlement which is taken on record as Ex. S1. As per settlement, today first instalment of Rs. 1,10,000/- has been paid to the complainant by way of demand draft and payment of second instalment shall be paid to the complainant in the court itself.
>
> Be listed for 30.01.2014.
>
> (Chander Mohan)
> MM(C-02)/Delhi
> 07.10.2013"

9. The plaintiff states that the defendants did not comply with the said

settlement and did not make payment of the balance amount of Rs. 98,90,000/-. Consequently, under the said agreement, the defendant became liable to make payment of double the amount of Rs. 2,82,50,000/- i.e. Rs. 5,65,00,000/-.

10. The plaintiff accordingly claims the amount of Rs. 5,65,00,000/- in the present suit along with interest @ 18% per annum.

11. The submission of learned counsel for the plaintiff is that since the defendants have not filed their written statement to contest the suit and the suit itself is premised on documents and recorded transactions, the plaintiff is entitled to a decree under Order 8 Rule 10 CPC.

12. The plaint filed by the plaintiff is verified wherein the plaintiff has stated that the averments contained in para 1 and 32 of the plaint are true and correct to her personal knowledge derived from the records in the ordinary course of business. She has also filed an affidavit in support of this plaint wherein she has affirmed that the accompanying suit has been drafted under her instructions and the averments made therein are true and correct to her knowledge. Since there is no contest to the suit, there is no reason for this Court to disbelieve the case of the plaintiff. The plaintiff has placed on record copy of the two cheques of Rs. 2,82,50,000/- issued by the defendants as well as the guarantor Ms. Poonam Chawla, both dated 30.04.2012. Learned counsel states that the original cheques issued by the defendants have been filed in the court of the learned Metropolitan Magistrate along with the complaint under Section 138 of the Negotiable Instruments Act. A copy of the notice issued to the defendants on

19.05.2012 under Section 138 of the Negotiable Instruments Act, has also been placed on record. The plaintiff has also placed on record the copy of the complaint preferred in the court of the Chief Metropolitan Magistrate (Central District), Tis Hazari Courts, under Section 138 read with 142 of the Negotiable Instruments Act. The plaintiff has placed on record copy of the MoU/settlement dated 07.10.2013 arrived at between the parties, which, inter alia, states that the defendants had issued a cheque for Rs. 2,82,50,000/- dated 30.04.2012 bearing No. 192034 drawn on State Bank of India, Commercial Branch, Community Centre, Naraina Vihar, towards their liability and that the same is settled fully and finally for total consideration of Rs. 1 crore. In clause 2 of the said settlement, it is, inter alia, recorded, "*if in case there is any hindrance or ambiguity in non-compliance of the aforesaid schedule, in that case, the first party agreed to pay the double amount of the cheque of Rs. 2,82,50,000/- without any dispute.*"

13. Premised on the said settlement, the learned Metropolitan Magistrate passed the order dated 07.10.2013 which has been extracted above and a copy of the same has been placed on record by the plaintiff.

14. Learned counsel for the plaintiff further submits that the settlement/MoU dated 07.10.2013 was, in fact, filed by the defendants in Bail Application No. 881/2012. The said bail application had been filed by defendant Nos. 2 and 3 in a case filed by the agreement purchasers Gagandeep Singh and Rajinder Singh. Defendant Nos. 2 and 3 had, in their affidavit, filed in the said bail application disclosed the settlement arrived at with the plaintiff in respect of their liability of Rs. 2,82,50,000/- by

disclosing that the same had been settled for Rs. 1 crore to be paid in instalments.

15. In view of the aforesaid, I am of the considered opinion that the plaintiff is entitled to a decree in her favour. The question that remains for consideration is the amount for which the suit could be decreed. The defendant entered into a written agreement with the plaintiff, namely, the MoU/settlement dated 07.10.2013 undertaking to make payment of Rs. 1 crore in full and final settlement of liability of Rs. 2,82,50,000/- which was to be paid in instalment. They also agreed that if they did not make payment in instalment, as agreed, they would be liable to pay double the amount of the original liability of Rs. 2,82,50,000/- i.e. Rs. 5,65,00,000/-. Such an agreement, in my view, in the facts and circumstances of the present case cannot be viewed as prescribing a penalty. The transactions between the parties show that the parties were agreeable that the defendant makes payment of interest to the plaintiff on the outstanding principal liability. Thus, the prescription that the defendant shall make payment of the double the amount of the outstanding liability in case the settlement amount is not paid on the due dates, can be treated as one prescribing a liability on account of accrual of interest over a passage of time. Thus, in my view, the plaintiff is entitled to the amount of Rs. 5,65,00,000/-. However, the defendants made payment of Rs.1,10,000/- at the time of arriving at the settlement/ MOU dated 07.10.2013. The defendant would be entitled to adjustment of the said amount. Thus, the liability of the defendant stands at, and the suit is decreed for Rs.5,63,90,000/-. So far as the claim for interest is concerned, the plaintiff cannot claim interest on interest. The original crystallised

principal liability of the defendants towards the plaintiff is Rs. 2,82,50,000/-. Thus, the plaintiff would be entitled to interest on the said amount from the date of filing of the suit till realization @ 10% per annum.

16. The suit of the plaintiff is decreed in the aforesaid terms.

VIPIN SANGHI, J

JUNE 01, 2016
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