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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% ***Date of Decision: 15.09.2016***

+ CM(M) 532/2016

ICICI BANK LTD Petitioner
Through: Mr.Punil K. Bhalla, Advocate.

Versus

ABRAR HUSSAIN Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition, the petitioner seeks to impugn the order dated 29.04.2016. The petitioner filed a suit for recovery of Rs. 3,34,972.90/-. It is urged that the respondent had approached the petitioner for grant of a loan for purchase of vehicle namely "DUSTER/ RXL" under Loan-cum-Hypothecation scheme. The respondent executed Credit Facility application, deed of hypothecation and irrevocable Power of Attorney in favour of petitioner bank. The respondent executed various documents and agreed to pay the loan in 60 equated monthly instalments. The petitioner sanctioned a loan of Rs. 6,00,000/- to the dealer, AVIA AUTO SERVICES PVT. LTD.
2. Since there was default in repayment of the monthly instalment, the petitioner claims to have, in terms of the loan document, recalled the loan facility by sending a recall notice dated 20.01.2016. Thereafter, the present suit has been filed.

3. When the suit came up for hearing, the trial court instead of issuing summons to the respondent passed the following orders:-

“In the present case, it is evident that the dispatch proof/tracker’s report of the loan recall notice thereby foreclosing the account of the defendant has not been placed on record and in fact, what is present on record is the photocopy of LRN Bulk Register which is an internal register of the plaintiff bank and not the dispatch proof of the Postal and Telegraph Department or receipts thereof as claimed in the plaint. I may observe that it is by way of this notice that according to the plaintiff, the defendant was allegedly informed about the recall of the entire loan amount and entire remaining amount having fallen due so as to create a cause of action for filing the suit for the entire remaining outstanding loan amount including the future instalments. Any failure to inform and convey to the defendant, the recall of the loan facility and the total outstanding dues thereafter, the cause of action for filing the suit for the entire remaining loan amount, does not arise as the same would be restricted only to the outstanding dues as on date. In the present case the loan recall notice shows that as on the date, the defaulted amount is only 39,135/- which is below the Pecuniary Jurisdiction of this court. It is therefore necessary for the plaintiff to place before me the material to show the communication of the foreclosure notice to the defendant i.e. the dispatch/service proof/tracker’s report for which the Ld. Counsel seeks time.

Further, there are also certain glaring/visible discrepancies in the documents qua the pleadings which I note as under:

1. Why is there a difference in the outstanding amount as reflected in the plaint, the loan recall notice and the Statement of Account [I note that as per the plaint (para 9) a principal amount of Rs.3,18,436/- is due and after adding the late payment penalties, cheque bouncing charges, interest for the month and interest on the instalments a total sum of Rs.3,34,972/- is due as on 02.03.2016; as per the loan recall notice on

account of delay the arrears of Rs.39,135/- is due from the defendant whereas after the recall of the loan/credit facility, the amount dues is Rs.3,55,428/- as on 14.01.2016 and as per the Statement of Account a sum of Rs.3,53,203.41p is due].

2. Under what clause/law the overdue has been charged multiple times as reflected in the Statement of Account?
3. Whether the instalments as reflected in the Statement of Account include the interest? If yes, then under what clause/law the interest has been imposed on the instalments which were to mature in future and under what clause.
4. Information with regard to the total number of instalments/total amount deposited till the date of institution of the suit be also placed on record.
5. Whether the account of the defendant has been declared NPA (Non Performing Asset), if yes, on what day and whether any proceedings under the SARFAESI Act initiated thereafter?"

4. A perusal of the impugned order shows that the trial court has asked the petitioner to place before it the material to show the communication of the foreclosure notice to the respondent, i.e, the dispatch/service proof/tracker's report.

5. The trial court has also sought clarifications with respect to five discrepancies mentioned hereinabove. The trial court also observed that the issues with regard to the jurisdiction of the trial court to try this suit in view of the fact that the defendant is not residing and working for gain within the jurisdiction of the court nor there is any document to confirm that any material cause of action arose within the jurisdiction has also arisen but declined to consider the issue as the same is subjudice before this court.

6. The purpose of above directions is not clear. The plaint shows that the petitioner states that there is default in number of instalments that was payable by the respondent. It also shows that the only security available with the petitioner is the movable property in question. Instead of issuing summons to the respondent, the trial court has gone into an enquiry about various averments made in the plaint on merits.

7. 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.

8. 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.”

9. 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.”

10. 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.

11. 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 various other averments.

12. 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.”

13. 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.

14. 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.

15. It may also be noted that in the present case the petitioner had moved an application under Order 40 Rule 1 CPC for appointment of a Receiver to take into custody of the vehicle from wherever it is found and in whosoever possession it is found and also to empower the Receiver to sell the same and pay off the sale proceeds to the petitioner bank. No directions have been passed.

16. Learned counsel appearing for the petitioner has submitted that this is

the only security available with the petitioner and if the same is disposed off by the respondent, the petitioner would suffer grave and irreparable loss and injury.

17. Accordingly, Gyanesh Kumar, representative of the petitioner is appointed as receiver. The receiver will take possession of the said vehicle i.e. "DUSTER/ RXL". In the event the respondent were to pay the amounts due and payable, on account of defaulted instalments only excluding overdue interest and penalties for which default has been committed with an undertaking to pay future agreed instalments on time, the subject vehicle will be released to the respondent on superdari. The Receiver will issue a receipt in that behalf. The Receiver will, however, bear in mind the time and place at which possession of the subject vehicle are sought to be taken, bearing in mind that no inconvenience is caused to the respondents. The receiver will extend due courtesy to the respondents while seeking to take possession of the said vehicle. The receiver is directed to file a report with the trial court, within one week of taking possession of the said vehicle. The trial court will, thereafter be at liberty to pass any order that it may deem fit in respect of the application pending before it in that behalf.

18. The petition stands disposed of in the above term.

JAYANT NATH, J.

SEPTEMBER 15, 2016