*　　IN THE HIGH COURT OF DELHI AT NEW DELHI

\+　　**RSA No. 290/2016**

%　　**28th September, 2016**

SH. MAHAVIR GUPTA ..... Appellant

Through: Mr. Sarvesh Singh, Mr. Dhananjay Kumar Singh and Mr. H.S. Rawat, Advocates.

versus

SH. SHOBHA RAM SARAN ..... Respondent

Through:

**CORAM:**
**HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not?

**VALMIKI J. MEHTA, J (ORAL)**

**C.M. Appl. No. 35925/2016 (for exemption)**

Exemption allowed subject to just exceptions.

C.M. stands disposed of.

**RSA No. 290/2016 and C.M. Appl. No.35924/2016 (for stay under Section 151 CPC)**

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed against the concurrent Judgments of the courts below; of the Trial Court dated 6.6.2016 and the First Appellate Court dated 23.7.2016; by which the leave to defend application filed by the

appellant/defendant in a suit for recovery of Rs.2,10,000/- with interest and costs was dismissed. The suit under Order XXXVII CPC was filed by pleading grant of a loan by respondent/plaintiff to the appellant/defendant of an amount of Rs.1,50,000/- by cheque. The appellant/defendant for repayment issued cheque no. 000046 dated 5.5.2015 of Rs.1,50,000/- in favour of the plaintiff which was dishonoured and therefore the subject suit came to be filed under Order XXXVII CPC on the basis of the dishonoured cheque along with interest. I note that while dismissing the leave to defendant application of the appellant/defendant, the courts below have decreed the suit not for Rs.2,10,000/- but only for Rs.1,50,000/- with *pendente lite* and future interest at the rate of 9% per annum, i.e pre-suit interest was not granted on the amount of Rs.1,50,000 on account of no documents being filed to prove the entitlement to pre-suit interest.

2. The facts of the case are that respondent/plaintiff filed the suit for recovery of Rs.2,10,000/-, of which Rs.1,50,000/- was the principal amount and the balance interest. It was pleaded that the respondent/plaintiff had given a friendly loan of Rs.1,50,000/- to the appellant/defendant vide cheque no. 184104 dated 5.9.2011 drawn on State Bank of India, Dilshad Garden, Delhi and which was encashed. It was pleaded in the plaint that the appellant/defendant paid interest till September, 2013, but thereafter did not

make payment of the interest amount. Ultimately, the appellant/defendant issued a post dated cheque of Rs.1,50,000/- on 7.2.2015 being cheque no. 000046 dated 5.5.2015 for repayment of loan amount, which was dishonoured, and therefore the subject suit was filed under Order XXXVII CPC to recover the principal amount of Rs.1,50,000/- along with interest at the rate of 24% per annum. Appellant/defendant appeared in the suit and filed his leave to defend application. In the leave to defend application, the appellant/defendant pleaded that he had returned the cheque amount, however, no proof was filed for showing as to how the cheque amount was paid back. Appellant/defendant also pleaded that there was no loan transaction because actually the respondent/plaintiff only wanted to show to his family that he had given a loan to the appellant/defendant. It is noted that the appellant/defendant had issued the subject cheque on the basis of which Order XXXVII CPC suit was filed and which was dishonoured.

3. The leave to defend application was dismissed by the trial court observing that the defence is moonshine, inasmuch as, no proof was filed as to how the loan was repaid as claimed by the appellant/defendant and also there was no name of any witnesses before whom the so called repayment was made. The trial court also noted that the appellant/defendant had taken inconsistent pleas because on the one hand taking of loan itself was denied whereas on the

other hand besides pleading return of loan it was also pleaded that the suit was barred on account of violation of the Punjab Registration of Money-Lender's Act, 1938. The trial court also found it to be unbelievable that why would the appellant/defendant accept a cheque of the respondent/plaintiff on a story that the respondent/plaintiff wanted to show to his own family that he had given a loan to the appellant/defendant to show that respondent/plaintiff had no monies, and that again allegedly the respondent/plaintiff approached the defendant to give a blank signed cheque for showing to his family of having given the loan and with a promise given to the appellant/defendant by the respondent/plaintiff that this cheque would not be misused. Accordingly, by applying the principles for grant of leave to defend laid down in the judgments of the Supreme Court in the cases of ***M/s Mechalec Engineers & Manufacturers Vs. M/s Basic Equipment Corporation***, ***AIR 1977 SC 577*** and ***V.K. Enterprises and Another Vs. Shiva Steels, (2010) 9 SCC 256***, the leave to defend application was dismissed. The relevant paragraphs of the trial court judgment are paragraphs 8 to 10 and which paragraphs read as under:-

> "8. After perusing the record of the Court file and considering the submissions made by the Ld. Advocates for the parties, I find it expedient to refer to the law by the Hon'ble Supreme Court in M/s Mechalec Engineers & Manufacturers v M/s Basic Equipment Corporation, AIR 1977 Supreme Court 577 and V.K. Enterprises and Anr. v Shiva Steels, (2010) 9 SCC 256. In M/s Mechalec Engineers & Manufacturers v. Basic Equipment Corporation (supra), the Hon'ble Supreme Court, while dealing with prerequisites for grant or refusal of a leave to defend has observed as under:

"8…

(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 bonafide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgments and the defendants 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 immediate make it clear that he had 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."

9. In V.K. Enterprises and Anr. v. Shiva Steels, (2010) 9 SCC 256, the Hon'ble Supreme Court has observed as under:

"10. Order 37 CPC 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 <u>at least plausible</u>, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted.**

**11. What is required to be examined for grant of leave is whether the defence taken in the application under Order XXXVII Rule 3 CPC makes out a case, which if established, would be a plausible defence in a regular suit**. In matters relating to dishonor of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted."

10. Upon examining the defence sought to be raised by the defendant in the present case, in light of the aforesaid observations, I find that it falls under clause (d) of the observations made by the Ho'ble Supreme Court of India in M/s Mechalec Engineers & Manufactures's case (supra). In my view, the defence setup by the defendant is per se illusory, sham and devoid of any merit because of multiple reasons. Firstly, the defendant has not given any particulars regarding the alleged payment of Rs.1,50,000/- made to the plaintiff after encashing the cheque no. 184104 dated 05.09.2011. In my view, if the defendant had made any such payment to the plaintiffs, he would have at least disclosed the exact date of such payment and the name of witnesses, in front of whom he had made such payment. In case there were no such witnesses, it is highly unbelievable that the defendant had made the payment without taking any receipt of Rs.1,50,000/- from the plaintiff. Secondly, the defendant has taken inconsistent pleas in the leave to defend application. At one juncture, the defendant has denied taking any loan from theplaintiff and at another juncture, the defendant has pleaded that the plaintiff is lending money in violation of Punjab Registration of Money Lenders Act, 1938. If the defendant had never taken any loan from the plaintiff, he should not have taken the plea of the plaintiff lending money in violation of Punjab Registration of Money Lenders Act, 1938. In my view, the aforesaid inconsistency in the pleas of the defendant exposes the falsity of the defence sought to be raised by the defendant. Thirdly, in my view, the entire defence set up by the defendant is implausible because it is absolutely unbelievable that a shopkeeper (defendant) would take the risk of encashing the cheque of a customer at his shop (plaintiff), through his bank account, make the payment to the customer and later on give his own cheque to the customer, without having any commercial benefit from the transaction. In view of the foregoing reasons, the application for leave to defend filed under Order XXXVII Rule 3(5), CPC by the defendant is refused/rejected."

4. In my opinion, the trial court, and whose reasoning has been accepted by the first appellate court, has rightly dismissed the leave to defend application of the appellant/defendant and no substantial question of law arises for entertaining this second appeal under Section 100 CPC.

5. Counsel for the appellant sought to argue that the subject suit under Order XXXVII CPC is not maintainable without filing the original dishonoured

cheque or a copy thereof, but when a query was put to the counsel for the appellant/defendant to show any such defence taken up in the leave to defend application, it was found that even copy of the leave to defend application has not been filed in this Court. In fact, such a plea would not have been raised in the leave to defend application because it is found that the judgment of the trial court does not advert to this aspect. Also, the defence now raised is also totally frivolous because it is not disputed by the appellant/defendant that the dishonored cheque on the basis of which the subject suit was filed was issued by the appellant/defendant. In fact, in my opinion, the appellant/defendant is lucky to have got away with not paying of pre-suit interest allegedly because there was no agreement which was found to be executed for the pre-suit period, however, interest was in fact payable by the appellant/defendant in view of Section 80 of the Negotiable Instruments Act, 1881, which statutorily provides interest at the rate of 18% per annum on a dishonoured cheque.

6. In view of the above, there is no merit in this Regular Second Appeal and the same is accordingly dismissed.

**SEPTEMBER 28, 2016** **VALMIKI J. MEHTA, J**

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