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

\+ CS(OS) 2745/2015

% ***Judgment Dated 7th October, 2016***

SHRI CHANDEEP SINGH BHATIA ..... Plaintiff

Through : Mr.Sandeep P. Agarwal and Mr.Rajesh Pathak, Advs.

versus

SHRI DINESH SEHGAL & ORS ..... Defendants

Through : Mr.Kumar Dushyant Singh and Mr.Siddharth Dutta, Advs.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (*ORAL*)

I.A. 7904/2016

1. This is an application filed by the defendants under Order XXXVII Rule 3 of the Code of Civil Procedure seeking unconditional leave to defend.
2. Plaintiff has filed the present suit under Order XXXVII of the Code of Civil Procedure for recovery of Rs.2,42,58,812/- together with *pendente lite* and future interest at the rate of 1.5%, per annum. As per the plaintiff, present suit is based on a written Purchase Agreement dated 16.7.2014.
3. Facts of this case, as stated in the plaint, are that the plaintiff and defendants are known to each other for many years and in fact defendant no.1 remained as a tenant of the plaintiff for nine years. Defendant no.2 is the wife of defendant no.1. Defendants no.3 and 4 are the sons of defendants no.1 and 2.

4. As per the plaint, defendants are running a jewellery shop in the name and style of *Blues Jewellery Company*. On 16.7.2014, the plaintiff sold certain gold and diamond jewellery worth Rs.2,01,25,000/- to defendant no.1. A Purchase Agreement dated 16.7.2014 was executed between the parties. A list of jewellery items were detailed in Exhibit A attached to the said Purchase Agreement. The plaintiff claims that defendants no.2 to 4 extended their personal guarantee for the payment of the aforesaid amount due in favour of the plaintiff by signing on the Purchase Agreement dated 16.7.2014. It was agreed that the aforesaid amount was to be repaid within 365 days and in lieu of the credit given to the defendants, they would pay interest at the rate of 1.5 per cent, per month, on the said amount.

5. It is the case of the plaintiff that all the defendants agreed to be jointly and severely liable and responsible for the repayment of the said amount of Rs.2,01,25,000/- and interest accrued thereon in terms of the agreement. The defendants also handed over twelve post-dated cheques towards monthly interest due and payable. Details of the post-dated cheques, which have been extracted in paras 5 and 6 of the plaint, read as under:

Cheque No.	Date	Amount (Rs.)
134027	15/10/2014	Rs.50,00,000/-
134028	15/01/2015	Rs.50,00,000/-
134029	15/04/2015	Rs.50,00,000/-
134032	15/07/2015	Rs.51,25,000/-

Cheque No.	Date	Amount (Rs.)
140601	15/12/2014	Rs.3,00,000/-
140602	15/12/2014	Rs.3,00,000/-
140603	15/12/2014	Rs.3,00,000/-

140604	15/12/2014	Rs.3,00,000/-
140605	15/12/2014	Rs.3,00,000/-
140606	15/01/2015	Rs.3,00,000/-
140607	15/02/2015	Rs.3,00,000/-
140608	15/03/2015	Rs.3,00,000/-
140609	15/04/2015	Rs.3,00,000/-
140610	15/05/2015	Rs.3,00,000/-
140611	15/06/2015	Rs.3,00,000/-
140612	15/07/2015	Rs.3,00,000/-

6. Learned counsel for the plaintiff submits that vide letter dated 16.7.2014, defendant no.1 acknowledged and confirmed the actual receipt of gold and diamond jewellery worth Rs.2,01,25,000/- which was purchased and certified that the jewellery had no defect. Counsel further contends that although the defendants were to make the payment of interest from August, 2014, but on their request, the plaintiff agreed that the payment of interest would be made from December, 2014, onwards, only with the condition that payment of interest from August, 2014, to December, 2014, would be made by the defendants in the month of December, 2014, itself. Thus, the defendants issued five cheques towards interest payable to the plaintiff all dated 15.12.2014, details of which have been extracted hereinabove. It is contended that, at the request of the defendants, the said cheques were not presented to the bank as the defendants could not arrange the funds. Accordingly, the plaintiff presented the cheque bearing no.134027 dated 15.10.2014 for Rs.50,00,000/- towards the principle and five cheques bearing nos.140601 to 140605 towards interest on 23.12.2014 for payment to his banker i.e. South India Bank, however, the said cheques were dishonoured by the banker of defendant no.1 with the remark 'Fund Insufficient'. Thereafter the plaintiff presented

remaining cheques in terms of Purchase Agreement dated 16.7.2014 with respect to the principle amount as also towards interest on the dates as mentioned, however, the said cheques were returned unpaid.

7. Counsel for the plaintiff submits that since the said cheques were dishonoured, the plaintiff issued legal notices to the defendants however, the same were not replied by the defendants. Aggrieved by the conduct of the defendants, the plaintiff filed a complaint under Section 138 of the Negotiable Instruments Act against the defendants, which is stated to be pending. Counsel, in these circumstances, prays for a decree on the principle amount and interest.

8. Learned counsel for the defendants submits that the defendants seek unconditional leave to contest the matter as the defence raised by them is *bona fide* and genuine. Counsel further submits that the present suit is not maintainable under the provisions of Order XXXVII of the Code of Civil Procedure. It is also contended that no jewellery was ever sold by the plaintiff to defendant no.1 and the actual purpose for execution of the alleged Purchase Agreement dated 16.7.2014 was for securing a loan, which the plaintiff agreed to give to defendant no.1 which in fact has not been disbursed/given to defendant no.1 at any point of time.

9. Learned counsel for the defendants submits that there was no transaction, as alleged by the plaintiff, and thus it is claimed that the defendants has raised triable issues as a fraud has been played by the plaintiff upon the defendants and, thus, the present suit under Order XXXVIII of the Code of Civil Procedure would not be maintainable.

10. Learned counsel for the defendants further submits that defendant no.1 required money in the form of loan. The plaintiff was acquainted with defendant no.1 and his business. When the plaintiff learnt that defendant no.1 requires loan and is ready to pay interest on the loan

amount, he offered loan to defendant no.1 and defendant no.1 also agreed to pay interest on the loan at the rate of 1.5 per cent, per annum. However, the plaintiff after having learnt that defendant no.1 has rejected and refused loan offers from other sources, started arm-twisting the defendant no.1 by putting condition of executing a purchase agreement for securing his loan amount. Since the plaintiff was known to defendant no.1 and also in view of the fact that defendant no.1 had already rejected the loan offers from others, defendant no.1 had no option but to succumb to his pressure of unreasonable demands of the plaintiff. Counsel further submits that defendant no.1 was pressurised by the plaintiff and under pressure the plaintiff got the signature of defendant no.1 on the Purchase Agreement dated 16.7.2014, which is in fact is a loan agreement, however, no such amount was given nor any gold or jewellery item was sold by the plaintiff to defendant no.1. It is further contended that no formal bill was given by the plaintiff to the defendants and in fact no such jewellery was sold to defendant no.1. It is also submitted that at the relevant time, defendant no.1 was not carrying out any business under the name Blues Jewellery Company and the said company had merged with another company in the year 2012.

11. Learned counsel for the defendants also submits that plaintiff in order to secure the loan amount to be given to defendant no.1 demanded undated signed cheques towards the loan amount of Rs.2,01,25,000/- and towards the amount of interest. Defendant no.1 in good faith and *bona fide* belief handed over the said post-dated cheques to the plaintiff and after execution of the cheques and documents neither any amount was handed over nor gold jewellery were given, thus, the plaintiff is not entitled to the said amounts.

12. I have heard counsel for the parties and have carefully perused the documents. Before dealing with the rival submissions of counsel for the parties, it would be useful to re-visit the law laid down by the Apex Court with regard to dealing with an application for leave to defend.

13. The Apex Court in the case of ***M/s.Mechelec Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation***, reported at AIR 1977 SC 577, has drawn up the parameters to be considered by the court while dealing with the application for leave to defend. Relevant paras of the judgment read as under:

> *"8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246 , Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 37 C.P.C. in the form of the following propositions (at p. 253):*
>
> > *(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, shews 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."

14. It would also be useful to refer to the case of ***V.K. Enterprises Vs. Shiva Steels*** (2010) 9 SCC 256,wherein the Supreme Court had, in a matter with somewhat similar facts, upheld the order passed by the trial court where leave was rejected. Paragraphs 8 to 10 of the judgment read as under:

"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 hadconcocted 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.
xxxxx
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."*

15. The present application for leave to defend is to be decided on the touchstone of the law which has been laid down by the Apex court.
16. The plaintiff has relied upon the Purchase Agreement dated 16.7.2014, which has been duly signed by both the parties. Along with the said Purchase Agreement, details of jewellery purchased has been annexed as Exhibit A, besides details of four cheques issued for purchase and details of twelve cheques issued for payment of interest have been annexed, which are Exhibit B and Exhibit C. The execution of the Purchase Agreement dated 16.7.2014 has not been denied by the defendants either during the course of hearing or in their application for leave to defend. It may be noted that Exhibits A to C have been duly signed by all the defendants.
17. Along with the Purchase Agreement, the plaintiff has also annexed a communication dated 16.7.2014 thereby acknowledging Receipt of Goods by defendant no.1. The letter dated 16.7.2014 reads as under:

"*Chandeep Singh Bhatia,* *Dated : July 16th 2014*
S/o Mr.Jatinder Singh Bhatia,
E-28, Rajouri Garden, New Delhi 110027.

Subject : Acknowledgement of Receipt of Goods

This is to certify and acknowledge receipt of Gold and Diamond Jewellery worth Rupees Two Crore one lakh twenty five thousand, purchased via purchase agreement dated 16-072014.

I, further acknowledge that the goods have been inspected and are without defect, therefore, Final acceptance is hereby confirmed.

Dinesh Seghal"

18. This letter dated 16.7.2014 has also not been denied. The plaintiff has also placed on record photocopies of cheques and eight legal notices, which were issued by the plaintiff to defendants.
19. On the converse, in support of their defence, the defendants have not placed a single document on record. The only plea raised by the defendants is that they were forced and coerced to sign the Purchase Agreement dated 16.7.2014, Exhibits A to C and the letter dated 16.7.2014 of Acknowledgment of Receipt of Goods. It may be noticed that in case there was any merit or truth in the defence of the defendants, the defendants would have protested either at the stage of signing of the Purchase Agreement dated 16.7.2014, Exhibits A to C, the letter dated 16.7.2014 of Acknowledgment of Receipt of Goods issued by defendant no.1 to the plaintiff, or at least at the time when the plaintiff issued eight legal notices to the defendants if not earlier, however, the defendants did not do so and there is no explanation whatsoever by the defendants for not doing so.
20. It may further be noticed that the plaintiff deposited cheques issued by defendant no.1 to the plaintiff in different stages. At the time of dishonour of cheques, the bank of defendant no.1 would have informed the defendant no.1 about the dishonouor of cheque. In case there was any truth or merit in the defence of the defendants, they would have even at that stage protested and informed the plaintiff of the fraud committed by him on them. The defendants did not wake up from their slumber even upon receipt of not one but eight legal notices which were received by them. The documents placed on record by the plaintiff support the case of the plaintiff. The execution of the

agreement, annexures to the agreement and the cheques have not been denied. On the other hand, there has been complete silence on the part of the defendants after signing the documents and surprising by even upon receipt of eight legal notices. The silence remains unexplained in the application seeking leave to defend and even during the course of hearing, leading to a single conclusion that the defence sought to be raised by the defendants is not *bona fide* but sham, illusory, false and moonshine.

21. In my view, the defendants have failed to satisfy this Court that they have a good defence to the claim on merits. The defendants have also failed to raise any triable issue or a fair, *bona fide* or a reasonable defence. The defence, which has been raised, is illusory, sham and practically moonshine. Thus, for the reasons aforestated, the application seeking leave to defend, being without any merit, is dismissed.

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22. Consequent to the dismissal of the leave to defend application, the prayers made in the present suit is allowed. Suit is decreed in favour of the plaintiff and against defendant in the sum of Rs.2,42,58,812/- together with *pendent lite* and future interest at the rate of 8%, per annum, till its realization. Decree sheet be drawn up accordingly.

G.S.SISTANI, J

OCTOBER 07, 2016

msr