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

% **Date of Decision: 15.09.2016**

\+ CM(M) 1277/2015

ICICI BANK LTD ..... Petitioner
Through: Mr. Punit Bhalla, Advocate.

versus

IQBAL ..... Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

<u>JAYANT NATH, J. (Oral)</u>

1. By the present petition, the petitioner seeks to impugn the order dated 08.12.2015. The petitioner filed a suit for recovery of Rs. 4,61,694.46/-. It is urged that the respondent had approached the petitioner for grant of a loan of Rs.4,63,899/- for purchase of commercial vehicle namely "DOST LS". 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 47 equated monthly instalments. The petitioner sanctioned a loan of Rs. 4,63,899/- and disbursed an amount of Rs. 4,56,917/- to the dealer, M/S Shreevasu Commercial Motors 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 10.06.2015. 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:-

> "The plaintiff claims that though the defendant is residing and working for gain at Ghaziabad, Uttar Pradesh yet part of the cause of action has arisen within the territorial jurisdiction of this Court in as much as the loan documents have been executed at Videocon Tower, Jhandelwalan. Let the affidavit of the concerned officer in whose presence the said documents were executed at Videocon Tower branch of the plaintiff bank be placed before this Court on the next date of hearing since the perusal of the Statement of Account shows that the Agreement No. LVGHZ00028203921 was executed at Ghaziabad Branch. Admittedly, the statement of account has been retrieved from the Videocon Tower branch confirming that the Agreement No. LVGHZ00028203921 was executed at Ghaziabad Branch (rather the code in the Agreement itself reflects that it was executed at Ghaziabad).
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> Further, the perusal of the statement of account shows that over due charges have been charged multiple times. Why this has been done is not clear. Let the affidavit of the competent officer of the plaintiff be filed explaining as to how the overdue charges have been imposed multiple times as reflected from the statement of account. The officer shall also inform this court as to how many instalments have already been received and how many instalments have been fallen due till the date of filing of the suit and the amount thereof. Further, an information be also furnished as to whether the instalment amount which have been fallen due contains only the principal amount or the added interest as per the loan agreement. In case if it includes the interest, then the plaintiff should also inform as to how the interest on the future instalments which were yet to fall due, could be charged at this stage."

4. It may be noted that in some other connected matters, the trial court

had prior to issuance of summons, returned the plaint stating that the court does not have the territorial jurisdiction. In an appeal being FAO No.381/2015 vide order dated 06.11.2015, this court set aside the aforesaid order of the trial court holding that at this stage a cause of action is shown to arise within the territorial jurisdiction of this court and that the trial court has erred in concluding and observing that the loan agreement and the attendant documents do not appear to have been executed at Videocon Tower, Jhandewalan Extn., New Delhi. This court held that this aspect was a matter for trial and the trial court could not have, at the threshold, returned the plaint on a mere impression. The matter was remanded back. The trial court has now passed the impugned order.

5. The trial court has issued directions to the petitioner to file an affidavit of the concerned official in whose presence the documents were executed at Videocon Tower Branch of the petitioner Bank. This court vide order dated 06-11-2015 held that the issue of territorial jurisdiction was a matter of trial and that the trial court could not have, at the threshold, returned the plaint on a mere impression. Despite the said order, the trial court has passed the above noted directions.

6. A further perusal of the impugned order shows that apart from directions regarding filing of an affidavit of the concerned officer in whose presence the documents were executed, the affidavit of the competent officer explaining as to why overdue charges have been imposed and other details and also the direction of personal appearance of the officer to explain the alleged discrepancies in the statement of accounts have been passed. No basis for such directions are given.

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 also sought an affidavit of the competent officer explaining as to how over due charges have been imposed and also sought other details. It directed the petitioner to place on record the dispatch proof of the recall notice. Personal presence of the officer is also sought.

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 commercial 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, Mr.Kumar Vishal, a representative of the petitioner is

appointed as a receiver. The receiver will take possession of the said commercial vehicle i.e. “DOST LS”. In the event the respondent were to pay the amounts due and payable, excluding over due 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.

15. The petition stands disposed of in the above terms.

JAYANT NATH, J.

SEPTEMBER 15, 2016/rb