

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

% **Date of decision: 16th August, 2017**

+ **C.R.P. No.79/2016**

SHRADHA WASSAN **.... Petitioner**

Through: Mr. Vinod Tyagi, Adv.

Versus

KAMAL ARORA & ANR. **.... Respondents**

Through: Mr. Prashant Katara and Mr.
Neeraj Dubey, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Revision Petition under Section 115 of the CPC impugns the order [dated 22nd March, 2016 in Suit No. 119/2016, Unique ID No.02406C0019832016 of the Court of Additional District Judge-04, South-East, Saket Courts, New Delhi] granting unconditional leave to the respondents/defendants to defend the suit filed by the petitioner/plaintiff under Order 37 of the CPC for recovery of Rs.24,42,411/- jointly and severally from the two respondents / defendants.

2. The petition was entertained and notice thereof ordered to be issued.

3. The counsels have been heard on 11th August, 2017 and today.

4. The petitioner/plaintiff instituted the suit, from which this petition arises, pleading

- (i) that the respondent/defendant No.1 Mrs. Kamal Arora had friendly relations with Mrs. Sharda Kapoor, mother of the plaintiff;
- (ii) respondent/defendant No.2 Mr. Narender Kumar Arora is the son of the respondent/defendant No.1;
- (iii) that the respondent/defendant no.2, vide cheque dated 20th July, 2010 of the petitioner/plaintiff in favour of respondent/defendant No.1, had borrowed a sum of Rs.15 lacs for purchase a portion of property No. S-201, Greater Kailash-II, New Delhi;
- (iv) that the said cheque was debited to the account of the petitioner/plaintiff on 20th July, 2010 itself;
- (v) that the respondents/defendants on 20th July, 2010 itself acknowledged receipt of Rs.15 lacs as 'interest free loan' for a period of one month and in repayment thereof issued cheque dated 20th August, 2010 for Rs.15 lacs in favour of the petitioner/plaintiff;
- (vi) that the respondents /defendants on 20th August, 2010 informed the petitioner/plaintiff that they did not have sufficient funds in their account and asked the petitioner / plaintiff not to present the said cheque for encashment and agreed to pay interest on the amount aforesaid at the rate of 12% per annum thereon;

- (vii) that the respondents/defendants issued another cheque dated 19th March, 2011 in favour of the petitioner/plaintiff for the sum of Rs.15 lacs, further acknowledging their liability in writing; however the said cheque also was not presented on the request of respondents/defendants;
- (viii) another cheque dated 19th November, 2011 was issued by the respondents/defendants in favour of the plaintiff but which was also not presented on the request of the respondents/defendants;
- (ix) the respondents/defendants issued yet another cheque No. 358562 in favour of the petitioner/plaintiff for Rs.15 lacs in acknowledgement of their liability; however the said cheque when presented, was returned on 6th February, 2012 for the reason of insufficiency of funds in the account of the respondents/defendants;
- (x) on protest by the petitioner/plaintiff, the respondent/defendant No.2 issued yet another cheque dated 19th August, 2012 for Rs.15 lacs in favour of the plaintiff/petitioner but which again was not presented on the request of the respondents/defendants;
- (xi) that finally the respondents/defendants issued two cheques, both dated 15th December, 2013 in favour of the petitioner/plaintiff for Rs.10 lacs and Rs.5 lacs;

(xii) the said cheques were signed by the respondent/defendant No.2 and delivered to the petitioner/plaintiff by the respondent/defendant No.1;

(xiii) while the cheque for Rs.10 lacs was returned unpaid with the endorsement "payment stopped by drawer", the cheque for Rs.5 lacs was returned unpaid for the reason of insufficiency of funds; hence the suit for recovery of principal amount of Rs.15 lacs and interest therein at 18% per annum from 20th July, 2010 till the date of institution of the suit, of Rs.9,42,411/-, i.e. for a total sum of Rs.24,42,411/-.

5. The respondents/defendants filed a joint application for leave to defend pleading-

(i) that both the cheques dated 15th December, 2013, on the basis whereof the suit has been filed, have been issued by the respondent / defendant No.2 only and the respondent / defendant No.1 cannot be made liable towards the said transaction in any manner whatsoever;

(ii) the suit is thus bad for misjoinder of parties;

(iii) that the transaction, in lieu whereof the respondent/defendant No.1 had issued cheques in favour of the petitioner/plaintiff, and the transaction in lieu whereof the respondent/defendant No.2 had issued cheque in favour of the petitioner/plaintiff, are entirely different and the suit under Order 37 clubbing the two transactions does not lie;

- (iv) that the mother of the petitioner/plaintiff Mrs. Sharda Kapoor knew the respondent/defendant No.1 very well and introduced the respondent/defendant No.1 to one Shri Amandeep Singh Narang who was willing to sell terrace of S-210, Greater Kailash-II, New Delhi;
- (v) that on the assurance of the mother of the petitioner/plaintiff, the respondent/defendant No.1 paid the earnest money of Rs.30,15,000/- to the said Amandeep Singh Narang and an agreement to sell was executed;
- (vi) however, for the security of the mother of the petitioner/plaintiff with regard to her commission in the said deal, the documents pertaining to the said transaction were kept with the mother of the petitioner/plaintiff for safe keeping and a receipt of acknowledgement was issued by the mother of the petitioner/plaintiff affirming the said documents to be in her custody;
- (vii) that however due to certain legal issues with regard to the property no.S-210, Greater Kailash, Part-II, New Delhi, the Sale Deed with regard to the said property could not be executed and due to the said delay, the respondent/defendant no.1 came under acute financial crunch and on the respondent /defendant no.1 approaching the mother of the petitioner / plaintiff at whose instance respondent / defendant no.1 had entered

into the said transaction, the mother of the petitioner / plaintiff released a sum of Rs.15,00,000/- and in lieu of which the respondent / defendant no.1 gave her a post dated cheque of the same amount; that the respondent / defendant no.2 had no role to play in the said transaction;

- (viii) that pursuant to the aforesaid, an amount of Rs.15,00,000/- was returned by the respondent / defendant no.1 to the mother of the petitioner / plaintiff who in turn returned the post-dated cheque aforesaid;
- (ix) that after the demise of the mother of the petitioner / plaintiff, the respondent / defendant no.1 filed Arbitration Petition no.149/2013 before this Court for appointment of an Arbitrator in the dispute with Amandeep Singh Narang aforesaid and which petition was allowed and the respondent / defendant no.2 approached the petitioner / plaintiff for documents which were required for filing the claim before the Arbitrator and which were kept with the mother of the petitioner / plaintiff;
- (x) that the petitioner / plaintiff offered to mediate and on the suggestion of the petitioner / plaintiff the respondent / defendant no.2 signed the cheques for Rs.15,00,000/- and handed over the same to the petitioner / plaintiff for endorsing the same to Amandeep Singh Narang towards balance for property No.S-210, Greater Kailash-II, New Delhi; and,

- (xi) that however, the petitioner / plaintiff after receipt of the said cheques started demanding a further sum of Rs.25,00,000/- and also did not get the matter settled with Amandeep Singh Narang and presented the said cheques for payment.

The defendants, along with leave to defend application filed the written acknowledgment signed by mother of petitioner / plaintiff and the Agreement to Sell and receipt with respect to the property No.S-210, Greater Kailash-II, New Delhi.

6. The petitioner / plaintiff filed a reply to the aforesaid application for leave to defend, denying that the mother of the petitioner / plaintiff had introduced the respondent / defendant no.1 to Amandeep Singh Narang or that the mother of the petitioner / plaintiff had meted out any assurances to the respondent / defendant no.1 or that the respondent / defendant no.1 paid any earnest money to Amandeep Singh Narang on the assurance of the mother of the petitioner / plaintiff and pleading that the Agreement to Sell between the respondent / defendant no.1 and Amandeep Singh Narang has nothing to do with the petitioner / plaintiff nor is related to the suit in any manner. It was also denied that any commission was payable by anyone to the mother of the petitioner / plaintiff or that for her security for a commission, any documents pertaining to the alleged transaction were kept with the mother of the petitioner / plaintiff or that the cheques aforesaid of Rs.10,00,000/- and 15,00,000/- had been given in the circumstances aforesaid.

7. The learned Additional District Judge, vide the impugned order, has granted unconditional leave to defend to the respondents / defendants reasoning (i) that the respondents / defendants in the leave to defend had not denied taking of the loan and the onus to establish as to how and when the loan was paid back, was on the respondents / defendants; (ii) the application seeking leave to defend was largely silent on this aspect except making an assertion that the loan had been paid back / adjusted; (iii) however the suit had been filed on 17th January, 2014 when admittedly the loan had been taken on 20th July, 2010; (iv) it was the contention of the counsel for the petitioner / plaintiff that the issuance of cheques by the respondents / defendants in discharge of liability incurred on 20th July, 2010 is acknowledgment of liability and in part payment in terms of Sections 18 and 19 of the Limitation Act, 1963 and therefore the suit was within time; (v) the issue of limitation will therefore have to be tried at the touch stone of evidence to be led by both the parties; (vi) that it was also the plea in the application for leave to defend that the suit was bad for misjoinder of parties and the suit against the respondent / defendant no.2 was filed without any cause of action; (vii) the claim for interest at 18% per annum was also disputed; and, (viii) the case therefore involved various triable issues and in view thereof, the application seeking leave to defend had to be allowed.

8. The learned Additional District Judge having granted unconditional leave to defend primarily on the aspect of limitation, the arguments before me have been confined to the said aspect only with the counsel for the petitioner / plaintiff having vehemently contended that the cheques dated 20th August, 2010, 19th March, 2011, 19th November, 2011, 6th February,

2012 and 19th August, 2012 though not presented for payment, kept the claim for recovery of loan granted on 20th July, 2010 alive and within limitation and the suit on the basis of dishonoured cheques dated 15th December, 2013 instituted on 14th January, 2014, was within time.

9. I however do not feel the need to go into the aforesaid question.

10. In my view, the suit, as per averments in the plaint, was not maintainable under Order XXXVII of the Code of Civil Procedure, 1908 (CPC).

11. One of the conditions, for a suit to lie under Order XXXVII of the CPC, as prescribed in Order XXXVII Rule 2 (1)(b) of the CPC is that no relief which does not fall within the ambit of Order XXXVII Rule 1 should have been claimed in the plaint.

12. The plaint in the present case, in paras 14 and 15 thereof states as under:-

“14. That the Plaintiff specifically submits that the Plaintiff desire to proceed against the Defendants under the provision of Order XXXVII of the Code of Civil Procedure, 1908 (Act No.V of 1908) and thus, the present suit is being filed by the Plaintiff against the Defendants under summary procedure under the provision of Order XXXVII of the Code of Civil Procedure, 1908 (Act No.V of 1908).

15. That no relief which does not fall within the ambit of Rule 1 of Order XXXVII of the Code of Civil Procedure, 1908 (Act No.V of 1908), has been claimed in this suit in the Plaint in which the Plaintiff seek only to recover a debt and liquidated demand in money payable by the Defendants, with interest, based on the Cheques prepared, signed and delivered by the

Defendants to the Plaintiff in her favour for admitted – unpaid / deducted amounts borrowed by them from the Plaintiff at New Delhi, within the local territorial jurisdiction of this Hon'ble Court."

13. However the purport of Order XXXVII Rule 2 (1)(b) is not merely for the plaintiff to aver in the plaint that no relief which does not fall within the ambit of Order XXXVII of the CPC had been claimed in the plaint but also that no relief which does not fall within the ambit of the Order XXXVII of the CPC should have been claimed in the plaint. If the plaint, inspite of carrying such averment, is still found to contain a relief which does not fall within the ambit of Order XXXVII of the CPC, the suit cannot be entertained under the said provisions.

14. Had the said objection been brought to the attention of the counsel for the petitioner / plaintiff at the stage of admission of the suit, it would have been open to the petitioner / plaintiff to amend the plaint to bring it in consonance with Order XXXVII of the CPC and the suit Court, if had been satisfied that the reliefs claimed in the amended plaint were within the ambit of Order XXXVII of the CPC, would have issued summons for appearance to the respondents / defendants. However at this stage, the said course of action is also not available.

15. That brings me to the reason why I say that the suit was not maintainable under Order XXXVII of the CPC.

16. Order XXXVII Rule 1(2) of the CPC prescribes the classes of suits to which Order XXXVII of the CPC applies. The suit, either has to be on a bill of exchange or a hundi or a promissory note or the claim therein has to be to recover a debt or a liquidated demand in money arising, either i) on a

written contract; or ii) on an enactment; or iii) on a guarantee; or, iv) for recovery of receivables instituted by an assignee of a receivable.

17. The petitioner / plaintiff in the present case, in para 15 which is reproduced hereinabove has clearly stated that the suit is based on cheques dated 15th December, 2013 which were returned dishonoured on 19th December, 2013. The said cheques are of the respondent / defendant no.2 Narender Kumar Arora only. The petitioner / plaintiff however, instead of suing Narender Kumar Arora only, has also sued the respondent / defendant no.1 Kamal Arora and who is not the signatory of the cheques on the basis of which the suit has been filed.

18. Though the petitioner / plaintiff in the plaint, has referred to the cheques issued by the respondent / defendant no.1 as well and which cheques have already been filed along with the plaint but the said cheques were admittedly not presented for payment.

19. The Division Bench of this Court, in **Baldev Singh Vs. Rare Fuel & Automobiles Technologies (P) Ltd.** (2005) 119 DLT 44, referring to **Goyal Tax Fab. Pvt. Ltd. Vs. Anil Kapoor** AIR 2001 Del 341 and **Dharam Pal Vs. State** 24 (1983) DLT (SN) 3, held that for filing a suit under Order XXXVII of the CPC, it is necessary to present the cheque to the Bank. Thus the suit, on the basis of unpresented cheques of the respondent / defendant no.1, would not lie under Order XXXVII of the CPC.

20. I thus hold that for the reason of the petitioner / plaintiff in the suit having claimed the monies jointly and severally from both the respondents / defendants, the suit for recovery of the amount of the dishonoured

cheques of the respondent / defendant no.2 only, could not lie under Order XXXVII of the CPC.

21. Though the petitioner / plaintiff has pleaded that both the respondents / defendants, on 20th July, 2010, acknowledged receipt of Rs.15 lacs as interest free loan and issued cheque dated 20th August, 2010 for Rs.15 lacs in favour of the petitioner / plaintiff in repayment thereof but a perusal of the receipt dated 20th July, 2010 shows the same to have been signed by the defendant no.1 with the defendant no.2 having signed as a witness. The language thereof also is of the loan having been taken by the defendant no.1 alone and not of the loan having been taken by the defendants together. The cheques dated 20th August, 2010, 19th March, 2011, 19th November, 2011 also are of defendant no.1 only. The subsequent cheques dated 19th August, 2012, and the two cheques of 15th December, 2013 are of defendant no.2 only.

22. Though as aforesaid, a suit under Order XXXVII of the CPC does not lie on the basis of unpresented cheques and all the cheques of the defendant no.1 are unpresented but finding the last cheque of the defendant no.1 being of 19th November, 2011 and the suit instituted on 14th January, 2014 to be within three years therefrom, I have wondered whether a suit under Order XXXVII on the basis thereof, treating the same as a written contract, would be maintainable.

23. My research does not show any decision holding a cheque to be a written contract within the meaning of Order XXXVII Rule 1(2)(b)(i). On the contrary, I find this Court to have in ***J.S. Sood Vs. Prem Lata Mehta*** ILR (1984) II Delhi 716 held that normally a

written contract would be signed by both the parties; though in some cases, written contract may be spelt out from exchange of letters; but a contract which is to be inferred or implied from certain documents may not be a written contract to which the provisions of Order XXXVII would apply; the reason therefor is that in the summary procedure prescribed by Order XXXVII, the Court cannot possibly infer contract from various documents though exchanged between the parties and treat them as a written contract and then adopt the summary procedure under the said order. It was further held that the document in that case merely acknowledged the money due under a verbal contract; at best it would be a written acknowledgment which extends the period of limitation under Section 18 of the Limitation Act, 1963 but no more; such a document would not fall within the definition of a “written contract” and the provisions of Order XXXVII would not apply. It was yet further held that the words “written contract” envisage some sort of a formal document between the contracting parties.

24. I also find the High Court of Rajasthan to have in ***Lalchand Jain Vs. Gheesi*** AIR 1999 Raj 69 held that a bank draft cannot be treated as a written contract between the parties as it does not disclose the terms and conditions to which the parties had agreed.

25. I am also of the opinion that once the legislature has separately classified bills of exchange, hundies and promissory notes on the one hand and written contract on the other hand, a suit on the basis of a cheque, which is a bill of exchange, if not maintainable under Order

XXXVII owing to the cheque having not been presented, cannot be maintained by treating it as a written contract.

26. Thus, though for reasons different from that given by the learned Additional District Judge in the impugned order, no case for disturbing the impugned order is made out.

The petition is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

AUGUST 16, 2017

‘M’ /pp/gsr..

(Corrected & released on 6th December, 2017)