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

+ C.R.P. 203/2016 & CM No.46268/2016 (for stay).

VINOD RANA

..... Petitioner

Through: Mr. Rahul Gupta and Mr. Shekhar  
Gupta, Advs.

versus

SANJAY KUMAR SARAF

..... Respondent

Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**ORDER**

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**25.10.2017**

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 24<sup>th</sup> October, 2016 in CS DJ ADJ 15589/16 of the Court of Additional District Judge-04, (South-West) District, Dwarka Courts, New Delhi) granting unconditional leave to the respondent/defendant to defend the suit under Order XXXVII of the CPC filed by the petitioner / plaintiff.
2. The petition was entertained and notice thereof ordered to be issued and the proceedings before the Trial Court stayed.
3. On the last date of hearing i.e. 25<sup>th</sup> July, 2017, the report of service of notice ordered to be issued to the respondent / defendant was awaited; the counsel for the petitioner / plaintiff stated that though the respondent / defendant is appearing in the suit from which this petition arises but is avoiding service of notice of this petition; fresh notice was ordered to be issued to the respondent / defendant by all modes including *dasti* and through the Advocate for the respondent / defendant before the Suit Court as well as through the Advocate for the respondent / defendant in Section 138

Negotiable Instruments Act, 1881 proceedings also stated to be underway.

4. The report of the Court Master is that the report of notice issued by ordinary process as well as Speed Post is awaited and the petitioner / plaintiff did not collect *dasti* notice.

5. The counsel for the petitioner / plaintiff however states that the petitioner / plaintiff himself i.e. Vinod Rana had personally gone to Mumbai for service and the counsel for the petitioner/plaintiff has in Court handed over a sealed envelope from the Court of Small Causes, Bandra, Mumbai which has been opened.

6. The counsel for the petitioner / plaintiff, after being asked to read the said report, states that the respondent / defendant was not found and while on the first visit his servant refused to accept the notice, on second visit, the minor daughter of the respondent / defendant stated that the respondent / defendant has gone to the United States.

7. The counsel for the petitioner / plaintiff also states that the notice sent by Speed Post also remained unclaimed.

8. On further enquiry, the counsel for the petitioner / plaintiff further states that the respondent / defendant has stopped appearing in the Suit Court also and Non Bailable Warrant (NBW) has been issued against the respondent / defendant in Section 138 Negotiable Instruments Act proceedings and are unexecuted.

9. There is no reason to disbelieve the counsel for the petitioner / plaintiff.

10. Believing the counsel for the petitioner / plaintiff, I am satisfied that the respondent / defendant has been duly informed of today's date and is

avoiding appearance.

11. The respondent / defendant is proceeded against *ex parte*.

12. To be taken up post lunch for hearing.

**RAJIV SAHAI ENDLAW, J**

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13. The counsel for the petitioner / plaintiff states that on checking the records in the lunch break he has found that though Non-Bailable Warrants (NBW) were issued in Section 138 of the Negotiable Instruments Act proceeding but the counsel for the respondent / defendant has filed an application for stay of NBW. He further states that in the order dated 22<sup>nd</sup> February, 2017 in the suit from which this petition arises, the factum of pendency of the present petition is recorded in the presence of the counsel for the respondent / defendant.

14. From the aforesaid, it is abundantly clear that the respondent/defendant has failed to appear despite knowledge. What is now disclosed does not call for recall/modification of order proceeding *ex parte* against respondent/defendant in the pre-lunch session.

15. The counsel for the petitioner / plaintiff has been heard.

16. The counsel for the petitioner / plaintiff instituted the suit from which this petition arises for recovery of Rs.25 lacs with interest on the basis of a mortgage deed, a handwritten receipt with promise to return the money received and a cheque for Rs.25 lacs returned for the reason of the payment thereof having been stopped by the drawer, pleading i) that the petitioner /

plaintiff had given friendly loan of Rs.25 lacs to the respondent / defendant and the respondent / defendant had executed a mortgage deed dated 17<sup>th</sup> April, 2010 in favour of the petitioner / plaintiff by depositing the original title documents of ownership of a premises at Mumbai and received an amount of Rs.25 lacs in cash from the petitioner / plaintiff and also signed receipt and acknowledgement dated 17<sup>th</sup> August, 2010; ii) that the respondent / defendant had promised to return the said friendly loan within a period of 75 days from the date of receipt; iii) that the respondent / defendant had issued in favour of the petitioner / plaintiff, a crossed account payee cheque dated 1<sup>st</sup> November, 2010 in the sum of Rs.25 lacs and drawn on a bank at Mumbai; and, iv) that the said cheque was returned unpaid vide memo dated 2<sup>nd</sup> November, 2010 for the reason of payment thereof having been stopped by the respondent / defendant.

17. The suit was entertained under Order XXXVII of the CPC and summons for appearance and thereafter summons for judgment issued.

18. The respondent / defendant filed application for leave to defend pleading i) that the petitioner / plaintiff had forged the alleged mortgage deed, receipt and the cheque; ii) that as per the own averment of the petitioner / plaintiff, the respondent / defendant had received loan amount on 17<sup>th</sup> August, 2010 whereas he has executed the mortgage deed and deposited the title deed way back on 17<sup>th</sup> April, 2010 and which raises serious doubts on the suit; iii) that there was also inconsistency in the stand of the petitioner / plaintiff of the friendly loan being repayable within 75 days and the demand notice having been issued on 13<sup>th</sup> August, 2013; iv) that the custody of the documents of title of the flat in Mumbai were given by the respondent

/ defendant to his brother-in-law for completing the various formalities in different authorities; v) that some blank signed cheques of the respondent / defendant were also in possession of the petitioner / plaintiff which were given to the petitioner / plaintiff by the respondent / defendant in the capacity of associate producer during the period of production of a television serial, for meeting necessary expenses with respect to the same; vi) that the respondent / defendant requested the petitioner / plaintiff several times to return the cheques but the petitioner / plaintiff lingered on the return of the cheques on one pretext or the other; vii) that ultimately, the respondent / defendant got the payment of the said cheques stopped; viii) that the title documents of the flat in Mumbai do not identify the respondent / defendant as registered owner of the said flat and in fact the title documents of the said flat are to be registered by Smt. Sonia Kapoor and Sh. Jaykaran Kapoor, the registered owner of the property; ix) that since the respondent / defendant is not the registered owner of the flat, the question of the respondent / defendant mortgaging the same did not arise; and, x) that the respondent / defendant had never executed mortgage deed, the receipt or the cheque. Besides the aforesaid, technical objections, of the maintainability of the suit under Order XXXVII of the CPC, the territorial jurisdiction of the Court to try the suit and of the mortgage deed being not registered, were also taken in the application for leave to defend.

19. The learned ADJ, vide the impugned order, has granted unconditional leave to defend to the respondent / defendant reasoning i) that it is intriguing that the mortgage deed was executed on 17<sup>th</sup> April, 2010 and the loan was advanced only on 17<sup>th</sup> August, 2010; ii) that there was no cause of action for

the respondent / defendant to execute any mortgage deed in favour of the petitioner / plaintiff on 17<sup>th</sup> April, 2010; iii) that no explanation has been given by the petitioner / plaintiff as to why the loan was advanced after about four months of execution of the mortgage deed; iv) that though the counsel for the petitioner / plaintiff had sought to explain by contending that the mortgage deed was also executed on 17<sup>th</sup> August, 2010 and the date thereon was inadvertently mentioned as 17<sup>th</sup> April, 2010 but the said explanation was not believable inasmuch as the petitioner / plaintiff did not plead so in the plaint; v) that in the legal notice dated 13<sup>th</sup> August, 2013, it was pleaded that the loan of Rs.25 lacs was given in the year 2009 and the explanation given therefor also was that in the legal notice the year 2009 was inadvertently incorrectly mentioned; vi) that thus the defence of the respondent / defendant did not appear to be sham or bogus and cannot be discarded at this stage without affording an opportunity to the respondent / defendant to prove the same.

20. Though the counsel for the petitioner / plaintiff has in his arguments sought to refer to the mortgage deed but the same being unregistered, inspite of being compulsorily required to be registered, cannot be looked at.

21. The counsel for the petitioner / plaintiff has sought to contend that it can be looked at for collateral purpose but the parties to the deed and the consideration of mortgage cannot be a collateral purpose of a registered mortgage deed. Reference in this regard can be made to ***K.B. Saha & Sons (P) Ltd. Vs. Development Consultant Limited*** (2008) 8 SCC 564. Thus the reliance by the petitioner / plaintiff on the mortgage deed is of no avail.

22. However, the suit under Order XXXVII of the CPC would be maintainable on the basis of the handwritten receipt and the cheque aforesaid. The stand of the respondent / defendant with respect thereto is ambivalent. While at one stage in the application for leave to defend, it is alleged that the said document has been forged and fabricated by the petitioner / plaintiff but at other places, it is stated that the cheques were signed in blank and some blank papers were also signed.

23. Had that been so, the respondent / defendant would have, besides stopping the payment of the cheque, issued a legal notice demanding from the petitioner / plaintiff return of the same and which is not claimed save in the application for leave to defend.

24. Though Supreme Court in *Mechelec Engineers & Manufacturers Vs. Basic Equipment Corporation* AIR 1977 SC 577 had laid down very wide parameters for grant of leave to defend under Order XXXVII of the CPC but vide recent judgment in *IDBI Trusteeship Services Limited Vs. Hubtown Limited* (2017) 1 SCC 568 the said judgment has been held to be no longer good law and the parameters for consideration of the application for leave to defend under Order XXXVII of the CPC have been prescribed. Applying the said parameters, it cannot be said that the application of the respondent / defendant entitled the respondent / defendant to leave to defend.

25. No reason whatsoever has been disclosed in the application for leave to defend, of the occasion for the respondent / defendant to give custody to the petitioner / plaintiff of the blank signed papers. As far as the explanation given for entrusting the blank signed cheques to the respondent / plaintiff is

concerned, though there is some explanation but the same is not found satisfactory inasmuch as if there were to be any ring of truth to the said explanation, there would have been documentary evidence thereof and qua which not even a whisper is made in the application for leave to defend.

26. The counsel for the petitioner / plaintiff, to challenge the reasoning given by the ADJ, has drawn attention to the endorsement of the stamp vendor on the backside of the first page of the mortgage deed showing the stamp on which the mortgage deed is endorsed to have been sold on 17<sup>th</sup> August, 2010 and states that the same establishes that the date thereon of 17<sup>th</sup> April, 2010 is evidently a typographical error.

27. For the reasons aforesaid, the petition is allowed.

28. The impugned order dated 24<sup>th</sup> October, 2016 granting unconditional leave to the respondent / defendant to defend the suit of the petitioner / plaintiff under Order XXXVII of the CPC for recovery of Rs.25 lacs is set aside. The application for leave to defend is dismissed.

29. The petitioner / plaintiff in the suit, besides claiming the principal amount of Rs.25 lacs, has also claimed future interest.

30. Though there is no agreement between the parties as to the rate of interest but it has been held in judgment of this Court in ***Palm Art Apparels Pvt. Ltd. Vs. Enkay Builders Pvt. Ltd.*** MANU/DE/3533/2017 that the Court can fix reasonable rate of interest.

31. In the facts and circumstances aforesaid, the petitioner / plaintiff besides the principal amount, is found entitled to interest with effect from the date of institution till realization, at the rate of 10% per annum.

32. A decree is accordingly passed in favour of the petitioner / plaintiff and against the respondent / defendant for recovery of Rs.25 lacs with interest at the rate of 10% per annum from the date of institution of the suit till realization.

33. The petitioner / plaintiff shall also be entitled to costs of the suit.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J.**

**OCTOBER 25, 2017**

‘pp’/gsr..

*(corrected & released on 3<sup>rd</sup> January, 2018)*