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

+ RFA 25/2017 & CM 543/2017

MUKESH KUMAR SINGH Appellant
Through : Mr. L.B. Rai, Advocate.

versus

SATISH CHNADRA MISHRA Respondent
Through: None.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI

ORDER
16.01.2017

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1. The appellant/defendant has assailed an order dated 01.10.2016, passed by the learned trial court dismissing his leave to defend application in a suit for recovery of Rs.1,40,00,000/- instituted by the respondent/plaintiff against him along with *pendente lite* interest.
2. Holding that the appellant/defendant had not made out any defence to the suit and had concocted a false story to avoid payment of money to the respondent/plaintiff, the learned trial court dismissed the appellant's leave to defend application on the ground that no triable issue was raised by him.
3. The version of the respondent/plaintiff in the summary suit instituted by him under Order XXXVII CPC is that the appellant/defendant had approached him to purchase a plot of land measuring 128 square yards comprised in Khasra No. 20/13 situated in village Matyala, bearing No. 120-A, village Matyala known as Jain Colony Part-I, T-Block Extension, Uttam Nagar, New Delhi for a total sale consideration of Rs.1,10,00,000/-.

After negotiations, the respondent/plaintiff agreed to purchase the subject land and the parties executed an Agreement to Sell dated 05.11.2010 wherein, it was recorded that the respondent/plaintiff had paid a sum of Rs.4 lacs to the appellant/defendant as part purchase price and the parties had agreed that the balance amount would be paid to the appellant/defendant at the time of executing the Sale/Conveyance Deed, for which the target date was fixed as 31.3.2011. Thereafter, the respondent/plaintiff made further payments to the appellant/defendant totalling to a sum of Rs.1,06,50,000/-, thus leaving the balance amount of Rs.3,50,000/-, to be paid to the appellant/defendant at the time of executing a Sale/Conveyance Deed.

4. The respondent/plaintiff approached the appellant/defendant well before the due date to execute the Sale Deed but he expressed his inability to sell the subject land to him. After some deliberations between the parties, the appellant/defendant agreed to refund the sum of Rs.1,40,00,000/- to the respondent/plaintiff, which included the amount received by him towards part sale consideration along with interest/profit. Consequently, a Memorandum of Understanding dated 06.6.2013 (hereinafter referred to as '**the MOU**') was executed between the parties, which recorded the fact that the appellant/defendant had received a sum of Rs.1,06,50,000/- from the respondent/plaintiff in terms of the Agreement to Sell dated 05.11.2010 and that the said deed stood cancelled vide Cancellation Agreement dated 20.1.2012, with an understanding that the appellant/defendant shall return a sum of Rs.1,40,00,000/- to the respondent/plaintiff, which included the profit element and interest. The appellant/defendant agreed that he shall pay the said amount to the respondent/plaintiff in three instalments i.e. Rs.25 lacs in June, Rs.50 lacs in July and Rs.65 lacs in August, 2013.

5. Despite the commitment given by the appellant/defendant, as recorded in the MOU, he failed to abide by the same and sought another opportunity from the respondent/plaintiff in terms of a letter of commitment dated 14.2.2014, re-acknowledging his debt and liability and issued four post dated cheques for a sum of Rs.35 lacs, Rs.50 lacs, Rs.25 lacs and Rs.30 lacs dated 10.3.2014, 15.4.2014, 10.5.2014 and 20.5.2014 respectively, totalling to a sum of Rs.1,40,00,000/-, with an undertaking that the said cheques, when presented for encashment shall be duly honoured.

6. However, when all the four cheques mentioned above were presented by the respondent/plaintiff to his Banker for encashment, they were dishonoured with the remarks "Funds Insufficient". Left with no option, the respondent/plaintiff issued two legal notices dated 28.06.2014 and 07.05.2014 calling upon the appellant/defendant to pay the amounts, subject matter of the cheques, failing which, legal proceedings, both civil and criminal including the remedies under the Negotiable Instrument Act would be initiated against him. When the appellant/defendant failed to make compliance, the respondent/plaintiff filed four separate criminal complaints against him under Section 138 of the Negotiable Instruments Act and contemporaneously instituted a summary suit for recovery against him for a sum of Rs.1,40,00,000/-.

7. After service of the summons in the suit in the prescribed format was effected on the appellant/defendant, he entered appearance and filed a leave to defend application. The stand taken by the appellant/defendant in the leave to defend application is that the respondent/plaintiff has not paid him the sum of Rs.1,06,50,000/- towards the purchase price of the suit premises, rather he has given him the said amount to construct eight flats on the land

in question which was to be sold later on and the sale proceeds were to be divided amongst the parties. The appellant/defendant had stated that completion of construction of the said flats took almost two years during which period, the price of the properties in Delhi had slumped steeply. As a result, the flats could not fetch the expected price. In those circumstances, in order to secure the interest of the respondent/plaintiff, the appellant/defendant had handed him over cheques worth Rs.1,40,00,000/- with an assurance that they would not be presented for encashment till the flats could be sold at a reasonable price.

8. All the aforesaid contentions were however denied by the respondent/plaintiff in his reply to the application for leave to defend and he reiterated the averments made in the plaint.

9. After examining the pleas taken by the appellant/defendant in the leave to defend application and observing that he had admitted to the execution of the Agreement to Sell dated 5.11.2010, the MOU dated 6.6.2013, Letter of Commitment dated 14.12.2014 and confirmed having received a sum of Rs.1,06,50,000/- from the respondent/plaintiff, the learned trial court held that it was very difficult to accept the explanation offered by him that he had never agreed to sell the suit premises to the respondent/plaintiff and had only received moneys from him for undertaking construction of flats. It was further noticed that nowhere did the Agreement to Sell dated 5.11.2010 refer to any agreement between the parties of sharing the profits from the sale proceeds from the flats proposed to be constructed by the appellant/ defendant. Lastly, the trial court observed that the appellant/defendant had himself issued four cheques in favour of the respondent/plaintiff totalling to a sum of Rs.1,40,00,000/- along with the

Letter of Commitment dated 14.2.2014 and all the said cheques, when presented, were dishonoured, which led the respondent/plaintiff to lodge four separate complaints against him under Section 138 of the NI Act, in which proceedings, he was convicted by the learned MM. The trial court thus concluded that the pleas raised by the appellant/ defendant were baseless and bogus and did not give rise to a triable issue. As a result, the leave to defend application filed by the appellant/defendant was rejected. Hence the present appeal.

10. The cornerstone of the arguments addressed by Mr. Rai, learned counsel for the appellant/defendant is that the learned trial court had failed to appreciate the fact that the respondent/plaintiff had invested his money in the subject premises owned by the appellant/defendant on a clear understanding that the parties shall construct eight flats there and share the profits from the sale of the said flats. But since the real estate market had plunged, the flats could not be sold and the money could not be shared by the parties, as was agreed. He contended that the ground taken by the appellant/defendant in his leave to defend application has raised triable issues and the leave to defend ought to have been granted in his favour.

11. The Court has perused the averments made by the respondent/plaintiff in his suit, the pleading in the leave to defend application filed by the appellant/defendant and the relevant documents.

12. The principles governing the grant/refusal of the leave to defend application in a summary suit have been explained in several judicial pronouncements including the decision in the case of Santosh Kumar Vs., Bhai Mool Singh reported as **AIR 1958 SC 321** Milkhiram(India) (P) Ltdf. Vs.Chamanlal Bros. reported as **AIR 1965 SC 1698**. In the oft quoted

judgment of M/s Mechalec Engineers & Mfr. vs. M/s Basic Equipment Corporation, reported as **AIR 1977 SC 577**, the principles that were laid down in Sm. Kiranmoyee Dassi vs. Dr. J. Chatterjee, reported as **(1945) 49 Cal WN 246**, were summarized in the following words:

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 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, 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".

13. In Raj Duggal Vs. Ramesh Kumar Bansal reported as **1991 Supp(1) SCC 191**, the Supreme Court had made the following observations:-

"3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."

14. The pleas taken by the appellant/defendant must be tested on the anvil of the judicial precedents referred to above. The explanation offered by the appellant/defendant in his leave to defend application is that the agreement between the parties was to the effect that the respondent/plaintiff would pay a sum of Rs.1,06,50,000/- to the appellant/defendant for him to construct eight flats on his plot and post-construction, the said flats were to be sold and the sale proceeds divided between them, but the same could not be done due to a heavy slump in the real estate market, it is considered necessary to

examine the documents executed between the parties.

15. The first relevant document is the Agreement to Sell dated 5.11.2010 executed by the parties, the recital whereof and the clauses are reproduced hereinunder for ready reference:

“AGREEMENT TO SELL

This Cancellation Agreement is made at New Delhi on 05.11.2011 between MR. MUKESH KUMAR SINGH S/o Shri BINAY KUMAR SINGH R/o FLAT NO.266, VEER AWASH SECTOR 18A, DWARKA, NEW DELHI 110075 hereinafter called the FIRST PARTY/SELLER;

AND

MR. SATISH CHANDRA MISHRA S/O LATE SHRI GUNJAN MISHRA R/O 33A, CHANDRANATH CHATERJEE STREET, MERLINE JASMINE BHOWANIPUR, KOLKATA-25 (WEST BENGAL) hereinafter called the SECOND PARTY/PURCHASER.

WHEREAS the Second party was owner and in possession of Entire under construction building which is on PROPERTY NO.120-A, which total land area admeasuring 128 square yards, out of KHASRA NO.20/13, situated in the area of VILLAGE MATIALA, New Delhi, colony known as JAIN COLONY PART-1, T-BLOCK EXTENSION, UTTAM NAGAR, NEW DELHI-110059 and entire property is bounded as under:

*EAST : ROAD 20 FEETS
WEST : GALI 5 FEETS
NORTH : PLOT NO.121
SOUTH : PORTION OF PLOT NO.120
(hereinafter called the property)*

AND WHEREAS the first party has agreed to sell and the second party has also agreed to purchase the above said

property in total sale consideration of Rs.1,10,00,000/- (Rupees One Crore Ten Lakh Only), out of which a sum of Rs.41,00,000/- (Rupees Forty One Lakh Only) has been paid by the second party to the first party as an earnest money at the time of this agreement with the following manner:

1. Rs.1,00,000/- (Rupees One Lakh Only) by cash
2. Rs.15,00,000/- (Rupees Fifteen Lakh Only) By Chq. No.35418 Dated 05.11.2010, Drawn on HSBC Bank, BBD Bagh, Kolkata
3. Rs.25,00,000/- (Rupees Twenty Five Lakh Only) By Chq. No.35419 Dated 17.11.2010, Drawn on HSBC Bank, BBD Bagh, Kolkata.

AND WHEREAS the balance amount of Rs.69,00,000/- (Rupees Sixty Nine Lakh Only) shall be paid by the second party to the first party as full and final payment on or before 31.03.2011 the last date for final execution of sale document in favour of the second party or his/her/their nominee(s).

NOW THIS AGREEMENT WITNESSES AS UNDER:

1. That the first party hereby assures the second party that the said property is free from all sort of encumbrances such as sale, transfer, gift, mortgage, stay, obligation etc. and there is no defect in the title of the first party.
2. That the vacant possession of the said property will be delivered by the first party to the second party at the time of final execution of sale documents along with all previous documents of the said property.
3. That all charges, duties including stamp duty, transfer duty, registration fee, etc. in respect of registration of sale/transfer documents shall be paid by the second party.
4. That all dues and demands such as house tax/property tax, ground rent, lease money, instalments, maintenance charges,

electricity and water charges etc. regarding the property under sale upto date of final execution of sale documents shall be paid by the first party and thereafter the same shall be paid and borne by the second party.

5. That in case the second party fails to pay the balance amount until fixed period to the first party then the first party shall have the right to forfeit the earnest money and this transaction shall be treated as cancelled.

6. That in case the first party fails to execute the sale documents within stipulated period in favour of the second party or his/her/their nominee(s) or neglects to do so or any defect is found in the title of the first party then the second party shall have the right to get the double of the earnest money from the first party or get completed this transaction through court of law.

7. That the first party shall not create any charges over the said property after the execution of this agreement and first party has no right to sell it to anybody else after the signing of this agreement, however second party has got rights to sell the said property to anybody else without any objection from the first party.

8. That the first party hereby further confirms and declares that this agreement is irrevocable and shall be final and binding on his/her/their heirs, executors, administrators and assigns and is enforceable through the competent court of law.

9. That the expression of the parties shall mean and include their legal heirs, successors, executors, representatives and assigns respectively.”

16. It is evident from a plain reading of the aforesaid document that no reference has been made therein to any understanding between the parties that eight flats would be constructed by the appellant/plaintiff on the subject

premises and the sale proceeds thereof shall be shared between them.

17. The Receipt dated 5.11.2010, for a sum of Rs.1,41,00,000/- executed by the appellant/defendant is also on the same lines as the Agreement to Sell and the relevant extract is reproduced hereinbelow:-

“Receipt

MUKESH KUMAR SINGH S/o Shri Binay Kumar Singh R/o Flat No.266, Veer Awas, Sector 18A, Dwarka, New Delhi-110075 have received a sum of Rs.41,00,000/- (Rupees Forty One Lac only) from MR. SATISH CHANDRA MISHRA S/O LATE SHREE GUNJAN MISHRA R/O 33A, CHANDRANATH CHATERJEE STREET, MERLINE JASMINE, BHOWANIPUR, KOLKATA-25 (WEST BENGAL) OUT OF Rs.1,10,00,000/- (Rupees One Crore Ten Lacs only) as full and final sale consideration on account of Entire under construction building which is on PROPERTY NO.120-A, land area measuring 128 square yards, out of KHASRA NO.20/13, situated in the area of VILLAGE MATIALA, New Delhi, colony known as JAIN COLONY PART-1, T-BLOCK EXTENSION, UTTAM NAGAR, NEW DELHI-110059 (hereinafter called the above said property). Payment has been received by the first party with the following manners:-

- 1. Rs.1,00,000/- (Rupees One Lakh Only) by cash*
- 2. Rs.15,00,000/- (Rupees Fifteen Lakh Only) By Chq. No.35418 Dated 05.11.2010, Drawn on HSBC Bank, BBD Bagh, Kolkata*
- 3. Rs.25,00,000/- (Rupees Twenty Five Lakh Only) By Chq. No.35419 Dated 17.11.2010, Drawn on HSBC Bank, BBD Bagh, Kolkata.”*

18. The aforesaid document refers to the appellant/defendant receiving the full and final sale consideration in respect of the entire under construction building on the subject plot. Nowhere does it mention the terms sought to be pleaded by the appellant/defendant in the leave to defend application.

19. The third material document is the MOU dated 6.6.2013 executed between the parties after a period of two years and seven months from the date of execution of the Agreement to Sell, whereunder the appellant/defendant had admitted to the fact that he had received a sum of Rs.1,06,50,000/- from the respondent/defendant towards the sale of the suit premises, vide Agreement to Sell dated 5.11.2010. The terms of the MOU dated 6.6.2013 were as follows:

“Memorandum of Understanding

This MOU is made at New Delhi on 06.06.2013 between : MR. MUKESH KUMAR SINGH S/o Shri BINAY KUMAR SINGH R/o FLAT NO.266, VEER AWASH SECTOR 18A, DWARKA, NEW DELHI 110075 hereinafter called the FIRST PARTY/SELLER;

AND

MR. SATISH CHANDRA MISHRA S/O LATE SHRI GUNJAN MISHRA R/O 33A, CHANDRANATH CHATERJEE STREET, MERLINE JASMINE BHOWANIPUR, KOLKATA-25 (WEST BENGAL) hereinafter called the SECOND PARTY/PURCHASER.

WHEREAS the Second party was paid sum of Rs.1,06,50,000/- (Rupees One Crore Six Lakh and Fifty Thousand Only) to the first party seller vide agreement to sell dated 05.11.2010 against Entire under construction building which is on PROPERTY NO.120-A, which total land area admeasuring 128 square yards, out of KHASRA NO.20/13, situated in the area of VILLAGE MATIALA, New Delhi, colony known as JAIN COLONY PART-1, T-BLOCK EXTENSION, UTTAM NAGAR, NEW DELHI-110059.

That after the cancellation of above property deals vide cancellation agreement dated 20.01.2012 first has assures to second party that I will return you Rs.1,40,00,000/- (Rupees One Crore Forty Lakh only) including profit of above said property in

part time to time.

That after many commitments of first has fails to pay the said amount, and now first party assuring second party that he will pay that amount in any case in following instalments of Rs.25 Lakh in June, 50 Lakh in July and Rs.65 Lakh in August, 2013.

IN WITNESS WHEREOF the parties have signed this agreement on the day, month and year first above written in the presence of the following witnesses.”

20. The aforesaid MOU mentions a Cancellation Agreement dated 20.1.2012, whereunder the appellant/defendant had assured the respondent/plaintiff that he shall return a sum of Rs.1,40,00,000/-, which shall include the profit of the suit premises, but in instalments. The appellant/defendant had also admitted to the fact that he had failed to abide by several commitments made to the respondent/plaintiff earlier, to refund the said amount and had gone on to give an assurance that he shall pay the amount in four instalments in August, 2013. Again, the said document does not refer to any agreement to construct eight flats and share the sale proceeds as pleaded by the appellant/defendant in his leave to defend application. On the contrary, the appellant has admitted to the fact that he had failed to adhere to his commitment to pay a sum of Rs.1,40,00,000/- to the respondent/plaintiff upon cancellation of the Agreement to Sell dated 5.11.2010.

21. That the appellant/defendant had failed to abide by his undertaking to pay the sum of Rs.1,40,00,000/- to the respondent/plaintiff in the month of August, 2013, is borne out by the fact that on 14.2.2014, he executed a Letter of Commitment confirming *inter alia* that he had to pay a sum of

Rs.1,40,00,000/- to the respondent/plaintiff, which included the principal amount invested by him and since he had failed to adhere to the commitment made by him earlier, he was issuing four post dated cheques in favour of the respondent/plaintiff for payment of the said amount. The contents of the said Letter of Commitment dated 14.2.2014 are as follows:

“Commitments

Date: 14.02.2014

I, Mukesh Kr. Singh S/o Sh. Binay Kumar Singh R/o Flat No.3401, IIT Engg. Aptt. Plot No.12, Sector – 12, Dwarka, New Delhi-110075. I have to pay Rs.1,40,00,000/- (One Crore Forty Lakh Only) to Mr. Satish Chandra Mishra, the above said amount is including principal amount invested by him as I failed many commitments now I assuring him that this will be the final commitments that I will pay all the amount given post dated cheque by me. The issues cheques details are as mentioned below :

<i>Sr. No</i>	<i>Amount</i>	<i>Cheque No.</i>	<i>Date</i>	<i>Drawn on</i>
<i>1</i>	<i>35,00,000/-</i>	<i>064480</i>	<i>10.03.2014</i>	<i>ICICI Bank Ltd.Sector-5, Dwarka, N. Delhi</i>
<i>2</i>	<i>50,00,000/-</i>	<i>064481</i>	<i>15.04.2014</i>	<i>---- Do----</i>
<i>3</i>	<i>25,00,000/-</i>	<i>064482</i>	<i>10.05.2014</i>	<i>---- Do----</i>
<i>4</i>	<i>30,00,000/-</i>	<i>064483</i>	<i>20.05.2014</i>	<i>---- Do----</i>

Declaration: Above said statement are given by me in my own belief & faith.

(Mukesh Kumar Singh)”

22. The aforesaid documents when read together, make it abundantly clear that there was never any understanding between the parties that the respondent/plaintiff had paid a sum of Rs.1,06,50,000/- to the appellant/defendant so that he could utilize the said funds to construct eight flats in the suit premises and after the completion of the construction, parties had agreed that the said flats would be sold in the open market and the sale proceeds shared between them.

23. On the contrary, all the aforesaid documents demonstrate an underlying common intent and purpose which was that the appellant/defendant had decided to sell the subject property outright to the respondent/plaintiff for a total sale consideration of Rs.1,10,00,000/-. Nowhere has the appellant/defendant taken a stand in the leave to defend application that he had signed the said Agreement to Sell under any misconception or claimed that the same had been executed by him under any undue influence or coercion. Instead, even as per the averments made by him in the leave to defend application, the appellant/defendant has stated that the parties were known to each other as both of them belong to Bihar and have common relatives and friends.

24. All the terms and conditions of the Agreement to Sell dated 5.11.2010, when read along with the documents executed subsequently by the appellant/defendant, point only in a single direction which is that he had agreed to sell the suit premises lock, stock and barrel to the respondent/plaintiff for a total sale consideration of Rs.1,10,00,000/- and he had admittedly received the earnest money of Rs.41,00,000/- from the respondent/plaintiff and that the parties had agreed that the balance sale consideration of Rs.69,00,000/- would be paid to the appellant/defendant at

the time of executing the sale deed, on or before 31.3.2011.

25. In the Receipt dated 5.11.2010, executed by the appellant/defendant, he had again acknowledged having received the earnest money in respect of the suit premises out of a sum of Rs.1,10,00,000/-, which was the agreed sale consideration. The said Receipt specifically refers to the sale consideration being in respect of the “*entire under-construction building*” on the subject premises and does not mention any flats.

26. The language of the MOU dated 6.6.2013, that was subsequently executed by the parties is no different. It clearly brings out the intention of the appellant/defendant which was to sell the entire under-construction building to the respondent/plaintiff for a certain amount. The MOU goes on to record that the parties had agreed to cancel the Agreement to Sell on the assurance of the appellant/defendant that he would return the sum of Rs1,40,00,000/- to the respondent/plaintiff, which included the profit element. The Letter of Commitment dated 14.2.2014 executed by the appellant/defendant records that he had to pay a sum of Rs.1,40,00,000/- to the respondent/plaintiff, which included the principal amount invested by him and he had failed to abide by his earlier commitments made in this regard and had issued four post-dated cheques for returning the said amount to the respondent/plaintiff.

27. In the light of aforesaid documents, it does not lie in the mouth of the appellant/defendant to set up an entirely different story in his leave to defend application which is not borne out from any of the documents on the record. All the aforesaid documents and the conduct of the parties when examined together, leaves no scope of doubt that the appellant/defendant had entered into an Agreement to Sell with the respondent/plaintiff in respect of the

entire under construction property and had received an advance amount from him on the said count. There is not a whisper in the said documents of the appellant/defendant and the respondent/plaintiff having agreed that the former shall construct eight flats on the subject premises from the funds received and on completion of the said construction, the said flats would be sold and the sale proceeds divided amongst the parties.

28. On a bare reading of the admitted documents, it is crystal clear that the appellant/defendant had issued four post-dated cheques totalling to a sum of Rs.1,40,00,000/- in favour of the respondent/plaintiff towards repayment of the principal amount along with interest and all the said cheques were dishonoured on presentation. It is also an undisputed position that the respondent/plaintiff had served two legal notices dated 28.6.2014 and 7.5.2014 on the appellant/defendant calling upon him to pay the amounts, subject matter of the post dated cheques. Pertinently, the appellant/defendant did not give a reply to the said notices. When the respondent/plaintiff filed four criminal complaints against the appellant/defendant under Section 138 of the NI Act on account of dishonour of the aforesaid cheques, the latter had contested the said complaints. It is an admitted position that the appellant/defendant has been convicted by the learned MM in the said complaints.

29. On a consideration of the facts of the case, this Court concurs with the finding returned by the learned trial court that no prima facie case has been made out by the appellant/defendant for grant of leave to defend and that leave to defend cannot be granted as a matter of course, unless there is a substantial defence and the pleas raised by the defendant gives rise to triable issues. Further, the affidavit of the appellant/defendant does not disclose a

plausible defence which indicates that he may succeed in establishing the same.

30. Learned counsel for the appellant/defendant has failed to point out any illegality, perversity or mis-appreciation of facts by the learned trial court for interference in appeal. The appeal is accordingly dismissed *in limine*, along with the pending application, being devoid of merits.

JANUARY 16, 2017
ap/rkb/sk/mk

HIMA KOHLI, J

