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

+ **FAO(OS) (COMM) No. 176/2017**

Date of decision: 20th September, 2017

AVINASH RASTOGI

..... Appellant

Through Mr. Prashant Mehta, Ms. Mrinmoi
Chatterjee & Mr. Varun Dev Mishra,
Advocates.

versus

SANJEEV SHARMA THROUGH LEGAL HEIRS

..... Respondent

Through Mr. Deepak Sahni & Mr. Manish
Dua, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (ORAL):

This intra Court appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 104 and Order XLIII, Rule 2 of the Code of Civil Procedure 1908 (Code, for short) impugns the order dated 17th July, 2017 passed by the single Judge disposing of application for leave to defend IA No. 25386/2015 in CS (OS) No. 1205/2016, *Sanjeev Sharma versus Avinash Rastogi*.

2. The aforesaid suit filed by the respondent-plaintiff under Order XXXVII of the Code for recovery of Rs. 3,30,00,000/- towards

principal amount and Rs. 99,00,000/- towards interest is based upon agreement/letter dated 6th July, 2013 and four cheques issued by the appellant which on presentation were not honoured.

3. The contention of the appellant-defendant is that the learned single Judge has relied upon decision of the Supreme Court in ***Mechelec Engineers and Manufactures versus M/s Basic Equiptment Corporation***, (1976) 4 SCC 687 notwithstanding the amendments made to Rule 3(5) to Order XXXVII of the Code. He has drawn our attention to the judgment of the Supreme Court in ***IDBI Trusteeship Services Limited versus Hubtown Limited***, AIR 2016 SC 5321. He submits that the present case would be covered by clause (b) of the dictum as laid down in paragraph 18 in ***IDBI Trusteeship Services Limited*** (supra). He has drawn our attention to the defence of the appellant as well as the finding recorded in paragraph 10 of the impugned order which holds that the defendant had certainly raised triable issues qua the losses suffered by him in the business with the respondent to the tune of Rs. 1,87,00,000/-.

4. Learned counsel for the appellant is correct that the application for leave to defend was required to be decided in terms of the parameters as stipulated in Rule 3(5) of Order XXXVII of the Code. However, this would not be ground for us to accept the present appeal and modify the final directions given in the impugned order.

5. We have proceeded to examine the contentions of the appellant with reference to the parameters and principles laid down by the Supreme Court in ***IDBI Trusteeship Services Limited*** (supra), which are as under:-

“18. Accordingly, the principles stated in paragraph 8 of Mechelec’s case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram’s case, as follows:

a. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

b. if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

c. even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant’s good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

d. if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with

such interest as the court feels the justice of the case requires.

e. if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

f. if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.”

6. As per the application for leave to defend, the appellant had earlier entered into a distributionship agreement dated 24th March, 2009 with one Baxter India Limited for distribution, supply and sale of renal (HD) products. Baxter India Private Limited had made supplies to the extent of Rs. 14,00,00,000/- approximately to the appellant. It is the case of the appellant that they had made investment of Rs. 5,50,00,000/- against pay-per-treatment mode in reputed hospitals in North India. It appears and it is apparent from the application for leave to defend that the appellant had suffered losses.

7. In the month of March, 2012, Baxter India Private Limited had appointed the respondent Sanjeev Sharma now represented by his legal heirs as the new distributor.

8. The appellant thereafter started making purchases from the respondent. The appellant had defaulted and failed to make payment

to the extent of Rs. 3,30,00,000/- to the respondent on account of supplies made after March, 2013.

9. An Agreement dated 6th July, 2013 was executed by the appellant with the respondent. The said agreement reads as under:-

“I Avinash Rastogi, Prop M/s Proxima Medicare, do hereby agrees and accept that M/s R S Company has supplied us the material as per Orders placed and Rs. 3.30 crores is due towards us including interest.

I Avinash Rastogi, Prop M/s Proxima Medicare, do hereby agrees and accept that I will transfer/handover my PPT Business of Rs. 2.50 Crores except the business going on with M/s Madaan Hospital, Panipat. That in the business going on with M/s R S Company I have borne a loss of Rs 1.87 Crores which I request Mr Sanjeev Sharma to issue us a Credit note for the same amount.

I further agree to issue post dated cheques and will make sure that all cheques gets cleared on respective dates and no stop payments will be imposed on them and I will not change my bank account till the payment cleared by me. Cheque details are as under:

1. Cheque No. 004309 dated 16.08.2013 drawn on bank of Maharashtra, Karol Bagh for Rs. 82,50,000.00 only.
2. Cheque No. 004310 dated 01.09.2013 drawn on Bank of Maharashtra, Karol Bagh for Rs. 82,50,000.00 only.
3. Cheque No. 004311 dated 15.09.2013 drawn on Bank of Maharashtra, Karol Bagh for Rs. 82,50,000.00 only.
4. Cheque No. 004312 dated 30.09.2013 drawn on Bank of Maharashtra, Karol Bagh for Rs. 82,50,000.00 only.

I confirm that if I failed to get the above mentioned cheques cleared on time, legal action shall be initiated on me and I shall be liable for Interest charge on amount due @3% per month.

I further agree and to make their payment secured, I will keep my Original Property Papers of 1194, Ground Floor, Cycle Market, Jhandewalan Extension, Delhi-110055, in a Bank Locker of Bank of Maharashtra, under the joint operations of Mr. Sanjeev Sharma and Myself (Avinash Rastogi).

I request Mr. Sanjeev Sharma Prop of M/s R S Company to issue four (04) Credit notes of Rs. 46,75,000.00 only each in favour of M/s Proxima Medicare. First credit note of Rs. 46,75,000.00 only will be issued by Mr. Sanjeev Sharma Prop M/s R S Company out of Rs. 1,87,00,000.00 only once first two cheques of Rs. 82,50,000.00 only each gets cleared.”

10. The appellant does not dispute the aforesaid agreement or the signatures thereon. The appellant also does not dispute having issued the four cheques of Rs. 82,50,000/- each. It is not challenged that the cheques were not honoured on presentation.

11. The contention of the appellant is that the respondent had agreed that he would takeover the PPT (Pay Per Treatment) business of Rs. 2,50,00,000/-, except business going on with Madaan Hospital, Panipat. Paragraph 2 of the agreement further records that the appellant had incurred a loss of Rs. 1,87,00,000/- for which he had requested the respondent to issue a credit note to him. Credit notes of Rs. 1,87,00,000/- were to be issued on encashment of the first two cheques. It is accepted that the first two cheques were not honoured. In fact, all the four cheques for Rs. 3,30,00,000/- which the appellant

had agreed to pay on presentation were dishonoured and not paid. Thus, in respect of Rs. 1,43,00,000/- the appellant's defence lacked good faith and genuineness as to constitute a triable issue. It would at best be plausible but improbable.

12. The learned single Judge has observed:-

“10. However, the defendant certainly has raised a triable-issue qua the losses suffered by him in the business with the plaintiff to the tune of Rs.1,87,00,000/- for which the plaintiff too had agreed to issue credit notes to him but alleges that the issuance of credit notes were rather contingent upon the encashment of the first two post dated cheques. No doubt the plaintiff's submission find support in the document dated 06.07.2013 but one cannot ignore the fact that such dishonour of cheques relates only to the financial capability of the defendant to pay for which a conviction already stands against him and that the dishonour of cheques would not wipe of the contention of defendant that he had suffered losses for which he is entitle to credit notes. Hence, at this stage, suffice is to say that his plea that he had suffered losses in dealing with the plaintiff for which plaintiff had agreed to issue credit notes, cannot be ignored for the purpose of grant for leave to defend.”

Thereafter, the learned Single Judge has directed as under:-

“12. In view of law discussed above and taking into consideration the triable issue raised by defendant as above, the leave to defend is granted to the defendant on his depositing an amount of Rs.1,43,00,000/-(Rupees One Crore Forty Three

Lacs) with the Registrar General of this Court within four weeks from today. The amount so deposited shall be converted into a fixed deposit with a nationalised bank for a term of three months initially, extendable, per order of the Court.

13. The application stands disposed of in above terms.”

13. When we refer to the facts of the present case and the aforesaid discussion, we would observe that the present case would be covered by Clauses (c) and (d) of the dictum laid down in paragraph 18 in ***IDBI Trusteeship Services Limited*** (supra). The appellant has been given benefit to the tune of Rs. 1,87,00,000/- even when the cheques issued by him had been dishonoured, for the respondent was to issue credit notes to the appellant for the said amount. However, with regard to Rs. 1,43,00,000/- payment was certainly due and payable as per the agreement dated 6th July, 2013. The defence of the appellant in this regard would stand in the category (c) and (d).

14. Learned counsel for the appellant submitted that the agreement had also stipulated, that the appellant would transfer/handover PPT business of Rs. 2,50,00,000/- except the business going on with Madaan Hospital, Panipat. We would observe that this is correct, but taking over of the business was independent and in addition, and as per the agreement the appellant had agreed to payment by four cheques. These cheques totaling Rs.3,30,00,000/- were in addition to the undertaking given by the appellant that he would transfer/handover his PPT business of Rs. 2,50,00,000/- except business going on with Madaan Hospital, Panipat. Handing over and transfer of the PPT

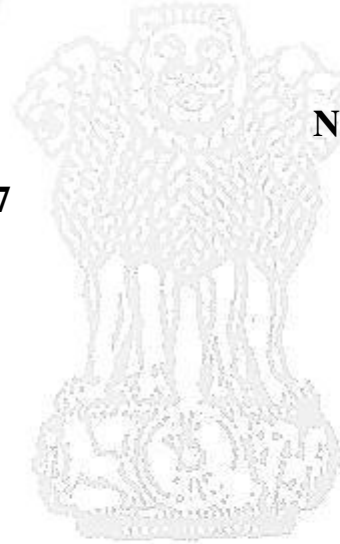
business was an additional consideration which was payable by the appellant to the respondent.

15. For the reasons stated above, we do not find any merit in the present appeal and the same is dismissed, without any order as to costs. Observations and findings recorded, are for the disposal of the present appeal and would not be treated binding and conclusive findings at the time of decision of the suit.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

SEPTEMBER 20, 2017
MR/VKR



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