

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

+ **RFA No. 118/2018**

% **7th February, 2018**

MANDIP SINGH Appellant

Through: Mr. D.Bhattacharya, Advocate.

versus

SUSHIL KUMAR Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 4699/2018(Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

CM No. 4698/2018 (delay in filing 197 days)

For the reasons stated in the application, delay in filing is condoned, subject to just exceptions.

CM stands disposed of.

RFA No. 118/2018 & CM No. 4697/2018 (stay)

1. This Regular First Appeal under Section 96 of the Code of the Civil Procedure, 1908 (CPC) is filed by the defendant in the suit

impugning the judgment of the trial court dated 24.3.2017 by which the trial court has dismissed the application for leave to defend under Order XXXVII Rule 3(5) CPC and has decreed the suit for recovery of Rs.10 lacs along with interest at 9% per annum. Suit under Order XXXVII CPC was filed on the basis of a dishonoured cheque, and which cheque admittedly is signed by the appellant/defendant and is of the bank of the appellant/defendant.

2. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that he has given a friendly loan of Rs.10 lacs to the appellant/defendant and which was secured in terms of the subject cheque bearing no.018155 dated 15.12.2014 drawn on Oriental Bank of Commerce, Sant Nagar, East of Kailash, New Delhi and this cheque when presented for encashment was dishonoured on 18.12.2014 and 26.12.2014 on account of insufficient funds. After waiting for a long time for the appellant/defendant to clear the dues the respondent/plaintiff filed the subject suit under Order XXXVII CPC.

3. Appellant/defendant filed his leave to defend application and pleaded that appellant/defendant had never taken loan from the

respondent/plaintiff and that the subject cheque was in fact one of the 20 blank cheques given by the appellant/defendant to one Sh. Siddharth Sapra when appellant/defendant had taken a loan of Rs.1,00,000/- from Sh. Siddharth Sapra. It was pleaded that respondent/plaintiff in collusion with Sh. Siddharth Sapra manipulated one of the 20 cheques for filing of the subject suit.

4. Trial court has relied upon the judgment of the Supreme Court in the case of *Mechalec Engineers & Manufactures Vs. Basic Equipment Corporation, AIR 1977 SC 577* on the principles of grant of leave to defend, however it is noted that now the principles of leave to defend under Order XXXVII suit are those as contained in the recent judgment of the Supreme Court in the case of *IDBI Trusteeship Services Limited vs. Hubtown Limited (2017)1 SCC 568*. The principles with respect to grant of leave to defend in an Order XXXVII suit have been laid down in paras 17 to 17.6 of this judgment and these paras read as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec's* case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in *Milkhiram's* case, as follows:

17.1. 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.

17.2 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.

17.3 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.

17.4 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.

17.5 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.

17.6 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."

5. Applying the ratio of the judgment of the Supreme Court in the case of *IDBI Trusteeship Services Limited (supra)* it is seen that the case of the appellant/defendant is a complete moonshine for the reason that I have put a specific query to counsel for the appellant/defendant as to why the appellant/defendant, if the case put forth by the appellant/defendant was correct, did not file the counterfoils of the cheque book of the appellant/defendant with

respect to the 20 cheques alleged to be given by the appellant/defendant to one Sh. Siddharth Sapra and which would have shown *prima facie* that the cheque which was subject matter of the present suit was part of the series of the cheques given by the appellant/defendant to Sh. Siddharth Sapra. Obviously, the counterfoils is the best evidence which the appellant/defendant would have had and which was in his possession and which the appellant/defendant therefore is bound to file under Section 106 of the Indian Evidence Act, 1872 and admittedly neither before the trial court nor before this Court the counterfoils of the cheque book of the appellant/defendant have been filed to show that the cheque which was the subject matter of the present suit was one of the series of the cheques handed over allegedly to Sh. Siddharth Sapra.

6. In view of the above discussion, I do not find any merit in the appeal. Dismissed.

FEBRUARY 07, 2018/ib

VALMIKI J. MEHTA, J