

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

+ **RFA No. 526/2018 & CM No.27185/2018 (stay)**

% **13th July, 2018.**

SUSHIL MAAN

..... Appellant

Through: Mr. Pradeep Kumar, Advocate.

versus

RAJESH RANA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the Order XXXVII CPC suit impugning the Judgment of the Trial Court dated 13.2.2018 by which the trial court has dismissed the leave to defend application filed by the appellant/defendant and decreed the suit filed on the basis of dishonoured cheque for a sum of Rs.6,00,000/-.

2. The case of the respondent/plaintiff was that the appellant/defendant was granted a friendly loan of Rs. 6,00,000/- on

7.9.2015 and to secure which the appellant/defendant had issued a post dated Cheque No. 324347 drawn on Punjab National Bank, Sector-10, Dwarka, New Delhi dated 7.9.2016. Respondent/plaintiff did not present the cheque for encashment on the request of the appellant/defendant but ultimately on account of non-payment of the dues the respondent/plaintiff issued the Legal Notice dated 2.2.2017 and thereafter filed the subject Order XXXVII suit.

3. In the leave to defend application it is not disputed by the appellant/defendant that he did take a loan of Rs. 6,00,000/- from the respondent/plaintiff and also that the subject cheque was issued by the appellant/defendant in favour of the respondent/plaintiff. The defence of the appellant/defendant was that he had repaid the loan amount to the respondent/plaintiff in the presence of a witness being his brother Sh. Anil Maan on 30.4.2016. It was pleaded that the respondent/plaintiff promised to return back the cheque but he did not do so inspite of reminders. Accordingly unconditional leave to defend was prayed.

4. Trial court has dismissed the leave to defend application by observing that there is no dispute that appellant/defendant took a

loan and there is no dispute that appellant/defendant had issued the subject cheque. Trial court has further held that it is not believable that in case the appellant/defendant had returned the loan then he would not have taken back the subject cheque given as security to the respondent/plaintiff. I accept trial court's reasoning as aforesaid.

5. In addition to the aforesaid reasoning of the trial court even assuming that relations between the parties were good and respondent/plaintiff stated that he would return the cheque later, then there was no reason why in spite of repeated reminders as pleaded by the appellant/defendant, since the cheque was not given, appellant/defendant neither issued any legal notice nor even sent formal letter to the respondent/plaintiff of the factum of repayment of loan or asking back return of the subject cheque which was given as security. Therefore the defence of the appellant/defendant is clearly frivolous and vexatious and raises no triable issues.

6. Learned counsel for the appellant/defendant argues that suit was not maintainable under Order XXXVII CPC as the subject cheque was not presented for encashment, however, in my opinion, even if a cheque is not presented for encashment, a cheque is a written

agreement containing a liquidated amount, and therefore, a suit on the basis of a non-presented cheque is maintainable under Order XXXVII CPC. I have recently held so in the judgment delivered by this Court in the case of ***B.L.Kashyap & Sons Ltd. Vs. M/s JMS Steel & Power Corporation & Anr.*** RFA No.402/2018 decided on 11.5.2018. The relevant paras of this judgment read as under:-

" XXXX XXXX XXXX

8(iv) Even with respect to the cheques issued, though the cheques are issued by the respondent no.2/defendant no.1 yet an Order XXXVII CPC suit for the amount of cheques would also lie against the appellant/defendant no.2 because Order XXXVII Rule 1 CPC does not in any manner state that the cheques which are issued for payments have to be of the person against whom liability is claimed. Obviously this is so as per Order XXXVII Rule 1 CPC because as per Section 2(d) of the Indian Contract Act, 1872 consideration under a contract need not flow/pass only between the parties to a contract. Also it may be noted that even if cheques were not presented, would not mean that the suit would not be maintainable under Order XXXVII CPC because Order XXXVII Rule 1 CPC does not require the cheques to be dishonoured cheques for filing of the Order XXXVII CPC suit.

9. The fact that there is a joint and several liability of the appellant/defendant no.2 with the respondent no.2/defendant no.1 will not mean that to enforce this joint and several liability, the subject suit could not have been filed both against the appellant/defendant no.2 and the respondent no.2 herein. Once liability is joint and several of the appellant/defendant no.2 with the respondent no.2/defendant no.1, and as stated above Section 2(d) of the Indian Contract Act permits passing/payment of consideration by a person who is not a party to the contract, therefore merely because respondent no.2/defendant no.1 had agreed to be liable to make the payment of the goods purchased by the appellant/defendant no.2, this would not mean that the

appellant/defendant no.2 would no longer be liable and liability will only be of the respondent no.2/defendant no.1.

To the aforesaid reasoning the added aspect is that even if a cheque is required first to be dishonoured cheque for suing under Order XXXVII CPC, and in case where the cheque is not presented and hence not dishonoured, yet the cheque will still be a written agreement containing the liquidated amount as per Order XXXVII Rule 1 Sub-Rule 2, and therefore a cheque which is not presented will be treated as a written contract containing the liquidated debt or demand in money payable by the defendant, and hence on an unpresented cheque the suit was maintainable under Order XXXVII CPC against the appellant/defendant no.2.” (underlining added)

7. Supreme Court in the recent judgment in the case of ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., (2017) 1 SCC 568*** has laid down the principles for grant of leave to defend and these principles are 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."

8. The ratio of the judgment of the Supreme Court in ***IDBI Trusteeship (supra)*** clearly states that once the defence is clearly frivolous and vexatious and there is no triable issue raised then leave to defend should be not be granted. In view of the above discussion, trial court was justified in dismissing the leave to defend application.

19. This appeal is without any merit and is accordingly dismissed.

JULY 13, 2018/ib

VALMIKI J. MEHTA, J