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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **REGULAR FIRST APPEAL (OS) (COMM) No. 19/2018**

Date of decision: 31st August, 2018

M/S HIGH GROUNG ENTERPRISES Ltd. Appellant

Through: Mr. Tanmaya Mehta, Advocate
with Mr. Abhishek Mishra, Advocate.

versus

RAMA KRISHNA ELECTRO COMPONENTS PVT LTD.

..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

The present Regular First Appeal under Section 96 read with Section 104 of Code of Civil Procedure, 1908 (Code, for short) and Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 impugns order dated 23rd July, 2018 passed in IA No. 21843/2014 in CS(COMM) No. 599/2017.

2. The aforesaid order dismisses the application for leave to defend filed by the appellant, M/s High Ground Enterprises Limited ('appellant-defendant', for short), under Order XXXVII, Rule 3 of the Code.

3. Learned counsel for appellant-defendant submits that the learned single Judge has erroneously observed and held that M/s Rama Krishna Electro Components Private Limited ('respondent-plaintiff for short) had advanced loan of Rs. 2 crores to the appellant-defendant. Referring to clauses 1, 3, 5, 6 and 9 in the Memorandum of Understanding dated 27th April, 2011 ('MoU' for short) it is submitted that the respondent-plaintiff had made an investment with the appellant-defendant. At best the respondent-plaintiff would be entitled to return of the investment as per the terms of the MoU. Further, the suit as framed had also prayed for decree of Rs.50 lacs paid by way of two cheques of Rs.25 lacs each dated 13th June, 2011 and 15th June, 2011, respectively. Thus, the suit under Order XXXVII of the Code was not maintainable as it was not entirely based and predicated on the MoU. The appellant-defendant had raised the plea and contention that Rs. 50 lacs was paid by the respondent-plaintiff to the appellant-defendant towards branding, advertisement, credit and publicity etc. Accordingly, triable issues that require evidence and regular trial were raised. The respondent-plaintiff had concealed and stated incorrect facts as the appellant-defendant had repaid Rs.1 crores and Rs. 50 lacs, a fact accepted in the impugned order. Dishonoured cheques were given by the appellant-defendant to the respondent-plaintiff as a mere security. Reference was made to the e-mail dated 18th January, 2012, sent by Satish Luthra on behalf of the respondent-plaintiff. These pleas were specifically raised in the application for leave to defend. Lastly, the respondent-plaintiff has filed complaints under Section 138 of the Negotiable Instruments Act, 1882, ('N.I. Act' for short) against the appellant- defendant and others which are

pending. The decision could adversely impact the defence of the appellant-defendant in the criminal proceedings.

4. The last contention does not bother us and has to be rejected for the simple reason that mere pendency of complaints under Section 138 of the N.I. Act for dishonoured cheques cannot be a ground to grant leave to defend in a suit under Order XXXVII of the Code. The two proceedings are separate proceedings. Proceedings for recovery of money under Order XXXVII of the Code are civil proceedings, whereas proceedings under Section 138 of the N.I. Act are primarily criminal proceedings.

5. For the sake of clarity, we would reproduce the entire MoU itself, which reads as under:-

“Whereas both the parties have agreed on the following terms and conditions.

*1. **Investor** will invest total of Rs.2,00,00,000/- (Rupees Two Crores Only) into **producer’s** forthcoming film “Bhindi Baazaar Inc.”.*

2. The above mentioned amount will be Invested as under:

i Rs. 1 crore on or before 1st May 2011

ii Rs. 1 crore on or before 15th May, 2011

3. The Term of this Investment will be 4 (four) Months from the day when first cheque is received.

4. Receiver will give payer Post Dated cheques of Invested amounts as the security.

5. Investor in return will be sharing 20% of profits in the movie “Bhindi Baazaar Inc.” or a

minimum guaranteed return of 18% p.a. on the Invested amount whichever is higher.

6. *The Investor will get a credit as 'Co Producer or Associate producer' on the film and its publicity material, and also the logo of his company at the beginning of the film.*

7. *All Clauses mentioned in the clause No. 2,3,5 & 6 is essence of this Agreement.*

8. *This Agreement shall not constitute a Partnership between both the Payer and Receiver and none of the Parties hereto shall act/and or hold out as the agent or the Partner of the other parties hereto within the meaning of the Indian Partnership Act, 1932.*

9. *The Agreement shall also not constitute as Joint Venture or A.O.P. or Money Lending transactions between the Receiver and the Investor.*

10. *Above terms are agreed, confirmed and binding to Receiver without any type of dispute."*

There is no doubt that the MoU mentions the word "investment" but a perusal of the terms and clauses of the MoU would reveal that the appellant-defendant had agreed to refund Rs. 2 crores along with 20% share in the profits earned in the movie "*Bhindi Baazaar Inc.*" or with minimum guarantee of 18% per annum on the invested amount, whichever was higher. Thus, there was a clear stipulation that the respondent-plaintiff would be entitled to minimum guaranteed return @ 18% per annum. Clause 3 of the MoU had stated that the appellant-defendant was to refund Rs.2 crores within four months from the date the first cheque was received. Thus, the date when Rs.2 crores was to be refunded, with minimum guaranteed interest @ 18% per annum or profit @ 20% if higher, was clearly

stipulated. Therefore, the question whether the amount paid was an investment or a loan is insignificant and inconsequential as both the date of refund of Rs.2 crores and rate of interest are plain and lucid. Contest and submission to the contrary must be rejected.

6. It is also a fact that the appellant-defendant has re-paid Rs.1.5 crores on different dates as mentioned in paragraph 8 of the impugned order. Two payments of Rs.50 lacs each were made on 12th August, 2011 and 24th October, 2011, respectively. Two payments of Rs. 25/- lacs each was made on 10th November, 2011 and 16th January, 2012, respectively. The factum that the appellant-defendant had made part re-payments affirms our view and finding, rejecting the contention of the appellant/defendant that nothing was payable and to be refunded unless the appellant/defendant was in a position to refund the amount invested or there was a profit in terms of the sharing arrangement. Contention is incorrect and sham.

7. It is not the case of the appellant-defendant that while making payments of Rs.1crore and Rs. 50 lacs, they had notified the respondent-plaintiff that the amounts paid should be first adjusted towards the MoU and not towards Rs.50 lacs paid by the respondent-plaintiff by way of two cheques of Rs. 25 lacs each on 13th June, 2011 and 15th June, 2011, respectively. In these circumstances, it was open to the respondent-defendant to adjust the payments made against Rs.50 lacs paid by way of two cheques of Rs. 25 lacs each on 13th June, 2011 and 15th June, 2011, respectively. Moreover, in the present case, the respondent-defendant had also instituted the suit on the basis of three dishonoured cheques; cheque dated 31st December, 2011 of Rs.25

lacs, cheque dated 15th January, 2012 of Rs.25 lacs and cheque dated 1st February, 2012 of Rs. 75 lacs. It is accepted and admitted that these cheques were dishonoured. Suit under Order XXXVII of the Code is maintainable on the basis of dishonoured negotiable instrument in the nature of cheques.

8. Noticeably, the single Judge has passed decree for Rs.1 crore without interest. The reason being that the respondent-plaintiff had suppressed facts and details of payment of Rs.1.5 crores in the plaint. Therefore, the amount to be paid by the appellant-defendant in terms of the decree passed is Rs.1 crore. In the event of failure to pay Rs. 1 crore within eight weeks, interest @ 12% per annum is payable on the decretal amount of Rs. 1 crore from the date of the decree till payment.

9. In these circumstances, we do not think the contention of the appellant-defendant that the suit under Order XXXVII of the Code was not maintainable has any force and merit. Noticeably, the respondent-plaintiff has drafted the plaint relying on the MoU under which Rs.2 crores was advanced and also on dishonour of three cheques totalling Rs.1.25 crores. The amount decreed i.e. Rs. 1 crore is less than the amount mentioned in the three cheques/MoU.

10. The contention of the appellant-defendant that the cheques were given as mere security and were not meant to be honoured on presentation again does not impress us. The cheques issued were not to be kept in a show-case and were meant to be honoured on presentation. The e-mails placed on record show that the appellant-defendant had not disputed its liability to pay, albeit the appellant-

defendant was praying for time as they were facing a liquidity crunch and waiting for certain deals to come through. These e-mails do not, in our opinion, furnish any reason and ground for grant of leave to the appellant-defendant.

11. The appellant-defendant accepts the MoU. The appellant-defendant also accepts having received Rs.2 crores as mentioned in the MoU and Rs. 50 lacs by way of two cheques of Rs.25 lacs. Amount refunded by the appellant-defendant is Rs.1crore and 50 lacs. Balance amount of Rs.1 crore was payable. Impugned order directs payment of this amount and the decree passed is in accordance with law.

12. Viewed from all angles, we do not find any merit in the present appeal. The appeal is dismissed, without any order as to costs. However, as noticed by us earlier, there is a difference between a civil suit under Order XXXVII of the Code and proceedings under Section 138 of the N.I. Act. We say nothing and have not adjudicated and expressed any opinion on the proceedings under Section 138 of the N.I. Act pending before the criminal court.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

AUGUST 31st, 2018
MR