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

Date of Decision: 19th February 2018

\+ **RFA 545/2015**

SUNITA SHARMA ..... Appellant

Through: Mr. Anand Singh, Advocate. (M:9868347568)

versus

SANTOSH SHUKLA ..... Respondent

Through: Mr. Vinay Kumar, Advocate. (M:9811161525)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. **(Oral)**

CM No. 15296/2015 (filing of additional documents)

1. By way of this application, Appellant seeks to bring on record the copy of the record slip in respect of the cheque book from which the cheques were issued to the Plaintiff as also the copy of the legal notice dated 7th December, 2009 on record.

2. A perusal of the documents reveals that the same are relevant for the adjudication of the appeal and this application was filed at the initial stage of the appeal itself. The said documents are taken on record.

3. Application is allowed and disposed of in the above terms.

CM No. 20167/2017 (condonation of delay)

4. This is an application seeking condonation of delay in depositing the amount of Rs.2 Lakhs with the Registrar General of this Court. Delay in

depositing the amount is condoned.

5. Application is allowed and disposed of in the above terms.

<u>RFA 545/2015</u>

6. This is an appeal against the impugned judgment and decree dated 18th April, 2015 by which the learned Trial Court decreed the suit of the Respondent/Plaintiff (*hereinafter, 'Plaintiff'*) in the following terms:

> *"(a) A money decree in the sum of Rs.6,00,000/- (Rupees Six Lacs Only) as principal amount;*
> *(b) Pendentelite interest @ 12 % per annum from the date of institution of suit till the date of decree and future interest @ 6% per annum till the date of realization.*
> *(c) Parties to bear their own costs."*

7. The plaint was based upon an agreement to sell dated 30th May, 2009 for property bearing no. Flat No. 587, 2nd Floor, Pocket-2, Phase -II, Sector 14, Dwarka, New Delhi. It is the case of Plaintiff that a sum of Rs.6 Lakhs was paid by Plaintiff to the Appellant/Defendant (*hereinafter, 'Defendant'*) as bayana. It is the case of the Plaintiff that the Defendant was not willing to perform the agreement to sell and accordingly, a legal was issued and the Defendant offered to return the amount. Accordingly, a cheque for a sum of Rs.6 Lakhs bearing no.721954 dated 2nd May 2010 drawn on Syndicate Bank, Lodhi Road, New Delhi was issued by the Defendant in favour of Plaintiff. Plaintiff further states that the cheque was presented by the Plaintiff but was dishonoured for *"funds insufficient"* on 7th July, 2010. Plaintiff further submits that by issuing notice dated 16th July, 2010, the Defendant was called upon to honour the payment, which was not done, and hence the Plaintiff filed the subject suit for recovery of Rs.6 Lakhs along with interest. Along with the plaint, Plaintiff filed the original cheque dated

2nd May, 2010 bearing no.721954 for the sum of Rs.6 Lakhs, bank memo with remarks *"funds insufficient"* and notice dated 16th July 2010.

8. In the leave to defend application, the Defendant pleaded that the agreement to sell as claimed by the Plaintiff was never signed by the Defendant. It was also denied that the amount of Rs.6 Lakhs was paid as bayana by the Plaintiff to the Defendant. Defendant put up the plea that the cheque was issued to one Mr. Amit who had been an agent for sanctioning of loan from ICICI Bank, Pitampura Branch. The Defendant, therefore, submitted that the cheque having not been issued to the Plaintiff, it appears that some collusion has happened between Mr. Amit and the Plaintiff and that the Defendant is not aware as to how the cheque which was given for the ICICI Bank was found in the possession of the Plaintiff.

9. The Trial Court, after hearing arguments, held that since the cheque itself is admitted, the Defendant has taken a lame excuse and she does not have any defence in her favour.

10. After hearing learned counsel for the parties, it is found that the Trial Court had initially not issued notice in the suit under Order XXXVII of Code of Civil Procedure, 1908 (*hereinafter, 'CPC')*. The Trial Court had called for the original agreement to sell and sought some clarifications. Plaintiff had, in his statement, recorded on 25th August, 2010, stated as under:

> "*Suit No. 225/10*
>
> *25.08.2010*
> *Statement of Sh. Santosh Shukla Son of Sh. M.P. Shukla aged about 37 years R/o Flat No.58, Pocket-I, Phase-I, Sector-13, Dwarka, New Delhi.*
>
> *ON S.A.*

I am doing the business of Dish Television Network. I am Income Tax Payee. I had agreed to purchase suit property for Rs.18,00,000/-. I had given Rs.6,00,000/- as earnest money. The payment was made in cash. An agreement to sell was prepared and executed between the parties. I can produce original of the same on the next date. However, later on as prices of property increased defendant resiled from the agreement. After much persuasion she gave me a sum of Rupees 6 lacs by way of cheque which was however dishonoured with remarks "Funds Insufficient". I sent a legal notice to the defendant but she did not give me any reply. This is my true and correct statement."

11. A perusal of the above reveals that the entire payment of Rs. 6 lakhs, in respect of the alleged agreement to sell, is claimed to have been made in cash. The Plaintiff also submitted that he could produce the original agreement before the Court on the next date of hearing. However, on the next date of hearing i.e. 4th September, 2010, only a copy appears to have been filed on record. The agreement to sell is not even a registered document. The payment is claimed to have been made in cash. The legal notice dated 6th July, 2010 which is annexed to the plaint, neither mentions the date of agreement to sell, nor the date of the legal notice which was issued for calling upon the Defendant to execute the agreement to sell. The plaint also does not mention the date of the agreement to sell.

12. Though the Defendant's case also appears to be slightly unbelievable i.e. in the sense that the Defendant seeks to argue that out of the four cheques which were given blank without any date to a third party, one of them has found its way to the Plaintiff, there is a lot to be said about the conduct of both the parties. The Defendant relies upon the record slip of the

cheque book which shows that the cheques were allegedly issued on 26th February, 2009. The agreement to sell is dated 30th May, 2009. The date on the cheque filed as Annexure P-1 with the plaint is 2nd May, 2010. It is indeed mysterious as to why a cheque dated 2nd May, 2010 would be issued in this manner without any connection with the date of the agreement to sell. The so-called notice issued by the Plaintiff seeking specific performance, in response to which the cheque is said to have been issued, is not placed on record. It appears that the cheque was issued blank & a date was filled in it.

13. There is yet another dimension to this case, namely a second legal notice has been placed on record of the appeal which is dated 7th December, 2009 which appears to be in identical language to the notice dated 16th July, 2010. This notice dated 7th December 2009, relies upon cheque no.721955 of the same bank issued by Defendant. The said cheque which bears a subsequent number bears an earlier date viz., 19.11.2009. Thus, the Court is faced with a situation that there are two notices addressed to the Defendant from two different persons for two cheques bearing nos. 721954 and 721955 but are dated 19th November, 2009 and 2nd May, 2010. But the record slip of the Defendant shows that the same were issued to ICICI on 26th February, 2009.

14. Learned counsel for the Plaintiff submits that on 7th December, 2009 notice was issued to the Defendant by some other lawyer in respect of a different transaction. However, what is alarming is the stark resemblance in the language used in both the notices and the fact that the cheque number is only one number apart.

15. Thus, it appears that this is not a straight forward case for grant of a decree under Order 37, based on a cheque. The background of the issuance

of the cheque ought to be seen in such a suit and the facts need to be unearthed in evidence. Even if there is a triable case raised by the Defendant, leave to defend ought to be granted.

16. The Supreme Court in ***IDBI Trusteeship Services Ltd. v. Hubtown Ltd. AIR 2016 SC 5321*** *(hereinafter, 'IDBI Trusteeship')* has laid down the following principles under Order XXXVII of CPC:

> *"18. 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:*
>
> > *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."

17. A perusal of the facts in the present case and the pleadings reveal that both the parties have not come out with the true facts in the pleadings and at this stage it is not possible to hold as to whose version of the case is correct. Evidence is, thus, required to be led. The case of the Defendant would fall in categories (b) and (c) set out in ***IDBI Trusteeship (supra)***.

18. During the pendency of the present appeal, the Defendant has deposited a sum of Rs.7,50,000/-. The same is lying in an FDR with this Court. Since the amount for which the decree was sought has been secured, it is deemed appropriate, in the background of the facts narrated above, to grant conditional leave to the Defendant. Ordered accordingly.

19. The amount lying deposited in this Court shall continue to remain in the Fixed Deposit, earning interest and shall be bound by the final orders of the Trial Court.

20. Appeal is allowed in the above terms.

21. List before the Trial Court for further proceedings on 15th March 2018.

PRATHIBA M. SINGH
Judge

FEBRUARY 19, 2018/*dk*