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

% Reserved on: 13th November, 2019
Decided on : 18th November, 2019

\+ **RFA 965/2019 & CM APPL No.48847/2019**

S.S. THAPAR ..... Appellant
Through: Mr.Suneet Bhardwaj, Advocate.

versus

L.R VERMA ..... Respondent
Through: Mr.Moni Cinmoy, Mr.Ajay Kr.Tiwari, Mr.Kumar Gaurav, Advocates.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant/defendant against the judgment and decree dated 16.08.2019 passed by the learned Additional District Judge-06/South-East District, Saket Courts, New Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.*10039/2016* whereby the suit of the respondent/plaintiff filed under Order XXXVII CPC for recovery of Rs.85.00 lac was decreed for Rs.74.00 lac on failure of the appellant to deposit the amount in learned Trial Court as ordered while allowing the leave to defend application of appellant.

2. The brief facts are:- ***a)***the respondent filed summary suit for money recovery under Order XXXVII CPC on the ground the appellant and his son Pankaj Thapar (who generally resides in United Kingdom) had

approached the respondent and represented the appellant was running an export business of Indian garments under the name and style of M/s.AAA Overseas Handicrafts/AAA Handicrafts Overseas – a proprietorship firm which exports garments to Pankaj Thapar at England, who retail such garments in England;

b) the appellant since was in financial need had requested the respondent to invest in such export business in return of some benefits. Both the father and son posed a rosy picture of their entire business and hence the respondent invested a sum of Rs.30.00 lac in the manner as given in para No.5 of plaint;

c) the appellant did not repay the amount as also the profits and when threatened to lodge legal action, at the behest of the appellant, his son Kapil Thapar issued a demand promissory note in the sum of Rs.30.00 lac in favour of the respondent. Upon execution of such documents in December 2004 and January 2005, the appellant and her son again represented the respondent to invest some more amount in the business and on their inducement the respondent invested Rs.44.00 lac with effect from January 2005 till February 2006 in the manner as alleged in para No.11 of the plaint;

d) after the receipt of the amount of Rs.74.00 lac in total, the appellant started avoiding the respondent and after great persuasion the appellant had issued two cheques – dated 21.03.2005 and 25.05.2005 both for Rs.25.00 lac each both drawn on Punjab National Bank, Nehru Place, New Delhi as well as New Custom House, IGI Airport, New Delhi from the account of his firm as AAA Overseas Handicrafts;

e) both the cheques were dishonoured on presentation; thus a legal notice dated 21.10.2005 was issued , which was ignored and hence this suit under Order XXXVII CPC was filed on the basis of such cheques.

3. An application for leave to defend was filed by the appellant wherein the appellant alleged the respondent had given surety for the appellant for some bank loan transaction and had given title deeds of his house and when the appellant could not repay the loan, the respondent paid Rs.10.00 lac to the bank to clear the loan of the appellant and got signed from him various documents, including subject cheques etc, which the respondent has now misused.

4. The parties settled their disputes before Delhi Mediation Centre, Tis Hazari Courts, Delhi vide a settlement agreement dated 30.09.2009 wherein both the parties had agreed as follows:-

> *"1. That the parties shall appear in the Court of Sh.D.K.Malhotra, ld.ADJ, Delhi on 31.10.2009 where a Suit for Specific Performance is pending. They shall make a request to the Court for adjourning the matter to 05.11.2009 on which date Ms.Neha Thapar, Sh.Rajiv Thapar and Sh.S.S.Thapar shall pay an amount of Rs.Five lacs by way of a bank draft to Smt.Bimla Devi Verma w/o Sh.L.R.Verma. On receipt of the aforesaid amount of Rs.Five Lac, Smt.Bimla Devi Verma shall withdraw her Suit for Specific Performance filed against Sh.S.S.Thapar on 05.11.2009 itself.*
> *2. That the balance amount of Rs.Thirty Eight Lacs shall be paid by Ms.Neha Thapar, Rajiv Thapar and S S Thapar to Smt.Bimla Devi Verma in 12 equal monthly installments. First such installment shall be paid on or before 05.12.2009. Each subsequent installment shall be paid on or before 5th day of each subsequent month. Money on account of all these installment shall be deposited by them in the bank account of Smt.Bimla Devi Verma bearing No.55007220294, State Bank of Patiala, Kalkaji Branch, New Delhi."*

5. Admittedly, Rs.7.00 lac only was paid by the appellant to the respondent, hence conditional leave to defend was granted by the learned Trial Court to the appellant to contest this suit on his depositing an

amount of Rs.34.00 lac. The relevant portion of the order dated 28.03.2019 of the learned Trial Court is as under:-

> *"5. It is important to note that there was settlement between the parties in respect of this case in complaint cases filed by plaintiff. The said settlement was in the Mediation Center in Tis Hazari Court on 30.09.2009 fully and finally for the sum of Rs. 43 lacs. The said settlement was in respect of various cases and the present suit was to be withdrawn on its next date of hearing. The said settlement also recorded that in case of two consecutive defaults in the payment of Rs.43 lacs the whole agreement was to become null and void. Rs. 5 lacs was to be paid on 05.11.2009 and balance of Rs. 38 lacs was to be paid in twelve monthly installments starting from on or before 05.12,2009. It is admitted case that said payment was not paid in full and only sum of Rs. 7 lacs was paid which though initially was denied by the plaintiff in the suit but was subsequently admitted as appears from the order sheet dated 24.07.2014 and 08.09.2014.*
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> *6. Keeping in view the aforesaid material contention raised as to the limitation, issuance of cheque of Rs.. 74 lacs from the account of AAA Handcrafts Overseas as detailed above, issue as to the liability upto extent of Rs. 74 lacs i.e. pertaining to the cheque amount arises which requires trial but keeping in view payment of Rs. 41 lacs by way of alleged cheque by plaintiff to the defendant, I deem it proper to seek deposit of a sum of Rs. 34 lacs by way of FDR on record as Rs. 7 lacs stands paid admittedly after the aforesaid mediation settlement. Defendant is accordingly granted conditional leave to defend the suit subject to deposit of sum of Rs. 34 lacs by way of FDR within four weeks with advance dopy of the written statement to the opposite counsel. Application for leave to defend stands allowed accordingly."*

6. The appellant challenged the order dated 28.03.2019 in Civil Miscellaneous (Main) No.*880/2019* before this Court but such petition was also dismissed by this Court vide an order dated 28.05.2019 which read as under:-

> *"6. On the facts of the present case, the payment of ₹ 41 lakhs, by the respondent to the petitioner, was by cheque. The settlement of disputes between the parties on 30.09.2009 also contemplated payment of the sum of ₹43 lakhs by the petitioner to the respondent. In these circumstances, the discretion exercised by the Trial Court to require deposit of ₹34 lakhs (out of the claim of ₹85 lakhs) cannot be said to be unreasonable or perverse. The condition imposed accords with the law laid down in paragraph 17.4 of IDBI (supra), applicable to cases where the defence is plausible, but improbable.*
> *7. The judgment in Raj Duggal (supra) is also not of much assistance to the petitioner. Paragraph 3 of that judgment, on which learned counsel for the petitioner has sought to rely, lays down that judgment ought not to be entered where a triable defence of fact or law is raised. The impugned judgment in the present case does not decline leave to defend, but imposes a condition for the same. In fact, the final order of*

the Court in Raj Duggal(supra) also granted conditional leave to defend.
8. In the facts and circumstances aforesaid, the petitioner has not made out a case for exercise of jurisdiction of this Court under Article 227 of the Constitution. The petition is, therefore, dismissed."

7. Despite dismissal of the CM(M) No.*880/2019* the appellant did not deposit the required amount with learned Trial Court, hence per impugned judgment dated 16.08.2019, the suit of the respondent was decreed. The relevant portion of the impugned judgment notes:-

"7. Counsel for the plaintiff submitted that in view of noncompliance of the conditional order for leave to defend, suit is liable to be decreed for the amount of Rs. 74 Lakhs pertaining to two cheques with further interest @ 12 % per annum to the tune of Rs. 11 Lakhs as claimed.
8. Usually, the order in case of non-compliance of the conditional order is passed for the amount pertaining to the cheques issued towards liability. But certain developments in this case are important to be noted as are duly recorded in the order-sheets including the conduct of the plaintiff where plaintiff had denied receipt of Rs. 7 Lakhs on 24.07.2014 but his counsel on 08.09.2014 and admitted the mistake and filed the application for bringing on record the unconditional apology. The mediation settlement dated 30.09.2009 was to become void on two consecutive defaults and was noted by the Hon'ble High Court of Delhi in the order sheet dated 04.04.2014 while restoring the suit.
9. Keeping in view the developments in this case as noted above, the two cheques of Rs. 74 Lakhs having been issued from the account of AAA Handicrafts against a sum of Rs. 44 Lakhs between January 2005 to February, 2005 received by cheque and remaining Rs. 33 Lakhs received in cash, I deem it proper to decree the suit for a sum of Rs. 74 Lakhs only with interest @ 8 % per annum from the date of decree till realization with cost of the suit as per rules.
10. No interest as claimed till filing of the suit and for pendentelite period is being granted in peculiar facts and circumstances of this case where there was settlement in mediation about withdrawal of this case against payment of Rs.43 Lakhs though it included settlement in respect of the case(s) filed against plaintiff also amongst some other complaint cases. Decree-sheet be prepared accordingly. File be consigned to Record-Room."

8. In this appeal, the appellant once again is trying to raise issues raised by him in his application for leave to defend and consequently in CM (M) No.*880/2019.* The appellant cannot be allowed to re-agitate same issues again. All that the appellant could have done in these circumstances was to find solace in Order XXXVII Rule (3) (6) (b) CPC

by alleging what prevented him to deposit Rs.34.00 lac in time. Order XXXVII Rule *(3) (6) (b)* CPC notes:-

> *"Order XXXVII Summary Procedure :-*
> *(3) Procedure for the appearance of defendant:--*
> *(1) to (5) xxxx xxxx*
> *(6) At the hearing of such summons for judgment :-*
> *(a) xxx*
> *(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith."*

9. Thus, in this appeal, the appellant could have only pleaded the circumstances which debarred him to deposit Rs.34.00 lac, as directed vide order dated 28.03.2019 of granting conditional leave to defend to him, lest there was no other alternative with the learned Trial Court except to decree the suit, which rightly has been done so vide the impugned judgment. The only other contention raised is the respondent did not file any proof of encashment of cheques stated in paragraph Nos.*5* & *11* of the plaint. Such plea also ought to have been raised in the application for leave to defend. It cannot be raised now.

10. There is no other ground to entertain the appeal. The appeal, therefore, is dismissed. The pending application, if any, also stands dismissed. No order as to costs.

YOGESH KHANNA, J.

NOVEMBER 18, 2019
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