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

+ **RFA(OS) 50/2019 & C.M.23501/2019 (stay)**

+ **RFA(OS) 51/2019 & C.M.23758/2019 (stay) & 23762/2019 (delay)**

KEWAL KRISHAN KUMAR

..... Appellant

Through: Mr.Abhishek Sharma, Mr. Narendera
M. Sharma and Mr. Aditya Singh,
Advocates

versus

SAMEER BHUTANI

RAJEEV KUMAR BATRA

..... Respondents

Through: None

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

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17.07.2019

1. These appeals are directed against a common judgment dated 24th January, 2019, passed by the learned Single Judge in two summary suits [CS(OS) 462/2018 and CS(OS) 463/2018] instituted by the respondents/plaintiffs whereunder the leave to defend applications filed by the appellant/defendant have been dismissed. Resultantly, a decree has been granted in favour of the respondents/plaintiff in CS(OS) 462/2018 (subject matter of RFA 50/2019) and CS(OS) 463/2018 (subject matter of RFA 51/2019).

2. For considering the factual matrix, we shall refer to the facts of

CS(OS) 462/2018, that have been taken into consideration in the impugned judgment. The appellant is the defendant in both the suits and by and large, the pleadings in the said suits are similar. However, there is a variation in the amounts claimed by the respondents/plaintiffs from the appellant.

3. The facts pleaded by the respondent/defendant in the plaint have been summarized in para 4 of the impugned judgment, as extracted hereinbelow: -

“4. The plaintiff has instituted the suit pleading that (i) the plaintiff is an exporter of home textile (the plaintiff in CS(OS) No.463/2018 is in the business of printing and paper conversion as well as export of stationary); (ii) the defendant is a renowned businessman and is on the Board of Directors of many renowned companies such as Shakti Bhog Foods Ltd. (SBFL), Bikano Foods Pvt. Ltd., Sumesh Financiers Pvt. Ltd. etc.; (iii) sometimes in August, 2014 (April, 2015 in CS(OS) No.463/2018), the defendant approached the plaintiff and represented that he was in dire need of funds and sought a loan on friendly basis for a period of three years from the plaintiff; (iv) the plaintiff, on account of past acquaintance with the defendant and because of the illustrious background of the defendant agreed to loan a sum of Rs.50,00,000/- (Rs.2,00,00,000/- in CS(OS) No.463/2018) for a period of three years at an interest rate of 15% per annum and on 2nd September, 2014 (10th April, 2015 in CS(OS) No.463/2018) forwarded a loan of Rs.50,00,000/- to the defendant vide RTGS; (v) in October, 2014, the defendant again sought a loan of Rs.1,00,00,000/- from the plaintiff at the same rate of interest and to which the plaintiff agreed and the said amount of Rs.1,00,00,000/- also was loaned on 15th October, 2014 vide RTGS on the same terms; (vi) similarly on 23rd December, 2014, a further amount of Rs.1,00,00,000/- was loaned to the defendant via RTGS

transfer; (vii) thus the plaintiff loaned a total sum of Rs.2,50,00,000/- to the defendant; (viii) the defendant immediately started paying interest at the agreed rate of interest and continued to promptly pay the same till March, 2016; (ix) after March, 2016, the defendant started defaulting in payment of interest, compelling the plaintiff to repeatedly call upon the defendant to return the entire loan with interest; (x) by the end of April, 2018, a sum of Rs.78,12,500/- (Rs.60,00,000/- in CS(OS) 463/2018) had accumulated on account of interest alone besides the principal amount of Rs.2,50,00,000/-; (xi) on 30th April, 2018, the defendant drew five cheques in the sum of Rs.2,50,00,000/- in favour of the plaintiff in part payment of his total liability of Rs.3,28,12,500/-; (xii) however all the aforesaid cheques were returned dishonoured for the reason, either of the funds in the account of the defendant being 'Insufficient' or the 'Drawer's Signatures Differing'; (xiii) a notice of demand was got served on the defendant but to which no reply was received from the defendant; and, (xiv) a complaint under Section 200 of the Code of Criminal Procedure, 1973 (Cr.P.C) of commission of offence under the Negotiable Instruments Act, 1881 has been filed by the plaintiff against the defendant. Hence, the suit for recovery of principal amount of Rs.2,50,00,000/- with interest at 15% per annum of Rs.90,62,500/-. The plaintiff also claims pendente lite and future interest at 15% per annum. The claim in CS(OS) No.463/2018 is for the principal sum of Rs.2,00,00,000/- and for pre-suit interest at 15% per annum of Rs.72,50,000/-."

4. The appellant entered appearance in the suit and filed an application for seeking leave to defend. The sum and substance of the pleas taken by the appellant for raising triable issues and grant of leave to defend have been

recorded in para 5 of the impugned judgment as below: -

“5. The defendant seeks leave to defend pleading that, (a) the plaintiffs in the two suits had approached the defendant, who was the Managing Director of SBFL and represented that they wanted to try their hand in the business of foods and grains and showed interest to purchase rice grain in bulk quantity, to supply the same in the market at wholesale rates; (b) however, during the discussions, it was pointed out by the defendant to the plaintiffs that since the plaintiffs did not have necessary license / permissions to lift the goods from the market in such high quantity, the plaintiffs could not take up the business of supplying the goods in the market at wholesale rates; (c) after some time, the plaintiffs reverted to the defendant and requested the defendant to do forward trading for and on behalf of plaintiffs whereby the plaintiffs would deposit an amount with the defendant for purchase of rice grain and request the defendant to immediately transfer the said amount in the account of SBFL for purchase of rice grain in bulk from the vendors / farmers, as and when the plaintiffs instructed; (d) the defendant agreed to the aforesaid proposal of the plaintiffs and the plaintiffs assured that in the meantime they would make best efforts to obtain necessary license / permission for trading the rice grain in the market; (e) the plaintiffs, on account of forward trading, transferred the principal amount in each of the suits, in terms of the understanding with the defendant; (f) the defendant / SBFL assured quarterly payment of nominal amount towards return to the plaintiffs on the amounts so paid by the plaintiffs, till instructions for purchase of rice grain were issued by the plaintiffs to defendant / SBFL; (g) this understanding between the parties is evident from the fact that “SBFL immediately on receipt of the aforesaid

amounts which were disbursed on various dates waged some amount towards nominal returns to the plaintiff”; (h) there was neither any written agreement between the parties nor was the rate of interest fixed; (i) the defendant issued undated security cheques in the sum of Rs.2,50,00,000/- to the plaintiffs in each of the suits stating that if the plaintiffs did not issue any instructions for purchase of rice grain, the said cheques for refund of the amounts received by the plaintiffs will be returned without any interest; (j) copy of statement of account of the defendant reflecting the remittance of funds to SBFL and receipt of amount from SBFL towards nominal returns which were ultimately disbursed to the plaintiffs are annexed to the leave to defend applications; (k) the plaintiffs failed to place any order for purchase of rice grain for nearly one and a half years, making the defendant / SBFL bear the unwarranted return which was serviced to the plaintiffs quarterly; (l) the plaintiffs, in the first quarter of the year 2017, instructed the defendant to purchase goods for a sum of Rs.2,50,00,000/- (Rs.2,00,00,000/- in CS(OS) No.463/2018) and assured to lift the rice grain in due course; (m) the defendant accordingly forwarded the said instruction for purchase of rice grain to SBFL, in terms of arrangement between the parties, and SBFL, without holding up the order of the plaintiffs, purchased rice grain worth Rs.2,50,00,000/- from the vendors / farmers; (n) the plaintiffs however did not turn up or approach the defendant to lift the rice grain which was so purchased by the defendant / SBFL at the instance of the plaintiffs; (o) considering that the rice grain was perishable and could not be stored for long, the defendant made several attempts to meet the plaintiffs but the plaintiffs avoided to do so and on the contrary continued to assure that they were likely to get permissions to commence the

business and would lift the rice grain shortly; (p) on account of failure of the plaintiffs to lift the goods, SBFL sold the goods in scrap in order to mitigate the losses and got the warehouse space vacated; (q) to the shock of the defendant, the plaintiffs presented the cheques which were given by way of security and were axiomatically returned to the plaintiffs; (r) on learning from the banker that the cheques had been presented, the defendant requested the plaintiffs to return the cheques but the plaintiffs being well aware that SBFL had gone into liquidation, threatened the defendant to pay the amounts; (s) the plaintiffs, without holding any necessary license / permission, insisted on the defendant indulging in forward trading on the assurance that the plaintiffs would obtain such permissions / license shortly; (t) the plaintiff in CS(OS) 462/2018 has wrongly pleaded receipt of Rs.2,50,000/- on 30th January, 2015 when in fact the payment made on that date by the defendant to the plaintiff was of Rs.12,50,000/-; (u) the plaintiffs have not sent a single demand to the defendant for payment of interest; (v) the plaintiffs have misused the cheques given by way of security; (w) in fact, it is the defendant and SBFL who were entitled to claim damages from the plaintiffs for the loss suffered on behalf of the plaintiffs; and, (x) the suits are bad for non-joinder of SBFL.”

5. Besides, the aforesaid pleas taken by the appellant in the leave to defend application filed by him in CS(OS) 462/2018, he took an additional plea in CS(OS) 463/2018 to the effect that he had issued cheques for a sum of Rs.2.50 crores in favour of respondent/plaintiff by way of security instead of for a sum of Rs.2 crores, which amount he had actually received from the respondent since the latter had insisted that the said cheque would be

necessary for purposes of making entries in his Books of Accounts.

6. At the time of addressing arguments before the learned Single Judge, learned counsel for the appellant had stated that the respondents have elected to institute summary suits against his client knowing very well that Shakti Bhog Foods Limited (*hereinafter referred to as 'SBFL'*), a company of which the appellant was the Managing Director, had gone into liquidation; that the suits are therefore bad for non-joinder of SBFL, who is a necessary and proper party in the proceedings and that the cheques handed over by the appellant to the respondents/plaintiffs totalling a sum of Rs.2.50 crores in CS(OS) 462/2018 and a sum of Rs.2 crores in CS(OS) 463/2018, which form the basis of the summary suits, were offered by the appellant only as 'security' with an oral understanding between the parties that if the respondents fail to issue any order for purchase of rice grain and the monies given by them to the appellant/SBFL is not utilized for the said purpose, then they would be entitled to fill in a date on the cheques and present them for receiving back the monies that they had paid. Pertinently, the respondents/plaintiffs had proceeded to present the cheques handed over to them by the appellant for encashment, but all the said cheques were dishonoured with the remarks, '*insufficient fund*'. It was contended that though the aforesaid understanding between the parties was oral, the very fact that the appellant had transferred the monies received by him from the respondents/plaintiffs into the account of SBFL, bears out the stand taken in the leave to defend application that there was a verbal understanding between the parties as recorded above.

7. After hearing the arguments advanced by learned counsel for the parties, the learned Single Judge rejected the leave to defend applications

filed by the appellant for the following reasons: -

“A. No particulars have been given of the legal constraint of the plaintiffs, if desirous of purchasing large quantities of rice grain for subsequently selling the same, to do so without involving defendant and/or SBFL.

B. Similarly, no particulars have been given of entitlement of SBFL to do so. It has not been pleaded, what did SBFL have, to be qualified to do so, which the plaintiffs did not have.

C. No dates have been given of (i) when the plaintiffs instructed the defendant / SBFL to purchase rice grain; (ii) when such rice grain was procured by SBFL, at what price and from whom; (iii) when SBFL sold the said rice grain, for how much and to whom; and, (iv) what loss if any has been suffered by SBFL on account of stress sale of the said rice grain.

D. Had there been any semblance of truth in the pleas on which leave to defend is sought, it would not have been difficult for the defendant, who has not disputed to be the Managing Director of SBFL, though now in liquidation, to furnish the said particulars. In fact, the date on which SBFL went in liquidation has also not been pleaded.

E. Without the said particulars being pleaded, it has but to be held that there is no chance of the defendant succeeding, even if was to be given an opportunity to lead evidence. Even if the suit had not been under Order XXXVII, in the absence of such pleas which under the law the defendant was required to incorporate in his pleadings, the plaintiffs would be entitled to a decree forthwith under Order XV Rule 1 of the CPC.

F. Without the said particulars, the story set up is indeed a cock and bull story.

G. Else, the defendant has not disputed receipt of

monies from the plaintiffs and / or the rate of interest agreed which the defendant had agreed to pay to the plaintiffs. Though the defendant has pleaded that reasonable return was agreed to be given to the plaintiffs on the amounts paid by the plaintiffs to the defendant but the defendant has shied away from disclosing the rate at which such reasonable return was agreed to be given.

H. It is inconceivable that had there been any semblance of truth in the version of the defendant, there would have been no reflection thereof in the income tax returns and / or books of accounts, which not only the defendant but SBFL also is statutorily required to maintain. The defendant again, has shied from making a statement in the applications for leave to defend, as to how the amounts received from the plaintiffs were reflected in the income tax returns which the defendant can be presumed to be filing and/or in the books of accounts and balance sheet of SBFL. Though SBFL is not a party to the suits but the defendant in his capacity as Managing Director of SBFL was/is in a position to disclose all the said particulars specially since the monies were routed through the defendant.

I. It is unbelievable that the plaintiffs, if had wanted to trade in rice grain would have advanced monies therefor one and a half years before they are actually claimed to have so traded. The said version of the defendant is contrary to normal human conduct and is unbelievable.”

8. As a result, a decree was passed in favour of the respondent/plaintiff in CS(OS) 462/2018 for a sum of Rs.3,40,62,500/- alongwith the interest calculated at the rate of 10% *per annum* on Rs.2.50 crores, from the date of the institution of the suit till realization. Similarly, a decree was passed in favour of the respondent/plaintiff in CS(OS) 463/2018 for a sum of

Rs.2,72,50,000/- alongwith interest calculated at the rate of 10% *per annum* on the sum of Rs.2 crores from the date of institution of the suit, till realization. Besides the aforesaid amount, the impugned judgment has directed the appellant to pay costs of the suit to the respondents/plaintiffs alongwith professional fee assessed at Rs.1.50 lacs.

9. Aggrieved by the said judgment, the present appeals have been filed. Mr. Abhishek Sharma, learned counsel for the appellant/defendant submits that the learned Single Judge has erred in dismissing the leave to defend applications though triable issues have been raised in the application and an opportunity ought to have been granted to the parties to lead evidence; that the learned Single Judge ought to have ensured the presence of SBFL in the suit proceedings as the said company is a necessary and proper party inasmuch as the appellant had made over the payment received from the respondents, to SBFL in terms of the verbal arrangement arrived at between the parties; that it is an admitted case of the appellant that there was no agreement between the parties and the transaction between them was not of a loan extended by the respondents to the appellant, but was in the nature of an investment against return; that undated cheques were handed over by the appellant to both the respondents towards ‘security’ and not towards any ‘liability’ with a clear understanding that the same would not be presented for encashment, but be returned to him.

10. Before considering the grounds urged by learned counsel for the appellant to assail the impugned judgment, a quick glance at the framework within which a leave to defend application must be examined by the Court in a summary suit instituted under Order XXVII of the C.P.C.. In IDBI Trusteeship Services Limited vs. Hubtown Limited, (2017) 1 SCC 568, the

Supreme Court has laid down the following parameters for a court to exercise its discretion under Order XXXVII of the C.P.C. to grant or refuse leave to defend or to grant conditional or unconditional leave to defend in a summary suit:-

“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.”

11. Keeping in mind the above criteria, we have considered the submissions made by learned counsel for the appellant, examined the pleadings in the leave to defend applications and carefully perused the findings returned by the learned Single Judge and are of the view that the impugned judgment does not suffer from any illegality, perversity or infirmity for interference. The defence taken by the appellant in the leave to defend applications is found to be highly ambiguous, bereft of any material particulars and unsubstantiated by supporting documents. The appellant has failed to give material particulars relating to the purported legal constraints under which the respondents had proposed to involve him on a verbal understanding that they were inclined to purchase large quantities of rice grain for selling the same and making profit. There is not a whisper in the leave to defend application to explain as to why could the respondents not have undertaken the aforesaid exercise without involving SBFL, a company of which the appellant was the Managing Director. The leave to defend applications do not state the date on which the respondents had allegedly instructed the appellant to purchase rice grain for them, the date when the rice grain was actually procured for the respondents by SBFL, the party from whom the purchase was made as also the purchase price. There is no mention of the date when SBFL had sold the rice grain, the name of the

purchaser, the rate at which it was sold and the extent of loss, if any, that was suffered by SBFL on selling rice grain at distressed rates.

12. In the absence of the aforesaid material particulars, the appellant cannot be heard to state that triable issues have been raised by him, which would entitle him to grant of leave to defend. It is not disputed by the appellant that he had received monies from the respondents. The plea taken in the leave to defend applicant is that immediately on receiving amounts from the respondents, the appellant had transferred the same into the account of SBFL. If that was so, then surely, the appellant, who is an Income Tax Assessee, would have reflected the said transactions in his Income Tax Returns for the relevant years and similarly, on his transferring amounts received from the respondents into the account of SBFL, the said company would also have reflected it in the Books of Accounts required to be maintained by it statutorily.

13. In the above circumstances, we are inclined to agree with the observation made by the learned Single Judge that even though SBFL was not impleaded as a party in the suits, the appellant being the Managing Director of the company was certainly in a position to disclose the aforesaid particulars and the manner in which monies were routed through him to the company and the purpose for which it was utilized. In the absence of any documents, particularly, the extracts of Books of Accounts maintained by the appellant/SBFL in due course that would have reflected the transactions in question between the parties, the pleas taken by the appellant for seeking leave to defend are found to be specious and untenable. We are therefore of the opinion that the leave to defend applications have been rightly rejected by learned Single Judge.

14. Despite the aforesaid position, before parting with the case, we have enquired from learned counsel for the appellant as to whether his client is ready and willing to deposit the decretal amount or at least the principal amount decreed in favour of the respondents in both the suits, for us to consider granting him conditional leave to defend. Learned counsel had first sought a passover to obtain instructions from his client and later on, appeared and stated that the appellant is not in a position to deposit any amount in Court.

15. In view of the aforesaid discussion and the facts and circumstances of the present case, the impugned judgment is upheld and both the appeals are dismissed *in limine* as meritless alongwith all the pending applications.

HIMA KOHLI, J

ASHA MENON, J

JULY 17, 2019

s/mk/s