

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

% **Date of decision: 24th January, 2019.**

+ **CS(OS) 462/2018, IA No.16387/2018 (u/O XXXVII R-3(4) read with S-151 CPC) & IA No.472/2019 (u/O XXXVII R-3(5) CPC)**

SAMEER BHUTANI **Plaintiff**
Through: Mr. Abhijat, Mr. Rishabh Bansal &
Mr. Ajay Arjun Sharma, Advs.

Versus

KEWAL KRISHAN KUMAR **Defendant**
Through: Mr. Narendera M. Sharma, Ms. Prachi
Gupta & Mr. Abhishek Sharma, Advs.

AND

+ **CS(OS) 463/2018, IA No.16386/2018(u/O XXXVII R-3(4) read with S-151 CPC) & IA No.471/2019 (u/O XXXVII R-3(5) CPC)**

RAJEEV KUMAR BATRA **Plaintiff**
Through: Mr. Abhijat, Mr. Rishabh Bansal &
Mr. Ajay Arjun Sharma, Advs.

Versus

KEWAL KRISHAN KUMAR **Defendant**
Through: Mr. Narendera M. Sharma, Ms. Prachi
Gupta & Mr. Abhishek Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The applications of the sole defendant in both the suits under Order XXXVII of the Code of Civil Procedure, 1908 (CPC), for recovery of

Rs.2,50,00,000/- and for recovery of Rs.2,00,00,000/- respectively, are for consideration.

2. The counsel for the plaintiffs and the counsel for the defendant state that the pleadings in both the suits and in the applications for leave to defend in both suits are identical and have argued the two suits as one only. Thus this order is in the context of facts in CS(OS) No.462/2018 but will also apply to CS(OS) No.463/2018 with the variations of the amount in claim in the two suits.

3. The counsel for the plaintiffs and the counsel for the defendant have been heard.

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/-.

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 CS(OS) 462/2018 & CS(OS) 463/2018

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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. The defendant, in the leave to defend application in CS(OS) No.463/2018, in addition has pleaded to have issued cheques for Rs.2,50,00,000/- by way of security instead of for Rs.2,00,00,000/- which was in fact received from the plaintiff, on the insistence of the plaintiff for the purpose of entries in account books of the plaintiff.

6. The leave to defend applications filed by the defendant came up first before this Court on 14th January, 2019 when, while issuing notice thereof to

the plaintiffs for today, a direction was also issued to the defendant to remain present in person today along with all documents which the defendant may have in support of his pleas in the applications for leave to defend.

7. The counsel for the defendant states that the defendant is unwell and has undergone a surgery and has thus not come to the Court. It is further stated that the documents have been filed as annexure to the leave to defend applications. However, what has been filed as annexure to the leave to defend applications is only the statement of account of the defendant with Axis Bank to show transfer by the defendant of the monies received from the plaintiffs on the same day to SBFL.

8. The counsel for the defendant, besides what is already stated in the applications for leave to defend, argues that, (i) these suits have been filed because SBFL is in liquidation; (ii) the suits are bad for non-joinder of SBFL; (iii) the accounts between the parties cannot be settled in the absence of SBFL; and, (iv) the plaintiff in CS(OS) 462/2018 also has now admitted that on 30th January, 2015, a sum of Rs.12,50,000/- instead of Rs.2,50,000/- as pleaded in the plaint was received from the defendant; however, the plaint in CS(OS) No.462/2018 has not been amended and in pursuance to the aforesaid change, the summons for judgment also have not been amended.

9. The counsel for the plaintiffs admits the mistake and states that the figure of Rs.2,50,000/- instead of Rs.12,50,000/- received from the defendant on 30th January, 2015 was mistakenly typed in the plaint in CS(OS) 462/2018.

10. The counsel for the defendant has further argued that, (a) the dishonoured cheques, on the basis of which the suits under Order XXXVII of

the CPC have been filed, were given only as security, the verbal understanding being that if the plaintiffs did not issue any order for purchase of rice grain and the monies given by the plaintiffs to defendant / SBFL not used for the said purpose, the plaintiffs could fill in the date of the cheques and present the cheques for refund of the monies paid; it is highlighted that the dishonoured cheques, on the basis of which these suits under Order XXXVII have been filed, are filed in type save the dates which have been filled up in hand; (b) the said understanding is evident from the statement of the account of the defendant in which monies vide RTGS were received from the plaintiffs and which statements unequivocally show that the defendant did not retain the monies received in his bank account from the plaintiffs, for a single day and immediately transferred the same to SBFL; and, (c) without opportunity to lead evidence being granted, it cannot be adjudicated whether the verbal version of the plaintiffs is correct or the verbal version of the defendant is correct.

11. Per contra, the counsel for the plaintiffs argues, that (i) the only document produced by the defendant along with the leave to defend application is the statement of his account with Axis Bank and which document is self-serving; (ii) merely because the defendant immediately transferred the monies received from the plaintiffs to SBFL, does not show any understanding or verbal agreement of forward trading; (iii) no document to show such forwarding trading has been filed; (iv) no demand was ever made by the defendant on the plaintiffs for return of the cheques claimed to have been given by way of security; (v) there is no correspondence in writing between the parties; (vi) the defendant has set up a cock and bull story,

without relying on a single document in support thereof; and, (vii) there is no likelihood of the defendant succeeding, even if leave to defend is granted.

12. Though this Court vide order dated 14th January, 2019 gave an opportunity to the defendant to file additional documents, but still no documents have been produced.

13. The counsel for the plaintiffs relies on my dicta in ***Puneet Kumar Agarwal Vs. Imaginations Agri Exports*** 2013 SCC OnLine Del 701 dealing with an application for leave to defend and holding that if a negotiable instrument is given in blank, there is implicit authority in law to the holder thereof to fill up the same. It is argued that thus, the mere fact that the dates of the cheques has been filled in hand, is of no consequence.

14. The counsel for the plaintiffs has further argued that the defendant never demanded return of cheques from the plaintiffs nor issued instructions to his banker for stopping payment thereof.

15. The counsel for the defendant argues that since according to the plaintiffs also the loan was verbal and there is nothing to show the rate of interest settled or as to for how much time/period the loan was given, there is no option but to allow parties to lead evidence for determination of, which of the two oral versions is correct.

16. I have considered the contentions aforesaid.

17. I have enquired from the counsel for the defendant, that if according to the defendant the oral understanding arrived at between the parties was that the defendant, immediately on receipt of monies from the plaintiff will

transfer the same to SBFL, why could the monies from the plaintiffs have not been directly received by SBFL.

18. The counsel for the defendant states that the plaintiffs “could not give to SBFL because the plaintiffs trusted the defendant more than they trusted SBFL and that is why the monies were not directly given by the plaintiffs to SBFL.”

19. In my view, the response aforesaid of the counsel for the defendant is enough to hold the defendant to be not entitled to leave to defend. Once the defendant himself admits that the reason for the monies being transferred by the plaintiffs in the personal account of the defendant, when according to the defendant the monies were for the benefit of SBFL, was that the plaintiffs trusted the defendant more than they trusted SBFL, there can be no iota of doubt that it is the defendant who is liable to refund to the plaintiffs the monies admittedly received from the plaintiffs and the plea of the defendant in the applications for leave to defend the suits, of the suits being bad for non-joinder of SBFL or SBFL being a necessary and proper party to the suit loses its steam.

20. Else, I find the leave to defend applications of the defendant to be falling in para 17.5 as under:

“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.”

of ***IDBI Trusteeship Services Limited Vs. Hubtown Limited*** (2017) 1 SCC 568, 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.
- J. I have in ***Raj Narain Vs. HBN Housing Finance Ltd.*** 2013 SCC OnLine Del 3847 and ***Renu Aggarwal Vs. Baldev Raj Sachdeva*** 2018 SCC OnLine Del 12299 (SCL(C) Nos.30541-30542/2018 preferred whereagainst was dismissed on 30th November, 2018) held that “if such unsubstantiated and vague pleas were to be entitled to grant of leave to defend, I fail to fathom as to in which cases, leave can be refused and if such interpretation is to be taken, the same would render the provisions of Order XXXVII of the CPC nugatory.” It was further held that if on such pleas leave to defend were to be granted, the same would not serve the purpose for which Order XXXVII incorporated in the CPC, to provide summary procedure for disposal of some kind of suits and would result in leave to defend being granted qua all suits filed under Order XXXVII of the CPC, making the procedure for disposal thereof more elaborate rather than summary. Similarly, in ***Sasumorov Enterprises Pvt. Ltd. Vs. Odeon Builders Pvt. Ltd.*** 2018 SCC OnLine Del 12509 it was held that once the defendant does not dispute the transaction, amount due whereunder is claimed by the plaintiff, it is incumbent on the defendant to produce its statement of account to disprove the claim of the plaintiff and to

show the status of the said transactions in the books of the defendant statutorily required to be maintained. It was further held that the defendant, without producing the same, cannot be heard to contend that the statement of account produced by plaintiff is contrary to the books of account of the defendant and the silence of the defendant in this regard entitles the Court to, while considering the application for leave to defend, draw adverse inference against the defendant. It was yet further held that a defendant cannot be permitted to convert a summary suit to an ordinary suit, by mere denial and by contending that the onus is on the plaintiff to prove; Order XXXVII of the CPC, if so interpreted, will defeat the legislative intent and will make the procedure for disposal of suits of the class intended to be summarily decided, longer rather than shorter. It was yet further held that Order XXXVII is concerned with commercial suits, claim wherein is based on documents and a mere denial of the document cannot entitle the defendant to leave to defend; the defendant, in the leave to defend application, is required to plead all surrounding circumstances concerning the document, to create a doubt as to authenticity of the document and if the defendant does not plead so and/or does not produce documents which in the ordinary course of the transaction ought to be with the defendant, leave to defend has to be refused. To the same effect is *Versatile Commotrade Private Limited Vs. Balraj* 2019 SCC OnLine Del 6558 holding that a defendant in an Order XXXVII suit cannot be entitled to leave to defend,

merely by taking a plea and without giving particulars and filing documents as would logically be available in support of the said plea and if fails to do so, cannot be entitled to leave to defend. It was reiterated that if leave to defend suits under Order XXXVII of the CPC were to be granted merely by taking a plea, even if does not inspire confidence owing to lack of particulars and documents, there would be no case in which leave would not be granted owing to the drafting skills of the Advocates for the defendants and disposal of the suits under Order XXXVII of the CPC, instead of being summary, would be lengthier, for having additional issuance of summons for appearance, summons for judgment and filing of application for leave to defend and consideration thereof.

21. Resultantly, the applications for leave to defend are dismissed.
22. The claim of the plaintiffs for pre-suit interest at 15% per annum in terms of the contract between the parties has to be upheld in the face of the defendant shying away from disclosing the rate at which reasonable return was agreed to be given to the plaintiffs.
23. The plaintiffs are thus found entitled to pre-suit interest at the contractual rate claimed.
24. As far as *pendente lite* and future interest is concerned, it is deemed appropriate to award interest at the rate of 10% per annum.
25. Axiomatically, a decree is passed (i) in favour of the plaintiff and against the defendant in CS(OS) No.462/2018 for recovery of Rs.3,40,62,500/- with interest at 10% per annum on Rs.2,50,00,000/- with CS(OS) 462/2018 & CS(OS) 463/2018

effect from date of institution of the suit till realization; and, (ii) in favour of the plaintiff in CS(OS) No.463/2018 and against the defendant therein for recovery of Rs.2,72,50,000/- with interest at 10% per annum on the sum of Rs.2,00,00,000/- from the date of institution of the suit till realization.

26. The plaintiff in both the suits will also be entitled to costs of the suit with professional fee assessed at Rs.1,50,000/- per suit.

Decree sheets be drawn up.

JANUARY 24, 2019
'gsr/bs'

RAJIV SAHAI ENDLAW, J.



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