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

% ***Date of Judgment: 30th April, 2019***

+ **RFA(OS) 82/2018 & C.M.49857/2018**

DR NIAZ AHMED

..... Appellant

Through: Mr.Sanjay Kr.Chhetry and Mr.Shiv
B.Chhetry, Advocates

versus

M/S INDCAP ENTERPRISES ,LLP

..... Respondent

Through: Mr.P.S.Bindra, Mr.Vinayak Marwah,
Mr.G.S.Patwalia and Mr.Bhubneshwar
Tyagi, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. This is a regular first appeal filed under Section 96 of the Code of Civil Procedure (CPC) read with Order XLI CPC read with Section 10 of the Delhi High Court Rules. The prayer made in this appeal is to set aside the judgment and decree dated 13.09.2018 and order dated 03.10.2018 passed in a suit filed by the respondent under the provisions of order XXXVII of the CPC.

2. Learned counsel for the appellant submits that the parties had entered into an agreement dated 29.10.2007 where, besides the appellant, his wife, Mr. Arindom Ganguly and Integrity Geosciences Private Limited were also parties. The appellant, his wife and the Company had sought investment of Rs.3,24,54,000/- from the respondent, to be invested with the appellant and

his Company. It is submitted that although reliance is placed by the respondent on agreements dated 12.04.2010, 31.03.2011 and 23.08.2012, however, the agreement dated 23.08.2012 was signed by the appellant under coercion, pressure, undue influence, force and threat of filing criminal proceedings. It is also contended that the learned Single Judge has dismissed the application seeking leave to defend and passed a decree without taking note of the settled law that the appellant-defendant raised triable issues and thus, the appellant was entitled to unconditional leave to defend. It is further submitted that the amount was invested with the Company and thus, the appellant alone could not have been held responsible for making the payments. Accordingly, the defence raised by the appellant in the application seeking leave to defend is reasonable and plausible and the appellant was entitled to unconditional leave. It is contended that in fact, the appellant has no liability at all. Moreover, the name of the respondent firm was previously known as Ind Cap Finance Services Pvt. Ltd. Subsequently, as the name changed, this too would be a triable issue. It is further submitted that it is only upon evidence would the appellant be able to prove his case and the trial could not have been cut short by rejecting the application seeking leave to defend. Learned counsel for the appellant has also contended that the recoveries which are sought to be made against the appellant are itself a form of extortion and thus, the relief claimed in this appeal should be allowed. Learned counsel submits that the appellant had sought quashing of the proceedings initiated by the respondent under the provisions of Section 138 of the Negotiable Instruments Act, being illegal and in furtherance to the acts of the respondent of coercion, undue influence and pressure, which would show that he had taken steps to move the State

machinery by filing such a petition. It is also the stand of the appellant that the issuance of legal notice by the respondent to the appellant would show that he was put under extreme pressure to pay, though no amount was due and payable by the appellant to the respondent.

3. Mr. Bindra, learned counsel appearing for the respondent submits that there is no infirmity in the order passed by the Single Judge. The appellant-defendant in the suit has failed to raise a plausible defence. The defence sought to be raised is not bonafide. It is sham and moonshine. It is further contended that the appellant was a signatory to the first agreement dated 29.10.2007, where the amount invested by the respondent to the tune of Rs.3,24,54,000/- stands duly admitted. The appellant was also a signatory to the second agreement dated 12.04.2010, pursuant to which while acknowledging the debt, 13 post-dated cheques amounting to Rs.3,24,54,000/- were handed over to the respondent, details of which are given below:

Sl. No.	Cheque No.	Cheque Amount
1.	320351	Rs.25,00,000/-
2.	320352	Rs.25,00,000/-
3.	320353	Rs.25,00,000/-
4.	320354	Rs.25,00,000/-
5.	320355	Rs.25,00,000/-
6.	320356	Rs.25,00,000/-
7.	320357	Rs.25,00,000/-
8.	320358	Rs.25,00,000/-
9.	320359	Rs.25,00,000/-
10.	320360	Rs.25,00,000/-
11.	320361	Rs.25,00,000/-
12.	320362	Rs.25,00,000/-
13.	320363	<u>Rs.24,54,000/-</u>
TOTAL		Rs.3,24,54,000/- .

4. Additionally, it is relevant that the aforesaid 13 cheques were given, post the signing of the second agreement. In fact, Rs.1 crore was paid by the appellant, which is reflected in the third agreement dated 31.03.2011, styled as Memorandum of Understanding (MOU). The sum of Rs. 1 crore was divided in two parts, viz. Rs. 50 lacs was paid to M/s. Indcap Financial Services Pvt. Ltd. & Rs. 50 lacs was paid to Ms. Sonia Chand. The payment was made by four cheques, two in favour of each. Since Rs. 1 Crore had been paid, the MOU reflected a debt of Rs. 2,24,54,000/-. Under the said MOU, 10 post dated cheques were handed over to the respondent and it was mentioned in the MOU that the amounts due would be honoured and in case of default, the appellant would be liable to pay interest @ 18% p.a. The details of the 10 post dated cheques as reflected in the MOU are as under:

Date	Chq. No.	Amount
30/07/2011	798300	25,00,000/-
30/07/2011	79299	25,00,000/-
30/08/2011	798302	25,00,000/-
30/08/2011	798301	25,00,000/-
30/09/2011	798307	25,00,000/-
30/09/2011	798306	25,00,000/-
30/10/2011	798308	25,00,000/-
30/10/2011	798309	25,00,000/-
30/11/2011	798310	24,00,000/-
30/11/2011	798312	54,000/-
Total		Rs. 2,24,54,000/-

5. Mr.Bindra contends that the appellant again failed to honour his commitments and except for the last cheque of Rs. 54,000/-, all the remaining 9 cheques were dishonoured with the remarks, “funds

insufficient”. A notice was accordingly issued by the respondent on 12.12.2011 demanding payment of Rs. 2.24 Crores and upon failure to make payment, the respondent filed proceedings under Section 138 of the NIA. During the pendency of the said proceedings, another Memorandum of Settlement was entered on 23.08.2012 by which the appellant undertook to clear the outstandings as per the following schedule.

Instalment	By (date)	Amount (in Rs.)
First	11.09.12	50,00,000/-
Second	11.01.13	50,00,000/-
Third	11.04.13	40,00,000/-
Fourth	11.07.13	40,00,000/-
Fifth and Final	11.10.13	44,00,000/-
	TOTAL	2, 24,00,000/-

6. Mr. Bindra points out that the schedule drawn up between the parties was also not completely honoured by the appellant and only first instalment of Rs. 50 Lacs was paid.

7. It is thus, the contention of the learned counsel for the respondent that the conduct of the appellant in his consistent acknowledgments in writing; acknowledgments having been acted upon; handing over post dated cheques; part payments having been made, can lead to only one conclusion that the appellant owed money to the respondent and admitted his liability and resultantly, the defence sought to be raised is completely sham and moonshine. He submits that the defence sought being raised by the appellant in this Court of coercion, pressure, undue influence and force is completely

bogus as no threat, coercion or force can last for a period of 8 years during which four agreements have been signed between the parties.

8. Mr. Bindra, learned counsel for the respondent further submits that though the appellant has extensively raised the defence of signing the agreements under extreme coercion, pressure, undue influence and force, and has reserved his right to take legal action against the respondent, in fact, no legal action has ever been initiated against the respondent.

9. It is also the stand of the respondent that his case is fully covered by a recent decision by the Apex Court in the case of ***IDBI Trusteeship Services Limited vs. Hubtown Limited*** 2017 (1) SCC 568, more particularly, reliance is placed on para 17, which is reproduced hereinbelow:

“17. Accordingly, the principles stated in para 8 of Mechelec case [Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case [Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698 : (1966) 68 Bom LR 36] , as follows:

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.”

10. We have heard learned counsel for the parties and considered their rival submissions.

11. The submission of learned counsel for the appellant can be summarised as under:

- (i) The amount was invested by the respondent with M/s. Integrity Geosciences Pvt. Ltd.
- (ii) The appellant is not liable to make any payment;
- (iii) The name of the respondent company has undergone a change

more than once;

- (iv) The agreement dated 23.08.2012 has been signed under coercion, pressure, undue influence and under threat of false cases being filed against the appellant;
- (v) The appellant had moved a petition under Section 482 Cr.P.C. seeking quashing of proceedings under Section 138 of the Negotiable Instruments Act, wherein liberty has been granted to the appellant to raise all these grounds at the time of hearing of the petition under Section 138 of the Negotiable Instruments Act.
- (vi) The defence raised by the appellant is plausible, reasonable and the appellant has every likelihood of success. Accordingly, unconditional leave should be granted and the matter be decided after evidence is led.
- (vii) The amounts due to the respondent have not been proved by the respondent.

12. The submissions of Mr. Bindra can be summarised as under:

- (i) There is no infirmity in the order of the learned Single Judge.
- (ii) The defence raised by the appellant is sham and moonshine.
- (iii) The appellant has made successive acknowledgments of debt, which are evident upon reading of the four agreements dated 29.10.2007, 12.04.2010, 31.03.2011 and 23.08.2012.
- (iv) In support of the terms of the agreement, post dated cheques were handed over which were dishonoured, upon presentation.
- (v) Part payments to the tune of Rs. 1 Crore 50 Lacs have been paid

upon signing of agreement.

- (vi) The ground of threat, coercion and pressure is bogus and till date, no criminal proceedings have been initiated by the appellant.

13. A short question which arises for our consideration is whether the defence raised by the appellant is bonafide and probable; has the appellant been able to raise a triable issue or whether the defence of the appellant is moonshine, sham, bogus and malafide.

14. The suit instituted by the respondent is based on a document which has been styled as a Memorandum of settlement. The said document is duly signed by the appellant. The signatures are not denied and nor is the execution of the document.

15. The following terms of this agreement would be relevant for appreciating the arguments of learned counsel for the parties:

“1. Dr. Niaz admits that as on date he owes to Indcap a principal sum of Rs. 2,24,00,000/- (Rupees Two Crore Twenty Four Lakh). Dr. Niaz also admits that in case of default in payment as per the schedule agreed in this settlement he (Dr. Niaz) shall be liable to pay interest @ 18% per annum on the above amount of Rs. 2.24 Crore from the date of receipt of the loan (29.10.07) till all the amounts (principal + interest + costs) are paid to Indcap.

2. That now Dr. Niaz has offered to pay the aforesaid entire principal amount of Rs. 2.24 Crore, by 11.10.13, in instalments as per the following schedule:-

<i>Instalment</i>	<i>By (date)</i>	<i>Amount (in Rs.)</i>
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<i>First</i>	<i>11.09.12</i>	<i>50,00,000/-</i>
<i>Second</i>	<i>11.01.13</i>	<i>50,00,000/-</i>
<i>Third</i>	<i>11.04.13</i>	<i>40,00,000/-</i>
<i>Fourth</i>	<i>11.07.13</i>	<i>40,00,000/-</i>
<i>Fifth and Final</i>	<i>11.10.13</i>	<i>44,00,000/-</i>
	<i>TOTAL</i>	<i>2, 24,00,000/-</i>

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11. That the parties hereto confirm that the above settlement has been arrived at by the parties out of their free will and volition and without any force, coercion, influence, inducement, etc.”

16. It is relevant to note that in the preamble of this agreement, the background has been given with regard to the appellant and one Shri Arindom Ganguly, having approached the respondent, M/s. Indcap Financial Services Pvt. Ltd. for financial assistance. The preamble also reflects that this company stands amalgamated as M/s. Indcap Enterprises LLP. The preamble also reflects that a sum of Rs. 3,24,54,000/- was invested with M/s. Integrity Geo Sciences Pvt. Ltd. and an agreement dated 29.10.2007 was signed between the parties. Subsequent agreement takes note of the fact that a sum of Rs.1 Crore stands paid leaving a balance of Rs. 2,24,54,000/- which incidentally is the suit amount.

17. We have, in the paragraphs foregoing, referred to the earlier 3 agreements executed between the parties dated 29.10.2007, 12.04.2010 and 31.03.2011. What is relevant to notice is that consistently in all the agreements, the appellant has been a signatory. Another important factor is

that the first agreement refers to the financial assistance to the tune of Rs.3,24,54,000/-. The second agreement styled as Memorandum of Understanding dated 12.04.2010 as well as the third agreement dated 31.03.2011 and the last agreement dated 23.08.2012, all reflect that there were transactions between the parties and the amounts were outstanding to the respondent and that there had been part payments.

18. To say that the agreement dated 23.08.2012 has been signed under coercion, pressure and threat, in our view, is a completely sham and moonshine defence as it cannot be expected that a person would be threatened for a long period from 29.10.2007 to the signing of the last agreement on 23.08.2012. Nowhere between this span of so many years has the appellant ever approached any court of law or ever filed a police complaint. Neither it is the case of the appellant that the case was not registered on his making efforts to do so nor it is the case of the appellant that he was prevented in any manner from taking recourse to the provisions of Section 156(3) Cr.P.C.

19. A reading of the leave to defend application, more particularly, paragraph 6, which has been extracted by the learned Single Judge in detail, would show that the appellant had consistently taken a stand that he would be taking action against the respondent for the illegal acts committed but no such action has been initiated. The signatures on the agreement are not disputed. Handing over of cheques and part payments made during this period are clearly indicative of the acknowledgement of debt and liability by the appellant. Another factor which cannot be ignored is that to clear the debt, the appellant had also sought permission of the respondent to involve

overseas investors, which was obviously an act by the appellant to clear his debt.

20. In response to the stand taken by the respondent that no criminal complaint had been filed, counsel for the appellant submits that he had filed a petition under Section 482 Cr.P.C. for quashing of the proceedings under Section 138 of the Negotiable Instruments Act. He submits that he had agitated this question before the learned Single Judge of this Court and the Court granted liberty to raise the grounds before the concerned court. According to us, this cannot be a plausible defence available to the appellant to oppose the suit filed by the respondent. Para 17.5 in the case of **IDBI Trusteeship Services Limited** (*supra*) would squarely apply to the facts of this case. i.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.”*

21. In our view thus, the learned Single Judge has rightly dismissed the application of the appellant seeking leave to defend. There is no merit in the appeal and the same is accordingly dismissed.

G.S. SISTANI, J

JYOTI SINGH, J

APRIL 30, 2019

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