

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 06.01.2020

Pronounced on: 09.01.2020

Coram::

The Honourable Dr.Justice G.Jayachandran

Application No.5680 of 2017
in C.S.No.393 of 2017

1. M/s.Magic Frames,
Partnership Firm,
Reg. by its Partner R.Sarath Kumar,
Having Office at No.14, Jayammal Street,
Teynampet, Chennai – 600 018.
 2. R.Sarath Kumar,
Partner of M/s. Magic Frames,
 3. R.Radhikaa Sarath Kumar,
Partner of M/s. Magic Frames,
Both are having office at,
No.14, Jayammal Street,
Teynampet, Chennai – 600 018.
 4. Mr.Listin Stephen,
Partner of M/s.Magic Frames,
Having office at No.14, Jayammal street,
Teynampet, Chennai – 600 018.
- ... Applicants/Defendants

/versus/

M/s. Radiance Media P. Ltd.
Rep. by its authorised Signatory,
N.Srinivasan,
having registered office at
Khivraj Complex – II, 6th Floor,
No.480, Anna Salai,
Nandanam, Chennai – 600 035.

... Respondent/Defendant

Prayer:-

Master's summon under Order XIV Rule 10 and Order VII Rule 6 of Original Side Rules read with Order XXXVII Rule 3 of C.P.C:-

To grant unconditional leave to defend the defendants, to defend the suit C.S.No.393 of 2017 and pass orders.

For Applicants : Mr.K.Ravi
for M/s.Rugan and Arya

For Respondent : Mr.V.Prakash, Senior Counsel
for Mr.R.Bhagawat Krishna

ORDER

This Application is filed to grant unconditional leave to defend to the defendants, to defend the suit C.S.No.393 of 2017.

2. In the summary suit filed for recovery of Rs.2,00,00,000/- (Rupees Two crores only) with interest at the rate of 18% based on the cheques issued by the defendants and dishonoured on presentation. The defendants have filed this application seeking leave to defend the suit for the reasons stated in the affidavit filed by 2nd defendant.

Plaint averments:-

(a). The suit under order IV Rule 1 of the High Court, Original Side Rules read with order XXXVII Rules 1 and 2 of the C.P.C., is filed on the premise that, the defendants collectively approached the plaintiff to finance for the production of the feature film titled as "Production No.4". The plaintiff entered into a loan agreement with the defendants on 05.11.2004 and advanced a sum of Rs.1,50,00,000/- (Rupees One Crore and Fifty Lakhs only) to the defendants. As per the loan agreement, the loan has to be repaid before 31st March 2015, along with the interest at the rate of 30% per annum is payable every month and the service charge of 2% on the loan amount.

(b). Further under this agreement, the defendants also consented that all the revenues from World Satellite rights, television relating screening and broadcasting, Cable Television, DTH Television, Digital Broadcasting, Video, VCD, DVD etc., of the feature film titled as "Production No.4" or in the event of the said feature film does not materialise, the subsequent projects of the defendants, shall vest with the plaintiff and the plaintiff can collect the revenues till the loan amount gets discharged. In addition, the defendants have also issued promissory notes and post dated cheques as

security for the loan amount and interest.

(c). The defendants failed to repay the debt before 31.03.2015 as agreed, the 2nd defendant approached the plaintiff with a request to lend Rs.1,00,00,000/- (Rupees One crore only) more along with the outstanding loan amount and interest and promised to execute mortgage deed to that effect for both outstanding amount and the fresh loan. Consequently, the 2nd defendant executed a mortgage deed dated 21.01.2016 in favour of the plaintiff for Rs.3,39,29,960/-. (Rupees Three Crores Thirty Nine Lakhs Twenty Nine Thousand Nine Hundred and Sixty only). As per the terms of the mortgage deed, the loan amount along with interest shall be paid on or before 18.06.2018 failing which the properties mortgaged in favour of the plaintiff shall be entitled to foreclose the mortgage and shall become the absolute owner of the properties free from encumbrances.

(d). When the defendants failed to pay the monthly instalment of interest or principal amount, on 01.03.2017 the plaintiff approached the defendants to repay the entire loan amount. The defendants instructed the plaintiff to present the 7 cheques during first week of May 2017 for collection and en-cash Rs.2,00,00,000/- towards part payment. (2 cheques for a sum of Rs.75,00,000/- each issued by the 1st defendant M/s.Magic

Frames, signed by the 2nd defendant and 5 cheques for a sum of Rs.10,00,000/- each issued by the 2nd defendant, totally a sum of Rs.2,00,00,000/-). Contrary to the said promise the cheques were dishonoured on presentation with endorsement "Payment Stopped by the Drawer". Hence, the present suit for recovery of Rs.2,00,00,000/- (Rupees Two Crores only) with interest.

Grounds for seeking leave to defend:-

3. The defendants have filed the application seeking leave to defend the suit, apart from other standard grounds, specifically on the ground that, the subject cheques were issued as collateral security for the loan availed under the loan agreement dated 05.11.2014. After the execution of the mortgage deed on 21.01.2016 for a sum of Rs.3,39,29,960/- covering the outstanding loan due of Rs.2,39,29,960/- and fresh loan of Rs.1,00,00,000/- (Rupees One Crore only) alleged to have availed by the defendants, the earlier loan transactions covered under the loan agreement dated 05.11.2014 and the cheques given as collateral security for the said loan got fully discharge. Further, subsequent to the mortgage dated 21.01.2016, one of the property secured under the mortgage deed was released by the plaintiff through a separate discharge

receipt dated 28.10.2016 on receiving a sum of Rs.40,00,000/- (Rupees Forty Lakhs only) from the defendants. Therefore, the present suit san cause of action is not maintainable.

4. The Learned Counsel for the Applicants/defendants referring the principle of "accord and satisfaction" submit that, it is admitted case of the plaintiff that, the mortgage deed on 21.01.2016 was executed for a sum of Rs.3,39,29,960/- which is inclusive for the outstanding loan amount and interest arose from the loan agreement dated 05.11.2014. Therefore, the loan agreement and the cheques entrusted to the plaintiff as collateral security for the said loan have lost its enforceability.

5. The Learned Counsel for the defendant submit that, the subsequent contract extinguishes all the rights vested with the plaintiff prior to the new contract. When the maintainability of the suit itself is under cloud and several facts such as alleged instruction by the defendant to present the cheques, promise to pay the loan amount covered under mortgage through these cheques, receipt of additional loan of Rs.1,00,00,000/- (Rupees One Crore only) on execution of mortgage deed are all disputed. So, there are issues triable and every probability of success by the defendant, therefore the defendants are entitled for unconditional

leave to defend.

6. The application for leave to defend is vehemently opposed by the plaintiff on the ground that, the defence taken in the application does not make out a plausible defence for the money claim. In fact, the receipt of the loan and issuance of cheques for the said loan being admitted by the defendants and reiterated through the mortgage deed, the present suit filed for portion of the admitted liability is bound to be allowed and there is no probability of success for the defendants.

7. Relying upon the judgment of the Hon'ble Supreme Court in **V.K.Enterprises and another Vs. Shiva Steels** reported in **(2010) 9 SCC 256**, which is a case arising out of dishonour cheques similar to the present case, the Learned Counsel for the plaintiff would submit that, the defence raised by the defendants is only moonshine and sham.

8. The Learned Counsel also rely upon the observation of the Hon'ble High Court of Rajasthan in **M/s.Sapna Saree Centre and others Vs. Bank of Rajasthan Ltd.**, reported in **2000 SCC Online Raj 38**, and submits that the application to grant leave to defend does not carry merit.

9. The suit is filed under Order XXXVII Rules 1 and 2 of the C.P.C, in the Original Side of this Court. Pointing out this, the learned Counsel for the applicants/defendants would submit that, the suit itself is not to be considered, under special procedure as specified under Order VII of the Original Side rules which is akin to Order XXXVII of C.P.C. Whereas, the Learned Counsel for the respondent/plaintiff would submit that, the application to seek leave to defend was not filed within the time prescribed. Hence, same is not maintainable.

10. The rival submissions regarding the procedure and provisions are not so significant since the intention of the plaintiff is to file plaint as summary suit and same has also been accepted and proceeded by the parties as well as by this Court. Hence, this Court, instead of looking into the technical aspect of the pleas raised by the parties, concentrate on the factual aspect. Whether in this case, the defendants are entitled for leave to defend?

11. The basic guidelines for this Court to consider the application for leave to defend is to find whether the defence discloses a triable issue or atleast a plausible issue to try.

12. The Learned Counsel for the Applicants have relied upon the judgment of Hon'ble Supreme Court in **V.K.Enterprises** cited supra and the judgment of the Hon'ble High Court of Rajasthan in **M/s.Sapna Saree Centre** cited supra, the relevant observations of the Courts are extracted below:-

In re V.K.Enterprises:-

"10. Order XXXVII C.P.C. has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted."

In re M/s.Sapna Saree Centre:-

"8. The provisions in Order 37, CPC incorporated by the amending Act of 1976 prescribe summary procedure for trial and expeditious disposal of cases in suits on the basis of bills of exchanges, hundies and promissory note. The very object underlying summary procedure for trial of suits under Order 37 CPC is to

prevent unreasonable delay and obstruction by a defendant from advancing sham or illusory defences which if allowed to do so, in facts, the very purpose of legislature incorporating Order 37 in the CPC would stand frustrated. That apart, the very object by insertion of such provision in Order 37, CPC by the amending Act of 1976 was to curb malady prevailing in the society when loans are advanced by the Financial Institutions to borrowers who refused to honour the spirit of the agreements at the cost of public exchequer and also with intent to keep control over financial institutions over excessive charge of interest from the helpless borrower. If sham and illusory defences are allowed to be advanced by the defendants then no institution such as nationalised Banks would be to safe in advancing the loan to any party in difficulty. Therefore, provisions of summary trial of suits under Order 37, CPC has been envisaged with a view to safeguards the bona fide money lenders like the banks from exploitation at the instance of those borrowers who take loan by making all promises of repayment by executing all relevant documents relating to loan advanced to them and thereafter take false plea and betrays promises by saying that no loan was advanced, so as to defeat the legitimate and genuine rights of the financing authority.”

13. This suit is based on the dishonour cheques admittedly given by the 2nd defendant. It is also admitted that, subsequent to the issuance of the cheque, the parties have entered into a fresh contract by registering a mortgage deed on 21.01.2006. Thereafter, during the month of October 2010, one of the property covered under the mortgage deed was released by the plaintiff. In such circumstances, the new agreement entered between the parties, give a fresh cause of action and different mode of recovery. The terms of repayment found in the loan agreement dated 05.11.2014 is different from the terms of repayment enumerated in the deed of mortgage dated 21.01.2016. Even as per the narration of the facts by the plaintiff in the plaint, it could be seen that, the money which was borrowed for producing a movie titled as "Production No.4", was not repaid and the cheques which are subject matter of this suit were given for the loan received under the said loan agreement. As per the said loan agreement, the defendants promised to repay the loan before 31.03.2015 or in default give away the rights of screening the movies to be produced by the defendants in future till the loan completely discharged. On failure to pay the said loan amount, new agreement by way of mortgage has been entered between the parties on 26.01.2016 with new set of repayment terms.

14. The Principle of 'Accord and Satisfaction' has been stated by the privy council as a Principle of substituted agreement. In ***Payana Reena Saminathan v. Puna Lana Palaniappa, (1914) 41 I A 142,*** "Accord and Satisfaction" is explained in the following words:-

"The 'receipt' given by the appellants and accepted by the respondent, and acted on by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the 'receipt'. It is a clear example of what used to be well-known in common law pleading as 'accord and satisfaction by a substituted agreement'. No matter what were the respective rights of the parties inter se they are abandoned in consideration of acceptance by all a new agreement. The consequence is that when such an accord or satisfaction takes place, the prior rights of the parties are extinguished."

15. The Hon'ble Supreme Court following the above Privy Council judgment, later in ***Union of India Vs. Kishorilal Gupta & Bros*** reported in ***(1960) 1 SCR 493***, has said that, *the Principle of 'accord and satisfaction' is only a method of discharge of a contract and not annihilating the contract, but only to make the obligation arising from it unenforceable.*

16. According to Pollock and Mulla (The Indian Contracts Act and Specific Relief Acts - 15th Edition, R.Yashod Vardhan and Chitra Narayan Volume – 1), "*when an action is brought for non-performance, an accord and satisfaction furnishes a good defence*". Through the mortgage deed, this Court finds that, the earlier loan transaction has been substituted by a different consideration and security. While so, the question whether the plaintiff can sustain the suit based on the cheques issued for the earlier loan is a triable issue and no summary judgment can be passed without affording opportunities to the defendants.

17. While considering the provisions of Civil Procedure Code as well as the Original Side Rules, for granting leave to defend, this Court finds that, if there is some semblance of merit to contest, leave has to be granted on condition. In this case, it is submitted by the Learned Counsel for the defendants that, the defendants has already furnished bank guarantee for the entire suit claim of Rs.2,00,00,000/- (Rupees Two Crores only) and the said bank guarantee is valid till 18.01.2020.

18. The contention of the Learned Counsel for the applicants

is that, it is only a moonshine and sham. Having admitted the liability, the plaintiff has no defence to the suit claim. No doubt, the defendants have admitted the part of the liability. However, under the mortgage deed, they had time to repay the debt till 18.06.2018. But, the present suit is filed before expiry of the period and it is stated by the Learned Counsel for the defendants that, the defendants have already filed suit for redemption of mortgage and same is pending.

19. In such circumstances, the plea taken by the defendants to contest the suit cannot be termed as moonshine or sham. In view of the facts and circumstances stated above, this Court allow the application to grant leave to defend on condition that, the defendants shall renew the bank guarantee of Rs.2,00,00,000/- (Rupees Two Crores only) immediately which is likely to be expired on 18.01.2020, for a period of one year and continue to renew the same till the disposal of the suit.

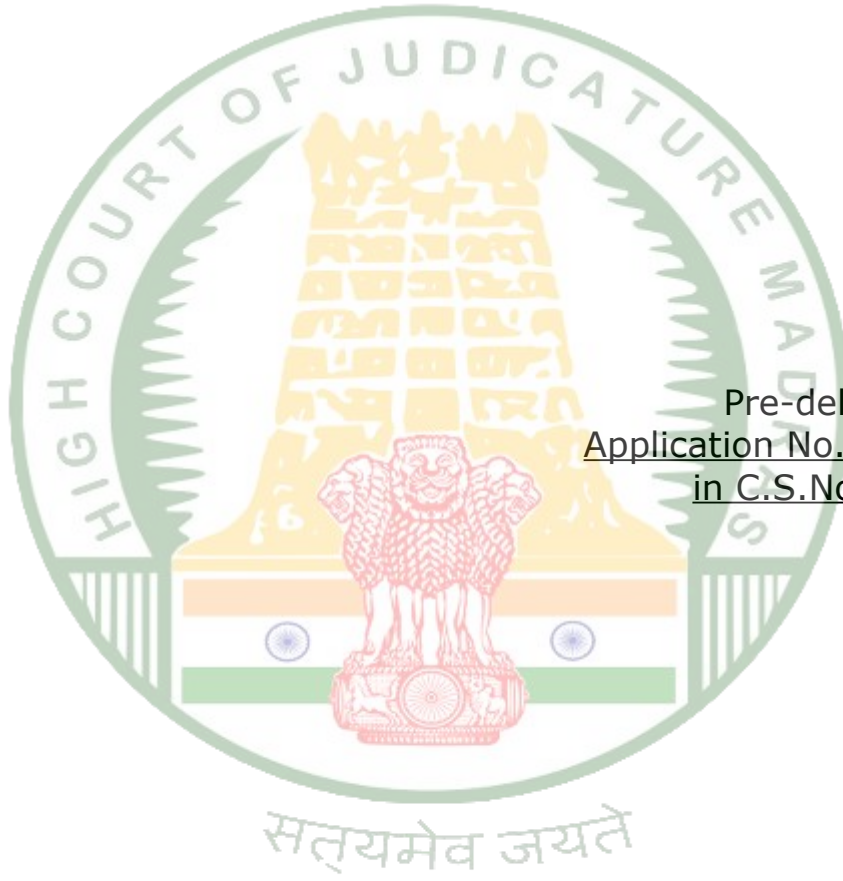
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Index :Yes/No
Speaking Order/Non-speaking order
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Dr.G.Jayachandran,J.

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Pre-delivery order in
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