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

Date of Decision: 15th December, 2020

\+ **C.R.P. 57/2020 & CM APPL.20305/2020**

SURENDER KUMAR ..... Petitioner

Through: Mr. Harsh Kumar, Advocate. (M:9958313389)

versus

MANOJ KUMAR ..... Respondent

Through: Mr. Hemant Chaudhary, Advocate. (M:9891384449).

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. This hearing has been done by video conferencing.

2. The present petition challenges the order dated 18th August, 2020 by which the suit under Order XXXVII Rule 3(5) CPC filed by the Plaintiff/Petitioner (*hereinafter 'Plaintiff'*) has been converted into an ordinary suit and unconditional leave to defend has been granted to the Defendant/Respondent (*hereinafter 'Defendant'*).

3. The brief background is that the Plaintiff filed a summary suit under Order XXXVII CPC for recovery of a sum of Rs.21 lakhs along with interest. The case of the Plaintiff is that the Plaintiff gave a loan to the Defendant to the tune of Rs.21 lakhs, which was transferred from the bank account of the Plaintiff in Bank of Baroda to the bank account of the Defendant's firm i.e., MK Clothing, in HDFC Bank, Priyadarshini Vihar, Delhi. The payment of Rs.21 lakhs and receipt thereof on 8th August, 2015 is not disputed by the Defendant. According to the Plaintiff, the Defendant bought a Mercedes car by using the amount given by the Plaintiff. The

Plaintiff repeatedly sought repayment of the amount, which was not done. Hence, the suit for recovery was filed.

4. In support of the Plaintiff's claim of bank transfer of Rs.21 lakhs, the Plaintiff's bank passbook of Bank of Baroda has been placed on record. The passbook shows four transactions i.e., three transactions of Rs.5 lakhs each and one transaction of Rs.6 lakhs – all in favour of M.K. Clothing.

5. The case of the Defendant in the leave to defend application is that the Defendant had given a loan to the Plaintiff in cash in 2013-14, which was repaid by the Plaintiff through banking channels. However, not a single document has been placed on record by the Defendant, either in support of the leave to defend application or even thereafter, along with the written statement.

6. Mr. Harsh Kumar, ld. counsel for the Plaintiff relies upon two judgments of this Court in ***Anju & Anr. v. Rampal & Anr. [CS (OS) 1159/2014, decided on 11th April, 2019]*** and ***Jindal Steel & Power Limited v. N.S. Atwal [CS(OS) 713/2010, decided on 4th July, 2013]*** to argue that once the money is paid through banking channels, an Order XXXVII CPC suit is liable to be entertained. Further, it is argued that technicalities ought not to come in the way if receipt of the amount is admitted and the suit would be liable to be decreed.

7. On the other hand, Mr. Hemant Chaudhari, ld. counsel for the Defendant submits that the Defendant disputes the fact that the amount was a loan. Though the amount is credited to the Defendant's bank account, the same was merely in repayment of a loan given by the Defendant. He fairly states that no document has been placed on record in support of this contention until this stage. Ld. counsel also raises an issue as to the suit

being barred by limitation.

8. Heard ld. counsels for the parties. A perusal of the impugned order shows that the Trial Court has held that a mere bank passbook would not be sufficient to show the nature of the transaction and the mutually agreed terms and conditions and whether it is a loan or not. The observations of the Trial Court are as under:

> *"11. .... However, in the case at hand there is no document under the signature of the defendant to show that what was transferred to his bank account was in fact towards a loan. It also bears repetition to state that there is no document whatsoever to show as to what were the terms and conditions of any such contract between the parties. There is no document in writing evidencing any contract. <u>The photocopy of the bank passbook showing such a transfer through cheques will not of its own accord constitute a written contract. There is no document, under the signature of defendant, to show that what was transferred to his bank account was actually a loan and no other transaction. It is only the self serving ipse dixit of the plaintiff as set out in his plaint (and nowhere else) that it comes out that it was a loan. Merely and merely on the basis of what is averred in the plaint, this Court will not take it that it was a loan transaction and no other transaction. A photocopy of the bank passbook would at the most show such a transfer but the same will not show the nature of the transaction, the mutually agreed terms and conditions and whether it was in fact a loan or some other transaction.</u> Had there been a receipt, or else a cash receipt showing that it was a loan transaction, the matter may have been entirely different. The only and only document being*

relied upon is photocopy of a bank passbook. This document would not show as to what was the nature of the transaction and why the amount was transferred to defendant's account. It would also not show as to whether the transaction was one that was not prohibited by law. If in a given case it turns out the the transaction was illegal, the mere fact that there is a copy of bank passbook showing such a transfer, without anything more, the outcome may be entirely different."

9. As per the above findings, the Trial Court holds that since the only document relied upon is a bank passbook, the reasons why the money was transferred would not be clear from the said passbook. It would only show that the transaction was one that was not prohibited by law. In view thereof, the unconditional leave to defend was granted.

10. The law in respect of a suit under Order XXXVII CPC is well settled by the Supreme Court in the judgment of ***IDBI Trusteeship Services Ltd. v. Hubtown Ltd (2017) 1 SCC 568*** wherein the Supreme Court has held as under:

> *"**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:*
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> > ***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. Order XXXVII Rule 1 CPC applies to suits in which a debt or liquidated demand is sought to be recovered. The term *'liquidated demand'* has been defined by a ld. Single Judge of this Court in ***Rajinder Kumar Khanna v. Oriental Insurance Co., AIR 1990 Del 278*** as follows:

> ***"2.** It was asserted by the plaintiff in the suit and the petitioner before me, that the claim in the suit was a "liquidated demand". The petitioner seeks to take advantage of the amendments made to the Code of Civil Procedure, by which "liquidated demand" became subject-matter of summary suits for the first time.*
> ***3.** The industry of counsel had not been able to produce a single precedent of courts in India, which explained what is "liquidated demand". However, reference has been made to Words and Phrases Permanent Edition, in which reference is made to* Rifkin v. Safenovitz, *40 A 2d 188. It is stated that <u>"amount claimed to be due is a "liquidated demand" within statute authorizing summary judgments if it is susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in possession or knowledge of party to be charged</u>"."*

It is therefore clear that any sum which can be ascertained from the documents on record would constitute a liquidated demand.

12. As per the above decisions, the Court has to see as to whether the suit relates to the liquidated sum and whether any plausible defence has been set

up by the Defendant. In the present case, a perusal of the leave to defend shows that the plea of the Defendant is as under:

> "*B. That the deponent never took any loan from the plaintiff on 08.08.2015 to the tune of Rs.21,00,000/-, in fact, it was the plaintiff, who took the loan from the deponent time to time during the period of 2013 to 2014 in cash to meet his business needs and later on in order to repay the same, he transferred the said amount in the account of the firm of the deponent. Now, by taking the advantage of the said bank transfer, the plaintiff cooked up a false story and filed the aforesaid false suit against the deponent without any legal enforceable liability payable to the plaintiff by the deponent.*"

13. In support of the plea of the Defendant that he gave a loan to the Plaintiff in 2013-14, which was being given on a continuous basis of various amounts from time to time, there is not a single document that has been placed on record. It is highly improbable that any party which is giving huge sums of money would not file a single receipt or promissory note and merely proceed to lend money on some oral arrangement. Even otherwise, a perusal of the leave to defend does not inspire confidence.

14. Considering the fact that the amount, which was transferred by the Plaintiff to the Defendant was through proper banking channels for which clear evidence has been placed on record, the suit under Order XXXVII CPC would be maintainable as it is for a liquidated sum. The onus would be on the Defendant to show as to why the leave to defend should be granted.

15. At this stage, since ld. counsel for the Defendant clearly concedes that no document has been placed on record in support of the plea that a loan was given to the Plaintiff, allowing unconditional leave to defend

would not be in accordance with law. At best, since the written statement has now been filed and the suit is proceeding further, this Court is of the opinion that the suit under Order XXXVII CPC is maintainable but some conditions be imposed upon the Defendant to permit him to defend his case.

16. Accordingly, it is directed that the Defendant shall furnish either a Bank Guarantee or any other security to the tune of Rs.10 lakhs, to the satisfaction of the Trial Court, within 8 weeks. Subject to the said condition being fulfilled, the written statement shall be taken on record and trial in the suit shall continue.

17. The petition is disposed of in the above terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 15, 2020/*dk/T*