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

% ***Reserved on: 16.05.2023***
Pronounced on: 02.06.2023

\+ **RFA 355/2022 and CM APPL. 34030/2022**

MS. DEEP SHIKHA @ DOLLY ..... Appellant
Through: Mr. Anil Mishra, Mr. Arvind Kumar, Mr. Vineet Kumar Singh and Ms. Supantha Sinha, Advocates.

versus

SMT. ARCHANA JAIN ..... Respondent
Through: Ms. Chaitali Jain and Mr. Yogesh Saini, Advocates.

CORAM:
HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The present appeal has been filed under Section 96 of the Code of Civil Procedure r/w Order XLI Rule 1 & Section 151 of the Code of Civil Procedure ('CPC') for impugning the judgment and decree dated 04.05.2022 *("**Impugned Judgment**")* passed by the Learned Principal District & Sessions Judge (HQs), Tis Hazari Courts, Delhi in *Civil Suit No. 381/2019* titled as '*Smt. Archana Jain vs. Ms. Deep Shikha @ Dolly*'. *Vide* the said Impugned Judgment, the learned Trial Court was pleased to dismiss the application filed by the Appellant (Original Defendant) seeking leave to defend the suit for

recovery filed by the Respondent (Original Plaintiff) under Order XXXVII CPC and decreed the Suit filed by the Respondent.

FACTS RELEVANT FOR ADJUDICATION OF THE PRESENT APPEAL

2. It is the case of the Respondent that the Appellant and Respondent were having cordial relations. As and when the Appellant needed any financial help, the Respondent used to advance friendly loans to the Appellant and she used to return back the same on time. In November 2015, the Appellant requested the Respondent for a friendly loan of Rs.60,00,000/- (Rupees Sixty Lakhs only) on the ground that her husband was admitted in hospital and is in a very critical condition. In view of the said request made by the Appellant, the Respondent arranged a sum of Rs.53,50,000/- (Rupees Fifty Three Lakhs Fifty Thousand only) by borrowing from different sources and the same was paid as loan to the Appellant in the month of December 2015. The Appellant issued a cheque bearing No. 008060 dated 22.04.2016 in favour of the Respondent drawn on the Axis Bank *(“**subject cheque**”)* towards repayment of the aforesaid loan. The Respondent presented the subject cheque for encashment, however, the same got dishonored and was returned with the endorsement “*instrument outdated/stale*” *vide* return memo dated 26.07.2016.

3. The Respondent made several requests to the Appellant for repayment of the said loan. After much persuasion, the Appellant

issued five post-dated cheques bearing No.000017, 000019, 000020, 000022 and 000023 each for a sum of Rs.8,00,000/-. The Appellant asked the Respondent to present each cheque for encashment for 5 consecutive months starting from September 2016. The Appellant also assured that the balance amount of Rs.13,50,000/- along with interest shall be cleared within a short period. The Appellant also executed a promissory note in favour of the Respondent. Based on the assurances of the Appellant, the Respondent presented the cheques for encashment for 5 consecutive months starting from September 2016. However, all the aforesaid cheques were dishonored and returned with the endorsement '*funds insufficient*'.

4. Despite repeated requests, the Appellant failed to repay the said loan and the Respondent filed a police complaint dated 03.09.2016 against the Appellant. The Respondent also initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 against the Appellant and the said proceedings are still pending before Metropolitan Magistrate (Central), Tis Hazari Court. Subsequently, on 18.04.2019, the Respondent instituted a summary suit under Order XXXVII CPC for recovery of Rs.72,76,000/- with pendente lite and future interest thereon @ 12% per annum against the Appellant. The Respondent subsequently amended the suit and restricted the prayer to recovery of the principal loan amount of Rs.53,50,000/- with pendente lite and future interest.

5. On serving the summons under Order XXXVII CPC, the Appellant entered appearance and filed an application seeking leave to defend.

In the said application, the Appellant categorically stated that she never took any friendly loan from the Respondent. It is the case of the Appellant that the Respondent and her husband in conspiracy with other persons namely Ms. Ritu Arora, Ms. Anu Ghera, Mr. Rajender Kumar, Mr. Sanjay and Ms Ritu misused the blank signed cheques and other papers of the Appellant thereby committing forgery and fraud. In August 2016, the Appellant filed a police complaint against the Respondent and her associates alleging commission of offences by them under Sections 406/420/383/385/468/471/120-B/34 IPC. FIR bearing No.540/2016 dated 30.09.2016 under Sections 420/406/34 IPC was registered against the Respondent and her other associates in P.S. Model Town, Delhi on the direction of learned Metropolitan Magistrate, Rohini Court on an Application preferred by the Appellant u/s 156(3) Cr.P.C.

6. The learned Trial Court, vide the Impugned Judgment, was pleased to dismiss the said Application seeking leave to defend filed by the Appellant and decreed the Suit. The relevant extract of the Impugned Judgement has been reproduced herein below:

> *"14. As regards the subject cheque of Rs. 53,50,000/- there is not even a whisper in the leave to defend application. Admittedly, the FIR no. 540/2016 referred to by the defendant does not pertain to the subject cheque of Rs. 53,50,000/-. There is no denial that the subject cheque bears signature of the defendant. There is no denial that the subject cheque was given by the defendant to the plaintiff. There is even no explanation as to under what circumstances the subject cheque was drawn by the defendant and given by her to the plaintiff, if not towards repayment of the loan amount.*

15. As regards FIR no. 540/2016, it would be interesting to note that the same was registered subsequent to dishonour of the five cheques described above. Not only this, in FIR no. 540/2016, plaintiff alleged that those five cheques were given by her to a lady running a kitty, whereas in reply to notice under Section 251 CrPC (certified copy whereof was filed on behalf of plaintiff) during the proceedings under Section 138, Negotiable Instruments Act, the defendant stated that she had misplaced some signed cheques from her chequebook.

16. As regards the issue of privity of contract, raised by the defendant in her application for leave to defend, suffice it to record that admittedly the subject cheque of Rs. 53,50,000/- was issued by the defendant, so having not come up with any explanation, the presumption of liability to pay survives against the defendant.

17. In nutshell, in the application seeking leave to defend, what to say of setting up a good defence or a substantial defence or even a frivolous or vexatious defence, the defendant has not set up even a shred of defence as regards the subject cheque of Rs. 53,50,000/- drawn by her in favour of plaintiff, which cheque is the basis of this suit.

18. Consequently, application dated 27.11.2019 of the defendant seeking leave to defend this suit under Order XXXVII CPC is dismissed."

7. Accordingly, the learned Trial Court, vide Impugned Judgment, decreed the suit for a sum of Rs.53,50,000/- with pendente lite and future interest @ 5% per annum and cost.
8. Aggrieved by the Impugned Judgment, the Appellant has preferred the instant Appeal challenging the validity of the said Impugned Order on the grounds mentioned in the Appeal.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

9. Mr. Anil Mishra, learned counsel appearing for the Appellant has submitted that the learned Trial Court erroneously decreed the Civil

Suit No. 381/2019 in favour of the Respondent, without giving due opportunity to the Appellant to defend the suit. Learned Counsel for the Appellant has submitted that the above mentioned suit was instituted under Order XXXVII of the CPC based on the subject cheque which was 'stale/outdated' which means that the validity of the cheque had lapsed. It is argued by learned Counsel for the Appellant that a cheque which had been dishonoured by the reason of it being outdated or stale, cannot give rise to a suit for recovery under Order XXXVII CPC.

10. Learned Counsel further stated that the said cheque was obtained by way of fraud from the Appellant's possession for which an FIR has been registered against the Respondent and her other associates. It is also submitted that there has been some material alteration in the subject cheque, which issue has been duly raised by the Appellant by way of his application seeking leave to defend before the learned Trial Court, along with other triable issues. Despite such a substantial plea, the application seeking leave to defend filed by the Appellant was dismissed by the learned Trial Court.

11. For bolstering the submissions made by him, the learned Counsel for the Appellant has relied upon the judgments in the cases of ***First Lucre Partnership Co. v. Abhinandan Jain***, reported as ***2013 SCC OnLine Del 2819***; ***Baldev Singh v. Rare Fuel & Automobiles Technologies (P) Ltd***., reported as ***2005 SCC OnLine Del 406; BPDL Investments (Pvt) Ltd. v. Maple Leaf Trading International (P) Ltd,*** reported as ***2006 SCC OnLine Del 217***

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

12. Ms. Chaitali Jain, learned counsel representing the Respondent, vehemently countered the arguments made on behalf of the Appellant by submitting that the Appellant cannot be permitted to raise any fresh plea at this stage. It is submitted that the Appellant failed to raise the issue with respect to the subject cheque being stale/outdated before the learned Trial Court. It is further submitted that there exists no averment in the Appellant's application seeking leave to defend with regard to the validity of the said cheque. Further, it has been submitted that such a plea has been raised for the first time before this Court, even when the litigation went on before the learned Trial Court for a considerable period of time where the Appellant was given adequate opportunity to represent her case. The Appellant is barred from taking any fresh plea under the Section 96 of the CPC which states that an appeal can be preferred only when there is a 'question of law' emanating out of a decree in any suit.

13. Learned Counsel for the Respondent further submitted that the subject cheque was timely presented for the encashment before the bank, which is evident from the receipt issued by the ICICI Bank, Shakti Nagar, Delhi wherein date of deposit is clearly visible as 18.07.2016. Dishonour of the subject cheque is not attributable to any fault on the part of the Respondent since it was presented within the statutory period of limitation of 3 months, as prescribed by the Negotiable Instruments Act, 1881. It was rather dishonoured because of the reason that the Appellant has deliberately issued a cheque

without bar code and all such chequebooks without barcode were withdrawn by the bank. Since the subject cheque was not carrying bar code, the same was dishonoured with the comment '*Instrument Outdated/Stale*'.

14. Learned counsel for the Respondent has relied upon judgements in the matters of ***Mange Ram v. Raj Kumar Yadav***, reported as ***2018 SCC OnLine Del 10316***; ***Ashwani Kumar v. Kalimuddin***, reported as ***2018 SCC OnLine Del 11003; IDBI Trusteeship Services Ltd. v. Hubtown Ltd.,*** reported as ***2018 SCC OnLine SC 2795.***

LEGAL ANALYSIS

15. This Court has heard rival contentions of the parties and has perused all the relevant documents and judgments relied upon by the learned counsels for the parties.

16. The Respondent initiated the suit for recovery under Order XXXVII CPC against the Appellant based on the subject cheque. The said cheque was returned unpaid by the bank with an endorsement '*instrument outdated/stale*'. It is the contention of the Appellant that summary suit is not maintainable based on a stale cheque. It is thus important to examine the law regarding summary suits based on stale cheques.

17. The Hon'ble Division Bench of this Court in ***Baldev Singh v. Rare Fuel & Automobiles Technologies (P) Ltd***., reported as ***2005 SCC OnLine Del 406*** examined an identical issue and *inter alia*, held as follows:

"5. The question posed is simply this. Can a cheque which is not presented for encashment within its validity period be made the basis of a suit under Order XXXVII of CPC? We feel that the answer must go in favor of the appellant. A mere issuance of a cheque, kept dormant, in say, a drawer, would not invest the drawee with a cause of action. The cause of action in such a case would arise only when the cheque, on presentation, is dishonoured or not encashed for any fault attributable to the drawer. The drawee cannot be allowed to complain when he himself allows the validity period to lapse rendering the same invalid. What was required of the respondent in this case was to present the cheque for encashment. However what happened is that the respondent sat over the cheque, did not present it for encashment and allowed the validity of the cheque to lapse. He has now made an issue which stems out of its masterly inactivity. Of course, the respondent has made an effort to cover its lapse. It has come up with a plea that it was only on the asking of the appellant that the cheque was never presented. We feel that even if it was on that account that the cheque was not presented still the fact remains that the basis of the suit is a cheque which remained un- presented. This, we further feel, takes away the shine from the suit and robs it of the cause of action under Order XXXVII CPC. This view that we have taken is also the view taken in two judgments emanating from this Court, AIR 2001 Delhi 341 Goyal Tax Fab. Pvt. Ltd. v. Anil Kapoor and 24 (1983) DELHI LAW TIMES(SN) 3 Suri and Suri Private Ltd. v. Ram Swarup Arora & Co. In both these judgments it was held that for filing a suit under Order XXXVII, it is necessary to present the cheque to the Bank. We approve both the aforesaid judgments holding that it lays down the law correctly."

18. Learned Single Judge of this Court in ***BPDL Investments (Pvt) Ltd. v. Maple Leaf Trading International (P) Ltd reported*** as ***2006 SCC OnLine Del 217*** followed the same view and reiterated that the cheques which were not presented for encashment during the validity period could not form basis of a suit under Order XXXVII CPC and the suit has to be tried as an ordinary suit.

19. Another learned Single Judge of this Court in ***First Lucre Partnership Co. v. Abhinandan Jain***, reported as ***2013 SCC OnLine Del 2819*** even though followed the same principle, opined that the said view requires reconsideration. The relevant portion of the said Judgment, reads as follows:

> *"18. In view of the above pronouncements of this Court on the issue that a Suit under Order 37 CPC does not lie on a stale cheque, I would be bound by the said pronouncements. Though in my view the judgment may at proper stage require reconsideration as no reasons have been given in the said judgment as to why a cheque which is not presented for encashment to the bank, cannot be the basis of a Suit under Order 37 of the Civil Procedure Code specially keeping in view the provisions of Section 6 of the Negotiable Instruments Act, 1938 which holds that the cheque is a Bill of exchange. There are observations of the Hon'ble Supreme Court in the case of Shri Ishar Alloy Steels Ltd.(supra) that when a cheque is not presented, the drawer may still be liable to pay the cheque amount in a civil action."*

20. It is pertinent to mention that in ***Lucre Partnership Co. (Supra),*** the defendant's case was not solely based on the stale cheque. In the said case, the stale cheques were supported with a written contract which clearly establishes the existence of a valid debt between the parties and the stale cheques were issued with an intention to clear the outstanding debt. Hence, the learned Single Judge rejected the application seeking leave to defend filed by the defendant therein. The said Judgment was challenged before this Court in RFA (OS) 50/2014, however, the said Appeal was disposed of by way of a compromise decree.

21. In view of the case laws discussed herein above, the legal position that emerges is that the summary suits cannot be decreed solely

based on the stale cheques. However, if it is supported with other evidences, especially, written acknowledgments/promissory notes etc., the same may be decreed.

22. Based on these legal principles, this Court now proceeds to examine the facts of the present case.

23. In the present case, it is the case of the Respondent that she advanced a friendly loan of Rs.53,50,000/- to the Appellant in the month of December 2015. It is the case of the Appellant that she never took any such loan from the Respondent. Thus, the factum of advancement of loan itself is a disputed question of fact. There is no written contact/promissory note to establish the existence of a valid debt between the parties. The Respondent in the proceedings under Section 138 of the Negotiable Instruments Act, 1881 disclosed that she is taking tuitions for children. In the present case, the Respondent stated that she took loans from various sources to arrange Rs.53,50,000/- to advance the said friendly loan to the Appellant. The capacity of the Respondent to advance such a huge loan itself is a matter of trial, to be established based on the evidence.

24. It is further the case of the Respondent that in order to secure the said friendly loan, the Appellant issued the subject cheque. It is to be noted that the friendly loan was advanced in the month of December 2015, however, the subject cheque was dated 22.04.2016. There is no explanation provided as to why the Respondent advanced such a huge amount of loan to the Appellant without any security. The

circumstances under which the subject cheque was issued after 4 months, i.e., April 2016 is also not explained in the plaint. In order to establish all these facts, evidence needs to be led.

25. The bank returned the said cheque undelivered on 26.07.2016 with an endorsement '*instrument outdated/Stale*'. It is the case of the Respondent that she submitted the subject cheque for encashment on 18.07.2016, however, it was dishonoured because of the reason that the Appellant has deliberately issued a cheque without bar code and all such chequebooks without barcode were withdrawn by the bank. Since the subject cheque was not carrying bar code, the same was dishonoured with the comment '*Instrument outdated/stale*'. Even to prove the said fact, evidence is required to be led.

26. It is the case of the Respondent that the Appellant never took objection qua the staleness of the subject cheque or non-maintainability of the suit on basis of stale cheque in her application seeking leave to defend. It is the case of the Respondent in the Plaint itself that the subject cheque was returned by the bank with a remark '*outdated instrument /stale*'. Hence the factum of return of the cheque on the ground of '*outdated instrument/stale*' was there before the learned Trial Court. Whether a summary suit is to be entertained or not on the basis of a stale cheque is a legal issue which can be taken up at any stage of the proceedings. This Court in **Baldev Singh (Supra)** also had encountered with an identical plea and rejected the same, *inter alia*, observing as follows:

> *"6. Before concluding we may mention that the plea dealt with by us above was not specifically raised in the application for*

leave to defend. It was raised before us during arguments and since the plea involved a question of law we heard learned counsel for the parties on the point in question.

27. *Vide* the Impugned judgment, the learned Trial Court observed that the Appellant failed to come up with any explanation as to the issuance of the subject cheque to the Respondent, which bears his name and signature. The learned Trial Court further noted that the Appellant did not deny the fact that the subject cheque carried his signature which was issued for the repayment of the loan availed from the Respondent. Hence, the learned Trial Court was of the view that the Appellant failed to set up his defence and therefore dismissed the Appellant's application seeking leave to defend under Order XXXVII Rule 3 CPC. However, the learned Trial Court failed to appreciate the basic fact that the subject cheque was returned by the Bank with a remark '*Instrument outdated/stale*'. Learned Trial Court ought to have appreciated the fact that the subject cheque is not supported with any further evidence such as written instruments/promissory notes etc. In view of the law laid down by the Division Bench of this Court in **Baldev Singh (Supra)**, it is evident that the suits cannot be summarily decreed on the basis of stale cheques.

28. The Hon'ble Supreme Court in **IDBI Trusteeship Services Ltd Vs Hubtown Ltd reported as 2017 (1) SCC 568** laid down the principles to be adopted while dealing with suits under Order XXXVII CPC. The relevant portion, reads, inter alia, reads as follows:

"17. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram's case, 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."

29. In view of the detailed discussions herein above, this Court is of considered view that the present case falls within the situation as

envisaged by the Hon'ble Supreme Court in paragraph 17.4 of IDBI Trsuteeship (Supra). Hence, the Appellant is entitled to conditional leave as envisaged therein. The Impugned Judgment is set aside and this Court grants leave to the Appellant to contest the present suit subject to deposit of Rs.15 Lakhs with the learned Trial Court within a period of 4 weeks. The parties are directed to appear before the learned Trial Court on 03.07.2023.

30. The present Appeal is allowed and all the pending applications are disposed of. No order as to costs.

GAURANG KANTH, J.

JUNE 02, 2023
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