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IN THE HIGH COURT OF DELHI AT NEW DELHI***Date of decision: 30.11.2023***

+ CS(OS) 3980/2014, I.A. 8912/2017 (Order XXXVII Rule 3(4), CPC)
& I.A. 16784/2021 (Order XXXVIII Rule 5, CPC)

SWARANJIT SINGH SAYAL Plaintiff

Through: Mr.Davinder Singh, Sr.Adv. with
Mr.Srivats Kaushal, Adv.

versus

M.K JAIN

..... Defendant

Through: Dr.Amit George, Mr.Vipul Wadhwa,
Ms.Carina Arora & Mr.Adishwar Suri, Adv.

CORAM:**HON'BLE MS. JUSTICE REKHA PALLI****REKHA PALLI, J (ORAL)****I.A. 5441/2018 (leave to defend)**

1. This is an application filed by the defendant under Order XXXVII Rule 3 (5) of the Code of Civil Procedure, 1908 (CPC) seeking leave to defend the present suit.
2. Before dealing with the rival submissions of the parties, the brief factual matrix, as may be necessary for adjudication of the present application may be noted at the outset.
3. The plaintiff has filed the present suit under Order XXXVII CPC seeking recovery of a sum of Rs.3 crores along with interest @ 18% p.a. from the defendant on the basis of a written acknowledgement for a sum of Rs.2 crores in the form of a receipt issued by the defendant on 23.12.2011



and a cheque dated 06.01.2012 for the remaining sum of Rs.1 crore issued by him.

4. It is the case of the plaintiff that the defendant, claiming to be the absolute owner of the property bearing No.C-107, Naraina Industrial Area, New Delhi, agreed to sell the aforesaid property to him for a total sale consideration of Rs.15.75 crores. The plaintiff claims that in furtherance of the same, he paid a sum of Rs.2 crores to the defendant partly in cash and the remaining amount towards part sale consideration by way of multiple cheques for the said property, receipt whereof was acknowledged by the defendant by way of a hand written receipt dated 23.12.2011. It is on the basis of this receipt that the plaintiff has, under Order XXXVII CPC, filed the present suit for recovery of a sum of Rs.2 crores along with interest @ 18% p.a. After the issuance of the aforesaid receipt by the defendant, the plaintiff paid a sum of Rs.1 crore to the defendant by way of a cheque dated 06.01.2012, receipt whereof is undisputed. The plaintiff has therefore urged that the suit under Order XXXVII CPC for recovery of this amount of Rs.1 crore along with interest is also maintainable.

5. The plaintiff has contended that despite receiving a sum of Rs. 3 Crores towards part sale consideration, the defendant neither executed the sale deed in his favour nor returned to the plaintiff the amount paid by him. It is only later that the plaintiff discovered that the defendant was not in a position to execute the sale deed in his favour as the property already stood mortgaged with Kotak Mahindra Bank, which fact was never disclosed to him by the defendant. It is in these circumstances that the plaintiff served the defendant with a legal notice dated 06.09.2012 seeking refund of the



aforesaid amount of Rs.3 crores along with interest @ 18% p.a., a reply whereeto was received by the plaintiff on 05.10.2012.

6. In his reply, the defendant *inter alia* contended that as per the oral agreement between the parties, the sale consideration was Rs.48.75 crores and not Rs.15.75 crores as was claimed by the plaintiff, which amount the plaintiff had failed to pay and therefore, the amount of Rs.3 crores paid as earnest money stood forfeited. In the light of this reply received from the defendant, the plaintiff instituted the present suit under Order XXXVII CPC seeking recovery of a sum of Rs.4.17 crores, which amount includes a sum of Rs.1.17 crores towards interest @ 18 % p.a. Upon summons being issued in the suit on 12.03.2015, the defendant has entered appearance and filed the present application seeking leave to defend.

7. At the outset, learned counsel for the defendant, Dr.Amit George, has urged that the receipt dated 23.12.2011 issued by the defendant, based on which the present suit has been preferred by the plaintiff cannot be termed as a written contract as the said receipt admittedly does not contain the complete particulars of the transaction which the parties had orally envisaged entering into. By placing reliance on the decision of this Court in ***Ganpati Infrabuild Pvt Ltd vs. Sudarshana Duggal and Ors.* 2012 SCC Online Del 3039**, he submits that the receipt merely records that the plaintiff had paid a sum of Rs. 2 crores to the defendant towards part sale consideration of the property and does not mention the total sale consideration, therefore it could not be treated as a written contract. Furthermore, the receipt is silent qua the other terms and conditions which had been agreed between the parties, including the clause for forfeiture of the pre-determined amount of Rs.3 crores in case of default by the plaintiff.



He has further urged that the plaintiff's claim towards the amount paid to the defendant by way of cheque dated 06.01.2012 for a sum of Rs.1 crore would also not qualify as a document which would fall within the ambit of Order XXXVII CPC.

8. By placing reliance on a decision of a Co-ordinate Bench of this Court in ***IFCI Factor Ltd vs. Maven Industries Ltd and Ors*** 2015 SCC Online Del 13519, he contends that a bare perusal of the plaint shows that the case of the plaintiff is not resting merely on the receipt or the cheque as is sought to be contended by the plaintiff but is based on a bundle of facts as set out in the plaint. He further submits that the receipt of a sum of Rs.1 crore by the defendant from the plaintiff by way of cheque dated 06.01.2012, would also not qualify as an agreement. He submits that a suit under Order XXXVII CPC on the basis of cheque would lie only in a situation where the claim is towards a dishonored cheque and not in a case like the present where the plaintiff is seeking refund of the amount paid to the defendant by way of a cheque.

9. The next plea raised by the defendant is that the amount of Rs.3 crores, of which the plaintiff is seeking refund, already stands forfeited as per the terms of oral agreement entered into between the parties, which terms, he contends, can be proved only if the defendant is granted an opportunity to file a written statement and lead evidence during trial. He submits that once the defendant has clearly set out in its application that as per Section 74 of the Indian Contract Act, the amount paid by the plaintiff stands forfeited in terms of the oral agreement entered into between the parties, it cannot be said that the defence raised by the defendant is sham or is not a plausible defence.



10. The final plea raised by Dr.Amit George is that a suit wherein the plaintiff seeks to include a claim of interest would automatically stand excluded from the ambit of Order XXXVII CPC. The plaintiff having raised a specific claim for interest @ 18% p.a. for which there is admittedly no written contract, the suit is liable to be tried as an ordinary suit. In support of his plea, he seeks to place reliance on a decision of a Co-ordinate Bench of this Court in ***J.R.Sharma Overseas Ltd vs Abner Pharmaceuticals Ltd 2005 (80)DRJ 51.***

11. On the other hand, Mr.Davinder Singh, learned senior counsel for the plaintiff, has vehemently opposed the application by urging that once the defendant has without any demur admitted the receipt of the entire sum of Rs.3 crores from the plaintiff, the suit is liable to be decreed forthwith as neither the defendant has raised any plausible defence nor any triable issue otherwise arises in the present case. He contends that the grant of any opportunity to the defendant to lead evidence would only unnecessarily prolong the adjudication of the suit wherein the defence sought to be raised by the defendant is absolutely sham and is based only on a purported oral agreement, which is not even borne out from the grounds raised in the defendant's affidavit.

12. By drawing my attention to the decision of this Court in ***Sanjay Kohli vs Vikas Srivastava and Ors 2012 (130) DRJ 458,*** he contends that the defendant's plea that a suit for recovery of an amount paid to the defendant through cheque would not be maintainable under Order XXXVII CPC, is wholly misconceived. The defendant's plea that a suit under Order XXXVII CPC on the basis of a cheque would lie only in a case where recovery is sought on account of the dishonouring of a cheque is



contrary to the decision of the aforesaid decision. He further submits that the defendant's plea that interest cannot be claimed in a suit under Order XXXVII is incorrect as this Court has already held in **Sanjay Kohli (supra)** and various other subsequent decisions that the plaintiff can always include a claim for interest in a suit under Order XXXVII.

13. He further submits that the only defence raised by the defendant to the plaintiff's claim for refund of Rs.3 crores that the said amount stands forfeited is liable to be outrightly rejected being barred under Section 73 of the Indian Contract Act. He contends that in a case like the present where the defendant does not deny the receipt of Rs.3 crores from the plaintiff, there is not even any requirement for the plaintiff to plead or prove any other fact. He, therefore, prays that the application be dismissed.

14. I have considered the submissions of learned counsel for the parties and perused the record. The first and foremost ground on which the defendant/applicant has sought leave to defend is that the suit, as filed by the plaintiff, is not maintainable under Order XXXVII CPC. It has been urged by the defendant that the suit which has been admittedly filed by the plaintiff only on the basis of a receipt for a sum of Rs.2 crores issued by him and a cheque for a sum of Rs.1 crore issued in his favour by the plaintiff, would not qualify as a written contract as envisaged under Order XXXVII CPC. The plaintiff has, however, urged that since the receipt clearly explains the reasons for which the amount was advanced to the defendant, the same is a written contract falling within the ambit of under Order XXXVII Rule 1 (2)(b)(i) CPC. It has been further urged by the plaintiff that his claim, based on the cheque dated 06.01.2012, would also qualify as a claim for a fixed amount of money as envisaged under Order XXXVII Rule 1 (2)(b)(ii) CPC



and would therefore, fall within the ambit of Order XXXVII CPC.

15. In order to appreciate the rival pleas of the parties on this aspect, it would be necessary to note the contents of the receipt dated 23.12.2011, which is a receipt in the own handwriting of the defendant. The same reads as under:

“Received a sum of Rs. 85, 00, 000/- (Eighty Five Lacs Only) by cheque and cash Rs. 1,15,00,000/- (Rs. One Crore Fifteen Lacs Only) totaling to Rs. 2, 00, 00, 000/- (Two Crores Only) for Shri S.S. Sayal S/O Shri K.S. Sayal R/O 124 A Central Avenue, Sainik Farms, New Delhi-62 against the sale of C-107 Naraina Industrial Area Phase-I, New Delhi as part payment.

SD

23.12.2011.

(ANUJ BHATIA)

SD

23.12.2011

(M.K. ,JAIN)

Ch. NO. 554171 dated 23/12/2011 Rs. 29, 00, 000/-

Ch. NO. 554170 dated 23/12/2011 Rs. 30, 00, 000/-

Ch. NO. 554165 dated 15/12/2011 Rs. 26, 00, 000/-

Received Rs. 85,00,000/ cheques Rs. 85,00,000”

16. From the aforesaid receipt, the execution whereof is not denied by the defendant, it is evident that the defendant has acknowledged the receipt of a sum of Rs.2 crores from the plaintiff towards the sale consideration the suit property bearing No. C-107, Naraina Industrial Area, New Delhi. Even though the defendant has by relying on ***Ganapati Infrabuild (Supra)*** and ***IFCI Factors (Supra)*** urged that this receipt alone would not be sufficient to substantiate the plaintiff's claim. I am unable to agree. I find that the specific liability of the defendant for a liquidated amount of Rs.2 crores is borne out from the aforesaid receipt, it cannot therefore be said that this



receipt is not a written contract. Once there is a categorical acknowledgement by the defendant of this liquidated amount by way of this receipt, execution whereof is not denied by the defendant who has only tried to raise a plea that the amount stands forfeited with which plea I will deal at a later stage, it cannot be said that the suit based on this receipt dated 23.12.2011 is not maintainable under Order XXXVII Rule 1 (2)(b)(i).

17. Even though, the receipt of a sum of Rs. 1 crore by the defendant, vide cheque dated 06.01.2012 from the plaintiff, is not denied by the defendant, it is his plea that the suit based on such a cheque would not be maintainable under Order XXXVII. Having considered the provisions of Order XXXVII Rule 1 (2)(b)(ii), I am of the view that the plain language of this provision is in itself is sufficient to reject the defendant's plea that a claim based on a cheque would lie under Order XXXVII only in the case of a dishonored cheque. The plaintiff's claim based on this cheque, which is a negotiable instrument for a fixed amount, would clearly fall within the ambit of Order XXXVII Rule 1 (2)(b)(ii) and therefore, there is no merit in the defendant's plea that the suit, as filed by the plaintiff, under Order XXXVII is not maintainable.

18. I am of the considered opinion that the claim of the plaintiff being for a fixed amount of money under a receipt and cheque, the execution whereof is not denied by the defendant, would squarely fall within the ambit of Order XXXVII CPC. In this regard, reference may be made to the following observations of the coordinate bench in paragraph 13 of its decision in *Jindal Steel & Power Limited vs. N.S. Atwal decided on 04.07.2013* in CS(OS) 713/2010:



"13. As far as the plea of the maintainability of the suit under Order 37 of the CPC is concerned, though undoubtedly there is no document on the basis whereof, the defendant can be said to have admitted the liability in the balance principal amount of Rs. 2,98,39,060/- towards the plaintiff but in my opinion, in view of the subsequent admission by the defendant of the liability in the principal amount claimed in the suit, the same pales into insignificance. This Court, if were to, inspite of such admission by the defendant, go into technicalities as to the maintainability of the suit under Order 37 of the CPC, would be lending credence to the perception "the law is an ass - an idiot" echoed by Mr. Bumble in Charles Dickens 'Oliver Twist'. Justice cannot be frustrated by legalistics. It is the duty of every court to prevent its machinery from being made a sham, thereby running down the rule of law itself as an object of public ridicule. It will and must prove any stratagem self defeating if a party indulges in making the law a laughing stock, for the court will call him to order. Justice Krishna Iyer in Bushing Schmitz Private Limited v. P.T. Menghani MANU/SC/0344/1977 : (1977) 3 SCR 312 quoted with approval Lord Erskine "there is no branch of the jurisdiction of this Court more delicate than that, which goes to restrain the exercise of a legal right". He further held "But the principle of unconscionability clothes the court with the power to prevent its process being rendered a parody". Once it is clear that there is no dispute of the sum of Rs. 2,98,39,060/- being due from the defendant to the plaintiff in the loan account, the Court will not enter into an academic exercise and pronounce on technicalities. The Supreme Court in T. Arvindandam Vs. T.V. Satyapal MANU/SC/0034/1977 : AIR 1977 SC 2421, Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I MANU/SC/0951/2003 : (2004) 9 SCC 512 and ITC Limited Vs. Debts Recovery Appellant Tribunal MANU/SC/0968/1998 : (1998) 2 SCC 70 has held that the Courts are not to prolong litigations, the fate whereof is otherwise clear and at the expense of other cases requiring



adjudication. Even if not under Order 37 of the CPC, the plaintiff under Order 12 Rule 6 CPC or under Order 15 is entitled to a decree in the principal sum of Rs. 2,98,39,060/- . Recently also, in Krishna Devi Malchand Kamathia v. Bombay Environmental Action Group MANU/SC/0085/2011 : (2011) 3 SCC 363, the Supreme Court observed that justice is only blind or blindfolded to the extent necessary to hold its scales evenly; it is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.”

19. In a case like the present where the claim of the plaintiff is for a fixed amount of money, based on a receipt which clearly sets out the background in which the amount of Rs.2 crores was received by the defendant and on a cheque for Rs.1 crore, payment whereof towards the sale consideration is also admitted by the defendant, the acceptance of the defendant's plea that the suit is not maintainable under Order XXXVII would only prolong litigation, which course of action the Court must avoid. Once it is clear that the defendant unequivocally admits the receipt of the entire sum of Rs. 3 crores from the plaintiff towards the sale consideration of the aforesaid property, the sale deed in respect whereof was never executed, his technical plea that the suit is not maintainable under Order XXXVII CPC deserves to be rejected.

20. Now, I may come to the defendant's next plea that the amount of Rs.3 crores received by him from the plaintiff stands forfeited in terms of the oral agreement between the parties, according to which the plaintiff was required to pay a total sum of Rs.48.75 crores for execution of the sale deed in his favour, which amount, he was unable to pay. It has been urged by Dr. George that the defendant has, in accordance with Section 74 of the Indian



Contract Act, rightly forfeited this amount of Rs.3 crores on account of the plaintiff's breach of the oral agreement between the parties and therefore, the defendant is entitled to an unconditional leave. On other hand, learned senior counsel for the plaintiff has, by drawing my attention to the defendant's application for leave to defend, vehemently urged that this plea is wholly sham and vexatious as no such agreement for forfeiture of the amount paid by the plaintiff was ever entered into between the parties. He has also urged that not only was the sale consideration fixed at Rs.15.75 crores, as against the defendant's false claim of Rs.48.75 crores, but even otherwise when the defendant received the amount from the plaintiff, the property already stood mortgaged with Kotak Mahindra Bank, which fact was concealed from the plaintiff by the defendant. It is the plaintiff's case that despite his readiness to pay the balance amount, the defendant was unable to execute the sale deed in favour of the plaintiff only on account of the subsisting mortgage with the bank and therefore, ought to have immediately returned the sum of Rs.3 crores to the plaintiff with interest @18% per annum.

21. It thus emerges that while the plaintiff has urged that the defence raised by the defendant is wholly sham, the defendant has claimed that he has a good defence to the claim on merits and is, therefore, entitled to unconditional leave to defend. In order to appreciate the rival submissions of the parties on this aspect, it would be apposite to note rule 3(5) of Order XXXVII which reads as under:

“(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to



defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.”

22. From a bare perusal of the aforesaid provision, it is evident that in case while dealing with an application for leave to defend under Order XXXVII Rule 3(5) CPC, the Court finds that the facts disclosed by the defendant in his affidavit are sufficient to show that he has a good defence to the plaintiff's claim on merits, he is entitled to an unconditional leave to defend. On the other hand, where the defendant may not have a good defence but is able to raise a triable issue indicating that he has a *bonafide* or reasonable defence, he is entitled to leave subject to conditions as may be deemed appropriate by the Court. It is only in a case where the Court finds that the facts disclosed by the defendant in his affidavit do not indicate any substantial defence or indicate that the defence raised by him is frivolous or moonshine, leave to defend will be refused. It is in the light of this legal position that the defence raised by the defendant is required to be considered. In the present case, as already noted hereinabove the only defence raised by the defendant is that the amount, received by him from the



plaintiff, stood forfeited. While the learned counsel for the defendant has vehemently urged that the amount stood forfeited as the plaintiff failed to pay the balance sale consideration within the agreed time, it is the plaintiff's case that the property was already mortgaged with the Kotak Mahindra Bank on the date when the payment was received by the defendant, a fact which was concealed by him.

23. From a perusal of the defendant's affidavit, what emerges is that while the defendant has set out in great detail the particulars of the purported oral agreement entered into between the parties, which entitled him to forfeit the amount in case of default by the plaintiff, he has conspicuously failed to even aver that the plaintiff's plea that the property stood mortgaged with Kotak Mahindra Bank was incorrect. The defendant has not even made any attempt to give the dates or particulars of the manner in which the mortgage with Kotak Mahindra Bank was redeemed, thereby entitling him to execute the sale deed in favour of the plaintiff. In fact, even during arguments, learned counsel for the defendant has not been able to deny that on the date of receipt of the payment by the defendant, his right to deal with the property stood curtailed and therefore, he could not have executed any sale deed in favour of the plaintiff.

24. When the defendant's plea that there was an oral agreement entitling him to forfeit the sum of Rs.3 crores received from the plaintiff is considered in the light of his aforesaid conduct, the same has to be necessarily rejected. Once it is clear that on the date of receipt of the amount by the defendant, he could not have executed any sale deed in favour of the plaintiff despite having received the sum of Rs.3 crores from him, I have no hesitation in holding that this defence sought to be raised by the defendant



that the amount, though received by him from the plaintiff stood forfeited in terms of Section 74 of the Act, is wholly sham, vexatious and moonshine. This attempt by the defendant to raise the baseless defence of a purported oral agreement raised by the defendant is a mere attempt to continue to deprive the plaintiff of the amount which he paid to the defendant more than a decade ago and must be curbed.

25. I may now refer to the plaintiff's final plea that the suit which includes the claim for interest is not maintainable under Order XXXVII CPC. For this purpose, while the defendant has relied on the decision in ***J.R. Sharma Overseas Ltd. (Supra)***, the plaintiff has relied on the later decisions of this Court in ***Sanjay Kohli (Supra)*** and ***Jindal Steel & Power Limited (Supra)***. In my considered view, even though the defendant is correct in urging that there is no written contract insofar as the plaintiff's claim for interest @18% p.a. is concerned, the plaintiff would still, in terms of Section 80 of the Negotiable Instrument Act, 1881, be entitled to claim interest. It is by now well settled that while filing a suit under Order XXXVII CPC, a claim for interest on the due amount can be raised by the plaintiff. In this regard, it may be apposite to refer to paragraph 11 of the decision in ***Sanjay Kohli (Supra)***, which reads as under:

“The other contention raised by the counsel for the defendant no. 1 is that the amount of interest cannot be claimed in a summary suit under Order XXXVII is also devoid of any merit. This issue is no more res integra as the settled legal position is that even if there is no agreement between the parties to claim any specified interest, the plaintiff is entitled to include the interest amount in a summary suit in terms of Section 80 of the Negotiable Instrument Act read with Order XXXVII of CPC. It will be relevant here to refer to the judgment of this court in the



case of S.K. Malhotra v. Man Mohan Modi MANU/DE/2960/2009 : 166 (2010) DLT 723: 2009 (113) DRJ 802 wherein the court while granting the interest in a summary suit held as under:

4. In the case of Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy reported as: MANU/SC/0142/1992 : AIR 1992 SC 732, the Supreme Court held that a person is entitled to the payment of interest on the principal amount and the security deposit illegally retained, on the ground that the person deprived of the use of money to which he is legitimately entitled, has a right to be compensated for the deprivation, call it by any name. Even in the present case, it cannot be disputed that the appellant was deprived of the use of the money to which he was legitimately entitled and thus he had a right to be compensated for the period of deprivation at least from the date of institution of the suit till the date of passing of the decree.

As manifest from above, the plaintiff would be entitled to the amount of interest even if there is no term regarding payment of interest stipulated between the parties. In the light of the above discussion, this court does not find any merit in the present application and the same is hereby dismissed."

26. I have also considered the decision in ***J.R. Sharma Overseas Ltd. (Supra)*** but find that the same is not applicable to the facts of the present case. It can, therefore, not be said that merely because the plaintiff has raised a claim for interest on the sum of Rs.3 crores, the suit would not be maintainable under Order XXXVII CPC. However, taking into account the current market rate of interest and the rates of interest charged by different banks, the plaintiff's claim for interest @18% per annum cannot be accepted. Considering the fact that the plaintiff has been deprived of this amount since the year 2012, I am of the view that interest of justice will be



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met by directing that the plaintiff would be entitled to interest @10% per annum with effect from 06.01.2012, when the defendant had received the entire sum of Rs.3 crores from the plaintiff.

27. For the aforesaid reasons, the application for leave to defend, being meritless, is dismissed. Consequently, a decree is passed in favour of the plaintiff and against the defendant for recovery of a sum of Rs.3 crores along with interest @10% per annum with effect from 06.01.2012 till the date of institution of the present suit, along with *pendete lite* and future interest at the same rate of 10% per annum till the date of recovery. The plaintiff will also be entitled to costs of the suit as per the schedule. Decree sheet be drawn up accordingly.

(REKHA PALLI)
JUDGE

NOVEMBER 30, 2023
acm/kk