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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 27th August, 2018
Pronounced on: 07th September, 2018**

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CS(OS) 1451/2014

M/S SQUAR COMMUNICATIONS PVT LTD

..... Plaintiff

Through : Mr. Anil Sapra, Senior Advocate.
with Ms.Manjula Gandhi,
Mr.S.K.Gandhi, Mr.Aditya
Kapoor, Ms.Medha Tandon,
Mr.Shivanshu Kumar, Mr.Sarthak
Katyal and Mr.Jaideep, Advocates.

versus

IGNOU UNIVERSITY & ORS

..... Defendant

Through : Mr.Aly Mirza, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

IA No.8545/2016 & 4289/2017

1. IA No.8545/2016 is under Order XXXVII Rule 3(5) CPC, seeking leave to defend the suit filed by the plaintiff against the defendant for recovery of ₹ 1,21,61,339/-. IA No.4289/2017 is for seeking condonation of delay of 7 days in moving IA No. 8545/2016. In view of reasons given delay is condoned.

2. This suit is for recovery of an amount of ₹ 1,21,61,339/- inclusive of interest which has been calculated at the rate of 24 % per annum till the date of filing of the present suit and for future interest at the rate of 24% per annum till realization. In addition, the plaintiff also seek recovery of damages in the amount of ₹ 20 lakhs as compensation for the loss of goodwill, harassment etc.

3. Admittedly, a suit under Order 37 can be instituted only when, inter-alia, the same is to recover a debt or liquidated demand in money payable by the defendant. The plaintiff therefore seeks to give up its claim for damages and is well within its rights to do so as held in *SICOM Ltd. vs. Prashant S. Tanna and Others* AIR 2004 Bombay 186 wherein the Court held:

*“28. In the circumstances, we summarise the answer to the reference as follows:
The judgments in Randerian & Singh v. Indian Overseas Bank and Hydraulic and General Engineering v. UCO Bank (1998) 1 L.J. 793 are overruled. The suit would be maintainable as a summary suit if it falls within one of the classes of suits enumerated in Order XXXVII, Rule 1(2) even if the claim made therein is not properly quantified or is in excess of what the plaintiff is entitled to.
xxx”*

4. The defendant argues

- (i) according to the case set up by the plaintiff, the defendant approached the plaintiff for advertisement of the ceremony of placing a foundation stone of Indian Sign Language Research and Training Centre (ISLRTC), which was held on 4.10.2011 at IGNOU Campus, Maidan Garhi, New Delhi. There is no record of any offer letter having been written by the defendant to the plaintiff and the plaintiff may be called upon to produce documentary evidence in support of its allegation the

University has approached the plaintiff for advertisement, as alleged. In fact no such offer could have made at all;

- (ii) it is alleged by the plaintiff the fees quotation/estimate for the purpose of issuance of advertisement, as desired was submitted to the University on 1.10.2011, which was approved by the then Vice Chancellor Professor VNR Filial viz. *Annexure B*. The plaintiff has filed only a copy thereof and from a perusal of the said document it is not clear as to with whom the said estimate was submitted and how it ended up before the then Vice Chancellor without it being routed through proper channel. The University does not have the original of this document in its record. The so called estimate shows a figure of ₹ 1,40,92,187/- and this is not the manner in which contracts running into crores are awarded by the University. It is alleged, every time a contract is awarded, the same in the first stage is proposed by the concerned department/centre; the proposal is thereafter reviewed and vetted by various committees, including financial committee to look into the various aspects of the matter and once the same has been approved, a proper tender is floated for the purpose of inviting bids/quotations so that competitive pricing can be achieved. In the present case there is no record as to how and in what manner the plaintiff was approached by the University and under what circumstances the estimate was approved by the then Vice Chancellor on 3.10.2011; and
- (iii) the payment already made to the plaintiff cannot be justified under the circumstances as the University is the custodian of

State largesse which receives grants from the MHRD and its accounts are audited by the Comptroller General of India and presented before the Parliament. The award of the agreement to the plaintiff, the payments already made thereunder constitutes a financial irregularity of such magnitude that it warrants a criminal investigation in the matter to fix culpable responsibility as the action of awarding the tender to the plaintiff, when it was the only bidder, was improper and illegal.

5. In its application for leave to defend the defendant, primarily, has argued (a) the suit is not maintainable as is based upon the amount due on invoices and there being no written contract; (b) original documents having not been filed; (c) the Vice Chancellor having committed a fraud upon the University two FIRs having been lodged against him; (d) since the sanction was only of ₹ 1.25 crores, the Vice Chancellor had no authority to grant the approval for the expenses of ₹ 1.40 crores; (e) interest was never agreed to be 24% per annum, and (f) the plaintiff has paid lesser amount to the publishers than claimed. Reference is made to his admissions viz. his profits would never exceed 5%.

6. Qua issue (a) the suit being not maintainable under Order XXXVII, being filed on the amount of invoices, the learned counsel for the defendant relied upon a judgment dated 31.08.2012 *GE Capital Services India vs. May Flower Healthcare Pvt. Ltd. & Ors.* in CS(OS) 2859/2011 wherein the following was held:

“5. xxx Only when the liability which is admitted in the dishonoured instrument or in the written document containing a liquidated demand as payable to the plaintiff, suits can be filed under Order 37 CPC. Those suits claiming amounts which are only balances due at the foot of account cannot be treated as falling under Order 37 CPC because the suit claim is based on the account and the amount claimed is not a

liquidated amount arising/payable to the plaintiff on an instrument on the limited types which are the subject matter of Order 37 CPC. Entries and statements of account have necessarily to be proved as per Section 34 of the Evidence Act, 1872 for the balance at the foot of the account to be arrived at.

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in the present case the suit is not based on the invoices only but the amount claimed in the suit is the balance due at the foot of a running account i.e. after giving adjustment/credit for certain payments made for the invoices/bills. The suit is therefore definitely not only on the basis of invoice amounts alone for the same to be covered under Order 37 CPC.”

7. The facts in the judgment cited above reveal the suit therein was never based on invoices but was based upon amount due at the foot of the running account, which are not the facts herein. Rather in *KLG System Ltd. vs. Fujitsu ICIM Ltd.* AIR 2001 Delhi 357 this Court held otherwise, viz.,

“11. The Defendant/Applicant has also challenged the maintainability of the suit under Order xxxvII of the C.P.C., stating that "there is no debt or liquidated demand in money payable to defendant-Company (sic. read Plaintiff) and/or based on a written contract". It is no longer res integra that Invoices/Bills are 'written contracts' within the contemplation of this Order. Reference is directed to Messrs. Punjab Pen House vs. Samrat Bicycle Ltd., , Corporate Voice (Pvt.) Ltd. vs. Uniroll Leather India Ltd., , and Beacon Electronics vs. Sylvania and Laxman Ltd., 1998 (3) Apex Decisions (Delhi) 141. There is, thus, no hesitancy in holding that the present suit is a suit which should be tried under the summary procedure of Order xxxvII of the C.P.C.”

8. And in *M/s.Punjab Pen House vs. M/s. Samrat Bicycle Ltd.* AIR 1992 Delhi 1 the Court held :

“5. xxxxx Therefore, when the goods are supplied through a bill on certain terms and conditions duly agreed to between the parties, there is no escape from the conclusion that it amounts to a written contract between the parties. Therefore, I am of the view that the suit is covered by cl. (2) sub-cl. (b) of O. 37 of the Code according to which the plaintiff seeks to recover a debt or liquidated amount in money payable by the defendant with or without interest arising on written contract. Learned counsel for the plaintiff also tried to cover the present suit on the clause according to which recovery of a debt or liquidated money, with or without interest is based on an enactment. xxxxx”

9. Qua contention (b) it was argued by the learned counsel for the defendant that none of the original documents have been filed by the

plaintiff; the approval note is only a photocopy. The learned counsel for the defendant then relied upon Neebha Kapoor vs. Jayantilal Khandwala and Ors. AIR 2008 SC 1117 wherein the Court held as follows:

*“For the purpose of obtaining a summary judgment in terms of Order 37 of the Code, ordinarily the original documents must be produced. Original documents are not available. Appellant, therefore, is obligated to prove the loss of documents. Only because a suit has been entertained as a summary suit, the same by itself may not be a ground for passing of a judgment on mere asking. We have noticed the fact situation obtaining herein. The High Court was of the opinion that it is a case where unconditional leave should be granted. The question as to whether the defence of the respondents is moonshine or not was not a matter which required consideration of the High Court at that stage. **A decree could not have been granted on the basis of even photostat copies of the documents.** See Food Corporation of India v. Dena Bank, Indore and another AIR 2004 MP 158] Presumption in regard to a negotiable instrument or a bill of exchange in terms of Section 118 of the Act is also an evidence. It is true that a presumption can be raised that a bill of exchange was correctly stamped as provided for under Clause (f) of Sub-section (2) of Section 128 of the Code but a decree is to be passed by a court of law upon application of mind.”*

10. However, as per the averments of the plaintiff all the originals viz. approvals/notices/quotations etc. are stated to be with the defendant as per the ordinary course of business dealings, though the letters of acknowledgments of defendant upon which the plaintiff has relied upon are lying with the plaintiff and they have shown it to the Court and even offered the defendant to compare its copies with the originals. Nevertheless the defendant does not challenge the approval given by the Vice Chancellor but its challenge is *only* to his authority to approve such transaction without following internal procedures. Admittedly the plaintiff had no role to play in internal affairs of the defendant. Hence in the circumstances where the original documents, are supposedly lying with defendant the suit under Order XXXVII CPC shall be maintainable.

11. Qua contention (c) viz. fraud alleged against Vice Chancellor the learned counsel for the defendant referred to *State Bank of Saurashtra vs.*

Ashit Shipping Services (P) Ltd. and Anr. AIR 2002 SC 1993 which notes:

“13. Xxxxxx The Appellants have made serious allegations of fraud and collusion. They had stated that such a document did not exist in their records. This was not a defence which could be characterised, at this stage, as sham or illusory or practically moonshine. These triable issues should not have been summarily rejected by the trial Court and/or the High Court.”

12. Even otherwise, in *Madan Lal Limited vs. Growth Techno Projects Ltd. and Ors.* CS(OS) 197/2006 decided on 26.02.2009 the Court held otherwise as under:

“15. xxxxxx In the circumstances aforesaid, I do not find any such requirement; nor does Order 37 of the Code prohibits proceeding in the absence of the original documents. Rule IA.No. 13021/07 & CS(OS) 200/06 & IA.No. 13018/07 & CS(OS) 201/06 5 of Order 37 empowers the court to order the bill, hundi or note on which the suit is found to be deposited with an office of the court; the same is indicative of there being no mandatory requirement of the original being before the court where the filing of original is deemed necessary for adjudication, of course the court can refuse to proceed.”

13. Now as per the case of the plaintiff, on 01.10.2011 the plaintiff was called by the then Vice Chancellor to cover a function, to be held on 04.10.2011, which function the Hon'ble Prime Minister was to inaugurate. The facts reveal since there was an extreme urgency, the estimates were given only on 03.10.2011 and were approved there and then by the then Vice Chancellor and on 03.10.2011 itself the following release order was issued:

“Please publish the enclosed sign long advt. on 4th Oct 2011 in the following media on immediate translation in relevant language. In minimum possible space under half page columns on the right hand side of newspaper preferably top right. The hindi translation of the advertisements must be done by the Translation cell, School of Humanities, IGNOU. Translation of other languages can be done by respective newspapers. ”

14. The said release order specified the advertisements to be given in different newspapers/editions and its length be minimum of half page.

15. The plaintiff then gave a bill dated 10.10.2011 disclosing inter alia, the publications/editions which published such advertisements; the release dates of such advertisements; the size details/surcharge details; the space; the rate; the GR surcharge amount and the bill amount. Each and every detail qua such advertisements is mentioned in the invoice and such advertisements were in fact published in newspapers mentioned in the release order given by the defendant and there is *no denial* to all these averments by the defendant.

16. The dispute raised by the defendant is *only* qua the then Vice Chancellor had no authority to grant such approval against financial rules. This stand taken by the University appears to be frivolous as even though on 20.10.2011 the Vice Chancellor had retired but admittedly on 23.12.2011 the University wrote a letter to the plaintiff and admitted its liability to pay, as under:

“This has reference to your bill for Rs.1,40,87,238/- towards the Half Page color advertisement of IGNOU published on 4/10/2011 in National Media (The Indian Express, Hindustan Times, The Pioneer, Amar Ujala, The Hindu). This bill is in under process for payment.

Due to delayed the Budget allocation the University shall release the payment early next year.”

17. Further a letter dated 03.05.2012 was also written by the University as under:

“with reference to your email dated 3rd May 2012 regarding the outstanding payment of Rs.1.40 crores approx. This is to convey that the payment will be made as soon as possible.”

18. The plaintiff has also filed a copy of a cheque of ₹ 62,12,472/- being cheque of the half amount, less 10% discount, less 2% TDS and it was signed by the same person who had filed this leave to defend application. Rest of the half amount despite being *admitted* was never

paid though the plaintiff had raised various demands and lastly a legal notice dated 16.01.2014 was sent. Rather the defendant for three years did not even care to reply to such demands and legal notice or raised dispute of any alleged fraud on the part of the then Vice Chancellor.

19. It is strange to see till the time of filing of this suit the defendant did not object to validity to such demands and rather sought time to make such payments. As late as on 22.11.2013 the defendant replied to an RTI of the plaintiff as under :

“Your letter dated 25.10.2013 has been duly received by our Accounting and Finance Department. The description / answer to the queries raised by you in your said reply are as follows:

Question 1: The advertisement was printed by Square Comm. Pvt. Ltd. A copy of the Release Order is attached herewith.

Question 2: A copy of the Approval / Acknowledgement is attached herewith.

Question 3: The Approval / acknowledgement has been given by the Chancellor / Head person (of IGNOU).

Question 4: A copy of the Bill is attached herewith.

Question 5: 50% of the total Bill amount has already been paid. The remaining amount is under process.

In the event of any objections or clarifications or further queries to the above answers, the same can be presented before the First Appellate Officer.”

20. All above show the defendant rather acknowledged the debt as late till November 2013 but now in its leave to defend application is trying to raise a dispute which was never there *during* and *much after* the transaction. Rather in para 29 of its affidavit annexed to the application to leave to defend, the defendant has admitted:

“that thereafter, as the amount of bill was more than the entire grant, 50% of the invoice amount that is ₹ 62,12,472/- was paid to the plaintiff vide cheque no. 817957, drawn on Punjab National Bank, Maidan Garhi, the balance 50% payment was kept pending for the receipt of grant during the next financial year.”

21. This averment is in contrast of the submission of the learned counsel for the defendant the total grant awarded for this project was only ₹ 1.25 crores approx. and hence the Vice Chancellor could not have granted the approval for an amount more than that.

22. Admittedly, the Ministry vide its letter dated 12.09.2011 received by defendant on 21.09.2011 had approved Rs.1.255 crores for this function as 1st installment. The letter dated 12.09.2011 of the Ministry clarifies the position of the plaintiff:

“Sir,

I am directed to convey the sanction of the President to payment of Grant-in-Aid of ₹ 1,25,50,000/- (Rupees Once Crore twenty five lakhs and fifty thousand only) for Grant-in-Aid General as 1st Installment to the Vice Chancellor, Indira Gandhi National Open University (IGNOU), New Delhi for Indian Sign Language Research & Training Centre (ISLRTC) at New Delhi, during the financial year 2011-12 Plan (recurring) subject to following conditions:

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Yours faithfully,

(R.P.Puri)

Under Secretary to the Govt. of India”

23. Hence the defense now sought to be created during the pendency of this suit is nothing but a sham and a false defence. One could have imagined if a dispute was raised during the period of transaction or just after that but not years after when a suit is filed. Hence contention (c) and (f) has no merit as the defendant cannot peep into the profit margins of the plaintiff in such transaction after admitting its dues time and again.

24. Qua contention (d) it was argued by the defendant the plaintiff did not charge any interest even at the time when part payments were made by the defendant and there being no agreement to charge interest by the plaintiff, the claim of interest @ 24% per annum is not maintainable. the

defendant relied upon *Steel Authority of India Ltd. vs. Century Tubes Ltd. and Ors.* 121 (2005) DLT 122, wherein the Court held:

“17. Suit is based on 22 dishonoured cheques. No document has been relied by the plaintiff, much less shown during arguments, which contains a written acknowledgment of the defendants that defendants would be liable to pay interest @ 27% per annum. It is obvious that the suit claims a relief which falls beyond the scope of Order 37 CPC in so far it relates to recovery of interest.”

25. The judgment cited above has no relevance in the context as the cited case is based purely on cheque but whereas this case herein is based on an invoice containing various clauses, including that of interest, hence the law applicable in these facts would be *Dura-Line India Pvt. Ltd. vs. BPL Broadband Network Pvt. Ltd.* 111 (2004) DLT 736 wherein this Court held:

“13. Point III Claim for interest at 24% in the absence of any agreement, exorbitant and not sustainable. Defendant also questions the claim for interest at the rate of 24 per cent per annum. A perusal of the terms and conditions on the invoices show that interest at the rate of 24 per cent per annum was payable. Hence, the submission of Mr. Jain that there was no agreed rate of interest and the claim for interest at the rate of 24 per cent per annum is not correct as the conditions of invoice itself stipulated the rate of interest itself.”

26. Hence the defendant has failed to raise any triable issue indicating he has fair, reasonable or bonafide defence. In fact the defence sought to be raised is illusory, sham and practically moonshine. What need to be done in these circumstances one may be guided by *Mechelec Engineers And Others vs. M/s. Basic Equipment Corporation* 1977 SCR (1)1060 wherein the Court held:

“In Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee(1), Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 37 C.P.C. in the form of the following propositions (at p. 253):

(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign

judgment and the Defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence".-----

27. The defence of defendant being illusory, sham and practically moonshine hence the leave to defend is though granted but only upon the defendant depositing the suit amount with upto date interest @ 12% per annum with effect from date of filing of suit till today within two months and the amount so deposited be released to the plaintiff upon its filing an affidavit/undertaking that it shall deposit the same within a month if the Court so desire/orders to deposit.

28. In above terms the application stand disposed of.

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29. Upon deposit of such amount by the defendants, written statement be filed by the defendant within four weeks thereafter with an advance

copy thereof to the plaintiff. Replication, if any, thereto be also filed within two weeks thereafter.

30. List before the Joint Registrar on 12.12.2018.

31. Matter be placed before Court upon completion of pleadings.

YOGESH KHANNA, J

SEPTEMBER 07, 2018

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