

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

% **Date of decision: 19th March, 2013**

+ **CS(OS) 47/2011**

SATYENDRA JAIN **..... Plaintiff**

Through: Mr. Sanjeev Puri, Sr. Adv. with Mr.
Sanjay Sarin, Mr. Tarun Rana & Ms.
Gagan Deep Kaur, Adv.

versus

M/S OMWAY BUILDESTATE PVT. LTD. & ORS.... Defendants

Through: Mr. Amit Chadha, Sr. Adv. with Mr.
Kunal Sinha, Adv.

AND

+ **CS(OS) 48/2011**

RAVI SHARMA **..... Plaintiff**

Through: Mr. Sanjeev Puri, Sr. Adv. with Mr.
Sanjay Sarin, Mr. Tarun Rana & Ms.
Gagan Deep Kaur, Adv.

versus

M/S OMWAY BUILDESTATE PVT. LTD. & ORS.... Defendants

Through: Mr. Amit Chadha, Sr. Adv. with Mr.
Kunal Sinha, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

**IA No.17660/2011 [u/O 37 R-3(5)] in CS(OS) No.47/2011 and IA
No.17661/2011 [u/O 37 R-3(5)] in CS(OS) No.48/2011 (both for grant of
leave to defend)**

1. Applications for leave to defend the two suits under Order 37 of the Code of Civil Procedure, 1908 for recovery of Rs.5,75,17,240/- and Rs.9,94,14,041/- with interest and costs are for adjudication. The two suits, though by different plaintiffs, are against the same defendants No.1 to 3 save that there is an additional defendant No.4 in CS(OS) No.48/2011. The suits are being listed together and the same set of counsels have made the same arguments in both the suits.

2. The suits were filed pleading:

- (i) That the defendant No.2 in both the suits viz. Mr. Janak Goyal, being the Director of the defendant No.1 Company, had approached the plaintiff in each of the suits in January, 2010 for business loan of Rs.4,35,00,000/- and Rs.7,50,00,000/- respectively for the purpose of promoting and developing the business of the defendant No.1 Company.
- (ii) That the defendant No.3 Smt. Neelam Goyal is also a Director of the defendant No.1 Company.

- (iii) That the defendants required the subject loan for the period with effect from 20.01.2010 to 31.05.2010 extendable upto 30.09.2010 with interest thereon at 36% per annum.
- (iv) That the plaintiff in CS(OS) No.47/2011 agreed to lend the said loan to the defendant No.1 Company on the guarantee of the defendant No.2 and the plaintiff in CS(OS) No.48/2011 agreed to lend the said loan to the defendant No.1 Company on the guarantee of the defendants No.2 and 4.
- (v) That the defendant No.1 executed the Loan Agreements dated 20.01.2010 with each of the plaintiffs and the defendant No.2 stood as guarantor with respect to the loan subject matter of CS(OS) No.47/2011 and the defendants No.2 and 4 stood as guarantors with respect to the loan subject matter of CS(OS) No.48/2011 and in pursuance to the said Agreements, loan was advanced by each of the plaintiffs and the defendants agreed to pay interest at the rate of 36% per annum on the said loan.

- (vi) That the loan amount was disbursed vide cheques, particulars whereof are given in the plaint in each of the two suits and which were duly encashed by the defendant No.1 Company.
- (vii) That the loan was secured by, mortgage by delivery of title deeds of the properties described in the plaint in each suit, post dated cheques and guarantee of defendant No.2 in CS(OS) No.47/2011 and guarantee of defendants No.2 and 4 in CS(OS) No.48/2011.
- (viii) That a Memorandum of Mortgage by deposit of title deeds was also executed.
- (ix) That the defendants defaulted in repayment of the loan even within the extended period of 30.09.2010.
- (x) That the post dated cheques issued in favour of the plaintiffs in each of the suits in repayment of the loan amount were also returned dishonoured with the endorsement of the bank of the defendant No.1 Company of “owing to insufficiency of funds” in the account of the defendant No.1 Company.

(xi) That notices demanding the amount were got issued by the plaintiffs to the defendants and subsequently complaints of offences under Section 138 of the Negotiable Instruments Act, 1881 also instituted.

These suits for recovery of the principal amount of the loan together with interest thereon at 36% per annum till the institution of the suits and the amount already deducted by the defendant No.1 Company towards tax at source from the interest amount, were filed under Order 37 of the CPC.

3. In response to the summons for appearance, appearance was filed on behalf of the defendants, summons for judgment issued and the defendant No.1 Company has filed IA No.17660/2011 and the defendants No.2 and 3 have filed IA No.17659/2011 in CS(OS) No.47/2011 for leave to defend and defendant No.1 Company has filed IA No.17661/2011 and the defendants No.2 & 3 have filed IA No.17662/2011 and the defendant No.4 has filed IA No.17763/2011 in CS(OS) No.48/2011 for leave to defend. However, as aforesaid, the same senior counsel on behalf of both the plaintiffs and the senior counsel on behalf of the defendants in both the suits have raised common arguments. Need is thus not felt for referring separately to each of

the applications for leave to defend and reference hereinafter shall be made to the leave to defend of the defendant No.1 Company only.

4. The grounds urged in the affidavits accompanying the applications for leave to defend are as under:

- i) That the suit against the defendant No.3 on the ground of her being the Director of the defendant No.1 Company and against the defendants No.2 and 4 as guarantors, is bad for misjoinder of parties and cannot be tried as a summary suit.
- ii) That the original documents on which the suit is based have not been filed and the suit is thus not maintainable under Order 37 as the plaintiffs will have to lead evidence requiring trial.
- iii) That the defendants are still willing to honour their commitments of allotting the “said plot of land” to the plaintiffs after the clearance of already pending Court cases.
- iv) That the claim for interest is beyond the scope of summary procedure.

- v) That the alleged mortgage deed is neither registered nor is it properly stamped and no reliance can be placed thereon.
- vi) That the defendant No.1 Company had started a project at Alwar in Rajasthan under the name and style of Park City Alwar which has got delayed owing to certain disputes having arisen with respect thereto.
- vii) That the plaintiff in CS(OS) No.47/2011 and M/s Astute Real Estate Pvt. Ltd. of which the plaintiff in CS(OS) No.48/2011 and his wife were Directors, had approached the defendants in the year 2008 for purchase of 7556 and 16933 sq. fts. super area respectively of the ground floor of the said project and had paid Rs.50,00,000/- and Rs.1,50,00,000/- respectively to the defendant No.1 and in respect of the same mortgage deed as demanded by the plaintiffs were signed and post dated cheques given as security.
- viii) An MOU dated 01.08.2008 and 18.10.2008 respectively was entered into for the said purpose and further amounts paid thereunder to the defendant.

- ix) Further amounts were paid for the said project.
- x) That the rate at which commercial space was so agreed to be sold were concessional rates and the Agreements signed were not normal booking agreements made by the defendants in the due course of their business but had been drafted by the plaintiff in each case.
- xi) That the plaintiff in CS(OS) No.47/2011 is a Chartered Accountant and the plaintiff in CS(OS) No.48/2011 had approached the defendants through the plaintiff in CS(OS) No.47/2011 only.
- xii) Further Agreement dated 10.10.2008 was also entered into with plaintiff in CS(OS) No.47/2011 for 3307 sq. fts. developed space and further amounts paid thereunder.
- xiii) However owing to disputes aforesaid, the development of the project was held up.
- xiv) That the total money received by the defendant No.1 Company from the plaintiff No.1 in CS(OS) No.47/2011 is

Rs.1,00,00,000/- only and from M/s Astute Real Estate Pvt. Ltd. is Rs.1,75,00,000/- only.

- xv) That the defendants are ready and willing to handover the allotted space to the plaintiffs in each of the cases as soon as the stay orders owing to which the development of the project is held up are vacated.
- xvi) That each of the plaintiffs forced the defendant to sign the Agreements dated 20.01.2010.
- xvii) That the Loan Agreements dated 20.01.2010 are a farce and do not record the understanding or the agreements between the parties inasmuch as the amounts of Rs.4,35,00,000/- and Rs.7,50,00,000/- were never paid by the plaintiffs to the defendant by way of loan.
- xviii) That the account with the Bank of Baroda, Lajpat Nagar Branch, New Delhi in which the loan amount was given was not the normal account of the defendant No.1 Company but had been opened a day or two prior to the Agreements dated

20.01.2010 and the plaintiff only had introduced the defendant No.1 Company for the purposes of opening the account as the plaintiff in each case had a long standing account with the said Branch.

- xix) That the *modus operandi* was that the cheques would be deposited by the plaintiffs on one day and would thereafter be taken out by the plaintiffs themselves on the basis of signed cheques taken by them.
- xx) That the fact of the matter is that the two plaintiffs had advanced Rs.1,00,00,000/- and Rs.1,75,00,000/- respectively only to the defendant and in the case of CS(OS) No.48/2011, in respect of M/s Astute Real Estate Pvt. Ltd., money was sought to be shown as given by the plaintiff therein namely Mr. Ravi Sharma.
- xxi) That even the Loan Agreements dated 20.01.2010 provide that if the project of the defendant No.1 Company is approved, the area which is given as security would be given to the plaintiff in each case at Rs.2,250/- per sq. ft.

xxii) That the plaintiffs have deliberately and *mala fide*ly concealed the Agreements of 2008.

xxiii) That the suit is barred under the provisions of the Money Lending Act, Usurious Interest Act and also on account of the fact that the documents are improperly stamped and unregistered.

It is thus the case of the defendants that triable issues arise.

5. The senior counsel for the defendants has confined his arguments to the transaction of the year 2010 being a “money rotation transaction”. On being enquired as to what is a “money rotation transaction”, the senior counsel during the hearing on 31.01.2013 informed that such transactions are common and are done to show huge volume of business with money going in and coming out of the account, to enable the account holder to obtain a loan from the Bank. On being asked as to whether that was the criteria of any of the banks for granting loan, the senior counsel promised to show loan documents of banks on the next date of hearing but did not show anything in the adjourned hearing on 06.02.2013. I find the said arguments unpalatable. The creditworthiness cannot possibly

be judged on the basis of large amounts of money being credited and debited and logic tells, has to be judged either on the profitability and soundness of the business and / or on the assets of a prospective debtor from which the loans if any remaining outstanding can be realized.

6. The senior counsel for the defendants then drew attention to the factum of the plaintiffs only having introduced the defendant No.1 Company for the purpose of opening the account with the bank in which the loan amounts stated to be given by each of the plaintiffs to the defendant No.1 were credited. He has with the help of a chart handed over during the hearing shown that three cheques of the total value of Rs.4,35,00,000/- were on 19th & 20th January, 2010 transferred from the account of the plaintiff in CS(OS) No.47/2011 into the account of the defendant No.1 and four cheques of the total value of Rs.7,50,00,000/- were transferred from the account of the plaintiff in CS(OS) No.48/2011 into the bank account of the defendant No.1. It is further shown that a total sum of Rs.5,43,15,669/- was transferred from the same account of the defendant No.1 to the account of plaintiff in CS(OS) No.47/2011 on 18th & 20th January, 2010 and a total sum of Rs.6,30,75,211/- was transferred on 19th & 20th January, 2010 from the account of defendant No.1 to the account of M/s Astute Real Estate Pvt. Ltd.

7. The senior counsel for the defendants has next invited attention to a report submitted by Serious Fraud Investigation Office (SFIO) of the Ministry of Corporate Affairs, Government of India in Company Petition No.277/2011 filed by the plaintiff in CS(OS) No.48/2011 for winding up of the defendant No.1 Company. It is argued that the argument of the defendants of the transaction between the parties being a “money rotation transaction” is supported from the said report also. The senior counsel has further argued that the cheques of the plaintiff in each case, by which the loan in each case is stated to be disbursed to the defendant No.1 Company, are of prior to the date of the Agreements and there is no disbursement of loan after the Loan Agreements dated 20.01.2010 and the Agreements are thus without consideration and cannot be relied upon. Reference in this regard is made to the language of the Agreements which is of the loan being disbursed in pursuance thereto and not of having already been disbursed. The senior counsel has thus argued that the defence of the defendants is a triable one and cannot be called a moonshine and the defendants are thus entitled to leave to defend.

8. The senior counsel for the plaintiffs has argued that the plaintiffs do not deny the transactions of the year 2008 of the plaintiff in CS(OS)

No.47/2010 and of M/s Astute Real Estate Pvt. Ltd. of which the plaintiff in CS(OS) No.48/2011 is a Director, with the defendant No.1 Company. He has invited attention to the documents of the said transaction filed by the defendants themselves and has shown that the monies paid by the plaintiffs in CS(OS) No.47/2011 and by M/s Astute Real Estate Pvt. Ltd. of which the plaintiff in CS(OS) No.48/2011 is a Director, to the defendant No.1 Company in the year 2008 though against booking of space were refundable with interest mentioned therein as incidental charges, after a particular date and even the defendant No.1 Company had an option under the said Booking Agreements of the year 2008 to so refund the monies with incidental charges and was not obliged to give space only in pursuance to the said Agreements. The senior counsel for the plaintiffs further states that the accounts between the plaintiff in CS(OS) No.47/2011 and M/s Astute Real Estate Pvt. Ltd. of which plaintiff in CS(OS) No.48/2011 is a Director, and the defendant No.1 relating to the said flat Booking Agreements of the year 2008 stand settled and neither plaintiff in CS(OS) No.47/2011 nor M/s Astute Real Estate Pvt. Ltd. is now claiming any rights under the said Loan Agreements and the plaintiffs are claiming rights only under the Loan Agreements of 20.01.2010. On enquiry, whether any documents of closure of the 2008 transaction were

executed, it is informed that no such documents were executed. He has further shown that though the defendant No.1 while issuing post dated cheques for refund of the loan amount under the Loan Agreements dated 20.01.2010 with interest, deducted tax at source of Rs.10,85,474/- and Rs.19,45,479/- respectively and endorsement whereof is to be found on the reverse of the cheques but no TDS Certificates also have been issued to the defendants. He has further taken me through the SFIO report to contend that the same supports the version of the plaintiffs rather than that of the defendants. Attention is also invited to the statement of the defendants recorded on 02.05.2011 in the Court of Sh. Vikrant Vaid, MM (NI Act)-02/South, where it was stated that the cheque was given as security to be presented 'upon failure of the defendants to abide by the terms and conditions of the Agreement'. It is argued that the Loan Agreements dated 20.01.2010 which in the application for leave to defend is being called a farce, is not denied in the said proceedings. The senior counsel for the plaintiffs relies on *Ms. V.K. Enterprises Vs. M/s Shiva Steels* AIR 2010 SC 2885 to contend that where the issuance of the cheque on which the suit under Order 37 of the CPC is based is not disputed, leave to defend has to be refused. It is further argued that the defendants had been injuncted vide

order dated 22.01.2007 in OMP No.36/2007 filed by some other person, from dealing with the land which in pursuance to the Loan Agreement dated 20.01.2010 was mortgaged with the plaintiffs. It is stated that owing to the earlier injunction order, the said mortgage is useless. Copy of the application dated 13.08.2010 filed by the defendant No.1 in S.B. Civil Writ Petition No.195/2009 titled *M/s Omway Buildestate Pvt. Ltd. Vs. Divisional Commissioner, Jaipur* is also handed over during the hearing to show that the defendant No.1, therein, has admitted liability to pay interest to the plaintiffs.

9. The senior counsel for the defendants in rejoinder has argued that the plaintiffs in the plaint did not disclose the earlier Agreements of the year 2008 with the defendant No.1 and portrayed the loan transaction of the year 2010 to be a standalone transaction and cannot now be permitted to explain away on the basis of said earlier transaction. It is argued that had the plaintiffs made a case, as is now being made, of the transaction of the year 2008 being squared off and no claim surviving therein, the defendants would have had an opportunity to give their reply with respect thereto. On enquiry as to whether according to the defendants, the transaction of the year 2008 was still alive, the senior counsel for the defendants answered in the

affirmative. The senior counsel for the defendants has further argued that no money in the year 2010 at the time of the alleged loan came from the pockets of the plaintiffs to the pocket of the defendants. It is further argued that evidence is to be directed to be led to substantiate the plea of the transaction of the year 2010 being a sham and the defendants at this stage are only required to show that their defence is not a moonshine. It is stated that the defendants in their documents have filed a copy of the ledger of M/s Astute Real Estate Pvt. Ltd. in the books of accounts of the defendants, where monies are still shown as due from the defendant No.1 Company to M/s Astute Real Estate Pvt. Ltd. It is further explained that the earlier injunction of 22.01.2007 in OMP No.36/2007 was vacated by the Arbitrator in the year 2010. It is further argued that the land of which mortgage has been given is outside the developed land and is still good security. It is further contended that the title deeds of the properties of the defendants in fact were deposited with the plaintiffs pursuant to the Booking Agreements of 2008 and not in pursuance of the Agreement of 2010. The senior counsel has argued that it is a question of evidence as to what is the exact nature of relationship between the parties and when two views are possible, the principle is that leave to defend should be granted. As far as the reliance by

the plaintiffs on the report of SFIO is concerned, the senior counsel for the defendants has argued that the defendants have not had the opportunity to cross examine the persons examined by the SFIO and which opportunity the defendants would have upon leave being granted and during the trial of the present suit.

10. I have considered the rival submissions. What is abundantly borne out is that, the execution of the Loan Agreements of 20.01.2010 and issuance of the cheques in repayment of loan with interest, on which the suit is based, is no disputed.

11. The Loan Agreements of the year 2010 are unequivocal and record, i) loan having been advanced by each of the plaintiffs to the defendant No.1 and the terms of the said loan; ii) guarantees furnished by the other defendants for repayment thereof; iii) equitable mortgage having been created to secure the said loans; iv) post dated cheques for repayment of the loan amount with interest due having been issued; and, v) tax having been deducted thereon.

12. The argument of the senior counsel for the defendants, of the transactions of the year 2010 in the bank account of the defendant No.1

Company being a “money rotation transaction”, besides being illogical and having remained unsubstantiated during the arguments, does not have any foundation in the application for leave to defend. The said argument appears to have been taken by the senior counsel from the report of the SFIO. However the SFIO has not reported that the transactions were only intended for transfer of monies from one account to another.

13. The position which emerges from the entire narration aforesaid and the documents on record, according to me is clear as day light, though the parties to the suit for their own reasons may have avoided to so spell out the same. The plaintiffs (the plaintiff in CS(OS) No.48/2011 through his company M/s Astute Real Estate Pvt. Ltd.) had in the year 2008 advanced certain monies to the defendant No.1 and which in 2008 were given the colour of advance sale consideration / booking amount for the built up space being developed by the defendant No.1. However, the defendants themselves in their leave to defend application admit that the 2008 transaction between the parties was not the same as of the defendant No.1 with it is other flat buyers. The defendant No.1 thereunder, agreed to provide collateral security in the form of title deeds to secure the advance consideration / booking money paid by the plaintiffs to the defendant No.1.

Not only so, the defendant No.1 also agreed to buy back the said space from the plaintiffs at a consideration far more than the consideration at which it had agreed to sell the same space to the plaintiffs. Though the additional amount which was to become payable to the plaintiffs on repurchase of the said space by the defendant No.1 was described as 'incidental charges' but experience of life shows that the same was nothing but an interest for the period of time after which the buyback / repurchase was agreed to be effected. This is also evident from the fact that the defendant No.1 also issued post dated cheques for the buyback / repurchase price.

14. It is admitted by the defendants themselves that the project for which finances had, in the aforesaid manner, been provided by the plaintiffs to the defendant No.1, was held up. The defendant No.1, under the Agreements of the year 2008 and the post dated cheques issued at that time, was liable to refund not only the principal amount of Rs.1,00,00,000/- and Rs.1,75,00,000/- admittedly received from the plaintiffs, but also the incidental charges and / or the repurchase price which the defendant No.1 had agreed to pay to the plaintiffs and which the defendant No.1 had admittedly been unable to pay to the plaintiffs owing to the project being held up. The execution of the Agreements of the year 2010 show that the

parties then decided to give the transaction of financing, earlier in the year 2008 given the colour of a Flat Booking Agreement, the true colour of Loan Agreement. However to show such a loan transaction, money was required to be shown to have flown from the plaintiffs to the defendant No.1 and for which purposes the account aforesaid of the defendant No.1 was opened in the bank and monies transacted. Further however, since the aforesaid monies were already with the defendant No.1 under the Flat Booking Agreements of the year 2008 and were not required to be again given to the defendant No.1, the monies in the said account shown to have been advanced by the plaintiffs to the defendant No.1 were directed back into the accounts of the plaintiffs and M/s /s Astute Real Estate Pvt. Ltd. To my mind, the defendants now cannot be permitted to rake up the transactions of the year 2008, to ward off their liabilities under the transaction of the year 2010.

15. The parties are dealing in large volume of financing. They have reduced their transaction into writing. Should this Court, inspite of such writings, and inspite of seeing through the real transaction as aforesaid which is clearly visible through the documents, still insist on trial. In my view, no. I have recently in judgment dated 1st February, 2013 in CS(OS)

No.1480/2009 (corrected and released on 4th March, 2013) titled ***Chemical Systems Technologies (India) Pvt. Ltd. Vs. Simbhaoli Sugar Mills Ltd.*** held that unless the Courts construe pleadings in commercial disputes, taking note of the modern prevalent business practices, they will be failing in their duty towards trade and commerce, flourishing whereof depends upon expeditious disposal of disputes. The pleadings and transactions of commercial persons cannot be viewed on the same principles as applicable to transactions between family members or laypersons. A commercial / business person who has signed documents and issued cheques in pursuance thereto cannot be lightly allowed to shake off the effect of such documents. We are here not dealing with villagers but with astute street-smart, hard-nosed, shrewd businessmen. The Courts cannot be blind to the prevalent business practices and environment and cannot afford to continue to decide modern day transactions on ancient principles / precedents. If the Courts continue to do so, it will be a great disservice to the administration of the justice delivery system which will then be forced to look at unconstitutional dispute resolution mechanisms. The Courts have to necessarily keep pace with the innovations of businesses and business practices and the Court will always be slow to find that the written agreement does not represent the

actual agreement between the parties on the matters which it addresses. This is necessary, both to promote commercial certainty and to prevent parties from achieving what is effectively rectification without proving a common intention. Judge Learned Hand as far back as in *James Baird Co. v. Gimbel Bros., Inc.* 64 F.2d 344, 346 said that in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves. The same sentiment was echoed in *Allied Communications Corporation Vs. Continental Cellular Corporation* MANU/FEFC/0637/1987 where it was observed that when the transaction is commercial, the parties sophisticated, and the contract itself detailed, it is wise for the Courts to rely on express language than to imply a promise on their own.

16. Though the law permits a plea of a transaction being a sham one but for such a plea to be taken, the circumstances in which the person (pleading the transaction to be a sham) was made to succumb thereto and the reasons for creating a camouflage have to be pleaded. There is no pleading whatsoever to this effect in the leave to defend applications of the defendants. Upon the same being put to the senior counsel for the defendants, he stated that the reasons would be given in the written

statement. This cannot be an argument for seeking leave to defend under Order 37. It is incumbent upon the defendant applying for leave to defend to make out a plausible case and the defendant cannot be heard to state that the case will be made after the leave to defend is granted.

17. The defendants having signed the loan Agreements and having issued post dated cheques, are bound thereby and if commercial men, especially those dealing in large sums of monies, are not held to be bound by their writings, signatures and by the negotiable instruments admittedly executed by them, the wheels of business which turn on monies, loans and finances will stop rotating.

18. The other defences taken by the defendants in their applications for leave to defend are also not found to be entitling the defendants to trial, even though no arguments have been addressed thereon. Rather than the suit against the principal debtor and the guarantor being bad for mis-joinder of parties, the law in fact requires joinder of such causes of action. Similarly, the non filing of the original documents in the suit under Order 37 of the CPC is not fatal when there is no dispute thereof and when the same are shown to be filed in Section 138 Negotiable Instruments Act proceedings.

The offer of the defendants to honour the 2008 Agreements with the plaintiffs, when the same stand substituted as aforesaid, is of no avail. It is too late in the day, to also contend that the claim for interest is beyond the scope of summary procedure. The claim in the present suit is not based on a mortgage and thus the plea in the applications for leave to defend of the Mortgage Deed being required to be registered and not registered is not relevant. The substantive rights of the plaintiff for recovery of monies from the defendant cannot be denied on the grounds of concealment. The senior counsel for the defendants has also failed to demonstrate as to how the suit is barred by the provisions of the Money Lending Act or Usurious Interest Act. No arguments on the improper stamping or non registration of the documents have also been addressed. I am otherwise unable to find any defects to the said effect. I am also unable to find any merit in the argument that the Loan Agreements are without consideration for the reason of the language thereof suggesting that the loan was still to be given and in fact having already been given. There is even otherwise nothing triable in the said pleas.

19. I have enquired from the senior counsel for the defendants whether the defendants have taken any plea in their applications for leave to defend

with respect to the deduction at source of the tax on the interest amount due from the defendant No.1 to the plaintiffs and for which post dated cheques were issued by the defendant No.1 to the plaintiffs. The answer is in the negative. The defendants under the law are required to deposit the tax so deducted with the authorities. The defendants have not taken any stand whether the tax was so deposited or not. Under the law, the tax once deducted, is required to be deposited. The defendants cannot be permitted to take a contrary stand before this Court from that taken before the Taxation Authorities. The defendants cannot before the Taxation Authorities state that they have taken a loan from the plaintiffs and are paying interest thereon and before this Court deny any loan transaction. I have in *Chemical Systems Technologies (India) Pvt. Ltd.* supra, held the same also to be impermissible.

20. I am therefore of the opinion that neither is the plea of “money rotation transaction” such which requires any trial nor is the plea of the admitted documents, post dated cheques issued by the defendants being a sham worth of trial. They are moonshine.

21. The applications for leave to defend are thus rejected.

22. However as per the averments of the plaintiffs, the liability made out is of the defendant No.1 Company and the defendant No.2 in CS(OS) No.47/2011 and of the defendants No.1, 2 and 4 in CS(OS) No.48/2011. The only case pleaded against the defendant No.3 is of being a Director of the defendant No.1 Company. However a person owing to being a Director of a company does not become personally liable for dues of the company. No case against the defendant No.3 Smt. Neelam Goyal is thus made out and the suit as far as against her, is dismissed.

23. A decree is accordingly passed in favour of the plaintiff in each case and against the defendants, as sought for Rs.5,75,17,240/- and Rs.9,94,14,041/- respectively. Though the parties had agreed to payment of interest at the rate of 36% per annum but interest *pendente lite* and future is restricted at 9% and 15% respectively and only on the principal amount of loan in each case. The plaintiffs shall also be entitled to costs in accordance with law. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

MARCH 19, 2013

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