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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 199/2010

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Judgment dated 02.12.2011

MADHU RANI

..... Plaintiff

Through : Mr. Sudhir Naagar and Mr. Narveer
Dabas, Advs.

versus

NAVEEN SHARMA

..... Defendant

Through : Mr. Avadh Kaushik, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

I.A.NO.3028/2011.

1. This is an application filed by defendant under Order XXXVII Rule 3(5) of the Code of Civil Procedure seeking leave to defend.
2. Plaintiff has filed the present suit under the Provisions of Order XXXVII CPC for Recovery of Rs.38,85,000/-.
3. The necessary facts, to be noticed for disposal of the present application, are that in the month of September, 2008, defendant approached the plaintiff, who is a housewife, with regard to certain schemes of the business being run by the defendant under the name of M/s Money Mantra, which was the sole proprietorship concern of defendant. The plaintiff was assured by the defendant of the lucrative

returns on the investment made by the plaintiff with the defendant company. Based on the assurances and representations of the defendant plaintiff agreed to invest her hard earned money with the defendant and it was agreed that defendant would pay to the plaintiff interest at the rate of 10% on the invested amount and would repay the principal amount after twelve months. Defendant further assured the plaintiff that the amount invested by the plaintiff would be totally safe and defendant would utilize the same as per law and not for any illegal activities. Believing the assurances given by the defendant, plaintiff invested Rs.38,58,000/- with the defendant, out of which, Rs.37,00,000/- was paid by the plaintiff to the defendant vide cheque bearing no.161829 drawn on State Bank of India and the balance amount was paid in cash. Defendant issued a duly signed receipt to the plaintiff bearing no.6760 dated 29.9.2008, acknowledging receipt of a total sum of Rs.38,85,000/-. A copy of the receipt has been placed on record. To secure the plaintiff, defendant had handed over a post-dated cheque dated 22.9.2009 bearing no.884843, drawn on Citibank, Delhi, towards the principal amount of Rs.38,85,000/-. Plaintiff assured that the said cheque would be encashed on presentation.

4. Learned counsel for the plaintiff submits that in discharge of his liability defendant had paid monthly interest only for two months and thereafter cited financial constraints due to recession. Defendant, however, promised to pay outstanding interest amount in lumpsum after September, 2009, once the principal amount is repaid. Counsel further submits that on 22.9.2009 the aforesaid cheque in the sum of

Rs.38,85,000/- was presented by the plaintiff to the Bank, however, the same was returned with the remark 'Account closed' vide return memo of State Bank of India dated 23.9.2009, a copy of which has been placed on record.

5. Plaintiff learnt that defendant has been arrested in case FIR No.109/09 under Sections 406/420/120-B IPC, Police Station Economic Offences Wing. Counsel next submits that plaintiff came to know from various sources that defendant has been accused of cheating various innocent persons of crores of rupees. Plaintiff issued a legal notice on 3.10.2009 to the defendant demanding the amount due as per the cheque. The said notice was sent to the Office of the defendant as also through Jail Superintendent where the defendant was lodged. Copy of the notice and postal receipts have been placed on record. Despite the legal notice and the plaintiff having initiated steps under Section 138 of Negotiable Instruments Act, no amount has been received by the plaintiff from the defendant. Counsel for the plaintiff submits that present suit is based on the cheque as well as on the receipt issued by the defendant.
6. Learned counsel for the defendant submits that defendant is entitled to unconditional leave to defend having regard to the fact that receipt, sought to be relied upon by the plaintiff, does not show as to how much amount has been paid by the plaintiff by cheque and how much amount has been paid by cash to the defendant and in the receipt only the cheque number has been mentioned. Counsel further submits that the cheque, sought to be relied upon by the plaintiff, was an undated cheque, which was stolen from the house of the defendant

after he was sent to jail and, thus, the cheque cannot be relied upon by the plaintiff and the same cannot be made the basis for filing present suit under the provisions of Order XXXVII CPC.

7. Learned counsel for the defendant submits that the allegations made by the plaintiff are baseless, wild and unfounded. Counsel further submits that even otherwise the cheque was dishonoured on account of the fact that the said bank account of the defendant was seized under the instructions of Economic Offences Wing. Counsel next submits that plaintiff had parted with the money with open eyes for the purpose of speculation in the share market and not that the amount was to be returned after one year. Counsel also submits that even otherwise the plaintiff in her cross-examination in the proceedings filed under Section 138 of Negotiable Instruments Act has stated that she is a housewife; the plaintiff has not disclosed her source of income and in fact has stated that she does not even know the defendant and is not even aware about the pendency of the present suit. It is in these circumstances, defendant has sought unconditional leave to defend.
8. Learned counsel for the defendant has drawn the attention of the court to the Memo of Parties filed in the present suit and cross-examination of the plaintiff in the proceedings filed under Section 138 of Negotiable instruments Act, a copy of which has been placed on record. Learned counsel for the plaintiff submits that in the Memo of Parties the plaintiff has mentioned her address as 17, Gupta Colony, Delhi, while in her cross-examination in the proceedings under Section 138 of Negotiable instruments Act, the plaintiff has

stated that she is residing at Gulabhi Bagh for the past eight to ten years. Counsel further submits that cross-examination of the plaintiff would show that plaintiff is a housewife and she is residing with her family. Counsel next submits that on the one hand, the plaintiff has disclosed that she has no source of income but the cheque was issued to the defendant after her husband had sold a property, on the other hand the plaintiff has also stated that she had paid a sum of Rs.38,58,000/- to the defendant from her past savings and out of the sale of the said property. She also goes on to state that this amount was given by her son and is unable to disclose the particulars of the property, which has been sold.

9. I have heard counsel for the parties and also perused the plaint, the application and the documents filed along with present plaint. Before dealing with the rival contentions of learned counsel for the parties, it would be useful to refer to *Mechelec Engineers and Manufacturers v. Basic Equipment Corporation*, reported at 1977 AIR (SC) 577 wherein the Supreme Court has laid down guidelines for considering an application for leave to defend. Para 8 reads as under :

8. In *Kiranmoyee Dassi Smt v. Dr J. Chatterjee*, (1945) 49 Cal WN 246, 253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC 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.”

10. In order to succeed in the present application, defendant must establish that his defence is bona fide and he has been able to raise triable issues. On the contrary, if the defence sought to be raised, is false, sham or moonshine, the same is to be rejected and the application is to be dismissed.
11. It would be useful to refer to the observations of the Supreme Court in the case of V.K. Enterprises Vs.m/S. Shiva Steels 2010 (IX) AD (SC) 426 and more particularly paragraphs 8, 9 & 10, which read as under:

“8. Order XXXVII C.P.C. has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted. What is required to be examined for grant of leave is whether the defence taken in the application under Order XXXVII Rule 3 C.P.C. makes out a case, which if established, would be a plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence would have been plausible had it not been for the fact that the allegations relating to the interpolation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the

issuance of the cheque had never been disputed on behalf of the Petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means.

9. Against such cogent evidence produced by the plaintiff/respondent, there is only an oral denial which is not supported by any corroborative evidence from the side of the Petitioner. On the other hand, the ledger book maintained by the Respondent and settled by the Petitioner had been produced on behalf of the Respondent in order to prove the transactions in respect of which the cheque in question had been issued by the Petitioner.

10. In our view, the defence raised by the Petitioner does not make out any triable issue and the High Court, has dealt with the matter correctly and has justifiably rejected the Petitioner's application under Order XXXVII Rule 3 C.P.C. and the same does not call for interference by this Court. The Special Leave Petition is, therefore, dismissed, but without any order as to costs.”

12. As per the plaint, the plaintiff approached defendant in the month of September, 2008, with regard to certain schemes of business being run by the defendant in the name of M/s Money Mantra of which defendant was the sole proprietor. The defendant assured the plaintiff of lucrative returns on the investment. Believing the assurances made by the defendant to the plaintiff, plaintiff invested Rs.38,85,000/- with the defendant out of which Rs.37,00,000/- was paid by cheque and the remaining amount was paid in cash. Defendant issued a receipt dated 29.9.2008 to the plaintiff acknowledging receipt of Rs.38,85,000/-. A post-dated cheque dated 22.9.2009 was issued by

the defendant to the plaintiff towards the principal amount and defendant also assured the plaintiff that the said cheque would be encashed on presentation. The said cheque when presented by the plaintiff was dishonoured with the remark 'Account closed'. Plaintiff came to know that defendant has been arrested in case FIR No.109/2009 with the allegation of cheating. Plaintiff thereafter sent a legal notice dated 3.10.2009 to the defendant at the office of the defendant and also through Jail Superintendent, however, the amount has not been returned by the defendant to the plaintiff, which forced the plaintiff to file the present suit.

13. The defence, sought to be raised by the defendant, in this leave to defend application is that he is not liable to pay any amount to the plaintiff and the defendant was in judicial custody when the blank signed cheque was stolen from the premises of the defendant. Another defence, sought to be raised by the defendant, is that as per the plaintiff herself the defendant had issued a post-dated cheques on 22.9.2009 and the present suit cannot be based on a post-dated cheque. The defendant has also drawn the attention of the Court to the cross-examination of the plaintiff in proceedings under Section 138 of Negotiable Instruments Act. It is the contention of learned counsel for the defendant that reading of cross-examination would show that the plaintiff has not been able to establish the source of income as she claims herself to be a housewife. It is also submitted by counsel for the defendant that the plaintiff has not deposed truthfully as she is unable to give her correct residential address.

14. The aim and object of introducing the provision of Order XXXVII

CPC is to grant speedy and summary justice in matters where the plaintiff is able to establish a clear and undisputed claim. In order to succeed in an application for leave to defend, defendant must disclose a triable issue or at least a plausible defence. In case, defence of the defendant is frivolous or vexatious no leave is to be granted to the defendant. The stand taken by the defendant that a blank cheque was stolen from his house during the period he was in jail is frivolous and unacceptable. Even otherwise, there is nothing on record which suggests that any family member of the defendant lodged any FIR with regard to theft of cheque of the defendant or that the plaintiff has stolen the cheque in question from the house of the defendant. The defence is sham and moonshine as it is unexpected that his house would be lying unlocked or plaintiff, who is a lady would walk into his house and steal the blank cheque.

15. Another defence, which has been raised is that the plaintiff has not been able to establish her sources of amounts deposited with the defendant. I have also carefully perused the cross-examination of the plaintiff in the proceedings filed under Section 138 of Negotiable Instruments Act, a copy of which has been placed on record. Cross-examination of the plaintiff would show that plaintiff is a housewife and she is residing with her family. Plaintiff has disclosed that she has no source of income, however, the said cheque was issued to the defendant after her husband had sold a property. The plaintiff has also stated that she had paid a sum of Rs.38,58,000/- to the defendant, which was from her past savings and out of the property sold by her husband. She also goes on to state that this amount was

given by her son and she is unable to disclose the particulars of the property sold.

16. The cross-examination of the plaintiff shows that the plaintiff has been able to satisfactorily establish the source of her money. Even otherwise, it is not necessary for the plaintiff to establish the source of income. What is relevant is that this amount was paid by the plaintiff to the defendant, which is evident from the receipt duly given by the defendant and the presumption, which is to be drawn in favour of the plaintiff on account of the post dated cheque having been issued by the defendant in favour of the plaintiff. While plaintiff has been able to place cogent evidence on record there is only an oral denial, which is not supported by any corroborative evidence from the side of the defendant. The defendant has not been able to make out any triable issue.
17. Having regard to the fact that plaintiff is a housewife, it is not expected for her to give answers, which are meticulous in nature, however, she has categorically stated that this amount was paid to the defendant out of the savings and out of the proceedings received from sale of the property. The contention raised by counsel for the defendant with regard to address mentioned by the plaintiff in the Memo of Parties filed in the present suit is of Gupta Colony, however, she has stated in her cross-examination that she is residing in Gulabi Bagh, is not a triable issue and cannot be a ground for granting leave to defend.
18. Accordingly, present application is without any merit and the same stands dismissed.

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19. In view of above present suit is decreed in the sum of Rs.38,85,000/- with interest at the rate of 8%, per annum, from the date of filing of the suit till realisation.

G.S.SISTANI,J

DECEMBER 02, 2011

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