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

Date of Reserve: 26.02 2015
Date of Decision: 27.04. 2015

\+ CS(OS) 2254/2013

MAYA JAIN ..... Plaintiff
Through: Mr. R. K. Rathore and Mr.Vijay Gupta, Advs.

versus

YASH CHHABRA ..... Defendant
Through: Mr. Kush Chaturvedi, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.10525/2014 (for leave to defend)

1. This is an application under Order 37 Rule 3 (5) of the CPC seeking leave to defend the suit. The plaintiff has filed the present suit for recovery of Rs.59,85,000/-. It is averred in the plaint that the defendant is well known and acquainted with the plaintiff having business association with her husband. The plaintiff agreed to give a "dasti" loan of Rs.45 lacs to the defendant on 20.01.2011. The defendant acknowledged having received the said sum of Rs.45 lacs in cash vide receipt dated 20.01.2011. The defendant is stated to have handed over an original signed receipt to the plaintiff with two cheques dated 1.2.2012 for Rs.22,00,000/- and Rs.23,00,000/- respectively drawn on Corporation Bank, Noida to enable the plaintiff to

realise the sum on the stipulated date. Based on these documents the present suit is filed under Order 37 CPC. Interest @12% per annum w.e.f. 21.01.2011 till date of filing of the suit is also sought.

2. In the application filed for leave to defend the defendant has raised the following defences :-

(a) It is averred that this Court lacks territorial jurisdiction as the receipt relied upon by the plaintiff is executed in Noida, U.P. The cheques stated to have been handed over by defendants were also handed over in Noida drawn on a branch in Noida. Hence, it is stated that no part of the cause of action has arisen in Delhi and hence this Court has no territorial jurisdiction.

(b)It is further stated that the plaintiffs have approached this Court with unclean hands. The receipt dated 20.01.2011 is said to have been obtained by fraud and misrepresentation. It is averred that the loan amount was to be transferred through RTGS/NEFT from the account of the plaintiff. The plaintiff insisted that before the same is transferred the defendant should issue cheques as security and pressurised the defendant into issuing the same. The plaintiff it is stated has failed to transfer the money to the defendant through RTGS or NEFT. Hence, it is urged that the receipt was obtained fraudulently. The defendant has placed on record his IT Returns and the bank statements for the relevant period to support the contention that no payment has been received by the defendant.

(c) It is further stated that the receipt is signed by the defendant (Mr. Yash Chhabra) while the alleged cheque is signed by Mr. Yash Chhabra in the capacity of a Director of M/s.Sanya Fibre Private Limited. The cheque is issued by M/s.Sanya Fibre Private Limited. Thus, the receipt is signed by a different entity and the cheque is signed by a different entity.

(d) Learned counsel for the defendant has further averred that the two cheques on the basis of which the present suit under Order 37 CPC is purported to be filed cannot be the foundation for a suit under Order 37 CPC. He relies on judgments of this Court in the case of ***First Lucre Partnership Co. vs. Abhinandan Jain, 202 (2013) DLT 177*** and of the Division Bench in ***Bal Dev Singh vs. Rare Fuel and Automobiles Technologies (P) Ltd., 119 (2005) DLT 44*** to contend that in this regard the settled legal position is that the cheques which are not presented for payment cannot be the basis of a suit under Order 37 CPC.

3. Learned counsel appearing for the plaintiff on the other hand submits that as per the plaint the receipt was executed in Delhi. He also states that the settled legal position is "debtor has to find the creditor". Hence, it is urged that this Court would have the territorial jurisdiction. Regarding the receipt of payment by the defendant, it is urged that the reliance of the defendant on his Bank Statements and Income Tax Returns is misplaced as payment has been made in cash. It is further stressed that the defendant had executed the receipt in question dated 20.01.2011. If, at a later stage, the defendant did not receive RTGS or any part of the payment as claimed, there is no communication sent by the defendant seeking cancellation of the receipt or pointing out to the plaintiff that despite having taken the receipt no payment has been received by the defendant. It is urged that this defence is only an afterthought to wriggle out of the liability. Reliance is also placed on section 91 of the Indian Evidence Act. It is also urged that under the Negotiable Instruments Act a cheque, raises a presumption of consideration paid.

4. As to when leave to defend is to be granted the basic judgment in this

regard is of ***M/s Mechalec Engineers & Manufacturers v. M/s Basic Equipment Corporation AIR 1977 SC 577.*** In para 8, the Hon'ble Supreme Court has held as follows:

> "In ***Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246*** , Das. J.,after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :
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> > (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.
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> > (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.
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> > (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.
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> > (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."

In the light of the above, I may now consider the submissions of the defendant.

5. I may first look at the receipt admittedly executed by the defendant. It reads as follows:-

> "Received with thanks from Mrs. MAYA JAIN w/o Sh. Parmod Jain R/o E -16 A, East of Kailash, New Delhi a sum of Rs.45,00,000/- (Rupees : Forty Five Lacs Only), as Loan agst. Ch. No.690845 for Rs.22,00,000/- (Rupees Twenty Two Lacs only) & Ch. No. 690846 for Rs. 23,00,000/- (Rupees Twenty Three Lacs only) drawn on Corporation Bank, Noida as security".

It is unequivocal. It explains the transaction fully. It mentions the cheques numbers which are given as security for the loan of Rs.45lacs.

5. I may now deal with the submissions of the defendant. Coming to the first submission of the defendant i.e. regarding territorial jurisdiction of this Court. The suit is based on a receipt. As per the plaint the receipt was executed in Delhi.

6. Based on the documents on record it is apparent that the plaintiff is based in Delhi. Reference may be had to the judgment of this Court in the

case of ***Mrs. Shradha Wassan and Ors. vs. Mr. Anil Goel and Anr., MANU/DE/0490/2009*** where in para 15 on the principle of "debtor has to find the creditor" the Court held as follows:

> "15. I find that this Court in Milkfood Ltd v. Union Bank of India, MANU/DE/8271/2007 has held that even if it is assumed that Delhi was not the expressly contracted place of payment, Delhi would still be a presumed place of payment because of the general rule that in the absence of a contract to the contrary, a debtor is bound to find the creditor for making the payment - the place of payment is where the creditor resides.
> 16. In this regard it may be noticed that in this case the legal notice demanding the payment, preceding the suit was sent from Delhi and demanding the payment at Delhi. The principle of debtor must seeks the creditor was held to be applicable."

7. Reference may also be had to another judgment of the High Court in the case of ***L.N.Gupta vs. Tara Mani, 24 (1983) DLT 184: MANU/DE/0159/1983*** where this Court held as follows:

> "(1)The respondent plaintiff Tara Mani, a widow living in D-II/160, Kaka Nagar, New Delhi, filed a suit in Delhi against the petitioners defendants on the basis of a pronote which was made and delivered on 9-6-1978 in Bangalore in her favor by the petitioners defendants payable on demand 'at Bangalore or any part of India'. In New Delhi she was living with her relative and attorney B.S. Gupta. On 12-3-1981 B.S. Gupta wrote from New Delhi to the petitioners to remit the amount due to her within 30 days. On 11-5-1981 her advocate upon instructions from Smt. Tara Mani by a notice called upon the petitioners to pay the amount due within seven days. Since no payment was forthcoming, the present suit was filed on 28-5-1981.
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> (7).....In State of Punjab v. A.K. Raha (Engineers) Ltd.

> MANU/WB/0079/1964: AIR1964Cal418, it was observed : "WHERE no place of payment is specified in the contract either expressly or impliedly, the debtor must seek the creditor; the obligation to pay the debt involves the obligation to find the creditor and to pay him at the place where he is when the money is payable."
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> (8) The position of law could not have been stated more categorically than it was done in S.P. Consolidated Engineering Co. (P) Ltd. v. Union of India and another, MANU/WB/0060/1966 : AIR1966Cal259 . The learned Judge said : "The English Common Law Rule that 'a debtor must seek the creditor' is universal in its application, since it is founded on justice and equity. It is surely not a technical rule of English law, wrongly made applicable to India. It is a beneficent rule, inflexible and is of universal application. The rule cannot be said to be nothing more than a presumption rebuttable by contrary evidence. When there is evidence to indicate the place where the parties to a contract intended that the debt was payable, then the court will hold that such place of payment has been indicated in the contract itself, though not expressly but by implication. The occasion for applying the rule, as a rule of justice, equity and good conscience, would arise only when the court finds that no place of payment is expressly stated in the contract nor is it possible to find such place of payment indicated in the contract by necessary implication, on the relevant evidence on record."
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> (9) Following Bharumal v. Sekhawatmal, MANU/MH/0089/1956 : AIR1956Bom111 , it was held in M/s Shoba singh and Sons v. Saurashtra Iron Foundry and Steel Works (Pvt.) Ltd., MANU/GJ/0060/1968 : AIR1968Guj276 , that the common law rule that the debtor should find the creditor and pay the debts where the creditor resides, applied in India in fit cases. I am in respectful agreement with this reiteration."

The receipt is silent about the place where the defendant has to return the money. As the said term is not specifically stated in the documents, defendant in view of the above legal position was obliged to refund the

amount in Delhi. In the present case the plaintiffs have sent a legal notice through counsel from Delhi demanding payment. The facts are akin to the case of ***Mrs. Shradha Wassan vs. Mr. Anil Goel (supra)***. Hence defendant was obliged to pay the amount to the plaintiff in Delhi. Hence, this Court would have the territorial jurisdiction

8. As far as the second submission of the defendant is concerned i.e. about not having received any payment. The defendant has admitted execution of the receipt dated 20.1.2011. The submission is that it was under duress the receipt was executed and payment was to be transmitted to the defendant later on through RTGS. What the defendant is trying to argue is that though the receipt says that money has been received, the money was actually to be received at a later date through RTGS and was not received. The contention cannot be accepted.

Firstly this contention is contrary to section 91 of the Indian Evidence Act which reads as follows:-

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The Supreme Court in the case of ***Roop Kumar vs. Mohan Thedani, AIR 2003 SC 2418: MANU/SC/0276/2003*** held as follows:-

> "13. Section 91 relates to evidence of terms of contract,

> grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that of all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thaver's Preliminary Law on Evidence p. 397 and p. 398; Phipson Evidence 7th Edn. p. 546; Wigmore's Evidence p. 2406.)"

Secondly, it is noteworthy that the defendant admits execution of the receipt. It is, however, contended that the payment was never received. The receipt is executed on 20.1.2011. A legal notice was sent by the plaintiff on 1.8.2013. In the intervening period there was no attempt by the defendant to take any steps to cancel the receipt. In fact there is no communication even on record showing any protest by the defendant of having not received any payment despite execution of the receipt dated 20.1.2011. The contention of the defendant of having signed the receipt without receipt of consideration is completely devoid of any merits.

9. Regarding the statement of bank accounts filed by the defendant to show that no payment was received by him, the same is misplaced. The defendant has filed the account statements of M/s Sanya Fibre Private Limited and the income tax returns of the defendant and M/s Sanya Fibre Private Limited. Possibly these accounts do not reflect receipt of the loan amount paid by defendant of Rs.45 lacs. It is but obvious as the payment was made in cash and would not be reflected in the bank accounts. As far as

income tax returns are concerned it was for the defendant to have shown this receipt in their income tax records. Not having done the same he cannot take advantage of his own default.

10. Coming to the third contention of the defendant about cheque having been signed by Shri Yash Chhabra in the capacity of Director of M/s Sanya Fibre Private Limited whereas the receipt is signed by the said Yash Chhabra in the individual capacity. This contention again appears to be misplaced and without any merits. The receipt executed by the defendant Mr.Yash Chhabra specifically states that payment has been received by the defendant against cheque No.690846 and 690845 i.e. the cheques issued by the said M/s Sanya Fibre Private Limited. The signatory of the cheque and the receipt is the same i.e. Mr.Yash Chhabra. What persuaded the defendant i.e. Mr.Yash Chabra to issue cheques from the account of M/s Sanya Fibre Private Limited? It was for him to have explained. His own conduct and acts cannot constitute a ground for defence of the present suit. There is no attempt even to explain the relationship between the defendant and the M/s Sanya Fibre Private Limited. In fact a perusal of the documents filed by the defendants show that the defendant himself has filed on court record IT returns and bank statements of M/s Sanya Fibre Private Limited. He has also filed along with list of documents a list of shareholders of M/s Sanya Fibre Private Limited. The shareholding of M/s Sanya Fibre Private Limited shows that bulk of the shares the owned by the defendant himself. A small amount of shares are owned by his wife, son and daughter. It is a family company wholly controlled by the defendant and his family. The plea is clearly without merits.

11. Coming to the fourth contention. It is contended that the cheques

cannot be the basis of a suit under Order 37 CPC. The contention of the defendant is that the cheques were not presented and hence a suit does not lie under Order 37 of CPC, in view of the judgments cited by the defendant. There can be no dispute with the said contention. The Division Bench in ***Bal Dev Singh vs. Rare Fuel and Automobiles Technologies (P) Ltd. (supra)*** has categorically held so.

However, I have already held in ***First Lucre Partnership Co. vs. Abhinandan Jain (supra)*** in somewhat similar facts and circumstances that the suit is based on a receipt issued by the defendant and not on the basis of the unpresented cheques. The present suit is not based on the unpresented cheques but is based on the receipt executed by the defendant showing receipt of Rs.45 lacs as a loan.

12. One cannot also ignore section 139 of the Negotiable Instruments Act which provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque for discharge, in whole or in part, of any debt or any other liability. Hence, an unpresented cheque cannot be a basis of a suit under Order 37 CPC. However, the plaintiff can certainly use it to support the receipt dated 20.01.2011 i.e. it would have evidentiary value.

13. In my opinion, the facts of the above case fall in the category (d) which have been narrated by the Supreme Court in the case of ***M/s.Mechelec Engineers & Manufacturers vs. Basic Equipment Corporation (supra)***. The defendant has failed to show any worthwhile defence to the case of the plaintiff. The defence is entirely moonshine and frivolous. The receipt showing receipt of Rs.45 lacs has been placed on record duly corroborated by post dated cheques. All three documents are

duly signed by defendant. The primary defence that the receipt was executed without receipt of any money whatsoever is a complete sham defence with no basis whatsoever. It is not possible to grant leave to defend to the defendant on this defence on other pleas taken. Application is dismissed.

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14. As the above application for leave to defend has been dismissed, the suit is decreed with interest @9% per annum from the date of filing of the suit till recovery. Plaintiff shall also be entitled to costs.

JAYANT NATH, J

APRIL 27, 2015/n