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

Reserved on: 14.12.2021

Pronounced on: 03.01.2022

+ CS(OS) 297/2019

SMT. NEELAM BATRA

..... Plaintiff

Through: Mr.Rajnish Ranjan & Mr.Shashwat
Dubey, Advs.

versus

SHRI V. RAMCHANDRA RAO

..... Defendant

Through: Mr.Mahavir Singh, Sr. Adv. with
Mr.Vikas Deepa, Ms.Nidhi Jain &
Mr.Veerender Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

I.A.13110/2019 in CS(OS) 297/2019

1. The plaintiff filed the captioned suit for recovery of Rs.4,96,00,000/- along with interest @ 9% per annum from 20.08.2014. The suit has been filed on the basis of two agreements dated 23.03.2013 and 20.08.2014.
2. Present application has been filed by the applicant/defendant under Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908 seeking grant of leave to defend the suit.

3. It is averred in the present application that the suit does not fall within the ambit of Order XXXVII CPC and it does not fall in any of the classes/ category as envisaged in clause (2) of Rule (1), of Order XXXVII CPC.

4. Mr.Mahavir Singh, learned senior advocate appearing on behalf of the applicant/defendant submitted that in order to invoke the special summary procedure as provided under Order XXXVII CPC, a simple money transaction is not sufficient but something more is required within the four corners of CPC and all and every money transactions cannot become the basis of claim under the said provision. The defendant has substantial question on facts which can only be adjudicated after leading evidence and cannot be decided in summary manner.

5. In the present case, the defendant has pleaded after entering the Agreement to Sell dated 23.03.2013 qua plot bearing No. 37, Block No.5, situated in the western extension area, Karol Bagh, New Delhi – 11005 measuring about 254 sq. yds, Khasra No. 1613/1147 and even after expiry of maturity period of the said agreement, the plaintiff was at no point of time ready with the funds and willing to perform her part of contract but only kept the property in question on hold for long time due to which the defendant could not sell the said property for long time and finally was able

to sell the same only in the year 2018. The defendant has further pleaded that since the plaintiff had intentionally kept the property on hold, the defendant had to bear the losses as there was huge slump in the real estate market and the property had to be sold on a throw away prices. The defendant has pleaded that another reason to sell the property on throw away prices was the negativity published by the plaintiff in the relevant market and also created hue and cry threatening all the prospective buyers on the pretext of Agreement to Sell dated 23.03.2013. However, the plaintiff was neither ready to perform her part of contract nor allowed the defendant to sell the said property to any other buyer.

6. The defendant has further averred that he was in dire need of money which compelled him to enter the Agreement to Sell dated 23.03.2013, but such conduct of plaintiff led to direct and indirect business losses to the defendant and further suffered loss on account of prospective earning and also the interest. On the other hand, the defendant was always ready to abide by his part of agreement and further condoned the defaults and failures committed by the plaintiff as he always wanted the plaintiff to complete the deal. Therefore, the defendant is entitled for the damages which he suffered, directly & indirectly, and, therefore, the defendant reserves his rights to file

the suit for damages.

7. Mr.Singh further submitted that the plaintiff has not disclosed the actual and true facts. The plaintiff was only the prospective buyer, who entered the Agreement to Sell dated 23.03.2013, only to gain profit out of the transactions, by selling the said property (bearing No. 10529 (5/37), ward No.XVI, Plot No.37, Block No.5, situated in the western extension area, Karol Bagh, New Delhi), at some higher rate, upon finding a suitable buyer without making any substantial investments/payments. But the plaintiff was unable to find the prospective buyer in respect to the property till the maturity of Agreement to Sell dated 23.03.2013. Therefore, the plaintiff neither shown her intentions and willingness to buy the property nor she was ready with the funds, at any point of time. Now the plaintiff has filed the suit only to extort the money from the defendant, with totally false and frivolous averments, just to gain benefits of her own wrongs, faults and misdeeds. The plaintiff even failed to place any record/document/Bank statement which could establish that she had the requisite amount at the relevant time. As far as alleged sanctioning & disbursement of loan is concerned, same is totally manipulated, wrong, false and afterthought which is evident from the conduct of plaintiff as the plaintiff never intimated nor

even uttered a single word in respect of alleged sanction of loan in her legal notice dated 10.05.2016. Therefore, the story of such alleged sanction of loan is nothing but afterthought and manipulation on her part, just to create the false evidence whereby the plaintiff is trying to take advantage of her own faults and defaults. The Plaintiff had never made any arrangement of funds but now she is trying to cover up the “*no availability of funds*” at the later stage. Thus, the present application deserves to be allowed.

8. On the other hand, Mr.Rajnish Ranjan, learned counsel appearing on behalf of the plaintiff /non-applicant submitted that the grounds taken by the defendant in his leave to defend application does not disclose any substantial defense and are frivolous and vexatious. The grounds do not disclose any triable issue and the application is liable to dismissed and plaintiff is entitled to judgment. The defendant has not come to this Court with clean hands and has taken bogus ground in its application for grant of leave to defend, moreover, defendant's stand is contradictory and mutually destructive on facts. Furthermore, Defendant on 19.05.2016 has himself replied to earlier legal notice dated 10.03.2016 sent by the Plaintiff, wherein Defendant has categorically and unambiguously admitted:

(a.) Execution of Agreement to sell dated 23.03.2013;

- (b.) Novation on agreement to sell on 20.08.2014;
- (c.) Receipt of part payment of purchase price of Rs.3.65 Crore;
- (d.) Superstructure built over the suit property was demolished by the Plaintiff himself; and
- (e.) Aspect of construction over the suit property by plaintiff, before execution of sale deed.

9. To wriggle out of the above admissions, defendant has stated in his reply dated 13.05.2019 sent in response to the legal notice dated 16.04.2019 sent for cancelling the agreement to sell:

- (i) *"In para 19, it has been averred that "my client is in the process of searching and tracing the reply dated 19.05.2016 and a suitable comment over the same reply shall be given as and when the same is traced by my client. Your office is requested to kindly provide the true copy of the said reply dated 19.05.2016 so that suitable and proper comments may be given. "*
- (ii) *In para 1, it has been averred that "at the outset it is hereby informed that the in your notice stipulates about the payments and transactions which are not legal and hence not sustainable, which do not come within the purview of legal transactions. So, all such alleged illegal*

transaction, if so be, cannot be basis of any legal proceedings. Therefore, all the cash transaction in your notice are not required to be admitted or denied and needs to be proved by your client a suitable reply of the list cash transaction shall be given at the appropriate stage, if need arises."

10. Learned counsel for the plaintiff submitted that the defendant has not specifically denied that part purchase price of Rs.3.65 crore under the Agreement to sell dated 23.03.2013 and under the novated agreement on 20.08.2014 received by him. He has not even stated as to what happened to the part purchase price paid by the plaintiff. Whether the said amount was forfeited and if yes? under which provision of the terms of the agreement to sell? Defendant has first time disclosed in para 10 of leave to defend application that suit property has been sold by him on 11.01.2018. However, no consideration has been disclosed for the sale of property. Pertinently, factum of sale of suit property has not been disclosed in his reply dated 13.05.2019 sent to legal notice dated 16.04.2019. Defendant has not stated anything on the part purchase price received from Plaintiff and has only stated in para 22 of its reply dated 13.05.2019 that agreement dated 23.03.2013 has expired by efflux of time. Moreover, it is not the case of the

defendant in reply to legal notices or in application to leave to defend that time was the essence of agreement to sell dated 23.03.2013 or if it was, how the same was essence of the contract. It is also not the case of the defendant that the part purchase price paid by the Plaintiff has been forfeited by the Defendant.

11. Learned counsel for plaintiff further submitted that Section 55 of the Transfer of Property Act provides for the right and liabilities of buyer and seller. It is submitted that clause (b) of Sub-section (6) of Section 55 of the Transfer of Property Act provides that purchase money paid by the buyer operates as charge over the property not only against the seller's interest but also against all person claiming under him unless the buyer has improperly declined to accept the delivery of the property in question. That this charge is a statutory charge in favour of the buyer and the buyer is entitled to enforce the said charge against the property. Thus, present application seeking leave to defend is liable to be dismissed and present suit be decreed with interest and costs.

12. To strengthen his arguments, learned counsel for the plaintiff has relied upon the following judgments:

- (i) ***Suresh Kumar Wadhwa vs. State of M.P.***, (2017) 16 SCC 757;
- (ii) ***Versatile Commotrade Pvt. Ltd. vs. Balrja***, 2019 SCC OnLine

DEL 6558 and

(iii) ***Videocon Properties Ltd. vs. D R Balachandra Lab***, (2004) 3 SCC 711

13. Order XXXVII CPC was included in the Code of Civil Procedure with the intent to allow the plaintiff who has an undisputed liquidated claim against the defendant, who *has no substantial defence and/or raises no genuine triable issues* to obtain a quick and summary judgment without pointlessly being kept away from what is due, in respect of any monetary dues, to recover the dues swiftly by a summary procedure instead of taking the extensive route of a regular suit. But if the defendant satisfies the court that he has a substantial defence or satisfy the Court that there are triable issues by way of plea *the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.*

14. The principles of law for grant or refusal of leave to defend has been well settled by the Hon'ble Supreme Court in ***IDBI Trusteeship Services Limited vs. Hubtown Limited***, (2017) 1 SCC 568 which has been followed in ***Sudin Dilip Talaulikar v. Polycap Wires (P) Ltd.***, (2019) 7 SCC 577. The Hon'ble Supreme Court in ***IDBI Trusteeship Services Limited vs. Hubtown Limited*** (supra) held that Order XXXVII CPC was subject matter of amendment in the year 1976 and the same has resulted in the difference in

the law laid down by earlier judgments i.e., principally *Mechelec Engineers & Manufacturers vs. Basic Equipment Corpn.*, (1976) 4 SCC 687. The Apex Court further held that principles stated in para 8 of *Mechelec Engineers & Manufacturers vs. Basic Equipment Corpn.*, (supra) were superseded, given the amendment of Order XXXVII and the binding decision of the Constitutional Bench of four judges in *Milkhiram (India) (P) Ltd. vs. Chamanlal Bros*, AIR 1965 SC 1698 would apply. The relevant portion of the judgement summarizing the principles to be followed while adjudicating grant leave to defend in a summary suit are as follows:

“17. Accordingly, the principles stated in para 8 of Mechelec case [Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case [Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698 : (1966) 68 Bom LR 36] , as follows:

17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial

Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.”

(Emphasis Supplied)

15. Coming to the facts of the case, the parties executed two agreements i.e., firstly, Agreement to Sell dated 23.03.2013 and secondly, novated agreement dated 20.08.2014. The sale consideration was Rs.15 Crores and was subsequently revised to 15.25 crore but plaintiff paid total Rs.3.65 crores to the defendant. However, till filing of the suit, no further payment was made by the plaintiff. Admittedly, the suit property was sold by

defendant to third parties in the year 2018.

16. It is itself the case of the plaintiff that she served a legal notice dated 10.05.2016 and in the said notice, the plaintiff did not offer any amount. However, vide reply dated 19.05.2016, the defendant invited the plaintiff to complete the obligations under agreement to sell and asked to make balance payments and also invited to settle the matter. Thereafter, due to inordinate delay, suit property was sold by the defendant on 11.01.2018 vide three sale deeds of the said date. It is pertinent to mention that defendant was running a restaurant under the name and style “*Raghuvindra Udipi*” in the suit property. The plaintiff had demolished the entire property in April-May 2014 for doing fresh construction over the said property.

17. This Court is of the view that defendant has been able to substantially raise multiple triable issues and the judgments relied upon by the plaintiff are of no help in the present facts and circumstances of the case for the following reasons stated below:

- (i) ***Suresh Kumar Wadhwa vs. State of M.P.*** (supra) was a case of suit for declaration and refund of security amount qua the four *nazul* plots of the State that were to be sold in public auction. This judgement does not in any way help the plaintiff as far as the arguments for reject

the leave to defend is concerned.

- (ii) ***Versatile Commotrade Pvt. Ltd. vs. Balrja*** (supra) was case in which the agreement in question contained specific clause for forfeiture forfeit of the earnest money in case the party breaches or backs out from the agreement. Moreover, in the present case the defendant has averred and made the claim that he has suffered losses due the fault of plaintiff.
- (iii) ***Videocon Properties Ltd. vs. D R Balachandra Lab.*** (supra) was case in which agreement specifically stipulated for situation that if the vendors fail to make out a marketable title to the land agreed to be sold, the buyer shall be entitled to cancel the agreement, the earnest money shall be forthwith returned to the purchasers by the vendors without any interest, cost or compensation. Moreover, the Apex Court in this case has observed that statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and the same is lost in case of purchaser's own default or his improper refusal to accept delivery. However, in the case in hand, the defendant has averred that plaintiff i.e. purchaser was at fault.

18. On careful consideration of rival contentions of the parties, this Court of the considerate opinion that the defendant has successfully raised various triable issues more particularly as to whether the plaintiff has committed the breach of the agreements between the parties, which cannot be decided without recording the evidence. But since, the defendant has not expressly denied the receipt of the amount of Rs. 3.65 Cr from the plaintiff coupled with the fact that the agreement does not contain any forfeiture clause of the advance payment made by the plaintiff. Furthermore, the defendant has not disclosed the consideration amount for which the suit property was sold. This Court is of the view, in facts and circumstances of this case, defendant is entitled to conditional leave to defend the suit subject to deposit of Rs. 2 Cr or the bank guarantee of the equal amount within three weeks with Registrar General of this Court from today.

19. Accordingly, I.A.13110/2019 is disposed of in above terms and the defendant is granted conditional leave to defend the suit.

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20. Subject to deposit of Rs. 2 Cr or the bank guarantee of the equal amount within three weeks with Registrar General of this Court from today, the defendant is granted four weeks' time to file the written statement. The

plaintiff is at liberty to file replication within four weeks thereafter. Both the parties shall file their original documents and affidavit of admission/denial within four weeks from today.

21. List for completion of pleadings and admission/denial of the documents before the Joint Registrar on 15.03.2022.

22. List before this Court after completion of pleadings and admission/denial of the documents on 06.04.2022.

23. The date already fixed i.e. 10.03.2022 stands cancelled.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 03, 2022
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