

**IN THE COURT OF SH. RAMESH KUMAR-II,
ADDITIONAL DISTRICT JUDGE-01, SHAHDARA
DISTRICT, KARKARDOOMA COURTS:
DELHI**

CS No. 223/2019

In the matter of:-

Smt. Neetu

.....Plaintiff

Versus

Sh. Ramasre & Anr.

.....Defendants

27.04.2024

ORDER

Vide this common order I shall dispose off two separate applications filed on behalf of defendant no.1 and 2 for leave to defend the present suit.

Brief facts as necessary for adjudication of the application are that the defendant no.1 and 2 approached the plaintiff in the month of June 2019 seeking financial loan from plaintiff to the tune of Rs.6 lacs and the plaintiff having good friendly relationship with defendants agreed to extend help and advanced a loan amount of Rs.6 lacs to the defendants on 24.06.2019 and in this regard a mortgage deed dated 30.12.2019 was mutually executed between the plaintiff and defendant no.1 where it was agreed by the defendant no.1 that the loan amount shall be returned on or before 31.03.2020. It is further averred that the

defendant no.2 towards the assurance to return the money on time has also issued a post dated cheque bearing no.795445 dated 31.03.2020, drawn on State Bank of India, Nand Nagri Market, Delhi in favour of the plaintiff which could not be used to nationwide lock-down imposed by the Govt. of India in light of Covid-19 pandemic and the same got out dated. It is further averred that after the relaxation in lock-down given by the Government, the plaintiff approached the defendants for the issuance of a new cheque in order to recover her loan amount, however defendants miserably failed to do so and further tried to evade the plaintiff on one pretext or another. It is further averred that thereafter, the plaintiff sent a legal demand notice dated 05.10.2020 thereby calling upon the defendants to pay a total sum of Rs.6 lacs to the plaintiff within a period of 15 days of the receipt of the notice but the defendant no.1 did not complied with nor replied to the said notice. Hence, the present suit has been filed by the plaintiff against the defendants with a prayer to pass a decree for a sum of Rs.6 lacs in his favour and against the defendants alongwith cost and pendentelite and future interest @ 18% per annum from the date of issuance of cheque till its realization.

Summons for appearance was served upon the defendants and they filed their appearance well within time. Thereafter, summons for judgments was issued to the defendants. However, the defendants could not file their appearance in time and on 20.03.2023, two separate applications on behalf of defendants under Section 5 of the Limitation Act for condonation of delay in filing leave to defend application were filed, which were allowed vide order dated 21.10.2023. Applications for leave to defend the

suit were taken on record.

The defendant no.1 filed leave to defend application alongwith supporting affidavit wherein it is stated that the suit of the plaintiff is not maintainable as the plaintiff has no locus standi to file the present suit against the answering defendant as the plaintiff has not mentioned in her plaint as to on which instrument, the present case is based upon and in the absence of this material fact the present suit is not maintainable under Order 37 CPC. It is further stated that the plaintiff has also suppressed the material facts that the defendant no.1 is the real elder brother of plaintiff's father and real uncle (Tau) of the plaintiff and the defendant no.1 has neither taken any loan from the plaintiff nor executed any mortgage deed in favour of the plaintiff. The defendant no.1 further alleged that the plaintiff has not paid any single penny in the bank account of the defendant no.1 and in fact the plaintiff and defendant no.2 have played a foul play against the defendant no.1. The defendant no.1 further alleged that in October/November 2019, defendant no.1 has sold a shop bearing no.1/4883, Gali No.8, 60 Futa Road, Balbir Nagar Extension, Shahdara, Delhi-32 and at that time, the defendant no.2 has obtained signature on some papers by stating that it is formalities paper for selling the said shop and there is a strong presumption that the defendant no.2 has used the said signed paper in the said mortgage deed in connivance with the plaintiff. The defendant no.1 further alleged that as per the mortgage deed, the possession of First Floor portion of property bearing no.A-1/227, Nand Nagri, Delhi-93 has been handed over to the plaintiff but she never vacated the said portion at any point of time and still she is in possession of the said property. It is further

stated that the defendant no.2 has sold his shop bearing no.1/4883, Gali No.8, 60 Futa Road, Balbir Nagar Extension, Shahdara, Delhi-32, therefore, he was not in need of taking any loan from the plaintiff. It is further stated that it is the plaintiff, who, on the basis of the present false suit and relying on the alleged mortgage deed, wants to take illegal benefit from this court by creating fog screen and as such the defendant no.1 has a prima facie good defence and he has many triable issues which cannot be decided without leading evidence as per the law, hence the defendant no.1 is entitled for unconditional leave to defend in the present suit.

The defendant no.2 filed leave to defend application alongwith supporting affidavit wherein it is stated that the suit of the plaintiff is not maintainable as the plaintiff has no locus standi to file the present suit against the defendant no.2 as the cheque has not been deposited in the bank and in the absence of the dishonourment of the cheque, Order 37 CPC cannot be applicable against the defendant no.2 in the present suit. The defendant no.2 further alleged that the suit of the plaintiff is not maintainable against the defendant no.2 as the defendant no.2 is not the party of the mortgage deed and hence the present suit does not fall under Order 37 CPC. The defendant no.2 further alleged that as per the suit, the plaintiff had given a loan of Rs.6 lacs to the defendants and the defendant no.2 had issued a cheque of Rs.5 lacs and it is highly unbelievable that if any person will take or give an amount of Rs.6 lacs, then why he will accept or issue cheque of Rs.5 lacs, thus it is clear that the plaintiff has made a concocted and false story. The defendant no.2 further alleged that the plaintiff is residing with her father in the same

house where the defendant no.2 was residing i.e. at 2nd Floor of House No.A-1/227, Nand Nagri, Delhi-110093 and she has stolen the said cheque in the absence of defendant no.2. The defendant no.2 further alleged that the defendant no.2 has not received any amount from the plaintiff bank account and the plaintiff even has not disclosed anywhere in her plaint that when she had paid Rs.6 lacs to the defendants. The defendant no.2 further alleged that the defendant no.2 has a prima facie good defence and he has many triable issues which cannot be decided without leading evidence as per the law, hence the defendant no.2 is entitled for unconditional leave to defend in the present suit.

Plaintiff has denied the claims of the defendant no.1 and 2 by filing separate counter affidavits in response to the affidavits filed by the defendant no.1 and 2 alongwith leave to defend application.

Arguments were heard on the application seeking leave to defend on behalf of the plaintiff.

During the course of arguments, Id. Counsel for defendant no.1 submitted that the plaintiff has suppressed the material facts in her plaint that the defendant no.1 is the real elder brother of plaintiff's father and real uncle (Tau) of the plaintiff and the defendant no.1 has neither taken any loan from the plaintiff nor executed any mortgage deed in favour of the plaintiff. Id. Counsel for defendant no.1 further submitted that the plaintiff has not paid any single penny in the bank account of the defendant no.1 and in fact the plaintiff and defendant no.2 have played a foul play against the defendant no.1. Id. Counsel for defendant no.1 further submitted that in October/November 2019, defendant no.1 has sold a shop bearing no.1/4883, Gali No.8, 60

Futa Road, Balbir Nagar Extension, Shahdara, Delhi-32 and at that time, the defendant no.2 has obtained signature on some papers by stating that it is formalities paper for selling the said shop and there is a strong presumption that the defendant no.2 has used the said signed paper in the said mortgage deed in connivance with the plaintiff. Ld. Counsel for defendant no.1 further submitted that as per the mortgage deed, the possession of First Floor portion of property bearing no.A-1/227, Nand Nagri, Delhi-93 has been handed over to the plaintiff but she never vacated the said portion at any point of time and still she is in possession of the said property. Ld. Counsel for defendant no.1 further submitted that the defendant no.1 has a prima facie good defence and he has many triable issues which cannot be decided without leading evidence as per the law, hence the defendant no.1 is entitled for unconditional leave to defend in the present suit.

Ld. Counsel for defendant no.2 submitted that the suit of the plaintiff is not maintainable against the defendant no.2 as the defendant no.2 is not the party of the mortgage deed and hence the present suit does not fall under Order 37 CPC. Ld. Counsel for defendant no.2 further submitted that the plaintiff is residing with her father in the same house where the defendant no.2 was residing i.e. at 2nd Floor of House No.A-1/227, Nand Nagri, Delhi-110093 and she has stolen the said cheque in the absence of defendant no.2. Ld. Counsel for defendant no.2 further submitted that the defendant no.2 has not received any amount from the plaintiff bank account and the plaintiff even has not disclosed anywhere in her plaint that when she had paid Rs.6 lacs to the defendants. Ld. Counsel for defendant no.2 further submitted that the defendant no.2 has a prima facie good defence

and he has many triable issues which cannot be decided without leading evidence as per the law, hence the defendant no.2 is entitled for unconditional leave to defend in the present suit.

Per contra, ld. Counsel for plaintiff vehemently opposed the present applications, submitting that defendants had taken friendly loan of Rs.6 lacs from the plaintiff for a period of six months vide mortgage deed dated 30.12.2019, but the defendants could not repay the said loan amount and as such symbolic possession of first floor portion of property bearing no.A-1/227, Nand Nagri, Delhi-93 was given by the defendant no.1 to the plaintiff. Ld. Counsel for plaintiff further submitted that the plaintiff had transferred the loan amount in the bank account of the defendant no.2 through RTGS and Paytm and copy of payment slip are available on record. Ld. Counsel for plaintiff further submitted that the defendants have not denied in their respective applications that they had not taken the loan amount from the plaintiff and the defendant no.2 has also not lodged any police complaint against the plaintiff regarding theft of his cheque from his house. Ld. Counsel for plaintiff further submitted that there are no triable issues in this matter and as such the leave to defend applications are liable to be dismissed and the suit of the plaintiff may kindly be decreed in favour of the plaintiff against the defendants.

I have considered the rival submissions made before the court and also perused the record.

The principle of grant or refusal of leave to defend has been crystallized by the Hon'ble Supreme Court in ***IDBI TRUSTEESHIP SERVICES LTD. V/s. HUBTOWN LTD. in CIVIL APPEAL NO.10860 of 2016 DOD : 15/11/2016*** which

are as follows: -

"18. Accordingly, the principles stated in paragraph 8 of Mechelecs case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhirams case, as follows: 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;

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;

even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendants 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;

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.

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;

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."

On considering the rival contentions of the parties in the light of principles of law laid down in case of **IDBI TRUSTEESHIP SERVICES LTD. V/s. HUBTOWN LTD** (*supra*), this court comes to the conclusion that the defendant no.1 and 2 both have raised the triable issues and they are entitled to defend the present case. The reasons which support decision of this court are that the alleged loan amount was not given to the defendant no.1 by the plaintiff; that the defendant no.1 has also specifically pleaded that the plaintiff and defendant no.2 have played a foul play against the defendant no.1 as the defendant no.2 has used the said signed paper in the said mortgage deed in connivance with the plaintiff; that the defendant no.1 has also specifically pleaded that he had sold his shop of Balbir Nagar Extension therefore he was not in need of taking any loan from the plaintiff; that the defendant no.2 has also specifically pleaded that he is not a party to the mortgage deed dated 30.12.2019; that the defendant no.2 has also specifically pleaded that the plaintiff had given a loan of Rs.6 lacs to the defendants and the defendant no.2 had issued a cheque of Rs.5 lacs and it is highly unbelievable that if any person will take or give an amount of Rs.6 lacs, then why he will accept or issue cheque of Rs.5 lacs, thus it is clear that the plaintiff has made a concocted and false story; that it is also observed that the plaintiff is claiming decree for recovery of Rs.6 lacs but copy of bank passbook and copy of screenshots of Paytm reveal that the plaintiff has paid amount of

Rs.4 lacs through RTGS on 24.06.2019, Rs.100/- through Paytm on 22.06.2019, Rs.40900/- through Paytm and Rs.50000/- through Paytm on 22.06.2019 Rs.5 lacs to the defendant no.2 which comes to Rs.5 lacs only. The plaintiff has pleaded in her plaint that she advanced loan amount of Rs.6 lacs to the defendant no.1 and 2 on 24.06.2019, whereas copy of bank passbook and copy of screenshots of Paytm reveals that the plaintiff had transferred the amount in the bank account of defendant no.2.

Therefore, in view of the abovesaid reasons some doubts have come to the notice of this court which raises triable issues and requires evidence to be led. Accordingly, this court is of the considered opinion that if the leave to defend is not granted to the defendant no.1 and 2, in the facts and circumstances of the present case then it may lead to injustice.

Thus, I am of the considered opinion that the present case seems to be covered within para no. 18 (b) of IDBI Trusteeship Services case (supra), which reads as under:

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;

In view of the aforesaid reasons, the applications for leave to defend are therefore allowed and the defendant no.1 and 2 are granted unconditional leave to defend the suit.

Defendant no.1 and 2 are directed to file written statement within stipulated period with an advance copy to the opposite party.

Applications for leave to defend are disposed off accordingly.

(Typed to the dictation, directly corrected and pronounced in open court on 27.04.2024).

(RAMESH KUMAR-II)
ADJ-01/SHD/KKD COURTS
DELHI