

**IN THE COURT OF SHRI TARUN YOGESH**  
**ADDL. DISTRICT JUDGE-03: SOUTH WEST DISTRICT:**  
**DWARKA COURTS:NEW DELHI**

**CS No. 16166/16**

**Sh. Vijay Kumar Bhatia**

..... **Plaintiff**

**Vs.**

**1) Sh. Gorakh Nath Mishra**

**2) Sh. Amit Jaiswal**

.....**Defendants**

**Order**

**1.** Defendant's application under Order XXXVII Rule 3 (5) read with section 151 CPC for leave to defend is listed for order.

**2.** Brief facts as set out in the plaint are narrated below:

**2.1** Plaintiff Sh. Vijay Kumar Bhatia being holder of Special Power of Attorney dated 15.07.2006 on behalf of Sh. Rajeev Bhatia & Ors. agreed to sell property No. 341-342, Ward No. 2, situated within Nagar Palika Parishad, District Basti, Uttar Pradesh to defendant Sh. Gorakh Nath Mishra for sale consideration of Rs. 75,00,000/-.

**2.2** A sum of Rs. 46,00,000/- was paid by defendant on various dates till 04.06.2014 whereas Rs. 29,00,000/- remained balance to be paid against total sale consideration. Four cheques bearing no. 070833, 070834, 070835 & 070836 dated 22.07.2014 for Rs. 7,50,000/- each were issued by defendant at the time of registration of sale deed on 05.05.2014 towards balance consideration. The said cheques upon presentation were however dishonoured and returned vide returning memo dated 18.10.2014 with remarks "Funds

Insufficient” and four notices were thereafter issued to defendant on 11.11.2014 for apprising about dishonour of cheques.

**2.3** A sum of Rs. 1,00,000/- was transferred in plaintiff's account by defendant in February 2015 leaving balance Rs. 28,00,000/- and defendant is stated to have assured that cheques would be cleared upon presentation and legal proceedings in case of cheque being dishonoured could be initiated in Delhi.

**2.4** Claiming that he was made to believe that cheque number mentioned in the undertaking dated 05.05.2014 were same and defendant has refused to accept notice of dishonour of cheques, plaintiff, thereafter, has filed suit under Order XXXVII CPC for recovery of Rs. 28,00,000/- as principal sum outstanding against defendant and Rs. 4,86,000/- as interest @ 18% per annum w.e.f. 22.07.2014 till 21.07.2015 and has accordingly prayed for decree of Rs. 32,86,000/- along with pendente lite and future interest @ 12% per annum.

**3.** Perusal of judicial file reveals that plaintiff's suit under Order XXXVII CPC was filed in High Court of Delhi and summons in prescribed form no. 4 Appendix B CPC was directed to be issued to defendant by Ld. Joint Registrar (Judicial) vide order dated 12.08.2015. Plaintiff's suit was thereafter transferred to District Courts vide order dated 10.01.2016 and defendant no. 2 Sh. Amit Jaiswal was dropped from the array of parties on 16.05.2016 on the basis of statement of Advocate Sh. B. S. Randhawa for plaintiff.

**4.** Defendant's application for condoning delay in filing application under Order XXXVII Rule 3 CPC was allowed subject to cost Rs. 3,000/- vide order dated 21.07.2016 and defendant's application under Order XXXVII Rule 3(5) read with Section 151 CPC for leave to defend was filed on 13.10.2016.

- 5.** Plaintiff's reply opposing defendant's application was filed on 14.12.2016.
- 6.** Ld. counsels have addressed their submissions upon defendant's application for leave to defend and plaintiff's counsel in addition has filed written submissions on 07.05.2018.
- 7.** Defendant Sh. Gorakh Nath Mishra in his affidavit filed along with application has averred that he had met plaintiff at his residence on 06.04.2014 and agreement for sale of property was entered with plaintiff on 11.04.2014. Defendant has also stated about payment of Rs. 37,50,000/- in cash to plaintiff whereas balance amount was to be given by cheques. However, he later on came to know that plaintiff is neither owner nor attorney holder and thereafter met real owners of property and informed them about fraud played by the plaintiff. He somehow convinced the real owners namely Sh. Rajeev Bhatia and Ors. for selling the property. Plaintiff, in the meantime, encashed few cheques from concerned banks with malafide intention despite the fact that he was owner of limited portion of the property and cheques Rs. 27,50,000/- were required to be returned to defendant.
- 8.** Defendant has also averred about payment of Rs. 29,00,000/- to real owner of property and execution of sale deed of major portion of property by the real owner on 08.05.2014 for disputing plaintiff's suit for recovery on the basis of impugned cheques.
- 9.** Defendant's application for leave to defend has been opposed by plaintiff in his para-wise reply on merits by disputing the contents of para no. 2 of the affidavit and by insisting that no triable issue or defence could be raised by defendant who has raised false and concocted story as a ploy to defeat plaintiff's claim.

**10.** Written arguments on behalf of plaintiff has been filed on record for contending that defendant had got sale deed executed in favour of his wife on 11.04.2014 and issued cheque against balance payment in addition to his affidavit / undertaking dated 05.05.2014 and that sale deed of remaining property was executed by Sh. Rajiv Bhatia & Ors. upon his instruction.

**11.** Defendant, on the other hand, has filed application along with original documents viz. (i) agreement dated 11.04.2014 entered between parties; (ii) sale deed dated 11.04.2014 registered in the office of Sub-Registrar Basti, Uttar Pradesh; (iii) NOC/application for mutation dated 08.05.2014 and (iv) sale deed dated 08.05.2014 registered in the office of Sub Registrar Basti, Uttar Pradesh.

**12.** It is, therefore, revealed from plaint and affidavit filed by defendant along with application for leave to defend that Rs. 37,50,000/- was paid to plaintiff in cash and aforesaid four cheques for Rs. 7,50,000/- each were issued by defendant Sh. Gorakh Nath Mishra as part of sale consideration. Further, it is also averred by defendant that balance Rs. 29,00,000/- has been paid to Sh. Rajeev Bhatia & Ors. after it was revealed that plaintiff was neither owner nor attorney holder of real owner of property at Basti Uttar Pradesh and registered sale deed dated 11.04.2014 and 08.05.2014 have been executed in favour of his wife and defendant by plaintiff and real owners of remaining major portion.

**13.** Following principles were laid down by Hon'ble Supreme Court of India in its judgment titled "***M/s Mechalec Engineers & Manufacturers vs. M/s Basic Equipment Corporation***" AIR 1977 SUPREME COURT 577 in respect of triable grounds being raised for seeking leave to defend :-

(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 makes it clear that he has a defence, yet shows 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 defend on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.*

**14.** Hon'ble Supreme Court of India in case titled "**V K Enterprises vs. M/s Shiva Steels**" AIR 2010 Supreme Court 2885 has observed:-

*“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.”*

**15.** Since aforesaid cheques were issued in favour of plaintiff for payment of balance consideration whereas defendant has averred about payment of Rs. 29,00,000/- and execution of sale deed dated 08.05.2014 by Sh. Rajeev Bhatia & Ors. so substantial defence has been raised by defendant disputing his liability against cheques issued in the name of plaintiff.

**16. Defendant's application under Order XXXVII Rule 3(5) CPC is therefore allowed** and defendant is directed to file written statement within 30 days with advance copy to plaintiff/ ld. counsel.

(TARUN YOGESH)  
ADJ-03/Dwarka Courts  
New Delhi /10.12.2018