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

% *Date of decision: 12th July, 2022.*

+ **CS(OS) 160/2020 & I.A.5214/2020 (u/O-XXXIX R-1 & 2 of CPC),
I.A.6157/2020 (u/O-XXXVII R-3(4) of CPC), I.A.8212/2020 (u/O-
XXXIX R-4 of CPC)**

SARVESH BISARIA

..... Plaintiff

Through: Mr. Rakesh Khanna, Senior Advocate
with Mr. Rajeev Garg and Mr. Ashish
Garg, Advocates

versus

HARI OM ANAND

(DEAD THROUGH LEGAL HEIRS)

..... Defendant

Through: Mr. Sanchit Garga and Mr.
Nikunj Jain, Advocates

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J. (Oral)

**CS (OS) 160/2020 & I.A.8211/2020 (of defendants u/O-XXXVII R-3(5)
of CPC) & I.A.8213/2020 (of defendants u/O VII R-11(d) of CPC)**

1. The present suit was filed on behalf of the plaintiff under Order XXXVII of the CPC, claiming the principal amount of Rs.3,20,00,000/- along with interest @ 18% per annum from September, 2018 to May, 2020, the date of the filing of the suit, totalling Rs.4,86,66,570/-.

2. Summons in the suit were issued on 6th July, 2020 and defendants

were directed to maintain status quo with regard to title and possession of the property bearing No. E-139, 1st Floor, Greater Kailash-I, New Delhi.

3. I.A. No. 8211/2020 has been filed on behalf of the defendants seeking leave to defend and I.A No. 8213/2020 has been filed on behalf of the defendants under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) seeking rejection of the plaint. Pleadings have duly been completed in the aforesaid applications.

4. The present suit has been filed on the basis of the following pleadings:

(i) The plaintiff is a practicing advocate before the Supreme Court of India.

(ii) The defendant, Late Sh. Hari Om Anand, was known to the plaintiff for 20 years. The defendant is represented through his legal heirs viz Sh Meera Anand (wife), Mansi (daughter), Nidhi Bhasin (Daughter) and Sh. Gautam Anand (son).

(iii) On 8th February, 2016, a loan of Rs.3,20,00,000/- was given by the plaintiff to Late Sh. Hari Om Anand, through a bank transfer to his bank account in HDFC Bank Limited. The said loan was to be used by the Late Sh. Hari Om Anand for commercial purposes for the expansion of his business.

(iv) Till September, 2018, Late Sh. Hari Om Anand paid interest to the plaintiff towards the said amount of loan.

(v) A cheque dated 27th March, 2019 for Rs.3,20,00,000/- was given by Late Sh. Hari Om Anand to the plaintiff towards repayment of the said loan.

(vi) Upon presentation, the said cheque was dishonoured by the bankers of the Late Sh. Hari Om Anand, on the ground of “insufficient funds”.

(vii) On 6th April, 2019, the plaintiff sent a legal notice under Section 138

of the Negotiable Instruments Act, 1881 (NI Act). Late Sh. Hari Om Anand did not reply to the said notice.

(viii) The plaintiff filed a Criminal Complaint Case No.6371/2019 before the Metropolitan Magistrate under Section 138 of the NI Act.

(ix) On 16th November, 2019, a demand notice was issued on behalf of the plaintiff to Late Sh. Hari Om Anand, demanding the principal amount of Rs.3,20,00,000/- plus interest. Late Sh. Hari Om Anand duly received the said notice. However, he failed to reply to the same.

(x) Accordingly, the present suit has been filed.

5. Counsel appearing on behalf of the defendant has raised the following grounds for seeking leave to defend:

(i) The present suit is not maintainable in view of the fact that the plaintiff is not registered under the provisions of Punjab Registration of Money Lender's Act, 1938 (Punjab Act).

(ii) No documents have been filed on behalf of the plaintiff to show that the aforementioned amount was given as a loan.

6. In support of his submission regarding non-registration under the Punjab Act, the counsel for the defendant places reliance on Sections 2(7), 2(8) and 3 of the Punjab Act. He submits that the transaction, which is the subject matter of the present suit, is a loan covered under Section 2(8) of the Punjab Act and therefore, Section 3 of the Punjab Act would apply and no suit could be filed on behalf of the plaintiff, on account of non-fulfilment of conditions prescribed in Section 3 of the Punjab Act. He places reliance on the judgment of a Coordinate Bench of this Court in **Rajat Jain v. Neeta Gupta**, 2017 SCC OnLine Del 8695, to contend that the plaintiff was in the business of money lending and therefore, the provisions of the Punjab Act

would apply. He also relies on the gazette notification to contend that the Punjab Act is applicable to NCT of Delhi. Reliance has also been placed on three similar suits filed on behalf of the plaintiff against three different persons, to show that the plaintiff is engaged in the business of money lending.

7. Counsel for the defendant further submits that there is nothing to show that the amount was advanced as a loan. No loan agreement or promissory note has been filed on behalf of the plaintiff. Reliance is placed on the judgment of the Supreme Court in *B.L. Kashyap and Sons Limited Vs. JMS Steels and Power Corporation and Another*, (2022) 3 SCC 294, to contend that this is a fit case for grant of unconditional leave to defend.

8. Senior counsel appearing on behalf of the plaintiff submits that the legal heirs of Late Sh. Hari Om Anand, have not disputed that the aforesaid amount has been duly received by Late Sh. Hari Om Anand. Reliance is placed on Section 2(8) of the Punjab Act, to contend that amount given as loan on the basis of the negotiable instrument as defined in the NI Act, will not be covered under the Punjab Act. In this regard, he places reliance on the judgment of this Court in *Lakshmi Builders Vs. Devender Lakra*, 2016 SCC Online Del 1453.

9. Reliance is also placed on the judgment of the Division bench in *M/s Shri Colonizers and Developers Pvt. Ltd. v. M/s. FELESIA Real Com India Pvt. Ltd*, (2019) 265 DLT 138 (DB), to contend that this is not a fit case for the grant of leave to defend.

10. Reliance is placed on the judgment of the Coordinate Bench of this Court in *Sanjeev Jain Vs. Rajni Dhingra & Ors.*, 2018 SCC Online Del 13093, to contend that the suit under Order XXXVII of the CPC would be

maintainable against the legal heirs of Late Sh. Hari Om Anand.

11. I have heard the counsels for the parties.

12. To appreciate the rival contentions, a reference may be made to the provisions of the Punjab Act relied upon by both sides, which are as under:

“2. Definitions –

(7) "Interest" includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specially by way of interest or otherwise.

(8) "Loan" means an advance whether secured or unsecured of money or in kind at interest and shall include any transaction which the court finds to be in substance a loan, but it shall not include –

(i) an advance in kind made by a landlord to his tenant for the purposes of husbandry;

Provided the market value of the return does not exceed the market value of the advance as estimated at the time of advance.

(ii) a deposit of money or other property in a Government Post Office Bank, or any other Bank, or with a company, or with a co-operative society or with any employer as security from his employees;

(iii) a loan to, or by, or a deposit with any society or association registered under the Societies Registration Act, 1860, or under any other enactment;

(iv) a loan advanced by or to the Central or any [State] Government or by or to any local body under the authority of the Central or any [State] Government;

(v) a loan advanced by a bank, a co-operative Society or a company whose accounts are subject to audit by a certificated auditor under the Indian Companies Act, 1913;

(vi) *a loan advanced by a trader to a trader, in the regular course of business, in accordance with trade usage;*

(vii) ***an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note.***”

...

3. Suits and applications by money-lenders barred, unless money-lender is registered and licensed. - *Notwithstanding anything contained in any other enactment for the time being in force, a suit by a money lender for the recovery of a loan, or an application by a money-lender for the execution of a decree relating to a loan, shall, after the commencement of this Act, be dismissed, unless the money-lender –*

(a) *at the time of the institution of the suit or presentation of the application for execution; or*

(b) *at the time of decreeing the suit or deciding the application for execution -*

(i) *is registered; and*

(ii) *holds a valid licence, in such form and manner as may be prescribed; or*

(iii) *holds a certificate from a Commissioner granted under section 11, specifying the loan in respect of which the suit instituted, or the decree in respect of which the application for execution is presented; or*

(iv) *if he is not already a registered and licensed money-lender, satisfies the Court that he has applied to the Collector to be registered and licensed and that such application is pending : provided that in such a case, the suit or application shall not be finally disposed of until the application of the money-lender for registration and grant of licence pending before the Collector is finally disposed of.”*

13. A reading of proviso (vii) to Section 2(8) of the Punjab Act above, would show that an advance made on the basis of a negotiable instrument as

defined in NI Act, other than promissory note, would not be included in the definition of a “loan”. The purpose of the Punjab Act is to regulate loans given in cash or through non-banking modes and therefore, does not include loans given through negotiable instruments, such as cheques. In the modern times, the use of cheque as an instrument for making payment has been increasingly replaced with direct bank transfers, which is far more convenient than cheque transfer. In my view, payments made through bank transfers, would be akin to payments made through cheque and therefore, would not be a “loan” covered under the provisions of the Punjab Act and section 3 of the Punjab Act would not be attracted.

14. Though, counsel for the defendant has relied upon the judgment in **Rajat Jain** (supra), in my view, the said judgment supports the case of the plaintiff. The relevant observations of the said judgment are set out below:

“8. It is therefore apparent that this statute would have applicability only in respect of and against persons of firms who are engaged in the business in of advancing loans as defined under the Act. The expression ‘loan’ is defined under Sub-section (8) of Section 2. ‘Loan’ has been defined to mean an advance, whether secured or unsecured, of money or in kind at interest and shall include any transaction which the Court finds to be in substance a loan. Certain exceptions to this definition has been carved out and under Sub-clause (vi) of Sub-section (8) of Section 2 it is specifically stipulated that a loan advanced by a trader to a trader in the regular course of business, in accordance with trade usage shall not be covered under the definition of the loan. The loan as defined in Section 2(8) of the Act of 1938 specifically excludes an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note. In **Amar Singh v. Kuldeep Singh AIR 1952 Punj. 207, it was held by the Court that a man does not become a money lender merely because he may, upon one or several occasions, lend money to a stranger. There must be a business of money**

lending and the 'business' imports the notion of system, repetition and continuity to be covered under the definition of money lender under this statute."

15. In the present case, it is an admitted position that the plaintiff is a practicing Advocate in the Supreme Court of India and though he may have lent money to people on various occasions, he cannot be said to be in the business of money lending, as provided in the Punjab Act.

16. In support of his submission that the present suit is maintainable against the legal heirs of Late Mr. Hari Om Anand, the senior counsel for the plaintiff has correctly placed reliance on the judgment in *Sanjeev Jain* (supra). In the said case also, the plaintiff had advanced loan to one Mr. Virendra Dhingra, who defaulted in repayment of the loan. The cheque given by him for repayment of the loan was dishonoured. Mr. Virendra Dhingra passed away on 30th April, 2018 and the suit was filed under Order XXXVII of the CPC on 30th July, 2018 against the legal heirs of Mr. Virendra Dhingra. The submissions on behalf of the legal heirs in the said case was that an Order XXXVII suit was not maintainable against the legal heirs. Relying upon various judgments, this Court came to the following conclusion:

"15. Thus, the above judgments are conclusive as to the maintainability of the present suit against the LRs of Late Mr. Virendra Dhingra. This Court however, is not going into the issue as to whether the said LRs in fact came into possession of any assets of Mr. Dhingra, or if the decree which may be passed in the present suit is executable against Mr. Dhingra's assets and if so, against which of the assets. This is not an issue that has been raised in the present suit."

17. The present suit was filed on 24th June, 2020, when Late Sh. Hari Om

Anand was alive. He expired on 27th June, 2020. Thereafter, the suit was re-filed after impleading the legal heirs of Late Sh. Hari Om Anand, as the defendants. Therefore, the present case is maintainable in terms of the dicta of *Sanjeev Jain* (supra).

18. In *IDBI Trusteeship Services Ltd. v. Hubtown Ltd.*, (2017) 1 SCC 568, the Supreme Court has laid down the following principles with regard to grant of leave in summary suits filed under Order XXXVII of the CPC:

“17 Accordingly, the principles stated in paragraph 8 of 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 (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698, 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.”

19. The fact that Rs.3,20,00,000/- given by the plaintiff to the Late Sh. Hari Om Anand, has not been denied by the legal heirs of the Late Sh. Hari Om Anand. Further, even the payment of interest on the aforesaid amount being paid by Late Sh. Hari Om Anand to the plaintiff, has not been denied by the legal heirs of the Late Sh. Hari Om Anand. Therefore, this amounts to a clear admission that the aforesaid amount was given as a loan by the plaintiff to Late Sh. Hari Om Anand. Merely because the loan was not evidenced by a written agreement, would not mean that the sum was not advanced as a loan. It has also not been denied that Late Sh. Hari Om Anand issued a cheque of Rs. 3,20,00,000/- for the repayment of aforesaid loan, which was dishonoured. Further, no replies to the legal notice under NI Act as well as Demand notice dated 16th November, 2019, before filing of the present suit, were given by Late Sh. Hari Om Anand, who was alive at that point of time.

20. In view of the above, the defendant has no substantial defence and the leave to defend application does not raise any plausible defence or

triable issue. Therefore, the present case is squarely covered by paragraph 17.5 of *IDBI Trusteeship* (supra).

21. The grounds taken in the application under Order VII Rule 11 of the CPC are identical to the grounds taken in the leave to defend application. Consequently, both I.A. 8211/2020 and I.A. 8213/2020 are without any merits and are dismissed.

22. Resultantly, the present suit is decreed for the principal sum of Rs.3,20,00,000/-. In the facts and circumstances of the present case, since the individual who took the loan, has passed away leaving behind his wife and children, who are defendants in the present suit, following the observations in *Sanjeev Jain* (supra), I deem it fit to award interest @ 6% per annum from September, 2018, the date from which, the default in payment interest was made.

23. It is clarified that this Court has not gone into the issue as to whether the LRs or any of their assets can be attached or sold. The defences available to the LRs under Section 52 shall continue to be available in any execution of the present decree.

24. Let the decree sheet be drawn accordingly. All the pending applications stand disposed of.

AMIT BANSAL, J

JULY 12, 2022

dk