

(2015) 10 DEL CK 0232
In the Delhi High Court
Case No : CS(OS) No. 2552/2011

GE Capital Services India

APPELLANT

Vs

K.M. Veerappa Reddy and Others

RESPONDENT

Date of Decision : 16-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 3, Order 37 Rule 3(5), Order 37 Rule 37, Order 7 Rule 11
Evidence Act, 1872 — Section 34

Citation : (2015) 224 DLT 1

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : Deepika V. Marwaha, Worthing Kasar, Vaibhav Asthana and Atul Bansal, Advocates, for the Appellant; Ankit Jain, Advocate, for the Respondent

Judgement

Valmiki J. Mehta, J.

I.A. Nos. 3586/2013 (U/o XXXVII R 3(5) CPC), 16124/2013 (U/o XXXVII R 3(5) CPC), 3116/2014(U/o VII R 11 CPC) & 10097/2015 (U/o XXXVII R 3(5) CPC)

1. By this Order I am disposing of the three leave to defend applications filed by the defendant Nos. 1 to 3 in the suit. Leave to defend applications are under Order XXXVII Rule 3 sub-Rule 5 of the Code of Civil Procedure, 1908 (CPC). The suit is a suit for recovery of Rs. 1,06,89,531.40.

2. Before I turn to the facts of the present case, and pass the present order allowing the leave to defend applications, I must mention certain disturbing and disconcerting facts. It is found that in many cases, which come up in this Court, though the cases are pleaded to have been filed as falling under Order XXXVII CPC, ex facie, the suits ought not to have been filed by these litigants under Order XXXVII CPC. Filing of suits as Order XXXVII suits, though the same are not covered under Order XXXVII CPC result in wastage of precious judicial time, and which in this case has stretched to about four years and around two dozen dates of hearings. It is high time that this unacceptable practice must be stopped.

3. What is Order XXXVII CPC and what are the suits which are filed under Order XXXVII CPC? Order XXXVII CPC was enacted as an exception to the normal procedure under our Constitution and Civil laws, viz of following the principles of natural justice that a suit has to be decided in accordance with law by allowing a defendant an automatic right to defend the suit, and once there are disputed questions of fact both the parties would lead evidence on the factual issues framed. Once there would be various factual issues which require adjudication and determination, an ordinary civil suit has to be filed and decided as per the ordinary procedure provided in CPC. Order XXXVII CPC was carved out as an exception to the general rule of following the principles of natural justice, because, the subject matter of the said provision deals with are written instruments which on their fact ex facie show existence of liability of the defendants, and such instruments being dishonoured cheques, a written contract of guarantee, or a written contract obliging payment of liquidated amounts. Once such documents existed, which clearly showed prima facie liability of the defendants and an obligation of the defendants to pay such amounts, suits are filed under the exceptional procedure of Order XXXVII CPC that a defendant is not allowed as per the principles of natural justice to automatically contest the suit and the defendants have a right to contest the suit only if they apply and are granted leave to defend the suit on the leave to defend application being filed and allowed. Specific amounts given in the written instruments, therefore, once shown as due and payable by the said written instruments, benefit was given to a person in whose favour the instruments were executed, to file the suits under the special procedure of Order XXXVII CPC. It was never the intention of the framers of Order XXXVII CPC that amounts which have to be arrived at by looking at different documents, different transactions over different dates, entries in the statement of accounts and various other facts so as to arrive at the amounts due which are claimed in the suit, can be claimed by filing an Order XXXVII suit. The object of Order XXXVII CPC is clear and categorical that the amount claimed arises directly and only from a written instrument. Therefore, the applicability of the Order XXXVII CPC cannot be misused by litigants to file a suit which requires the court to go into various documentation, different amounts in different documentation, different amounts in different documentation of different years and periods, and examining the statement of accounts containing balances due which are different than the amounts which are mentioned in the original agreements under which the loans were granted, and only after looking at all these documents and facts, the amount claimed as the suit amount can be arrived at. Of course, if the case is that the amount which is claimed is only the exact/liquidated amount under the written contract such as a loan agreement with interest arising therefrom because no repayments were made by the borrowers or the guarantors right from the very inception itself, then it could be said that the amounts directly arise under the written contracts, but once after the original loan transactions when historically the written documents are executed, but thereafter there are subsequent transactions of repayment, and hence the amount which is claimed is not the amount which directly arises from

the written contract/loan agreements because the amounts which are claimed in the suit are wholly different amounts payable on account of the balance due at the foot of the account on account of transactions which are separated by various periods and running into various years, a suit in such a case is definitely not maintainable under Order XXXVII CPC and should not be filed under Order XXXVII CPC.

4(i). I have had an occasion to examine this aspect in three cases as under:-

"(i) M/s Associates India Financial Services (P) Ltd. Vs. M/s Atwal and Associates and Others BC+--> ;

(ii) M/s. K&K Health Care Pvt. Ltd. v. M/s. Pehachan Advertising RFA No. 202/2011 decided on 23.01.2012.

(iii) GE Capital Services India v. May Flower Healthcare Pvt. Ltd. & Ors. CS(OS) No. 2859/2011 decided on 31.8.2012;"

(ii) It may be noted that one out of the above three cases pertains to the plaintiff who is the same plaintiff in the present case viz GE Capital Services India. Plaintiff however is no wiser and insists on abusing the process of the law by filing the suits which are not maintainable under Order XXXVII CPC but continuing to insist even at the stage of arguments of leave to defend applications in the year 2015 that the suit should be treated under Order XXXVII CPC.

5. The relevant paragraphs of the judgment in the case of M/s. Associates India Financial Services (P) Ltd. (supra) are paras 2 to 6 and these paras read as under:-

"2. The subject suit is a suit filed by a Finance Company. A reference to the plaint shows that the plaintiff makes averments with respect to granting of finance for a sum of Rs. 66,06,200/- for certain commercial equipment. A hire purchase agreement is referred to, which is signed by the defendants on 28.9.2000. There is a reference to a demand promissory note of the same date for Rs. 66,06,200/-. There is also a mentioning of a guarantee executed by defendant Nos. 2 and 3 in favour of the plaintiff of the same date. The averments made in the plaint also admit the fact that after grant of the original loan, there were various repayments made by defendant No. 1, however, since there were defaults in payments of certain installments, the amount which is claimed in the suit, is said to have become due. The amount which is claimed in the suit even as per the plaint is not the amount which is the amount mentioned in the agreement dated 28.9.2000, but the amount is the balance due at the foot of the account. No doubt remains in this regard inasmuch as para 13 of the plaint reads as under:-

"13. That as per the accounts maintained by the plaintiff company the defendants are liable to pay a sum of Rs. 44,83,209/- (RUPEES FORTY FOUR LACS EIGHTY THREE THOUSAND TWO HUNDRED NINE ONLY) (Jointly and

severally) towards principal, interest, penal interest and other charges after adjusting the payment made by the defendants as on 30.11.2002." (emphasis added)

3. Admittedly, there is no other averment in the plaint as to how the amount claimed in the suit of Rs. 44,83,209/- arises from a particular written agreement. In an Order 37 suit the amount claimed in the suit may be the principal amount plus interest arising therefrom, however, once again the plaint makes no reference to a specific particular principal amount which has been stated as a liquidated amount in a written agreement payable to the plaintiff, and the balance claimed in the suit is only interest arising thereafter.

4. The object of an Order 37 CPC suit is that on the basis of the documents specified therein the liability towards the plaintiff is admitted. Only when the liability which is admitted in the dishonoured instrument or in the written document containing a liquidated demand as payable to the plaintiff, suits can be filed under Order 37 CPC. Those suits claiming amounts which are only balances due at the foot of account cannot be treated as falling under Order 37 CPC because the suit claim is based on the account and the amount claimed is not a liquidated amount arising/payable to the plaintiff on an instrument on the limited types which are the subject matter of Order 37 CPC. Entries and statements of account have necessarily to be proved as per Section 34 of the Evidence Act, 1872 for the balance at the foot of the account to be arrived at. The present suit plaint also makes no mention of any written acknowledgment of debt, which may have amounted to a written agreement containing the liquidated demand with interest arising.

5. I have had an occasion to examine the aspect as to whether a suit such as the present can be said to be one under Order 37 CPC in the judgment of M/s. K&K Health Care Pvt. Ltd. v. M/s. Pehachan Advertising, RFA 202/2011 decided on 23.1.2012, in which, I have observed that such type of suit cannot be filed under Order 37 CPC. Paras 2 to 5 of that judgment are relevant and which read as under:-

2. The subject suit for recovery of money was filed by the respondent/plaintiff for recovery of monies on the cause of action of non-payment of bills by the appellant/defendant. The bills were raised by the respondent/plaintiff on the appellant/defendant on account of advertisements issued in newspapers by the respondent/plaintiff on behalf of the appellant/defendant. The suit which was filed under Order 37 CPC, claimed the amounts due under the bills which were stated to be "written contracts containing liquidated demand", though simultaneously admitting that after the bills were raised various payments were made towards the bills. The details of bills and payments made, when first filed by the respondent/plaintiff, were as under:-

"Accounts Statement of M/s. K & K Health Care Pvt. Ltd. from 01.07.2005 to 15.11.2005

3. Subsequently, on the appellant/defendant stating and detailing other payments, a fresh statement of account was filed by the respondent/plaintiff reflecting the position of bills and payments as under:-

M/s. K & K Health Care Pvt. Ltd. Ledger Account from 01.04.2005 to 7.11.2005

This latter statement of account is a part of the statement of account running into a total number of eight pages. This second statement of account, in addition to the two payments reflected in the first statement of account, admitted and reflected as many as five other payments. The fact that payments have been made as reflected in aforesaid two statements of account is not in dispute between the parties. The suit really therefore is a suit for the balance due at the foot of the account and is not one which is only and only on the basis of the amounts contained in the bills. The suit thus could not have been filed under Order 37 CPC as the amount claimed in the suit was not the amount as mentioned in the bills which are stated to be written contracts containing the liquidated demands of moneys payable.

4. Learned counsel for the respondent relies upon a decision of learned Single Judge of this Court in the case of Lohmann Rausher GmbH Vs. Medisphere Marketing Pvt. Ltd., to argue that the suit on the basis of invoices is maintainable under Order 37 CPC. Of course, I am bound by the decision of the learned Single Judge and therefore a suit on the basis of invoices can be said to be maintainable under Order 37 CPC, however, in the present case the suit is not based on the invoices only but the amount claimed in the suit is the balance due at the foot of a running account i.e. after giving adjustment/credit for certain payments made for the invoices/bills. The suit is therefore definitely not only on the basis of invoice amounts alone for the same to be covered under Order 37 CPC. Also, in my opinion, in an appropriate case this issue will have to be examined whether a suit under Order 37 CPC can be filed on the basis of invoices alleging the same to be "written contracts containing a debt or liquidated demand"- the necessary requirement of Order 37 CPC. The whole purpose of the provision of Order 37 Rule 1 CPC entitling filing of the suit on a debt or liquidated demand was that there is an agreement showing that there is an admitted liability and a liquidated liability or debt which is claimed in an Order 37 suit. When an Order 37 suit is filed on bills, the bills only reflect goods supplied and therefore I feel that it cannot be said that bills should be taken as agreements containing liquidated demands or an acknowledgment or promise to pay or an admitted liability or such other factor so as to bring the claim as "claim for debt or liquidated demand arising on a written contract" as found in Order 37 CPC.

5. In view of the above, I need not go into the merits of the matter inasmuch as the plaintiff cannot arm-twist a defendant by filing a suit under Order 37 CPC, and argue in the trial Court and also before this Court, that it has a prima facie strong case on merits and therefore the impugned order granting conditional leave to defend must be sustained. Merely because a plaintiff/respondent feels it has a strong case on merits cannot mean that the suit can be filed under Order

37 unless the mandatory requirement of basing the suit on one of the four requirements of Order 37 Rule 1 sub Rule 2 is complied with. If the suit is not maintainable under Order 37, there does not arise an issue of any conditional leave to defend as was granted by the trial Court.

(underlining added)

6. The present suit is pending since the year 2002 i.e., 11 years. In these 11 years, in my opinion, there has been a gross wastage of judicial time on account of the plaintiff insisting that the suit be treated under Order 37 CPC. It is quite obvious that the suit is not maintainable under Order 37 CPC. Even today, I put it to the counsel for the plaintiff that how can a suit which claims the balance at the foot of the account can be a suit under Order 37 CPC because the balance which is claimed at the foot of the account is not supported by a written document admitting such liability to be payable and whereupon this liability would be a liquidated demand arising out of a written contract. Counsel for the plaintiff insisted on arguing that the suit is maintainable under Order 37 CPC."

(emphasized bold portion above is by me)

6. The relevant paras in the judgment in the case of plaintiffs earlier suit being CS(OS) No. 2859/2011 viz GE Capital Services India (supra) are paras 3 to 6 and which read as under:-

"3. I put it to counsel for the plaintiff that in the suits such as the present, where the amount due effectively arises from the balance due at the foot of the account, it cannot be said to be a liquidated amount arising from a written agreement. The suit amount has to be the liquidated amount arising from the written agreement and in cases where the balance due at the foot of account is claimed the same automatically does not become a part of original loan document which contains a totally different amount. On the pleaded basis the suit is not maintainable under Order 37 CPC. I have so held in two judgments, one in the case of M/s. K & K Health Care Pvt. Ltd. v. M/s. Pehachan Advertising in RFA 202/2011 decided on 23.1.2012 and another in M/s. Associates India Financial Services (P) Ltd. v. M/s. Atwal and Associates & ors in CS(OS) No. 2109/2002 and I.As therein for leave to defend decided on 9.8.2012. I have also observed that there is a gross wastage of judicial time where plaintiffs unnecessarily file suits under Order 37 CPC although quite clearly the same are not maintainable under Order 37 CPC because there is no such category in Order 37 CPC where suit can be filed on amounts stated in an agreement entered into long back but the suit amount is wholly different and is the balance due at the foot of the account.

4. Paras 4 to 6 of the judgment in the case of M/s. Associates India Financial Services (P) Ltd. are relevant and which read as under:-

"4. Admittedly, there is no other averment in the plaint as to how the amount claimed in the suit of Rs. 44,83,209/- arises from a particular written agreement.

In an Order 37 suit the amount claimed in the suit may be the principal amount plus interest arising therefrom, however, once again the plaintiff makes no reference to a specific particular principal amount which has been stated as a liquidated amount in a written agreement payable to the plaintiff, and the balance claimed in the suit is only interest arising thereafter.

5. The object of an Order 37 CPC suit is that on the basis of the documents specified therein the liability towards the plaintiff is admitted. Only when the liability which is admitted in the dishonoured instrument or in the written document containing a liquidated demand as payable to the plaintiff, suits can be filed under Order 37 CPC. Those suits claiming amounts which are only balances due at the foot of account cannot be treated as falling under Order 37 CPC because the suit claim is based on the account and the amount claimed is not a liquidated amount arising/payable to the plaintiff on an instrument on the limited types which are the subject matter of Order 37 CPC. Entries and statements of account have necessarily to be proved as per Section 34 of the Evidence Act, 1872 for the balance at the foot of the account to be arrived at. The present suit plaintiff also makes no mention of any written acknowledgment of debt, which may have amounted to a written agreement containing the liquidated demand with interest arising.

6. I have had an occasion to examine the aspect as to whether a suit such as the present can be said to be one under Order 37 CPC in the judgment of M/s. K&K Health Care Pvt. Ltd. v. M/s. Pehachan Advertising, RFA 202/2011 decided on 23.1.2012, in which, I have observed that such type of suit cannot be filed under Order 37 CPC. Paras 2 to 5 of that judgment are relevant and which read as under:-

2. The subject suit for recovery of money was filed by the respondent/plaintiff for recovery of monies on the cause of action of non-payment of bills by the appellant/defendant. The bills were raised by the respondent/plaintiff on the appellant/defendant on account of advertisements issued in newspapers by the respondent/plaintiff on behalf of the appellant/defendant. The suit which was filed under Order 37 CPC, claimed the amounts due under the bills which were stated to be "written contracts containing liquidated demand", though simultaneously admitting that after the bills were raised various payments were made towards the bills. The details of bills and payments made, when first filed by the respondent/plaintiff, were as under:-

"Accounts Statement of M/s. K & K Health Care Pvt. Ltd. from 01.07.2005 to 15.11.2005

3. Subsequently, on the appellant/defendant stating and detailing other payments, a fresh statement of account was filed by the respondent/plaintiff reflecting the position of bills and payments as under:-

"M/s. K & K Health Care Pvt. Ltd.

Ledger Account from 01.04.2005 to 7.11.2005

Total Outstanding Rs. 656,957.25"

This latter statement of account is a part of the statement of account running into a total number of eight pages. This second statement of account, in addition to the two payments reflected in the first statement of account, admitted and reflected as many as five other payments. The fact that payments have been made as reflected in aforesaid two statements of account is not in dispute between the parties. The suit really therefore is a suit for the balance due at the foot of the account and is not one which is only and only on the basis of the amounts contained in the bills. The suit thus could not have been filed under Order 37 CPC as the amount claimed in the suit was not the amount as mentioned in the bills which are stated to be written contracts containing the liquidated demands of moneys payable.

4. Learned counsel for the respondent relies upon a decision of learned Single Judge of this Court in the case of Lohmann Rausher GmbH Vs. Medisphere Marketing Pvt. Ltd., to argue that the suit on the basis of invoices is maintainable under Order 37 CPC. Of course, I am bound by the decision of the learned Single Judge and therefore a suit on the basis of invoices can be said to be maintainable under Order 37 CPC, however, in the present case the suit is not based on the invoices only but the amount claimed in the suit is the balance due at the foot of a running account i.e. after giving adjustment/credit for certain payments made for the invoices/bills. The suit is therefore definitely not only on the basis of invoice amounts alone for the same to be covered under Order 37 CPC. Also, in my opinion, in an appropriate case this issue will have to be examined whether a suit under Order 37 CPC can be filed on the basis of invoices alleging the same to be "written contracts containing a debt or liquidated demand"- the necessary requirement of Order 37 CPC. The whole purpose of the provision of Order 37 Rule 1 CPC entitling filing of the suit on a debt or liquidated demand was that there is an agreement showing that there is an admitted liability and a liquidated liability or debt which is claimed in an Order 37 suit. When an Order 37 suit is filed on bills, the bills only reflect goods supplied and therefore I feel that it cannot be said that bills should be taken as agreements containing liquidated demands or an acknowledgment or promise to pay or an admitted liability or such other factor so as to bring the claim as "claim for debt or liquidated demand arising on a written contract" as found in Order 37 CPC.

5. In view of the above, I need not go into the merits of the matter inasmuch as the plaintiff cannot arm-twist a defendant by filing a suit under Order 37 CPC, and argue in the trial Court and also before this Court, that it has a prima facie strong case on merits and therefore the impugned order granting conditional leave to defend must be sustained. Merely because a plaintiff/respondent feels it has a strong case on merits cannot mean that the suit can be filed under Order 37 unless the mandatory requirement of basing the suit on one of the four requirements of Order 37 Rule 1 sub Rule 2 is complied with. If the suit is not

maintainable under Order 37, there does not arise an issue of any conditional leave to defend as was granted by the trial Court.

(underlining added)

5. Counsel for the plaintiff has failed to point out any written agreement containing the specific amount claimed in the suit and which is the liquidated amount and which is stated in the written agreement. Merely because there is a written agreement way back of the year 2002, cannot mean that the suit amount which is not stated in the said agreement would also become a liquidated amount in the suit filed under Order 37 CPC.

6. During the course of hearing, I put it to the counsel for the plaintiff as to whether in the light of facts which have emerged should the suit at all be pressed as one under Order 37 CPC, and the counsel insists that the suit lies under Order 37 CPC.

In view of above, and considering the fact that unnecessarily judicial time is being wasted by the plaintiff who insists on filing suits under Order 37 CPC which cannot be filed under Order 37 CPC which cannot be filed under Order 37 CPC, I allow the application for leave to defend with costs of Rs. 25,000/-. The defendants are granted unconditional leave to defend."

(emphasized bold portion is by me)

7. It may be noted that the plaintiff in the said suit, and who is also the plaintiff in the present suit, was represented by the same counsel who today has argued the applications for leave to defend and the aspect of maintainability of the suit under Order XXXVII CPC.

8. A reading of the relevant ratios of the aforesaid judgments shows that the object of Order XXXVII CPC never was to allow filing of the suit under Order XXXVII CPC if the amount which is claimed is the balance due at the foot of the account. I have already expounded above the object of bringing in Order XXXVII CPC by the legislature, and there cannot be even an iota of doubt that Order XXXVII suits were not intended to be filed for claiming balances due at the foot of an account. With the aforesaid preliminary discussion, let us turn to the cause of action as alleged in the present suit.

9(i) Plaintiff as per the suit plaint avers that by means of a total of 8 loan agreements dated 25.3.2003, 28.3.2004, 6.8.2003 and 27.9.2003, a sum of Rs. 1,72,88,100/- was given as loan to a company M/s. Starr Hospital & Research Centre Ltd. and for which loan transactions the defendants stood as guarantors. In the plaint, it is further averred that the aforesaid eight loan agreements got merged into a fresh Compromise Deed dated 25.9.2005 thereby rescheduling the payments. Curiously, there is no averment in the plaint as to for the actual amount the Compromise Deed dated 25.9.2005 was entered into the amount, and which amount had remained due to the plaintiff for the loans which were earlier granted to M/s. Starr Hospital & Research Centre Ltd. under the eight

agreements of four dates of March, August, September 2003 and March 2004 as stated above. Counsel for the plaintiff concedes that this factual aspect is not mentioned in the plaint and that the amount due as on 25.9.2005 was not the amount due of Rs. 1,72,88,100/- payable under the earlier eight agreements of March, 2003 to March, 2004. Reference of this Court is invited so as to know what is the amount due on 25.9.2005, not to the averments in the plaint, but to the documents filed with the plaint and of which documents there is no reference in the plaint so that this Court should read the said document to know the amount due as on the date of the Compromise Deed dated 25.9.2005. The document which is referred to is a statement of account showing that as on 25.9.2005, a sum of Rs. 1,30,00,000/- was due to the plaintiff i.e., admittedly the amount said to be due on 25.9.2005 is different than the original loan amount of Rs. 1,72,88,100/-. It may be noted that when the Compromise Deed dated 25.9.2005 was entered into, the name of the principal borrower company had changed from Starr Hospital to M/s. Gold Star Hospital & Research Centre Ltd.

(ii) The next averments in the plaint with respect to the amount due to the plaintiff, are found in para 11 of the plaint, and as per this para 11, the plaintiff pleads that as per the statements of accounts of "two agreements", a total sum of Rs. 1,19,58,688.94 is due to the plaintiff including TDS dues and which total comprises of two amounts of Rs. 1,13,29,626.94 plus Rs. 6,29,062/-. How the total amount of Rs. 1,19,58,688.94 is referable to a liquidated amount specified in any written contract as being the amount due and payable to the plaintiff is conspicuous by its absence in the plaint and in fact a sum figure is also not found even in any of the documents filed by the plaintiff. Also, there is no detail given in para 11 of the plaint as to under what two heads the amount of Rs. 1,13,29,626.94 and Rs. 6,29,062/- fall i.e., whether the amounts are towards principal or principal plus interest or only interest or TDS dues etc and this Court is left guessing as to under what heads these amounts fall. A lot is therefore to be said with respect to the drafting of the plaint for filing the same under Order XXXVII CPC.

(iii) Plaintiff thereafter in para 11 of the plaint itself states that from the amount of Rs. 1,19,58,688.94 an amount of Rs. 8,00,000/- which was financed under one principal agreement has been reduced, as also a further amount of Rs. 4,69,157.52, and hence the suit amount which is claimed is said to be the figure of Rs. 1,06,89,531.40 as pleaded in para 14 of the plaint. Once again, there is no reference in the plaint to any document as to how this amount of Rs. 1,06,89,531.40 is the liquidated amount under which written contract by which defendants are liable to pay such amount and obliged to pay such amount to the plaintiff and thus for the suit to be filed under Order XXXVII CPC. In fact, counsel for the plaintiff concedes that there is no statement of account filed alongwith the suit showing how this amount of Rs. 1,06,89,531.40 which is claimed in the suit is as per that statement of account due, and counsel for the plaintiff wanted to invite my attention to the reply filed by the plaintiff to the leave to defend

applications giving calculations as to how this amount of Rs. 1,06,89,531.40 is arrived at, i.e., what I am observing is that the calculations given in the reply to the leave to defend applications are not given in the plaint and in case such amount is not supported as a figure even arising from a statement of account filed with the plaint, leave aside the said amount arising as the liquidated amount from a written contract under which defendants obliged themselves to pay such amount to the plaintiff and which is the mandatory requirement of Order XXXVII CPC.

10. In order to understand the observations which have been made above, I am reproducing paras 4, 6 and 11 of the plaint and these paras read as under:-

"4. Based on defendants assurances and representations of defendants, the plaintiff company entered into Equipment Master Security & Loan Agreements, bearing Nos. W10827 (A120052), W10867 (A120086), W10866 (A120085), W10918 (A120190), W10965 (A120240), W10968 (A120238, W11120 (A120440), W11196 (A120528) with Starr Hospital & Research Centre Ltd. For Nos. W10827 (A120052), W10867 (A120086), W10866 (A120085), W10965 (A120240) and W11120 (A120440) a single agreement booklet dated 25-Mar-2003 was executed between the parties. Further, for No. W10968 (A120238) agreement dated 27-Sep-2003, for No. W10918 (A120190) agreement dated 06-Aug-2003 and for No. W11196 (A120528) agreement dated 28-Mar-2004 were executed between the parties. In the aforesaid manner total of four Loan Agreements were entered into with Starr Hospital & Research Centre Ltd. The said Loan Agreements were concluded and executed in New Delhi. Under the Loan Agreements a total sum of Rs. 1,72,88,100/-(Rupees One Crore Seventy Two Lacs Eighty Eight Thousand and One Hundred Only) was financed by the Plaintiff Company to Starr Hospital & Research Centre Ltd. The amount financed under the Loan Agreements was used by Starr Hospital & Research Centre Ltd. for the purchase of various medical equipment. As per the terms of said Loan Agreements various following medical equipments ("Collateral" hereinafter) were financed to Starr Hospital & Research Centre Ltd. and the said equipments were also the collateral under the respective Loan Agreements:

6. That the amount financed under the loan agreements was to be repaid through monthly instalments. The instalments were to be paid by Starr Hospital & Research Centre Ltd. after deducting TDS and also to provide TDS Certificates to the Plaintiff. It was, inter alia, a representation from Starr Hospital & Research Centre Ltd. and also the Defendants, that the terms of the Loan Agreements will be adhered to, in full, and that there will not be any default. However, the Principal Borrower started committing defaults in payment of instalments under the loan agreements and also did not provide TDS certificates to the Plaintiff or pay the equivalent amount to the Plaintiff. Thereafter, the Starr Hospital & Research Centre Ltd. changed its name to Gold Star Hospital & Research Centre Ltd. After repeated follow-ups by Plaintiff, Gold Star Hospital & Research Centre Ltd. again approached Plaintiff Company in or around September 2005 and

expressed it's difficulty in paying the instalments as per the schedule under the loan agreements. Gold Star Hospital & Research Centre Ltd., further requested Plaintiff to reschedule the outstanding amount under the loan agreements. After discussions a Deed of Compromise dated 25-Sep-2005, and fresh repayment schedule were entered into between Gold Star Hospital and Research Centre Ltd., and Plaintiff, and new agreement Nos. viz. W12042 (A121444) & W12043 (A121445) were given to the fresh repayment schedules. Agreements No. W12042 was towards the repayment schedule of Loan Agreement Nos. W10827, W10867, W10866, W10918, W10965, W11120, W11196, and Agreement No. W12043 was towards the repayment schedule of Loan Agreement No. W10968. Gold Star Hospital and Research Centre Pvt. Ltd., agreed to pay the Outstanding amount in accordance with the fresh repayment schedules.

As per the repayment schedules, the loans were to be repaid in instalments uptill 25.03.2010. Under the fresh repayment schedule also Gold Star Hospital & Research Centre Ltd. was to deduct TDS from the monthly instalment amount and provide TDS Certificates to the Plaintiff.

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11. That when the Defendants failed to pay the outstanding amount even after repeated follow ups by the officers of the Plaintiff Company, the Plaintiff was constrained to issue a notice of demand dated 13.07.2011 issued on 19.07.2011 to the Defendants and Spatica Super Speciality Hospitals Ltd. (Principal Borrower) through registered post. The notice addressed to Defendant Nos. 1 and 4 have been received back with the remarks "Left". The address on which the notice was sent is the address given in the Personal Guarantee signed by the Defendants, and it is the last known address of the Defendants No. 1 and 4 to the Plaintiff. The notice was sent to the Defendant No. 4 at both the addresses of his. However, the Defendant No. 2 has replied to the said Notice vide his Reply dated 15.08.2011, wherein has denied his liability. But Defendant No. 3 has not replied to the notice. It is pertinent to mention here that in the notice dated 13.07.2011 it was specifically stated that the total Outstanding amount mentioned therein did not include the TDS dues which are additionally payable. As per the records of the Plaintiff Company out of the total TDS dues of Rs. 9,61,457/-, TDS certificates amounting to Rs. 6,29,062/- are still to be provided to the Plaintiff Company. As such none of the Defendants have paid the outstanding dues as mentioned in the notice nor the TDS dues of the Plaintiff have been cleared. As per the statements of accounts with respect to Agreement No. W12042 (the new Agreement Number allotted to the said Agreement is A121444) and Agreement No. W12043 (the new Agreement Number now allotted to the said Agreement is A121445) maintained by Plaintiff, a total sum of Rs. 1,19,58,688.94 (Rs. 1,13,29,626.94 + Rs. 6,29,062/-), including TDS dues, ("Total Outstanding") is still due and payable as per the fresh repayment schedules under the Deed of Compromise, which was in addition to and not in

supersession of the initial loan agreements, and consequently there is also liability of the Defendants to pay the above said Total Outstanding amount under the initial Loan Agreement Nos. W10827 (A120052), W10867 (A120086), W10866 (A120085), W10918 (A120190), W10965 (A120240), W10968 (A120238), W11120 (A120440), W11196 (A120528).

Out of the said amount of Rs. 1,19,58,688.94, the Plaintiff is not claiming an amount of Rs. 8,00,000/- which was financed under the Agreement bearing No. W11196 (which was part of new Agreement No. W12042 and which was later on Agreement No. A121444) and also an amount of Rs. 4,69,157.52 which is payable to the Plaintiff Company under new repayment schedule No. W12043 and abandoning its claim qua the said amounts."

11. From the aforesaid discussions, the following conclusions emerge:-

"(i) Suits which are to be filed under Order XXXVII CPC, were as per the legislative intent, only those where the amount claimed in the suit is the same liquidated amount which arises as emerging/flowing directly from the written instrument which is the subject matter of the Order XXXVII suit, and, a civil court cannot under Order XXXVII CPC be called upon to look at various documents and various statements of accounts, spread over periods running into years, so as to determine how the amount due in the suit claimed is arrived at, and which amount is admittedly different from the amount contained in the written document(s).

(ii) The plaint in the present suit when it refers to the amount which is claimed in the suit of Rs. 1,06,89,531.40 does not make averments and refer to any specific document being the written contract between the parties containing this specific liquidated amount as due and payable by the defendants to the plaintiff.

(iii) Not only there is no cause of action pleaded in the plaint with respect to the amount of Rs. 1,06,89,531.40, even the figure of Rs. 1,19,58,688.94 which is referred to in para 11 of the plaint is not supported by any written document as a liquidated amount being due and payable by the defendants to the plaintiff. Also, as stated above, not only there is no written contract containing this liquidated amount of Rs. 1,19,58,688.94, there is in fact not even a supporting statement of account where this figure is shown as the balance due at the foot of the account.

(iv) The plaintiff, in spite of a directly applicable judgment passed in an earlier suit of the plaintiff, holding that suits such as the present are not maintainable under Order XXXVII CPC, insists that suits such as the present be held as maintainable under Order XXXVII CPC, that such suits must be continued to be heard and decided under Order XXXVII CPC.

(v) The suit plaint leaves wide gaps with respect to averments required of co-relating the three separate amounts as stated in the plaint being the amounts of Rs. 1,72,88,100/-, Rs. 1,19,58,688.94/- and Rs. 1,06,89,531.40/- as stated

above.

(vi) The final figure of Rs. 1,06,89,531.40/- claimed as being the suit amount is neither supported by any contract containing this liquidated amount stating that such amount is due and payable by the defendants to the plaintiff nor even a statement of account as to how this figure is the balance due at the foot of which account."

12. Learned counsel for the plaintiff very strongly sought to place reliance upon a judgment of this Court in the case of the plaintiff itself being GE Capital Services India v. G. Neuromed Diagnostic Centre 2007 VIII AD (Delhi) 464 to argue that Order XXXVII suits are maintainable even for the balance due at the foot of the account and which amount is different than the amount in the historical loan agreements entered into many years earlier. It is argued that original agreements can be used as written documents for filing of the suit under Order XXXVII CPC though the amount claimed in the suit is completely different than the amount stated in the written contracts of the earlier historical dates and the suit is filed for the amount which actually is the different amount due after many years being such balance due at the foot of the account. Reliance is placed upon paras 21 to 23 of the said judgment and these paras read as under:-

"21. I find no force in the last submission of the defendant that the suit is based on a statement of account and not on the written agreement and the documents executed along with it. The basis of the claim in the suit is the written loan agreement, the promissory notes executed by defendant Nos. 1 to 4 and the individual guarantees executed by defendant Nos. 2 to 4. The statement of account merely sets out the outstanding amounts along with overdue interest computed by the plaintiff.

22. Counsel for the defendant fairly admits that the entries contained in the statement of account filed by the plaintiff have not been questioned in the defendant's present application. In any event, in my view, mere general denial of the statement of account filed by the plaintiff is not sufficient, and the defendants ought to have raised specific pleas in relation to the various entries which go to make the statement of account, if according to them, any, or all of them were incorrect.

23. In my view, the defences as raised by the defendants are moonshine and frivolous and do not raise any triable issue. No useful purpose would be served in granting leave to the defendants to defend the suit, since the defences raised, even if proceeded further for examination in a trial, cannot succeed as they are misconceived and untenable in law. Accordingly, I dismiss this application."

13. In my opinion, the judgment in the case of GE Capital Services India (supra) (2007's case) relied upon by the plaintiff is distinguishable for the reason that the reading of the said judgment does not show that after the original loan agreements were entered into and amounts paid as loans, in the said suit there took place repayments by the borrowers towards the amounts due and that the

amounts which were claimed in the suit were as per the statement of account prepared after taking consideration of the subsequent payments made by borrowers. In fact, there are clear cut observations in para 4 of this judgment that the amount which was claimed in the said suit was the principal amount stated in the agreements and changes thereto were only on account of arising of interest thereon. It need not be again said that Order XXXVII suit is maintainable with respect to the principal amount provided that it is that principal amount which is claimed alongwith the interest arising thereon as stated in the written agreement. The first line of para 4 of the said judgment observes that the defendants in the said suit had failed to adhere to the time schedule from the very beginning. Para 21 of the judgment in the said case further clarifies that the suit was taken to be on the basis of the documents and not on the statement on account as the statement of account in the said case only sets out the outstanding amounts alongwith overdue interest. Outstanding amount obviously when read with the first line of para 4 of this judgment is the original amounts as stated in the original agreements. In any case the most important and distinguishing fact of the said judgment with the facts of the present case is that in the said case the statement of account was not disputed by the defendants as is seen from para 22 of the judgment, and therefore there was an admitted document containing a liquidated amount in the said case.

I do not find anything observed in the said judgment to support what is argued before me by the counsel for the plaintiff that in the facts of the said case various repayments were made by the borrowers and the amounts which were claimed in the suit therefore were balances due in terms of the balance due at the foot of the account after giving credits for the repayments made, inasmuch as, there is no such discussion on these facts as regards this aspect in the said judgment. In any case as stated above, nothing turns on this aspect, as in the said case the statement of account was admitted and which is not the position in the present case.

14. It is settled law that a judgment of a court is not to be read like as a statute. Even a change of a single fact can make a difference to the judgment to be delivered in a particular case and this is so stated by the Constitution Bench of the Supreme Court in the judgment in the case of Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, . Para 9 of this judgment is relevant and which reads as under:-

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways Board*; (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

15. This is a suit of the year 2011. For around four years valuable judicial time has been wasted and it is noted that there are around two dozen order sheets in this case already, and for a suit which ought not to have been pursued under Order XXXVII CPC.

16. In view of the above, the leave to defend applications are allowed inasmuch as the suit itself is not maintainable under Order XXXVII CPC. The suit is therefore directed to be treated as an ordinary suit. Applications are allowed and disposed of accordingly, however, in view of the conduct of the plaintiff in contumaciously and obstinately pursuing this suit which clearly did not lie Order XXXVII CPC, hence while disposing of these applications in the suit which seeks to recover over Rs. 1 crore, costs of Rs. 5 lacs are imposed upon the plaintiff and of which, a sum of Rs. 4 lacs is to be deposited with the Delhi High Court Legal Aid Services Committee within a period of four weeks from today and a sum of Rs. 1 lac is to be equally divided between the three defendants whose time has been wasted and expenses incurred for these four years for contesting the leave to defend applications although the suit itself was not maintainable under Order XXXVII CPC. I may note that even in the earlier suit of 2011 of the plaintiff decided on 31.08.2012, applications for leave to defend were allowed subject to costs of Rs. 25,000/-, and the plaintiff is however no wiser and it feels having a clout of sufficient monies, the plaintiff can abuse the process of the law, and thus it is high time that a strong message should be sent to those litigants who do not exercise discretion in accordance with law.

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17. Let the written statement be filed within eight weeks. Replication be filed within four weeks thereafter. List before the Joint Registrar for completion of pleadings and for admission/denial of documents on 28th January, 2016.