

(2015) 11 DEL CK 0183
In the Delhi High Court
Case No : CS (OS) No. 2950/2015

IFCI Factors Ltd.

APPELLANT

Vs

Maven Industries Ltd. and Others

RESPONDENT

Date of Decision : 20-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 37
Evidence Act, 1872 — Section 34
Sales of Goods Act, 1930 — Section 41, 42
Specific Relief Act, 1963 — Section 14, 14(2)

Citation : (2015) 225 DLT 32

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

Bench : Single Bench

Advocate : Anupam Srivastava and Sharmistha Ghosh, Advocates, for the Appellant

Judgement

Valmiki J. Mehta, J.—Plaintiff who is the lender/creditor has filed this suit for recovery of Rs. 10,45,05,890.43/- against three defendants. Defendant No. 1 is the principal borrower company and the defendant Nos. 2 and 3 are the guarantors.

2. In terms of the averments made in the plaint, the plaintiff in terms of an agreement for factoring of receivables lent an amount of Rs. 4.98 crores under the subject Agreement dated 28.1.2011 which was for domestic factoring upto a limit of Rs. 5 crores. The working of the factoring agreement is that the defendant No. 1 is supplier of goods and when it supplies goods to a third party, such third party is liable to make the payment for the goods supplied to the defendant No. 1, but such third party instead of making the payment to the defendant No. 1 will make the payment to the plaintiff which has lent the amount to the defendant No. 1 under the Agreement for Factoring of Receivables dated 28.1.2011. Effectively, the plaintiff discounts the bills which are raised by the defendant No. 1 upon the buyer and the plaintiff on such discounting grants financial facility to the defendant No. 1 on the security of the discounted bills. As

per the plaint, after giving the final limit to the defendant No. 1 a total repayment of Rs. 42,04,068/- was made and as per the plaintiff now a sum of Rs. 10,45,05,890.43/- is due to the plaintiff from the defendants alongwith contractual rate of interest @ 13% per annum. The subject suit is filed stating that the suit is based upon the written contract being the Agreement for Factoring of Receivables dated 28.1.2011 under which a limit of Rs. 5 crores was available to the defendant No. 1 and which agreement was used by the defendant No. 1 to avail an amount of Rs. 4,98,07,015 by discounting of the bills, and on the date of the suit an amount of Rs. 10,45,05,890.43/- is due being the amount of principal plus interest after giving benefit to the defendants of an amount of Rs. 42,04,068/- having been paid.

3. This matter was listed for admission before the Joint Registrar and the Joint Registrar vide Order dated 7.10.2015 listed the suit in this Court on account of non-maintainability of the same because the Agreement dated 28.1.2011 had an arbitration clause. The Order of the Joint Registrar dated 7.10.2015 reads as under:--

"IA No. 20423/2015 (Exemption)

Allowed, plaintiff be directed to file the original document be filed within four weeks time.

Accordingly IA stands disposed of.

CS(OS) 2950/2015

During the course of argument, it revealed that there was an agreement dated 28.01.2011 incorporated the arbitration clause No. 25 between the plaintiff and defendant No. 1 which says that:--

"all disputes, differences, claims, questions and controversies arising in connection with this agreement which the parties are unable to settle between themselves, shall be referred to Arbitration, in accordance with the Arbitration and Conciliation Act, 1996 or any statutory amendment or modification thereof. The Arbitration proceedings shall be held in the English language and shall be held at Mumbai/New Delhi."

Plaintiff also averted in para 6 of the plaint that defendants 2 & 3 executed separate deed of guarantee titled as "Guarantee" dated 28.01.2011 in favour of the plaintiff for securing the facility in favour of defendant No. 1 by the plaintiff. The amount of guarantee given by defendants 2 & 3 to the plaintiff was to extend Rs. 5 Crore each. The plaintiff has also relied upon the judgment in case Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, and ors and further prayed that to issue the summons to the defendants under Order 37 CPC.

In view of the submission and the arbitration clause, the matter be placed before the Hon"ble Court on 20.11.2015 for further directions."

4. In addition to the non-maintainability of the suit because of the arbitration

clause, there would also be an issue as to whether the subject suit of the type in the present case is maintainable under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) inasmuch as the amount claimed in the suit does not directly arise from the written Contract dated 28.1.2011, but in effect the suit seeks the balance payment after the availing of the financial limit by the defendant No. 1 and thereafter defendant No. 1 made certain payments i.e the amount claimed in the suit is not the amount payable by the defendants as being stated as that specific amount in the Agreement dated 28.1.2011 and the Agreement dated 28.1.2011 is only a historical fact and the amount mentioned as a financial limit therein is not the amount which is claimed in the suit inasmuch as what is claimed in the suit is the balance due and payable to the plaintiff after repayment by the defendants of different amounts totaling to a sum of Rs. 42,04,068/-.

5. At the outset so far as the view of the Joint Registrar with respect to non-maintainability of the suit is concerned, reference is required to be made to Section 14(2) of the Specific Relief Act, 1963 which provides that where there is an arbitration clause/arbitration agreement between the parties, a person who is party to such an arbitration agreement cannot file a suit and such a suit would be barred. Section 14(2) of the Specific Relief Act, 1963 reads as under:--

"Section 14 . Contracts not specifically enforceable.--

(1) xxx xxx xxx xxx

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) xxx xxx xxx xxx"

6. Clearly therefore a civil suit for recovery of money would be barred because of Section 14(2) of the Specific Relief Act, 1963 on account of there existing an arbitration clause. However, I must hasten to add that qua this aspect the aforesaid observations are only prima facie observations with respect to non-maintainability of the suit because of the arbitration clause, inasmuch as, there is a possibility of examination of the aspect that arbitration proceedings cannot be resorted to in a case such as the present because it is only a Court which can decide a civil suit as per the procedure of Order XXXVII CPC and not the arbitration tribunal.

7. Learned counsel for the plaintiff also concedes that so far as defendant Nos. 2 and 3 are concerned, and who are the guarantors for the financial limit granted to the defendant No. 1, they have not signed the Agreement dated 21.8.2011 relied upon for filing the suit nor any other document admitting and

acknowledging any liability with respect to the original amount lent of Rs. 4,98,07,015/- and much less the amount which is now claimed in the suit being the amount of Rs. 10,45,05,890.43/-. Therefore, so far as defendant Nos. 2 and 3 are concerned, once there is no written contract from which the amount claimed in the suit directly springs and arises so far as defendant Nos. 2 and 3/guarantors are concerned, this suit clearly qua defendant Nos. 2 and 3 would not be maintainable under Order XXXVII CPC. It may be noted that every suit which is filed under Order XXXVII CPC requires an endorsement to be made therein that no relief is claimed in the Order XXXVII suit which does not arise under Order XXXVII CPC. Therefore, a suit cannot be filed where it is pleaded to be maintainable against one defendant being defendant No. 1, whereas against other defendant Nos. 2 and 3/guarantors the suit does not lie under Order XXXVII CPC as they are not parties to the Contract dated 28.1.2011 which as per the plaintiff contains a liquidated amount which is sought in the suit. Once in an Order XXXVII CPC suit reliefs are claimed which do not fall under Order XXXVII CPC, viz no reliefs being available against defendant Nos. 2 and 3 under Order XXXVII CPC, then such a suit in part claims reliefs not falling under Order XXXVII CPC, the suit as a whole itself will not lie under Order XXXVII CPC.

8. Apart from the suit not being maintainable under Order XXXVII CPC on account of reliefs claimed against defendant Nos. 2 and 3, the real issue is also with respect to non-maintainability of the present suit under Order XXXVII CPC qua the defendant No. 1 also inasmuch as the suit under Order XXXVII CPC can only be filed if the same is based on a written contract containing a liquidated amount, or a dishonoured bill of exchange or a cheque or a guarantee containing the liquidated amount for filing of the suit under Order XXXVII CPC whereas there is no document relied upon by the plaintiff which obliges the defendant No. 1 with respect to the amount claimed in the suit.

9. Let us therefore see the averments which are made by the plaintiff in the present suit as to whether the suit should be treated under Order XXXVII CPC. In this regard, I would therefore reproduce and refer to paras 4, 5 and 8 to 10 of the suit plaint, and which paras read as under:--

"4. That the Defendant No. 1, through its Senior Management, approached the Plaintiff and requested it to grant the Domestic Factoring facility to the Defendant No. 1. The said Domestic Factoring facility was granted to the Defendant No. 1 and the same was communicated to it by the Plaintiff vide Sanction Letter bearing No. IFL/VSK/2011/01/162 dated 24.01.2011 pursuant to which the Plaintiff entered into an agreement titled as "Agreement for Factoring of Receivables" dated 28.01.2011 with the Defendant No. 1 (hereinafter referred to as the "Agreement").

5. That by way of said Agreement dated 28.01.2011, the Plaintiff provided the Domestic Factoring with Recourse (hereinafter referred to as the "Facility") facility to the Defendant No. 1 for an amount of Rs. 5,00,00,000/- (Rupees Five Crores only).

XXXXX

XXXXX

8. That the Defendant No. 1, pursuant to the said Agreement, raised invoices on Jayesh Oil Trade Pvt. Ltd. and presented the same to the plaintiff for factoring. The Plaintiff paid a sum of Rs. 4,98,07,015/- (Rupees Four Crores Ninety Eight Lacs Seven Thousand Fifteen only) towards the factoring of invoices. A sum of Rs. 5,89,02,943/- (Rupees Five Crores Eight Nine Lacs Two Thousand Nine Hundred Forty Three only) is due from the Defendants towards the factoring charges, discounts, overdue discounts, tax and other factoring debits as per the said Agreement.

9. The defendants made an aggregate payment of Rs. 42,04,068/- (Rupees Forty Two Lacs Four Thousand Sixty Eight only) towards their liability. The Defendant No. 1 on 07.08.2013, handed over a bank draft bearing No. 010505 in a sum of Rs. 10,00,000.00 (Rupees Ten Lacs only) to the Plaintiff before the Court of Shri Vinay Kumar Khanna, Additional Session Judge, which money was realized. On the same day the Defendant No. 1 also handed over a Cheque bearing No. 291026 in a sum of Rs. 4,00,000.00 (Rupees Four Lacs Only) and a cheque bearing No. 291027 in a sum of Rs. 11,00,000.00 (Rupees Eleven Lacs Only), which cheques were also duly realized on presentation. Further a sum of Rs. 5,00,000.00 (Rupees Five Lacs only) was paid by the Defendants to the Plaintiff on 21.02.2014 and another sum of Rs. 10,00,000.00 (Rupees Ten Lacs only) was paid by the Defendants on 01.04.2014 to the Plaintiff.

10. A sum of Rs. 10,45,05,890.43 (Rupees Ten Crores Forty Five Lacs Five Thousand Eight Hundred Ninety and paisa Forty three only) is due and payable by the Defendants to the Plaintiff towards the satisfaction of the Agreement. The Defendants are liable to repay the same to the Plaintiff along with the pendent lite and future interest @ 13% per annum as per the contract between the parties."

10. The issue is that whether the subject suit is maintainable under Order XXXVII CPC and can it be said that the amount claimed in the suit being of Rs. 10,45,05,890.43/- is the liquidated amount which arises from a written contract. I do not have to examine the aspect, and nor is the case of the plaintiff, that the suit is based upon the dishonoured bill of exchange or cheque.

11. I have recently had an occasion to examine the maintainability of a suit which is stated to be filed and maintainable under Order XXXVII CPC in the following three cases, and these are as under:--

"(i) Order dated 4.11.2015 in CS(OS) No. 3316/2015 titled as Krishan Kumar Wadhwa & Ors. Vs. Arjun Som Dutt & Ors.

(ii) Order dated 16.11.2015 in CS(OS) No. 1369/2015 titled as Vinod Kumar Abbey Vs. Mountain Fall India Pvt. Ltd. & Ors.

(iii) Judgment dated 16.10.2015 in CS(OS) No. 2552/2011 titled as GE Capital Services India Vs. Dr. K.M. Veerappa Reddy and Ors."

12. In the judgment in the case of GE Capital Services India (supra), I have also referred to earlier judgments passed by this Court with respect to non-maintainability of the suit under Order XXXVII CPC unless and until the amount claimed in the suit directly springs and arises from the written contract i.e a suit under Order XXXVII CPC cannot be filed if besides the written contract various other evidences and documents have to be looked into so as to determine the amount which is claimed in the suit.

13. The Order dated 4.11.2015 in the case of Krishan Kumar Wadhwa & Ors. (supra) reads as under:--

"I.A. No. 23300/2015 (u/S 149 CPC)

1. This application is allowed as amount of court fees has been deposited. Deficient court fees be made up within one week from today.

Application stands disposed of.

CS(OS) 3316/2015 & I.A. No. 23298/2015 (Stay)

2. It is unfortunate that counsels and litigants without even understanding the basics of what are the requirements of law for filing an Order 37 of the Code of Civil Procedure, 1908 (CPC) suit, insist on wrongly filing and even insist during arguments on maintaining the suit although the suit does not lie under Order 37 CPC. This is a very sorry state of affairs because this has become a regular practice of filing suits under Order 37 CPC although obviously which cannot be under Order 37 CPC. The object of provision of Order 37 CPC is that when there is a written document which ex facie, in itself, without any further factual events to be pleaded as a cause of action in the suit, admits and acknowledges liability and obligation of the defendant to pay to the plaintiff and only when a suit can be filed under Order 37 CPC suit. A historical fact of an amount paid under an agreement to sell long back and which is stated to be refundable in case the agreement does not go through, cannot be the basis of Order 37 CPC suit once various events transpire after execution of a particular document and the document is not to be taken as the last word as the contractual document between the parties from which arises the obligation to pay as required by Order 37 CPC. When we look at Order 37 CPC it is seen that the said provision is with respect to filing of the suits either on the basis of a negotiable instrument or a written contract of guarantee or a written contract obliging payment of liquidated amount. Order 37 CPC is antithesis of the ordinary procedure where a defendant can contest a matter as a matter of right. This provision of Order 37 CPC is provided where from a written document a clear cut obligation of a liquidated amount is shown to be payable to the plaintiff by the defendant and execution of which fact without anything more is the only and the complete cause of action of the Order 37 CPC suit. If facts have to be stated in addition to the document

which falls under Order 37 CPC then such a suit does not lie under Order 37 CPC. Order 37 CPC therefore provides that the suit must say that no other relief is claimed in the Order 37 CPC suit i.e. except because of the documents which are the subject matter of Order 37 CPC. In the light of these preliminary observations, let us see if the present suit can be maintained under Order 37 CPC.

3. Admittedly, the suit is a suit for recovery of money filed by three plaintiffs against five defendants. The crux of the averments made in the suit plaint are that there was an Agreement to Sell dated 03.01.2012 entered into by three plaintiffs with the five defendants pertaining to the property bearing No. B-8, Maharani Bagh, New Delhi. Total price fixed under the Agreement to Sell dated 03.01.2012 payable by the plaintiffs to the defendants was Rs. 65,00,07,000/- and of which the Agreement to Sell advance payment made was of Rs. 10 crore and liability to refund the same in case the Agreement to Sell does not go through and which amount is claimed under this Order 37 CPC suit. The situation of payment is as existing on the date of Agreement way-back on 03.01.2012 and today we are in November, 2015. In this period from January, 2012 till November, 2015 there have occasioned a chain of events as mentioned in the plaint itself which talk of various factual aspects, and which as per the plaintiffs includes aspects of breach of contract by the defendants; admission by some of the defendants of the breach by other defendants; admission by some of the defendants of the Agreement to Sell having entered into with its terms and so on. It is therefore clear that once a document mentions a historical fact with respect to an amount which is said to be liquidated amount, the cause of action in the suit is not the entire cause of action arising only from the document which is alleged to be passed under Order 37 CPC. Clearly therefore the suit under Order 37 CPC which has to be based on the cause of action only of the document containing the liquidated amount for being filed under Order 37 CPC, such a situation does not exist in the present case because cause of action in the plaint only begins with the Agreement to Sell but thereafter the plaint contains 26 other pages with respect to events which have transpired after the Agreement to Sell and which facts constitute the cause of action for the suit.

4. The reliance placed by counsel for the plaintiff upon certain documents being an execution petition filed by some defendants mentioning about the agreement to sell will not help the plaintiff to argue that merely because of these subsequent documents, that too of only some defendants, making reference to the agreement to sell, the present suit hence will be a suit under Order 37 CPC.

5. Therefore, in conclusion, this Court is forced to observe that it is high time that whenever a litigant, or for that matter a lawyer who chooses to file a suit under Order 37 CPC, there before filing of such a suit takes place a reading of the elementary requirements of Order 37 CPC and a suit should be filed under Order 37 CPC only if a suit is maintainable strictly under Order 37 CPC. Merely because a person has a strong case or a strong cause of action supported by

various documents, as averred in the present plaint, will not mean that the cause of action is only on the basis of a written document and which is the sole cause of action for filing a suit under Order 37 CPC and maintainable under Order 37 CPC.

6. Instead of dismissing the suit, I direct that plaintiff should amend the suit and delete all unnecessary averments which do not pertain to the suit being under Order 37 CPC.

7. List on 18th November, 2015."

14. The Order dated 16.11.2015 in the case of Vinod Kumar Abbey (supra) reads as under:--

"I.A No. 23685/2015 (U/o 37 Rule 3 CPC by defendants)

1. This is an application for grant of leave to defend. In my opinion, there was no need of filing this application under Order 37 CPC because the suit in fact is not maintainable, and ought not to have been filed, under Order 37 CPC. The reasons for the same are given hereinafter.

2. An Order 37 CPC suit, it is trite, is filed where liability against the defendant and in favour of the plaintiff ex facie arises from a written document containing the specific liquidated amount which is claimed in the suit or a bill of exchange or a cheque. Order 37 CPC is not an ordinary procedure where on the basis of principles of natural justice a defendant as a matter of right contests a suit and Order 37 CPC proceeds on the basis that before contesting the suit the defendant must seek leave from the Court in view of the suit having satisfied the requirement of Order 37 CPC. The requirement of Order 37 CPC is that the entire cause of action in the plaint must commence and conclude in terms of the averments of the written contract containing the liquidated demand or a bill of exchange or a cheque. If other facts are required to be added to the averments and cause of action as stated in the plaint to complete the same besides the written contract or cheque or bill of exchange, the suit cannot and ought not to be filed under Order 37 CPC. It is for this reason that the suit which is filed has to state that it is filed under Order 37 CPC and the suit does not claim any relief which does not arise from Order 37 CPC viz the entire cause of action in the suit can only be averments of facts in terms of the documents creating the obligation in favour of the plaintiff and against the defendant in view of Order 37 CPC and which is clear from use of the expression "arises" found in Order 37 CPC. With this preliminary statement of facts let us see what is the suit plaint.

3. The suit plaint is a suit for recovery of Rs. 33,52,003/- by the plaintiff Sh. Vinod Kumar Abbey who was an employee of the defendant No. 1-M/s. Mountain Fall India Pvt. Limited. Plaintiff as an employee claims that he has not been paid the complete and correct salary and therefore it is pleaded that he is entitled to the suit amount. Essentially the main paras of the suit pleads entitlement of the plaintiff on account of admissions of the defendants made in various documents

over a period of time including in the statement of accounts of the defendant No. 1

4. I have about half a dozen of times put it to the counsel for the plaintiff to show me the averments and the cause of action in the plaint that the suit amount as claimed of Rs. 33,52,003/- arises from which specific written document, inasmuch, the document on the basis of which an Order 37 CPC suit is filed must contain this specific liquidated amount which is either the principal amount or the principal amount plus interest. Counsel for the plaintiff could not answer this query of the Court and there is no averment in the plaint that which is the specific document which mentions this liquidated amount of Rs. 33,52,003/- which is claimed in the suit as being a liquidated demand "arising" from a written contract as required by Order 37 CPC. A historical document containing the terms of employment is not a document which can be the basis for an Order 37 suit as the document envisaged for filing the suit under Order 37 is a document from which, directly and only, the specific amount claimed in the suit is mentioned as a liquidated amount and liability of the defendant towards the plaintiff on the basis of such document. Clearly therefore, the suit is not maintainable under Order 37 CPC. Merely because a plaintiff may have a strong case does not mean that the suit is filed under Order 37 CPC. All that I have to further say is that this Court has passed similar orders as a present one in quite a few number of cases in last few weeks and which show that it is high time that litigants must understand and read Order 37 CPC before filing suits under Order 37 CPC.

5. Though I was inclined to dismiss the suit as it ought not to have been filed under Order 37 CPC, however, instead of dismissing the suit I direct that the plaintiff must delete all references in the plaint to Order 37 CPC and must amend the plaint so as to make it a simple suit filed for simple recovery of monies.

6. I.A is accordingly allowed for the aforesaid reasons and defendants are granted unconditional leave to defend. Amended plaint be filed by the plaintiff within a period of four weeks from today.

CS(OS) 1369/2015

7. List before the Joint Registrar for completion of pleadings and for further proceedings on 19th February, 2016, the date already fixed."

15. The relevant paras of the judgment in the case of GE Capital Services India (supra) are paras 6 to 13 and these paras read as under:--

"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. Vs. M/s. Pehachan Advertising in RFA 202/2011 decided on 23.1.2012 and another in M/s. Associates India Financial Services (P) Ltd. Vs. 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 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.

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 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.

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. Vs. 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:--

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 ie 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 along with 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, ie 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 its 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 Spatika 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 Vs. G. Neuromed Diagnostic Centre Pvt. Ltd., 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."

16. It is trite, and as observed in the aforesaid three orders/judgment, that Order XXXVII CPC is a unique departure from the ordinary principles of natural justice wherein a defendant has an automatic right to defend the suit. By Order XXXVII CPC, exceptions have been carved out whereby defendant cannot defend the suit as a matter of right as is done in other cases and this is because ex facie or at least prima facie the specific liability of a defendant in terms of a liquidated amount is shown to clearly exist from a written contract containing the liquidated amount or from a dishonoured bill of exchange or a cheque. Once there are such documents, being a written contract containing liquidated amount or a dishonoured bill of exchange or a cheque, which by themselves without any further fact(s) or document(s) required to be pleaded and proved, shows clearly the liability of the defendant in favour of the plaintiff as existing, it is for this reason that filing of such suits under Order XXXVII CPC are allowed and defendant who is otherwise ex facie or prima facie liable by virtue of the written document is asked to seek leave to defend to contest the suit. Obviously an exception from the normal procedure and the requirement of following the principles of natural justice when it exists, the same has to be necessarily construed within the strict terms of the requirements contained in Order XXXVII CPC. Order XXXVII CPC is not intended to allow parties to extend the scope of Order XXXVII CPC so as to allow filing of the suits when amounts which are claimed in the suit do not directly spring and arise from the written document or the dishonoured bill of exchange or cheque. Putting it in other words, the cause of action in the suit for recovery of money which is filed under Order XXXVII CPC concludes as regards the averments on the existence of the cause of action to the written document containing the liquidated amount or the dishonoured bill of exchange or cheque. If in the suit plaintiff, besides the averments of the cause of action of the written contract containing the specific liquidated amount which is specifically claimed in the suit, necessary further facts, averments and cause of action has to be pleaded for the plaintiff to show the claim to the amount claimed in the suit, then, such a suit is not based only on the written document only or the dishonoured bill of exchange or cheque only because other facts are to be established to show the liability of the defendant claimed in the suit, and thus such a suit was not intended by the legislature to be filed under Order XXXVII CPC. Accordingly, therefore once the suit amount which is claimed in the suit is not the amount which directly arises in terms of the liquidated amount stated in the written document or a dishonoured bill of exchange or a cheque, the suit will not be maintainable under Order XXXVII CPC otherwise a large category of cases which were not meant by the legislature to be filed under Order XXXVII CPC will be sought to be filed and entertained under Order XXXVII CPC.

17. Learned counsel for the plaintiff places reliance upon the judgment of a learned Single Judge of this Court in the case of *Bijender Chauhan @ Bijender Kumar Vs. M/s. Financial Eyes (India) Ltd.*, and it is sought to be argued by placing reliance upon paras 19 to 21 of the said judgment that in fact the suit

under Order XXXVII CPC can be filed even on the basis of a balance due at the foot of a statement of account. The paras 19 to 21 which are relied upon of the judgment in the case of Bijender Chauhan @ Bijender Kumar (supra) read as under:--

"19. The third contention of the defendant that the present suit is based on a Statement of Account and hence would not lie is a vague contention and is also without merits. A perusal of the plaint would show that the present case is not based on a statement of accounts but is based on the 20 invoices which have been raised on the defendant pursuant to which the goods have been supplied to the defendant. The plaint in paragraph 4 relies on the said invoices. The Plaintiff further states that out of the total figure of Rs. 52,12,726/- worth of invoices raised on the plaintiff the defendant had paid Rs. 23,30,804. Hence, the suit is based on the balance on these invoices. Merely because a mention is made to a Statement of Account in the plaint would not make the present suit to be based on Statement of Accounts. A specific query was made to learned senior counsel appearing for the defendant about the figures mentioned in the plaint. Learned senior counsel fairly stated that in the application for leave to defend the receipt of the goods, the value of the goods and payments having been made by the defendant is not disputed. He submitted that the defence of the defendant is regarding quality of goods.

20. The judgments cited by the learned counsel for the plaintiff to argue that a suit based on statement of account does not lie under Order 37 CPC would not apply to the facts of the case. In both cases namely Associate India Financial Services (supra) and M/s. K & K Health Care Pvt. Ltd. the Court came to the conclusion that the case is based on the statement of accounts. Hence, the said judgments have no application to the present facts as I have held that the present suit is based on invoices.

21. In the context of the above contention of the learned senior counsel for the defendant, reference may also be had to the judgment of this Court in Dura-Line India Pvt. Ltd. Vs. BPL Broadband Network Pvt. Ltd., where in para 8 the Court held as follows:

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The said submission is misconceived. The suit is based on a written contract comprising the offer, its acceptance by issuance of purchase orders and raising of invoices in execution thereof. These constitute the written contract. The amounts claimed are those due in the suit under the above written contract. Additionally, reliance has been placed on the acknowledgement and confirmation of balance issued by the defendant. The mere averment in the plaintiff that the plaintiff also maintains a running account, reflecting the price of the goods supplied and the payments made therefore, does not change the nature of the suit as in one being based on a running account. The mere maintenance of a running account does not disentitle the plaintiff from filing the suit under Order XXXVII , CPC, based on

a written contract and acknowledgement in writing."

(underlining added)

18(i). I am unable to agree with the argument urged on behalf of the plaintiff by placing reliance upon the judgment in the case of Bijender Chauhan @ Bijender Kumar (supra) for the reason that paras 19 to 21 of the said judgment make it clear that the court held that the statement of accounts which were referred to in the plaint of that suit were only incidentally mentioned, however, the amounts which were claimed in the suit were amounts which directly arose from the written documents or the written invoices and which were claimed in the suit. This aspect that the suit in the case of Bijender Chauhan @ Bijender Kumar (supra) was based on amounts stated in the invoices was taken by the court alongwith the fact that in the case referred to in para 21 of the judgment in the case of Bijender Chauhan @ Bijender Kumar (supra) it was found that the amount which was claimed by the plaintiff arose besides from the written contract also from an acknowledgement in writing. Thus so far as the decision in the case of Bijender Chauhan @ Bijender Kumar (supra) is concerned, the learned Single Judge found that the amount claimed in the suit was based only on the invoices i.e balance due on the invoices which were to be taken as written contracts and the suit was not taken as being filed on the basis of a statement of account. Therefore, counsel for the plaintiff cannot argue that paras 19 to 21 of the judgment in the case of Bijender Chauhan @ Bijender Kumar (supra) holds that a suit on a statement of account is maintainable under Order XXXVII CPC. On the contrary, the said paras 19 to 21 hold that the suit in that case was not filed on the basis of statement of accounts and hence was taken under Order XXXVII CPC being filed on written documents/invoices. Also, I may note that the judgment in the case of Bijender Chauhan @ Bijender Kumar (supra) was based on the peculiar facts of the case where the defence of the defendant with respect to defective goods could not be looked into in view of Sections 41 and 42 of the Sale of Goods Act, 1930 and which Sections prevent a buyer of goods from raising objections with respect to defects in the goods after a period of time as envisaged by Sections 41 and 42 of the Sale of Goods Act, 1930 and consequently the amount claimed in the suit in the case of Bijender Chauhan @ Bijender Kumar (supra) was only the amount claimed of the unpaid invoices. In the facts of the present case, no benefit can be taken by the plaintiff of the judgment in the case of Bijender Chauhan @ Bijender Kumar (supra) which was only filed relying on the invoices by a supplier of goods and which invoices were taken as written contracts with the fact that no other defence of the defendant/buyer was available with respect to defective goods because of Sections 41 and 42 of the Sale of Goods Act, 1930.

(ii) The facts of the present case show that present suit is not a suit by a seller of goods for claiming balance payment due on the invoices, but the suit is a suit by a lender for recovery of balance amount of moneys out of the amounts which were lent to the defendant No. 1 and obviously for such a suit the amount

claimed in the suit will be the balance due at the foot of the account after taking various repayments by the defendant No. 1 and the suit plaintiff's cause of action will not conclude with the original/historical Agreement dated 28.1.2011 because plaintiff in the plaint has pleaded other facts so as to arrive at the cause of action for the amount claimed in the suit.

(iii) Therefore, there is no need of referring of this matter to a larger Bench as prayed for on behalf of the plaintiff on the ground that there are different views which are taken by the different learned Single Judges of this Court. If there exist different views of different learned Single Judges of this Court, then, in an appropriate case that matter would be examined by a Division Bench of this Court, but so far as the facts of the present case are concerned they do not fall within the ratio laid down in the case of *Bijender Chauhan @ Bijender Kumar* (supra). Counsel for the plaintiff however states that he would be challenging the present order, and therefore, in any case the matter would be listed before the Division Bench of this Court.

19. In view of the above, the suit is clearly not maintainable under Order XXXVII CPC. Ordinarily I would have dismissed the suit however instead of dismissing the suit I give time to the plaintiff to amend the suit plaint so that all averments in the same with respect to Order XXXVII CPC are deleted and the suit is treated as an ordinary civil suit for recovery of moneys. The plaintiff may also if it so chooses withdraw the suit and initiate appropriate arbitration proceedings against the defendant No. 1 as the cause of action for recovery of moneys from defendant No. 1 is separate and independent of the cause of action against defendant Nos. 2 and 3.

20. Needful be done by the plaintiff in six weeks. List on 4th March, 2016 for further proceedings.