

(2013) 07 DEL CK 0373
In the Delhi High Court
Case No : CS (OS) 2031 of 2011

M/s. GE Capital Services India		APPELLANT
	Vs	
Dr. Mohan Chaturbhuj Jhamvar and Others		RESPONDENT

Date of Decision : 01-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 202

Citation : (2013) 07 DEL CK 0373

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Gaurav Gaur, for the Appellant; Surender Chauhan, Sanjeeda Khurana and Mr. Anand Sharma for D-1 and 2, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

IA No. 3346/2012 (of the defendants No. 1&2 for leave to defend)

1. The plaintiff has instituted this suit under Order 37 of the CPC on the basis of written Agreement, Personal Guarantees, Corporate Guarantees and Promissory Note, for recovery of Rs. 1,36,48,930/-, pleading:

(i) that the defendant No. 1 approached the plaintiff in the year 2007 for grant of loan for purchase of medical equipment being Bausch & Lomb Excimer Laser-217Z;

(ii) that the plaintiff examined the said request of the defendant No. 1 and informed the defendant No. 1 of the terms and conditions on which loan could be sanctioned;

(iii) that the defendant No. 1 informed that the said equipment was to be installed at the premises of the defendant No. 4 M/s. Vrundavan Hospital & Research Centre Pvt. Ltd. and offered personal guarantees of defendant No. 2 Mrs. Kiran Mohan Jhamvar and defendant No. 3 Dr. Digambar Naik for securing

the said loan; a Corporate Guarantee of the defendant No. 4 was also offered;

(iv) that however since the equipment to be so purchased was of a very high depreciation value and the same alone could not securitize the loan amount as collateral, the plaintiff asked for additional security and which was offered by the defendant No. 2 by way of mortgage of her property bearing No. 104, Doctor House, Dr. G. Deshmukh Marg, Peddar Road, Mumbai;

(v) that the plaintiff agreed to sanction the loan and a Master Security and Loan Agreement dated 31.01.2007 was executed by the plaintiff and the defendant No. 1, and the defendants No. 2 to 4 also executed Personal/Corporate Guarantees guaranteeing to the plaintiff repayment of the loan amount; the defendant No. 2 as an additional collateral also executed a Mortgage Deed dated 26.12.2006 of the property aforesaid in favour of the plaintiff to secure the said loan amount;

(vi) that under the Agreement aforesaid, the loan amount of Rs. 1,20,00,000/- with interest due thereon was repayable in 60 monthly installments of Rs. 2,57,000/- commencing from February, 2007 with the last installment of Rs. 2,13,594/- falling due on 27.01.2012; and,

(vii) that the defendant No. 1 failed to adhere to the agreed payment schedule and defaulted and on the date of institution of the suit, the sum of Rs. 1,36,48,930/- was due from the defendants jointly and severally to the plaintiff under the documents aforesaid.

Summons for appearance were issued to the defendants which were duly served. Only the defendants No. 1 and 2 entered appearance and to whom summons for judgment were issued and who have filed this application for leave to defend to which reply has been filed by the plaintiff. No rejoinder has been filed by the defendants No. 1 and 2 inspite of opportunity. The defendants No. 3 and 4 having failed to enter appearance, the suit in so far as against defendants No. 3 and 4 was decreed on 23.08.2012.

2. The defendants No. 1&2 have sought leave to defend on the grounds:

(i) that this Court does not have territorial jurisdiction since neither the plaintiff nor the defendants are within the jurisdiction of this Court and no cause of action also has arisen within the jurisdiction of this Court;

(ii) that the suit is not triable under Order 37 of the CPC;

(iii) that the suit instituted on 12.08.2011 on the basis of documents dated 31.01.2007 is barred by limitation;

(iv) that the plaintiff and its officials in collusion with M/s. Bausch & Lomb Eye Care (India) Pvt. Ltd. (M/s. Bausch & Lomb) have hatched a conspiracy and sold an obsolete model of Bausch and Lomb Excimer Laser-217Z machine for laser treatment of eyes to the defendant No. 1, a renowned ophthalmologist practicing in Pune, Maharashtra;

(v) that the officials of the plaintiff and M/s. Bausch & Lomb persuaded the defendant No. 1 to take the machine financed by the plaintiff to start a new laser treatment clinic at Goa; the defendant No. 1 was assured that the machine would be installed directly at the hospital premises of the defendant No. 4 and the defendant No. 1 believing the representation had signed documents having blank columns of loan of Rs. 1.20 crores to be repaid in 60 equated monthly installments of Rs. 2,57,000/-;

(vi) that in terms of the Agreement between the parties, M/s. Bausch & Lomb was to give technical maintenance support but miserably failed to provide any such assistance and the machine started creating problems within six months from the date of installation in the month of January, 2007;

(vii) that the defendant No. 1 informed the plaintiff as well as M/s. Bausch & Lomb of the machine being an obsolete model and the entire exercise of installing the machine and realizing the loan being to cheat the defendant No. 1 and threatened to lodge an FIR of the same;

(viii) that at that stage, the officials of the plaintiff and M/s. Bausch & Lomb offered to buy back the machine at the cost of Rs. 60 lacs in full and final settlement of the accounts if the defendant No. 1 paid Rs. 20,47,563.50p;

(ix) that the defendant No. 1 agreed to the same and sent a letter dated 08.06.2009 to the plaintiff in this regard but the plaintiff failed to respond; a copy of the said letter is annexed to the application;

(x) that the defendant No. 1 has already filed a criminal complaint before the Judicial Magistrate, First Class, Pune and in which investigation u/s 156(3) read with Section 202 of the Cr.P.C. was ordered and FIR No. 898/2011 of Police Station Bandgarden, Pune has been registered and the police is investigating the matter;

(xi) that the suit is bad for non-joinder of M/s. Bausch & Lomb;

(xii) that the plaintiff has already re-possessed the Bausch & Lomb Excimer Laser-217Z machine; and,

(xiii) that the claim of Rs. 1,36,48,930/- is exaggerated.

3 The plaintiff in its reply, besides controverting the aforesaid grounds has pleaded; (i) that the Agreement between the parties was executed within the territorial jurisdiction of this Court and the parties had agreed to confine themselves to the territorial jurisdiction of this court; (ii) that the plaintiff is located within the territorial jurisdiction of this court and this Court also has jurisdiction on the principle of debtor must find the creditor; (iii) that the last installment successfully paid by the defendant No. 1 was on 26.12.2008 and the plaintiff after failing in all its attempts to recover its money from defendant No. 1 ultimately terminated the Agreement on 11.05.2011 and therefore the present suit is within limitation; (iv) that there was no Agreement between the plaintiff

and the defendants for technical maintenance support of the machine to be given by M/s. Bausch & Lomb and the Agreement if any in this regard must be between the defendants and M/s. Bausch & Lomb; (v) that the plaintiff never offered to buy back the machine for Rs. 60 lacs only and no such letter, as annexed to the application for leave to defend, was received from the defendant No. 1; (vi) that the complaint filed by the defendant No. 1 is false and frivolous; (vii) that the plaintiff has not repossessed the machine; and, (viii) that the computation of the sum of Rs. 1,36,48,930/- is given in the foreclosure statement supplied to the defendant.

4 The counsels have been heard. The counsel for the defendants No. 1 and 2 besides reiterating the grounds hereinabove noted has contended that opportunity ought to be given to the defendants to prove the Agreement by the plaintiff to buy back the machine and that the plaintiff cannot seek to recover the amounts without first repossessing the machine.

5 The Agreement dated 31.01.2007 between the plaintiff and the defendant No. 1, execution whereof is not denied, nowhere in the recitals thereof records the defendant No. 1 having agreed to buy the machine on finance from the plaintiff on account of any representation by the plaintiff as to the quality or performance of the machine; rather the said Agreement nowhere refers to M/s. Bausch & Lomb and only describes the machine which is financed thereunder; similarly the same does not require the plaintiff to, upon default, first attempt to recover the monies due by repossession or sale of the machine and rather empowers the plaintiff to immediately recover the monies due without being required to repossess or sell the machine. In the face of such Agreement in writing between educated commercial persons (as discussed in *Satyendra Jain Vs. M/s Omway Buildestate Pvt. Ltd. and Others*, and in judgment dated 1st February, 2013 in CS(OS) No. 1480/2009 titled *Chemical Systems Technologies (India) Pvt. Ltd. Vs. Simbhaoli Sugar Mills Ltd.*) leave cannot be granted on grounds urged in contravention thereof.

6 As far as the objection to the territorial jurisdiction is concerned, Clause 10(g) of the Agreement admittedly executed by the defendants records the execution thereof by the authorized representative of the plaintiff at Delhi; there is no contravention of the said fact in the application for leave to defend; it thus cannot be said that no part of cause of action has accrued at Delhi for the agreement of the parties also contained in the Agreement dated 31.01.2007 as to the exclusive jurisdiction of the Courts at Delhi to be of no avail. Not only so, the address of the plaintiff in the Agreement is of Delhi only and the plaintiff is correct in relying on the principle of debtor must seek the creditor for vesting the Courts at Delhi with territorial jurisdiction over the matter. Similarly, the defendant No. 2 also has addressed the personal guarantee to the plaintiff at Delhi and thus undertaken to make the payments thereunder to the plaintiff at Delhi. Thus the grounds urged by both the defendants of this Court lacking territorial jurisdiction have no merit.

7 Mere ordering, by the Court of the Judicial Magistrate at Pune, Maharashtra, of investigation on the complaint being presented by the defendant No. 1 also does not persuade this Court to grant leave to defend. It is not as if any findings have been returned by Court in favour of the defendant No. 1.

8 The ground urged by the defendants No. 1 and 2 of the claim being barred by limitation also has no substance. The date of signing of the Agreement is of no relevance. The defendants in the application for leave to defend have expressly admitted the loan of Rs. 1.20 crores being repayable in 60 installments commencing from February, 2007 and to run till January, 2012; it is further not disputed that installments were paid till December, 2008. The suit has been instituted within three years therefrom, on 12.08.2011.

9. As far as the plea of Agreement by the plaintiff to re-purchase the machine for Rs. 60 lacs is concerned, again there is no writing from the plaintiff in this regard. The defendants along with the application for leave to defend have filed photocopy of a letter dated 08.06.2009 purportedly written by the defendant No. 1 to the plaintiff in this regard. However there is no proof even of dispatch thereof; the same is not even shown to have been sent by Registered AD post least under Postal Certificate. Even otherwise, it does not sound logical that the plaintiff would agree to settle dues of more than Rs. 1 crore on receipt of Rs. 20,47,563.50p only. Further the said letter does not refer to any oral Agreement or settlement but rather refers to a statement of account on the basis whereof balance of Rs. 20,47,563.50p was offered. The said statement of account even if any forwarded by the plaintiff to the defendant has not been enclosed to the application for leave to defend.

10. As far as the plea of the plaintiff having not given the computation of the amount of Rs. 1,36,48,930/- is concerned, the plaintiff has in the documents filed along with the plaint and which under Order 37 Rule 3 of the CPC are dispatched along with the copy of the plaint to the defendants, has given the said break up and the defendants No. 1&2 have nowhere controverted the same.

11. I, therefore, find the application for leave to defend not disclosing any defence, least substantial defence to the claim of the plaintiff in terms of the written Agreement between the parties. The pleas taken in the application for leave to defend do not disclose any facts indicating any substantial defence to the claim. Rather the grounds urged are frivolous and vexatious.

12. The application for leave to defend is accordingly dismissed.

13. Axiomatically, the suit has to be decreed. A decree is accordingly passed in favour of the plaintiff and against the defendants No. 1 and 2 jointly and severally for recovery of Rs. 1,36,48,930/-. In the decree dated 23.08.2012 against defendants No. 3&4, interest @20% per annum from the date of filing of the suit till realization was also decreed against the defendants No. 3&4. I do not see any reason to differ therefrom. Accordingly, it is directed that the plaintiff shall also be entitled to interest @20% per annum from the date of filing of the

suit till realization from the defendants No. 1 and 2 also. The plaintiff shall also be entitled to costs of the suit.

Decree sheet be prepared.