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

% Order Reserved on: 30th January, 2014
Order Pronounced on: 04th March, 2014

\+ IA 16458/2011 in CS(OS) 2293/2010

AMIT KUMAR CHOPRA ..... PLAINTIFF

Through: Mr.Sachin Puri, Mr.Mayank Wadhwa and Mr.Abhinav Dang, Advocates

versus

NARAIN COLD STORAGE & ALLIED INDUSTRIES PVT. LTD & OTHERS ....DEFENDANTS

Through: Ms.Maldeep Sidhu, Adv for D-2

Ms.Lavisha Kamra, Adv for D-3

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

IA No. 16458/2011 (under Order XII Rule 6 CPC on behalf of the Plaintiff)

1. The Plaintiff has filed the present application under Order XII Rule 6 of the Civil Procedure Code,1908 (for short 'CPC') seeking a decree against the Defendants

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No. 1 and 2 on admissions.

2. As per the Plaintiff, he is engaged in the business of distribution of packaged and processed drinking water, soda and allied products.

3. The Defendant No. 1 is stated to be engaged in the business of processing, packaging and supply of water, soda and allied products in the name of "DIRECTOR SPECIAL". The Plaintiff claims to have been approached by Defendant No.4 as an agent of Defendants No.1 and 2 for the purposes of distribution of the water, soda and allied products manufactured by the said Defendants.

4. The Plaintiff inter alia with some other persons decided to enter into a partnership to carry out the business of distribution of packaged and processed drinking water, soda and allied products under the name and style of "M/s. Ozone Enterprises". M/s. Ozone Enterprises entered into a memorandum of understanding (MOU) with “M/s. Ikon Industries” for

distributorship of packaged drinking water, soda and allied products under the name and style of Director Special (herein referred to as the material). As per the terms of the MOU the Plaintiff was to be the sole stockist/wholesale dealer of the said material. M/s Ozone Enterprises was to make a Security Deposit of Rs.15,00,000/-.

5. The case of the Plaintiff is that after the commencement of the MOU dated 16.07.2007 the 2 partners of M/s Ozone Enterprises left the partnership concern and the Plaintiff decided to continue with the MOU as a sole proprietor of M/s Swastik Enterprises. The MOU was modified by letter dated the 06.09.2007. The Plaintiff paid the amount of the Security Deposit, deposited with M/s. Ikon industries by the erstwhile partners of M/s Ozone enterprises to them and accordingly the Security Deposit was acknowledged by Defendant No. 1 and 2 solely in favour of the Plaintiff.

6. The Plaintiff claims to have placed a purchase order on Defendant No.2 and collected the material from the said Defendant for distribution. The Plaintiff thereafter requested for more material however the said Defendant never supplied the same. Somewhere in the month of September 2007 the Plaintiff became aware that the said Defendant was supplying material to M/s Raju agency in contravention to the terms of the MOU. As per the information of the Plaintiff the Defendant was supplying material to other parties other than the Defendant No. 3 as well. The Plaintiff contends that there was a breach of the terms of the MOU by the Defendants and accordingly the Plaintiff sought for a refund of the Security Deposit along with damages for the sum of Rs 5,00,000/–. The Defendant No. 2 through the Defendant No. 4 is stated to have given a cheque for Rs. 5,00,000/- and promised to pay the balance amount within 3 months.

7. This cheque when presented to the bankers was

dishonoured. The Plaintiff thus filed the present suit for recovery of the said amount of Rs 20,00,000/-with interest thereon.

8. The Defendant No.2 has disputed the claim of the Plaintiff. As per the written statement filed by the said Defendant the agreement dated 16.07.2007 is admitted however as per the Defendants no firm by the name of M/s Ozone enterprises had come into existence and the 3 persons who were doing business together had serious differences and disputes and accordingly it was only the Plaintiff who was left behind.

9. The said Defendant admits the receipt of the Security Deposit of Rs 15,00,000/- however contends that in terms of the agreement the Defendant continued to manufacture the packaged drinking water and soda. The Plaintiff as per the agreement had to pick up 75,000 packages per month. To meet the demands of the Plaintiff, the Defendant started work in two shifts.

The shelf life of the packaged water and soda is only 3 months. The Defendants were not aware of the dispute between the partners of the firm M/s Ozone enterprises, they kept on manufacturing the packaged water and soda. The Plaintiff never informed the Defendant about the disputes. As the Plaintiffs were not lifting the manufactured stock, the Defendant served a notice on the Plaintiff cancelling the agreement and stating that the Security Deposit was being forfeited. It is only when the cancellation notice was served that the Plaintiff informed about the dissolution of the partnership firm. Despite the service of the notice the Plaintiff did not lift any stock and the Defendant had to throw soda and manufactured water. After the service of the cancellation notice the Plaintiff persuaded the Defendant to sign the letter dated 20.08.2007. As per the Defendants the Plaintiff never made any demand for the supply of material that was manufactured by the Defendant. The Plaintiff had set up the Defendant No.3 to buy stocks from the

Defendant in small quantities so that the ground for breach of the agreement could be set up. The Defendant denies having agreed to refund the Security Deposit that stood forfeited. The Defendant denies having authorized any person to give any cheque to the Plaintiff. As per the Defendant on account of the breach by the Plaintiff the Defendant's manufacturing unit had to be closed down and he had to pay huge loan liability amount to the bank for which the factory had to be sold. The Defendant had obtained a franchisee for the product Director's Special. The Defendant claims to have forfeited the Security Deposit due to the default of the Plaintiff.

10. The Defendant No. 4 in his written statement with respect to the cheque of Rs 5,00,000/– has contended that the Defendant No. 4 did not know the Plaintiff but knew the father of the Plaintiff as he had friendly relations with him for last 20 years. The Defendant No. 4 along with a common friend had gone to inquire

about the health of the father of the Plaintiff and on the request of the father of the Plaintiff he had agreed to invest in the business of the Plaintiff and had issued him a cheque for the same. Subsequently however the father of the Plaintiff was not happy with the conduct of the Plaintiff and he did not want the Defendant No. 4 to be involved with the Plaintiff in any manner whatsoever and the Plaintiff had refused to return the cheque so he requested the Defendant No. 4 to stop the payment of the cheque.

11. The Plaintiff in the above premise filed the present application under Order XII Rule 6 praying for passing of a decree for the sum of Rs15,00,000/-. The Plaintiff in this application contends that perusal of the written statement of Defendant No. 2 would show that there is no denial of the material submissions made by the Plaintiff. He further contends that there is no forfeiture clause and the amount of Rs15,00,000/- given as Security Deposit was to be refunded as per the

agreement. Since the Security Deposit has been admitted to have been received the same should either be refunded or adjusted in accordance with mutual agreement. As there is no forfeiture clause for forfeiture of the Security Deposit the same has to be refunded.

12. The Defendant No. 2 has contended that the written statement filed by the Defendant does not contain any admission of fact and raises a number of factual and legal disputes which can be determined only after the trial of the suit. It is further contended that on account of the breach of the Plaintiff, the Defendant No. 2 has suffered substantial loss and the Security Deposit has been forfeited.

13. Order XII Rule 6 of the Code of Civil Procedure lays down as under:-

> "Judgment on admissions-(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit,

> either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.
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> (2) Whenever a judgment is pronounced under sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

14. The object of Order XII Rule 6 is to enable a party to obtain a speedy judgment to the extent of the admissions of the Defendant to which relief the Plaintiff is entitled to. The rule permits the passing of the judgment at any stage without waiting for determination of any other question. It is a settled proposition of law that before a judgment can be passed under Order 12 Rule 6, the admission must be clear, unambiguous, unconditional and unequivocal.

15. In **UTTAM SINGH DUGGAL & CO. LTD. V.UNION BANK OF**

INDIA & ORS. 2000 (7) SCC 120 the Supreme Court has laid down as under:-

> "12. As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that "where a claim is admitted, the court has jurisdiction to enter a judgment for the Plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the Defendant, the Plaintiff is entitled". We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed."

16. The Supreme Court has further in the case of **HIMANI ALLOYS LTD. V. TATA STEEL LTD. 2011 (11) JT 222** laid down as under:

> *"10. It is true that a judgment can be given on an admissioncontained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear admission which can be acted upon. (See also Uttam*

Singh Duggal & Co. Ltd. vs. United Bank of India [2000 (7) SCC 120], Karam Kapahi vs. Lal Chand Public Charitable Trust [2010 (4) SCC 753] and Jeevan Diesels and Electricals Ltd. vs. Jasbir Singh Chadha [2010 (6) SCC 601]. "

17. As per the law laid down by the Supreme Court for a Judgment to be passed on admission, the admission has to be clear, unambiguous and unequivocal. It is an enabling provision, it is neither mandatory nor peremptory but discretionary. The judicial discretion, has to be exercised keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits. The valuable right of a defendant to contest the claim should not be denied unless the admission is clear, unambiguous and unconditional.

18. The Defendant though has admitted the receipt of the Security Deposit but it has raised a dispute about the refund of the Security Deposit. As per the Defendants

the Plaintiff is in breach of the agreement on account of which the Security Deposit has been forfeited. There is no admission by the Defendants in the written statement that they are liable to refund the Security Deposit. The forfeiture of the Security Deposit is alleged to have been done on account of the failure of the Plaintiff to comply with the terms of the agreement and to lift the material that was manufactured by the Defendants at the request of the Plaintiff. The Defendants have alleged that the breach of the Plaintiff resulted in a substantial loss to the Defendants. On account of the loss suffered by the Defendants due to breach of the Plaintiff the Defendants forfeited the Security Deposits. There is thus no clear admission that is unequivocal, unambiguous or unconditional. As the admission of receipt of Security Deposit is coupled with the plea that the Security Deposit has been forfeited on account of breach by the Plaintiff, there is no clear admission in favour of the Plaintiff that can be acted

upon. The Plaintiff is thus not entitled to a decree on admission.

19. Learned counsel for the Plaintiff has further contended that there is no clause for forfeiture of Security Deposits and as per the agreement the Security Deposit was either to be refunded or to be adjusted in accordance with mutual consent. I find no merit in this contention. The amount of Rs.15,00,000/- deposited by the Plaintiff with the Defendants was not an advance. The said amount has been described as "Security Deposit". The very fact that the party has described the deposit as Security Deposit prima facie lends credit to the submission of the counsel for the Defendant that the Security Deposit was a deposit made by the Plaintiff with the Defendants for due performance of the agreement and as there was a breach committed by the Plaintiff the said amount was liable to be forfeited. The fact whether the Security Deposit could or could not have been forfeited has to

be tested at the trial.

20. Coming to the plea of the Plaintiff that the Defendants cannot claim a setoff of the amount of Rs.15,00,000/- as the setoff has not been lawfully claimed in the written statement.

21. The Supreme Court in the case of **JITENDRA KUMAR KHAN v. PEERLESS GENERAL FINANCE & INVESTMENT CO. LTD. 2013 (8) SCC 769** has laid down as under:

> 11.....To appreciate the said issue it is relevant to understand what is the requirement of set-off in the Code. Order VIII Rule 6 deals with set-off. It reads as follows:-
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> > "6. Particulars of set-off to be given in written statement. – (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same

character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) Effect of set-off. – The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off."

12. On a reading of the aforesaid Rule it is noticeable that certain conditions precedent are to be satisfied for application of the said

Rule. Two primary conditions are that it must be a suit for recovery of money and the amount sought to be set-off must be a certain sum. Apart from the aforesaid parameters there are other parameters to sustain a plea of set-off under this Rule. As far as equitable set- off is concerned, it has been enunciated in the case of Clark v. Ratnavaloo Chetti[2 M.H.C.R. 296 (1865)] that the right of set-off exists not only in cases of mutual debits and credits, but also where cross-demands arise out of the same transaction. The said principle has been reiterated by the Calcutta High Court in Chishlom v. Gopal Chander[ILR 16 Cal 711 (1889)].

13. In Raja Bhupendra Narain Singha Bahadur v. Maharaj Bahadur Singh and others[AIR 1952 SC 782] it has been opined that a plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction and not connected in its nature and circumstances. It has been further stated therein that a wrongdoer who has wrongfully withheld moneys belonging to

another cannot invoke any principles of equity in his favour and seek to deduct therefrom the amounts that have fallen due to him. There is nothing improper or unjust in telling the wrongdoer to undo his wrong, and not to take advantage of it.

14. In M/s. Lakshmichand and Balchand v. State of Andhra Pradesh[(1987) 1 SCC 19], this Court has ruled that when a claim is founded on the doctrine of equitable set-off all cross-demands are to arise out of the same transaction or the demands are so connected in the nature and circumstances that they can be looked upon as a part of one transaction.

15. In Union of India v. Karam Chand Thapar and Bros. (Coal Sales) Ltd. and others[(2004) 3 SCC 504], while referring to concept of set-off, this Court has stated thus: -

> "15. "Set-off" is defined in Black's Law Dictionary (7th Edn., 1999) inter alia as a debtor's right to reduce the amount of a debt by any sum the creditor owes

the debtor; the counterbalancing sum owed by the creditor. The dictionary quotes Thomas W. Waterman from A Treatise on the Law of Set-Off, Recoupment, and Counter Claim as stating:

"Set-off signifies the subtraction or taking away of one demand from another opposite or cross-demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set off was stopped or deducted from the cross-demand"."

Thereafter, the learned Judges referred to Sub-rule (1) of Rule 6 of Order VIII and proceeded to opine thus: -

"What the rule deals with is legal set-off. The claim sought to be set off must be for an ascertained sum of money

and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. Apart from the rule enacted in Rule 6 abovesaid, there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the court to entertain and allow such plea or not to do so."

16. From the aforesaid enunciation of law it is

quite clear that equitable set-off is different than the legal set-off; that it is independent of the provisions of the Code of Civil Procedure; that the mutual debts and credits or cross-demands must have arisen out of the same transaction or to be connected in the nature and circumstances; that such a plea is raised not as a matter of right; and that it is the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner. An equitable set-off is not to be allowed where protracted enquiry is needed for the determination of the sum due, as has been stated in Dobson & Barlow v. Bengal Spinning & Weaving Co.[(1897) 21 Bom 126] and Girdharilal Chaturbhuj v. Surajmal Chauthmal Agarwal[AIR 1940 Nag 177].

22. As per the **JITENDRA KUMAR KHAN CASE (SUPRA)** equitable set-off is distinct from the legal set-off as

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envisaged by Order VIII rule 6 of the Code. Equitable set-off is different than the legal set-off and it is independent of the provisions of the Code of Civil Procedure. However for claiming equitable set-off it must be established that the mutual debts and credits or cross-demands must have arisen out of the same transaction or are connected in the nature and circumstances. The Plea of equitable set-off is raised not as a matter of right but it is within the discretion of the court to entertain and allow such a plea or not. The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience. The discretion rests with the court to adjudicate upon it and the said discretion has to be exercised in an equitable manner.

23. The Delhi High Court in the case of **M/S CRB CAPITAL MARKETS LTD. V. SMT. BIMLA DEVI SAHNEY 2005 (121) DLT 471** has laid down as under:

> "Even on equitable grounds set-off may be allowed. Principles of equitable set-off is

> recognised in Rule 6 of Order VIII CPC. The essence of such a claim is that there must be some connection between the plaintiff claim for a debt and the defendant's claim to set-off, which will make it equitable to dry up the defendant to a separate suit. In those cases where cross demands arise out of the same transaction or are so connected in their nature and circumstances that can be looked upon as part of one transaction, equitable set-off is permissible. This principle is made applicable even in those cases where the claim of the defendant is for an unascertained sum like that of damages but arising out of same transaction."

24. As per the **CRB CAPITAL CASE (SUPRA)** equitable set-off can be claimed even for an unascertained sum of money provided the same arises out of the same transaction.

25. In the present case, the claim of forfeiture of the Security Deposit raised by the defendants arises out of the same transaction and is in the nature of an

equitable set-off. This of course is a prima facie expression of opinion. Whether the claim of forfeiture would be ultimately allowed or not would depend upon the evidence adduced by the Defendants so as to sustain a claim of equitable set-off. For the purposes of a Judgment to be pronounced on admissions, there is no clear, unambiguous and unequivocal admission that can be acted upon.

26. In view of the above, the application is clearly without any merit and is dismissed. No costs.

SANJEEV SACHDEVA, J

March 04, 2014
HJ

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