

(2006) 04 DEL CK 0019

In the Delhi High Court

Case No : IA No. 787 of 2004 in CS (OS) No. 1521 of 2003

Asia Today Limited and Another

APPELLANT

Vs

Sinhal Metal Industries Limited and Another

RESPONDENT

Date of Decision : 18-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1, Order 37 Rule 2, Order 37 Rule 3(5), 151

Companies Act, 1956 — Section 291

Citation : (2006) 04 DEL CK 0019

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : S.B. Tripathi, for the Appellant; Rajesh K. Gogna, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—This order shall dispose of defendants' application for leave to defend and contest the suit under Order xxxvII Rule 3 sub Rule 5 read with Section 151 of Code of Civil Procedure.

2. To comprehend the disputes, the facts in brief are that plaintiffs, Asia Today Limited and Zee Telefilms Ltd., have filed the suit for recovery of Rs. 57,53,692/- along with pendent elite and future interest @ 24% per annum contending that plaintiff No. 1, Asia Today Limited, is engaged in the business of satellite broadcasting of programmes from various satellite channels owned and controlled by Zee T.V. and Zee Cinema.

3. It was averred that plaintiff No. 2, Zee Telefilms Limited, was appointed as canvassing and collecting agent of plaintiff No. 1 for advertising, broadcasting on various channels including Zee T.V. and Zee Cinema of plaintiff No. 1.

4. The suit was filed by Mr. Godfrey Pimenta on behalf of plaintiff No. 1 and by Mr. K.S. Shukla on behalf of the plaintiff No. 2 contending themselves to be the constituted attorneys competent to sign, verify and institute the suit.

5. plaintiffs contended that defendant No. 1 is sued as an advertiser who had a contract with plaintiffs to advertise its commercial/programmers on Zee T.V. channel. Defendant No. 2 was alleged to be a company carrying on business as advertising agency which entered into a contract with plaintiffs for and on behalf of its clients, defendant No. 1, for the broadcast of various advertising/commercials.

6. The plaintiffs asserted that a tripartite agreement had been entered between the defendants and the plaintiff No. 2. It was also pleaded that plaintiff No. 2 had entered into the tripartite agreement on behalf of plaintiff No. 1 who is the owner of Zee T.V. and Zee Cinema Channels.

7. plaintiffs contended that various release orders for broadcasting/telecasting of advertisements of defendant No. 1 on Zee T.V. Channels of plaintiff No. 1 were executed and despite the plaintiffs having performed their part of contract by airing the commercials/advertisements of defendant No. 1, the defendants have failed to make payments. It was averred that the terms of contract between the parties were stipulated in general terms and conditions and sales policy on rate card which is mentioned in the release order which were accepted by the defendants. The release orders were alleged to be executed by defendant No. 2 on behalf of defendant No. 1 as defendant No. 2 is the advertising agency of the defendant No. 1.

8. Under the tripartite contract, defendants were required to make payment within 45 days from the receipt of the bills. On raising the invoices/bills, 70% of the payment was to be paid to the plaintiff No. 1 and 15% of the amount was payable to plaintiff No. 2. The plaintiff No. 1 also contended that it raise memorandum notes upon defendants in respect of 15% of the amount payable towards the commission to the plaintiff No. 2.

9. The plaintiffs also pleaded that in terms of tripartite contract, interest @ 2% per annum was payable on the delayed payments which was mentioned in the invoices raised by the plaintiffs on the defendants. Since the 85% cost of the advertisements had to be paid to the plaintiffs 70% to the plaintiff No. 1 and 15% to the plaintiff No. 2 and 15% of the balance was to be retained by defendant No. 2 as its commission, 85% amounts of invoices/bills is due which has not been paid despite various letters on behalf of plaintiff No. 2 to defendant No. 2 with a copy to defendant No. 1. It was also averred that defendants had asked by their letters to the plaintiff No. 2 for the statement of accounts which were duly sent and despite the statement of accounts sent to the defendants, they failed to make the payment. The amounts as has been claimed by the plaintiffs have not been sent by the defendants despite a notice dated 15th April, 2003 and thus the plaintiff has claimed 85% of the cost of advertising aggregating to Rs. 57,53,692/- along with interest @ 24% per annum. The plaintiffs have claimed a sum of Rs. 57,53,692/- comprising of Rs. 27,97,200/- towards the principal amount and Rs. 19,41,134.60 towards the interest payable to plaintiff No. 1 and a sum of Rs. 5,99,400/- plus Rs. 4,15,957.41 totalling to

Rs. 10,15,357.41 payable to plaintiff No. 2.

10. The suit was filed under Order xxxvII of the CPC contending that no relief which does not fall within the ambit of Rule 2 of Order xxxvII of CPC has been claimed in the plaint. The summons of this suit under Order xxxvII were served on the defendants who filed appearances and pursuant to summons for judgment served on the defendants on 14th January, 2004, the defendants filed a joint application within the period of limitation for unconditional leave to contest and defend the suit.

11. The defendants contended that they were approached to have advertisements in the TV Serial "Muskan" on the ground that the defendants will benefit immensely in terms of sales and brand building as the viewer ship of the Serial was about 7% and was likely to increase. By letter dated 21st July, 2000, plaintiffs supplied the TVR of "Muskan" from 1st episode to 19th episode. The defendants also asserted that it was represented to them that TVR viewer ship will jump and reach to 9% to 10% and consequently two different prices for first 13 weeks (category super silver) and subsequent 13 weeks (category gold) were offered. The prices quoted were Rs. 2.70 lakh per episode for the super silver category and Rs. 3.24 lakh per episode for the gold category. For 13 silver categories episodes cost was Rs. 35.10 lakh and for 13 episodes in the golden category, the price was Rs. 42.12 lakh. The defendants categorically asserted that the rates for silver category and gold categories were different as TVR of the Serial had to cross 10% after 13 episodes. The defendants also pleaded that they were promised 1005 seconds on super silver category programme as bonus on ROS basis and 165 seconds on silver category program as bonus on ROS basis. The defendants also claimed that they were promised other benefit:-

1.5 seconds opening and closing credit line.

2.2 seconds break bumpers (opening and closing) with each commercial break.

3.Promos with 2 seconds tag on of the client's product.

4.1 product exclusivity, which has to be specified in advance. In this case it is Tooth Brush.

12. The defendants claimed that normal TVR of the Serial "Muskan" before 4th July, 2000 was about 7% which instead of increasing dropped to 2.62% after the introduction of "Kaun Banega Karorpati" on Star TV in the month of July 2000. A chart was produced showing the TVR of the Serial "Muskan".

13. According to defendants, the purpose of sponsoring advertisement on the Serial "Muskan" was completely frustrated on account of dropping of the TVR of the Serial "Muskan" and, Therefore, on 25th July, 2000, they asked the plaintiff No. 2 to stop all further spots including the sponsorship. According to the defendants, after long discussion and persuasion, plaintiff No. 1 offered to compensate the defendants on account of fall of TVRs of the Serial by making good 190 seconds of commercial time and offered a compensation of a sum of

Rs.13.68 lakh make good and compensation of Rs. 30.54 lakh against pending bonus vide its letter dated 9th January, 2001. The defendants also relied on a letter dated 22nd November, 2001 sent to the plaintiffs in this regard by Shri Pramod Kaul to settle the matter after discontinuation of activity.

14. With these facts, the defendants raised grounds for unconditional leave to contest and defend the suit. The defendants/applicant contended that plaintiff are not companies duly registered with the Registrar for Companies and nothing has been produced by plaintiff to show that they are duly incorporated under the Companies Act. The defendants also contended that Mr. Godfrey Pimenta and Mr. K.S. Shukla have not been authorised by the Board of director to sign, verify and institute the suit on behalf of plaintiff No. 1 and 2.

15. The defendants contended that the suit under Order xxxvII of CPC is not maintainable as there is no privity between plaintiff No. 1 and defendants as no written contract was executed between the plaintiff No. 1 and the defendants nor any written contract has been produced between these parties. The defendants contended that they were entitled for reimbursement/adjustment for an amount of Rs. 43.20 lakh as the value of the pending bonus of Rs. 30,54,00/- and make good of 190 seconds amounting to Rs. 13.68 lakh. The defendants also raised a dispute about the amount of interest of Rs. 23.57,092/- payable by defendants to the plaintiffs in absence of any contract and especially any agreement with plaintiff No. 1.

16. The other pleas raised by the defendants are that plaintiffs are not entitled for undue enrichment. Despite their own lapses and faults, instead of bearing the loss the plaintiffs are not entitled to recover amounts from the defendants. The defendants also sought unconditional leave to defend and contest the suit on the ground that plaintiffs have misled the court and have not given the correct facts and the original documents specially the original bills have not been placed on record.

17. With these grounds, defendants contended that they are entitled for unconditional leave to defend the suit. Along with application, the defendants produced a copy of letter dated 21st July, 2000 whereby TVR ratings of the serial "Muskan" were given till 26th June, 2000. The TVR ratings were also produced from 3rd July 2000 after the start of Kaun Banega Karorpati. On 4th July, 2000 when Kaun Banega Karorpati programme started TVR ratings from 3rd July 2000 to 7th August, 2000 dropped to about 2.62%. The defendants have also produced the TVR ratings from 21st February, 2000 till 26th June, 2000 which fluctuated from 6.04% to 4.7% contrary to 7% to 11% alleged to be represented by plaintiffs. The defendants also produced the letter dated 25th July, 2000 from Mr. Pramod Kaul to plaintiff No. 2 and letter dated 9th January, 2001 from plaintiff No. 2 to defendant No. 2 offering a package of 190 seconds at Rs. 13.68 and for 425 seconds in super silver category for Rs. 25.50 and for 105 seconds in silver category for Rs. 5,04,000/-. The defendants also filed the audited accounts of defendant No. 1 and letter dated 1st December, 2001 regarding settlement

with Sinhal Metal, defendant No. 1 by plaintiff No. 2.

18. The plaintiffs opposed grant of unconditional leave to defend and contest the suit to the defendants contending that plaintiff had approached the defendants representing a viewer ship of about 7% for the TV Serial "Muskan" and tripartite agreement between the parties was admitted. The plaintiffs contended that the tripartite agreement was entered by plaintiff No. 2 and plaintiff No. 1 which is the owner of Zee TV and Zee Cinema channels. However, viewer-ship as alleged by the defendants was denied by the plaintiffs. plaintiffs stated that no one could assure an advertiser that the ratings of a particular programme would reach up to a particular level after certain time. The plaintiffs asserted that the defendants are liable to make payment and there was no question of compensating the defendants by the plaintiffs. Regarding the offer of settlement, it was contended by the plaintiff that it was only an one time offer from plaintiff No. 2 to defendants and since the defendants failed to make the payment, they are not entitled to any benefit. The letters and other documents produced by the defendants were, however, admitted.

19. Replying to the grounds for unconditional leave to defend and contest the suit, plaintiffs stated that plaintiff No. 1 is a company incorporated under the Law of Mauritius having its office in Hong Kong and plaintiff No. 2 is a company incorporated under the Companies Act, 1956 having its registered office at Mumbai and suits have been filed by Mr. Godfrey Pimenta and Shri K.S. Shukla on the basis of resolutions authorising them. The plaintiffs also stated that they are filing resolutions of the Board of Directors authorising Mr. Godfrey Pimenta and Shri K.S. Shukla to file the suit.

20. Regarding no privity between the plaintiff No. 1 and defendants, it was stated that since plaintiff No. 1 is outside India, Therefore, the contract was entered between plaintiff No. 2 on behalf of plaintiff No. 1 with the defendants and since defendants have already benefited from the contract, they are estopped from raising any technical objection in order to avoid making payments to the plaintiffs. The plaintiffs asserted that plaintiff No. 2 is collecting and is a canvassing agent on behalf of plaintiff No. 1. The dispute about the amount payable by defendants was not admitted. It was stated that the original contract has been filed by the plaintiffs and the release orders were sent to defendant No. 2. The other grounds raised by the defendants for leave to contest and defend the suit were also denied and it was alleged that defendants have failed to raise any triable issues in the present case and they are not entitled to leave to contest and defend the suit and the decree in terms of the prayer in the suit be passed in favor of the plaintiffs and against the defendants.

21. I have heard the learned Counsel for the parties and have also perused the application for leave to defend and contest the suit filed by the defendants and the reply filed by the plaintiffs and the averments made in the plaint.

22. What is to be considered for granting or refusing leave to defend and contest

the suit to the defendants. The parameters and principles to be kept in mind for grant of leave to contest were set out by the apex Court in *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, which are as under:

(a) If the defendant satisfies the Court that he has a good defense to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to have to sign judgment. The Court may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defense.

23. In AIR 1990 2218 (SC) it was held:

3. Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defenses. The test is to see whether the defense raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defense on those facts. If the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defense, he ought to have leave. Summary judgment under Order 37 should not be granted where serious conflict as to matter of fact or where any

difficulty on issues as to law arises. The Court should not reject the defense of the defendant merely because of its inherent implausibility or its inconsistency.

24. At the time of grant of leave to defend the Court is required to examine whether there is a real or a sham plea by the defendant in the application or whether the allegations made by the defendant, if established, would be a good defense. The Court should not go into the question whether the facts alleged are true or not and that situation would arise only after the leave was granted and at the trial.

25. In *Radha Mohan and Another Vs. Radha Fancy Stores and Others*, the following principles were enunciated in respect of grant of leave to defend:

(a) It is discretionary with the Court either to refuse or to grant leave to defend unconditionally or upon such terms as may appear to the Court to be just. But the aforesaid exercise of the discretion should be judicial and not arbitrary and whimsical.

(b) In case the defense intended to put up in frivolous or vexatious leave to defend must be refused.

(c) An unconditional leave to defend must be given if the facts disclosed by the defendant indicate that he has a substantial defense to raise, which means that defense so raised has good chance of success or has good potentiality to dislodge the plaintiff or which is bona fide and honest one and raises such question of law or of facts which require thorough judicial scrutiny.

(d) If the facts set up by the defendant do not disclose a substantial defense, leave should normally be refused or else on account of mercy as provided for in the Supreme Court judgment *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, or due to desire to exclude even remote chance of injustice to the defendant, leave to defend may be granted subject to the condition of a deposit of amount claimed by the plaintiff or furnishing a security in respect of that amount or deposit of part of that amount and furnishing security for the payment of balance.

(e) Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

26. The defendants have raised a plea that the suit has not been filed by duly authorized persons and they have challenged the incorporation of the plaintiffs also. In the suit no averments even has been made that the plaintiffs are companies duly incorporated under law. The defendants asseverated that the plaintiffs are not duly incorporated and they have not even filed the copies of certificate of incorporation. In reply to the application of the leave to defend the plaintiffs for the first time contended that the plaintiff No. 1 is incorporated in Mauritius and has its office at Hong Kong. However no copy of certificate of incorporation was filed. Similarly no copy of incorporation of plaintiff No. 2 has

been filed. Whether the plaintiffs are companies duly incorporated under law can not be inferred in the absence of any documents. There is no presumption under law that the plaintiffs are duly incorporated. This is a good defense to dislodge the plaintiffs. It was for the plaintiffs to produce the relevant documents. In the plaint the plaintiffs did not averred that the plaintiff No. 1 is a company incorporated in Mauritius and have an office at Hong Kong. The plaintiff should have disclosed this fact in the plaint.

27. The suit has been filed by two Attorneys who were appointed by two authorized persons on behalf of the plaintiffs. plaintiffs have filed photocopies of two power of attorneys. The power of attorney dated 22nd April, 2003 in favor of Mr. Godfrey Pimenta is signed by authorised representative Mr. Deepak Jain of plaintiff No. 1 company. From the photocopy of the power of attorney, it transpires that it is witnessed by a solicitor and a notary public and Rs. 100/- as a general stamp has been paid to the General Stamp Office, Mumbai. From the document produced by the plaintiff No. 1, it is not apparent as to who is Mr. Deepak Jain and how he is an authorised signatory. In reply to the application, the plaintiffs/non-applicants have stated in para 2 of the reply to the preliminary objection that the plaintiffs are filing resolutions of the Board of Directors authorizing Mr. Godfrey Pimenta, however, no such resolution has been filed. From the pleas and this document of the plaintiffs, it can not be inferred that the suit has been filed by a duly authorized person on behalf of the plaintiff No. 1

28. Similarly, from the photocopy of the power of attorney dated 26th February, 1999 in favor of Mr. K.S. Shukla, it is not apparent as to who is the authorised signatory on behalf of plaintiff No. 2 company and how the executant has been authorised by plaintiff No. 2 to execute the attorney in favor of Mr. K.S. Shukla. Despite a specific objection by the defendants, no copy of certificate of incorporation has been filed to show that plaintiff No. 2 is incorporated under the Indian Companies Act nor any copy of resolution of Board of Directors has been filed to show that the plaintiff No. 2 had agreed to appoint Mr. K.S Shukla to be the attorney of the plaintiff No. 2 and institute the suit on behalf of the plaintiff No. 2 Company.

29. It is no more rest integra that signing and verification of the plaint is different from filing the suit by a competent person. It also cannot be disputed that Order XXIX Rule 1 of the CPC does not authorise persons mentioned therein to institute suites on behalf of a company. The power which can be in inferred under Order XXIX is only to sign and verify the pleadings on behalf of the company. It is also well settled that u/s 291 of the Companies Act except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting in all other cases, Board of Directors are entitled to exercise all its power. Reliance for this can be placed on Nibro Ltd. Vs. National Insurance Co. Ltd., , Ferruccio Sias and Another Vs. Jai Manga Ram Mukhi and Others, Birla DLW Ltd. Vs. Prem Engineering Works, Birla DLW Ltd. v. Prem Engineering Works. Individual Directors have such powers

only as are vested in them by memorandum of articles. Normally the court does not insist for such technicalities nor gives much weightage on account of technicalities. However, the question of authority to institute a suit on behalf of a company is not a technical matter. It often affects the policy and finances of the company and has far-reaching effects, Therefore, unless a power to institute a suit is specifically conferred, a particular Director or person, merely contending that a person is a constituted attorney, such a person will not have authority to institute a suit on behalf of company. Needless to say, such a power can be conferred by the Board of Directors by passing a Resolution in that regard.

30. From the perusal of the pleadings of the parties, it is apparent that no resolution has been filed and thus the plaintiffs are unable to show that the suit has been instituted by duly authorized persons. In case, plaintiff is unable to prove that the suit has been instituted by a duly authorised person, the suit will be liable for dismissal. In the circumstances, it cannot be said that the defense about the suit being not instituted by duly authorized persons, taken by the defendants can be termed sham and illusory nor it can be inferred that it does not raises a real issue. This is a fair dispute raised by the defendants and it cannot be decided in favor of plaintiffs on the basis of photocopies of attorneys only produced by the plaintiffs without even producing the copies of alleged resolutions of the plaintiffs companies.

31. The applicants/defendants have also opposed the recovery on the ground that in terms of the settlement proposed to defendants by letter dated 9th January, 2001 whereby a package was offered to the defendants giving bonuses and other benefits. The defendants have taken a plea that the plaintiffs are not entitled for the amounts claimed by them. The defendants have pleaded that they were not benefited on account of dropping of TVR of the Serial contrary to the representations made by the plaintiffs and different rates quoted by the plaintiff on the basis of TVR rating of the Serial. The defendants pleaded that two rates given by the plaintiff No. 2 were accepted on the specific representation that the TVR rating of the Serial would go up. The plaintiffs have denied that the defendants were entitled for any benefits and concessions and the offer made to them was a one time offer which was not availed by the defendants as they did not pay the amounts. Why the bonus and benefits were agreed to be given by the plaintiff No. 2 to the defendants" The plaintiffs have shown stoic silence about it. No reasons have been given by the plaintiffs for offering the bonus and other benefits except the denial that the rates quoted by them were not connected to the TVR of the Serial. The benefits which were offered included, 5 seconds opening and closing credit line; two seconds break bumpers (opening and closing) with each commercial break; Promos with two seconds tag on of the client's product and one product exclusivity. The defendants have produced TVRs of Muskan sent to the defendants by communication dated 21st July, 2000 showing the different TVRs from 28th February, 2000 to 26th June, 2000. The said letter of the plaintiff sent by Mr. Paras Bali addressed to Mr. B.K. Singhal is not denied by the plaintiffs. The

subsequent TVRs of the Serial especially after the start of Kaun Banega Karorpati from 4th July, 2000 have also been produced showing a sharp decline in TVRs of the Serial "Muskan". The defendants have also produced a letter dated 25th July, 2000 complaining about the drastic effect on the TVRs of Muskan on account of Kaun Banega Karorpati at Star Plus Channel and seeking compensation and requesting the plaintiff to stop all further paid spots including sponsorship with immediate effect. The Explanation given that it was one time bonus of benefit also does not explain that. The plaintiff No. 2 can not link it solely to prior payment of the alleged amounts claimed by the plaintiff No. 2. The plea in the facts and circumstances that the rates quoted were linked to the TVR rating of the Serial "Muskan" can not be termed to be false or moonshine. The Court is not to go into question or correctness of the plea. What is to be seen is whether the facts alleged are of such a nature as to entitle the defendant to interrogate the plaintiff or cross examine his witnesses. The defendants have shown fair probability of bona fide defense. Consideration of the pleas raised and the documents produced by the defendants, it does raise triable issues, which if will be decided in favor of the defendants, will disentitle the plaintiffs for a decree as has been claimed by them.

32. Considering the plea of the defendants that that price agreed was related to the TVR of Serial "Muskan" especially because two rates were quoted, it cannot be inferred that the defense raised by the defendants to be a untenable and frivolous. The dispute raised by the defendants seems to be fair and leave cannot be declined to the defendants on this ground. In view of the settlement proposed by the plaintiffs by letter dated 9th January, 2001 and that various proposals were offered and discussed between the parties, it cannot be inferred that the amounts as claimed by the plaintiffs are due from the defendants and the defense taken by the defendants does not disclose a triable issue.

33. Another issue raised by the defendants is that there is no privity of contract between them and the plaintiff No. 1. No agreement was entered between plaintiff No. 1 and defendants and the averments of the plaintiff No. 1 that it entered into an agreement with defendants is not correct. The agreement produced between the plaintiff No. 2 and the defendants does not suggest or discloses in any manner that the plaintiff No. 2 had entered into agreement on behalf of plaintiff No. 1. No release orders of copies thereof have been filed. The defendants categorically asserted that no release order were released in favor of plaintiff No. 1, Asia Today Limited, and in absence of any contract with plaintiff No. 1, the suit under Order xxxvII of CPC by the plaintiff No. 1 against the defendants is not maintainable. There is no Explanation for not filing the release orders alleged to be issued in favor of the plaintiff No. 1. The plaintiffs have produced the copies of the invoices raised by plaintiff No. 1 on defendant No. 1. Without release orders by the defendants in favor of plaintiff No. 1, merely issuance of invoices by the plaintiff No. 1 on the defendants will not create a written contract between the plaintiff No. 1 and the defendants. Despite a specific issue raised by the defendants about the alleged release orders in favor

of plaintiff No. 1 company, the plaintiffs have not produced any release orders. Copies of three agency release orders do not show or suggest that the plaintiff No. 2 had been acting on behalf of the plaintiff No. 1. In the circumstances, the triable issue raised by the defendants indicates that the defendants have a fair, bona fide and reasonable defense and the plaintiffs will not be entitled to leave to sign judgment.

34. The plaintiffs has demanded 24% interest on the amounts due from the defendants to the plaintiffs. The plaintiffs have relied on tripartite agreement and has alleged that it was agreed that in case the payment is not made, the defendants shall be liable to 2% interest per month. However, perusal of the terms and conditions incorporated in the tripartite agreement between the plaintiff No. 2 and the defendants that such a rate of interest was not incorporated. The payment terms as stipulated in the agreement is as under: Payment Terms: The agency will pay Zee Telefilms Ltd. Post dated cheques on weekly basis for all their activity, however the client will get a credit period of 45 days from the receipt of the bills.

35. Though the terms and conditions also refer to all other terms and conditions as per the rate card and sales docket and the plaintiffs have also produced the photocopy of General Terms and Conditions, however no copy of sales docket has been produced. Whether these General terms and conditions were given to the defendants and were agreed to can not be inferred conclusively. The defendants have denied that they are liable to pay interest at the rate of 24% per annum as has been alleged by the plaintiffs. The defense raised by the defendants about not paying interest at 24% per annum is fair and bona fide even though it may not be a positively good defense. If that be so the plaintiffs shall not be entitled to sign judgments and the defendants shall be entitled to unconditional leave to defend and contest the suit.

36. In the circumstances, the inevitable inference is that the defense taken by the defendants entitles them to unconditional leave to defend and contest the suit and the plaintiffs are not entitled to leave to sign the judgment as defendants defense seems to be fair, bona fide and reasonable and the triable issues raised by the defendants, if proved, shall disentitle the plaintiff from a judgment and a decree against the defendants.

37. Consequently, application is allowed and unconditional leave to contest and defend the suit is granted to the defendants against the plaintiffs.