(2011) 07 DEL CK 0459

In the Delhi High Court

Case No : CS (OS) No. 1360 of 2006

A.V.R. Overseas Pvt. Ltd. APPELLANT

Vs

Mahmood Ahmed Khan and Others RESPONDENT

Date of Decision : 08-07-2011

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2011) 07 DEL CK 0459

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Prasoon Kumar, for the Appellant; Pawan Kumar Bansal, for Def. Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.

IA No. 8034/2009 [Order 37 Rule 3(7)]

This application, filed by Defendant No. 1 for condonation of delay in seeking leave to contest the suit was allowed by the Joint Registrar on 9th February, 2011 subject to payment of Rs. 20,000/- as costs. The costs, however, have not been paid and no one is present for Defendant No. 1. Since the costs have not been paid, the condonation of delay is deemed to have been refused. The application is dismissed.

IA No. 8033/2009 (by Defendant No. 1 for leave to defend)

No one is present for the applicant even on the third call. The application of Defendant No. 1 for condonation of delay in seeking leave to contest has been dismissed today due to non-payment of cost, subject to which the delay was condoned. Hence, this application is also dismissed in default as well as barred by time.

IA No. 5879/2009 (by Defendant No. 2 for leave to contest the suit)

1. The case of the Plaintiff is that the Defendant No. 1 who is trading in ferrous, non-ferrous and plastic scraps had approached the Plaintiff company in the month of April, 2005 for financial assistance as he had been allotted a scrap material contract by IOCL, Mathura Refinery, Mathura. The funds were required by Defendant No. 1 to enable him to lift the scrap material in terms of the contract awarded to him. The Plaintiff company advanced a sum of Rs. 70 lakhs to Defendant No. 1, who gave a writing dated 7th April, 2005 to the Plaintiff company agreeing to pay Rs. 2 per kg. as profit to the Plaintiff company for 1200 metric tons of scrap. The loan of Rs. 70 lakhs was given to him for a period of four months. In case the amount of loan was not repaid within four months, he was required to pay Rs. 2 lakh per month extra to the Plaintiff company. Rs. 2 per kg. of profit and Rs. 1 per kg. of capital was to be paid to the Plaintiff company every month. A cheque of Rs. 70 lakhs was also delivered by Defendant No. 1 to the Plaintiff company. The Defendant Nos. 2 and 3 stood as guarantors for Defendant No. 1 and gave a writing to the Plaintiff company undertaking that in case Defendant No. 1 fails to repay the amount of Rs. 70 lakhs, they will be responsible to repay the aforesaid amount. They also handed over cheques of Rs. 35 lakhs each to the Plaintiff company.

2. The case of the Plaintiff company is that the Defendant No. 1 did not pay either the principal sum or the amount of profit which he had agreed to pay the Plaintiff company. The cheques issued by Defendant No. 1 to the Plaintiff company were dishonoured for want of funds, when presented to the bank. The Defendant Nos. 2 and 3, however, agreed to pay a sum of Rs. 5 lakhs to the Plaintiff towards interest and accordingly, Defendant No. 2 issued a cheque of Rs. 5 lakhs in favour of the Plaintiff company and requested it to waive off the rest of the interest amount. The cheque of Rs. 5 lakhs, which Defendant No. 2 issued to the Plaintiff company, was encashed when presented to the bank though the cheques of Rs. 35 lakhs issued by him as well as cheques of Rs. 35 lakhs issued by Defendant No. 3 were dishonoured, when presented to the bank. Those cheques were also dishonoured for want of funds. The Plaintiff has now claimed the aforesaid principal sum of Rs. 70 lakhs from all the three Defendants along with interest @ 12% per annum.

3. The Defendant No. 3 has not applied for leave to contest the suit despite service of summons for judgment on him on 29th September, 2009.

4. In Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, the Supreme Court set out the following principles:

(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 friable 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 leave 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.

5. The contention of the learned Counsel for the Plaintiff is that when the Plaintiff company approached the Defendant No. 2, it was agreed that he will make payment of Rs. 5 lakhs to the Plaintiff company in full and final settlement of its claim against the Defendant No. 2 and accordingly, a cheque of Rs. 5 lakhs was issued to the Plaintiff company which was duly encashed. This, however, is disputed by the Plaintiff company which claims that the aforesaid payment was made towards payment of interest only.

6. It is not in dispute that the Defendant Nos. 2 and 3 had stood as guarantors for the loan of Rs. 70 lakhs taken by Defendant No. 1 from the Plaintiff company. The amount of loan advanced by the Plaintiff company to Defendant No. 1 is also not in dispute. There is absolutely no document on record to show that the payment of Rs. 5 lakhs was made by Defendant No. 2 in full and final settlement of his liability towards the Plaintiff company. The transaction between the parties was documented in the sense that not only Defendant No. 1 but Defendant Nos. 2 and 3 also executed documents in favour of the Plaintiff company at the time of advancement of loan to Defendant No. 1. Prima facie, it is difficult to accept that Defendant No. 2 would have made payment of Rs. 5 lakhs to the Plaintiff company in full and final settlement of his liability without taking any writing in this regard from the Plaintiff company. In the normal course of human conduct, since the Plaintiff insisted on a written guarantee, the Defendant No. 2 also would have taken it in writing that the payment of Rs. 5 lakhs was being made in full and final settlement of his entire liability towards the loan taken by Defendant No. 1 from the Plaintiff company. It is therefore difficult to accept that the payment of Rs. 5 lakhs was made in full and final settlement of the liability of

Defendant No. 2.

7. Admittedly, the cheques of Rs. 35 lakhs which the Defendant No. 2 had issued in favour of the Plaintiff company, when presented to the bank, were dishonoured for want of funds and the same are still with the Plaintiff company. This is yet another circumstance which indicates that the payment of Rs. 5 lakhs was not made in full and final discharge of the liability of Defendant No. 2 but was also only a part payment. Had the cheque of Rs. 5 lakh be given in full and final discharge of the liability of Defendant No. 2, the cheques of Rs. 35 lakhs which the Defendant No. 2 had issued to the Plaintiff company would have been taken back by him.

8. It is contended by the learned Counsel for Defendant No. 2 that no proceedings u/s 138 of the Negotiable Instruments Act have been instituted against the Defendant No. 2 which indicates that there was a settlement between the Plaintiff and Defendant No. 1 and that is why, no such proceedings were initiated by the Plaintiff company. This, however, is disputed by the learned Counsel for the Plaintiff, who states that it is the choice of the Plaintiff company whether to prosecute only the principal debtor or to prosecute the guarantor as well and the Plaintiff company has already instituted proceedings u/s 138 of the Negotiable Instruments Act against the principal debtor.

9. For the reasons given in the preceding paragraphs, it appears to me that the applicant/Defendant No. 2 has no plausible and logical defence to the claim of the Plaintiff company, at least to the extent of Rs. 65 lakhs and the plea of full and final settlement raised by him is made up only with a view to obtain the leave to contest the suit. However, in order to enable Defendant No. 2 to substantiate his rather illusory and sham defence, I, in terms of principle(s) laid down by Supreme Court in the case of M/s Mechalec Engineers and Manufactures v. M/s Basic Equipment Corporation (supra), grant leave to Defendant No. 2 to contest the suit subject to the condition that within four weeks from today, he will either deposit the balance amount of Rs. 65 lakhs or furnish a bank guarantee for the aforesaid amount in favour of Registrar General of this Court. The application stands disposed of.

10. If the applicant/Defendant No. 2 fails to either deposit the amount of Rs. 65 lakhs or fails to furnish a bank guarantee in the name of Registrar General of this Court for the aforesaid amount, the leave to contest the suit shall be deemed to have been refused to him and the suit shall stand decreed against him for recovery of Rs. 70 lakhs with costs and pendente lite and future interest @ 6% per annum.

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Since Defendant No. 3 has not applied for leave to contest the suit and the application of Defendant No. 1 for leave to contest the suit has been dismissed, the Plaintiff is entitled to judgment forthwith against Defendant Nos. 1 and 3. Hence, a decree for recovery of Rs. 70 lakhs with costs and pendente lite and future interest @ 6% per annum is passed in favour of the Plaintiff and against the Defendant Nos. 1 and 3.

The learned Counsel for Defendants No. 2 & 3 states that Defendant No. 3 is suffering from paralysis. Be that as it may, since no application for leave to contest the suit has been filed by him, the Plaintiff has become entitled to the judgment forthwith against Defendant No. 3. Decree sheet be drawn accordingly.

