

(2021) 09 DEL CK 0269
In the Delhi High Court
Case No : Civil Suit (COMM) No. 8 Of 2021

Axis Trustee Services Limited

APPELLANT

Vs

Brij Bhushan Singal & Anr

RESPONDENT

Date of Decision : 17-09-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Section 152, Order 34, Order 37, Order 39 Rule 1, Order 38 Rule 1(2)(b)(i), Order 38 Rule 1(2)(b)(iii), Order 39 Rule 2, Order 37 Rule 3
Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 — Section 2(1)(C)(I)
Insolvency and Bankruptcy Code, 2016 — Section 95

Citation : (2021) 09 DEL CK 0269

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Anuj Berry, Vijayant Paliwal, Anusha Ramesh, Moulshree Shukla, Vinayak Chawla, Daksh Kadian, Ranjana Roy Gawai, Vasudha Sen, Aayushi Singh

Judgement

Jayant Nath, J

This hearing is conducted through video conferencing.

IA No. 11096/2021

1. This application is filed by the plaintiff seeking rectification of the order dated 16.04.2021 by recalling the following part of the order:-

"Defendant No. 1 may file written statement within 30 days from today. Reapplication be filed within 30 days thereafter."

2. It is the case of the plaintiff that the present suit was filed for recovery of EUR 64,751,108.73 under Order 37 CPC read with Section 2(1)(C)(I) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 against defendant Nos. 1 and 2 on account of their failure to make payment in terms of an unconditional, and continuing guarantee dated 19.05.2011. It is further pleaded that the suit was taken up on 16.04.2021 when

the defendant through counsel had entered appearance. During the hearing, this court was pleased to register the plaint as a summary suit and issued summons to the defendants. However, it is pleaded, inadvertently the aforesaid lines came up in the said order permitting defendant No.1 to file its written statement within 30 days. It is pleaded that the above direction is an inadvertent error/clerical error inasmuch as the suit had already been registered as a summary suit.

3. It is further pleaded that this court may correct the said inadvertent error/clerical error inasmuch as under Order 37 CPC, summons for judgment have to be issued against defendant No.1.

4. It is further stated that on 13.08.2021, the plaintiff had filed IA No. 10333/2021 seeking summons for judgment against defendant No. 1 in Form No.4A in Appendix B CPC which was served on the registered address of defendant No. 1/learned counsel for defendant No. 1. The said application i.e. IA No. 10333/2021 was listed on 17.08.2021 and was adjourned to 30.09.2021.

5. I have heard learned counsel for the plaintiff and learned counsel for the defendants.

6. Learned counsel for the plaintiff relies upon Section 152 CPC. He also relies upon the judgment of the Division Bench of this court in the case of Angle Infrastructure Pvt. Ltd. vs. Ashok Manchanda & Ors., (2016) 228 DLT 624 to plead that the direction to file written statement is an inadvertent error and this court may issue summons for judgment to the defendants in terms of Order 37 CPC as the suit was filed under Order 37 CPC.

7. Learned counsel for the defendants has opposed the present application. She has pointed out that in the order dated 16.04.2021, this court while dealing within IA No.233/2021 had noted the submission of the answering defendant that in view of the Corporate Insolvency Resolution approved by NCLT, there is no further liability of the defendants. She states that this aspect was noted by this court and hence, the present suit cannot be termed as a suit under Order 37 CPC.

She further states that there is untold delay on the part of the plaintiff to approach this court for rectification of the alleged error in the order dated 16.04.2021.

8. A perusal of the plaint shows that it's heading itself states that it is a suit under Order 37 CPC. Para 52 of the plaint also makes the same averment. The said para 52 of the plain reads as follows:-

"The Plaintiff states and submits that it is entitled to file the present Summary Suit under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 as the present suit arises out of a written contract of guarantee, for a liquidated demand in money and is squarely covered under Order XXXVIII Rule 1(2)(b)(i) and (iii) of the CPC and no such claim is made in the present suit which does not fall within the ambit of Order XXXVII of the Code of Civil Procedure."

9. The plaintiff has relied upon the personal guarantee said to have been executed by the defendants on 19.05.2011 on which the present summary suit is based. A copy of the personal guarantee is placed on record.

10. Hence, the suit is based on a guarantee where the claim is against the principal.

11. However, based on the above averments in the plaint, this court on 16.04.2021 passed the following order:-

"CS(COMM) 8/2021

Let the plaint be registered as a summary suit.

Issue summons.

Learned counsel for defendants No. 1 and 2 enters appearance and states the defendant No. 2 has initiated proceedings under Section 95 of the IBC and hence, the present suit cannot proceed.

Let necessary details be placed on record.

Defendant No. 1 may file written statement within 30 days from today. Reapplication be filed within 30 days thereafter.

List on 17.08.2021.

IA No.233/2021

1. This application filed for interim relief wrongly states that it is filed under Order 34 and Rules 1 and 2 CPC whereas it has actually been filed under Order 39 Rules 1 and 2 CPC. The applicant/plaintiff seeks to restrain the defendants from alienating, transferring, encumbering or selling any of their assets or properties.

2. It is the case of the plaintiff -DZ Bank AG Deutsche Zentral-Genossenschaftsbank had made available to Bhushan Steel Ltd. an external commercial borrowing facility of EUR 180,999,281 vide a Facility Agreement Dated 14.04.2011. The plaintiff was appointed as a Security Agent pursuant to the terms of the Security Agent Agreement dated 18.05.2011. It is stated that defendants No. 1 and 2 executed an unconditional irrevocable, co-extensive and continuing deed of personal guarantee dated 19.05.2011 in favour of the Security Agent for the benefit of the financial creditor. The borrower defaulted in repayment of the principal instalments from 30.04.2015 onwards. On 08.11.2017, the plaintiff in its capacity as the Security Agent, acting for the benefit of the financial creditor issued Invocation Notice upon the guarantors demanding payment of EUR156,929,177.43 due as on 26.07.2017 within 30 business days.

3. In the meantime, NCLT issued Corporate Insolvency Resolution in respect of the borrower on 26.07.2017. The resolution plan was subsequently approved for

the principal borrower by NCLT.

4. Learned counsel for the plaintiff also relies upon the order passed against the same defendants in CS(COMM) 20/2021 dated 15.01.2021 to plead that a similar relief may be granted in this suit.

5. Learned counsel for the defendants opposes the present application. She states that as far as defendant No. 2 is concerned on account of the proceedings pending before the NCLT, no interim orders can be passed and the suit cannot proceed against defendant No. 2. She states that before NCLT the plaintiff/principal borrower has entered into a settlement and the plaintiffs dues have been satisfied under the resolution plan. Hence, a novation agreement has taken place.

6. Learned counsel for the plaintiff denies the above submission. She states that only partial settlement took place. She also relies upon the terms and conditions of the guarantee deed which clearly provide that in case of a settlement with the principal borrower, liability of the guarantors continues to exist.

7. In these circumstances, as this court has already passed order on 15.01.2021 in CS(COMM) 20/2021, let defendant No.1 maintain status quo regarding his immovable properties till further orders.

8. No orders for the time being are passed against defendant No. 2 as presumably the assets of defendant No. 2 shall be dealt with as per the statutory provisions.

...."

12. It is manifest from a reading of the aforesaid order dated 16.04.2021 that the plaint was registered as a summary suit.

13. The court was thereafter obliged to follow the following procedure as stipulated under Order 37 CPC. Order 37 Rule 3 CPC reads as follows:-

"3. Procedure for the appearance of defendant.-(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-

paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4-A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, 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.

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit."

14. This court instead of passing directions in terms of the above provision of Order 37 CPC erroneously and inadvertently by error granted time to the defendant to file written statement. Clearly, the last sentence in the order, namely, "Defendant No. 1 may file written statement within 30 days from today. Reapplication be filed within 30 days thereafter." has been added inadvertently by omission.

15. The question is: Can the court correct the said inadvertent error? In this

context reference may be had to Section 152 CPC which reads as follows:-

"152. Amendment of judgments, decrees or orders.- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties."

16. In this context reference may be had to the judgment of the Division Bench of this court in the case *Angle Infrastructure Pvt. Ltd. vs. Ashok Manchanda & Ors.*(supra), relevant portion of which reads as follows:-

"100. The statutory prescription is explicit and enables courts to correct "at any time", in judgments and orders, which are "clerical or arithmetical mistakes" as well as "accidental slip or omission". The legislature enables the court to do so on its "own motion" or "on the application by the parties". The exercise of this power has come up for judicial scrutiny and we hereafter note some authoritative precedents which set out the parameters within which such powers shall be exercised.

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104. No reconsideration of the matter on its merits is permissible under Section 152 of the CPC.

105. We may also advert to the pronouncement of the Supreme Court reported at (2003) 1 SCC 197, *Lakshmi Ram Bhuyan v. Hari Prasad Bhuyan* wherein a question was raised as to the relief granted by a judgment and the preparation of the decree thereon. In order to resolve the conundrum which had resulted, the Supreme Court referred to the power of the court under Section 152 to vary its judgment so as to give effect to its meaning and intention, which observations authoritatively explained the scope of the power under Section 152 in the following terms:

14. How to solve this riddle? In our opinion, the successful party has no other option but to have recourse to Section 152 CPC which provides for clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission being corrected at any time by the court either on its own motion or on the application of any of the parties. A reading of the judgment of the High Court shows that in its opinion the plaintiffs were found entitled to succeed in the suit. There is an accidental slip or omission in manifesting the intention of the court by couching the reliefs to which the plaintiffs were entitled in the event of their succeeding in the suit. Section 152 enables the court to vary its judgment so as to give effect to its meaning and intention. Power of the court to amend its orders so as to carry out the intention and express the meaning of the Court at the time when the order was made was upheld by Bowen, L.J. in *Swire, Re, Mellor v. Swire* [(1885) 30 Ch D 239: 53 LT 205 (CA)] subject to the only limitation that the amendment can be made without injustice or on terms which preclude injustice. Lindley, L.J. observed that

if the order of the court, though drawn up, did not express the order as intended to be made then

"there is no such magic in passing and entering an order as to deprive the court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal".

17. Hence, Section 152 CPC covers errors arising out of accidental slip or omission which may be corrected by the court on its own motion or on an application by any of the parties. In my opinion, this is a fit case for this court to exercise powers under Section 152 CPC to correct the inadvertent error noted above.

18. I may now deal with one of the pleas raised by the learned counsel for the defendant, namely, the delay on the part of the plaintiff in filing the present application. It has been pointed out that this court had passed the said order on 16.04.2021 which is the subject matter of the present application. Now, belatedly in August 2021, the plaintiff has chosen to file the present application seeking rectification of the alleged error in the order dated 16.04.2021.

19. On the issue of delay, I may only note that the learned counsel for the plaintiff has pointed out that after the order was passed by this court on 16.04.2021, a second wave of COVID hit Delhi. There was also change in the manner of functioning of the court as only restricted matters were being heard by the court. It is stated that on 17.08.2021 which was the next date of hearing fixed by the court on 16.04.2021, this aspect was brought to the notice of this court. This court had suggested that an appropriate application be filed. Hence, the present application.

20. I may only note that defendant No. 1 has filed an application being IA No. 11749/2021 wherein it has specifically been stated that learned counsel for the plaintiff for the first time raised objection regarding the direction for filing the written statement in the order dated 16.04.2021 on 17.08.2021 before the court.

21. There is a reasonable explanation explaining the so called delay/laches on the part of the plaintiff in moving the present application for the rectification of the order dated 16.04.2021.

22. The application is accordingly allowed.

23. The following lines from the order dated 16.04.2021 stand deleted:-

"Defendant No. 1 may file written statement within 30days from today. Reapplication be filed within 30 days thereafter."

24. Needless to add that the present order is passed without prejudice to the rights and contentions of the parties on the merit of the matter.

25. The application stands disposed of.

CS(COMM) 8/2021

List on 30.9.2021, the date already fixed.

IA NO. 12076/2021(u/O 37 R 3(4) CP)C

List on 30.9.2021.