

(2018) 05 DEL CK 0127
In the Delhi High Court
Case No : RFA No.402 of 2018

B.L. KASHYAP & SONS LTD.		APPELLANT
	Vs	
M/S JMS STEEL & POWER CORPORATION & ANR		RESPONDENT

Date of Decision : 11-05-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 96, Section 2(d), Order 37 Rule 1, Order 41 Rule 24

Citation : (2018) 05 DEL CK 0127

Hon'ble Judges : VALMIKI J. MEHTA

Bench : Single Bench

Advocate : Abhimanyu Mahajan, Anubha Goel, A.Ghosh

Final Decision : Dismissed

Judgement

S. No,Date,"Particulars Billof

Raised",Amount

1.,27.03.2015,1629,"Rs.15,08,357/-

2.,29.04.2015,1630,"Rs.14,72,269/-

3.,02.04.2015,02,"Rs.13,34,319/-

4.,27.05.2015,148,"Rs.10,34,103/-

5.,29.05.2015,155,"Rs.10,91,667/-

(i)Two purchase orders which were placed upon the respondent no.1/plaintiff, were admittedly only and only drawn upon the appellant/defendant no. 2",,,

and not upon the respondent no.2/defendant no.1. The purchase orders are filed at pages 56 and 57 of the paper book of the appeal and these,,,

documents show that the purchase orders are admittedly placed only by the appellant/defendant no. 2 upon the respondent no.1/plaintiff.At this stage,",,,

I reject the argument urged on behalf of the appellant/defendant no. 2 that the purchase orders are not placed by the appellant/defendant no.2,,,

inasmuch as merely because the delivery address of the goods to be supplied is written as c/o the address of the site of the respondent no. 2/defendant,,,

no. 1/owner of the project would not mean that the purchase orders would be of the respondent no. 2/defendant no. 1/owner of the project when on,,,

the face of the purchase orders they are issued only by the appellant/defendant no.2. Surely once the purchase orders are issued by the,,,

appellant/defendant no.2, then the appellant/defendant no.2 cannot argue that it has not issued the orders merely because the delivery address of the",,,

goods is stated to be at a site owned by the respondent no.2/defendant no.1 and at which site the appellant/defendant no.2 was making construction in,,,

terms of the agreement of construction entered into between the appellant/defendant no. 2 and the respondent no. 2/defendant no. 1.,,,

(ii)The invoices which are issued by the respondent no.1/plaintiff are upon the appellant/defendant no. 2 and not upon the respondent no.2/defendant,,,

no.1. These invoices are placed from pages 59 of the paper book of this appeal and these invoices show the buyer specifically as the,,,

appellant/defendant no.2 M/s B.L. Kashyap & Sons Limited. Even the consignee is the appellant/defendant no.2 in terms of these invoices except that,,,

the address is given as c/o the site of the respondent no. 2/defendant no.1.I reject the argument of the appellant/defendant no.2 that merely because,,,

the consignee in the invoices issued is though shown as the appellant/defendant no.2 but the delivery is at the site of respondent no.2/defendant no.1,",,

only for this reason the respondent no.2/defendant no.1 will become buyer of the goods.,,,

(iii)The liability of the appellant/defendant no.2 will be because the invoices for its total value are written contracts containing the liquidated amount of,,,

liability of the appellant/defendant no.2 for payment to the respondent no. 1/ plaintiff. As already stated above, the suit amount claimed is not the",,,

amount as the balance due at the foot of a running account but the amount of invoices themselves are claimed in the suit because no payments,,,

whatsoever were made under the subject invoices to the respondent no. 1/ plaintiff. Suit under Order XXXVII CPC was therefore maintainable as,,,

against the appellant/defendant no.2 on the basis of the invoices which are written contracts containing the liquidated amount payable by the,,,

appellant/defendant no.2 to the respondent no.1/plaintiff.,,,

(iv)Even with respect to the cheques issued, though the cheques are issued by the respondent no.2/defendant no.1 yet an Order XXXVII CPC suit for",,,

the amount of cheques would also lie against the appellant/defendant no.2 because Order XXXVII Rule 1 CPC does not in any manner state that the,,,

cheques which are issued for payments have to be of the person against whom liability is claimed. Obviously this is so as per Order XXXVII Rule 1,,,

CPC because as per Section 2(d) of the Indian Contract Act, 1872 consideration under a contract need not flow/pass only between the parties to a",,,

contract. Also it may be noted that even if cheques were not presented, would not mean that the suit would not be maintainable under Order XXXVII",,,

CPC because Order XXXVII Rule 1 CPC does not require the cheques to be dishonoured cheques for filing of the Order XXXVII CPC suit.,,,

9.The fact that there is a joint and several liability of the appellant/defendant no.2 with the respondent no.2/defendant no.1 will not mean that to,,,

enforce this joint and several liability, the subject suit could not have been filed both against the appellant/defendant no.2 and the respondent no.2",,,

herein. Once liability is joint and several of the appellant/defendant no.2 with the respondent no.2/defendant no.1, and as stated above Section 2(d) of",,,

the Indian Contract Act permits passing/payment of consideration by a person who is not a party to the contract, therefore merely because respondent",,,

no.2/defendant no.1 had agreed to be liable to make the payment of the goods purchased by the appellant/defendant no.2, this would not mean that the",,,

appellant/defendant no.2 would no longer be liable and liability will only be of the respondent no.2/defendant no.1.To the aforesaid reasoning the added,,,

aspect is that even if a cheque is required first to be dishonoured cheque for suing under Order XXXVII CPC, and in case where the cheque is not",,,

presented and hence not dishonoured, yet the cheque will still be a written agreement containing the liquidated amount as per Order XXXVII Rule 1",,,

Sub-Rule 2, and therefore a cheque which is not presented will be treated as a written contract containing the liquidated debt or demand in money",,,

payable by the defendant, and hence on an unpresented cheque the suit was maintainable under Order XXXVII CPC against the appellant/defendant",,,

no.2.,,,

10.The principles of grant of leave to defend though are not as those contained

in the impugned judgment which relies on the judgment of the Supreme,,,
Court in the case of Mechalec Engineers and Manufacturers Vs. Basic Equipment
Corporation AIR 1977 SC 577 because the principles with respect,,,
to grant of leave to defend are now contained in the recent judgment of the
Supreme Court in the case of IDBI Trusteeship Services Ltd. Vs.,,,
Hubtown Ltd., (2017) 1 SCC 568, but even when the principles laid down in the
case of IDBI Trusteeship Services Ltd.(supra) are applied, yet",,,
theappellant/defendant no.2 is held will not be entitled to leave to defend
because the defences which are raised by the appellant/defendant no.2 do not,,,
raise genuine triable issues for the reasons as stated above. The defences in fact
are clearly frivolous and vexatious defences, raised only in order to",,,
deny the just dues of seller of goods being respondent no.1/plaintiff. The
principles laid down by the Supreme Court with respect to grant of leave to,,,
defend have been crystallized by the Supreme Court in paras 17 to 17.6 of the
judgment in the case of IDBI Trusteeship Services Ltd.(supra) and,,,
these paras read as under:-,,,
17.Accordingly, the principles stated in paragraph 8 of Mechelec's case will now
stand superseded, given the amendment of Order XXXVII Rule 3,",,,
and the binding decision of four judges in Milkhiram's case, as follows:",,,
17.1. If the defendant satisfies the Court that he has a substantial defence, that
is, a defence that is likely to succeed, the Plaintiff is not entitled to",,,
leave to sign judgment, and the Defendant is entitled to unconditional leave to
defend the suit.",,,
17.2If the defendant raises triable issues indicating that he has a fair or
reasonable defence, although not a positively good defence, the Plaintiff is not",,,
entitled to sign judgment, and the Defendant is ordinarily entitled to
unconditional leave to defend.",,,
17.3Even if the Defendant raises triable issues, if a doubt is left with the trial
judge about the Defendant's good faith, or the genuineness of the triable",,,
issues, the trial judge may impose conditions both as to time or mode of trial, as
well as payment into court or furnishing security. Care must be taken",,,
to see that the object of the provisions to assist expeditious disposal of
commercial causes is not defeated. Care must also be taken to see that such,,,
triable issues are not shut out by unduly severe orders as to deposit or security.,,,
17.4If the Defendant raises a defence which is plausible but improbable, the trial

Judge may impose conditions as to time or mode of trial, as well as",,,
 payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the",,,
 entire principal sum together with such interest as the court feels the justice of the case requires.,,,

17.5If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious,",,
 then leave to defend the suit shall be refused, and the Plaintiff is entitled to judgment forthwith.",,

17.6If any part of the amount claimed by the Plaintiff is admitted by the Defendant to be due from him, leave to defend the suit, (even if triable issues",,,
 or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the Defendant in court.""",,,

11.I would like to at this stage state that this Court is empowered under Order XLI Rule 24 CPC to give additional reasoning than as given by the trial,,
 court and in fact the conclusion of the trial court and a decree of the trial court can be upheld by the appellate court by applying totally independent,,
 reasoning in terms of the powers conferred in the appellate Court under Order XLI Rule 24 CPC.,,,

12.In view of the above decision, I do not find any merit in the appeal.Dismissed",,,