
(2005) 08 DEL CK 0073

In the Delhi High Court

Case No : IAs 3420-21, 7618, 7627 and 9208 of 2002 and 2830/03 in CS (OS) 791 of 2002

Bush Boake Allen (India) Ltd.

APPELLANT

Vs

Mehtajee and Company and Others

RESPONDENT

Date of Decision : 25-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3(4), Order 37 Rule 3(5), Order 37 Rule 5, Order 39 Rule 1, Order 39 Rule 2

Citation : (2006) 2 BC 427

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Kapil Kher, for the Appellant; Sonali Malhotra, for defendant No. 1 and Sanjay Goel, for defendant No. 3, for the Respondent

Final Decision : Allowed

Judgement

Swatanter Kumar, J.—plaintiff-Bush Boake Allen (I) Ltd. filed a suit for recovery of Rs. 27,70,832/- under the provisions of Order 37 of the CPC (hereinafter referred to as the 'Code') plaintiff is a Company incorporated under the provisions of Companies Act, 1956 with its registered office at 1-5 Seven Wells Street, St. Thomas Mount, Chennai-600016 and has a Regional Office at Delhi. The suit has been instituted, signed and verified by Shri T.T.P. Shaheel, Regional Manager who has been duly authorised by the Board of Directors of the plaintiff-Company. The plaintiff is engaged in the business of manufacture, marketing and sale of flavours and fragrances and have been the oldest in the industry having been in operation since Mid 1800s. Defendant No. 1 is a partnership firm with defendant No. 2 and one Shri Satish Chugh as its partners. After the death of Mr. Satish Chugh, his wife defendant No. 3 became a partner of defendant No. 1 and have been conducting the business of defendant No. 1. The defendants had approached the plaintiff for supply of the item being sold by the plaintiff. The supplies was made as per requirement of defendant No. 1 and invoices were issued for such supplies. Number of cheques were issued by defendants in favor

of the plaintiff. The plaintiff presented the said cheques on the respective due dates, but they were dishonoured by the bankers due to "insufficiency of funds". It was thereafter that Mr. Satish Chugh had died. Defendant No. 2 had met plaintiff in January, 2001 and during the said meeting, it was confirmed that the partnership business is being continued by defendants 2 and 3 and defendant No. 2 issued fresh cheques towards the amount due and payable to the plaintiff with the assurance that the cheques now would be honoured on presentation. Copy of the letter dated 28th January, 2005 acknowledging the receipts of the said cheques have been placed on record. Defendant No. 2 had also requested the plaintiff that in the meanwhile the supplies of the material may be continued so as to ensure that the cheques already issued are not dishonoured on presentation. However, in violation to the assurance given the defendant asked the plaintiff not to present the cheques and vide letter dated 2nd March, 2001, the plaintiff had asked the defendant as to when the cheque should be presented. The cheques were again dishonoured and the plaintiff demanded the payment of the outstanding dues vide their different letters dated 21st April, 2001, 17th May, 2001 and 18th September, 2001. It is pleaded that another meeting was held between the officials of plaintiff and defendant No. 2 on 17th September, 2001 wherein defendant No. 2 again assured that an amount of Rs. 8 lacs to Rs. 10 lacs would be paid by 28th September, 2001 and fresh cheques would be issued in lieu of the dishonoured cheques. Despite repeated requests, defendants failed to clear their liability. Defendant No. 2 acknowledged the outstanding dues but failed to pay the said amount as confirmed in the letter dated 17th November, 2001. The agreement arrived at between the parties on 16.11.2001 was also not adhered to by the defendants. Finally, the plaintiff having left with no alternative, got a notice served upon the defendants through their counsel on 3rd March, 2002 calling upon them to clear the dues. The attempts were also made by the defendants to dissolve their firm and to sell the business. As per books of accounts, an amount of Rs. 20,37,376.52 is still due and payable by the defendants to the plaintiff. The plaintiff also claims interest @ 24% per annum thus making the total claim of Rs. 27,70,832.00. The present suit has been filed on the basis of a written contract between the parties as well as on the basis of the dishonoured cheques and according to the plaintiff, no claim made in the suit is beyond the purview and scope of the provisions of Order 37 of the Code.

2. Summons in the suit were issued vide order dated 8th April, 2002. Notice was also issued on IAs 3420-21/2002. These were the applications filed by the plaintiff under Order 38 Rule 5 and Order 39 Rules 1 & 2 of the Code respectively. is 7618/2002 and is 7627/2002 are the applications filed by the plaintiff under Order 37 Sub-Rule 4 of Rule 3 and Order 39 Rules 1 & 2 of the Code respectively. The plaintiff by way of is 7627/2002 praying for restraining the defendants from selling or transferring flat No. 388, 1st Floor, SD Block Tower, A.P. Vishakha Enclave, Dakshin Pitampura, Delhi. is 7618/2002 is for summons for judgment.

3. The defendant No. 2 having been served with the summons of the suit, then filed is 9208/2002 under Order 37 Rule 3(5) read with section 151 CPC seeking unconditional leave to defend the suit. is 2830/2003 was the other application filed on behalf of defendant No. 3 under the same provisions seeking grant of leave to defend the suit. is 2831/2003 is the another application by defendant No. 3 seeking condensation of delay in filing the is No. 2830/2003. As all the above seven applications are one way or the other related to the basic question as to whether the defendants are entitled to grant of leave to defend unconditionally or otherwise and whether there should be any order of injunction against them in relation to their property, as prayed for by the plaintiff. In is 2831/2003, as already stated above, which is an application for condensation of seven days" delay in filing the application for leave to defend i.e. is 2830/2003 by defendant No. 3, the reasons given that the applicant was served with the summons of the suit on 31st January, 2003 and the leave to defend application could be filed by 10th February, 2003. However, defendant No. 3 who is a widow of erstwhile partner of defendant No. 3 has stated that she had gone to her parents in Karnal (Haryana) and was to come back on 2nd February, 2005 but for unavoidable reasons could only come back on 7th February, 2003 and her daughter fell ill due to acute stomach infection and as such the application could not be filed within time. The delay in filing the application is for bonafide reasons. The application was opposed. But keeping in view the peculiar facts and circumstances of the case and in the interest of justice, defendant No. 3 has been able to show sufficient cause for condensation of delay of seven days in filing the application for leave to defend. In fact, she had also made an averment that defendant No. 2 who is actually holding the affairs of defendant No. 1 has been acting in a manner prejudicial to the interest of defendant No. 3 and due to dishonest intention of defendant No. 2, defendant No. 3 was constrained to issue legal notice dated 11.7.2002 to the said defendant in relation to dissolution of the firm and for rendition of accounts. In these circumstances, the interest of justice would require that the delay in filing the application for leave to defend could be condoned particularly when the application for leave to defend filed by defendant No. 2 has been considered separately by the Court within the stipulated period. Consequently is 2831/2003 is allowed. The delay of seven days" is condoned. The application for leave to defend bearing is No. 2830/2003 would be decided Along with application for leave to defendant of defendant No. 2 being is 9208/2002. As already noticed, the case of the plaintiff is based upon a written contract which is stated to be dated 17th November, 2001. As per this letter, the matter was discussed between the parties and it was signed by Mr. B.N. Seth-defendant No. 2 and the Regional Manager of the plaintiff. The relevant extracts of the letter are as under :-

We thank you very much for meeting our Executive Director, Mr. Sridhar Balakrishnan and the undersigned at your home on 16th November.

During our discussion on old payments due from you (separate letter on the outstanding and cheques in hand are attached), you have agreed to clear all the

payments and requested us for time for clearing the total amount.

Accordingly, you have assured us that you will clear Rs. 2.00 lakhs (Rupees Two lakhs) by November 25, 2001 and an additional Rs. 3.0 lakhs (Rupees Three Lakhs) by 24th December, 2001. You also have agreed that you will try to clear another Rs. 4.0 (Rupees Four Lakhs) - in addition to above two payment schedules - before 27th December 2001. We have promised to look into supplying you the material once you meet your above assurances as per the time schedules given above and on clearing 50% of total due of Rs. 19.5 lakhs (rupees Nineteen lakhs and Fifty thousand approx.).

As discussed in the meeting, we want you to honour your assurances without you going back any more on your assurances.

This letter is sent in duplicate. As discussed, we request you to sign at the place indicated as token of your agreement and return a copy for our records.

4. There are various letters placed on record by the plaintiff but all these are letters written by the plaintiff to defendant No. 1 relating to dishonouring of cheque, issuance of fresh cheques and the commitments made by the defendants to the plaintiff. There is no other letter except the minutes dated 17th November, 2001 which has been signed or confirmed by the defendants. There is a statement filed by the plaintiff on record which is stated to be Statement of cheques v. Invoices under which the material was supplied to the defendants. It has been indicated in the statement as well as the letter dated 17.5.2001 that certain cheques were dishonoured while, as per the statement of the plaintiff itself other cheques were not presented and were pending. In the letter dated 17.5.2001 which bears the endorsement of receipt by the defendants it was stated that the bounced cheques of Rs. 5.7 lacs would be substituted by pay orders in the month of May and the balance amount of Rs. 16 lacs will be cleared in the month of June, 2001. Thereafter on 18th September, 2001, plaintiff had still written another letter to the defendant confirming that the fresh cheques have been issued in lieu of the cheques already with the plaintiff. Some of these cheques were presented while other fresh cheques were not issued by the defendants. There are corroborative facts averred in these letters that the cheques issued by the defendants were dishonored and they were not presented by the plaintiff. The only written agreement between the parties is the letter dated 17th November, 2001. This letter is further supported by the fact that in paragraph 5 of the notice dated 30th March, 2002, the plaintiff had made a reference to the meeting dated 16.11.2001 and despite the fact that this notice was duly received by the defendants by Regd. Acknowledgment Due, was not disputed. In the application for leave to defend, the defendants besides making vague denial of the case of the plaintiff have in paragraph j) of the ground for leave to defend has specifically stated "the goods worth Rs. 25 lacs to Rs. 30 lacs could not be sold by defendants on account of the reasons mentioned above. The said goods are still lying with the defendants and officials of the plaintiff have been asked several times to left the goods". Further it is stated that the goods

supplied by the plaintiff to the defendant were of inferior quality and are not of good quality and the same being to be used before the expiry date. The plaintiff supplied such goods to the defendants which were near to the expiry and defective, could not be marketed or sold by the defendants and thus creating the liability against them. In relation to the letter dated 17.11.2001 in para e) of the ground it is stated that the defendant had never agreed to make the payment of any amount, as alleged in the said letter and the document is a forged and fabricated document and has not been signed by defendant No. 2 on behalf of defendant No. 1 and the suit is not maintainable. Though the defendants have admitted in the application for leave to defend that the goods worth Rs. 25 lacs to Rs. 30 lacs were received by them, no detail thereof whatsoever has been given as to how much goods were sold and how much goods are still lying with the defendant. Not even a single letter has been placed on record which the defendant might have written to the plaintiff requiring them to leave the defective goods as alleged. Now in the application under consideration another important factor is that despite specific averments made in the plaint and copy of the notices have been furnished to the defendants, the defendants have nowhere denying the receipt of the notices dated 30th March, 2002 as well as 1st April, 2002 wherein a specific reference has been made to the meeting dated 16.11.2002 and the minutes recorded by the parties on 17th November, 2001. It is obligatory on the part of the defendants to disclose true facts in his application for leave to defend as to these vital issues also. It is nowhere stated in the application that the defendants had not issued the cheques as claimed by the plaintiff. What is argued on behalf of the applicant while relying upon the judgment of this Court in the case of Goyal Tax Feb. Pvt. Ltd. Vs. Anil Kapoor Proprietor Supriya Fashion, that the suit of the plaintiff is not maintainable because cheques were not even presented to the Bank. This case is of no help to the defendant in as much as the present suit is not based upon the cheques, but is based upon a written contract between the parties wherein defendants had admitted a written liability and had promised to pay the liability, thus the suit is maintainable under the provisions of Order 37 (2)(b)(i). The defendants while relying upon the judgment of the Supreme Court in the case of AIR 1990 2218 (SC) argued that the application for leave to defend submitted by the defendant discloses triable issues and as such the would be entitled to an unconditional leave to defend. The Supreme Court in this case held that 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. This judgment again is not of much help to the applicant in as much as the receipt of goods is not denied. The goods were supplied during the period 2nd May, 2000 to 23rd February, 2001 and these goods admittedly were worth Rs. 25 lacs to Rs. 30 lacs for which even the cheques were issued. Some of them were clear, while others were dishonoured or were pending with the plaintiff. It was expected of a defendant seeking unconditional leave to defend as to at least place some documents or make definite averments which in normal course of business would be expected of a businessman and could be believed at least prima facie by the Court. The

only stand taken that the letter dated 17th November, 2001 is not signed by the defendant. The signatures on the letter appear quite to be that of the defendant if compared to the signatures of the defendant on the application for leave to defend, at least to the naked eye. The stand taken by the defendant appears to be more imaginative and is based on falsehood. The counsel appearing for the plaintiff/non-applicant while relying upon another judgment of this Court in the case of Aganall Traders Limited Vs. Shri Shyam Ahuja, Minerals and Metals Trading Corporation Ltd. Vs. Dimple Overseas Ltd., and Reliance Industries Ltd. Vs. Imperial Pigments (P) Ltd., argued that the defense put forward by the defendant is totally frivolous, false and practically a moonshine. The transactions are purely commercial and the normal conduct of the party in such commercial transactions should be taken into consideration. Further it was contended that in the facts of the present case, the supply of the goods were admitted and the disputes raised with regard to the quality of the goods by the defendant is an afterthought for avoiding the payment as no such endorsement was even made on the invoices which were received by the defendant over a long period. The defendants having acknowledged their liability in the letter dated 17th November, 2001 and the invoices where material was received, no penumbra for speculation remains and the plaintiff would be entitled to the decree. The stand taken by defendant No. 2 is not trustworthy and in fact is not supported by any correspondence between the parties. The defendant, in fact, has not cared to place single letter on record over these long years questioning the quality of the material received by him. In face of a specific admission of specific material, the acknowledgment dated 17th November, 2001 cannot be stated to be a fabricated or forged document. More so when reference to the meeting and the document was made by the plaintiff in the notice dated 30th March, 2002 while the present suit was filed by the plaintiff immediately thereafter in April, 2002, it was obligatory on the part of the defendant to react to the said notice or at least give his Explanation in his application for leave to defend. The Supreme Court in the case of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, clearly held where the defendant sets up a defense which is illusory or sham or practically a moonshine, then ordinarily the plaintiff is entitled to leave to sign judgment. The stand of defendant No. 3 in her application for leave to defend is a very limited one. She had shown ignorance about the receipt of the material. She has further stated that whether the material was received or not, whether the firm was liable to pay the amount or not; are the questions which have to be examined and proved during trial and as such no liability can be fastened upon her. However, in the proceeding paragraph, she herself had stated " it is also pertinent to mention that due to dishonest intention of the defendant No. 2, the applicant/defendant No. 3 was constrained to send a notice dated 11.7.2002 through her advocate for dissolution of partnership firm and for rendition of accounts of the firm". It is further stated that thereafter a compromise deed has been entered into wherein defendant No. 2 and one Smt.Shanti Seth has agreed to liquidate the entire liability after absolving the applicant/defendant No. 3. In fact, there is nothing in the application for leave to defend which require any

further discussion in view of the findings recorded above. The liability of partners of the partnership is unlimited and qua the third party, the partners are bound to discharge the liability of the partnership concern and their internal management would not be a defense to a third party's claim. If nothing else, the averments made by this applicant, against defendant No. 2 are indicative of the correctness of the stand taken by defendant No. 2 in his application for leave to defend.

5. In reply to is 3421/2002, defendant No. 2 has already made a statement in the Hon'ble Court stating therein that defendant No. 2 will not transfer, alienate, part with or create any third party interest in respect of property No. 1484, S.P. Mukherjee Marg, Delhi, as such the application is not maintainable. In view of this statement made by defendant No. 2 nothing survives in this application and the same can be disposed of by binding the respondent/defendants to their statements and no further orders are called for in this application.

6. For the reasons afore-recorded, I find no merit in the applications for leave to defend filed by defendants 2 and 3. The same are dismissed. In terms of the letter dated 17th November, 2001 which is the written contract between the parties and is the foundation of the suit of the plaintiff under Order 37 of the Code, the admitted liability is Rs. 19.5 lacs and as such plaintiff cannot claim an amount higher than the amount mentioned in this letter and even the plaintiff is not entitled to the principal amount of Rs. 20,37,376.52p as claimed in the plaint, but would be entitled to get only a sum of Rs. 19.5 lacs on account of principal. In regard to interest, the written contract between the parties does not postulate any payment of another interest. There is no document on record vide which the defendant had agreed to pay interest as claimed in the notice by the plaintiff. There is no invoice on record wherein payment of interest is stated to be payable to the plaintiff from the defendants. The provisions of Order 37 of the Code are to be construed strictly and only a claim which is based upon a written contract can be allowed within these provisions. In absence of any written contract between the parties, about the payment of interest, the plaintiff cannot press the claim of interest in a suit under Order 37. Order 37 itself is a self-contained code and the plaintiff cannot rely upon custom in trade or the provisions of the interest for payment of interest. Thus the claim of the plaintiff for grant of interest is also declined. The plaintiff has prayed for award of interest @ 24% per annum pendente lite and future.

7. After amendment of 1976 of the Code the discretion to give leave to defend is delineated by the proviso. The first proviso to Order 37 Rule 3(5) provides 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 defense to raise or that the defense intended to be put forward is frivolous and vexatious. The second proviso to the said Rule further states that claim of the plaintiff if admitted by the defendant, the leave will not be granted unless such amount was deposited. The discretion of the Court is to be guided by well established principals of law, keeping in view the facts and circumstances of each case. But

wherever the Court finds and satisfied that there is absence of substantial defense or that the defense is frivolous or vexatious, the Court would decline leave to defend to the applicant. The use of the expression "good defense" must be understood so as to include in its ambit reasonable triable issue and a bonafide stand. The good defense of the defendant has not to be a defense which is illusory or shown to be "ex facie unbelievable". Grant of leave to defend thus would be relateable to the content and value, in terms of law of the defense put forward by the defendant. The legislative intention in introducing the word "good" is to emphasise the need of a bonafide defense which is acceptable within the afore corners of law. A dispute raised for the sake of dispute or denial for the sake of denial with intent to delay the proceedings would be a category of cases which cannot fairly fall under this category. It is the duty of Court to amplify act of justice rather than jurisdiction or authority. It is a matter of common knowledge that denial by a party is the easiest method of delaying the proceedings before the Court and in fact without being subjected to rigors of high cost and penal loss. A plea which is put forward by the defendant should go to the root of the liability and must raise an issue which in law would be triable.

8. Keeping in view the facts and circumstances of the case, the plaintiff would be entitled to receive interest @ 6% from the date of institution of the suit till realisation of the amount on the principal sum of Rs. 19.5 lacs. The plaintiff would also be allowed to the costs of the suit.

9. The decree is passed in favor of the plaintiff and against the defendants in the above terms. The Registry shall draw decree in terms thereof. All the seven applications afore noticed are also disposed of accordingly.