(2018) 03 DEL CK 0288

In the Delhi High Court

Case No : Civil Suit (OS) No. 3073 Of 2015

Delhi Consumers Cooperative Wholesales Store Limited — APPELLANT

Vs

M/S K N R International And Anr — RESPONDENT

Date of Decision : 06-03-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Order 13A, Order 8 Rule 10

Citation : (2018) 03 DEL CK 0288

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Madhumeet Kapoor

Final Decision : Allowed

Judgement

Manmohan, J

I.A. 2572/2018

1. Present application has been filed under Order VIII Rule 10 CPC read with Order XIII-A of the Commercial Courts, Commercial Division and

Commercial Appellate Division of High Courts Act, 2015. It is pertinent to mention that the present suit has been filed for recovery of Rs.1,27,37,263/-

along with pendent lite and future interest at 18% per annum. The prayer clause in the present suit is reproduced hereinbelow:-

â??i Pass a decree for a sum of Rs.1,27,37,263/- (Rupees One Crore Twenty Seven Lacs Thirty Seven Thousand Two Hundred and sixty Three)

against both the defendants.

ii. Pendente lite & future interest @ 18% p.a. till payment and/or realization, may be awarded in favor of the plaintiff..

iii. All cost of this suit against the defendants and in favour of the plaintiff.

iv. Pass such any other relief which this Honâ??ble Court deems fit & proper in the facts & circumstances of the case in favour of the Plaintiff

â?"Bank and against the Defendants.â??

2. Since none appeared for the defendants, despite service by way of publication, they were proceeded ex parte vide order dated 12th December,

2017.

3. The contentions and submissions advanced by learned counsel for the plaintiff are as under:-

i. The plaintiff is a registered society and an Apex Level Cooperative organization under Govt. of NCT of Delhi.

ii. The defendant No. 1 is a partnership firm and defendant no. 2 is the authorized signatory and one of the partners of the defendant no. 1 firm. The

defendants are dealers, commission agents, government suppliers and are engaged in the business of import and export of pulses, food grains, kirana

and dry fruits.

iii. The plaintiff had made an inquiry from various dealers, for procurement of various items for onward supply to the Army Purchase Organization,

paramilitary and police organizations and other Government departments.

iv. On 20th March, 1990, the defendant no. 1 sent a proposal to the plaintiff for registration as the sole supplier of the required items for the

abovementioned organizations. After due compliance, the defendant no. 1 was taken as the registered supplier of the plaintiff.

v. On 15th June, 1990 the plaintiff and the defendants entered into an agreement for the supply of pulses. The agreement was valid for a period of two

years and on its expiry it was renewed through letter dated 16th June, 1992 for one year further.

vi. After renewal, the plaintiff entered into a contract dated 23rd March, 1993, with the Army Purchase Organization, for the supply of 3375 MTS of

Dal Chana at the rate Rs. 944/- per Qtls. The contract for supply of Dal Chana was entered into by the plaintiff on the assurances of comfortable and

undisturbed supply by the defendants as per the terms and conditions of the agreement.

vii. However, the defendants defaulted in the supply schedule because of which a request was made to the Army Purchase Organization for

extending the date of supply. The request was accepted by the Army Purchase

Organization and it extended the date of supply up to 31st August,

1993. The defendants once again failed to supply and due to non-supply of Dal Channa, the plaintiff could not honour the contract. This resulted in

cancellation of the supply order by the Army Purchase Organization on 28th September, 1993. Due to previous default, the plaintiff could not apply for

fresh tender floated by the Army Purchase Organization.

viii. On 06th March, 1997, Sh. Ram Bahadur Addl. Legal Advisor, Government of India, Ministry of Law was appointed as the sole arbitrator to

arbitrate on the assessment of damages for the non-supply of goods to the Army Purchase Organization and the arbitration was initiated. The

arbitration matter was defended at the behest, cost and risk of the defendants, as the defendant no. 2 had submitted an indemnity bond dated 03rd

November, 1995, giving an undertaking to indemnify the plaintiff for any loss or damage on account of non-execution of contract with the Army

Purchase Organization.

ix. An award was passed on 20th November, 1998, directing the plaintiff to pay net amount of Rs. 29,88,336.02/- plus interest @ 18% from the date

of the award, after adjustment of earnest money and security money of Rs. 1 lakh each.

x. After receiving a copy of the award, on 05th March, 1999, the defendants submitted another undertaking to the plaintiff, to comply with the terms of

the indemnity bond and agreement.

xi. The defendants were under obligation to bear the losses, and vide letter dated 08th February, 1999, they expressed their desire to file

objection/appeal and also agreed to bear the costs of litigation for challenging the award. Accordingly an appeal was filed before this Court vide OMP

63/1999, which was dismissed vide order dated 15th December, 2009. The defendants filed an appeal against the aforesaid order vide FAO(OS) No.

386/2010, which was also dismissed vide order dated 13th December, 2010. The order dated 13th December, 2010 was challenged by filing of an SLP

No. 10018/2011, which was dismissed vide order dated 18th April, 2011.

xii. Since despite requests, the defendants did not pay the award amount and interest to the Army Purchase Organization, the plaintiff was forced to

pay a sum of Rs. 98,18,493/- to the Army Purchase Organization, towards the full and final satisfaction of the arbitral award. The plaintiff paid the amount in five installments and the last installment was paid on 29th October, 2013.

xiii. Though the plaintiff served the defendants with a legal notice dated 11th February, 2014 and a reminder dated 19th May, 2014, requesting the

defendants to pay special damages, which include the complete amount of the award, interest and legal expenses, yet no response was received and

the defendants

xiv. failed to pay the demanded amount till date.

xv. The defendants are liable to pay to the plaintiff a sum of Rs. 1,27,37,263/- including principal, interest including litigation expenses, described

hereinbelow:-

Principal Amount : Rs. 98,18,493/-

Interest @ 18% : Rs. 27,98,270/-

(1.11.13 to date of filing)

Legal Expenses paid : Rs. 1,20,500/-

4. This Court while dealing with an application under Order VIII Rule 10 CPC inC S(OS) 873/2015 Samsung Electronics Company Limited & Anr.

Vs. Mohammed Zaheeer Trading As M/s. Gujarat Mobiles & Ors. has culled out the relevant law as under:-

â??10. The Supreme Court in C.N. Ramappa Gowda Vs. C.C. Chandregowda, (2012) 5 SCC 26 5has interpreted the Order VIII Rule 10 CPC as

under:-

25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect [Ed.: It would seem

that it is the purpose of the procedure contemplated under Order 8 Rule 10 CPC upon non-filing of the written statement to expedite the trial and not

penalise the defendant.] of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not

penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a

decree. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under

Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view

of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written

statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two

versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual

controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers

of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly

promotes the cause of speedy trial.

11. A Coordinate Bench of this Court in Nirog Pharma Pvt. Ltd. Vs. Umesh Gupta and Ors., 235 (2016) DLT 354 has held as under:-

11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory

tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be

cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to

prove its contents.

xxxx xxxx xxxx xxxx

28. The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division

of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to

linger on. Accordingly, if the defendant fails to persue his case or does so in a lackadaisical manner by not filing his written statement, the courts

should invoke the provisions of Order VIII Rule 10 to decree such cases.

12. Another Coordinate Bench of this Court in Satya Infrastructure Ltd. and Ors. Vs. Satya Infra & Estates Pvt. Ltd., 2013 III AD (Delhi) 1 7h6as

held as under:-

4. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way

of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being

verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of

examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the

plaintiffs and are already on record.........

5. This Court is of the opinion that despite receipt of the legal notice dated 11th February, 2014 and a reminder dated 19th May, 2014, the defendants

have failed to pay the plaintiff the amounts as demanded by the said legal notice. This Court is further of the view that under the agreement dated 15th

June, 1990 and subsequent indemnities and undertakings executed by the defendants, the defendants have failed to remit to the plaintiff the complete

amount of the arbitral award and interest due as well as legal expenses.

6. In any event, as the averments in the plaint have not been rebutted by the defendants nor did they bother to put forth their stand in spite of ample

opportunities given by this Court, they are deemed to have been admitted.

7. Accordingly, the present application is allowed and the suit is decreed in favour of the plaintiff and against the defendants for Rs.1,27,37,263/-along

with pendent lite and future interest @ 6% per annum. The plaintiff is also held entitled to actual costs of litigation including lawyerâ??s fees. The

plaintiff is given liberty to file on record the exact cost incurred by it in adjudication of the present suit. Registry is directed to prepare a decree sheet

accordingly.

