

(2004) 10 DEL CK 0017
In the Delhi High Court
Case No : CS (OS) 2182 of 2003

Emmsons International Ltd.

APPELLANT

Vs

Harshvardhan Chemicals and Minerals Ltd.

RESPONDENT

Date of Decision : 11-10-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 37 Rule 2(2), Order 37 Rule 3, Order 37 Rule 3(1), Order 37 Rule 5
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2005) 2 BC 26 : (2005) 80 DRJ 513

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : Chetan Sharma and Vikram Nandrajog and Anshul Tyagi, for the Appellant; Pallav Sisodia and Hemant Sharma, for the Respondent

Judgement

Mukul Mudgal, J.—This suit involves the interpretation of Order xxxvII and the summary procedure to be followed upon the service of statutory summons on the defendant under Order xxxvII Rule 3 of the Code of Civil Procedure, 1908(in short the `CPC"). The proceedings in this case eloquently demonstrate how repeated opportunities to the defendant can defeat the ends of justice in the name of equity. The plaint is based upon the Memorandum of Understanding dated 1st December, 2000, a document in writing covered by the post-dated cheques for a sum of Rs. 36,00,000/-.

2. It is not in dispute that on 17th February, 2004, the defendant was duly served with the summons in the statutory form, as envisaged under Order xxxvII Rule 3 of the CPC and is represented by Mr. Pallav Sisodia, Advocate. It is also not in dispute that no memo of appearance on behalf of the defendant has been entered thereafter as postulated under Order xxxvII CPC.

3. Summons for judgment are required to be taken out under clause (4) of Order xxxvII Rule 3 CPC. The Order xxxvII Rule 3 CPC reads as under:-

"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 prepaid 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 defense 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 defense to raise or that the defense 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;"

4. Thus there is nothing on record to indicate that the appearance has been entered on behalf of the defendant within the stipulated period of 10 days of the receipt of summons for appearance issued under Order xxxvII Rule 2(2) of the

CPC in the prescribed Form IV Appendix B. Consequently, the summons for judgment in Form 4A, Appendix B of Order xxxvII could not be issued to the defendant through counsel. The Order dated 15th April, 2004, passed in the main suit reads as follows:-

"15.04.2004

Present: Mr. Anshul Tyagi for the plaintiff.

Mr. Pallav Sisodia for the defendant.

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It is pointed out by the counsel appearing for the plaintiff that the summons in the statutory form, as envisaged under Order xxxvII Rule 3 of the Code of Civil Procedure, was served on the defendant on 17th February, 2004. The records do not disclose that the defendant has entered appearance thereafter in accordance with law.

Counsel appearing for the defendant, however, states that he has filed his power in this court either on 18th or 19th March, 2004 and that a letter was written to the plaintiff by the said defendant that the plaintiff is not entitled to recover the amount as claimed in the suit in view of pendency of the enquiry against the defendant under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

Counsel for the plaintiff, however, states that the provisions of Section 22 of the Act would not be applicable to the facts and circumstances of the case as the transaction and the amount for which the present suit is filed was entered into and became payable after the aforesaid reference was registered by the BIFR. In support of the said contention he relies upon a Division Bench decision of the Andhra Pradesh High Court in Vibgyar Ink Chem (Pvt.) Limited v. Safe Pack Polymers Limited reported in 1998 Company Cases (93) 407.

Counsel appearing for the defendant states that the matter may be adjourned for a week in order to enable him to obtain instructions. At his request, re-notify on 14th May, 2004."

On 14th May, 2004, the following order was passed:-

"14.05.2004

Present: Mr. Anshul Tyagi for the plaintiff.

Mr. Pallav Sisodia for the defendant.

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Counsel appearing for the defendant seeks for four weeks time to obtain instructions and/or to file response. Four weeks time is granted, as a last opportunity, making it clear that on the next date the matter shall be argued and

heard.

Re-notify on 15th September, 2004."

On 15th September, 2004, the matter was again adjourned to 1st October, 2004 on the request of the defendant's counsel to enable him to file an application for condensation of delay in filing the memo of appearance. Again on 1st October, 2004 no application for condensation of delay was filed and following order was passed:-

"01.10.2004

Present:Mr.Chetan Sharma, Senior Advocate with

Mr. Anshul Tyagi & Mr. V. Nandrajog for the plaintiff.

Mr. Pallav Sisodia with

Mr. Hemant Sharma for the defendant

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Mr. Sisodia seeks and is granted a week's time to obtain instructions from the defendant as to the amount which may be paid to the plaintiff by way of a settlement. Mr. Sharma submits that non-appearance has already caused consequences under Order xxxvII CPC.

List the matter on 11th October, 2004."

It is not in dispute that till date neither any application for condensation of delay/ memo of appearance is filed as contemplated by various orders of this court, extracted hereinabove nor the defendant is forthcoming with any offer of settlement. A salutary principle laid down felicitously by a learned Single Judge of this Court in 2004 IV AD 545 while bemoaning the adoption of dilatory tactics by the defendant bears repetition as follows:-

"This Revision discloses the manner in which the justice delivery system can be crippled by the adoption of dilatory devices which can succeed only because the system is bursting at the seams owing to the perennial shortage of judicial officers. A change in the mindset is essential and unavoidable and the affliction of showing leniency towards the party adopting delaying tactics calls for a paradigm shift so that this malaise can be put to a swift and clinical death.

..... The frequent occurrence of Advocates choosing not to appear in cases on any ground is leading to a break down of the system. In the present case it has been stated that the Defendant/ Tenant had taken away the file from his Advocate. This is not sufficient reason for the Advocate to discontinue appearing before the Court. It is mandatory that leave or permission of the Court should be obtained for which a pre-condition is the issuance of a notice to the client/litigant which ought to ensure his presence in Court simultaneous with the grant of leave to the Advocate to withdraw from the case. Once a party is served it may be

unnecessary to serve him once again since he is obliged to appear at every hearing either personally or through his Advocate and/or representative. Since our judicial system considers it an abhorrence to decide a case in the absence of a party, it often times punctiliously conforms to procedure, even where it is obvious that the delinquent party is abusing this judicial concern."

I fully concur with the above position of law laid down by the learned Single Judge and applying this position of law to the present case to hold that Shri Sisodia, the learned counsel for the defendant has failed to come forward with appropriate instructions/response of the defendant.

5. Thus since statutory summons have been served upon the defendant and no memo of appearance has been entered on behalf of the defendant as postulated under Order xxxvII CPC, the plaintiff is entitled to the judgment forthwith.

6. The whole purpose of expeditious and indeed summary disposal of an Order xxxvII suit which avowedly prescribes summary procedure is totally defeated if the defendant who under Order xxxvII Rule 3(1) has already been served with the statutory summons is given further opportunity to file the application for condensation of delay in filing the memo of appearance as postulated under Order xxxvII CPC. A defendant who has already been served with the statutory summons and is obviously not interested in any expeditious disposal, can easily delay proceedings by making himself scarce. This will defeat the whole purpose of expeditious and indeed summary disposal of an Order xxxvII suit. Once the defendant has been served and is represented through counsel after notice under sub section (1) of Order xxxvII rule (3), then the summons for judgment under sub-section (4) is only required to be served on such counsel, who files the memo of appearance on behalf of the defendant within the stipulated time of 10 days of the receipt of summons for appearance. All such hearings could have been averted and valuable judicial time and effort saved in case the defendant's counsel had taken care in filing the memo of appearance on behalf of the defendant within the stipulated time of 10 days of the receipt of summons for appearance even after availing so many opportunities so as to enable the Court to proceed to decree the suit in case leave to defend was not filed within the period stipulated under Order xxxvII Rule (5). Order xxxvII Rule 3 CPC provides a procedure for the appearance of the defendant and the defendant is required to enter appearance within 10 days of service which is dated 17th February, 2004. Since the defendant has not entered appearance in the stipulated period under Order xxxvII Rule 3 CPC, the consequences indicated under Order xxxvII of 2 CPC follow and the plaintiff is entitled to succeed in the suit.

7. Accordingly, a decree for recovery of Rs. 55,67,918/-(Rupees Fifty Five lacs sixty seven thousand nine hundred eighteen only) along with the pendente lite and future interest @ 18% per annum from 29th November, 2003, i.e., the date of the filing of the suit till realization is passed in favor of the plaintiff and against the defendant.

8. The suit stands decreed and disposed of accordingly with no order as to costs. The decree be drawn up accordingly.