
(1981) 12 DEL CK 0029

In the Delhi High Court

Case No : Regular First (OS) Appeal No. 2 of 1981

Food Corporation of India

APPELLANT

Vs

Balkrishna Garg

RESPONDENT

Date of Decision : 10-12-1981

Acts Referred:

Citation : (1982) 21 DLT 167 : (1982) 1 ILR Delhi 756 : (1982) ILR Delhi 756

Hon'ble Judges : Rajinder Sachar, J; M.L. Jain, J

Bench : Division Bench

Advocate : S.K. Puri, S.K. Nishi and D.K. Sayal, for the Appellant;

Judgement

M.L. Jain, J.

(1) The respondent plaintiff brought a suit under Order 37 CPC against the appellant, the Food corporation of India, for recovery of Rs. 3 lakhs and odd, on the allegation that he submitted on 27-1-1978 a tender for the supply of 500 rolls of black polythene film at the rate of Rs. 13.87 per kg. and his tender was accepted on 28-3-1978. In pursuance of the terms of the contract, inspection of the goods was carried out from 16-5-1978 to 18-5-1978 by the said Corporation's regional office, Lucknow. The goods were then sealed and samples were taken for testing according to relevant ISI specification. The defendant communicated approval of the goods on 15-11-1978 and directed on 12-12-1978 that the goods be dispatched to Patiala. Later on, the inspection note dated 19-1-1979 was also issued. The plaintiff then dispatched the rolls on 25-1-1979. 95 per. cent of the price was immediately payable, but the defendant failed to pay. Meanwhile 5 per cent balance price had also become due. Hence, the suit for recovery of the price with interest at 15 per cent per annum.

(2) The defendant made two applications on 25-1-1980 one u/s 34 of the Arbitration Act (herein the Act) for stay of the suit along with one other u/s 5 of the Limitation Act. In the latter, it was stated that the summons of the suit were received by the defendant on 27-12-1979, but their counsel was available for

consultation only on 23-1-1980. They urged that the period of 20 days prescribed under Rule 2 of the Delhi High Court (Original Side) Rules (herein the Original Side Rules) does not apply to an application u/s 34 of the Act and if it does, the delay may for reasons aforesaid, be condoned. It was also contended that the suit was not covered by Rule 1 of the Original Side Rules and was also outside the purview of Order 37 Rule 2(6) of CPC because the amount in question was not a debt and there was no stipulation for interest in the written contract which was necessary for a suit to be covered by Order 39 CPC. It also appears" to be the case of the defendants that the goods supplied upon subsequent examination were found deficient and inferior in quality.

(3) The plaintiff respondent contended that the defendant should have put in appearance within ten days of the service of the summons and sought permission to defend the suit. The application u/s 34 of the Act could also be moved only within those ten days. The grounds on which the delay was sought to be condoned were also controverted. The plaintiff further moved an application under Order 37 Rules 2 and 3 and section 151 of the Code of Civil Procedure, praying for a decree.

(4) The learned single Judge held that Order 37 Rule 1(2) C.P.C. envisages suits where plaintiff seeks to recover a debt with or without interest arising on a written contract, and, Therefore, it is implied that interest amounts too can be claimed on the debt irrespective of whether such interest is permissible under the contract itself or not. The learned Judge further held that ordinarily an application u/s 34 of the Act can be moved before filing the written statement or taking any other step, but since Order 37 CPC deals with specific types of suits and provides a special procedure and if the defendant fails to obtain permission from the court to defend the suit, decree in favor of the plaintiff follows as a matter of course. Taking recourse to arbitration clause in the agreement in order to seek stay of the suit can as well be treated as raising a defense to the suit. Therefore, a defendant seeking protection of the Act must act within the limitation prescribed under Order 37 CPC or as enlarged by the Original Side Rules. The learned Judge relied upon *The Pench Valley Coal Co. Ltd. Vs. The Indian Cable Co. Ltd.*, for the view taken by him.

(5) As regards condensation of delay, the learned Judge held that the summons was served on 27-12-1979 (sic) but the note of the Deputy Manager (Legal) of the defendant, dated 8-1-80 did not show that proper thought to the summons was given or that proper legal advice was taken for moving the application u/s 34 of the Act. It is for the defendant to explain each day's delay. At any rate, nothing was shown why the application could not be moved soon after 8-1-1980, when the period of 20 days was still to expire. It is also not shown that any legal advice from the counsel was obtained which could have led to an error in good faith. The defendant rather remained silent for about a year after the receipt of the goods and did not seek any specific reference to arbitration before the suit was instituted and further did not obtain legal advice from a counsel as to when

the application u/s 34 of the Act should have been moved. The summons was delivered to the receipt clerk of the defendant and clothing has been brought out to show that the defendant was not apprised of the summons within 20 days preceding 25-1-1980 when the application was moved. Both the applications were rejected and the suit was decreed with costs. Hence, this appeal.

(6) Regarding the objection as to the maintainability of the suit raised by the appellants, we are of the view that where the suit is for recovery of the price of the goods, it should be construed as a suit for enforcing payment of a debt, within the amended clause (b) of sub-rule (2) of Rule 1 of Order 37 CPC . which cover a few more categories of suits and not being inconsistent with Rule 1 of Chapter Xv of the Original Side Rules will govern the present suit, vide Rule 12 of the said Rules, .as explained in *Print Pak Machinery Ltd. Vs. Jay Kay Papers Conveters*, . Avadh Behari J. in *Sushila Mehta v. Shri Bansi Lal Arora & another*. I.A. 3032|81 in Suit No. 93181, decided on 26-10-1981(3), has held that the amendment of Order 37 CPC is neither repugnant nor inconsistent with Chapter Xv of the Original Side Rules, and a suit on a debt arising out of a written contract can be brought under the summary procedure. We are in respectful agreement with that view.

(7) What then, is a debt? Relying on *Webb v. Stenton* (1883) 11 Qbd 518, it was held in *The Commissioner of Wealth Tax Vs. Pierce Leslie and Co. Ltd.*, , that the essential requisites of a debt are (1) an ascertained or readily calculable amount ; (2) an absolute unqualified and pre- sent liability in regard to that amount with the obligation to pay forthwith or in future within a time certain; (3) the obligation must have accrued and be subsisting and should not be that which is merely accruing. A contingent liability or a contingency debt in, Therefore, neither a liability nor a debt. A debt is a "debitum in pracsenti, solvendum in future". We, Therefore, hold that the amount covered by the suit is an ascertained amount payable under an unqualified present liability. The obligation has accrued and subsists. It is a debt accruing under a written contract. The learned counsel for the defendant wanted to urge that the words "arising on a written contract" must be read along with the word "interest" and since no interest was payable under the contract the suit is not covered by clause (b) of Rule 2 of Order 37 CPC This is an argument totally unsupportable. The words "arising on a written contract" apply to the word "debt" which may be "with or without interest". We, Therefore, without any hesitation reject this contention of the appellant.

(8) In the *Pench Valley Coal Co. Ltd.* (supra.) it was held that the application u/s 34 of the Act must be made within the time as contemplated by Rule 3 of Order 37 CPC . Otherwise, this will be a method to defeat the provisions of Order 37. The only harmonious way to look at the parallel provisions of the Act and the CPC is to hold that an application covering section 34 of the Act where there is scope of such application, must fulfill the further limitation for leave to defend under Order 37 CPC The next question, Therefore, is whether this is the correct

statement of law and whether an application u/s 34 of the Act should have been moved within 20 days of service at the most and could in no case be entertained after the expiry of that period, as was the view taken in *Tekchand Madan v. M/s. Shyam Kamal Agencies*, (1978) 80 Plr 83, and *James Manickam Vs. Jaya Narayan Daga*, .

(9) According to Order 37 and the Forms prescribed summons in Form No. 4 in Appendix B together with a copy of the plaint and annexures thereto is issued in the first instance. Such summons requires the defendant to cause an appearance to be entered within ten days from the service thereof and to file in court an address for service of notices on him. If he fails to enter appearance, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree forthwith. If he enters appearance, he shall deliver a notice of such appearance to the plaintiff or his pleader or send the same by pre-paid letter to their address. The plaintiff then will file an application that he be at liberty to obtain judgment in the suit against the defendant. The application will be accompanied by an affidavit verifying the cause of action and the amount claimed and stating that in his behalf there is no defense to the suit. A summons in Form 4A will then be issued returnable not less than ten days from the date of service. Such summons directs all the parties concerned to attend the court in the forenoon of a date specified therein for hearing of the application of the plaintiff. Within ten days of the service of summons for judgment the defendant may by affidavit or otherwise disclosing such facts as may be sufficient to entitle him to defend, apply for leave to defend. If at the hearing of the summons for judgment, the defendant does not apply for leave to defend or if leave applied for is refused, the plaintiff shall be entitled to judgment forthwith. If the defendant is permitted to defend the suit. he may be asked to furnish security or to carry out any other direction and in case of default the plaintiff shall be entitled to judgment forthwith. The Court may for sufficient cause show excuse the delay in entering appearance or in applying for leave to defend. The decree, if any, passed may also be set aside and the defendant may be given leave to appear and defend.

(10) According to Rule 2 of Chapter Xv of the Original Side Rules (relating to summary suits) a notice is issued to the defendant calling upon him to obtain leave from the court to appear and defend the suit within 20 days of the service of the notice. The defendant is not allowed to appear or defend the suit unless he obtains leave for the said purpose. If he fails to obtain such leave, or fails to appear and defend in pursuance of the leave so obtained, the allegations in the plaint shall be deemed to have been admitted and the plaintiff shall be entitled to a decree. It is only when an order has been made giving leave to the defendant to defend the suit, that the defendant shall file the written statement and that too within 14 days from such order.

(11) No doubt in view of *Print pack* (supra) the procedure of Chapter Xv of the Original Side Rules will prevail over Order 37 CPC ., but we need not examine the

extent to which this will so prevail and better proceed to examine the notice which was issued to the defendant under Order 37 CPC read with Chapter Xc of the Original Side Rules. It purported to summon the defendant

"To obtain leave from the court within twenty days from the service hereof to appear and defend the suit and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of much twenty days to obtain decree for any sum not exceeding the sum of Rs. 3,69,642.64. The case is fixed for hearing on 31-3-1980."

"Leave to appear may be obtained on an application to the court supported by any affidavit of declaration showing that there is a defense to the suit on the merits or that it is reasonable that you should be allowed to appear in the suit."

(12) This notice as the endorsement on the back shown was served on 27-12-1979, but was not returned until 1-2-1980 and the case was adjourned to 17-3-1980. In the meanwhile, on 25-1-1980 Mr. S. K. Puri for the defendant Corporation filed an application u/s 34 of the Act coupled with an application u/s 5 of the Limitation Act for condensation of delay. Thereafter the case was adjourned on several occasions. Ultimately, the arguments were heard and the impugned order was passed on 6-10-1980.

(13) The rule to obtain leave within 20 days laid down in Chapter Xv relating to summary suits of the Original Side Rules does prescribe some sort of a period of limitation, as article 118 of the Limitation Act does in respect of applications for leave to appear and defend a suit under summary procedure (which Article appears redundant in so far as it may relate to Order 37 C.P.C. or the said Chapter XV. They lay down their own time schedule of procedure and do not depend upon the Limitation Act. But the necessary consequence is not that such an application must be rejected u/s 3 of the Limitation Act because Order 37 CPC or for that matter Chapter Xv itself indicates the consequences of failure to apply within the time specified therein. Such consequences are that the plaintiff shall be entitled to a decree upon the allegations made in the plaint. But until such a decree is passed, there is nothing to prevent the defendant to appear and explain the circumstances why he failed to apply for leave to appear and defend within 20 days from the service of the notice and why should he be allowed to do so now. Sub-rule (7) of Rule 3 of Order 37 CPC has placed this position beyond any controversy. Indeed, it appears incongruous and extremely position to adopt to hold that after the aforesaid failure to obtain leave within 20 days, a decree must be deemed to have been passed and then the defendant be required to move an application under Rule 8 of the said Rules to have it set aside. We are of the view that as long as a decree is not passed in accordance with Chapter Xv of the Original Side Rules, the defendant may be permitted for sufficient cause to make an application for leave to defend, specially when, as in this case, the court had fixed 30-1-1980 for hearing in the summons. This was so held in *S. Srinivasan and Another Vs. P. Bhakthavatsulu Naidu*, . The Calcutta High Court in *Pench Valley* (super) was of the view that if the defendant is allowed to make an

application u/s 34 of the Act even after 20 days, then it will defeat the provisions of Order 37. We are and may be permitted to say so with respect, not in agreement with that approach. The proper way of looking at the matter is that the special law of arbitration should be allowed to prevail over the general law. If the procedure under Order 37 or Chapter Xv of the Original Side Rules is allowed to prevail and the period of 20 days is held to operate as the period of limitation for making a stay application u/s 34 of the Act, then, the defendant will not at all be able to make such an application unless he has obtained leave to appear and defend because it is only upon such leave being given that a defendant is entitled to be heard in the matter. And if he makes an application to obtain leave to appear and defend, then it will amount to taking a step in the proceedings and he will be precluded from making an application u/s 34 of the Act. Authority for such a view is available in *Jadavji Narsidas Shah and Co. Vs. Hirachand Chatrabhuj*, . We, Therefore, hold that it is not necessary that an application for stay u/s 34 of the Act can be made only .within the time prescribed in Chapter Xv of the Original Side Rules or Order 37 CPC and shall be rejected if not made in time. Such an application can be made as long as a decree has not been passed and before any application has been made indicating that the defendant wants his rights to be determined by the civil court and not by the domestic forum of choice.

(14) There is now no need to examine the grounds of condensation, but we prefer to be categorical on that matter as well. If the said period of twenty days is a period of limitation attracting the penalty of rejection of any application u/s 3 of the Limitation Act, then an application u/s 5 of the Limitation Act does certainly lie. The summons was served on 27-12-1979 on the receipt and dispatch clerk of the defendant. They were sent on 28-12-1979 to the officer concerned. But the concerned main file could not be traced immediately. The case, Therefore, could be sent to the legal department only on 14-1-80. On that date the counsel was not available. He was available only on 21-1-1980 as he had gone outside Delhi. The legal adviser advised that the limitation of 20 days does. not apply to an application u/s 34 of the Act. This was 3 correct and bona fide advice and the application was made on 25-1-1980 before the date of hearing fixed by the summons. The delay has thus been satisfactorily explained, we condon the delay.

(15) We, Therefore, accept this appeal, set aside the order and decree under appeal and direct that the. application u/s 34 of the Act will now be decided on merits by the learned single Judge. The costs of the appeal shall be easy. The parties shall appear before the Deputy Registrar on 27-1-1982.