
(2013) 07 DEL CK 0107

In the Delhi High Court

Case No : Regular First Appeal 423 of 2012

Jord Engineers India Ltd.

APPELLANT

Vs

J.K. Forgings

RESPONDENT

Date of Decision : 05-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 17, 22, 22(1)

Citation : (2013) 07 DEL CK 0107

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Afroz Ahmad, for the Appellant; B.S. Dhir, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—This appeal u/s 96 of the CPC impugns the judgment and decree dated 7th July, 2012 of the learned Addl. District Judge-04, West (in CS 226/2011) in favour of the respondent for recovery of Rs. 6,57,060/- along with pendente lite interest @ 18% per annum from the appellant. Notice of the appeal was issued and vide ex parte ad interim order dated 16th October, 2012 the operation of the impugned judgment and decree was stayed subject to the appellant depositing the entire decretal amount before this Court. The same has not been done and CM No. 569/2013 has been filed seeking exemption from such deposit on the ground of the appellant being a sick company within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985. The counsel for the appellant/defendant Company has purported to argue the appeal on merits.

2. The counsel for the respondent objects stating that the appellant Company is not entitled to argue the appeal on merits without first complying with the condition imposed upon it of deposit of decretal amount.

3. The appellant Company in support of its plea of being a sick company has filed copy of the order dated 9th November, 2005 of the Board for Industrial and Financial Reconstruction (BIFR) in which it is recorded that the BIFR was satisfied that the appellant Company has become a sick industrial company as on 30th

June, 2001 and appointing an Operating Agency with respect to the appellant Company u/s 17 of the said Act. The appellant Company has also filed a copy of the order dated 4th June, 2007 of the Appellate Authority for Industrial & Financial Reconstruction (AAIFR) dismissing the appeal preferred by one Oman International Bank against the aforesaid order dated 9th November, 2005 of BIFR and holding that the BIFR has correctly arrived at the finding that permission u/s 22(1) of the said Act for recovery of the dues claimed by the said Oman International Bank from the appellant Company should not be granted. The appellant Company has also filed copy of the order dated 1st June, 2011 of the Division Bench of this Court in W.P. (C) No. 7047/2007 preferred by the said Oman International Bank.

4. In the face of the aforesaid documents, it has been enquired from the counsel for the respondent whether the respondent controverts the appellant Company being sick as aforesaid.

5. The counsel for the respondent states that he has no idea.

6. The counsel for the appellant Company on enquiry states that the appellant Company continues to be sick and there is no reason to disbelieve the said statement.

7. Though undoubtedly the appellant Company before the Trial Court did not apply u/s 22 of the said Act but cannot be faulted therefor inasmuch as the stage therefor as would be apparent from below, did not arise.

8. Once the appellant Company is found to be sick, the condition imposed upon it while granting stay of execution cannot be enforced and the same would be in the teeth of Section 22 supra. Even otherwise, non-compliance of such a condition can at best lead to the stay being vacated and does not come in the way of hearing of the appeal.

9. With the consent of the counsels, the appeal itself is taken up for hearing, the Trial Court record having been received.

10. A perusal of the record shows that the respondent had filed the suit under Order XXXVII of the CPC and summons for appearance were issued to the appellant Company. The appellant Company filed an appearance on 13th October, 2011, stating that it had been served on 11th October, 2011. The suit was thereafter listed on 14th October, 2011 when the counsel for the appellant appeared. The Trial Court however found that the summons served on the appellant Company had not been returned and thus the date on which the appellant Company had been served could not be known. The matter was thus adjourned awaiting the return of the summons served on the appellant/defendant Company showing the date of service of summons for appearance on the address, to determine whether appearance had been filed in prescribed time.

11. The summons were however not received back and the Trial Court thereafter on 2nd November, 2011, 23rd November, 2011, 5th December, 2011, 21st May,

2012 & 26th May, 2012 engaged itself in finding out the date on which the summons for appearance had been served on the appellant/defendant Company by ordering enquiry in the Nazarat as well as by directing the appellant/defendant Company to produce summons or other records to show the date on which it was served.

12. However neither could it be found out as to when the summons for appearance were served on the appellant/defendant nor did the appellant/defendant produce the summons received by it or any other record showing the date on which it received the summons.

13. On 26th May, 2012 orders were reserved and vide impugned judgment dated 7th July, 2012 the Trial Court decreed the suit observing that the appellant/defendant Company had not put any legal and valid appearance and the appearance put was without any proper and legal authority and beyond the prescribed period of 10 days.

14. I have enquired from the counsel for the respondent as to whether there is any finding of the Trial Court of the date on which the appellant/defendant Company was served with the summons for appearance. The counsel has fairly admitted that there is no finding to the said effect. The counsel even otherwise from the record is unable to show the date on which the appellant/defendant Company was served with the summons for appearance. His only argument is that since the appellant/defendant Company was claiming to have been served on 11th October, 2011, it was for the appellant/defendant Company to produce the summons served upon it and the appellant/defendant Company having failed to do so the Trial Court is correct in presuming the appearance to have been not filed within the prescribed period of 10 days.

15. A perusal of the Trial Court record shows that the summons for appearance were first issued on 2nd August, 2011 for 14th October, 2011. The noting made by the Reader of the Trial Court on the order sheet of 2nd August, 2011 is that though summons were issued by both ways on 27th August, 2011 but had not been received back and the AD card received back also did not show the date of delivery.

16. I am of the view that a defendant upon service of summons for judgment is only obliged to enter/file an appearance within 10 days and is not obliged to appear (on the dates fixed in the suit) before the Court thereafter till summons for judgment are served on the defendant. Rather, Form No. 4 of Appendix B to the CPC, of summons for appearance, does not even disclose the next date fixed in the suit to the defendant on whom the summons are served. Once an appearance has been filed, the summons for judgment have to be issued at the address for service disclosed in the said appearance and no enquiry as to whether the appearance had been filed by the authorized person on behalf of the defendant, if a Company, or not is envisaged at that stage. Even if the defendant, though as aforesaid not required to appear before the Court and

required only to file an appearance before the Court, the Court cannot commence an enquiry as to the authority of the person who has filed the appearance. The appearance filed in the present case shows the appellant/defendant Company to have given its Gujarat address for summons for judgment and the said appearance was filed by an Advocate regularly practising in the Courts along with his Vakalatnama.

17. The Trial Court, though as aforesaid could not have conducted an enquiry into the authority of the person entering appearance, is however entitled to find out whether the appearance has been filed within time. The learned Addl. District Judge in the present case did commence such an enquiry but the same remained unsuccessful and as aforesaid the learned Addl. District Judge also has in the impugned judgment not returned any finding on the date on which the summons had been served. In the absence of any such finding, the learned Addl. District Judge has certainly erred in holding the appearance to have been filed beyond time.

18. I am also of the opinion that since a defendant is required only to enter/file appearance and not to appear before the Court on the date next fixed for appearance, the onus to prove the date on which the summons for appearance were served cannot be placed on the defendant and resultantly no adverse inference can be drawn against the defendant for not discharging the said onus. If it were to be held otherwise, it would commence a mini trial at that stage and which the law does not envisage.

19. In so far as the learned Addl. District Judge has observed that the appearance has not been filed in accordance with law, I find the appearance to be signed on behalf of the appellant/defendant Company under seal of the appellant/defendant Company as well as by the Advocate for the appellant/defendant Company and accompanied by the affidavit of the "legal executive" of the appellant/defendant Company, the address for service of summons for judgment on the appellant/defendant Company, as well as Vakalatnama in favour of the Advocate for the appellant/defendant Company. The counsel for the respondent also is unable to tell any irregularity in the appearance so entered.

20. Once it is held that the finding of the learned Addl. District Judge of the appearance entered into by the appellant/defendant Company being beyond time or not in accordance with the law is unsustainable, the impugned judgment and decree which has merely followed such finding has but to be set aside.

21. The appeal therefore succeeds. The judgment and decree dated 7th July, 2012 decreeing the CS No. 226/2011 of the Court of Addl. District Judge-04, West, Delhi is set aside and the matter is remanded to the District Judge, West for proceeding further, treating the appellant/defendant Company to have filed appearance within time in pursuance to the summons for appearance. The respondent/plaintiff to appear before the District Judge West, Delhi on 22nd August, 2013. The Trial Court record which was requisitioned before this Court be

also returned forthwith.

No costs.

Decree sheet be drawn up.