

(2012) 08 DEL CK 0150
In the Delhi High Court
Case No : CS (OS) No. 2109 of 2002

M/s Associates India Financial Services (P) Ltd.	APPELLANT
Vs	
M/s Atwal and Associates and Others BC+	RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 2
Evidence Act, 1872 — Section 34

Citation : (2012) 08 DEL CK 0150

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : P.K. Bhalla, for the Appellant; Varun Jain, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.

I.A. Nos. 11370/2003 (U/o 37 R 5 CPC by D-1)

I.A. No. 5498/2003 (U/o 37 R 5 CPC by D-3)

I.A. No. 5499/2003 (U/o 37 R 5 CPC by D-4)

I.A. No. 791/2004 (U/o 37 R 5 CPC by D-2)

1. These are applications filed by all the four defendants for leave to defend in a suit filed under Order 37 of Code of Civil Procedure, 1908 (CPC) for recovery of Rs.44,83,209/-. It is trite that suit under Order 37 is maintainable on three counts. One is that there is a dishonoured negotiable instrument in favour of the plaintiff. Second is that a liquidated demand arises from (i.e as specified in) a written contract with interest arising and thirdly on a written contract of guarantee and which also has to contain the liquidated demand.

2. The subject suit is a suit filed by a Finance Company. A reference to the plaint shows that the plaintiff makes averments with respect to granting of finance for a

sum of Rs.66,06,200/- for certain commercial equipment. A hire purchase agreement is referred to, which is signed by the defendants on 28.9.2000. There is a reference to a demand promissory note of the same date for Rs.66,06,200/-. There is also a mentioning of a guarantee executed by defendant Nos. 2 and 3 in favour of the plaintiff of the same date. The averments made in the plaint also admit the fact that after grant of the original loan, there were various repayments made by defendant No. 1, however, since there were defaults in payments of certain installments, the amount which is claimed in the suit, is said to have become due. The amount which is claimed in the suit even as per the plaint is not the amount which is the amount mentioned in the agreement dated 28.9.2000, but the amount is the balance due at the foot of the account. No doubt remains in this regard inasmuch as para 13 of the plaint reads as under:-

13. That as per the accounts maintained by the plaintiff company the defendants are liable to pay a sum of Rs. 44.83.209/- (RUPEES FORTY FOUR LACS EIGHTY THREE THOUSAND TWO HUNDRED NINE ONLY) (Jointly and severally) towards principal, interest, penal interest and other charges after adjusting the payment made by the defendants as on 30.11.2002.

(emphasis added)

3. Admittedly, there is no other averment in the plaint as to how the amount claimed in the suit of Rs.44,83,209/- arises from a particular written agreement. In an Order 37 suit the amount claimed in the suit may be the principal amount plus interest arising therefrom, however, once again the plaint makes no reference to a specific particular principal amount which has been stated as a liquidated amount in a written agreement payable to the plaintiff, and the balance claimed in the suit is only interest arising thereafter.

4. The object of an Order 37 CPC suit is that on the basis of the documents specified therein the liability towards the plaintiff is admitted. Only when the liability which is admitted in the dishonoured instrument or in the written document containing a liquidated demand as payable to the plaintiff, suits can be filed under Order 37 CPC. Those suits claiming amounts which are only balances due at the foot of account cannot be treated as falling under Order 37 CPC because the suit claim is based on the account and the amount claimed is not a liquidated amount arising/payable to the plaintiff on an instrument on the limited types which are the subject matter of Order 37 CPC. Entries and statements of account have necessarily to be proved as per Section 34 of the Evidence Act, 1872 for the balance at the foot of the account to be arrived at. The present suit plaint also makes no mention of any written acknowledgment of debt, which may have amounted to a written agreement containing the liquidated demand with interest arising.

5. I have had an occasion to examine the aspect as to whether a suit such as the present can be said to be one under Order 37 CPC in the judgment of M/s K&K Health Care Pvt. Ltd. Vs. M/s Pehachan Advertising, RFA 202/2011 decided on

23.1.2012, in which, I have observed that such type of suit cannot be filed under Order 37 CPC. Paras 2 to 5 of that judgment are relevant and which read as under:-

2. The subject suit for recovery of money was filed by the respondent/plaintiff for recovery of monies on the cause of action of non-payment of bills by the appellant/defendant. The bills were raised by the respondent/plaintiff on the appellant/defendant on account of advertisements issued in newspapers by the respondent/plaintiff on behalf of the appellant/defendant. The suit which was filed under Order 37 CPC, claimed the amounts due under the bills which were stated to be "written contracts containing liquidated demand", though simultaneously admitting that after the bills were raised various payments were made towards the bills. The details of bills and payments made, when first filed by the respondent/plaintiff, were as under:-

Accounts Statement of M/s K & K Health Care Pvt. Ltd. from 01.07.2005 to 15.11.2005

Date

Particulars

Amount (Dr)

Amount (Cr)

Balance (Dr)

15.06.2005

Balance B/F

32,372.25

30.07.2005

Bill No. 07/020

290,652.00

11.08.2005

Bill No. 08/010

66,376.00

13.08.2005

Bill No. 08/019

72,127.00

18.08.2005

Bill No. 08/022

72,127.00

25.08.2005

Bill No. 08/035

288,609.00

05.09.2005

Bill No. 09/003

72,127.00

08.09.2005

Bill No. 09/005

99,418.00

08.09.2005

Bill No. 09/008

5,254.00

07.11.2005

Ch. No. 527736

87,652.00

10.11.2005

Ch. No. 527738

254,453.00

Total

999,062.25

342,105.00

6,56,957.25

3. Subsequently, on the appellant/defendant stating and detailing other payments, a fresh statement of account was filed by the respondent/plaintiff reflecting the position of bills and payments as under:-

M/s K & K Health Care Pvt. Ltd. Ledger Account from 01.04.2005 to 7.11.2005

Date

Particulars

Debit

Credit

Balance

01.04.2005

Dr

Opening Balance

9,54,722.81

9,54,722.81

11.04.2005

Cr

Ch. No. 860348

100,000.00

2,112,065.25

30.05.2005

Cr

Ch. No. 474952

200,000.00

1,912,065.25

06.06.2005

Dr

Bill No. 06/015

72,126.91

1,098,976.63

09.06.2005

Cr

Ch. No. 474974

100,000.00

1,812,065.25

16.06.2005

Dr

Bill No. 06/018

73,199.07

1,72,175.70

23.06.2005

Dr

Bill No. 06/031

72,126.91

1,026,849.72

29.06.2005

Cr

Ch. No. 464018

100,000.00

1,712,065.25

30.06.2005

Cr

Ch. No. 464025

100,000.00

1,612,065.25

30.06.2005

Dr

Bill No. 06/059

73,199.07

1,245,374.77

22.07.2005

Cr

Ch. No. 464062

100,000.00

1,512,065.25

30.07.2005

Dr

Bill No. 07/020

290,651.96

1,536,026.73

05.08.2005

Cr

Ch. No. 464078

64,313.00

1,447,752.25

06.08.2005

Cr

Ch. No. 464079

65,183.00

1,318,256.25

08.08.2005

Dr

Bill No. 08/010

66,376.25

1,674,529.89

13.08.2005

Dr

Bill No. 08/019

72,126.91

1,608,153.64

18.08.2005

Dr

Bill No. 08/022

72,126.91

1,746,656.80

25.08.2005

Dr

Bill No. 08/035

288,609.18

2,035,265.98

26.08.2005

Cr

Ch. No. 464160

64,313.00

1,383,439.25

29.08.2005

Cr

Ch. No. 464161

65,268.00

1,252,988.25

09.09.2005

Cr

Bill No. 09/003

72,126.91

2,107,392.89

09.09.2005

Cr

Bill No. 09/005

99,418.18

2,206,811.07

09.09.2005

Dr

Bill No. 09/008

5,254.18

2,212,065.25

21.10.2005

Cr

Ch. No. 527737

4,632.00

1,248,356.25

24.10.2005

Cr

Ch. No. 527732

58,521.00

1,189,835.25

27.10.2005

Cr

Ch. No. 527734

63,591.00

1,126,244.25

27.10.2005

Cr

Ch. No. 522233

63,591.00

1,062,653.25

30.10.2005

Cr

Ch. No. 527735

63,591.00

999,062.25

07.11.2005

Cr

Ch. No. 527736

87,652.00

911,410.25

10.11.2005

Cr

Ch. No. 527738

254,453.00

656,957.25

Total Outstanding Rs.656,957.25

This latter statement of account is a part of the statement of account running into a total number of eight pages. This second statement of account, in addition to the two payments reflected in the first statement of account, admitted and reflected as many as five other payments. The fact that payments have been made as reflected in aforesaid two statements of account is not in dispute between the parties. The suit really therefore is a suit for the balance due at the foot of the account and is not one which is only and only on the basis of the amounts contained in the bills. The suit thus could not have been filed under Order 37 CPC as the amount claimed in the suit was not the amount as mentioned in the bills which are stated to be written contracts containing the liquidated demands of moneys payable.

4. Learned counsel for the respondent relies upon a decision of learned Single Judge of this Court in the case of M/s. Lohmann Rausher Gmbh. Vs. M/s. Medisphere Marketing Pvt. Ltd.; 2005 2 AD (Del) 604 to argue that the suit on the basis of invoices is maintainable under Order 37 CPC. Of course, I am bound by the decision of the learned Single Judge and therefore a suit on the basis of invoices can be said to be maintainable under Order 37 CPC, however, in the present case the suit is not based on the invoices only but the amount claimed in the suit is the balance due at the foot of a running account i.e. after giving adjustment/credit for certain payments made for the invoices/bills. The suit is therefore definitely not only on the basis of invoice amounts alone for the same to be covered under Order 37 CPC. Also, in my opinion, in an appropriate case this issue will have to be examined whether a suit under Order 37 CPC can be filed on the basis of invoices alleging the same to be "written contracts containing a debt or liquidated demand?"- the necessary requirement of Order 37 CPC. The whole purpose of the provision of Order 37 Rule 1 CPC entitling filing of the suit on a debt or liquidated demand was that there is an agreement showing that there is an admitted liability and a liquidated liability or debt which is claimed in an Order 37 suit. When an Order 37 suit is filed on bills, the bills only reflect goods supplied and therefore I feel that it cannot be said that bills should be taken as agreements containing liquidated demands or an acknowledgment or promise to pay or an admitted liability or such other factor so as to bring the claim as "claim for debt or liquidated demand arising on a written contract" as found in Order 37 CPC.

5. In view of the above, I need not go into the merits of the matter inasmuch as the plaintiff cannot arm-twist a defendant by filing a suit under Order 37 CPC, and argue in the trial Court and also before this Court, that it has a prima facie strong case on merits and therefore the impugned order granting conditional leave to defend must be sustained. Merely because a plaintiff/respondent feels it

has a strong case on merits cannot mean that the suit can be filed under Order 37 unless the mandatory requirement of basing the suit on one of the four requirements of Order 37 Rule 1 sub Rule 2 is complied with. If the suit is not maintainable under Order 37, there does not arise an issue of any conditional leave to defend as was granted by the trial Court.

(underlining added)

6. The present suit is pending since the year 2002 i.e 11 years. In these 11 years, in my opinion, there has been a gross wastage of judicial time on account of the plaintiff insisting that the suit be treated under Order 37 CPC. It is quite obvious that the suit is not maintainable under Order 37 CPC. Even today, I put it to the counsel for the plaintiff that how can a suit which claims the balance at the foot of the account can be a suit under Order 37 CPC because the balance which is claimed at the foot of the account is not supported by a written document admitting such liability to be payable and whereupon this liability would be a liquidated demand arising out of a written contract. Counsel for the plaintiff insisted on arguing that the suit is maintainable under Order 37 CPC. Since the suit is not maintainable under Order 37 CPC, I allow these applications and grant unconditional leave to defend with payment of costs of Rs.25,000/- to these defendants, who have been put to unnecessary expenditure with respect to filing of the applications for leave to defend in a suit which is quite clearly not maintainable under Order 37 CPC.

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Since I have allowed the applications for leave to defend, the defendants will now file the written statement within six weeks from today. Replication be filed within four weeks thereafter. Counsel for the plaintiff states that admission/denial of documents has been already done in this suit.

List for framing of issues on 19th November, 2012.