

**(2019) 09 DEL CK 0019**

**In the Delhi High Court**

**Case No :** Civil Revision Petition No. 42 Of 2019

M/S S S Steel Industry

APPELLANT

Vs

M/S Shri Guru Hargobind Steels

RESPONDENT

**Date of Decision :** 05-09-2019

**Acts Referred:**

Code Of Civil Procedure, 1908 — Order 37, Order 37 Rule 2(3)

**Citation :** (2019) 3 RLR 164

**Hon'ble Judges :** Sanjeev Sachdeva, J

**Bench :** Single Bench

**Advocate :** Vishal Garg

**Final Decision :** Allowed

## Judgement

Sanjeev Sachdeva, J

1. Petitioner impugns the order dated 26.11.2016, whereby the Suit of the petitioner / plaintiff filed under Order XXXVII Code of Civil Procedure has been directed to be treated as an ordinary Suit. Petitioner has also impugned order dated 11.10.2018, whereby the application seeking recall / review of the order dated 26.11.2016 has been dismissed.

2. Petitioner filed the subject Civil Suit under Order XXXVII CPC claiming recovery of Rs. 37,51,513/- being the amount due to the plaintiff for sale and supply of material inter alia steel scrap to the respondent.

3. The Suit is based on ten invoices. The Suit was filed for ten invoices totalling to Rs. 47,23,996/-. The Suit was filed after giving an adjustment of Rs. 12,57,351/-, which the plaintiff stated was the sale consideration for the material i.e. old scrap, iron material, which was stated to have been purchased by the plaintiff from the defendant.

4. The trial court issued summons in the prescribed format under Order XXXVII CPC. Summons were duly served on the respondent on 24-25.08.2016 through

courier and 20-22.08.2016 by registered AD. Despite the service respondent failed to enter appearance.

5. When the petitioner applied to the Court for passing of a decree as respondent had failed to enter appearance, the trial court by the impugned order dated 26.11.2016 held that since the petitioner was claiming balance amount of the invoices and there was some doubt about the authenticity of the invoices, the Suit be treated as an ordinary Suit.

6. It is pointed out by learned counsel for the petitioner that the Suit filed by the petitioner under Order XXXVII CPC was for ten invoices, which were duly acknowledged and signed by the respondent and adjustment in the Suit had been given only of an amount which was payable by the plaintiff for the goods purchased by the plaintiff from the defendant. He submits that the Suit based on written contract i.e. the invoices.

7. Further, it is contended that the trial court had doubted the invoices solely because there was some white fluid on a portion of the invoices containing terms and conditions. Learned counsel submits that the trial court could not have doubted the veracity of the invoices, especially, when no appearance was entered by the respondent / defendant or any application seeking leave to defend filed and objection taken to the invoices.

8. Learned counsel submits that the trial court has erred in relying upon the decision of the Supreme Court in Neebha Kapoor Vs Jayantilal Khandwala (2008) 3 SCC 770. He submits that in the said case the defendant had entered appearance and the Supreme Court had noticed that no original documents had been produced before the Court and held that the plaintiff in any case had to lead secondary evidence to prove the documents and in those circumstances the Supreme Court was of the view that it was a fit case for grant of conditional leave to defend even though no application seeking leave to defend had been filed.

9. Learned counsel submits that in the present case no appearance had been entered by the respondent, so averments made in the plaint are liable to be admitted under Order XXXVII CPC and a decree is liable to be passed forthwith.

10. Learned counsel further relies on the judgment of the Division of this Court in Comba Telecom Ltd. Vs. S. Tel Private Ltd. 2016 (228) DLT 713 to which I was also a party.

11. The Division Bench in the said judgment has held that in a Suit under summary procedure under Order XXXVII, where summons are duly served and the defendant has not entered appearance, the defendant could not defend the Suit, all allegations made in the plaint are deemed to be admitted and the consequences are that the plaintiff would be entitled to a decree as indicated under Order XXXVII Rule 2 Sub Rule 3 CPC.

12. Order XXXVII Rule 2 Sub Rule 3 CPC specifically lays down that defendant

shall not defend the Suit unless he enters appearance and in default of his entering appearance the allegations made in the plaint shall be deemed to be admitted and plaintiff would be entitled to a decree for the sum not exceeding the sum mentioned in the summons.

13. The learned Trial Court, though noticed the judgment of the Division Bench of this Court in Comba Telecom Ltd. (Supra), has held that the same is not applicable on the ground that the Suit is not maintainable under Order XXXVII CPC.

14. The Trial Court has clearly committed an error. In view of the specific provisions of Order XXXVII Rule 2 Sub Rule 3 CPC, it is not within the powers of the Trial Court at that stage, to assess as to whether the Suit satisfies the requirement of Order XXXVII CPC or not. Once summons in the prescribed form have been directed to be issued and duly served, the defendant is obliged to enter appearance within the statutory period, and on failure of the defendant to enter appearance within the statutory period, the averments in the plaint are deemed to be admitted and the plaintiff is entitled to a decree forthwith.

15. The plaintiff has specifically filed the Suit under Order XXXVII CPC and contended that the said Suit is based on a written contract i.e. invoices which have been duly signed and acknowledged by the respondent. It was not open to the learned Trial Court at that stage to re-consider the issue and hold that the Suit is not maintainable under Order XXXVII CPC.

16. With regard to the finding of redaction of Clauses in the invoices by applying white fluid, it was for the respondent / defendant to have taken an appropriate objection in an application seeking leave to defend, filed after entering appearance.

17. Since the respondent has failed to enter appearance the averments in the plaint are deemed to have been admitted and the plaintiff is entitled to a decree.

18. It may further be noticed that since the respondent had failed to enter appearance, no notice is required to be issued to the respondent of the present proceedings, consequently, no notice has been directed to be issued to the respondent at this stage. The respondent who has failed to enter appearance in terms of Order XXXVII CPC is also not entitled to defend an order which is passed erroneously by the Court at that stage.

19. In view of the above, the present petition is allowed. Consequently, the impugned orders dated 26.11.2016 and 11.10.2018 are set aside.

20. Let the Suit be placed before the concerned Trial Court on 12.09.2018. The Trial Court shall pass an appropriate order in accordance with law.

21. Order Dasti under signatures of the Court Master.