
(2010) 09 DEL CK 0129

In the Delhi High Court

Case No : R.A. No. 5 of 2010 and R.P. No. 70 of 2010 in C.S. (OS) No. 267 of 2006

National Small Industries Corp. Ltd.

APPELLANT

Vs

Shrishti Auto Engg. (P) Ltd. and Others

RESPONDENT

Date of Decision : 08-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 2, Order 37 Rule 3, Order 37 Rule 3(5)

Citation : (2010) 09 DEL CK 0129

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Mohinder Thakur, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

Shiv Narayan Dhingra, J.

R.A. No. 5/2010 in C.S. (OS) No. 267/2006

No ground to entertain this application. Same is dismissed.

R.P. No. 70/2010 in C.S. (OS) No. 267/2006

1. This application for review has been filed by the plaintiff seeking review of order dated 14th December, 2009, whereby this Court had granted leave to defend to defendants No. 2 and 3 in a suit under Order 37 Rule 1 of CPC. It is submitted by the plaintiff/review petitioner that this Court in its order dated 26th April, 2007, had observed that the defendant No. 4 was very well aware of the pendency of the suit, but, had not filed memo of appearance within 10 days as per requirement of Order 37 Rule 2 & 3 CPC and the order with regard to this fact would be passed on next date of hearing. However, the necessary order regarding effect of not putting appearance by defendant No. 4 within 10 days was not passed and the order dated 26th April, 2007, skipped the notice of this Court at the time of considering the application for leave to defend. The other

submission is that defendant No. 3, who was Director of defendant No. 1, company, was served in December, 2007, and he had also not put his appearance. An order of this Court dated 8th April, 2008, noticed that defendant No. 3 had been served and had not put appearance. The order-sheets after 8th April, 2008 and thereafter clearly show that only defendant No. 1, 2 and 4 were appearing and represented by the Counsel and there was no appearance/representation on behalf of defendant No. 3. However, this Court on the basis of observations made in application for leave to defend of defendants No. 1 & 2, considered as if leave to defend was filed on behalf of defendant No. 3 also and vide order dated 14th December, 2009, allowed the leave to defend application on behalf of defendant No. 3. It is stated that order passed in respect of defendant No. 3 and 4 granting leave to defend was therefore, contrary to record and there was an error apparent on the face of order dated 14th December, 2009.

2. I have perused the order dated 26th April, 2007 passed by this Court where from it is clear that defendant No. 4 had filed an affidavit supporting the application made by defendant No. 1 & 2 but he had not put in his appearance in the case and had not filed memo of appearance within 10 days. A decree in terms of the suit was to be passed out rightly against defendant No. 4. However, the order was deferred as the Court considered it would be appropriate to pass order in respect of all the defendants at one go. Similarly, the order dated 8th April, 2008, shows that defendant No. 3 was served in December, 2007, still, no appearance was put by defendant No. 3. A perusal of orders passed after dated 8th April, 2008, would show that defendant No. 3 did not appear in the court even thereafter nor he was represented in the court through any counsel. It is obvious that defendant No. 3 had not contested the suit under Order 37 CPC and plaintiff was entitled for a decree as against defendant No. 3 as well.

3. Thus, apparently, these two orders skipped the notice of this Court while disposing of application for leave to defend made by defendant No. 1, 2 and 4. The application for leave to defend filed by defendant No. 4 could not have been considered since he had not put appearance within prescribed period of 10 days and the plaintiff became entitled for judgment. Similarly, the defendant No. 3, who had not contested the suit and had not put appearance within prescribed period, was also to suffer a decree and was not entitled to leave to defend. There being errors apparent on the face of the record, the order dated 14th December, 2009, passed by this Court, needs modification for correcting these errors. Para No. 13 of the order dated 14th December, 2009, is modified to read as under:

13. I, therefore, find that no triable issues have been raised by defendant No. 1 in this case. The only effort of the defendants from the very beginning had been to see that the proceedings in this case are delayed on one or the other ground. As far as defendant Nos. 2, 3 and 4 are concerned, defendant No. 3 and 4 are not entitled to leave to defend since they did not put appearance within the prescribed period of 10 days and defendant No. 3 did not contest the suit at all. So far as defendant No. 2 is concerned, defendant No. 2, a director of the

Company, had executed an indemnity bond in favour of the plaintiff to the following extent:

In consideration of your having placed/agreed to place orders for machines for giving them to our company on H.P. Basis, we hereby jointly and severally agree to indemnify the National Small Industries Corporation, Gurgaon-Haryana against all losses, expenses which may be suffered and incurred by the Corporation in relation thereto, to the extent of Rs. 122.44 lacs.

4. Para No. 14 shall read as under:

14. In view of defendant No. 2 indemnifying the plaintiff for the losses that may be suffered by the plaintiff in respect of hire purchase agreements, I consider that defendant No. 2 is entitled for leave to defend in view of the judgment of Supreme Court in the case of State Bank of Saurashtra Vs. Ashit Shipping Services (P.) Ltd. and Another, I, therefore, dismiss the application made by defendant No. 1 & 4 under Order 37 Rule 3(5) CPC for leave to defend and defendant Nos. 2's prayer for leave to defend is allowed.

5. Para No. 15 shall read as under:

In view of the fact that application for leave to defend of defendant No. 1 & 4 has been dismissed and defendant No. 3 has not contested the suit, the suit of the plaintiff is decreed as against defendant No. 1, 3 & 4 for a sum of Rs. 1,45,08,077.00 along with costs and pendent elite and future interest @ 8% per annum, jointly and severally. Decree-Sheet be prepared against defendants No. 1, 3 and 4.

List before the Joint Registrar for completion of pleadings viz-a-viz defendant Nos. 2 on 24th February, 2010.

6. The review application is allowed in the above terms.