(2017) 12 DEL CK 0204

In the Delhi High Court

Case No : Civil Suit (OS) No. 3309 Of 2015, Miscellaneous Application No. 5964 Of 2017

TV18 Home Shopping Network Limited — APPELLANT

Vs

M/S Indiaontime Express Pvt Ltd & Ors — RESPONDENT

Date of Decision : 07-12-2017

Acts Referred:
Code Of Civil Procedure, 1908 — Section 151, Order 8 Rule 10

Citation : (2017) 12 DEL CK 0204

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Sumant Dey

Final Decision : Allowed

Judgement

Manmohan, J

I.A. 5964/2017

1. Present application has been filed under Order VIII Rule 10 read with Section 151 CPC.

2. It is pertinent to mention that the present suit has been filed for recovery of Rs.2,06,65,318/- along with interest and damages. The prayer clause in the present suit is reproduced hereinbelow:-

"(a) Pass a decree for a sum of Rs.1,69,57,826/- (Rupees One Crore sixty nine lacs fifty seven thousand eight hundred twenty six only) along with pendent lite and future interest @ 12% p.a. which is the agreed contractual rate of interest in favour of the Plaintiff and against the Defendants jointly and/or severally; and

(b) Pass a decree of Rs.37,07,492.00/- (Rupees thirty seven lacs seven thousand four hundred ninety two only) being the interet on the above mentioned amount as mentioned in prayer clause (a) @ 12% per annum from the date of due till the filing of the present suit; and

(c) pass a decree of future and pendent lite interest from the date of filing of the present suit till its realization @ 12% being the contractual rate of interest for any default; and

(d) Pass a decree of Rs.50,00,000/- in favour of the Plaintiff and against the Defendants, jointly as well as severally, towards the damages it suffered due to the illegal acts of withholding the amounts without any basis; and

(e) Pass a decree of Cost; and

(f) Any other or further relief which this Hon"ble Court deem fit and proper in the facts of the case be also granted in favour of the Plaintiffs and against the Defendants."

3. Though the defendants initially entered appearance, yet after 18th April, 2017 they stopped appearing. Accordingly, the defendants were proceeded ex parte vide order dated 18th May, 2017.

4. The contentions and submissions advanced by learned counsel for the plaintiff are as under:-

i. The plaintiff operates a digital commerce platform under the brand name 'homeshop18' that combines the reach of the internet, television and mobile devices enabling various manufacturers, sellers and distributors to efficiently market and sell their products to customers.

ii. The defendant No. 1 is a logistic company and is engaged in the business of collecting, transporting and delivering goods/consignments for its customers from one destination to another using various modes of transport. Defendant Nos. 2 and 3 are directors of defendant No. 1 and are actively involved in its day to day operations.

iii. For effective management of the e-commerce business i.e. to collect products/ consignments from the designated warehouses of the sellers and deliver them to the end user and on delivery, as the case may be, collect consideration on behalf of the plaintiff and deposit the same, the plaintiff entered into an agreement dated 21st August, 2012 with the defendants. As per Clause 5(I) of the said agreement, it was agreed between the parties that in case of damage/loss to the consignment during transit, the defendants were liable to make good the value of such consignment.

iv. During the subsistence of the aforesaid agreement, the parties entered into a separate service agreement on 28th November, 2012 with respect to delivery system and certain other services like storage wherein it was agreed between the parties that the rate chargeable would be on the basis of the dimension of the consignment.

v. As per the aforesaid agreements, the defendants undertook to make remittances within 7 working days post-delivery of the consignment with respect to shipments under the cash-on-delivery scheme to the plaintiff. It was agreed that all cash-on-delivery reconciliations were to be concluded within 60 days post-delivery and incase of delay in delivery, the plaintiff would be entitled to collect further 10% rebate on the freight bills of the said month.

vi. It was further agreed that the defendants shall inform the plaintiff, twice a day on daily basis i.e. once at 10:30 hours and thereafter at about 14:00 hours about all non-deliveries so as to allow the plaintiff to issue alternate instructions for delivery, if required.

vii. As per the agreed terms, the defendants raised monthly bills at the beginning of each month for all shipments made by them during the preceding month.

viii. On 29th November, 2012, the parties entered into another service agreement for delivery by Feet on Street (FOS) at all stations as enumerated under the Annexure to the said agreement wherein the defendants agreed to provide manpower to handle all such FOS shipment related services. The defendants further undertook to deposit the payments of all cash-on-delivery consignments within 5 working days of such delivery.

ix. Though under the aforesaid agreements, the cash payments collected by the defendants under the cash-on-delivery scheme were to be remitted to the plaintiff strictly as per the agreed terms, yet in August 2012, the defendants started evading regular updates and failed to give the details of the cash collections collected by them from the consignees under the COD scheme. The defendants also started evading reconciliations.

x. The cash amounts collected by the defendants on behalf of the plaintiff from 24th September, 2012 till 31st December, 2013 totaled to Rs. 35,72,95,766. However, the same were not reconciled as per the agreed mechanism. Though the defendants in order to liquidate its part liabilities towards the plaintiff issued a cheque dated 11th December, 2013 for Rs. 2 Crores, yet the same was returned unpaid with remarks 'Insufficient Funds'.

xi. Though the plaintiff vide its e-mails dated 05th May, 2014 and 15th March, 2014 as well as legal notice dated 2nd February, 2015, requested the defendants to clear the outstanding dues of Rs.2,06,65,318/-, yet the defendants have failed to pay the same till date.

5. This Court while dealing with a similar application under Order VIII Rule 10 CPC in CS(OS) 873/2015 Samsung Electronics Company Limited & Anr. Vs. Mohammed Zaheeer Trading As M/s. Gujarat Mobiles & Ors. has culled out the relevant law as under:-

"10. The Supreme Court in C.N. Ramappa Gowda Vs. C.C. Chandregowda, (2012) 5 SCC 265 has interpreted the Order VIII Rule 10 CPC as under:-

"25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect [Ed.: It would seem that it is the purpose of the procedure contemplated under Order 8 Rule 10 CPC upon non-filing of the written statement to expedite the trial and not penalise the defendant.] of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial."

11. A Coordinate Bench of this Court in Nirog Pharma Pvt. Ltd. Vs. Umesh Gupta and Ors., 235 (2016) DLT 354 has held as under:-

"11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to prove its contents.

xxxx xxxx xxxx xxxx

28. The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to linger on. Accordingly, if the defendant fails to persue his case or does so in a lackadaisical manner by not filing his written statement, the courts should invoke the provisions of Order VIII Rule 10 to decree such cases."

12. Another Coordinate Bench of this Court in Satya Infrastructure Ltd. and Ors. Vs. Satya Infra & Estates Pvt. Ltd., 2013 III AD (Delhi) 176 has held as under:-

"4. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record........."

6. This Court is of the opinion that despite receipt of the plaintiff's emails dated 05th May, 2014 and 15th March, 2014 as well as legal notice dated 2nd February, 2015, the defendants have failed to clear the outstanding amounts due to the plaintiff. The plaintiff's emails dated 05th May, 2014 and 15th March are reproduced hereinbelow:-

From: Nitin Jain KR[mailto:nitin.jain@homeshop18.com]

Sent: 05 May 2014 12:12

To: Ramesh KR; sureshd@indiaontime.com; "Fayaz";

usha@indiaontime.com; sudharsan@indiaontime.com; "VIMAL"

Cc:Gurvinder Singh (Finance); Mani Bhushan; DS Negi; Ravi Khanna

Subject: RE: IOT_ Outstanding HS 18

Dear Mr. Ramesh,

Kindly remit the COD payment immediately as per the below mentioned status update provided by you. For the balance cases, reconciliation needs to be done.

SUMMARY OF

RECONCLIATION; HS18

OUTSTANDING

PAYABLE

COD AMOUNT

FREIGHT AMOUNT

Remarks

Delivered Payable

1,36,90,328

1,30,62,000

LOST <5k

10,90,552

LOST > 5k

9,62,316

COF to Be Issued

Open Cases as per NDC till May

1,86,704

TOTAL

1,59,29,900

Best Regards

Nitin Jain

From: Nitin Jain

Sent: 15 March 2014 12:06 PM

To: "Ramesh KR"; "sureshd@indiaontime.com"; "Fayaz"; "usha@indiaontime.com"; "sudharsan@indiaontime.com"; "VIMAL"

Cc: Gurvinder Singh(Finance); Mani Bhushan; DS Negi;

Ravi Khanna

Subject: RE: IOT_Outstanding HS 18

Dear IOT Team,

Kindly clear the long pending COD Outstanding aount on utmost priority otherwise we would left with no option but to initiate legal proceedings.

Best Regards,

Nitin Jain"

7. In fact, the defendants vide their email dated 28th May, 2014 addressed to the plaintiff duly acknowledged the plaintiff's aforesaid emails and did not dispute the demand for payment of the outstanding dues raised by the plaintiff. The defendants' email 28th May, 2014 is reproduced hereinbelow:

"From: Ramesh KR<rameshkr@indiaontime.com>

Sent: Wednesday, May 28,2014 4:44 PM

To: "Ramesh KR"; Nitin Jain

CC: "Gurvinder Singh", sudharsan@indiaontime.com; krishnan@indiaontime.com

Subject: RE:IOT_Outstanding HS 18

Dear Nitin,

As stated by us in the trailing mail with respect to the pending case against the Kerala Sales Tax before the Hon"ble High court, Kerala, the matter came up for hearing on 28th May 2014 i.e. and the Hon"ble court was pleased to hear our arguments and has directed the Sales Tax department, Kerala to file affidavit with document proof to and dispose of the matter within 30 days.

Hence as the matter is nearing its closure, we request you to extend your kind support during these difficult times.

Warm Regards

8. This Court is further of the opinion that the cheque issued by the defendants in part payment of the aforesaid outstanding amount is clearly indicative of the defendants' mala fide intent of attempting to evade the payments due and payable to the plaintiff.

9. This Court is of the view that under the aforesaid agreements, the cash payments collected by the defendants under the cash-on-delivery scheme were to be remitted to the plaintiff strictly as per the agreed terms. However, the defendants have failed to furnish the details of the cash collections collected by them from the consignees as well as remit the same to the plaintiff under the COD scheme.

10. In any event, as the averments in the plaint have not been rebutted by the defendants nor did they bother to put forth their stand in spite of ample opportunities given by this Court, they are deemed to have been admitted.

11. Accordingly, the present application is allowed and the suit is decreed in favour of the plaintiff and against the defendants for Rs.2,06,65,318/- along with pendent lite and future interest @ 12% per annum on the outstanding amount in accordance with the Clause 5(d) of the Agreement dated 21st August, 2012 and Clause 5(e) of the Agreement dated 29th November, 2012. The plaintiff is also held entitled to actual costs of litigation including lawyer's fees. The plaintiff is given liberty to file on record the exact cost incurred by it in adjudication of the present suit. Registry is directed to prepare a decree sheet accordingly.

