

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA(OS) No. 04/2008**

Date of Decision : August 25, 2008

BRIGHT STAR HOTELS P.LTD. Appellant

Through : Mr. Ashwini Matta, Sr. Advocate, with Mr.
Anupam Srivastava and
Mr. Sanchit Walia, Advocates.

versus

AIRCON ENGINEERS P.LTD. Respondent

Through : Mr. Shailendra Paul, Advocate.

AND

+ **FAO(OS) 72/2008**

BRIGHT STAR HOTELS P.LTD Appellant

Through : Mr. Ashwini Matta, Sr. Advocate, with Mr.
Anupam Srivastava and
Mr. Sanchit Walia, Advocates.

versus

AIRCON ENGINEERS P.LTD.

..... Respondent

Through : Mr. Shailendra Paul, Advocate.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

: MUKUL MUDGAL,J. (ORAL)

1. Admit. With the consent of the learned counsel for the parties, the appeals have been taken up for final hearing.
2. The appellant, M/s. Bright Star Hotels Pvt. Ltd., has challenged the order dated 22nd August, 2003 passed by the learned Single Judge in RFA(OS) No. 04/2008 and the order of the learned Single Judge dated 24th August, 2007 passed in FAO(OS) No. 72/2008.
3. The facts of the case briefly stated are as follows:
 - a. The appellant are the promoters of a hotel namely “The Bristol”, located at 108-

110, Sikandarpur, Main Gurgaon Faridabad Road, Haryana and had engaged the services of the Respondent, for purposes of installing, erecting and commissioning of an Air-conditioning system for their hotel at Gurgaon.

b. A work order dated 29th June, 1995 was placed on the respondent for a value of Rs.19,59,362/-.

c. Although the scope of work remained the same, the value of the contract was subsequently enhanced to Rs.69,13,967.94. On execution of the said work, the respondent raised the total bills for a sum of Rs.69,13,967.94 out of which, the appellants made payment of Rs.39,69,595. A discount at the rate of 2% on running account bills amounting to Rs.1,15,279.26 and Rs.7,97,133.00 as value of the material received, were deducted from the total amount of Rs.69,13,967.94 thus leaving the balance of Rs.20,31,960.68.

d. The last payment of Rs.75,000/- was made by the appellant on 30th July, 1998 and according to the respondent, a sum of Rs.20,31,960.68 remained due from the appellants which they did not pay despite various legal notices and reminders.

e. The respondent instituted a civil suit no.1411/2001 for the recovery of

Rs.31,29,219.32p which was decreed in favour of the respondent, by the learned Single Judge vide its order dated 22nd August, 2003 on the premise that the failure of the appellant to file the written statement within the stipulated period of time of 90 days entitled the respondents to a decree under the provisions of Order VIII Rule 10 CPC.

f. On 27th April, 2006 the appellant came to know about the aforesaid decree passed by the learned Single Judge of this Hon'ble Court when the execution application was fixed for 4th May, 2005.

g. The appellant appeared before the learned Single Judge of this Hon'ble Court on 4th May, 2006 wherein the learned Single Judge restrained the appellant from selling, transferring, mortgaging or parting with the property bearing no.s. 108-110, Sikandarpur, Main Gurgaon Faridabad Road, Haryana.

h. The appellant filed the following three applications before the learned Single Judge of this Hon'ble Court on 6th July, 2006:-

- (i) I.A. No. 5822/2005 seeking stay of execution proceedings pertaining to Execution Petition No. 28/2005,

(ii) I.A. No. 5823/2005 under Order IX Rule 13 of the Code of Civil Procedure seeking setting aside of ex-parte decree dated 22nd August, 2003.

(iii) I.A. No. 5837/2005 under Section 5 of the Limitation Act seeking condonation of delay in filing I.A. No. 5823/2005 seeking setting aside of the ex-parte decree.

4. The learned Single Judge of this Hon'ble Court heard arguments on all the abovenoted three applications filed by the appellant and dismissed all the three applications filed by the appellant by a common order dated 24th August, 2007 and vacated the interim stay of the execution granted by vide order dated 17th January, 2005.

5. The main appeal being RFA(OS) No. 04/2008 proceeds against the judgment dated 22nd August, 2003 under the provisions of Order VIII Rule 10 of the Code of Civil Procedure (for short 'CPC') in favour of the plaintiff/respondent herein on the premise that the written statement was not filed within 90 days. In so far as the FAO(OS) 72/2008 is concerned, this arises from an order dated 24th August, 2007 passed by the learned Single Judge in IA No. 5823/2005 in CS(OS) No. 1411/2001 under Order IX Rule 13 of the CPC for setting aside the ex parte decree dated 22nd August, 2003 and

also for setting aside the dismissal of IA No. 5837/2005 under Section 5 of the Limitation Act seeking condonation of delay.

6. The main plea of Mr. Ashwini Matta, the learned senior counsel, who appears on behalf of the appellant is based on the order dated 9th May, 2003 which reads as follows:

-

“09.05.2003

Present : Mr. Sanjay Gupta with Mr. P.K. Gupta for
the plaintiff.

None for the defendant.

+ S.No. 1411/01

Counsel for the defendant has not filed the written statement within the period of 90 days from the date of service. The matter came up before the Joint Registrar on a number of occasions but the defendant did not appear on either dates nor filed the written statement. Therefore the plaintiff is entitled for a judgment under order 8 Rule 10 CPC.

Judgment during the course of the day.

H.R. MALHOTRA, J.

May 09, 2003

sa”

4.30 p.m. file perused. Matter needs to be re-heard as some clarification is needed.

List for consideration on 10th July, 2003.

H.R. MALHOTRA, J.

May 09, 2003

sa”

7. The learned counsel has laid particular emphasis on the latter part of the order i.e. the order passed at 4.30 p.m. and emphasized the words “needs to be re-heard as some clarification is needed” (emphasis supplied). He has submitted that these words clearly show that the impugned order which was later on passed on 22nd August, 2003 was not an order under Order VIII Rule 10 CPC but an order on merits as it was passed after hearing. The learned counsel for the appellant also submitted that the perusal of the order and in particular paragraphs 4, 5 and 6 thereof shows that this was not an order under Order VIII Rule 10. He relied on a judgment of the Hon’ble Supreme Court in the case of **Ramesh Chand Ardawatiya vs. Anil Panjwani AIR 2003 Supreme Court 2508**, the relevant part of which reads as under: -

“So far as the plea of bar as to maintainability of suit for failure to seek further relief is, concerned, we cannot find fault with the plaint as framed. The defendant was alleged to be a rank trespasser who was in the process of committing a trespass and was allegedly raising unauthorised construction over the property neither owned nor legally possessed by him. The relief of specific performance is not a further relief to which the plaintiff is entitled or which he could have sought for against this defendant. Thus, from the point of view of the present defendant, we cannot find any such defect or infirmity in the relief sought for by the plaintiff as would render the suit not maintainable and liable to be thrown out at the threshold. But there is substance in the other limb of this submission made by the learned

senior counsel for the defendant-appellant. Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order VIII, Rule 10 of the CPC is attracted and the Courts acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the Court is not bound to frame issues under Order XIV and deliver the judgment on every issue as required by Order XX, Rule 5. Yet the trial Court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the ‘points for determination’ and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.

(emphasis supplied)”

The basis of the above plea predicated is on the non-applicability of order VIII Rule 10 CPC. In our view the impugned order dated 22nd August, 2003, apart from stating that it was under Order VIII Rule 10 CPC, even otherwise could not be demonstrated to be an order on merits. In fact, the order specifically states so and a mere recital of facts does not deprive the order of its character under Order VIII Rule 10. Merely because the order dated 9th May, 2003 uses the word ‘re-heard’, that does not necessarily connote hearing on merits. Accordingly, this plea does not stand and is rejected.

8. The learned counsel appearing for the appellant has also relied upon another judgment of the Supreme Court in the case of **Balraj Taneja and Anr. vs. Sunil**

Madan and Anr. (1999) 8 Supreme Court Cases 396 and in particular paragraph 29

thereof which reads as under:-

“As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment 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 regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in Sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8.

(emphasis supplied)”

In our view the above passage relied upon by the learned counsel for the appellant would not be applicable as this court in consonance with the view taken by the learned Single Judge is satisfied that the plaintiff/respondent herein had made out a clear case and there is no fact which needs to be proved on account of the deemed admission, the Court can thus, pass a judgment against the defendant/appellant herein who had not filed the written statement within the stipulated period of time.

9. We have also noticed the reasons given by the learned Single Judge in the order

dated 24th August, 2007 dismissing the application under Order IX Rule 13 CPC. We

have in particular noticed the following findings:-

“.....The present case is a case where it has been contended by the defendant that the summons sent through the process server have been merely left with some unknown person having no responsibility in the office of the defendant.

However, the process server has reported that he was guided to the accounts section of the defendant company to effectuate the service. In his report, he has submitted that the summons were scrutinised by the officer who received the copy thereof. The rubber stamp which is affixed does not merely state the name of the company but also records that it being affixed by the authorized signatory. The official who affixed his signatures in acknowledgment of the receipt also appended the date mentioned thereon.

It is thus not open for the defendant to contend that the summons were left with some unknown person in the office of the defendant company.

In any case, there is no explanation given or challenge to the service effected through the approved courier.

20. Before this court, it has been urged that only Mr. G.B.S. Sehgal was authorized, Administrative or Liaison Officer or his junior Shri Jagat Pal Singh were authorized to receive the summons on behalf of the company. Certainly, this method of working within the defendant company would not be in the knowledge of any outsider and would govern the working of the defendant company alone.

In the instant case, the process server is an official of the court specifically empowered to effect service by visiting the premises of the defendant where he has been directed to visit the accounts office of the defendant and guided purportedly to a person who was authorized to receive the summons brought by the process server. The rubber stamp on the copy of the summons on behalf of the defendant clearly reflects that the same was affixed by and signatures put by an authorized signatory.

In this view of the matter, the process server has done his duty and certainly could not be expected to do more in the circumstances.

21. Before this court, there is no dispute that the address of the defendant as shown on the plaint is the address wherefrom communications were being effected on its behalf. The service at this address is under the seal of the defendant corporation and reflects that it is signed by a duly authorized person. In similar circumstances, this court in the judgment reported at **128 (2006) DLT 51 Mediterranean Shipping Co. S.A. & Anr. vs. Margra Industries Ltd.**, has held that a plea cannot be accepted that the seal of the defendant company was with an unauthorized person. A person holding the seal of the defendant corporation was held to be a duly authorized person to receive such summons.

22. It is noteworthy that in the instant case, it is not even the case of the defendant that the seal was in the hands of some unauthorized person. This clearly militates against the submissions made before this Court.

23. There is also no dispute that the defendant carries on business at the address where it has been served.

.....26. So far as the pronouncement of the Apex Court reported at **AIR 1980 SC 1163 M/s Shalimar Rope Works Ltd. vs. M/s Abdul Hussain** is concerned, there is material distinction in the facts of that case. In that case, summons were left with the Office Assistant who did not bring them to the notice of the defendant company. In the instant case, the report of the process server shows that he has been directed to the basement of the office of the defendant company and the stamp includes the expression 'authorized signatory'. The person who has so received the summons has signed the same as well. Additionally, there is proof of service through approved courier as well. In the case before the Apex Court, the position had not been so."

The learned Single Judge also relied upon the following judgments of the Hon'ble Supreme Court in the cases of **M/s. Indo Den Energy Ltd. vs. The Saraswati Ind. Syndicate Ltd.** **Manu/DE/0586/2000; Parasarmpuria Synthetics Ltd. vs. Shankar Prasad** **AIR 2003 Delhi 348 and Mediterranean Shipping Co. S.A. & Anr. vs.**

Margra Industries Ltd. 128 (2006) DLT 51.

10. In our view, the learned Single Judge while dismissing the application under Order IX Rule 13 CPC has rightly applied the above judgments. Even the reason given by the learned Single Judge that the conduct of the appellant in taking pleas such as the lack of authorization per se to accept notice on behalf of the company inspite of the rubber stamp of the company having been affixed, is such so as to defeat the ends of justice. The effect of the acceptance of the plea of the appellant would be that every process server would be required to undertake an enquiry as to the legal authority of the person who accepts the notice. Such a premise would defeat the ends of justice as in this manner a dishonest litigant can avoid service by ensuring that the person authorized to receive the notice is not available when the server of the notice (such as the process server in the present case) arrives to effect service.

11. We have also noticed the inordinate delay of 4 ½ years in preferring the appeal i.e. since the year 2003. Since we have dealt with the aspect on the merits, we are not pronouncing on the issue of delay raised by the respondent's counsel. Accordingly, both the appeals stand dismissed and are thus disposed of.

MUKUL MUDGAL
(JUDGE)

MANMOHAN
(JUDGE)

AUGUST 25, 2008

sk