

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **CS (OS) No.1341/2004**

Date of decision : July 03, 2009

M/S. SWAROVSKI INDIA PVT. LTD. PLAINTIFF
Through : Mr. Prag P. Tripathi, Senior
Advocate with Mr. Sanjay
Grover, Advocate.

Versus

M/S. SPA AGENCIES (I) PVT. LTD. DEFENDANT
Through : Mr. J.P.Sengh, Advocate with
Mr. Pankaj Kumar, Advocate

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

J U D G M E N T

ARUNA SURESH, J.

IA No.2780/2005 (Order 37 Rule 3(5) CPC) in CS (OS) No.1341/2004

1. Plaintiff company has filed the present suit under Order 37 of the Code of Civil Procedure (hereinafter

referred to as 'CPC') for recovery of Rs.42,90,985/- against the defendant for the supply of goods against 114 invoices (impugned invoices) for the period from December, 2001 to March, 2003 of the total value of Rs.33,79,076/- along with interest @ 12% per annum amounting to Rs.9,11,909/- for the period from October, 2001 to 30.09.2004, which the defendant failed to pay despite service of notice of demand.

2. After receipt of summons for appearance the defendant put in appearance. Accordingly, the plaintiff applied for service of summons of judgment upon the defendant. Summons for judgment were duly served upon the defendant on 23.5.2005. Consequently, the defendant has filed this application under Order 37 Rule 3 (5) of the CPC seeking leave to defend and contest the suit of the plaintiff.
3. The defendant has sought leave to defend the suit inter alia on the grounds that the plaint has not been signed, verified and suit has not been filed by

an authorized person on behalf of the plaintiff company. That the present suit under Order 37 CPC is not maintainable in the present form as the plaintiff has not complied with the provision of order VI Rule 2 (3) CPC as all the dates, sums and numbers which are required to be expressed in a pleading in figures as well as in words have not been mentioned by the plaintiff in the plaint. That plaintiff has not mentioned in the title of the suit '*Suit for recovery under Order 37 of the Code of Civil Procedure, 1908*'. That the form of summons for judgment has not been duly verified under Order 19 Rule 3 CPC and that paragraph of the Affidavit have also not been properly verified. That plaintiff has not stated in the suit that he had filed the suit under Order 37 CPC. That plaintiff has not followed the mandatory provisions of Order 37 Rule 3 CPC as plaintiff has not supplied complete copies of the annexure relied upon by it along with the copy of the plaint to the defendant and, therefore, the suit being not maintainable, defendant is entitled to leave to defend and contest the suit.

4. On merits, defendant has contended that plaintiff is not entitled to interest as claimed, as there is no contract between the parties about payment of interest. That the amount charged by the plaintiff pertaining to interest requires investigation and raises a triable issue. That plaintiff company was incorporated in 1998 and launched the Swarovski Crystal and Crystal goods in short 'CGD' goods through exclusive retail out-lets in various parts of the country. That defendant in the year 1998 signed an agreement with the Plaintiff to represent and act as sole distributor of the Swarovski product in India. That suddenly, after plaintiff company opened its office in India and started dealing in goods directly with the customers of defendant company without any intimation to it in violation of the terms and conditions of the agreement because of which the defendant's business suffered huge setback. That one of the clients of the defendant company claimed a sum of Rs.1,37,134/- towards shortage in the sealed packet through Debit Note No.V-0003 dated 31.1.2002 containing the descriptions

regarding product name and customer name which was pending since that date and a further claim was also pending against invoice No.00004416 dated 11.11.2002 for Rs.21,794/-. That defendant company had claimed the amount of the said mentioned Debit note from the plaintiff but the plaintiff did not pay the same. That, therefore, plaintiff is fully liable to compensate the defendant for the short supply. That the quantities mentioned in the packed pieces were never tallied with the actual quantity in most of the cases and defendant never debited for small quantity shortage to the plaintiff company. That due to direct sale by the plaintiff to the customers of the defendant the stock piled up with the defendant which the plaintiff refused to take back despite correspondence. That defendant in an effort to sell the piled up stock reduced the rates and put the goods on sale through their agents M/s. Eleganza Bangore. That plaintiff issued a public notice that defendant company was selling 'NAKLI STOCK' under plaintiff's branded name. That this also affected the business

of the defendant and defendant had to close its company with huge stock remaining unsold. That plaintiff adopted unfair trade business activities resulting into gross violation of the terms and conditions of the agreement and adversely affected business of the defendant company. That certain goods worth Rs.1,73,999/- were also broken in the transit and information to that effect was given to the plaintiff for which plaintiff was liable to replace the broken articles which it never did. That defendant has stock more than the value of Rs.1,44,41,798/- due and payable by the defendant to the plaintiff. That till plaintiff company takes away the stock; defendant is not liable to pay anything to the plaintiff. That the statement of accounts filed by the plaintiff is false and frivolous and the amount claimed is excess amount which is not due to the plaintiff and this fact can only be proved by leading evidence. That defendant never refused to clear the due payment subject to the condition to settle the entire account first after taking into consideration the stock lying with the

defendant. Hence, defendant is entitled for unconditional leave to defend the suit.

5. The plaintiff in its reply has averred that the application for leave to defend does not disclose any defence as required under order 37 Rule 3 and 6 CPC. That the defendant admits that the amount claimed by the plaintiff is payable amount but is required to be adjusted against stocks which have to be returned to the plaintiff. That there are no allegations that the stocks which the defendant wants to return are the same as supplied against 114 invoices; the basis of the suit. That there is no denial in the application that the principal amount as claimed against the said 114 invoices is due from the defendant. That invoice No.00004416 against which short supply is alleged is not one of the invoices which are the subject matter of the suit. That there is no averment in the application that there was short supply of the goods as against the invoices in question. That the only defence made out by the defendant is that they made several requests to the plaintiff to buy back the goods

which could not be sold due to closure of their business and when such unsold stock is taken away and accounts are settled, there will be no amount due to the plaintiff. That there is no averment that goods which were offered by the defendant for taking back were supplied against 114 invoices and therefore there is absolutely no dispute in respect of the goods supplied against the pending invoices. That there is no allegation of shortage breakage, delays, rejection or any other plausible reason for non payment of these invoices. That there is no obligation in terms of the contract between the parties, for plaintiff to buy back the goods which were sold to the defendant. That plaint is signed and verified by a duly authorized person authorized by way of resolution of the Board of Directors of the plaintiff . That no agreement was signed with the defendant in the year 1998 as alleged as the plaintiff had not even commenced its business in the said year. That plaintiff is an Indian company and started doing its business in India in the year 2001. That defendant was never appointed as the

sole distributor of the plaintiff company and there is no such agreement and that defendant is just like any other customer of the plaintiff. That debit note No.V-0003 dated 31.1.2002 is from a customer of the defendant and raised upon him and that plaintiff is not aware of any such debit note. That defendant has not alleged that the said debit note pertains to any of the impugned invoices nor any such debit note was brought to the notice of the plaintiff for any claim. That plaintiff had no business dealings with M/s. Eleganza and the said person is not an authorized dealer of Swarovski products and the present claim of the plaintiff has nothing to do with said M/s. Eleganza and the public notice advertised and issued by the plaintiff has no concern with the present claim of the plaintiff and therefore, no defence is set out by the defendant as regards its dealing with M/s. Eleganza is concerned. That, therefore, the application does not disclose any grounds for grant of leave to defend to the defendant unconditionally or otherwise.

6. I have heard Mr. Prag P. Tripathi, Senior counsel for

the plaintiff, Mr. J.P.Sengh learned counsel for the defendant and have carefully perused the record.

7. It is contended by the learned counsel for the defendant that there is nothing on the record to suggest that Mr. Atul Garg, Senior Manager, Finance and Administration of the plaintiff company is duly authorized to present and verify the present proceedings. This objection is without any substance. Plaintiff has placed on record a certified true copy of the Resolution passed in the meeting of Board of Directors of the plaintiff company held on 13.9.2004. By virtue of this resolution Mr. Atul Garg, Senior Manager – Finance & Administration of Swarovski India Private Limited (Delhi) was authorized to file, institute or defend any legal action, including suits, petition, writs, appeals, revisions, compromise applications etc. before this Court or any court of law in India for recovery of sums and amount due from M/s. SPA Agencies India Pvt. Ltd. Mr. Atul Garg is also authorized to sign and verify any document including but not limited to complaints, written statements, replies, applications,

petitions, affidavits, appeals etc. and also to engage and withdraw advocates and pleaders and to sign vakalatnamas etc. Thus, the plaint has been signed and verified and filed by duly authorized person on behalf of the plaintiff company.

8. Learned counsel for the defendant has also challenged the maintainability of the suit on the grounds that requirement of Order 37 Rule 2 CPC have not been complied with. Perusal of the plaint indicates the title of the suits. It reads:-

'Suit under Order XXXVII of the Code of Civil Procedure for Recovery of Rs.42,90,985/-'.

Similarly, para 13 of the plaint reads:-

"That the present suit is a summary suit under Order 37 CPC, and no relief outside the ambit of Order 37 CPC has been claimed in the plaint."

Therefore, the requirement of Order 37 Rule 2 CPC has been duly complied with by the plaintiff.

9. The other objection raised by the learned counsel for the defendant to the maintainability of the suit is that plaint does not find mention of all the dates,

sums and numbers in figures as well as in words which is mandatory as per the provisions contained in Order 6 Rule 2 CPC. True that the plaintiff did not give the details of the invoices, their dates and the amount due against each invoice in the body of the plaint. However, in para 11 of the plaint, plaintiff specifically averred that the statement of accounts with interest calculation is annexed as Annexure A to the plaint. Annexure A undisputedly is a part of the plaint. Perusal of Annexure A clearly reveals that it contains the date of each invoice, invoice number, invoice amount, the due amount, the date of the payment of the due amount and number of days overdue and also the interest so calculated. Therefore, principally provisions of Order 6 Rule 2 CPC have been complied with by the plaintiff. Too technical a view should not be taken to reject the plaint for want of particulars. To gather true spirit behind a plea, court should read the plaint as a whole.

10. Defendant has raised another technical objection alleging that the Affidavit to the application for

issuance of summons for judgment is not verified in accordance with the provisions under Order 19 Rule 3 CPC. This Affidavit has been executed by Atul Garg, the authorized representative of the plaintiff company and he has verified the contents of the Affidavit as true and correct as derived from the record of the plaintiff company. I do not find any infirmity in the verification to declare it as improper. Affidavit annexed to the application has been filed for an interlocutory order i.e. for issuance of summons for judgment and is not an affidavit in evidence. An affidavit of this kind annexed to an application for interlocutory orders can be admitted on statement of the deponent, which is based on his belief. Hence the impugned affidavit is admissible.

11. Learned counsel for the defendant has submitted that defendant was not supplied with a copy of the documents along with the copy of the plaint, which is mandatory and there being non compliance of the provisions of law, the suit is not maintainable.

12. Order 7 Rule 14 CPC enjoins upon the plaintiff to file

the documents along with the plaint on which he bases his claim or relies upon, if the said documents are in his power and possession and at the same time deliver the documents and a copy thereof to be filed with the plaint.

13. As already pointed out above, annexure A to the plaint contains particulars of the impugned invoices raised on the defendant company with all the requisite details. This annexure must have been received by the defendant along with the plaint when summons for appearance were served upon him through registered AD cover and subsequently when summons for judgment were served upon it.
14. Supply of copies of the documents annexed to the plaint is not mandatory to be supplied to the defendant nor would it render service of summons under Order 37 CPC nugatory. The defence of non-supply of the copies of the document is seen invariably taken in every case by the defendant. To obviate such like situation, if the defendant had not received the copy, he could have inspected the

court records. In '**M/s. S.V. Electricals Ltd. vs. M/s. Sylvania and Lakshman Ltd., AIR 2000 Delhi 156**', where similar issue cropped up for consideration, this court observed:-

“.....However, after the amendment carried out in this Order it is no longer mandatory that copies of documents be supplied. It is now mandatory to supply annexures and, therefore, even if it is assumed that the documents were not supplied, this would not render the service of summons under Order XXXVII nugatory.....”

15. As pointed out above, annexure to the plaint was served upon the defendant. The grievance is regarding non supply of copies of the documents mentioned in the plaint and are the basis of the suit. Since it was not mandatory to serve the defendant with the copies of the documents, the service of summons under Order 37 CPC upon the defendant was proper. The defendant, therefore, cannot be allowed to agitate that since copies of the documents were not served upon him, summons under Order 37 CPC were not validly served upon it.

16. Plaintiff had filed original documents in the court on 11.10.2004 at the time of filing of the plaint with the registry. Therefore, plaintiff has complied with the provisions contained under Order 7 Rule 14 CPC.
17. Defendant has not disputed that he received 'CGD' goods from the plaintiff against 114 invoices for the period from December, 2001 to March, 2003 of the total value of Rs.33,79,076/-. Supplies vide these invoices were made to the defendant at Delhi, Chennai and Bangalore respectively. Defendant also does not dispute that he has not made the payment of these invoices to the plaintiff despite demand. Defendant has sought leave to defend the case on the grounds that his customers had claimed a sum of Rs. 1,37,134/- through debit note No.V-0003 dated 31.1.2002 towards shortage of goods supplied to one of his customers in a sealed packet whereas another customer claimed a sum of Rs.21,794/- for defective delivery against invoice number 00004416 dated 11.11.2002.

18. It is argued by the learned counsel for the defendant that plaintiff short supplied the articles and also some of the articles were found in broken condition for which the damaged goods are assessed worth Rs.1,73,999/- which plaintiff company is liable to reimburse but, has refused to do the needful. Learned counsel for the plaintiff has argued that debit note No.V-0003 has been raised by the customer of the defendant on the defendant only and as regards invoice number 00004416 dated 11.11.2002, the said invoice is not the subject matter of the present suit and therefore, it does not give rise to any substantive defence so as to allow the defendant to leave to defend the case.
19. Admittedly, the plaintiff has not based its claim on invoice No.00004416 dated 11.11.2002 therefore, any claim of the defendant against this invoice cannot be taken into consideration by the court for grant of leave to defend and contest the suit to the defendant.
20. Debit note no.V-0003 is dated 31.1.2002. There is a

noting at the bottom of this document:- *“Being shortage of material (As per details) supplied by you during the period ended on 30.06.01”*. Claim of the plaintiff in the present suit is for the period from December, 2001 till March, 2003. This debit note, therefore, does not pertain to any supply made by the plaintiff to the defendant vide impugned 114 invoices. It pertains to some material supplied to the defendant much prior in time. Therefore, this averment also does not raise any probable defence to allow the defendant to contest the suit on merits.

21. The grouse of the defendant is that it could not sell the goods in the market because plaintiff started directly supplying the goods to defendant's customers in violation of agreement executed between the parties and thereby adversely affected its business. The fact remains that in the application for leave to defend, defendant has not disclosed the name of any such customer with whom plaintiff started dealing directly. The alleged agreement entered into between the parties in 1998 is not placed on the record. Plaintiff has disputed

execution of any such agreement for the simple reason that it started its business in 2001 only.

22. There is nothing on record to suggest that defendant was appointed as the sole distributor of the plaintiff company. Though defendant has claimed that he was appointed the sole distributor, plaintiff company had launched its Swarovski Crystal and Crystal goods through retail out-lets in various parts of the country. As per the admission of defendant itself, plaintiff was supplying its goods to various other retail out-lets besides the defendant. Therefore, any supply made by the plaintiff to its other out-lets or agents does not in any manner indicate that plaintiff adopted unfair trade practice which could result into loss of business of the defendant. Parties were having commercial transactions and plaintiff in the absence of any agreement to the contrary, being the supplier of CGD goods is within its right to supply its goods to various retail outlets of its own or other persons, who wanted to have business transactions with the plaintiff. The grouse of the defendant, therefore,

that plaintiff started dealing with the other customers directly without informing him, having no right to deal with the customers of the defendant directly is without any basis especially when, the alleged written agreement duly signed by the defendant is nowhere to be seen on the record; execution of which is specifically disputed by the plaintiff.

23. Learned counsel for the defendant has submitted that some of the goods supplied to him were short supplied or were broken and therefore without settlement of accounts, defendant is entitled to grant of leave to defend and contest the suit. These submissions are also devoid of any merits. No where in the application defendant has pleaded that goods supplied against any of the invoices which are the subject matter of the suit were either short supplied or were broken.

24. Statements regarding short supplies made by the plaintiff as placed on the record by the defendant, only pertains to invoice No.00004416 dated

11.11.2002. Similarly, customer shortage claim indicate that it relates to the supply of goods for the period from 3.10.2000 to 31.1.2001 therefore this also has no reference with the impugned invoices. Defendant has made every endeavor to raise a sham and frivolous defence.

25. As regards claim of the defendant for the broken goods, in the statement of crystal goods in hand of the defendant, I find reference to invoice PTEX\0128\02-03 dated 20.12.2002 worth Rs.21,794/-. Perusal of this document also does not disclose number of any of the impugned invoices. The detailed list of CGD damaged goods running into various pages does not indicate the invoice number vide which the alleged damaged goods were supplied to the defendant. Even the date of supply does not find mention in the list. From perusal of this document it becomes difficult to co-relate the damaged goods with the goods supplied vide the impugned invoices.

26. Plaintiff has not disputed that some unutilized stock

is lying with the defendant. However, as per the terms and conditions contained in the invoices, duly signed for and on behalf of the defendant, it was agreed that goods once sold would not be taken back.

27. Various correspondences including messages by fax and e-mail were exchanged between the parties. Plaintiff in the plaint has specifically averred, which fact is not disputed by the defendant that plaintiff was ready and willing to repurchase the goods sold to the defendant subject to the defendant first making the payment of the outstanding amount due from the defendant to the plaintiff. E-mail dated 7.2.2003 by one Mr. Sharma Sanjay addressed to Mr. Agrawal speaks of certain terms and conditions regarding return of the stock to the plaintiff company arrived at between Mr. Sharma, one Mr. Sunil, Anil and Mr. Agrawal and Mr. Steiner during their meeting in Dubai in 2002. These points are:-

“1) SPA Agencies (India) Pvt. Ltd. will be responsible for the clearance of its own dues and that of SPA Agencies (TCS

Chennai).

2) Swarovski India Pvt. Ltd. (SIPL) offered to accept stocks in lieu of outstanding payment to the maximum value of the outstanding amount of both companies in order to facilitate the clearance of all outstanding dues provided that the following conditions are satisfied;

- a) SPA to provide a list of stock for return to SIPL from which SIPL would select the products it would take back. (This has already been completed).
- b) SPA to provide copies of supporting documents of purchase for the selected articles with invoices from either SIPL or Austria directly. Valuation of the stock to be based on value & conditions of sale as on date of purchase from SIPL or Swarovski International. (No supporting documents have been provided till date inspite of repeated reminders to Mr. Anil Agrawal since months).
- c) Selected stocks will only be accepted by SIPL after SPA purchases goods twice the value of the stocks from SIPL and clears all payments for the same.
- d) Once goods twice the value of the selected stock are purchases and payments for the same cleared, SIPL would

accept the selected stocks and issue credit notes for the same dividing it equally between the accounts of the two entities SPA Agencies (India) and SPA Agencies (TCS Chennai).

e) Any outstanding amounts which could not be settled with stocks as per this agreement, these outstanding amounts have to be cleared with cheque/DD before stocks in question are accepted.”

28. This e-mail was duly replied by Mr. Agrawal, the M.D. of the defendant company. In this reply Amar Agrawal did state that plaintiff had agreed to take back the stocks. True that, none of these e-mails are addressed to the plaintiff. The fact remains that plaintiff was ready and willing to repurchase the goods subject to defendant providing the supporting documents which they never provided to the plaintiff.

29. Once defendant has accepted the receipt of goods, he is liable to make the payment for the same. Simply because the business of the defendant has been shut down, he cannot raise a defence to

compel the plaintiff to repurchase the goods supplied to him. This in a way is a counter claim made by the defendant which is foreign to the provisions contained under Order 37 CPC. A counter claim under Order 8 Rule 6-A CPC is to be filed before the defendant has delivered his defence or before the time limited for his defence is expired. A defendant in a suit under Order 37 CPC is not entitled to defend the claim of the plaintiff unless he raises certain triable issues by way of a defence in his application for leave to defend.

30. In '**Definance Knitting Industries (P) Ltd. vs. Jay Arts, (2006) 8 SCC 25**', the Supreme Court laid down the principles to be kept in mind by the court while considering the application of the defendant for grant of leave to defend the suit, which are:-

“13. While giving leave to defend the suit the Court shall observe the following principles:

(a) If the Court is of opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally. (see) *Milkhiram (India) Pvt. Ltd v. Chaman Lal Bros.*

AIR 1965 SC 1698. The question whether the defence raises a triable issue or not has to be ascertained by Court from the pleadings before it and the affidavits of parties.

(b) If the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to put by the defendant is frivolous or vexatious is may refuse leave to defend altogether. *Kiran Mryace Dassi v. Dr. J. Challrjae AIR 1949 Cal. 479. (noted and approved in Mechalec's case, (1976) 4 SCC 687.*

(c) In cases where the Court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the Court may impose conditions in granting leave to defend. Leave to defend should be declined by the court if it is of the opinion that the defendant had raised frivolous defenses which are untenable with a view to prolonged the litigation. If court is of the opinion that there is triable issues, in other words, there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross examine his witnesses, leave should be granted. If the defendant shows on a fair probability that he has a bonafide defense he ought to have leave."

31. In the instant case, the defendant has admitted the receipt of goods against the impugned 114 invoices. He has also admitted that the principal amount as claimed by the plaintiff is due from him against the said invoices which he has failed to pay. The grounds on which he has sought leave to defend, to my mind, are untenable and are frivolous. They have been raised with a view to prolong the litigation. They do not raise any triable issue as there is no fair dispute between the parties to be tried. Defendant, therefore, has no substantial defence to entitle him for leave to defend and contest the suit.

32. In this case defendant has raised a defence of set off or counter claim by insisting upon the plaintiff to repurchase the goods. Defendant, therefore, cannot be allowed to travel beyond the scope of order 37 CPC and such a claim cannot be entertained in an application for leave to defend. It does not raise a triable issue between the parties. Extraneous controversies between the parties and different causes of action cannot justify

enlargement of the scope and purpose of the summary action brought under order 37 CPC. The claim of the plaintiff for the supply of goods against impugned invoices is independent of the claim of the defendant for set off of value of the goods which he could not sell in the market, or in other words, a counter claim made against the plaintiff. This cannot be permitted to be raised by the defendant in proceedings under Order 37 CPC. (*Reference is made to ‘Deutsche Ranco Gmbh vs. Mohan Murti, 1993 (52) DLT 288’.*)

33. In **‘Union of India & Ors. vs. Raj Kumar Sawhney, 1995 III AD (Delhi) 881**, it was observed:-

“14. There is another side of the picture. It is a well settled principle of law that a counter-claim is not maintainable in a case under Order XXXVII of the Code.

15. The underlying idea behind the enactment of Order XXXVII of the Code is to provide a summary procedure for the disposal of certain suits. Consequently, the defendant is not as in an ordinary suit entitled to a right to defend as a matter of right. He must apply for leave to defend

within ten days from the date of service of the summonses and leave to defend is to be granted only in those discerning few cases where the defendant shows and discloses such facts which the courts deem sufficient enough in the circumstances of a given case for granting leave to defend. In other words, the defendant is required to show by way of his defence that the defence put forward by him gives rise to triable issues. Thus, a counter-claim if allowed to be raised by way of defence in a summary suit it is likely to obstruct and delay the trial of the suit. Hence the very purpose of the enactment of Order XXXVII is liable to be defeated. Had the intention of the legislature been to entertain counter-claims they would have provided so in the provisions of Order XXXVII itself. The presentation of a counter-claim cannot by any stretch of imagination be said to be by way of defence inasmuch as the party whosoever puts forward a claim has got a cause of action and can file a suit on the basis of the same. Furthermore, a counter-claim under Order VIII rule 6 A of the Code is to be filed before the defendant has delivered his defence or before the time limited for delivering his defence has expired. Rule 6A which deals with the counter-claim by the defendant is reproduced below for appreciation of the said point:-

"6A. (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up by way of counter-claim

against the claim of the plaintiff, and right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.....

16. It has already been observed above, that a defendant in a suit under Order XXXVII is not entitled to defend the claim of the plaintiff unless he raised certain triable issues by way of defence in his application for leave to defend. Thus the counter-claims are beyond the scope of Order XXXVII of the Code and cannot be entertained thereunder. The same view was also given vent to by a Single Judge of this Court as reported in Bramec Suri (P) Ltd. V. Shri Smith Chem, 1981 R.L.R. 60..... "It is the defence with regard to course of dealings and cause of action set up in the plaint which has to be taken into account while granting such permission. Extraneous controversies and different causes of action cannot justify enlargement of the scope and purpose of the summary action brought under Order 37."

34. Defendant has sought leave to defend on the ground that there is no contract between the

parties to pay interest if the payment is not made in time, whereas plaintiff has charged interest @ 12% per annum for the period from October, 2001 to 30.9.2004 amounting to Rs.9,11,909/- (for the period before the filing of the suit) on the due amount and therefore this also raises a triable issue.

35. Admittedly, there is no clause in the invoices which are the contract between the parties regarding payment of interest, as claimed by the plaintiff in the suit. The provisions of Order 37 CPC are to be construed strictly and only a claim which is based upon a written contract can be allowed within this provision. In the absence of any written contract between the parties regarding payment of interest, plaintiff cannot press his claim for interest in a suit filed by him under the provisions of Order 37 CPC. Order 37 CPC is a self contain code and the plaintiff cannot rely upon any custom, trade or statute relating to the provisions of interest for claiming interest from the defendant. Under these circumstances, plaintiff's claim for interest is not

entertainable.

36. Learned counsel for the plaintiff has referred to ***'Minerals & Metals Trading Corpn. Ltd. vs. Dimple Overseas Ltd., AIR 2001 Delhi 427'***, wherein this court decreed the suit of the plaintiff filed under Order 37 CPC for the amount claimed which was inclusive of interest for the period before the filing of the suit. However, in the said case provision of Order 37 CPC qua the claim of the plaintiff where the agreement was silent on the payment of interest was not construed. This judgment was referred to by this court in ***'M/s. Bush Boake Allen (India) Ltd. vs. Mehtajee, 2006 (1) AD (Delhi) 396'***. In the said case where the invoices were silent about any agreement between the parties about payment of interest, this court held that plaintiff in the absence of any written contract was not entitled to interest as prayed and the claim of the plaintiff for grant of interest was declined. Therefore, plaintiff is not entitled to interest as claimed by him.

37. In view of my discussion as above keeping in mind the facts and circumstances of the case, I find that the defence as raised by the defendant is illusory and shammy and therefore, defendant is not entitled to leave to defend and contest the present suit. Hence, the present application is hereby dismissed.

CS (OS) No.1341/2004

1. In view of the dismissal of the application for leave to defend, plaintiff is entitled to recover the principal sum of the impugned invoices amounting to Rs.33,79,076/- from the defendant. Hence, I hereby pass a decree for Rs.33,79,076/- with proportionate costs in favour of the plaintiff and against the defendant.

2. Plaintiff is awarded interest pendent lite and future interest on the principal amount @ 12% per annum from the date of the institution of the suit till realization of the decretal amount.

3. Decree sheet be prepared accordingly.

**ARUNA SURESH
(JUDGE)**

**JULY 03, 2009
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