

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

+ **CS(OS) No.1228/2005**

% **Date of Decision: 25.05.2009**

M/s.Polyblends (India) Pvt Ltd Plaintiff
Through Mr.S.S.Jain, Advocate.

Versus

M/s.Videocon International Limited & Anr Defendants
Through Mr.R.D.Soni with Mr. Vidhu Upadhyay,
Advocates.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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IA No.348/2009

1. This is an application by the defendants under Order 37 Rule 4 read with Section 151 of the Code of Civil Procedure for setting aside the judgment and decree dated 21st November, 2008.

2. The plaintiff has filed the abovenoted suit under Order 37 of the Code of Civil Procedure for recovery of Rs.62,13,190/- on the basis of a running account maintained by the plaintiff.

3. After the summons under Order 37 of the Code of Civil Procedure were served on the defendants, appearance was filed on behalf of them and after summons for judgment were served application for leave to defend and contest the suit under Order 37 Rule 3(5) read with Section 151 of CPC dated 10th February, 2007 was filed by the defendants.

4. The application was listed on 21st November, 2008 on which date no one appeared on behalf of defendants and the application was, therefore, dismissed in default of appearance of the defendants and their counsel and the suit was decreed.

5. Thereafter present application was filled seeking setting aside the decree dated 21st November, 2008 and order of dismissal of the application in default of appearance of the defendants and their counsel and for restoration of the application for leave to defend and contest the suit. The applicants have contended that the non appearance of the defendants counsel was neither deliberate nor intentional but on account of the sufficient reasons and special circumstances.

6. It is contended that the counsel for the applicants had to shift his residence from M-200, Vikaspuri, New Delhi to 8, Ashoka Enclave-I, Faridabad, Haryana in the first week of July, 2008. The applicants further contended that the accommodation of the counsel at Delhi was a permanent since 1986 whereas the accommodation taken by the

counsel for the applicants where he shifted was rented. It is stated that since at the new residence the counsel had to make adjustment of his home and office and had to search for all the amenities detailed in the application because of which he was under lot of stress and suffered from vertigo and high blood pressure which was caused due to toxic imbalance in his ears and he also developed hearing problem.

7. The applicants contended that his counsel could develop vertigo at any time, while driving or hearing loud sound or speaking loudly which problem continued in August and part of September. The counsel is alleged to be under medication and treatment at Shivalik Hospital, HUDA Market, Sector 31, Faridabad. The applicants have produced the medical certificates of the counsel for the applicants.

8. According to the applicants/defendants the matter was listed on 8th August, 2008 and it had been adjourned before the counsel for the defendants could appear on that date. It is stated that the counsel was delayed on that date on account of his medical problems. Since the matter had already been adjourned on 8th August, 2008, the enquiries were made about what had happened in the matter by the counsel for the applicants and it transpired that the application for leave to defend was not dismissed but was adjourned to next date. The counsel, however, noted the next date as 24th November, 2008. The defendant was therefore, also informed the next date of hearing as 24th November,

2008.

9. The applicants have also contended that in October, 2008 his counsel had to again shift his residence from 8, Ashoka Enclave-I, Faridabad, Haryana to House No.281, Sector 28, Faridabad, Haryana which was purchased by the father of the counsel.

10. The plea of the applicants/defendants is that on 24th November, 2008 the matter was not listed and on enquiry by the counsel for the defendants, it transpired that the matter was listed on 21st November, 2008 on which date the application of the defendant was dismissed in default and the suit was decreed.

11. The applicants/defendants have produced the photocopy of the diary of the counsel dated 8th August, 2008 in which the next date of hearing in the matter is recorded as 24th November, 2008. In the circumstances, it is contended that non appearance of the defendants and their counsel on 21st November, 2008 was neither intentional nor willful and there is sufficient cause for setting aside the order of dismissal dated 21st November, 2008 dismissing the application under Order 37 Rule 3(5) of the Code of Civil Procedure for leave to defend and contest the suit and restoring the same to its number and for setting aside the judgment and decree dated 21st November, 2008 passed consequent upon the dismissal of the application for leave to defend

and contest the suit in default of appearance.

12. The application is contested by the plaintiff. The plaintiff/non applicant has contended that the application is not maintainable as it not in accordance with law. According to the plaintiff, defendants have failed to show special circumstances and good, substantial and meritorious defence on merit of the suit in the application, and in the circumstances the application is liable to be dismissed. The application is also alleged to be neither signed nor supported by the affidavits of the defendants and the power of attorney given in favor of Sh.Shailender Mishra does not authorize him and gives requisite power to file the application on behalf of the defendants. It is also contended that no resolution of the board of directors authorizing execution of power of attorney in favor of Sh. Shailendra Mishra has been filed with the application.

13. It is also contended that the Form 'C' were issued by the defendant no.1 company after issuance of legal notice raising demands and consequently the liability is admitted by the defendant company for the goods supplied. It is also contended that since the execution petition has also been filed there are no grounds to set aside the order of dismissal dated 21st November, 2008 dismissing the application of the defendants under Order 37 Rule 3(5) of the Code of Civil Procedure and passing judgment and decree dated 21st November, 2008.

14. I have heard the learned counsel for the parties at length and perused the applications and replies. The application filed on behalf of defendants/applicants showing cause for non appearance of defendants and their counsel on 21st November, 2008 is supported by the affidavit of the counsel. The reply filed by the plaintiff is supported by the affidavit of Sh.Dalip Kumar Parekh, Manager, Commercial of the plaintiff company. Beside the bald denial in the reply about the facts regarding the illness of the counsel for the applicants and also his shifting of residence and noting the wrong date, nothing has been pleaded or averred on behalf of the plaintiff so as to disbelieve the pleas and contentions of the defendants/applicants and affidavit of their counsel.

15. Perusal of the application seeking unconditional leave to defend and contest the suit is rather reveals that a ground has been taken by the defendants that this Court does not have jurisdiction to try the present suit as the Clause 21 of the purchase order which is not denied by the plaintiff categorically stipulates that the contract shall be deemed to have been entered in Aurangabad only and Courts will have jurisdiction in all matters whatsoever out of this work at Aurangabad only.

16. In the plaint the plaintiff has alleged that the defendants had been making purchases of the polyblends of different brands on

deferred payment and the defendants had been maintaining an open, mutual and current account with the plaintiff. It is also averred that the mode of payment adopted between the parties was that the defendants used to issue irrevocable letter of credit from their bankers and the goods used to be retired by the defendants against the acceptance of commercial hundies which used to be paid by the defendants or their bankers on or about due dates. This is also averred by the plaintiffs that defendants had also been giving demand drafts in favor of plaintiff for amounts towards payment of outstanding dues against them and the credit of these used to be given to the defendants in the books of account of plaintiff.

17. In the circumstances it cannot be held that part of cause of action had not arisen at Aurangabad. If part of the cause of action had arisen at Aurangabad and part of cause of action had arisen at New Delhi, by exclusion clause in the purchase orders which have been admitted by the plaintiffs, the jurisdiction of the Courts at Delhi will be excluded. The Supreme Court in A.B.C.Laminart Pvt Ltd and Anr v. A.P.Agencies, Salem, AIR 1989 SC 1239 had held that the exclusion clause in a contract is not against the public policy and if the cause of action has arisen at more than one place giving jurisdiction to different Courts, by agreement the jurisdiction can be vested in one Court excluding the jurisdiction of other Courts. It was held that if under law, civil Courts at various places have jurisdiction and the parties have agreed to submit

to one of these jurisdiction and not to others, then it cannot be said that there will not be total ouster of jurisdiction of other Courts. It was held that the jurisdiction to which the parties have agreed not to submit to, will not be a proper jurisdiction to decide the dispute arising out of a contract.

18. When the ouster clause is clear, unambiguous and is specific, this will bind the parties unless the absence of ad idem can be shown and the other Courts except the Court where the parties have agreed to have jurisdiction should avoid exercising jurisdiction. The ouster clause between the plaintiff and defendants also stipulates the word 'only' for the Jurisdiction at Aurangabad. In the circumstances, apparently the Court at Delhi will not have jurisdiction, prima facie and it will be a special circumstance to set aside the decree passed by this Court on 21st November, 2008 on dismissal of the application of the defendants for unconditional leave to defend and contest the suit. In U.Can Migrate Consultants Groups Ltd v. Canadian Connections Groups Ltd, 144(2007) DLT 863 a suit filed under Order 37 was returned as the Court at Delhi did not have jurisdiction and, therefore, the plaint was returned for filing at the appropriate Court relying on the ratio of A.B.C.Laminart Pvt Ltd (Supra).

19. The plaintiff have also alleged the liability against defendant No.2 on the ground that he is the managing director and the person

responsible and, therefore, he is liable to meet the liabilities of defendant No.1. The managing director of a private limited company cannot be held to be personally liable unless such a managing director had stood guarantee or assured the payment of the amounts due from the private limited company to the creditor.

20. A Division Bench of this Court in 136 (2007) DLT 573, *Manjari v. Ranjit Singh* had rather held that for invoking the power under Order 37 of the Code of Civil Procedure for setting aside the ex-parte decree the Court should not demand existence of triable issues. Approach of the Court to consider the triable issues before setting aside the ex-parte decree shall be illegal, incorrect and will result in miscarriage of justice. In *Manjari (Supra)* the defendant was served by publication though a copy of the suit was not published along with the summons. On this ground though a finding had been recorded that the service of summon upon the defendant was not in accordance with law, however, for setting aside an ex-parte decree passed in such circumstances, the Court had insisted for consideration of triable issues and such an approach of the trial Court was set aside.

21. In the present facts and circumstances, the defendants applicants have been able to make out special circumstances and sufficient cause for non appearance of applicants and his counsel on 21st November, 2008 when on account of non appearance of

defendants/applicants, their application for leave to defend and contest the suit being IA No.11606/2007 was dismissed and consequent thereto, the suit was dismissed.

22. The applicants have been able to establish that on 8th August, 2008 their counsel could not reach on time on account of his medical problems and by the time, the Counsel for the defendants had reached the matter had already been adjourned. The counsel made enquiries when it had transpired that the application for leave to defend and contest the suit had been adjourned. However, the next date of hearing was noted by the counsel as 24th November, 2008 in place of 21st November, 2008 leading to non appearance on 21st November, 2008 and dismissal of the application of the defendants for leave to defend and contest the suit and an ex-parte decree passed against the defendants. From the copy of the power of attorney executed in favor of the Shailendra Mishra dated 19th December, 2005 it cannot be inferred that he is not authorized on behalf of the defendant company to file the application for setting aside the ex-parte decree passed against the defendants. It has also been contended that Sh. Shailendra Mishra is the Principal officer as well as duly constituted attorney of the defendant company. In the circumstances, prima facie, it cannot be held that the application has not been filed by a duly authorized person on behalf of the defendant company.

23. Non appearance by the counsel for the defendants is for bona fide reasons and there are no grounds to disbelieve the counsel for the defendants who had also filed his affidavit in support of the allegations made in the application for setting aside the ex-parte decree. In the circumstances, the applicants have been able to make out sufficient cause for non appearance of the defendants leading to dismissal of the application for leave to defend and contest the suit and there are also special circumstances, prima facie, for the setting aside the judgment and decree passed against the defendants in the suit filed under order 37 of the Code of Civil Procedure.

24. Consequently, the judgment and decree dated 21st November, 2008 are set aside and order dated 21st November, 2008 dismissing the application of the defendants applicants for non appearance of defendants and their counsel is set aside and IA No.11606/2007 is restored to its original number.

IA No.11606/2007

Adjourned at the request of the counsel for the plaintiff.
Adjournment is not opposed.

List on 31st July, 2009 for hearing of application for leave to defend and contest the suit.

IA No.414/2009

Since the judgment and decree dated 21st November, 2008 has been set aside, the application has become infructuous.

Dismissed as infructuous.

MAY 25, 2009

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ANIL KUMAR, J.