

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: 14.11.2011

+ CS(OS) No. 60/2009

M/s Pioneer Publicity Corp. Pvt. Ltd. Plaintiff

Through: Ms. Anjali Chopra, Advocate

versus

M/s Vian Infrastructure Ltd.

.... Defendant

Through: None

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in Digest? | No |

V.K. JAIN, J. (ORAL)

IA 15644/2010(O.37 R.3(5) CPC)

1. No one has appeared for the defendant even on the third call to argue this application. I, therefore, have heard the learned counsel for the plaintiff and proceed to decide this application on merits.

2. This is a suit for recovery of Rs.1,78,85,461/-. The plaintiff Company is engaged in the field of outdoor

advertising for his clients. The defendant placed two orders one dated 4th November, 2006 and the other dated 17th April, 2007 with the plaintiff Company for advertisements. A sum of Rs.1,94,29,405/- became payable by the defendant Company. The defendant paid a sum of Rs.15,32,609/- vide cheque dated 4th November, 2006 and a sum of Rs.19,46,831/- vide cheque dated 10th January, 2007. These payments were made towards Bill dated 27th November, 2006. The defendant thereafter did not make any payment to the plaintiff Company and a sum of Rs.1,59,49,965/- is alleged to be due from it to the plaintiff Company. The defendant issued ten cheques for an aggregate sum of Rs.1,37,67,600/-, which when presented were dishonoured. The plaintiff sent a notice dated 4th August, 2007 to the defendant which was replied by defendant vide its reply dated 3rd September, 2007. The plaintiff has now claimed the aforesaid principal sum of Rs.1,59,49,965/- along with interest at the rate of 12% per annum amounting to Rs.14,35,496/-.

3. In its application for leave to contest, the defendant has alleged that it issued only two work orders in favour of the plaintiff Company for a total consideration

amounting to Rs.31 lakhs and the other for consideration amounting to Rs.18,50,000/-. It is also alleged that the work done by the plaintiff was not satisfactory as per the terms of the work orders and prudent commercial outdoor advertisement practices. As regards the cheques, it is alleged that they were issued cheques in advance on rough estimate basis so that the plaintiff could start its work. Since the work of the plaintiff was not upto the expectation of the defendant Company, the amount which it had paid to the plaintiff Company vide cheques dated 4th November, 2006 and 10th January, 2007 was demanded back. The parties then reached a full and final settlement whereby the plaintiff retained the amount which it had already received from the defendant.

4. The learned counsel for the plaintiff has pointed out that there is a gap of more than six months between the date of the first order and the date of the second order placed by the defendant on the plaintiff Company. It is further pointed out that as many as five Bills for total amount of Rs.1,73,97,200/- were raised by the plaintiff Company during this period. The contention is that had the work executed by the plaintiff Company not been in

accordance of the order placed on it, the defendant who would not have placed the second order with the plaintiff Company on 17th April, 2007, I find merit in this contention. Moreover, no letter or notice was sent by the defendant to the plaintiff Company at any point of time stating therein that the work executed by the plaintiff Company was not in consonance with the work order placed on it and, therefore, the defendant Company was compelled to instruct the banks to stop payment of the cheques which it had issued to the plaintiff Company. It is also pointed out by the learned counsel for the plaintiff that while placing the second order dated 17th April, 2007, the defendant had issued two cheques of Rs.1,37,67,600/- to the plaintiff Company, which the defendant would not have done had the work executed by the plaintiff Company being defective.

5. Though in the reply sent to the notice of the plaintiff Company, the defendant alleged that the job carried out by the plaintiff did not match the mutually agreed criteria for the reasons pointed out in para 2 of the reply, no such defect has been specified in the application for leave to contest the suit and only a general allegation has been made that the work executed by the plaintiff was not as per

the agreement between the parties.

6. One of the defects mentioned in para 2 of the reply sent by the defendant-company to the plaintiff-company was that the actual quality of the flex material was sub-standard. This according to the learned counsel is patently false since a perusal of the work orders would show that the flex material was to be supplied by the defendant-company.

7. In **M/s Mechalec Engineers and Manufactures v. M/s Basic Equipment Corporation** (1977) 1 SCR 1060, the Supreme Court set out the following principles:-

"(a) If the defendant satisfies the Court that he has a good defense to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) if the defendant raises a friable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a

defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defense."

In these circumstances, the defence taken in the application does not appear to be *bona fide* and appears to be sham and illusory.

8. Following the last guideline laid down by Supreme

Court, I grant leave to defendant to contest the defendant subject to its furnishing a bank guarantee or an FDR for the principal sum of Rs.1,59,49,965/- to the satisfaction of the concerned Joint Registrar within three weeks from today.

The application stands disposed of.

CS(OS) No. 60/2009

Renotify for hearing on 18th December, 2011.

(V.K. JAIN)
JUDGE

NOVEMBER 14, 2011
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