

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

Date of decision: 21st March, 2012

+ FAO (OS) 198/2006

% M/S MARGRA INDUSTRIES LTD. Appellant
Through: Mr. Kailash Vasudev, Sr. Adv. with
Ms. Anjali Manish, Adv.

Versus

**M/S MEDITERRANEAN SHIPPING
COMPANY, S.A. & ANR. Respondent**
Through: Mr. I.S. Alag with Mr. J.S. Lamba
and Mr. R.S. Bisht, Adv.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

RAJIV SAHAI ENDLAW, J.

1. This appeal under Section 10 of the Delhi High Court Act, 1966 impugns the judgment dated 20.02.2006 of a Single Judge of this Court dismissing the IA No.13116/2000 preferred by the appellant under Order XXXVII Rule 4 of the CPC i.e. for setting aside of the decree dated 17.11.2000 passed against the appellant in CS(OS) No.1444/2000 filed under Order XXXVII of the CPC for failure of the appellant to enter

appearance within the prescribed time of the service of the summons for appearance on the appellant. The said decree was for a sum of ₹60,25,112/- with *pendente lite* and future interest.

2. Notice of this appeal was issued. Vide order dated 18.09.2006, the operation of the impugned judgment and order stayed subject to the appellant depositing 50% of the decretal amount. The appellant failed to deposit the same and vide order dated 13.12.2006, the stay was vacated. During the pendency of the appeal, the parties were referred to the Mediation and Conciliation Centre of this Court but the same remained unsuccessful. The counsels have been heard.

3. The respondent No.1, a shipping line engaged in transportation by sea of goods / cargo in enclosed containers from one destination to another and the respondent No.2 being the agent of the respondent No.1 in India, instituted the suit aforesaid under Order XXXVII of the CPC for recovery of ₹60,25,112/- with *pendente lite* and future interest pleading, that the respondent No.1 had been approached at its office in Spain to carry a consignment of rough marble slabs and blocks to Delhi to be delivered to

the appellant; that though the respondents transported/shipped the said cargo but owing to the disputes between the appellant and the customs, the said cargo could not be cleared; that the appellant filed W.P.(C) No.7313/1999 in this Court claiming the relief of release of the cargo but which writ petition was dismissed on 11.02.2000; that the appellant filed another writ petition being W.P.(C) No.7314/1999 seeking mandamus directing UOI to undertake the exercise of fixation of reasonable demurrage charges; that though the respondent No.1 was impleaded as a party to the said writ petition but was subsequently deleted therefrom; that the consignment had arrived at ICD, Delhi on 14.01.1999 and the appellant was entitled to five free days for clearing and lifting the cargo and was thereafter liable to pay container charges as per the tariff chart of the respondent No.1; that the appellant failed to de-stuff the container and take delivery of the consignment inspite of repeated requests and reminders; that the appellant in July, 1999 approached the respondents for waiver of detention charges and though the respondents agreed to waive detention charges on payment of agreed amount but the appellant neither paid the same nor de-stuffed the containers; that owing to the same, the respondents

were unable to utilize and circulate the containers for their business purposes adversely affecting their business; that in January, 2000 the appellant again approached the respondents seeking waiver of detention charges and an agreement dated 21.01.2000 was entered into between the parties whereunder the respondents agreed to release the goods on payment of agreed amount within the stipulated date and the appellant agreed that upon appellant's failure to pay the agreed amount by the stipulated date, the container detention charges as prescribed under the Karmahom Conference in respect of the entire period of detention of the consignment shall be payable by the appellant; that though the appellant took the containers to its the factory for de-stuffing and was to return the same within seven days but failed to do so and ultimately out of twelve containers released 8 containers only, illegally, retaining four containers and failed to return the same inspite of reminders. The respondents in Para 25 of the plaint pleaded as under:

“25. That due to the breaches committed by the Defendant and more particularly in not destuffing and releasing the containers on 28.02.2000, the plaintiffs admittedly are

entitled to the entire amount of detention as per Karmahom Conference @ US \$ 48 per day per container. Therefore, as per the tariff the plaintiffs are entitled to a sum of ₹60,25,312/- till 30.06.2000 as detention / demurrage charges from the Defendant and the Defendant is liable to pay and the plaintiff are entitled to a sum of ₹60,25,312/-, along interest @ 24% from the date the said amount became due and payable to the plaintiff.”

4. Summons for appearance of the suit were issued to the appellant. The respondents filed an application pleading that though the summons for appearance in the prescribed form along with plaint and documents had been served on the appellant at its registered office on 19.07.2000 but the appellant had not entered appearance within the prescribed time and hence the suit was entitled to be decreed. The learned Single Judge after verifying that the summons had been so served on the appellant and noticing that a Vakalatnama on behalf of the appellant had been filed only on 14.09.2000, vide order dated 17.11.2000 corrected on 12.12.2000 decreed the suit for ₹60,25,112/- together with interest at the rate of 15% per annum from 10.07.2000.

5. Application as aforesaid under Order XXXVII Rule 4 of the CPC was filed by the appellant pleading:

- (i) that the service on the appellant was not effected as per the provisions contained in Order XXIX Rule 2 of the CPC;
- (ii) that the service of the summons of the suit was not effected at the registered office of the appellant as required under Order XXIX Rule 2 of CPC;
- (iii) that on service of summons, the appellant on inquiry had come to know that the suit was listed next on 08.12.2000 and accordingly instructed its counsel to enter appearance on 14.09.2000;
- (iv) however when the appellant inspected the file of the suit on 05.12.2000, it learnt that the suit had already been decreed on 17.11.2000;
- (v) that no notice of the application moved by the respondents for decreeing the suit was served on the appellant.
- (vi) that the disputes between the parties did not fall in the category enumerated in Order XXXVII;
- (vii) that the agreement on the basis of which the respondents had

instituted the suit under order XXXVII was not a valid agreement as the signatures of the representative of the appellant who otherwise was not competent to enter into the agreement were obtained under duress and coercion;

- (viii) that the appellant had on 10.07.1999 paid a sum of ₹3,26,528/- to the respondents as container detention charges calculated @ US\$ 4 per container per day; same was indicative of the understanding reached between the parties for payment of container detention charges at the said rate;
- (ix) that the appellant was in a extremely difficult situation due to illegal detention of cargo by the customs and resultant heavy financial liability and was thus desperately looking for release of the cargo;
- (x) that the appellant had visited the office of the respondent on 12.01.2000 and offered payment of ₹1.98 lakhs towards container detention charges @ of US\$ 2 per container per day in terms of understanding between the parties;
- (xi) that the respondents however still did not prepare delivery order and insisted upon the appellant signing an agreement to the effect undertaking to withdraw W.P.(C) No.7314/1999 (filed by the appellant challenging the unreasonable excessive

detention charges) and thereafter faxed a draft agreement to the appellant which did not contain any clause as to the charging of detention charges as per Karmahom Conference;

(xii) that the appellant was thereafter coerced to enter into the agreement (on the basis of which the suit was filed) due to its highly vulnerable position;

(xiii) that it was thereafter that the respondents on 21.01.2000 issued the delivery orders;

(xiv) that the appellant signed the agreement under extreme hardship and which agreement contained clauses which were never agreed to.

6. Needless to state the respondents filed a reply to the application of the appellant under Order XXXVII Rule 4 of the CPC controverting the pleas aforesaid.

7. The learned Single Judge in the order impugned before us has recorded / observed / held:

(a) that as per the records of the Court, the appellant had been served on 19.07.2000 and there was no explanation

forthcoming as to why till 13.09.2000 there was absence of knowledge of service with the appellant;

- (b) that the appellant had been using the same address at which it had been served in all its earlier correspondences; that the service at the said address was under the seal of the appellant company and even signed by the duly authorized person;
- (c) that the plea that the seal of the appellant company was fixed unauthorizedly could not be accepted;
- (d) that Order XXIX Rule 2 of the CPC permitted services on a principal officer and the person holding the seal would be duly authorized person to receive such summon;
- (e) that it was not the contention of the appellant at any point of time that the address of the appellant was other than D-1, Sector-11, Noida found on the letterheads of the appellant; it was only in support of the application under Order XXXVII Rule 4 of the CPC that the case of the registered office of the appellant being somewhere else was set up;
- (f) that the address given by the appellant of the registered office as “Near Primary School, Village Gharoli, Delhi-110 096” was a fake address;

- (g) all the relevant communications with the appellant were at the Noida address also found on its letterhead and at which it had been served;
- (h) that the appellant even at the time of filing the Vakalatnama on 14.09.2000 had not entered appearance in according with Order XXXVII of the CPC;
- (i) no notice of entering such appearance had been served on the respondents;
- (j) that the appellant not having entered appearance within time, the respondents were within their right to apply for decree and at the time when the respondents so applied on 17.08.2000 even the Vakalatnama on behalf of the appellant had not been filed;
- (k) that the appellant had thus failed to make out a case for not entering appearance within the prescribed time.
- (l) that though several efforts had been made for amicable settlement or for allowing the appellant to contest the suit on depositing half balance amount in the Court and furnishing bank guarantee for the remaining half but the appellant kept on taking dates for the said purpose and ultimately informed

that they were not agreeable to the same and would prefer to invite judgment on merits;

The learned Single Judge despite holding so also considered the merits and held:

- (m) since it was the own plea of the appellant that a draft agreement had been sent to it before execution thereof and further since the appellant had taken possession of containers and done other things in pursuance to the agreement ultimately singled between the parties, the appellant could not be heard to urge coercion etc.;
- (n) the appellant cannot act on the agreement and thereafter claim that he was under duress and pressure when admittedly draft of the agreement was sent and thereafter it was finalized and signed;
- (o) the fact that the appellant was under commercial compulsions arising from its financial liability to the custom authorities could not cast doubt or nullify the agreement;
- (p) that the appellant having acted upon the agreement dated 21.01.2000 and having taken advantage of the same, the plea of the appellant having signed the agreement under duress or

pressure did not raise a triable issue and was only an attempt to evade financial liability;

- (q) that under the said agreement the appellant was entitled to rebate but had disentitled itself from such rebate by failing to abide by the terms and conditions thereof;
- (r) the respondents being a sea liner were required to have their containers in Circulation and had suffered owing to their containers having been held up on account of the appellant;
- (s) that the dispute between the appellant and the custom authority was not attributable to the respondents and /or no decision qua the respondents;
- (t) that the matter was a pure commercial transaction which was acted upon by the parties;
- (u) the debt due was as per the written contract to be read with the Bill of Lading dated 30.09.1998 and the rates stipulated under the Karmahom Conference have to be necessarily read as part of the agreement by incorporation since it was so provided under the agreement;
- (v) that the defence sought to be raised by the appellant was a clear moonshine apart from being a false and afterthought to

evade liability.

8. The senior counsel for the appellant has reiterated the arguments of service of summons as well as on merits before us. He has also contended that there is no basis whatsoever in the plaint as to how the amount of ₹60,25,112/- has been arrived at and the suit did not qualify as under Order XXXVII of the CPC.

9. As far as the last of the aforesaid argument is concerned, we may notice that it was not the plea of the appellant in the application under Order XXXVII Rule 4 of the CPC that the amount even if to be computed as per the Karmahom Conference would not be ₹60,25,112/- claimed in the suit. No such plea appears to have been raised in the arguments before the learned Single Judge also as is obvious from the judgment being bereft thereof. It is also not a ground taken before us that such a plea was taken or has not been dealt with by the learned Single Judge. The appellant cannot be permitted to raise such a plea for the first time in appeal.

10. The respondents had filed the suit under Order XXXVII of the CPC

on the basis of the agreement dated 21.01.2000 which made the appellant liable for container detention charges as per Karmahom Conference if they failed to pay the reduced amount which the respondents had agreed to take if paid by the specified date. The appellant in the application under Order XXXVII Rule 4 of the CPC sought leave to defend pleading that it had been coerced to enter into the agreement. It was nowhere pleaded or urged that as per the Karmahom Conference also the amount was something other than as claimed in the suit. The only inference can be that the appellant did not dispute that as per Karmahom Conference the amount claimed was due. Order XXXVII Rule 5 requires a defendant to disclose facts as may be deemed sufficient to entitle him to defend the suit. The appellant by its failure to disclose any facts to the effect that the amount due as per Karmahom Conference was anything other than claimed by the respondents in the suit, is deemed to have admitted the said part of the plaint and cannot now be permitted to take advantage of the legalese to wriggle out of such admission.

11. We are unable to find any error in the judgment of the learned

Single Judge requiring interference in this appeal. As is borne out from setting up of the ingredients of the application herein above of the appellant under Order XXXVII Rule 4 of the CPC, there was absolutely no plausible explanation whatsoever for non filing of appearance within the prescribed time of service of the summons. The appellant admits having acted on the said summons by filing the vakalatnama on 14.09.2000; when the appellant could file vakalatnama in pursuance to such service, there is no explanation as to why the appearance which the appellant was required to enter in terms of Rule 3(1) of Order XXXVII could not have been entered. The summons under Order XXXVII do not contain the date of hearing. The falsity of the case set up by the appellant is borne out from the appellant's plea of having orally found out about the date of hearing on 08.12.2000. A clear default of the appellant in entering appearance is made out and in the absence of any explanation therefor, the learned Single Judge has rightly held the no case for recalling the decree under Order XXXVII Rule 4 to be made out.

12. We also concur with the judgment of the learned Single Judge qua the plea of coercion. The senior counsel for the appellant during the hearing had invited our attention to the agreement dated 21.01.2000 signing which the representative of the appellant has noted “payment made under protest”; therefrom it is argued that a clear case of the appellant being under coercion is made out.

13. We are unable to agree. The protest noted is only qua the payment made under the agreement and not qua the term of the agreement whereunder the appellant on failure to abide by its part of the agreement became liable to container detention charges as prescribed under the Karmahom Conference. The agreement as aforesaid was beneficial to the appellant. The appellant there under was being given a substantive rebate in its liability on account of container detention charges; seen in the commercial light also, the agreement was more advantageous to the appellant than to the respondents. We may also notice that the appellant even after the agreement and after taking delivery of the containers did not object to the said clause. Though a legal notice dated 17.02.2000 was

given by the appellant but even therein no objection was taken to the clause qua becoming liable to pay as per Karmahom Conference if in breach of the agreement. It is thus obvious that the said plea is taken as an afterthought.

14. The senior counsel for the appellant in rejoinder had also argued that if the respondents were to treat the registered office of the appellant to be at Noida, this Court would have no territorial jurisdiction. There is again no basis whatsoever for this argument and which appears to have been made in a last ditch effort and has but to be ignored.

15. We thus do not find any merit in the appeal. The same is dismissed with costs of ₹25,000/-.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MARCH 21, 2012

‘gsr’