

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CS(OS) 1824/2011**

Date of Decision: 17th October, 2012

IN THE MATTER OF

M/S HI-TECH PIPES LIMITED

. Plaintiff

Through: Mr. Bhuvan Gugnani and Mr. Rahul
Sharma, Advocates

versus

M/S PIONEER FABRICATORS PVT LTD AND ANOTHER . Defendants

Through: Mr. Vibhor Verdhan, Advocate

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J. (Oral)

1. The plaintiff has filed the present summary suit against the defendants for recovery of a sum of Rs.40,00,000/-.

2. Before dealing with the merits of the case, some dates and events that are relevant for consideration are taken note of. On 29.7.2011, notice was issued to the defendants under the prescribed proforma, returnable for 30.09.2011. Appearance was entered on behalf of the defendants on 30.09.2011 on which date, the learned Joint Registrar had observed that only a Vakalatnama had been filed on their behalf and that no memo of appearance was filed. As a result, matter was placed before the Court on 01.11.2011. On 01.11.2011, counsel for the defendants had submitted that summons for judgment may be served upon the

defendant at the address of the counsel as given in the Vakalatnama which may be treated as a memo of appearance. As counsel for the plaintiff had no objection to the aforesaid suggestion, time was sought by him to file summons for judgment and the case was adjourned to 21.12.2011.

3. In the meantime, the plaintiff filed an application for issuance of summons for judgment to the defendants, registered as I.A. No. 17951/2011. On 15.11.2011, notice was issued on the aforesaid application. On 21.12.2011, the date fixed before the Court, counsel for the defendants had submitted that he had filed an application for leave to defend on 12.12.2011. But the same was not found to be on record. Counsel for the plaintiff had also submitted that he had not received a copy thereof. The suit was then posted for 23.04.2012.

4. On 23.04.2012, counsel for the parties stated that they had arrived at an amicable settlement and a Tripartite Agreement dated 19.4.2012 was executed between the plaintiff, the defendant and M/s KMC Construction Ltd., a customer of the defendant who had agreed to pay the amounts payable by the defendant, directly to the plaintiff. At the request of counsels for the parties who had jointly sought some time to move an appropriate application in this regard, the matter was adjourned to 03.05.2012. On 03.05.2012, at the request of the counsel for the plaintiff, the matter was adjourned to 30.05.2012. In the meantime, an

application was filed by the plaintiff under Order 1 Rule 10 CPC, registered as IA No.8758/2012 seeking to implead M/s KMC Construction Ltd. The said application was listed before the Joint Registrar on two dates, i.e., 2.7.2012 and 18.9.2012 and finally, the matter was placed before the Court for 17.10.2012.

5. Today, learned counsel for the plaintiff states that as the counsel for the defendants has failed to remove the objections and re-file its leave to defend application and nor has a copy thereof been furnished to him till date, the present suit is liable to be decreed right away.

6. Learned counsel for the defendants submits that his client remained under a bonafide impression that after the parties had arrived at a settlement as recorded in the Tripartite Agreement dated 19.4.2012, whereunder M/s KMC Construction Ltd. had issued cheques worth Rs. 38 lacs in favour of the plaintiff to liquidate the liabilities of the defendants, the present case stood amicably resolved and, therefore, he did not take any steps to re-file the leave to defend application. He submits that if an adjournment is granted today, he shall take steps to re-file the said application and furnish a copy thereof to the other side.

7. It is relevant to note that pursuant to the plaintiff and the defendants arriving at a Tripartite Agreement alongwith M/s KMC Construction Ltd. on 19.04.2012, the third party had agreed to pay directly to the plaintiff, a sum of Rs. 38 lacs for & on behalf of the defendants and it had issued

three post dated cheques totaling to Rs. 38 lacs in full and final settlement of the claims of the plaintiff. Learned counsel for the plaintiff hands over the original Tripartite Agreement, which is taken on record. He points out that when the first cheque dated 10.5.2012 for Rs. 15 lacs was presented, the same was duly encashed, but when the remaining two cheques dated 18.5.2012 and 28.5.2012 for Rs. 15 lacs and Rs. 8 lacs respectively were presented, both were dishonoured on account of insufficient funds. He therefore submits that the defendants are very well aware of the aforesaid turn of events and they ought to have taken necessary steps to either approach M/s KMC Construction Ltd. with a request to it to abide by its undertaking as recorded in the Tripartite Agreement or they ought to have approached the plaintiff directly with the balance sum of Rs.23 lacs payable under the Tripartite Agreement. But having failed to take either of the aforesaid steps, the defendants ought to have instructed their counsel to re-file the leave to defend application and be prepared to address arguments thereon.

8. There is merit in the aforesaid submission made by learned counsel for the plaintiff. If the intention of the defendants was bonafide, they ought to have pursued the matter with M/s KMC Construction Ltd., a party that was introduced by them to the plaintiff as their customer and one who had agreed to discharge their liability by offering to pay a sum of Rs. 38 lacs to the plaintiff through three post dated cheques. Further, it is relevant to note that the last two post dated cheques for Rs.15 lacs

and Rs.8 lacs were issued by M/s KMC Construction Ltd. in the month of May, 2012 and, therefore, there was ample time for the defendants to have shown due diligence by following up the matter with its customer and verify as to whether the said cheques had actually been honoured on being presented by the plaintiff for encashment so that their liability stood completely discharged under the Tripartite Agreement. However, no such steps were taken by the defendants from May 2012, till date.

9. In the aforesaid facts and circumstances, it does not lie in the mouth of the defendants to claim that they did not re-file the leave to defend application as they had remained under an impression that the dispute between the parties had been amicably settled under the Tripartite Agreement. Moreover, on 18.9.2012, the date fixed before the Joint Registrar, it was mentioned in the order that despite service of summons of judgment, the defendants had not filed the leave to defend application. Thus ample opportunity was available to the defendants to have taken necessary steps to re-file their leave to defend application. As a result, the Court is not inclined to grant any further indulgence to the counsel for the defendants who seeks an adjournment to re-file the said application.

10. As the defendants have failed to re-file the leave to defend application knowing very well the consequences thereof, the Court is constrained to hold that the averments made in the plaint have remained

un-rebutted and are deemed to be admitted by them. Consequently, the present suit has to be decided on the basis of the averments that have been made in the plaint.

11. It is the case of the plaintiff company that it is in the business of manufacturing, trading and selling various types of pipes and the defendants use to purchase their goods from time to time on cash and credit basis. The plaintiff had opened an open, mutual and running account in its books of accounts in the name of the defendant No.1 that was maintained in the ordinary course of business. True copies of the ledger account of the defendants maintained by the plaintiff for the period from 01.04.2008 to 31.03.2009 and from 01.04.2009 to 31.05.2009 have been filed alongwith the list of documents. As per the aforesaid ledger account maintained by the plaintiff, as on 07.04.2011 the defendant No.1 was liable to pay a sum of Rs. 37,94,355/- to the plaintiff. In support of the aforesaid statement of account of the defendant No.1 company maintained by the plaintiff company, it has filed forty three original invoices raised by it on the defendant No.1 company for the period with effect from 24/12/2008 to 16.07/2010. Apart from the above, the plaintiff company has also filed its Memo of Articles of Association and a certified true copy of the resolution dated 4.6.2011, adopted by the Board of Directors of the plaintiff company authorizing Mr. Pradeep Aggarwal, working as General Manager (Finance) in the company to institute and prosecute the present suit on its behalf.

12. It is averred in the plaint that despite repeated reminders that were issued by the plaintiff company to the defendants, they have failed to clear the aforesaid outstanding amount of Rs.37,94,355/- and finally, after making persistent demands, the defendants had agreed to pay a round sum of Rs. 40 lacs to the plaintiff which figure included the interest component. Thereafter, the defendants issued four cheques in favour of the plaintiff as per the details given hereinbelow:-

S.No.	Cheque No.	Dated	Amount
1.	099015	14.02.2011	Rs. 10,00,000/-
2.	099016	05.04.2011	Rs. 10,00,000/-
3.	099017	05.04.2011	Rs. 10,00,000/-
4.	099018	05.04.2011	Rs. 10,00,000/-

13. When the plaintiff company presented the aforesaid four cheques for encashment, they were returned by the bankers of the defendant No.1 with the remarks, "PAYMENT STOPPED BY THE DRAWER". All the four dishonoured cheques alongwith the return memos forwarded by State Bank of India, the bankers of the defendants, have been filed by the plaintiff alongwith the list of documents.

14. After the plaintiff found that the all aforesaid cheques were dishonoured, it issued a legal notice dated 25.04.2011 to the defendant demanding payment of Rs.40,00,000/- with interest @ 24% p.a. The said notice was dispatched to the defendants by three modes, i.e., by speed

post, courier and by registered A.D post. Although the aforesaid legal notice was duly received by the defendants, they did not bother to respond thereto thus compelling the plaintiff company to institute the present suit under Order XXXVII CPC for recovery for a sum of Rs.40,00,000/- with interest thereon.

15. Having perused the averments made in the plaint and the documents that have been placed on the record and remain un-rebutted, it is deemed appropriate to decree the suit in favour of the plaintiff and against the defendants to the extent of Rs. 25 lacs after setting off the sum of Rs. 15 lacs that has been received by the plaintiff from M/s KMC Construction Ltd. for and on behalf of the defendants, under the Tripartite Agreement dated 19.04.2012. The plaintiff shall be entitled to realize the aforesaid amount from the defendants alongwith simple interest payable at the rate of 9% p.a from the date of institution of the suit till realization. Additionally, the plaintiff is held entitled to costs with counsel's fee quantified at Rs. 30,000/-. The suit is disposed of. Decree sheet shall be drawn accordingly.

HIMA KOHLI, J

OCTOBER 17, 2012

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