

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

+ **RFA No.815/2010**

% **2nd May, 2012**

RAVI BAGAI Appellant

Through: Mr. Niraj Mishra with
Ms. Neha Gupta, Advs.

versus

CLINTUS NETWORK LTD Respondent

Through: Mr. Sanjay Mishra, Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment dated 4.9.2010 granting conditional leave to defend to the appellant and to the consequential order dated 21.10.2010 decreeing the suit on account of failure to comply with the condition of payment of ₹2,50,000/-.

2. The present appeal lies in view of the judgment of the Supreme Court in the case of *Wada Arun Asbestos (P) Ltd. vs. Gujarat*

Water Supply & Sewerage Board, AIR 2009 SC 1027, which holds that once an application for leave to defend is dismissed, and a consequential decree is passed, appeal will have to be filed against the final judgment. In the present case, final judgment has been passed, and which is a consequential judgment decreeing the suit of the respondent/plaintiff on 21.10.2010 and hence the present appeal.

3. The facts of the case are that the respondent/plaintiff filed the present suit for recovery of ₹4,77,819/- against the appellant/defendant with respect to the claim of balance transportation charges for transporting the goods of the appellant/defendant from London to New Delhi. The respondent/plaintiff claimed to have issued invoices totaling to Rs.6,77,819/-, and it is claimed that subject suit is filed for the balance amount due as per invoices i.e. ₹4,77,819/-. The subject suit was filed under Order 37 CPC.

4. A suit can be filed under Order 37 CPC on the basis of a negotiable instrument or a written contract containing a liquidated amount with interest arising, or on a written contract of guarantee. In the present case, there is no averment in the plaint as to how the suit is maintainable under Order 37 CPC. I put it to counsel for the respondent/plaintiff to show me any averment in the plaint as to how the suit has been filed under

Order 37 CPC, but the counsel for the respondent/plaintiff has not been able to show me any averment in the plaint as to how the suit is filed and maintainable under Order 37 CPC. The suit is not on the basis of either a negotiable instrument or a liquidated demand arising from a written contract or from a written contract of guarantee. It is today orally argued that the suit was filed under Order 37 CPC on the basis of invoices which are written contracts.

5. In my opinion, the subject suit was not maintainable under Order 37 CPC and leave to defend was bound to be granted for various reasons. Firstly, the plaint itself does not mention as to how the suit falls under Order 37 CPC, and therefore orally it is not permissible to add to the averments of the plaint to bring the suit within Order 37 CPC. Secondly, the suit does not lie under Order 37 CPC, even assuming if the same is based on the invoices, inasmuch as, the parties are governed by a specific written contract dated 18.8.2000 and as per which a specific price has been mentioned by the respondent/plaintiff for the contract of transportation as under:-

“Price (as per quotation); ₹2,40,000/- + 3 & ½ % insurance charges”

Once there is a written contract containing the consideration, it is not possible to agree that the consideration was not that which is

mentioned in the written contract. Counsel for the respondent/plaintiff sought to contend that below the aforesaid line it is written that there is possible extra costs as per quotation and therefore the respondent/plaintiff was entitled to claim additional charges, however, in my opinion, prima facie this argument cannot be accepted inasmuch as it is necessary that there has to be an amount which is agreed to between the parties for the possible extra costs, and admittedly there is no other written agreement between the parties or consent by the appellant/defendant for raising of the invoices for amounts in excess of ₹2,40,000/- + 3 & ½ % insurance charges and that too for a hugely different/higher amount of ₹6,77,819/-. Thirdly, the present is not a case where the amount which is claimed arises only and directly from the written contract dated 18.8.2000, or assuming that the suit can be considered on the basis of invoices only for the amount of invoices, inasmuch as, amount of ₹2,00,000/- has already been paid by the appellant/defendant to the respondent/plaintiff and thus there is no written contract for the alleged liquidated amount of ₹4,77,819/- which is claimed in this suit. The aforesaid fact shows that not only the suit was not maintainable under Order 37 CPC, but in fact the appellant/defendant had raised enough grounds to allow unconditional leave to defend. Surely, claiming an exorbitant amount of ₹6,77,819/- when the admitted contract is

only for ₹2,40,000/- + 3 & ½ % insurance charges i.e. at best a total of ₹2,47,500/-, is an arm twisting tactic to say the least. As already stated above, with respect to the invoices which have been issued the same are of figures/amounts which is not the suit amount. Further, I must note that the respondent/plaintiff in order to pressurize the appellant/defendant has after releasing almost the entire goods, withheld one Piano instrument and which it is refusing to release, allegedly because the appellant/defendant is not paying the dues.

6. The principles with respect to grant of leave to defend are well settled and are contained in the judgment of the Supreme Court in the case of *M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation, AIR 1977 SC 577*. Para 8 of the judgment is relevant and which reads as under:

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :

(a) If the Defendant satisfies the Court that he has a good defence 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 triable issue indicating that he has a fair or bona fide or

reasonable defence although not a positively good defence 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 has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence 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 defence or the defence 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 defence or the defence 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 defence 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 defence.”

7. In the present case, in my opinion, the appellant/defendant is entitled to unconditional leave to defend in view of the principles (a), (b) & (c) inasmuch as not only the suit was not maintainable under Order 37

CPC, but also in view of the fact that there is no contract for the huge amount of ₹6,77,819/-, but only for ₹2,47,500/-, and out of which amount of ₹2,00,000/- has already been paid. The appellant/defendant therefore is entitled to unconditional leave to defend in the facts of the present case.

8. In the facts of the present case, considering that the appellant/defendant has unnecessarily been forced to file this appeal in a suit which is not maintainable under Order 37 CPC, and with respect to invoices which are way beyond the contractual amount of ₹2,47,500/-, I deem it fit that the appeal be allowed with costs of ₹20,000/-. Costs be paid within a period of four weeks from today.

9. I may note that the Supreme Court in the judgment in the case of *Ramrameshwari Devi and Others v. Nirmala Devi and Others, (2011) 8 SCC 249*, has held that it is high time that actual costs be imposed. I am also empowered to impose actual costs in terms of *Volume V* of the *Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15*.

10. Appeal is therefore allowed. Impugned orders dated 21.10.2010 and 4.9.2010 are set aside and the appellant/defendant is granted unconditional leave to defend.

11. Parties to appear before the District & Sessions Judge, Delhi

on 9.7.2012, and on which date, the District and Sessions Judge, Delhi will mark the suit for disposal to a competent Court in accordance with law.

12. Nothing contained in today's judgment is a reflection on the final merits of the case, as the observations made herein are for drawing prima facie conclusions for the purpose of grant of leave to defend. The Trial Court will hear and dispose of the suit at the stage of final arguments, as per the evidence led by both the parties, and in accordance with law.

VALMIKI J. MEHTA, J

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