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

+ **RFA NO. 329/2012**

SHANTANU ACHARYA

..... Appellant

Versus

WHIRLPOOL OF INDIA LTD

..... Respondent

Date of Decision: 12.09.2012

Advocates who appeared in this case:

For the Appellant : Ms. Priyanka Upadhyay, Advocate.
For the Respondent : Mr. Tarun Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

SUDERSHAN KUMAR MISRA, J. (ORAL)

RFA 329/2012 & CM Nos.13314 (delay) & 13316/2012 (delay in refiling)

1. I have heard counsel for both parties at length.
2. The respondent, Whirlpool of India Ltd., had instituted a summary suit under Order XXXVII of the Code of Civil Procedure against the appellant seeking recovery of Rs.18,78,000/-, along with pendente lite and future interest @ 24% per annum against the defendant/appellant. It

was the case of the plaintiff that the defendant is a sole proprietor of a firm dealing in domestic and home appliances and, at his request, the plaintiff appointed him as a distributor for the sale of its products. Thereafter, and in terms of the agreement between the parties, the defendant purchased goods from the plaintiff from time to time. Ultimately, with a view to settling the outstandings, a joint meeting took place at the office of the plaintiff company at New Delhi on 22nd March, 2004 where, out of the total outstandings of Rs.32,78,000/- shown in the books of accounts of the plaintiff company, the defendant admitted his liability to the extent of Rs.18,78,000/-, after adjustment of Rs.14,00,000/- towards certain defective stocks. A copy of the minutes of the aforesaid meeting held on 22nd March, 2004 was also annexed to the suit. After service of summons for judgment, the defendant applied for leave to defend under Order XXXVII Rule 3 (5) of the CPC on the ground, inter alia, that no cause of action in favour of the plaintiff and against the defendant had arisen within the territorial jurisdiction of the court below.

3. In response, the plaintiff took the stand that a part of cause of action had taken place in Delhi since the defendant had approached the plaintiff at Delhi seeking the distributorship, and that the joint meeting in question had also taken place on 22nd March, 2004 at New Delhi when the defendant agreed to pay a sum of Rs.18,78,000/-. Furthermore, minutes of that meeting dated 22nd March, 2004 were also executed between the parties at New Delhi, and the said outstandings of Rs.18,78,000/- were also payable by the defendant at New Delhi.

4. After hearing the parties, the plea of lack of jurisdiction raised by the defendant was rejected by the trial court and leave to defend was declined, inter alia, also on grounds that the application seeking leave to defend was neither signed by the defendant nor was it supported by any affidavit. However, the court found that the plaintiff was not entitled to interest @ 24% per annum, as claimed, since there was no document to support its claim and, in its view, it was excessive. Consequently, the suit was partly decreed for Rs.18,78,000/-, along with interest @ 12% per annum from the date of filing of the suit till realisation, along with costs.

5. Dissatisfied with this, the defendant has appealed to this Court. It might be noted that the appeal was initially filed after the delay of 622 days when it was returned under objections; it was then refiled after a further delay of 200 days. In view of the Delhi High Court Rules, in case the appeal is not refiled, after being returned under objections, within the time granted, it shall amount to a fresh filing. In other words, there is a total delay of 822 days in filing this appeal.

6. The only ground being urged by counsel for by the appellant is that the settlement dated 22nd March, 2004, relied upon by the plaintiff in the court below is just, “a piece of paper”, and that the same was not signed at Delhi, therefore, the trial court did not have jurisdiction in the matter.

7. Significantly, even before this Court, counsel for the appellant does not deny the signatures of the appellant on the minutes of the meeting dated 22nd March 2004, which the respondent claimed constituted a settlement between the parties and an acknowledgement of debt by the

appellant to the tune of Rs.18,78,000/-. The only thing being urged is that no place of signing is indicated on the document. Be that as it may, the fact remains that even as regards the objection with regard to the jurisdiction raised by the appellant/defendant, even the application containing the factual matrix upon which this objection is based, is not even signed nor is it supported by any affidavit.

8. The requirement for the application for leave to defend to be supported by an affidavit has been clearly enunciated by this Court in **Gainda Mull Hem Raj v. Arora Bros. and Ors.**, AIR 1973 Delhi 141; and in **Rama Vision Ltd. V. Couvery Elecronics Ltd. and Anr.**, I.A. No.536/99 in S. No.794/1996, decided on 28.02.2001, where also a similar preliminary objection was taken by the plaintiff that the application for leave to defend was not supported by an affidavit. In the latter case, while relying upon the ratio in **Gainda Mull Hem Raj** (supra), this Court held that under the circumstances, “in the eyes of law there is no application for leave to defend”.

9. The only other aspect which remains for consideration in this regard is the option granted by Rule 3(5) of Order XXXVII of the CPC to disclose relevant facts by applying, “on affidavit or otherwise disclosing such facts”, as may be deemed sufficient to entitle him to defend the suit. In this context, whilst no direct authority with regard to the scope of the expression, “or otherwise disclosing such facts.....”, occurring in Rule 3(5) has been brought to my notice; a decision of the Calcutta High Court in **Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee**, AIR 1949 Cal 479, which has been

quoted with approval by the Supreme Court in *Mechelec Engineers & Manufacturers v. Basic Equipment Corporation*; and again in *Neebha Kapoor v. Jayantilal Khandwala and Ors.*, AIR 2008 SC 1117, is of some significance. It states as follow:

“(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, 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 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.”

10. In my view, Order XXXVII of the Civil Procedure Code postulates an expeditious summary procedure for deciding certain actions brought in the special circumstances mentioned in that Order. It is with this object in mind that once the basic requirements of the Order XXXVII are satisfied by a party who brings an action under that provision, the defendant is obliged to obtain leave to defend the suit by disclosing such facts that would appear to the court to be sufficient to entitle him in law to defend the action. Naturally, for the disclosure of those facts to be taken seriously by the court, and with a view to ensuring that the very object of providing summary trial is not easily set at nought by an unscrupulous defendant, the defendant is obliged to disclose relevant facts under circumstances that enable the court to attach some sanctity to such disclosure. One method,

recognized at law, is for the facts relied upon by the defendant to either be disclosed on an affidavit or in an application supported by an affidavit testifying to their correctness. To my mind, the expression, “or otherwise disclosing such facts.....”, used in this sub rule(5) takes its colour from the preceding expression, “by affidavit”, meaning thereby, that the facts that come to the knowledge of the court at the instance of the defendant though not on affidavit, should nevertheless be disclosed in such a manner, or under such circumstances, that a similar sanctity and presumption of correctness would be accorded to them by the court. In other words, the expression, “or otherwise disclosing such facts.....”, should be considered *ejusdem generis* to the preceding expression, “on affidavit”. This is more so because if the expression, “or otherwise disclosing such facts.....”, was to be construed in its ordinary grammatical context, without anything more, then it would simply mean that if the defendant were to state any facts at all; neither on affidavit, nor under circumstances in which the requisite sanctity or probity can be attached to them; the court would still be obliged to treat them with the same sanctity. Such an approach would tend to render the preceding expression, “on affidavit”, otiose. It would lose its significance altogether. Such a situation could not have been intended by the legislature when it prescribed the words, “by affidavit or otherwise...”, in Rule 3(5) of Order XXXVII.

11. There is another reason for preferring this approach. Before the insertion of Sub-Rule (4) in Order VI Rule 15 of the CPC that provides for verification of pleadings, it was not necessary for pleadings in an ordinary civil suit to also be supported by an affidavit. This amendment

was inserted in the year 1999 and has become effective from 1.7.2002. Obviously, the legislature considered it necessary to prescribe rules that ensure a greater probity and sanctity to the correctness of facts that are pleaded by the parties even in an ordinary civil suit. Not only that, even in a summary suit the allegations of fact made in the plaint must be supported by an affidavit. Under the circumstances, to conclude that where a claim in a suit is to be disposed of expeditiously under a summary procedure, the opportunity envisaged by the legislature to be afforded to the defendant to disclose relevant facts; with a view to satisfying the court that he should be permitted to defend the action, permits the defendant to do so in a manner that may have a lower probative value, is inconceivable. To hold otherwise, would mean that while on the one hand, even in an ordinary civil suit, a written statement filed by a defendant asserting facts that go to defeat the claim of the plaintiff are required to now be supported by an affidavit testifying to their correctness on oath or solemn affirmation, on the other hand, the disclosure of facts by a defendant in a summary suit while seeking leave to defend need not have the same probative value or sanctity; but once he secures leave to defend, the defendant is then obliged to support the same facts in his written statement, which he is then permitted to file, with an affidavit.

12. Looked at differently, there is no gainsaying the fact that the provision mandating an application by the defendant to apply for leave to defend is key to the entire concept of summary procedure envisaged under Order XXXVII of the Code of Civil Procedure. It is the decision of the Civil Court at this stage which really determines whether it is a matter

deserving an expeditious disposal by resorting to summary procedure or whether the action brought by the plaintiff should be left to be tried in the normal course. The normal procedure under the Civil Procedure Code does not envisage the application for, and grant of Leave to Defend; and the defendant is obliged to enter his defence directly by way of a written statement. The facts on which the defendant relies in his written statement must necessarily be supported by an affidavit. Surely, when the court is called upon to decide the question whether an extraordinary, expeditious procedure envisaging summary disposal is warranted or not, the facts sought to be disclosed by the defendant to demonstrate that the action brought by the plaintiff does not deserve the benefit of such expedited procedure; should also be disclosed in a manner that, at the very least, has probative value and sanctity similar to a written statement filed under the usual procedure. It is hardly conceivable that a lower standard should be adopted with regard to the facts being disclosed by the defendant when the court is considering whether or not to grant leave to defend in the suit.

13. To my mind, the observation of the Supreme Court in **Mechelec Engineers & Manufacturers**(supra) is also to the same effect. A close reading of the said observation shows that the emphasis is on disclosure of facts that may be deemed sufficient to entitle the defendant to defend the action as mentioned by the Supreme Court in paragraph 10 of **Neebha Kapoor**(supra) which read as follows:

“10. ----the Code does not put any embargo on the courts exercising a suo moto power of granting leave in a case of this nature. If a court does so even when an application was not filed, keeping in

view the admitted position of the case, we do not see any illegality therein---.”

14. It follows, therefore, that what is really necessary is for the court to examine the overall context of the matter keeping in view, not only the application for leave to defend or the lack of it, but also the pleadings of the party who had brought the action under Order XXXVII of the CPC. It would therefore, always be open to the defendant to draw the attention of the court either to facts mentioned in the plaint itself or even to facts of which Judicial notice can be taken, as sufficient for the grant of leave to defend. In such a case, there need be no affidavit at all. In fact, in such a situation, court may grant leave to defend even if no application was filed. Obviously, it all depends on a given set of circumstances; but it can never be taken to mean that just any disclosure of facts; with no probative value or sanctity at all, would meet the requirement of Order XXXVII Rule 3(5) of the Code of Civil Procedure.

15. Some efforts have also been made to suggest that the appellant is seriously handicapped. On a query put by this Court, counsel states that the appellant is both mentally and physically handicapped. Consequently, the probity of the statements of fact mentioned in the leave to defend application which are not supported by affidavit is further undermined by the appellant's own case that he is mentally handicapped since the year 2007. I also notice that even in the application for leave to defend, it had been stated that the defendant has been physically and mentally handicapped since the year 2007. It is, therefore, not known whether the appellant even has the requisite mental capacity to enter his defence himself

or to institute this appeal. Also, the application for leave to defend has not been signed by the appellant/defendant; nor has he bothered to append an affidavit to the said application before the trial court. Furthermore, even with the application for leave to defend, incomplete as it was, the appellant did not bother to file any statement of accounts to establish his stand that nothing is payable to the plaintiff by him, even though he had admittedly signed the minutes dated 22nd March 2004 showing Rs. 18,78,000/- as payable by him to the respondent.

16. Under the circumstances, it is obvious that the appellant has raised no substantial defence in the matter and no triable issue has emerged, it therefore, follows that the decision of the court below in placing no reliance on the allegations of fact with regard to jurisdiction of the court cannot be faulted with.

17. I might notice in this behalf also that in CM No.13316/2012 moved for condonation of delay of 200 days in refiling the appeal, it is stated that the appellant met with an accident in the year 2007 and, “since then he is mentally and physically incapable to look after the matter”, whereas in CM No.13314/2006, seeking condonation of delay of 622 days in filing the appeal, it is stated that he met with an accident on 1st February, 2006. I also notice that the appellant has annexed a medical certificate dated 5th November, 2011 issued by one Dr. Narayan Karan, who proclaims on his letterhead to have degrees of, “MBBS (Cal) W.B.H.S..”. It is also stated that he is a, “general physician, Suri Sadar Hospital”. As far as I am able to decipher, whilst MBBS is a known medical degree, W.B.H.S. is

probably with reference to West Bengal Health Scheme and it cannot be said to be a separate medical degree although it has been placed under the name of Dr. Narayan Karan on his letterhead to give the impression as if it is a separate qualification.

18. The aforesaid medical certificate states that the appellant met with a car accident on 1st February, 2006 which caused, “serious type of head injury”, and that he was, “admitted in National Neuro Science Centre, Calcutta, Peerless Hospital Campus, and got released after having treatment on 03.02.2006”, i.e., within two days from the date of the accident. I might note that it seems rather unusual for a qualified medical doctor, which Dr. Narayan Karan has claimed to be, to describe the injuries allegedly received by any person, in this case the appellant, merely as, “serious type of head injury”, without any further assessment on medical terms as to the type of trauma to the head. Furthermore, nothing is stated as to the type of treatment, which was given to the appellant at the National Neuro Science Centre, Calcutta, during the two days when he was kept there as an inmate. Apart from that, said certificate observes conditions such as, “unconscious recurrently with intense headache, vertigo”, for which the learned doctor appears to have advised the appellant, “not to move anywhere alone so as to compromise with any situation.” It is also stated, inter alia, that the appellant is a patient of, “chronic obstructive sleep apnoea syndrome with snoring”, and that “this may cause his life fatal at any place and in any place in every moment.” The certificate also states, “he was treated from outside and from specific higher centres. He was under my supervision from the very beginning and was treated empirically.”

19. Furthermore, there is no indication whatsoever of the course of treatment given to the appellant either by Dr. Narayan Karan or by any other institution which may have treated him for such severe disability as is being claimed. Ex-facie, such a certificate does not inspire confidence and appears to have been procured merely to serve the purpose of the appellant. I do not, therefore, place much reliance on the aforesaid certificate.

20. Under the circumstances, I conclude that no reasonable ground has been raised for condoning the delay of 822 days. Consequently, the appeal deserves to be dismissed as barred by limitation.

21. No other ground is raised.

22. It is obvious that the appellant who appears to reside in Calcutta, has managed to avoid execution of the decree for nearly three years. I see no reason to interfere.

23. The application s for condonation of delay in filing and refiling the appeal are dismissed. The appeal is also dismissed on merits.

CM Nos.13313(Stay)

24. Since the appeal has been dismissed, this application does not survive and the same is dismissed as such.

SUDERSHAN KUMAR MISRA, J.

SEPTEMBER 12, 2012/dr