

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

+ C. S. (OS) No. 1164/2002

Date of Decision: 13.08.2013

NATIONAL SMALL INDUSTRIES CORPORATION LTD.

.....Plaintiff

Through: Mr. Sanat Kumar with Mr.Sahil
Mullick, Advs.

Versus

M/S. MYSON ELECTRONICS PVT. LTD. & ORS.

.....Defendant

Through: Mr. K. K. Jha, Adv. for D1, D3
to D5.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. The plaintiff has filed this suit for recovery of Rs. 78,49,274.89/- (Rupees Seventy Eight Lakh Forty Nine Thousand Two Hundred and Seventy Four and Paise Eighty Nine Only) under Order XXXVII of the Code of Civil Procedure. The plaintiff's case is as follows:

2. The plaintiff is a Govt. Company registered under the Companies Act, 1956 having its registered office at Delhi. It is a Govt.

of India Enterprise engaged in the development and growth of the Small Scale Units (SSU) throughout the country. The plaintiff states that it assists these small scale industrial units in a number of ways, one of which is to extend raw material assistance to them. Under the Raw Material Assistance Scheme (RMAS), the plaintiff procures raw material from canalized/govt. agencies and others, for and on behalf of the SSU by making payment directly to the supplier and delivering the said raw material to the said SSU as per their requirement.

3. The defendant no. 1, M/s. Myson Electronics Pvt. Ltd., an SSU requested the plaintiff for financial assistance under the RMAS, vide its letter dated March 2, 1989. The plaintiff submits that it considered the request and agreed to grant the said assistance under the RMAS. Accordingly, an agreement dated March 8, 1989 was executed between the plaintiff and defendant no. 1. Thereafter, a subsequent agreement dated December 5, 1989 was also executed between the parties, as well as defendant no. 2. The plaintiff submits that as per the terms of the said agreements, along with the terms and conditions of the RMAS, the plaintiff was required to procure and/or purchase and supply the raw materials as was to be communicated by defendant no. 1 and take other essential steps for the said purpose.

4. The plaintiff submits that defendants no. 2 to 4 along with Late Sh. P. C. Manchanda executed Guarantee Deeds dated March 8, 1989 whereby they guaranteed to pay the dues in the event of a default by defendant no. 1. And that they also undertook to ensure complete compliance of the terms and conditions of the two agreements along

with the RMAS. The plaintiff also submits that the said guarantee was a continuing guarantee and was to remain binding and operative until the terms of the said agreements had been fully complied with. The plaintiff submits that it granted assistance to defendant no. 1 as and when required by it, which has been acknowledged by the defendant no. 1 from time to time. And that the defendant no. 1 has also been acknowledging the amounts due and payable to the plaintiff.

5. The plaintiff submits that defendant no. 1 stopped paying its dues, and did not pay the same despite various letters and reminders. The plaintiff submits that with effect from April 1, 1992, it froze the defendant no. 1's account. Thereafter, the plaintiff states that the defendant no. 1 made some payments to the plaintiff, but the substantial amounts largely remained due and outstanding in the account. The plaintiff submits that the defendant no. 1 made several promises to pay its dues, but failed to make any payment. And that vide its letter dated July 1, 1998, defendant no.1 acknowledged and accepted its liability towards the plaintiff to the tune of Rs. 27,24,945.59/- due as on March 31, 1998, but failed to make the said payment.

6. The plaintiff submits that the defendant no. 1 came forward with a proposal for settlement of dues, and as per the same, the parties entered into an agreement dated June 25, 1999, whereby the defendant no. 1 again acknowledged and accepted its liability to the tune of Rs. 27,24,945.59 due as on March 31, 1992. The relevant clauses of the said agreement are as follows:

“1. The party of the second part acknowledges and accepts its liability of Rs. 27,24,945.59 on account of assistance availed by the unit from NSIC Head Office, Marketing Division and agreed to settle the said dues by making down payment of Rs. 1.50 lakhs by 15th July, 1999 and the balance amount in monthly Installments of Rs. 50,000/- per month starting from 1st August, 1999 for the first year and Rs. 75,000/- per month from 1st August, 2000 and Rs. 1 lakh per month from 1st August, 2001 and thereafter w.e.f. 1st August, 2002 @ 1.5 lakhs per month till realisation of entire dues Along with interest w.e.f. 01.04.1992.

2. That the amount of interest shall be paid after the recovery of said amount of Rs. 27,24,945.59. The party of first part may consider the request of party of second part for waiver of interest or allow concession thereon on recovery of the said amount of Rs. 27,24,945.59 in terms of this agreement.

3. That in case of breach of any of the terms of this agreement including the default in payment of down payment of Rs. 1.50 lakhs or any of the Installment as agreed herein, the entire amount shall become due and payable along with the interest by the party of second part. In that event the party of the first part shall be at liberty to take all necessary action to recover its dues forthwith.

6. That all personal guarantees furnished from time to time on behalf of the party of the second part for availing Raw Material Assistance from the party of first part shall remain valid till entire payment under this agreement is received by party of first part.”

7. The plaintiff submits that the defendant no. 1 defaulted in the performance of the abovementioned agreement, and vide its legal

notice dated January 24, 2000, the plaintiff called upon defendant no. 1 to pay a sum of Rs. 69,12,023.35 due as on November 30, 1999 along with upto date interest. The plaintiff further submits that vide the same legal notice, it also invoked the guarantee deed dated March 8, 1989 executed by defendants no. 2 to 4 and the late Sh. Manchanda. The plaintiff submits that despite the notice, the defendants failed to pay the dues, and thus as per the terms of the agreement dated June 25, 1999, the defendants are liable to pay a sum of Rs. Rs. 78,49,274.89/- as on May 31, 2002 as per accounts maintained by the plaintiff in its regular course of business. Further, the plaintiff also contends that as per the terms of the agreement between the parties, it is entitled to claim interest at the rate of 16% per annum. And that the defendant no. 1 had also agreed to pay additional interest at the rate of 2% on the overdue of amounts along with processing and administrative charges, as amended from time to time. Therefore, the plaintiff submits that it is entitled to interest on the suit amount at the rate of 18% per annum as agreed between the parties.

8. The plaintiff further submits that Late Sh. Manchanda, who had also executed a guarantee deed dated March 8, 1989 has left behind a widow, Smt. Nirmal Kant Manchanda (defendant no. 5) and a daughter, Mrs. Madhu Khullar (defendant no. 4) who had also executed a separate guarantee deed. And that since defendant no. 1 has failed to pay the outstanding dues, defendants no. 2 to 5 are jointly and severally liable to pay the said dues to the plaintiff along with defendant no. 1.

9. Summons was issued in the suit vide order dated August 14, 2002. Defendants no 1, 3 and 5 entered their appearances and consequently, the plaintiff filed an application under Order XXXVII Rule 3(4) of the Code for issuance of summons for judgment against the said defendants. Subsequently, applications for leave to defend u/O XXXVII Rule 3(5) were filed by defendants no. 1, 3, 4 and 5. No leave to defend was filed by defendant no. 2.

10. In their leave to defend application, defendant nos. 1 and 3 submit that the alleged agreement dated June 25 1999, in which defendant no.1 acknowledged and accepted its liability to the tune of Rs. 27,24,945.59/- (Rupees Twenty Seven Lakh, Twenty Four Thousand, Nine Hundred and Forty Five And Paise Fifty Nine only) as on March 31, 1992, was the outcome of fraud and manipulation. They allege that the plaintiff took undue advantage of the signatures on blank stamp papers and other plain papers and prepared three agreements dated June 25, 1999 and misused them against defendant no.1 and two of its sister concerns.

11. They further submit that all the liabilities of defendant No.1 company were taken over by M/s. Morgan Tectronics Pvt. Ltd. in the year 1992 with the consent and permission of the plaintiff and that the plaintiff has already filed a suit for recovery against the said company. And that the CBI has also registered a case against some officials of the plaintiff and the management of M/s. Morgan Tectronics Pvt. Ltd. Defendants no. 1 and 3 also submit that the plaintiff has nowhere stated in the plaint as to how much financial assistance was given to

defendant No.1 and at what time. Further, the plaintiff has also failed to file a proper statement of accounts to show the amount recoverable from the defendants. Therefore, the defendants no. 1 and 3, vehemently challenge the suit amount as well as the charges and interests thereupon.

12. In response to this application, the plaintiff has denied that the liabilities of defendant no. 1 company were taken over by M/s. Morgan Tectronics Pvt. Ltd. in the year 1992. It further submits that the defendant no. 1 company still exists since defendant no. 3 has entered into the agreement dated June 25, 1999 in his capacity as one of the directors of defendant no. 1. Moreover, defendant no. 3 has also filed the supporting affidavit to his leave to defendant application in his capacity as one of the directors of defendant no. 1. Further, the plaintiff also submits that it was not necessary to furnish a detailed statement of accounts to show the amount recoverable from the defendants, because the defendants themselves had admitted their liability vide agreement dated June 25, 1999, on the basis of which the present suit has been filed.

13. Defendant no. 5, Smt. Nirmal Kanta Manchanda, who is the widow of Late Sh. P. C. Manchanda, submits that the plaintiff never served any legal notice of demand, calling upon her late husband, during his lifetime, to make the payment of the amount due by defendant no. 1, for which Sh. Manchanda had stood as one of the guarantors. And thus, she contends that the plaintiff has no right to file the suit against her, as her husband died on July 31, 1997, which fact

was well within the knowledge of the plaintiff. She also submits that she has not inherited anything from her deceased husband, and that the property whose details were given in the annexure of the guarantee bond executed by her deceased husband, was already sold by Uttar Pradesh Financial Corporation, since it was pledged to them.

14. Responding to the application of defendant no. 5, the plaintiff submits that before filing the present suit, a legal notice dated January 24, 2000 was served on the husband of defendant no. 5, thereby invoking the guarantee deed executed by him. The plaintiff further submits that defendant no. 5 could not deny her liability to pay the just dues to the plaintiff, despite the fact that her husband had expired, since she was his legal representative.

15. The defendant no.4 in her leave to defend application contends that no cause of action ever arose against her at any point of time. And that after the execution of the guarantee bond in the year 1989 she was not informed by the plaintiff as to the transactions which were supposed to take place between the plaintiff and defendant no. 1 at any point of time. And that the plaintiff had wrongly filed the present suit impleading her as one of the defendants, that too when the plaintiff had already entered into another agreement with defendant no.1 in the year 1999.

16. In response to the application of defendant no. 4, the plaintiff submits that the agreement dated June 25, 1999 executed between the plaintiff and defendant no. 1 was in the nature of acknowledgment of debt amounts due under the initial agreement of 1989. And that by way

of this acknowledgment, the terms and conditions of the earlier agreement were neither changed nor substituted by any other terms and conditions, whereas defendant no. 1 merely acknowledged and accepted its liability towards the plaintiff. The plaintiff further submits that as per terms of clause 6 of the acknowledgment dated June 25, 1999, all the personal guarantees furnished on behalf of defendant no. 1 were to remain valid till the plaintiff received the payment due. With regard to the contention that the suit is time barred, the plaintiff submits that although the guarantee deed was executed in 1989, even then this suit is well within the period of limitation as the principal borrower had been acknowledging and accepting liability towards the plaintiff from time to time.

17. I have heard the learned counsel for the parties, and perused through the documents placed on record including the various agreements and undertakings executed between the parties. At the very outset, it is unequivocally clear to me that, not only the agreement between the parties, but the RMAS also stipulates that the defendant no. 1 was required to make payments to the plaintiff from time to time. The answering defendants do not contest their default under the agreements dated March 8, 1989, December 5, 1989 as well as the RMAS. The answering defendants only seem to allege the legality of the Acknowledgement Deed/Agreement dated 25 June, 1999. I am of the opinion that this defense is frivolous and far from being substantive.

18. The amount due as on March 31, 1992 was Rs. 27,24,945.59/- (Rupees Twenty Seven Lakh, Twenty Four Thousand, Nine Hundred and Forty Five And Paise Fifty Nine only), whereafter the account was freezed on April 1, 1992. Thereafter, the defendant no. 1 acknowledged its liability of this amount along with interest thereon vide letter dated July 1, 1998, which was written in response to plaintiff's letter dated June 20, 1998, whereby the defendant was informed of this amount as outstanding against it as per the records maintained by the plaintiff in its regular course of business. Vide its resolution passed on April 10, 1999, the Board of Directors of defendant no. 1, authorized Sh. V. P. Khullar, defendant no. 3 to finalise an agreement with the plaintiff for rescheduling of the loan and he was also authorized to sign the relevant documents and papers.

19. In determining the liability of the guarantors, viz. defendants no. 4 and 5, it is to be seen whether defendant no. 1 gave a proposal for rescheduling the loan on behalf of the guarantors and also whether the guarantors acknowledged the rescheduled liability as agreed under the agreement dated June 25, 1999. At this juncture, it is pertinent to take note of Clause 3 of the Guarantee Deed executed by the guarantors. It stipulates as follows:

“3. That the ‘Corporation’ shall have the fullest right to show any indulgence to the ‘Importer’ in allowing any deviation from the terms of the Agreement, and this shall not affect the ‘Guarantors’ liability under these presents.”

20. Clause 6 of the Agreement dated June 25, 1999 further stipulates:

“All personal guarantees furnished from time to time on behalf of the party of the Second Part, for availing Raw Material Assistance, from the party of the First Part, shall remain valid till entire payment under this Agreement is received by party of First Part.”

21. Regarding the defense of defendant no. 5, Clause 5 of the Bond of Guarantee dated March 8, 1989 clearly stipulates that the said Guarantee shall not expire with the death of the Guarantor. The relevant Clause 5 is reproduced as under:

“That the ‘GUARANTEE’ herein contained shall not be revoked or affected by the death of any of the ‘GUARANTORS’ herein but shall continue to be binding and operative in respect of all liabilities which may have arisen upto the date of death as well as the liabilities which may arise thereafter in all respects and for all purposes until the terms of the Agreement have been fully complied with.”

22. It is therefore, manifestly clear from the record that the defendants themselves gave a proposal to the plaintiff for re-scheduling of payments due from them and it was in this backdrop that the agreement dated 25th June, 1999 was entered into between the parties. Further, as per the terms of the Guarantee Deeds executed by the guarantors as well as the acknowledgment agreement dated June 25, 1999, the individual guarantees continued to subsist until all the dues were fully paid to the plaintiff. Having failed to abide by the terms of the agreement dated 25th June, 1999, it does not now lie in the mouth

of the defendants to allege that they have a substantial defense to the suit.

23. The defendants have also not been able to that the said agreement is forged and fabricated. Moreover, as per Clause 6 of the agreement dated June 25, 1999, the defendants have also extended the Guarantee Deeds till such time as the entire payment due was made to the plaintiff. Furthermore, as per Clause 5 of the Guarantee Deeds, the guarantee was not affected by the death of any of the guarantors. Therefore, the defense of the Guarantee Deeds being inoperative or barred by time is not legally tenable.

24. This Court, in similar case with the same plaintiff and some of the guarantors in the suit had made some pertinent observations. In ***National Small Scale Industries v. Novavision Electronics Pvt. Ltd. & Ors.*** 132 (2006) DLT 140, the position of law on Leave to Defend Applications is succinctly summarised from the proposition laid down in ***Bush Boake Allen (India) Ltd. (M/s.) v. M/s. Mehtajee and Company & Ors.,*** (2006) II BC 427:

“After amendment of 1976 of the Code the discretion to give leave to defend is delineated by the proviso. The first proviso to Order 37 Rule 3(5) provides that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put forward is frivolous and vexatious. The second proviso to the said Rule further states that if claim of the plaintiff is admitted by the defendant, the leave will not be granted unless such amount was deposited. The discretion of the Court is to be guided by well-established

principals (sic.) of law, keeping in view the facts and circumstances of each case. But wherever the Court finds and satisfied (sic.) that there is absence of substantial defense or that the defense is frivolous or vexatious, the Court would decline leave to defend to the applicant. The use of the expression good defense must be understood so as to include in its ambit reasonable triable issue and a bonafide stand. The good defense of the defendant has not to be a defense which is illusory or shown to be ex facie unbelievable. Grant of leave to defend thus would be relatable to the content and value, in terms of law of the defense put forward by the defendant. The legislative intention in introducing the word ‘good’ is to emphasise the need of a bonafide defense which is acceptable within the afore (sic.) corners of law. A dispute raised for the sake of dispute or denial for the sake of denial with intent to delay the proceedings would be a category of cases which cannot fairly fall under this category. It is the duty of Court to amplify act of justice rather than jurisdiction or authority. It is a matter of common knowledge that denial by a party is the easiest method of delaying the proceedings before the Court and in fact without being subjected to rigors of high cost and penal loss. A plea which is put forward by the defendant should go to the root of the liability and must raise an issue which in law would be triable. (emphasis supplied).

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*The legal principles relating to the grant of leave to contest a summary suit have been evolved by a catena of decisions. The Supreme Court in the case of **Mechalec Engineers and Manufacturers v. Basic Equipment Corporation** clearly held that where the defendant sets up a defense which is illusory, sham or practically a moonshine, then ordinarily the plaintiff is*

entitled to a judgment. To the same effect are the decisions in Aganall Traders Ltd. v. Shyam Ahuja , Minerals and Metals Trading Corporation Ltd. v. Dimple Overseas Ltd. 2001 V AD (DELHI) 206, Reliance Industries Ltd. v. Imperial Pigments (P) Ltd. 2003 III AD (DELHI) 278, Mrs. Raj Duggal v. Ramesh Kumar Bansal , Goyal Tax Fab Pvt. Ltd. v. Anil Kapoor 2001 IV AD (DELHI) 741 and Daya Chand Uttam Prakash Jain v. Santosh Devi Sharma 1997 III AD (Delhi).

In the last mentioned case, the suit under Order 37 was based on the written acknowledgment of the defendants and it was held by this Court that though the defendants specifically denied the written acknowledgment and alleged that the case of the plaintiff was based on a false document and the claim was barred by time, leave to defend the suit could be granted to the defendants only upon their furnishing a bank guarantee for the amount decreed by the trial court and in case of their failure to do so, the plaintiff would be entitled to pursue her execution application.”

25. For the reasons aforesaid, I find no merit in the applications for leave to defend filed by the answering defendants. The same are accordingly, in my view, liable to be dismissed. In terms of the agreement dated 25th June, 1999, which is the written contract between the parties and the foundation of the suit of the plaintiff u/O XXXVII of the Code, the admitted liability is Rs. 27,24,945.59/- (Rupees Twenty Seven Lakh, Twenty Four Thousand, Nine Hundred and Forty Five And Paise Fifty Nine only) as on 25th June, 1999. As regards interest payable to the plaintiff, this being a suit under Order XXXVII of the Code of Civil Procedure which by itself is a self-

contained code, the claim of the plaintiff for the grant of interest wholly depends upon the terms of the agreement between the parties. The rate of interest as provided for in the agreement dated December 5, 1989 was to be 16% from the date of the debit of the amount till reimbursement. Clause 7 which is relevant reads as follows:

“That the amount(s) advanced, paid or incurred by the party of the First Part towards remittances for payment of material to the canalized/govt. agencies and other for storage, insurance charges, freight, for movement of material, clearance charges, charges for transporting the material, expenses for storing the material in godown, postal expenses, and all other charges and expenses incurred by the party of the First Part in connection with the procurement/purchase of the material will be debited to the account of the party of the Second Part and it agrees and undertakes to repay or reimburse the amount(s) so debited its accounts with interest @ 16% per annum, from the date of debit of such amount(s) till reimbursement. The party of the Second Part agree that such repayment of or reimbursement of the amount debited to its account will be made on or before the expiry of 120 days from the date of storage of the material in the godown, a notice whereof shall be given to the party of the First Part.”

26. Furthermore, the relevant clause for the additional 2% interest as claimed by the plaintiff is contained in Clause 13 of the said agreement, which reads as follows:

“That the party of the Second Part agrees and undertakes to redeem the material from pledge by clearing the material against payment of the cost of material, interest, service charge

and all other charges incurred by the party of the First Part in terms of this letter with interest thereon as agreed herein within 100 days from the date of storage of material. In the event of seeking extension of time by the party of the Second Part of removing the material against payment, it shall be lawful for the party of the First Part at its sole discretion to grant such extension on condition that the party of the Second Part shall be liable to pay as agreed damages for delay in redemption, additional interest of 2% over and above the agreed interest @ 16% on the amount due and payable in terms of this letter for the period for which the extension of time is allowed to the party of the Second Part on its application in that behalf. It is expressly agreed that in the event of its applying for extension of time it shall not be entitled to rebate on service charges provide for hereinbefore.”

27. In view of the aforesaid findings, it is apparent to me that the defendants are in breach of the agreement dated June 25, 1999 and are jointly and severally liable to pay the acknowledged sum of Rs. 27,24,945.59/- (Rupees Twenty Seven Lakh, Twenty Four Thousand, Nine Hundred and Forty Five And Paise Fifty Nine only) along with interest @ 18% per annum from the date of institution of the suit till realization of the amount. Decree be drawn accordingly.

M. L. MEHTA, J.

AUGUST 13, 2013

kk/rmm