

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

Date of decision: 16th July, 2013.

+ **RFA 85/2012**

M/S TAJ TRADE AND TRANSPORT CO. LTD. ...Appellant

Through: Mr. Nakul Sachdeva and Ms. Saloni
Choudhary, Advocates.

Versus

NEXT WAVE CORPORATION & ANR Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUSTICE RAJIV SAHAI ENDLAW, J.

1. None has appeared for the two respondents inspite of service of notice.
2. The impugned judgment and decree records that the two respondents though filed a written statement to the suit before the Trial Court but had thereafter stopped appearing and were proceeded against *ex-parte* in the suit.
3. The respondents are proceeded against *ex-parte* in this appeal also.
4. Admit.
5. The Trial Court record has already been received. The same has been perused and the counsel for the appellant has been heard.

6. The appeal impugns the judgment and decree dated 30th July, 2011 of Additional District Judge, West Delhi dismissing CS(OS) No.265/2010/92 filed by the appellant for recovery of monies from the two respondents jointly and severally.

7. As aforesaid, the two respondents had filed a written statement to the plaint and on the basis whereof, the following issues were framed:

“(i) Whether this court has no jurisdiction to try and entertain the present suit? OPD

(ii) Whether Mr. Rakesh Khanna is duly empowered and authorized to institute the present suit and to sign and verify the plaint? OPP

(iii) Whether defendant No.2 was right in refusing payment to the plaintiff against the goods consigned to defendant No.1? OPD

(iv) What is the legal effect of the letter dated October 11, 1990, sent by defendant No.1 to the plaintiff, on the transaction in dispute? OPP

(v) To what amount, if any, the plaintiff is entitled to recover and from whom? OPP

(vi) Whether the defendants are liable to pay interest as demanded by the plaintiff? If so, at that rate? OPP

(vii) Relief.”

8. However, the two respondents thereafter stopped appearing and thus the judgment and decree is an *ex-parte* one.

9. The Trial Court decided Issues No.(i), (iii) & (iv) in favour of the appellant/plaintiff but decided the Issue No.(ii) *supra* against the appellant/plaintiff; accordingly, in view of decision on Issue No.(ii) against

the appellant/plaintiff, the suit was dismissed with costs of Rs.10,000/- to be paid to Delhi Legal Services Authority. The counsel for the appellant/plaintiff states that the costs have been paid.

10. Notice of the appeal was issued on the contention of the counsel for the appellant/plaintiff that the dismissal of the suit on the technical ground of the same having not been proved to have been filed by a duly authorized person on behalf of the appellant/plaintiff which is a company, is contrary to the judgment in *United Bank of India Vs. Naresh Kumar* AIR 1997 SC 3.

11. Today also, the contention of the counsel for the appellant/plaintiff is the same i.e. the dismissal of the suit on the technical ground of failure of the appellant to prove the authority of the person instituting the suit on behalf of the appellant/plaintiff is erroneous.

12. However, the judgment in *Naresh Kumar* relied upon by the counsel for the appellant/plaintiff has subsequently been held by the Division Bench of this Court in *Birla DLW Ltd. Vs. Prem Engineering Works* to be not applicable to private disputes for recovery of monies and it has been held that the ratio therein is confined to suits for recovery of public monies and public debts. The counsel is thus not justified in relying upon *Naresh*

Kumar in support of his suit which has no element of public money.

13. The counsel for the appellant/plaintiff also agrees to the aforesaid.

14. Be that as it may, the Supreme Court in **Uday Shanker Triyar Vs. Ram Kalewar Prasad Singh** (2006) 1 SCC 75 has, without any limitation as to the nature of the suit or the status of the parties, held that the procedural defects and irregularities which are curable should not be allowed to defeat substantive rights and any defect in authority of the person signing can subsequently be corrected.

15. In the present case, the appellant/plaintiff to prove Issue No.(ii) aforesaid had filed a photocopy of a power of attorney in favour of the signatory of the plaint. The said photocopy of the power of attorney was however not admitted into evidence for the failure of the appellant to produce the original. The Trial Court in the impugned judgment has held that the appellant/plaintiff having not proved the power of attorney which was the only document to show the authority of the person instituting the suit and inspite of the photocopy having not been permitted to be exhibited during the *ex-parte* evidence of the appellant, has not proved the valid institution of the suit and accordingly dismissed the suit on the said ground alone.

16. No error can be found in the aforesaid reasoning.

17. However, in the light of the dicta aforesaid, the Trial Court even if of the view that the appellant/plaintiff had not proved the authority to institute the suit, considering that the respondents were *ex-parte* ought to have granted an opportunity to the appellant/plaintiff to make up the deficiency in evidence. The same was not done. For this reason alone, the judgment of the Trial Court on Issue No.(ii) cannot be accepted.

18. It has been enquired from the counsel for the appellant/plaintiff whether the original power of attorney or any other document to show the authority in favour of the signatory to the plaint has been filed.

19. The counsel for the appellant states that though the original power of attorney has not been produced but an extract of a resolution of the Board of Directors of the appellant/plaintiff has been filed. However, again no affidavit by way of evidence to prove the said extract has been filed and the original Minutes Book has also not been brought before the Court.

20. While considering whether to grant opportunity to the appellant/plaintiff to make up the deficiency before this Court, it has been realized that the Trial Court has not returned any findings on the crucial Issues No.(v) & (vi) also. It is thus felt that no purpose would be served in

permitting the appellant/plaintiff to lead further evidence qua Issue No.(ii) before this Court inasmuch as there is no finding of the Trial Court on Issues No.(v) & (vi) as aforesaid. The Trial Court, even if deciding an issue on the basis of a finding whereon, the suit is liable to be dismissed, is required to return findings on all the issues framed and which has not been done in this case.

21. An opportunity has been given to the counsel for the appellant/plaintiff to show from the evidence recorded that the appellant/plaintiff has proved the amount due to it under Issue No.(v). The counsel however after seeking passover states that evidence may be required to be led on this aspect also and the evidence led is not sufficient. He thus seeks remand of the matter.

22. Though, ordinarily the Court would not give a second chance to the appellant/plaintiff who has failed in the first attempt to prove its case but since as per the dicta aforesaid of the Supreme Court the matter qua Issue No.(ii) is to be remanded to give an opportunity to the appellant/plaintiff to make up the deficiency in proving Issue No.(ii), it is deemed appropriate to grant an opportunity to the appellant/plaintiff to lead further evidence on other issues as well but subject to the following:

- (i) the appellant/plaintiff deposits further costs of Rs.20,000/- with the Delhi Legal Services Authority;
- (ii) the appellant/plaintiff will not take any adjournment and will examine its witnesses on whichever date is given by the Trial Court for this purpose;
- (iii) since the findings on substantial issues have not been rendered, it is not deemed appropriate to bind the Judge before whom the file will now be put up to the findings in the impugned judgment on other issues. Accordingly, the impugned judgment and decree is set aside in entirety and the suit is remanded for decision afresh, giving another opportunity to the appellant/plaintiff to lead further evidence to prove its case.

23. The appeal is allowed on the aforesaid terms. Decree sheet be drawn up.

24. The appellant to appear before the District Judge, West Delhi on 1st August, 2013.

25. The suit file which was requisitioned in this Court be returned to the Court of the District Judge, West Delhi for the said date.

RAJIV SAHAI ENDLAW, J.

JULY 16, 2013

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