

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

%

Date of decision: 17th July, 2013

+

RFA 383/2012

DESIGN WORKS

.... Appellant

Through: Mr. Kuldeep Kumar, Adv.

Versus

ICICI BANK LTD

.... Respondent

Through: Mr. Punit K. Bhalla, Ms. Chetna
Bhalla and Mr. Pranav Proothi,
Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal impugns the judgment and decree dated 23rd March, 2012 of the Court of Additional District Judge (ADJ), North West- IV, Rohini, Delhi decreeing the suit of the respondent/plaintiff for recovery of Rs.5,29,534.72 along with proportionate costs and interest @ 9% per annum from the date of institution till realization against the appellant/defendant.

2. This appeal was accompanied with an application for condonation of delay in re-filing. Though the appeal came up first before this Court on 7th September, 2012 but notice of the application for condonation of delay was issued to the respondent/plaintiff only on 1st February, 2013 as prior thereto adjournment was sought by the counsel for the appellant/defendant. Thereafter, steps for serving notice were not taken and the respondent/plaintiff finally appeared on 15th April, 2013. After hearing the

respondent, the delay was condoned vide order dated 3rd May, 2013 and the appeal posted for hearing for today and the Trial Court record requisitioned.

3. The counsels have been heard.

4. The suit from which this appeal arises was filed by the respondent/plaintiff against the appellant/defendant under Order 37 of Civil Procedure Code (CPC), 1908. Summons for appearance and thereafter for judgment were issued and application for leave to defend filed by the appellant/defendant. The said application for leave to defend was disposed of by the learned ADJ vide order dated 14th July, 2010 whereby the appellant/defendant was granted leave to defend on the condition of either depositing an amount of Rs.5,50,000/- in the Court or furnishing a Bank Guarantee in the said amount.

5. The appellant/defendant preferred CM(M) No.1224/2010 under Article 227 of the Constitution of India before this Court against the conditional grant of leave to defend but which petition was dismissed vide order dated 25th August, 2011. The said order has attained finality.

6. The appellant/defendant failed to comply with the condition subject to which leave to defend was granted to it/her, neither within the time granted by the learned ADJ therefor nor thereafter. Accordingly, the learned ADJ finding that the appellant had not complied with the condition on which leave to defend had been granted, has vide impugned judgment and decree allowed the suit of the respondent/plaintiff and passed a decree against the appellant/defendant.

7. The counsel for the appellant/defendant has argued that the suit as presented was not maintainable under Order 37 of CPC as the same was not based on any written contract or other documents on the basis of which a suit under Order 37 of CPC lies.

8. It has been enquired from the counsel for the appellant/defendant whether the aforesaid ground is available to the appellant/defendant in this round of litigation and whether the said plea would not be available to the appellant/defendant for the reason of the appellant/defendant having lost in the earlier round of litigation by way of CM(M) No.1224/2010. It has further been put to the counsel for the appellant/defendant that the appellant/defendant must have taken the said plea in its/her application for leave to defend and the said plea must have been adjudicated in the order granting conditional leave to defend to the appellant/defendant and the order in CM(M) No.1224/2010 preferred thereagainst.

9. Though the counsel has chosen not to answer the legal question aforesaid but has contended that in fact the orders in the first round of litigation aforesaid do not deal with the said aspect.

10. The counsel for the respondent/plaintiff states that in fact no such plea was taken by the appellant/defendant in the application for leave to defend.

11. The application for leave to defend preferred by the appellant/defendant before the learned ADJ has been perused and it is indeed found that there is no such plea in the affidavit accompanying the same. Rather, a perusal thereof shows that the appellant/defendant then sought leave to defend averring that signatures purporting to be hers on the

documents on the basis of which the suit was filed were not hers and had been forged.

12. It has then been enquired from the counsel for the appellant/defendant as to how the appellant/defendant, without even taking the said plea, can urge the same at this stage.

13. The counsel for the appellant/defendant is unable to state whether the said ground was urged in CM(M) No.1224/2010 or not by stating that he was not the counsel at that stage. The counsel for the respondent/plaintiff states that no such ground was urged in CM(M) No.1224/2010 also.

14. The counsel for the appellant/defendant has next drawn attention to Order 37 Rule 4 of CPC to contend that the same vests jurisdiction in the Court to even after a decree has been passed, set aside the same. However, upon being asked whether Order 37 Rule 4 of CPC was invoked before the learned ADJ, the answer again is that the counsel today appearing was not the counsel before the learned ADJ.

15. The Courts decide lis between the litigants whom the counsels represent and not the claims of the counsels. A counsel, when accepts the brief, is expected to know all the facts and continues from the stage at which the earlier counsel had left and cannot by his mere engagement be permitted to start proceedings *de novo*.

16. I am of the opinion that the appellant/defendant, in the challenge to the decree against it/her for the reason effectively of refusal of the leave to defend (inasmuch as decree for non-compliance of condition, subject to which leave to defend is granted, is effectively of refusal of leave to defend),

cannot take the plea of the suit being not maintainable under Order 37 of CPC, without taking the same in the leave to defend application.

17. Be that as it may, to satisfy the conscience of this Court that the suit was properly entertained under Order 37 of CPC, I have perused the Trial Court record and find the respondent/plaintiff to have along with the plaint filed before the Trial Court, (i) a Credit Facility Application Form signed by the appellant/defendant on each and every page along with the annexures thereto which include the Agreement for availing Credit Facility and the Deed of Hypothecation as security thereto; (ii) Irrevocable Power of Attorney given by the appellant/defendant in favour of the respondent/plaintiff; (iii) photocopy of the PAN Card of the appellant/defendant; (iv) Primary Credit Facility Application Form signed by the appellant/defendant; (v) the statement of account of the appellant/defendant certified under the Bankers Books Evidence Act; (vi) Office copy of the notices demanding payment and the legal notice sent to the appellant/defendant prior to the institution of the suit along with the proof of dispatch thereof.

18. I may also notice that the appellant/defendant in the leave to defend application has not explained as to how her proof of identity was available with the respondent/plaintiff, if she had not taken any credit facility from the respondent/plaintiff. In fact, there exist on the suit file other documents also signed by the appellant/defendant in connection with the loan. I am therefore satisfied that the suit was maintainable under Order 37 of CPC.

19. While this order is being dictated, the counsel for the appellant/defendant has again contended that the signatures on all the documents are not of the appellant/defendant.

20. In view of the aforesaid defence of the appellant/defendant, conditional leave to defend was granted and the appellant/defendant having chosen not to satisfy the condition, lost the right of trial. If the non-compliance of conditions imposed while granting leave to defend would not lead to dismissal of application for leave to defend, granting conditional leave to defend would not have any purpose.

21. The counsel for the appellant/defendant has relied on *Mechelec Engineers Vs. M/s. Basic Equipment Corporation* (1976) 4 SCC 687 and *Ram Chandra Singh Vs. Savitri Devi* (2003) 8 SCC 319.

22. As far as *Mechelec Engineers* is concerned that is on the principles of law applicable to the grant of leave to defend and which stage has gone. The challenge to the conditional grant of leave to defend has already attained finality by dismissal of CM(M) No.1224/2010 preferred by the appellant/defendant before this Court and the appellant/defendant cannot re-agitate the said issue. As far as *Ram Chandra Singh* is concerned, the counsel for the appellant/defendant has invited attention to paras 15 to 18, 25 and 37 as culled out in the head note but which are on the aspect of fraud vitiating even the most solemn act and has no application to the situation in which we are.

23. There is thus clearly no merit in this appeal, which is dismissed; however the appeal having been dismissed at an early stage, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 17, 2013

bs