

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

Decided on: 27.09.2013

+ **RFA (OS) 125/2013, C.M. NO. 15154/2013, 15155/2013 & 15156/2013**

N.S. ATWAL

..... Appellant

Through: Sh. Rajshekhar Rao with Sh. A.S. Pujari, Advocate.

versus

JINDAL STEEL AND POWER LTD. Respondent

Through: Sh. Pinaki Misra, Sr. Advocate with Sh. Atul Shankar Mathur and Ms. Shruti Verma, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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C.M. NO. 15154/2013 (for condonation of delay)

For the reasons mentioned in the application, C.M. No. 15154/2013 is allowed.

RFA (OS) 125/2013, C.M. NO. 15155/2013 & 15156/2013

1. This is an appeal from an order of the learned Single Judge declining the unsuccessful defendant's (in the suit, and the appellant herein) leave to defend a suit brought under Order XXXVII of the Code of Civil Procedure ("CPC") by Jindal Steel and Power Ltd. (hereinafter "*JSPL*") for recovery of a principal sum of ₹2,98,39,060/- along with interest at the agreed rate of 10% per annum accrued

thereon with effect from April, 2007 to March, 2008 and thereafter at 12% per annum from April, 2008 till the institution of the suit in February, 2010, thus amounting to a total amount of ₹ 4,00,44,341.20/-.

2. As the Single Judge records, the pleading on behalf of the plaintiff is as follows:

“1. XXXXXX XXXXXX XXXXXX

(i) *that the defendant is the sole proprietor of M/s Guru Mehar Construction;*

(ii) *that in December, 2000, the defendant approached the plaintiff with offer to conduct the excavation activities required by the Plaintiff at its mining site near Dongamohua village, District Raigarh, Chhattisgarh;*

(iii) *that after negotiations and deliberations, the plaintiff awarded to the defendant, the contract for hiring of heavy earth moving equipment and services for excavation works for a total period of four years i.e. till March, 2005 vide Work Order dated 02.03.2001;*

(iv) *that vide letter dated 13.06.2005, the defendant requested the plaintiff to provide a one time soft loan of Rs.7.17 crores recoverable over the period of five years on the ground that the defendant needed to replace and revamp the existing equipments;*

(v) *that the plaintiff agreed to so provide financial assistance to the defendant as is evident from the letters exchanged between the parties and disbursed the loan to the defendant and the defendant agreed to the plaintiff deducting instalments from the amounts becoming due and payable by the plaintiff to*

the defendant on the basis of bills raised by the defendant for the work done under the aforesaid Work Order;

(vi) that thereafter the defendant vide its letter dated 16.06.2005 informed the plaintiff that he needed a soft loan of Rs.500 lacs but since the plaintiff had agreed to provide a sum of Rs.300 lacs only, the said sum of Rs.300 lacs would be repayable by way of monthly installments of Rs. 10 lacs along with interest over a period of 30 months starting from November, 2005;

(vii) that the plaintiff released a total sum of Rs.563 lacs to the defendant from 18.06.2005 to 17.11.2005, out of which a sum of Rs.450 lacs was paid directly to the defendant and a sum of Rs. 113 lacs paid to SREI Infrastructure Finance Ltd. for and on behalf of the defendant towards lease financing of equipment;

(viii) that the defendant vide letter dated 24.11.2005 admitted and acknowledged the receipt of the aforesaid loan amount and requested for the same to be repaid over a period of five years instead of 30 months as agreed earlier and which was agreed to by the plaintiff;

(ix) that the defendant vide letter dated 19.07.2006 further requested for release of a sum of Rs.200 lacs for meeting its working capital requirement and further Rs.275 lacs to make down payment to financiers from whom he had got the required equipments financed on leasehold basis;

(x) that in response to the aforesaid request, the defendant was provided additional financial assistance of Rs.100 lacs on 02.08.2006;

(xi) that thus during December, 2004 till August, 2006 total financial assistance of Rs.663 lacs was provided by the plaintiff to the defendant;

(xii) that the plaintiff vide its letter dated 17.07.2006, on the request of the defendant, agreed to renew the Work Order for the period starting from 15.02.2006 till 31.03.2007 and a formal Work Order dated 04.08.2006 was issued by the plaintiff and accepted by the defendant;

(xiii) that the defendant failed to perform his obligations under the Work Order and the plaintiff vide its letter / notice dated 08.11.2006 terminated the said Work Order and called upon the defendant to pay the sum of Rs.548.64 lacs along with interest and also to pay the liquidated damages;

(xiv) that the defendant challenged the legality and validity of the termination and raised a claim to the tune of Rs.436 lacs on account of non adjustments and being due to him under the Work Order though not disputing the outstanding of Rs. 548.64 lacs in the loan account;

(xv) that the plaintiff denied the claim of the defendant of Rs.436 lacs and claimed the amount of Rs.2,98,39,060/- towards principal outstanding loan amount and Rs.163.86 lacs under the work order;

(xvi) that the plaintiff thereafter filed an Arbitration Application No. 53/2009 under Section 11 of the Arbitration and Conciliation Act, 1996 before this Court. The said petition was dismissed vide judgment dated 03.12.2009 holding that the loan transaction was independent of the Work Order and not arbitrable under the arbitration clause in the Work Order; and

(xvii) that hence this suit for recovery of principal outstanding of Rs. 2,98,39,060 under the loan account with interest as aforesaid.”

3. The appellant had argued before the learned Single Judge that there was no formalized contract between the parties on the basis of which a liquidated amount of money claimed in the suit could be decreed. Further, it was submitted that, at any rate, this represented a triable issue, for which leave had to be granted.

4. In response, JSPL relied on a letter dated 13.06.2005 from the appellant to it (JSPL) requesting a “soft” loan of ₹7.17 crores recoverable over a period of 5 years; a letter dated 16.06.2005 from JSPL confirming the agreement for the loan amount; a further letter dated 24.11.2005 by the defendant/appellant acknowledging a loan to the tune of ₹4.50 crores, and payment of ₹50 lakhs made to a third party on his behalf; a letter dated 19.7.2006 from the said defendant requesting a loan of ₹2 crores for working capital; a letter dated 22.11.2006 from him stating that the loan amount was being recovered as against the running bills raised on JSPL; and a letter dated 05.01.2007 from the defendant *not* denying the payment on the loan account; and finally, his reply in Arbitration Petition No. 53/2009, where the loan transaction was not denied, but rather, the plea taken was that the issue is not arbitrable.

5. The plaintiff relied on the *dictum* in *Rickmers Verwaltung GMBH v. The Indian Oil Corporation Ltd.*, (1999) 1 SCC 1, for the proposition that

“15.....it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract

for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The Court is required (sic, to consider) what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.”

Equally, reliance was placed on the decision in *Corporate Voice (P) Ltd. v. Uniroll Leather India Ltd.*, 60 (1995) DLT 321, for the proposition that a suit under Order XXXVII CPC may be entertained on the basis of letters exchanged between parties. Thus, it was argued by the learned senior counsel that the letters exchanged between the two parties here clearly establishes a liquidated debt due to JSPL.

6. Contrary to this, learned counsel for the defendant argued that the termination of the work order by JSPL was illegal, and that this issue required to be tried. In these circumstances, it was argued that the judgment of this Court dated 31.08.2012 in *GE Capital Services India v. May Flower Healthcare Pvt. Ltd.* [CS(OS) 2859/2011], comes in the way of such suits, as the Court noted that the balance due at the foot of the account is not the same as the original loan

document, which contains a different amount, and thus, such a suit is not maintainable under Order XXXVII CPC.

7. In the course of hearing, on 23.01.2013, the Court directed the defendant to appear for recording of his statement, and to produce his books of account, i.e. ledger and balance sheet for the relevant years and till date, showing the loan account with JSPL and to state how much money on the loan account, according to him, was due to JSPL without adjustment of his counter-claim. This was ordered by way of an examination under Order X, CPC. Accordingly, the defendant appeared and in the words of the Single Judge,

“10.....produced a bunch of documents comprising (sic) of 30 sheets containing inter alia the balance sheet of M/s Guru Mehar Construction, sole proprietary (sic) of the defendant and in which the sum of Rs. 2,98,39,060/-, being the principal amount claimed in the suit, was shown as loan outstanding to the plaintiff as on 31.3.2011.....”

8. In view of this admission of the amount claimed by JSPL in the suit, the learned Single Judge held that the question of liability was now only an academic exercise and accordingly, the Court would not pronounce on technicalities. Therefore, the learned Single Judge declined leave to defend, and decreed the suit.

9. Learned counsel for the appellant impugns this order, and argues that Order XXXVII CPC is exhaustive in respect of the classes of cases to which it applies. It is argued that despite admitting that the suit does not fall within any of the recognized heads, nonetheless the learned Single Judge grants relief by way of the summary procedure.

Learned counsel further contended that no finding is returned as to the existence of a written contract, which could possibly be the basis of a decree in a summary suit. It was further contended that it is settled law that when the applicability of Order XXXVII CPC itself is in question, the grant of leave to defend is to be as a matter of routine. This, it is argued, is especially so, since the defence presented was not ‘moonshine’, so as to justify the application of Order XXXVII CPC. On the question of the liability admitted in the balance sheet, learned counsel argues that the entry in itself, without considering the circumstances surrounding such entry, cannot be the basis of establishing liability. Finally, it was argued that the Single Judge failed to consider whether the plaint was barred by limitation, and thus, liable to be rejected under Order VII Rule 11 CPC, which a Court must do even in summary proceedings.

10. While it is correct that Order XXXVII CPC is applicable only to the limited circumstances mentioned in Rule 2, and that the Court cannot extend the scope of application of the summary procedure to other cases, the argument that the present case does not fall within Rule 2, sub-rule (b)(1) (“suits ... arising on a written contract”) is incorrect. It is clear that a suit based on an agreement through exchange of letters is amenable to being decided under Order XXXVII; *Corporate Voice*, (*supra*), states that:

“6. The letters exchanged between the parties and their Counsel, which are on record have not been disputed. It is also not disputed that plaintiff sent and defendant received the estimates, invoices and the bills. It is also not disputed that letters, purported to have been

written by the plaintiff were duly received by the defendant and some of them were duly replied including notice got sent by the plaintiff.”

11. Indeed, that was also the plea taken by JSPL: that the exchange of letters in this case establishes an agreement for the amount claimed. Not only have these letters not been contested by the appellant, but, instead of probing this route further in order to establish the debt (no doubt based, ultimately, on the exchange of letters), the learned Single Judge relied on the admission in the balance sheets presented by the defendant before the Court. On that question, of admissions of debt through balance sheet, while the circumstance surrounding the entry may be relevant for other purposes, the fact that the amount claimed in the present suit is admitted as a debt due, as a loan, from JSPL, is sufficient in order for the Court to reach a finding that the liability is established.

12. This Court in *ESPN Software India (P) Ltd. v. Modi Entertainment Network Ltd.*, [2012] 173 Comp Cas 465 (Delhi), noted that:

“17. Admission in balance-sheet is per-se an admission of liability.....

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19. This entry clearly states that an amount of Rs. 8,00,04,000/- is due and payable by the respondent in accordance with the terms of the contract. This document has been signed by the directors of the company and its Company Secretary on 31.10.2002.”

Similarly, in *Bhajan Singh Samra v. M/s Wimpy International Ltd.*, [2012] 173 Comp Cas 455 (Delhi), the Court noted:

“13. Having heard the parties, this Court is of the opinion that the petitioning-creditor has to satisfy the Court that the debt on which the petition is based was due and payable on the date of the petition. Certainly a time barred debt cannot be the basis of a winding up petition. However, admission of a debt either in a balance sheet or in the form of a letter duly signed by the respondent, would amount to an acknowledgement ...”

Similar findings have also been recorded by the Calcutta High Court in *Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff*, AIR 1962 Cal 115, paragraph 12, and *Rajah of Vizianagaram v. The Official Liquidator, Vizianagaram Mining Company Limited, Vizagapatam*, AIR 1952 Mad 136. Indeed, the entry admits such liability towards JSPL for the amount claimed, and no explanation that may be provided, or circumstance surrounding the entry, can alter the fact of that liability. Thus, while this admission establishes liability, the fact is traced to the exchange of letters mentioned above, thus bringing the case within Order XXXVII CPC.

13. The above discussion clearly shows that the facts of the case and the approach of the Learned Single Judge is in accord with the decision of the Supreme Court in *Mechelec Engineers & Manufacturers v. Basic Equipment Corporation*, (1976) 4 SCC 687, that no leave to defend must be granted if

“8. XXXXXX XXXXXX XXXXXX

(a) 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.”

14. Here, after the liability has been admitted, and the basis of the liability (the letters exchanged between the parties) also remains unquestioned, the exercise of proceeding to trial would be reduced to a mere formality. Therefore, the learned Single Judge, in our opinion, justifiably held that the defendant’s lack of explanation on the one hand, and the averments made were so weak and untenable, as to disentitle the grant of leave.

15. Finally, on the question of interest, the learned Single Judge noted that JSPL could not provide any details of an agreement between the parties for interest at the rates that have been claimed. Nor was any independent justification provided for the same. Accordingly, the learned Single Judge granted the rate of interest at 8% per annum from 01.04.2008, being the year in which JSPL instituted the arbitration application against the defendant, which he opposed. On this issue, learned counsel for the appellant/defendant argued that since the Single Judge admitted that no agreement was reached on the question of interest, the same cannot be the subject of summary proceedings. Here, learned counsel argues that the reliance on *Khera Handloom Supply v. O.B. Exports and Ors.*, 41 (1990) DLT 343 and *Rama Vision Ltd. v. Babbar Vision India Pvt. Ltd.*, 67 (1997) DLT 281, is misplaced, since those cases pertain to dishonoured cheques, which are distinct from the present facts and circumstances.

16. This Court is of opinion that neither *Khera (supra)* nor *Rama Vision (supra)* is limited only to cheques or negotiable instruments. In *Khera (supra)*, the Court, in fact, noted as follows:

“4.....Can by any stretch of imagination it be said that in the absence of any agreement to pay interest, the plaintiff is debarred from claiming interest in a suit under Order 37 of the Code. I am of the view that there is nothing to indicate in the language of Order 37 of the Code which may disentitle the plaintiff to claim interest from the defendant (sic). On the other hand it seems rather clear from a bare perusal of Order 37 Rule 1 Sub-rule (2) of the code that summary suits under this order can be filed based on Bills of Exchange. Hundies and Promissory notes where there is even no promise to pay interest at a certain specified rate. Therefore, simply because there was no agreement between the parties to pay interest at the specific rate of 18% per annum will not debar the plaintiff from filing a suit under Order 37 of the Code.....”

That case, therefore, does not create any distinction between Order XXXVII CPC suits based on cheques or based on written contracts, neither does the text of Order XXXVII CPC give any credence to such a distinction, given that both a written contract or a cheque, are only the source of the liability, which, in both cases, is liquidated and established as between the parties.

17. For the reasons indicated above, this Court finds that the appeal is liable to be dismissed, as there is no infirmity with the Order of the learned Single Judge and the leave to defend was correctly denied. The judgment and decree of the learned Single Judge is consequently not liable to be interfered with. The appeal is dismissed

without any order as to costs. The Court fees shall be paid within two weeks. C.M. No. 15156/2013 is accordingly disposed off in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

SEPTEMBER 27, 2013