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

+ **CS(OS) 89/2014**

% **Judgment dated 07.05.2014**

ITC LIMITED Plaintiff

Through: Mr.Anil K.Kher, Sr.Advocate with
Mr.Siddharth Jain, Adv.

versus

SRAVANA TRADERS & ORS Defendants

Through: Ms.Achu Ann Michael, Adv. for D-1, 2 & 5.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Plaintiff has filed the present suit under the provisions of Order 37 of the Code of Civil Procedure 1908 for recovery of Rs.1,16,34,198/-. Summons were issued in the suit to the defendants in the prescribed form on 13.1.2014 and on 28.2.2014. The defendants were served in the last week of March, 2014. Counsel for the defendants entered appearance on 29.4.2014. It was noticed in the order passed on 29.4.2014 that memo of appearance was not filed by the defendants in terms of Order XXXVII CPC. Even today memo of appearance is not on record.
2. Counsel for the defendants submits that she has filed the memo of appearance in the Registry on 02.05.2014 but the same is without any application for condonation of delay.
3. Mr.Kher, learned senior counsel appearing for the plaintiff submits that in the absence of memo of appearance and as no application for condonation

of delay is on record, the plaintiff is entitled to a decree forthwith in terms of the provisions of Order XXXVII Rule 2 Sub-Rule 3 CPC.

4. As per the plaint, the plaintiff is one of the leading companies of the country, and is having business interests in varied fields including lifestyle and retaining business of branded apparels and other accessories.
5. Further as per plaint, defendant no.1 is a partnership firm and defendant nos.2 to 6 are its partners. The defendant no.1 is engaged in the business of distribution, manufacturing, marketing, commission agent or broker in garment and textiles.
6. It has further been averred in the plaint that the defendant nos.2 to 6 for and on behalf of defendant no.1 approached plaintiff and requested that defendant no.1 may be appointed as a Consignment Sales Agent of the plaintiff for the branded apparels and accessories. After a detailed discussion parties entered into an agreement on 28.7.2008 whereby plaintiff appointed defendant no.1 as one of its Consignment Sales Agent on the terms and conditions mentioned therein. The said agreement was initially for a period of two years from 11.3.2008 which was extended for a period of three years from 11.3.2010 on the same terms and conditions.
7. As per the said agreement, upon every sale affected during the term of the agreement, the defendants were liable to pay within 60 days of such sale value thereof in terms of the said agreement and remittance beyond 60 days was to attract interest @ 18% per annum.
8. Further as per the plaint, defendants had furnished Bank Guarantee dated 11.04.2008 and 24.04.2008 issued by Syndicate Bank bearing numbers Bg 53/08 and Bg 60/08 in favour of plaintiff for Rs. 12 Lacs and Rs. 8 Lacs, respectively, as security for the goods supplied by plaintiff and due payment of all amounts owed to the plaintiff from time to time by the

defendants.

9. It is submitted that defendants were irregular in making the payments due to the plaintiff. Vide letter dated 22.09.2011 the defendants admitted that a sum of Rs.1,18,58,504/- was due and payable to the plaintiff and in acknowledgment thereof six post-dated cheques were issued by the defendants and further defendant no. 2 to 6, vide said letter, not only acknowledged their liability but also stood guarantee for the due payment of the outstanding amount. Vide another letter dated 22.09.2011 defendants further confirmed the realization of money from the retailers against the sale of the plaintiff's goods in the capacity of Consignment Sales Agent. The defendants vide the above letter confirmed the delay in making the payment and assured to settle the same at earliest.
10. The plaintiff out of the above mentioned six post dated cheques, presented three cheques bearing No.225760, 225761 and 225763 of Rs.20.0 lacs each for encashment, whereas all the aforesaid three cheques were dishonoured on presentation for the reason that the defendants did not arrange sufficient funds in their account. Plaintiff sent a notice on 4.3.2012 and on 2.4.2012 intimating defendants about the dishonour of the aforesaid cheques. Plaintiff also initiated criminal proceedings against the defendants under section 138 of the Negotiable Instruments Act, 1882 and the same are still pending. Vide e-mail dated 2.4.2012 and reply letter dated 19.4.2012 to the aforementioned notice of the plaintiff, the defendants reiterated their admission of outstanding dues and that entire liability towards plaintiff would be cleared by September, 2012.
11. In view of the continued failure of the defendants to pay the admitted outstanding dues, the plaintiff encashed both the bank guarantees for a total of Rs.20.0 lacs issued by defendant no.1. Defendants also made

certain part payments and raised some claims on plaintiff. After adjusting the amount realized from the encashment of the bank guarantee as well as the amount of sum of the credit notes, issued towards claims raised by the defendants a sum of Rs.84,56,433/- remained due and payable by defendants to plaintiffs, as per the books of accounts being maintained by the plaintiffs. Further, as per the terms of the agreement, an interest @ 18% per annum would be payable on all outstanding amounts due by the defendants. Accordingly, plaintiff has claimed interest amount @ 18% per annum for the period till 31.10.2013, which comes up to Rs.31,77,765/- making a total of Rs.1,16,34,198/- [i.e. Rs.84,56,433/- + Rs.31,77,765/-].

12. Learned senior counsel for the plaintiff submits that the defendant acknowledged their liability, which is apparent from the letter dated 22.09.2011 which is reproduced herein below:-

“To

ITC Limited
86, Udyogvihar, Phase 1,
Gurgaon – 122016
Haryana

Dear Sir,

We wish to inform you that we hereby acknowledge and confirm that a sum of Rs.1,18,58,504/- (One crore eighteen lacs fifty eight thousand five hundred and four only) (Gross outstanding Rs.1,45,60,295.00 less Pending Claims Rs.27,01,791.00) is outstanding and is due and payable to ITC Limited by us. This payment is being made by way of the following post-dated cheques being issued in favour of ITC Limited.

S.No.	Cheque No.	Date	Bank Name	Amount
1.	225760	03.10.2011	SBT	2000000
2.	225761	17.10.2011	SBT	2000000
3.	225763	24.10.2011	SBT	2000000
4.	225764	31.10.2011	SBT	2000000
5.	225762	07.11.2011	SBT	2000000
6.	225765	14.11.2011	SBT	1858504
				11858504

We acknowledge and confirm the aforementioned outstanding amount is a debt to ITC Limited and each of our partners has acknowledged and confirmed to stand guarantee for the due payment of the outstanding by us to ITC Limited.

We further agree and undertake to ensure that all cheques as mentioned above will be honoured when presented for clearing. In case any of the cheque is dishonoured, we along with our partners shall remain personally liable for the payment due and payable to ITC Limited. This will be without prejudice to the rights of ITC Limited to proceed against us under the Negotiable Instruments Act.”

13. Original documents have been filed by the plaintiff in the proceedings under Negotiable Instruments Act initiated against the defendants herein.
14. In the absence of filing of any memo of appearance in the time allowed and after hearing the matter on merits, the present suit is decreed in favour

of the plaintiff in sum of Rs.1,16,34,198/- with interest @12% per annum,
as pendente lite and future interest.

G.S.SISTANI, J.

MAY 07, 2014
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