

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

+ **C.R.P.No.72/2012**

% **13th November, 2014**

DELHI POWER SUPPLY COMPANY LTD. (DT. LTD.) Petitioner

Through Ms. Avnish Ahlawat with Ms.Latika
Chaudhary and Ms.Gunjan Bansal,
Advocates.

versus

M/S HINDUSTAN VIDYUT PRODUCTS LIMITED Respondent

Through None

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes.**

VALMIKI J. MEHTA, J (ORAL)

1. Challenge by means of this petition under Section 115 of the Code of Civil Procedure, 1980 (CPC) is to the impugned order of the trial court dated 29.5.2004 by which the trial court dismissed the application under Order XXXVII Rule 4 CPC filed by the petitioner/defendant. By the application under Order XXXVII Rule 4 CPC, the petitioner/defendant prayed for setting aside of the judgment and decree dated 07.4.2003 which was passed in default of non-filing of appearance within 10 days as required under Order XXXVII CPC.

2. A reading of the impugned order shows that the trial court has relied upon the judgment of the Supreme Court in the case of ***Rajni Kumar Vs. Suresh Kumar Malhotra 2003 (2) UJ 810 (SC)***, which holds that the petitioner besides pleading good cause for non-appearance had to plead merits of the case, but since no merits of the case were pleaded and which were *sine qua non* for an application to be considered under Order XXXVII Rule 4 CPC, the application was to be dismissed.

3. I do not find any error in the reasoning of the order of the trial court because the Supreme Court in the judgment in the case of ***Rajni Kumar (supra)*** categorically states that the cause of action for filing of an application under Order XXXVII Rule 4 CPC is besides giving reasons for non-appearance, that the applicant/defendant must also state grounds on merits by which the plaintiff would not have been entitled to a decree.

4. However, in my opinion, the present petition is liable to be allowed on a totally separate ground, and which goes to the root of the matter because the subject suit which is filed and treated under Order XXXVII CPC could not have been filed and treated under Order XXXVII CPC. The reasons for the same are that the respondent/plaintiff by the suit claimed recovery of earnest money deposited with the petitioner/defendant, and which earnest

money was given with respect to a tender which was submitted by the respondent/plaintiff to the petitioner/defendant. The suit was filed under Order XXXVII CPC stating that the earnest money amount was not refunded, and therefore the same was liable to be refunded to the respondent/plaintiff. For the suit to be considered under Order XXXVII CPC, the respondent/plaintiff stated the following in para 6 of the plaint:-

“ That the present suit is under order XXXVII of CPC and the plaintiff desires to file the same under the said order. The suit is based on written contract entered into between the parties vide notice inviting tenders and depositing the earnest money with them and the same was confirmed by the defendant vide their various letters as well as reply to the request for refund of the earnest money thereby confirming the aforesaid refund of earnest money amounting to Rs.2,31,000/-. However, the defendant failed to honour the contract and on the day of filing the present suit, the defendant is in arrears for a sum of Rs.2,31,000/-. However the plaintiff is claiming the interest @ 17.25% per annum for which the defendant is liable to pay.”

5. A suit under Order XXXVII CPC lies in terms of Order XXXVII Rule 1 Sub-Rule (2) (b) (i) CPC if the amount claimed is a debt or a liquidated demand of moneys arising on a written contract i.e for a suit to be maintainable under Order XXXVII CPC it is not enough if there is a document evidencing payment by the plaintiff to the defendant, but in fact the document must contain a liquidated demand and an acknowledgment of debt. This is because it is only a promise to pay which creates a liquidated

demand or a debt. A simple document showing payment by the plaintiff to the defendant will not be a written contract as is contemplated by Order XXXVII Rule 1 Sub Rule (2) (b) (i) CPC.

6. I am supported in my conclusion by the judgment of a learned Single Judge of this Court in case of ***Syed Moosa Emami Vs. Sunil Kumar Gilani & Anr. AIR 1982 Delhi 590***, which holds that no suit lies under Order XXXVII CPC where the plaintiff has given an amount to the defendant by a cheque, and which has been encashed, inasmuch as a suit under Order XXXVII CPC lies when a cheque is in favour of the plaintiff and it gets dishonoured. Learned Single Judge of this Court in the case of ***Syed Moosa (supra)*** has held that when a plaintiff made a payment by cheque to the defendant, at best that will be an evidence of giving moneys to the defendant, but that will not be a basis to file a suit under Order XXXVII CPC on the ground that money has been paid by cheque. Money being paid by a cheque is an evidence of payment but not an evidence of liability in favour of the plaintiff, and consequently the suit was held not to be maintainable under Order XXXVII CPC once there was no cheque which was dishonoured, and which was issued in favour of the plaintiff by the defendant.

7. In my opinion, the trial court at the time of passing of the judgment by default on 07.4.2003 ought to have first considered the maintainability of the suit itself under Order XXXVII CPC. If the suit itself was not maintainable under Order XXXVII CPC, the non-filing of appearance under Order XXXVII CPC would be immaterial. The observations of the Supreme Court in the case of ***Rajni Kumar (supra)*** would have applied only if the suit was firstly filed under Order XXXVII CPC. I am allowing the petitioner/defendant to take up the non-maintainability of the subject suit, which only is a legal issue arising from the admitted facts i.e admitted facts stated in the written statement and it goes to the root of the matter.

8. Lastly, I would like to note that if there is any change in the entity of the petitioner on transfer of its assets, rights and liabilities to any other entity, the suit can be continued by the successor entity in view of Order XXII Rule 10 CPC, and for which the petitioner/defendant may move an appropriate application before the trial court to bring on record this aspect.

9. In view of the above, the present petition is allowed. The impugned order dated 29.5.2004 is set aside and the suit is directed to be treated as an ordinary recovery of money suit and not a suit under Order XXXVII CPC.

10. The amount deposited by the petitioner in this Court be returned back to the petitioner/defendant along with accrued interest thereon. The petitioner/defendant will now be entitled to file the written statement in terms of the directions given by the trial court.

11. List before the District and Sessions Judge, Tis Hazari Court, Delhi on 17.12.2014, and the District and Sessions Judge will now mark the suit for disposal to a competent court in accordance with law treating the same as an ordinary suit for recovery of moneys.

VALMIKI J. MEHTA, J

NOVEMBER 13, 2014
KA