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

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FAO(OS) 310/2017

Date of Decision: 13th December, 2017

MICROMAX INFORMATICS LTD Appellant
Through: Mr. Jayant Mehta with Ms.
Snigdha Sharma, Ms. Ritwik
Sneha and Mr. Shaurya
Kuthiala, Advs.

versus

VIJAY JAIN & ORS Respondent
Through: Mr. C.M. Lall, Sr. Adv. with
Ms. Archana Sahadeva, Mr.
Nikhil Lal and Mr. R. Behl,
Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

CM Nos.45022-23/2017 (for exemptions)

Allowed, subject to all just exceptions.

CMs stand disposed of.

FAO(OS) No.310/2017

1. The appellant before us (defendant in suit) assails the order dated 15th November, 2017 passed in CS(OS) No.1831/2015 & CC No.102/2015 whereby the Id. Single Judge has directed both the parties to the suit to file their evidences by way of affidavits simultaneously within a further period of four weeks therefrom.

2. The primary ground of challenge on behalf of the appellant is that the filing of evidence by way of affidavits should first begin with the respondents/plaintiffs and therefore, the appellant could not have been called upon to file its evidence prior to the closure of the evidence of the respondents herein. The appellant has relied upon the provisions of Order XVIII Rule 1 & 2 of the Code of Civil Procedure which reads as under:

“1. Right to begin.- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

2. Statement and production of evidence.- (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(3A) Any party may address oral arguments in a case, and shall before he concludes the oral arguments, if any, submit if the Court so permit concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.

(3B) A copy of such written arguments shall be simultaneously furnished to the opposite party.

(3C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing considers it necessary to grant such adjournment.

(3D) The Court shall fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit.”

(Emphasis supplied)

3. It is submitted by Mr. Mehta that so far as hearing of the suit and the examination of the witnesses are concerned, the same have to be abide by Order XVIII Rule 1 and 2 of CPC which mandates that *“the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in*

point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seems, in which case the defendant has the right to begin. ”

Mr. Mehta would submit that it is not the respondents’ case before us that the provisions of Rule 1 of Order XVIII, CPC are satisfied.

4. So far as statement and production of evidence is concerned, Mr. Mehta contends that Rule 2 of Order XVIII categorically states that “*on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to being shall state his case and produce his evidence in support of the issues which he is bound to prove.*” It is urged that sub-rule (2) of Rule 2 of Order XVIII clearly stipulates the manner in which the “other” party would proceed and states that “*the other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.*”

5. On behalf of the appellant, reference is made to an order dated 22nd July, 2016 passed in the suit and counter claim framing issues wherein out of the 10 issues framed, onus of 9 issues is placed on the plaintiff, submitting that a situation may very well arise when after considering the evidence led by the plaintiff on the issues, the counter claimant may decide that he may not be required to lead evidence.

6. In opposition to the challenge by the appellants, Mr. C.M. Lall, Id. Senior Counsel appearing for the respondents herein relies on the impugned order on the ground that the appellant has filed its

counter claim in the suit which has been registered as CC 102/2015. Our attention is drawn to the provisions of Order VIII Rule 6A of CPC and it is contended that the counter claim has to be treated as a plaint and governed by the rules applicable to plaints.

7. At the outset, Mr. C.M. Lall, Id. Senior Counsel appearing for the respondents has taken a preliminary objection to the maintainability of the appeal which is premised on the provisions of Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as the “Commercial Courts Act”) contending that the order has been passed in a commercial suit and that such order is not appealable under Order XLIII of the CPC and therefore, no appeal would lie under Section 13. It is further submitted that the provisions of Section 10 of the Delhi High Court Act, 1966 cannot be invoked as its applicability has been excluded under sub-section (2) of Section 13 of the Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Act, 2015. We extract the provisions of Section 13 of the Commercial Courts Act, which reads as under:

“(1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be: Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are

specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996.

*(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, **no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than** in accordance with the provisions of this Act.”*

(Emphasis supplied)

8. It is contended by Mr. C.M. Lall, Id. Senior Counsel appearing for the respondents/plaintiffs, that by way of Entry 9 to the Schedule to the Commercial Courts Act, Order XVIII of the CPC stood amended. Categorical reliance has been placed on sub-rule (1A) of the amended provision.

9. In support of his submissions, Mr. Lall has placed reliance on para 6 the judgment of this Court in ***Kamal Kumar Modi & Anr. vs. Krishan Saigal*** 2003 (68) DRJ 290 (DB), which reads as under:

*“6. This provision refers to the **right of parties to begin** and says that **plaintiff would have the right to begin** unless the defendant admits his claim but where he disputes his entitlement either on some point of law or some additional facts, it would be the defendant who would have the right to begin. **This right to begin contemplated by Order 18 Rule 1 has nothing to do with** the requirement of submitting the examination-in-chief of the witnesses on an affidavit as prescribed by amended Rule 4. Nor does it impinge upon or militate against this*

right. All that new Rule 4 does is to require parties to file the examination-in-chief of their witnesses on an affidavit. This method has been devised for the convenience of the parties and to save their time and that of the Court. It does not reflect upon or take away a party's right to cross-examine the witness of the opponent. That right is very well safeguarded because the witnesses have to be summoned in any case, wherever needed, for cross-examination before the Commissioner or the Court. Moreover it is not understandable how cross-examination of a plaintiff's witness was relevant or crucial for the examination-in-chief of the defendant's witness. Because the rationale behind cross-examination was to test the veracity of deposition made in the examination in chief. Therefore, examination-in-chief of a defendant's witness had nothing to do with cross-examination of a plaintiff's witness and was to be made and recorded independently.

5. The judgment cited by Appellant's Counsel is also out of context.”

(Emphasis supplied)

Per contra, Mr. Jayant Mehta, ld. counsel for the appellant submits that para 6 of this judgment in fact supports the appellants case.

10. Reliance has also been placed by Mr. Lall on para 53 of a judgment dated 14th February, 2017 passed by this Court in FAO(OS) (COMM) No.12/2017 titled **HPL (India) Limited & Ors. vs. QRG Enterprises and Another**, which reads as under:

“53. Another contention that was raised on behalf of the appellants was that as the Delhi High Court Act, 1966 could be construed as a law for the time being in force

within the meaning of Section 104(1) of CPC, an appeal could lie from an order passed by a learned single Judge of this court before a Division Bench under Section 10 of the Delhi High Court Act, 1966 and since the said Section 10 uses the word judgment, it would have to be given the same meaning as ascribed to it in Khimji's case (supra). Consequently, an appeal would be maintainable under Section 10 of the Delhi High Court Act, 1966. We are unable to accept this contention for the simple reason that a provision such as the said Section 10 is expressly excluded by Section 13(2) of the said Act read with the proviso to Section 13(1) which specifically enumerates appealable orders to be those specified in Order XLIII CPC."

11. It has been pointed out by Mr. Jayant Mehta, Id. counsel for the appellant/defendant that sub-rule (1A) has been inserted into Order XVIII of CPC after examination of sub-rule (1) of Rule 4 and nowhere concerns the other provisions of Order XVIII of the CPC.

12. Mr. Jayant Mehta, Id. counsel for the appellant would contend that the suit in question has not yet been registered as a commercial suit and the proceedings before the Id. Single Judge have not been proceeded under the provisions of the Commercial Courts Act. It is contended that consequently, the prohibition under Section 13 of the Commercial Courts Act would have no applicability and that the present appeal would be maintainable under Section 10 of the Delhi High Court Act, 1966.

13. Insofar as primary objection of maintainability of the appeal is concerned, we find that the appeal is not-maintainable as, even though the Commercial Suit nomenclature may not have yet been assigned to the suit, as per Section 2(c)(xvii) of the Commercial Court Act, the subject matter of the suit is covered within the definition of a “commercial dispute”. The non-registering of the suit as such is only a ministerial omission.

The order impugned is not appealable in view of the prohibition contained in Section 13 of the Commercial Courts Act.

The appeal is, therefore, dismissed as not maintainable.

14. We make it clear that we have not expressed any opinion on the merits of the rival contentions.

15. It shall be open for the appellant to avail any remedy as is available in accordance with law including before the learned Single Judge.

CM No.45021/2017 (*for stay*)

In view of the order passed on the appeal, this application is also dismissed.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

DECEMBER 13, 2017/pmc