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

+ FAO(OS) 219/2017 & CM APPL.27015/2017

Date of Decision: 14th March, 2018

UNICORN DENMART LTD

..... Appellant

Through Mr. Suhail Dutt, Senior
Advocate with Mr. Gunjan
Kumar and Mr. Azhar Alam,
Advocates

versus

VATECH GLOBAL CO LTD & ORS Respondents

Through Mr. Vinod Khurana and
Mr. Mohinder Vig, Advs.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. By way of the present appeal, challenge is made to an order dated 30th May, 2017 passed by the learned Single Judge granting conditional leave to defend to the appellant (*defendant in the suit*) while allowing I.A. No.25396/2015 (*under Order XXXVII Rule 3(4) of the CPC*) in CS(OS) No.1849/2015 (*Vatech Global Co. Ltd v. Unicorn Denmart Ltd.*).

2. To the extent necessary, we will note the essential facts giving rise to the present appeal. The respondent (*plaintiff in the suit*) filed CS(OS) No.1849/2015 for recovery of an amount of

Rs.2,77,26,742/- under the provisions of Order XXXVII Rule 3(5) of the CPC. This amount was stated to be payable by the appellant/defendant on account of goods supplied by the respondent/plaintiff based on purchase orders from the appellant/plaintiff received through e-mails issued by the defendant. Towards these supplies, the respondent raised proforma invoices dated 15th October, 2014, 31st October, 2014, 25th November, 2014 and 26th November, 2014 based whereon, it was stated that the defendant was making payments.

3. So far as the suit claim was concerned, according to the plaintiff, the defendant had paid 50 percent of the amounts of the four proforma invoices as advance.

4. It is averred that despite repeated reminders, the defendants did not pay the balance amount of 50% and therefore, the suit was filed by the plaintiff under Order XXXVII of the CPC.

On receipt of the summons, in the prescribed format under Order XXXVII Rule 3(5) of the CPC, the defendant entered appearance and filed its memo of appearance. Thereafter, the respondent/plaintiff in purported compliance of the requirements of Order XXXVII Rule 3(4) of the CPC filed an application for summons for judgment. In as much as the appeal rests on the primary contention that the plaintiff violated this provision, for expediency, we extract hereunder, Rules 3(4) and 3(5) of Order XXXVII which reads as follows:-

3. *Procedure for the appearance of defendant:-*

xxx

xxx

xxx

(4) *If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.*

(5) *The defendant may at any time within ten days from the service of such summons for It's affidavit or otherwise d such facts as may be deemed sufficient to entitle him to defend , apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court or judge to be just:*

Provided that leave to defend shall not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

(Emphasis supplied)

4. So far as the compliance of the above statutory requirement

is concerned, the plaintiff seeking issuance of summons for judgment, has to file an affidavit in the prescribed format '*verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit*'. There is no dispute that this compliance of the Order XXXVII Rule 3(4) of the CPC is mandatory.

5. It has also been so held in a series of cases which has been noted by the learned Single Judge in the impugned order including ***Baker Oil Tools (India) Pvt. Ltd. vs. Baker Hughes Ltd. and Anr., Shri Satish Kumar vs. Prism Cemen Ltd. (2003) 107 DLT 36 and Columbia Picture 2001(60) DRJ 17 (DB).***

6. We may usefully extract the observations made in para 8 of ***Satish Kumar (supra)*** in this regard which reads as follows:-

"Now the next question is as to whether the said defect appearing in the summons for judgment can be cured subsequently simply by filing an affidavit subsequently by the plaintiff, copy of which, of course was furnished to the defendant. In the opinion of this Court and for the same reason that the summons for judgment issued in this case were defective and in valid for want of affidavit, the most appropriate and legal course for the trial court was to have issued a fresh summons for judgment along with a copy of the affidavit rather than to all upon the plaintiff to file an affidavit and reply upon the same for the purpose of passing a decree. The very fact that the learned trial court had not decreed the suit at once after supply of the copy of the affidavit to the defendant and had posted the case for arguments and disposal of the application moved by the defendant on several dates itself shows that the court was entertaining a serious doubt about the validity of the summons for judgment

issued by it else if the trial court treated the subsequent filing of the affidavit a compliance of the provisions of Sub-rule 4 of Rule 3 of Order XXXVII of the Code, it would have then and there notified the defendant that the defendant will be deemed to have been served with the summons for judgment on that date and then he could be called upon to file a leave to defend application, if any, within ten days from the said date. However, nothing of the sort was done and the court kept on adjourning the matter for hearing and disposal of the application moved by the defendant. In the opinion of this Court learned trial court has erred in relying and acting upon the subsequent affidavit and treating the same as due compliance for issuing the summons for judgment and passing the decree. **The defendant was not obliged to file a leave to defend application against an invalid and defective summons for judgment. Having regard to the entire background of the matter and the defect appearing in the summons for judgment, in all fairness the court ought to have exercised its jurisdiction and discretion in allowing the application rather than dismissing it."**

(Emphasis supplied)

7. In the present case, the respondent/plaintiff did not file an affidavit in terms of Order XXXVII Rule 3(4) of the CPC. The application of summons for judgment was accompanied by the affidavit of the respondent/plaintiff's counsel. There was no affidavit before the Id. Single Judge verifying the suit claim or the cause of action, as mandated by law, to justify issuance of the summons for judgment. The impugned order also notes that the respondent/plaintiff made no effort to substitute such affidavit with his own. A specific finding has been returned by the learned Single

Judge that the summons for such judgments suffered from a legal infirmity which is one of the reasons which has weighed with the learned Single Judge while granting leave to defend on the application of appellant/defendant.

8. So far as the defence of the appellant was concerned, it was *inter alia* contended that the plaintiff had concealed an exclusive distributorship agreement which was entered into with the defendant, pursuant whereunto compliance has been effected by the plaintiff. The defendant also claimed that it has suffered losses for the acts of the plaintiff and that it had independently filed a suit for recovery of around Rs.4 Crores for such losses and damages which was also pending trial.

9. The appellant/defendant had specifically contended that the disputes and claim raised by the defendant were already *subjudice* in the suit.

10. Furthermore, it was submitted in view of the violation of the requirement of the Order XXXVII Rule 3(4) CPC read with Appendix B Form No.4A, the defendant had not been served with the summons for judgment in accordance with law and, therefore, the suit has to be treated as an ordinary suit and that no decree could be passed under summary procedure by invoking the provisions of Order XXXVII Rule 3(4) of the CPC.

11. The respondent/plaintiff, on the other hand, contended that there was no agreement with it with regard to the distributorship and that the defendant was relying upon an agreement dated 4th September, 2009 entered into with one of its sister concerns in

Singapore. It was further contended that the agreement had come to an end for the reason that it was only for a period two years.

12. Extensive reliance was placed by the plaintiff on the proforma invoices being regularly raised upon the defendant pursuant whereunto payments were made without any dispute by the defendant to the plaintiff. It was contended that even with regard to the invoices in question, part payments had been effected by the defendant.

13. The learned Single Judge considered the rival contentions in the impugned order dated 30th May, 2017 relevant portion whereof reads as follows:

“33. In the present case, as is evident, the plaintiff even did not make any effort to substitute the affidavit of its Advocate with that of its own.

34. In view of the above discussions, it is apparent from the totality of facts and circumstances of the case, more particularly the issue that the summons for judgments suffers with legal infirmity, I am satisfied that it is a fit case to grant leave to defend to the defendants.

35. I am satisfied that on the facts of the case, where the documents shows that the defendants owes Rs.2,77,26,742 to the plaintiff, while granting the leave to defend to the defendants, defendants are directed to deposit the said money with the Registrar General within six weeks from the date of the order and it is a pre-condition to the grant of leave to defend. In case, the money is not deposited by the defendants within the stipulated period, application for leave to defend shall be considered to have been dismissed and the plaintiff shall be liable for the decree. The money be kept in fixed deposit, till further orders.”

(Emphasis supplied)

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14. Aggrieved by the finding returned in para 35 and the direction to deposit the amount in this court in this suit, the defendant has filed the present appeal.

15. We have heard Mr. Suhail Dutt, learned senior counsel for the appellant/defendant and Mr. Vinod Khurana, learned counsel for the respondent/plaintiff at length on the present appeal. We have also perused the record of the CS(OS)1849/2015 which has been produced.

16. We find that in para 34, the ld. Single Judge records consideration of the "*totality of facts and circumstances of the case*" and satisfaction of the defendants' entitlement to leave to defend. There is no basis or reasoning for the sudden crystallisation of the defendant's liability in para 35.

17. We find that so far as the proceedings in the suit are concerned, by an order dated 13th December, 2017, issues stand framed. The learned Single Judge has first framed the issue as to whether or not the invoices raised by the plaintiff are valid. The second issue which has been framed is on the aspect as to whether or not the terms of the invoices constitute a binding agreement. As a third issue, the learned Single Judge is considering as to whether there exists any valid distributor agreement dated 4th September, 2009 between the parties. Clearly the liability is yet to be determined after evidence is led by the parties.

18. So far as the direction made to deposit the amount in this court is concerned, we find from the above extract of the impugned order dated 30th May, 2017 that there is no discussion at all

supporting the same or reasoning thereof.

19. To support the correctness of the order, Mr. Vinod Khurana, learned counsel for the respondent/plaintiff has drawn our attention to the second proviso to Rule 3(5) of Order XXXVII of the CPC. A perusal thereof shows that according to this proviso "*where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.*"

20. Reliance on this proviso has been strongly contested on behalf of the defendants by Mr. Suhail Dutt, learned senior counsel who submits that the appellant has not admitted any part of the claim of the plaintiff and instead it is a contention of the defendant that the plaintiff is in breach of the agreement between the parties and that a claim stands raised by way of a separate suit valued at almost Rs.4 Crores which is pending on the Original Side of this court itself. That issues which have been framed on 13th December, 2017 in the respondent's suit also support this submission, as also the impugned order which contains a reference to the litigation between the parties.

21. We further find that in paras 33 and 34, the learned Single Judge also concluded that the failure of the plaintiff to file the affidavit in the prescribed format in accordance with Order XXXVII Rule 3(4) of the CPC rendered the summons for judgement as suffering with legal infirmity. This finding has not been contested or challenged by the respondent/plaintiff.

22. In view of the above discussion, there is nothing on record to support the suit claim and therefore the very issuance of summons for judgement was unjustified. We have noted above the judicial precedents which have noted that the requirements for filing of the affidavit in the prescribed format in support of the summons for judgment cannot be exempted. The judgements uphold that if an invalid and defective summons for judgment is issued, the defendant is not even obliged to file an application for leave to defend.

23. The learned Single Judge having concluded that the summons for judgement suffered with legal infirmity and recorded satisfaction that it was a fit case to grant leave to the defend to the defendant, could not have imposed a condition upon the defendants to deposit the entire suit amount in Court. In this background, there is substance in the objections on behalf of the appellant that in these circumstances the defendant would be entitled to unconditional leave to defend.

24. We may note that while issuing notice in the present appeal on 31st July, 2017 and granting such directions to deposit the amount made by learned Single Judge in the impugned order dated 31st May, 2017, we had directed the appellant to deposit security in the amount of Rs. 2,77,26,742/- to the satisfaction of the concerned Registrar.

25. We find that the appellant has furnished security in respect of following two properties:

(i) *Commercial property No.05, situated in LSC, MOR land, Rajendra Nagar, New Delhi-110060.*

(ii) *CGE222, DLF Capital Greens, 15, Shivaji Marg, New Delhi-15.*

26. It is submitted by Mr. Suhail Dutt, learned senior counsel submit that without prejudice to the rights, contentions and objections of the appellant with regard to the legality and maintainability of the claims made, the appellant is willing to furnish security of immovable property to the satisfaction of the learned Single Judge in order to ensure recovery of any amount which the appellant may be found and held liable to pay to the defendants / respondents.

27. We therefore find that there was insufficient material before the learned Single Judge to record satisfaction and conclude that the appellant holds the sum of Rs. 2,77,26,742/- and set aside this finding.

28. In view thereof, subject to the appellants/defendants furnishing security afresh for the amount to the extent of Rs.2,77,26,742/- in CS(OS)-No.1849/2015 to the satisfaction of the Registrar of this Court, to cover any decree which may be passed, we set aside the condition imposed in para 34 of the impugned order dated 30th May, 2017 whereby the defendants were directed to deposit the said amount with the Registrar General.

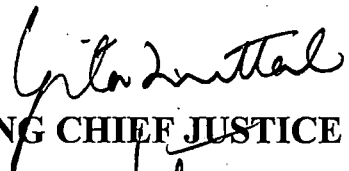
29. We find that surety bond of one of the properties, which was accepted by the Registrar was a residential property. The appellant shall furnish only security of such property which could be sold to

enable recovery of the decretal amount. The Registrar shall ensure that the security furnished is of such property only.

30. The appeal is allowed in the above terms.

31. In view of the order in the main appeal, the application does not survive for adjudication and is disposed of as such.

32. No order as to costs.


ACTING CHIEF JUSTICE


C. HARI SHANKAR, J

MARCH 14, 2018

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