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

% **Date of decision: 15th September, 2016**

\+ **RFA No.605/2015**

INVENTA CLEANTEC PVT. LTD. ... Appellant

Through: Mr. Ashim Vaccher, Adv.

Versus

AMIT MUDGAL ..... Respondent

Through: Mr. Manu Nayar and Ms. Meenakshi Chopra, Advs.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns a decree dated 30th May, 2015 of the Court of the Additional District Judge (ADJ)-03(Central), Tis Hazari Courts, Delhi for recovery of Rs.4,79,371/- along with interest at 12% per annum from the date of filing of the suit i.e. from 13th October, 2014 till realisation in Suit No.290/2014 under Order 37 of the CPC filed by the respondent, for recovery of Rs.5,49,678/- with *pendente lite* and future interest @ 24% per annum, as a consequence of dismissal of the application filed by the appellant for leave to defend.

2. Notice of the appeal was issued and subject to the appellant depositing a sum of Rs.3,18,183/- with this Court and which is reported to have been

deposited, execution stayed. Vide subsequent order dated 22nd February, 2016 the Trial Court record was requisitioned, the *ad interim* order made absolute and the appeal admitted for hearing and considering the fact that in the event of the appeal being allowed the matter will have to be remanded the appeal posted for hearing on 11th May, 2016.

3. The counsels were heard on 11th May, 2016. However certain proposals for settlement were also exchanged on that date; hence the matter adjourned to 16th May, 2016. No settlement could be arrived at between the parties and on 16th May, 2016 judgment was reserved.

4. The respondent instituted the suit from which this appeal arises, for recovery of Rs.5,49,678/-, as aforesaid under Order 37 of the CPC pleading (i) that the respondent/plaintiff is in the business of stainless steel pipes, pipe fittings and industrial valves and the appellant/defendant had been placing orders on the respondent/plaintiff from time to time and the respondent/plaintiff supplying the said goods to the appellant/defendant as per the orders placed; (ii) that a sum of Rs.4,79,371/- was outstanding from the appellant/defendant as per bills/invoices/ledger accounts maintained by the respondent/plaintiff; (iii) that in lieu of the aforesaid outstanding and for discharge of his legal liability, the appellant/defendant issued cheques for Rs.1,50,000/-, Rs.68,183.20p and

Rs.1,00,000/- in favour of the respondent/plaintiff; (iv) that the respondent/plaintiff presented the said cheques for clearance but the same were returned unpaid for the reason "payment stopped by the drawer"; (v) though the appellant/defendant had been meting out assurances to make payment but had not paid; and, (vi) that besides the principal amount of Rs.4,79,371/-, a sum of Rs.70,307/- was also due from the appellant/defendant to the respondent/plaintiff towards interest at 24% per annum w.e.f. 21st February, 2014 till filing of the suit.

5. The appellant/defendant entered appearance in the suit and thereafter applied for leave to defend pleading (i) that the respondent/plaintiff was the regular supplier of stainless steel raw material and pipes to the appellant/defendant and payment was done on account basis; (ii) dispute arose when the goods supplied by the respondent/plaintiff to the appellant/defendant were rejected by the appellant/defendant due to their inferior quality; (iii) the rejected material was negotiated to be returned to the respondent/plaintiff with a Debit Note which was accepted by the respondent/plaintiff; (iv) the balance amount was paid through two cheques which were dishonoured by the appellant/defendant's banker as the balance material supplied by the respondent/plaintiff was also rejected and the payment of the cheques stopped;

(v) that the suit was not maintainable under Order 37 of the CPC; (vi) the Courts at Delhi had no territorial jurisdiction; and, (vii) that the plaint does not conform to the requirements of Order 37 of the CPC.

6. Though a reply of the respondent/plaintiff to the application of the appellant/defendant for leave to defend as well as the rejoinder of the appellant/defendant thereto are on the record of the Trial Court but neither did the counsels during the hearing refer thereto nor is any need felt to refer thereto.

7. The learned ADJ dismissed the application of the appellant/defendant for leave to defend and axiomatically decreed the suit finding/observing/holding (i) that the claim of the respondent/plaintiff in the suit was for outstanding price of the goods sold; (ii) the appellant/defendant had neither disputed the placing of the purchase order nor the receipt of the goods nor the issuance of the cheques in discharge of the liabilities and had also admitted stopping payment of the said cheques; (iii) the statement of account placed on record and the invoices signed on behalf of the appellant/defendant were not disputed; (iv) it had not been shown that there was a condition or stipulation in the contract that the payments would be subject to rejection or approval of the goods that were delivered; (v) a perusal of the documents filed by the respondent/plaintiff show the invoices raised by the respondent/plaintiff to have been signed by both the

parties; (vi) such invoices have been held by the Courts to be written contract between the parties; (vii) as per the term of the invoices they were subject to Delhi Courts jurisdiction; (viii) the suit was very well within the ambit of Order 37 of the CPC; (ix) the claim in the suit was for outstanding amount that remained payable against the goods admittedly received by the appellant/defendant and against which payments were also released through cheques; (x) the plea that the payment of the cheque was stopped because the goods were rejected is not tenable; (xi) thus no triable issue arises; (xii) "in a suit filed under summary procedure, filing of the statement of account along with the negotiable instruments admittedly issued by the defendant is sufficient to establish the claim, particularly when the signatures on such cheques are not disputed and stopping payment for the cheques is admitted"; and, (xiii) though the respondent/plaintiff had claimed interest at 24% per annum but award of interest at 12% per annum appeared appropriate.

8. The counsel for the appellant/defendant has argued that of the three cheques, the cheque for Rs.1,50,000/- was not even presented by the respondent/plaintiff for payment.

9. On enquiry it was informed (i) that no proceedings under Section 138 of the Negotiable Instruments Act, 1881 also were taken out by the

respondent/plaintiff; (ii) that the learned ADJ has proceeded on the erroneous premise that the suit was for recovery of the entire amount of the cheques; (iii) that the cheques were of a total value of Rs.3,18,183/- only while the principal amount claimed in the suit was of Rs.4,79,371/-; (iv) that the learned ADJ has not considered that the suit was not even maintainable under Order 37 of the CPC; and, (v) that the suit in fact was for recovery of the balance due at the foot of the account and which has been held by this Court in ***GE Capital Services India Vs. Dr. K.M. Veerappa Reddy*** 224 (2015) DLT 1 and in judgment dated 23rd January, 2012 in RFA No.202/2011 titled ***M/s. K.&K Health Care Pvt. Ltd. Vs. M/s. Pehachan Advertising*** to be not maintainable under Order 37 of the CPC. (I may add that the same Hon'ble Judge has further expounded on the subject in ***IFCI Factors Ltd. Vs. Maven Industries Ltd.*** 225 (2015) DLT 32).

10. Per contra the counsel for the respondent/plaintiff has drawn attention to the documents filed by the respondent/plaintiff on the Trial Court record and comprising of invoices raised by the respondent/plaintiff on the appellant/defendant and the account of the appellant/defendant maintained in the ledger of the respondent/plaintiff showing a sum of Rs.4,79,371/- to be outstanding after adjusting the payments made by the appellant/defendant from

time to time against the amount of the invoices raised by the respondent/plaintiff on the appellant/defendant. Reliance is placed on (i) ***M/s. Fiitjee Ltd. Vs. Dr. Kanwal Sujit*** (2012) 191 DLT 408; (ii) ***SICOM Ltd. Vs. Prashant S. Tanna*** AIR 2004 (Bom) 186; and, (iii) ***Krishan Lal Arora Vs. Gurbachan Singh*** 2015 Supreme (Del) 2160.

11. As would be obvious from the above, before addressing the question whether the plea of the appellant/defendant of rejection of the goods constitutes a triable issue, the first question to be adjudicated is the maintainability of the suit under Order 37 of the CPC. If the suit were to be held to be not maintainable under Order 37 of the CPC, the question of whether the plea of rejection of the goods raises a triable issue will not arise as in that case the suit will have to be tried as an ordinary suit.

12. The counsel for the appellant/defendant is found to be correct in his contention that the learned ADJ has not really addressed the issue of maintainability of the suit though a lip service has been paid thereto. A reading of the order of dismissal of the application for leave to defend indicates that the learned ADJ proceeded on the premise that the cheques issued were for the entire amount claimed in the suit. The fact that the cheques issued were for a

lesser amount than claimed as principal amount due in the suit appears to have been glossed over.

13. To be fair to the counsel for the respondent/plaintiff, he also sought to justify the maintainability of the suit as for recovery of balance amount due of the invoices raised and not as based on the dishonoured cheques. Though the invoices are not bearing the signatures of the appellant/defendant at the places earmarked thereon for "Customer's Signatures" but it was stated that the signatures otherwise appearing on five of the nine invoices of one Mr. Murari Lal are on behalf of the appellant/defendant and that the appellant/defendant in any case had not disputed the said invoices or receipt of the goods thereunder. In response to a Court query, it was stated that once a suit under Order 37 lies for recovery of such invoice amount, there was no reason why it should not lie for the balance of the total amount of the invoices after adjusting the payments made from time to time.

14. Though the plaintiff is found to have filed the invoices along with the plaint but the plaint is conspicuously silent with respect thereto. In the plaint, neither the dates of the invoices nor the amount of the invoices is pleaded. What is pleaded is the dates and amounts and other particulars of the cheques and the return memos of the cheques and the impression sought to be conveyed

is, of the suit under Order 37 being on the basis of the said cheques and which impression indeed prevailed with the learned ADJ. Ordinarily if a suit claim under Order 37 of the CPC would be made on the basis of the amount of the invoices constituting a written contract, the particulars of the invoice would be pleaded in the plaint. Though the summons of a summary suit as also of other suits are also required to be accompanied with the documents filed therewith but in the absence of any particulars of the written contract on the basis whereof claim under Order 37 of the CPC is made, a defendant while applying leave to defend may not be sufficiently cautioned to respond with respect thereto.

15. Rather, the plaint expressly pleads " The present suit of the plaintiff is based on Bills/Invoices/Ledger Accounts between both the parties", "That a sum of Rs.4,79,371/- (Four Lakh Seventy Nine Thousand Three Hundred Seventy One Rupees only) is outstanding against the defendant as per Bills/Invoices, Ledger Accounts maintained by the plaintiff, and defendant is liable to pay the same". The respondent/plaintiff does not unequivocally plead the suit to be based on invoices and has sued also on Ledger Account. The respondent/plaintiff does not plead that the invoices bear the signature of the appellant/defendant and constitute a written contract. It is also not pleaded that

the appellant/defendant signed the ledger in acknowledgment of correctness of entries therein or in admission of liability for the amount shown outstanding therein. Thus, from a reading of the plaint, the suit cannot be said to be falling in any of the categories prescribed in Order XXXVII Rule 1 (2) and summons under Order XXXVII ought not to have been issued. If the suit, on a reading of the plaint, is found to be not maintainable under Order XXXVII, it cannot become maintainable on a reading of the application filed for leave to defend. The admission in the application for leave to defend though may entitle a plaintiff to a decree on admission is otherwise incapable of converting a suit which on averments in plaint is not maintainable under Order XXXVIII, maintainable thereunder.

16. The respondent/plaintiff here, is found to have sued for balance price, as outstanding in the account of the appellant/defendant in the ledger of the respondent/plaintiff, of the goods sold, supplied and delivered and such a suit does not fall in Order XXXVII Rule 1(2), to be maintainable thereunder. It was so held by this Court in ***Dentsply India Pvt. Ltd. Vs. Excel International*** 92 (2001) DLT 145 and by me in ***Mahinder Kumar Vs. Anil Kumar*** MANU/DE/1331/2009.

17. Once it is found that the suit is not based on invoices for the reason of the respondent/plaintiff having not chosen to plead the invoices as forming the basis of the claim, the need to go into the question, whether the appellant/defendant is entitled to leave to defend or not, as aforesaid, does not arise. I may however record that I have in ***TTK Prestige Vs. India Bulls Retail Services Ltd.*** 2013 (136) DRJ 217 held a suit under Order XXXVII on the basis of invoices to be maintainable for a lesser amount than of the invoices, after adjusting the payments made to be maintainable. To the same effect is the judgment of this Court in ***Bharat Forge Ltd. Vs. Onil Gulati*** 2005 (83) DRJ 140 and ***Dura-Line India Pvt. Ltd. Vs. BPL Broadband Network Pvt. Ltd.*** AIR 2004 Delhi 186. In the latter judgment it was also held that merely because the plaintiff, in the plaint, besides referring to the invoices on the basis of which suit had been filed also averred it maintains a running account, would not change the nature of the suit to one based on a running account. This judgment was recently followed in ***Bijender Chauhan Vs. Financial Eyes (India) Ltd.*** MANU/DE/2138/2013. However in the present case the plaintiff as aforesaid has not mentioned the invoices at all.

18. The order of the learned ADJ dismissing the application for leave to defend and consequently the money decree can thus not be sustained.

19. The appeal succeeds and is allowed. The impugned order dismissing the application of the appellant/defendant for leave to defend and the consequently the money decree are set aside. The suit is remanded and ordered to be treated as an ordinary suit.

20. The parties to bear their own costs.

21. Decree sheet be prepared.

22. The Trial Court file requisitioned in this Court be sent back forthwith.

23. The appellant/defendant to file written statement within 30 days of today with advance copy to the counsel for the respondent/plaintiff.

24. The parties to appear before the Court of the Additional District Judge (Central) 03, Tis Hazari Courts, Delhi on 19th October, 2016.

25. The amount deposited by the appellant/defendant in this Court with interest accrued thereon be refunded to the appellant/defendant.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 15, 2016
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