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

% **Date of decision: 13th December, 2017**.

\+ **<u>CS(COMM) 1579/2016</u>**

IFCI FACTORS LIMITED ..... **Plaintiff**

Through: Mr. Anupam Srivastava, Ms. Shreya Mehta and Mr. Arjun Saxena, Advs.

Versus

GANGOTRI IRON & STEEL CO. LTD & ORS ..... **Defendants**

Through: Mr. Amit Pawan and Mr. Akshat Srivastava, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. On 23rd November, 2017, the following order was passed in this suit:

> *"1. This suit, filed under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) for recovery of Rs.16,80,42,022.88/- jointly and severally from the four defendants, namely, Gangotri Iron & Steel Co. Ltd., Mr.Sanjiv Choudhary, Mr.Ankit Choudhary and M/s Gangotri Electrocasting Limited was entertained under Order XXXVII of the CPC and summons for appearance ordered to be issued to the defendants.*
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> *2. The order dated 11th October, 2017 records that the defendants had not entered appearance and the plaintiff was thus entitled to a decree under Order XXXVII of the CPC. However, decree was not passed on that date as the counsel for the plaintiff sought time to place on record the tabulation of the liquidated debts against the defendants.*

3. Today, Mr. Akshat Srivastava appears for all the defendants and states that he has already filed vakalatnama on behalf of defendants no.2 & 3, namely, Mr. Sanjiv Choudhary and Mr. Ankit Choudhary.

4. The defendants having not entered appearance within the statutory time and the advocate for the defendants having appeared today for the first time, the said appearance is of no avail.

5. The suit file has been perused and doubts expressed as to maintainability of the Suit under Order XXXVII of the CPC.

6. The counsel for the plaintiff has argued that once the suit has been entertained under Order XXXVII of the CPC and summons for appearance have been ordered to be issued, the question, whether the suit is maintainable under Order XXXVII of the CPC should not be gone into at this stage and a decree should follow.

7. The said argument cannot be accepted. The Court cannot be blind while passing a decree and has to necessarily, even when the defendant has failed to enter appearance or file leave to defend, before passing a decree, satisfy itself whether the plaintiff is entitled to a decree under Order XXXVII of the CPC. It is a different matter, if at the time of issuing summons of the suit, a speaking order, after making the requisite enquiry as to the maintainability of the suit under Order XXXVII, is made and in which case the said aspect cannot be gone into again.

8. However, summons in the present Suit are found to have been ordered to be issued vide order dated 13th February, 2017 of the learned Joint Registrar and without going into the aspect of maintainability of the suit under Order XXXVII of the CPC and treating the claim of the plaintiff, that the suit lies under Order XXXVII of the CPC as gospel truth.

9. The plaintiff has instituted the suit claiming itself to be a "factor" under Section 2(i) of the Factoring Regulation

Act, 2011 and for recovery of receivables as an assignee under Section 2(b) of the Act.

10. Though as per my recollection, order XXXVII Rule 1 of the CPC was amended by Section 35 read with the Schedule to the Factoring Regulation Act aforesaid by providing that Rule 1 of Order XXXVII applies to "suit for recovery of receivables instituted by the assignee of a receivable" but Universal's CPC, 2017 edition is not found to contain the said amendment to Order XXXVII Rule 1.

11. The counsel for the plaintiff on enquiry has handed over his own 'Universal's' CPC, 2016 edition and which is found to contain the said amendment. The Court's copy of the 2015 edition is also found to contain the said amendment. The counsel for the plaintiff, on enquiry whether the said amendment has been struck down or declared to be not applicable, replies in the negative. He however informs that a Coordinate Bench of this Court in ***IFCI Factors Limited vs. Maven Industries*** *has held Order XXXVII to be not applicable to such a suit filed by the plaintiff, but without noticing the amendment aforesaid and the appeal against the said order is pending.*

12. I have thus proceeded to examine the Factoring Regulation Act and the plaint.

13. The Factoring Regulation Act defines the expression 'factor' vide Section 2(i) thereof, as meaning "a non-banking financial company as defined in clause (f) of Section 45-I of the RBI Act, 1934 which has been granted a certificate of registration under sub-section (1) of Section 3 or any body corporate established under an Act of Parliament or any State Legislature or any Bank or any company registered under the Companies Act, 1956 engaged in the factoring business. Section 3(1) of the said Act provides that "no factor shall commence or carry on the factoring business unless it obtains a certificate of registration from the Reserve Bank to commence or carry on the factoring business under this Act".

14. The plaintiff though in para 1 of the plaint has pleaded that it is a factor under Section 2(i) but has not placed before *this Court the certificate of registration as required under Section 3(1) of the Act. Without the said certificate of registration, the plaintiff cannot be held to be entitled to maintain a summary suit under the amended Order XXXVII.*

15. Section 19 of the aforesaid Act also requires every factor to file, for the purposes of registration, the particulars of every transaction of assignment of receivables in his favour with the Central Registry to be set-up under Section 20 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, within a period of thirty days from the date of such assignment or from the date of establishment of such registry, as the case may be, in the manner and subject to payment of such fee as may be prescribed in this behalf.

16. The present suit has been filed by pleading: i) that the plaintiff vide agreement dated 19th August, 2011 agreed to provide the domestic sales bill factoring facility to the defendant no.1 Gangotri Iron and Steel Company Limited; ii) that the defendants No.2 to 4, namely, Sanjiv Choudhary, Ankit Choudhary and M/s Gangotri Electrocasting Limited vide deed of guarantee dated 19th August, 2011 agreed to be jointly and severally liable to the plaintiff along with the defendant no.1; iii) in the terms of the above mentioned agreement, the plaintiff disbursed 80% of the invoice value of the invoices of the total value of Rs.15,22,44,257.25/- to the defendant no.1; iv) that the defendants are liable to pay Rs. 6,81,47,639.88/- towards discount charges, service charges, administrative charges; and v) that a total sum of Rs.16,80,42,022.88/- is due from plaintiff to defendants.

17. I have enquired from the counsel for the plaintiff that the plaintiff having sued for recovery of receivables, whether the assignment is registered as assignee under Section 19.

18. The counsel for the plaintiff states that the plaintiff has not instituted the suit against the persons whose invoices the plaintiff has so discounted as an assignee of the defendant no.1 but has chosen to file the suit against the defendants only. He thus states that the plaintiff was not required to *register the assignment. He contends that registration required is of assignment by the defendant no.1 of the debts owed to defendant no.1 by the persons whose invoices the plaintiff discounted (and which persons are called debtors).*

19. On further enquiry, it is stated that the plaintiff has neither pleaded such registration nor filed any document in respect thereof.

20. The amended CPC under Rule 1 of Order XXXVII provides for the suit for recovery of receivables instituted by any assignee of a receivable to be a class of suit to which Order XXXVII applies. I have enquired from the counsel for the plaintiff, whether the plaintiff can sue under Order XXXVII without pleading and placing before the Court the document of registration under Section 19(1) of the assignment. Prima facie it appears that only an assignment which has been so registered can be the subject matter of Order XXXVII of the CPC.

21. A question also arises whether the suit under Order XXXVII Rule 1(2)(b)(iv) can be instituted only against the debtor aforesaid or also against the assignor. If the words of the amendment to CPC are not found to include the suit against the assignor, the said suit will again have to be instituted as an ordinary suit.

22. It is deemed appropriate to grant an opportunity to the counsel for the plaintiff to study the matter and if so desires make up the deficiencies aforesaid in the plaint.

23. List on 13th December, 2017."

2. The counsel for the plaintiff, with respect to the queries raised on 23rd November, 2017 and recorded in the order of that date, has stated:

(i) that for a factoring transaction, there are three parties, namely (a) the factor or an assignee; (b) assignor; and, (c) debtor;

(ii) that the plaintiff is a factor or an assignee and has instituted this suit for recovery of money due, not against the debtor but against the assignor;

(iii) that the registration of the plaintiff as a factor under Section 3 is exempted under Section 5 of the Factoring Regulation Act, 2011, as the plaintiff is a Government Company as defined under Section 617 of the Companies Act, 1956;

(iv) that assignment of the debts owed by the debtors to the defendant No.1 and assigned in favour of the plaintiff as assignee, are not registered under Section 19 of the Act;

(v) that Section 21 of the Act providing for effect of such non-registration only provides for fine extending to Rs.5,000/- and does not vitiate the assignment or the underlying transaction;

(vi) Section 24 of the Act provides that cognizance of such offence can be taken only on the complaint of an officer of the Reserve Bank of India;

(vii) that Order XXXVII Rule 1(2)(b)(iv) of the Code of Civil Procedure, 1908 (CPC) permitting suit under Order XXXVII to be filed for recovery of receivables instituted by assignee of a receivable, only provides for the plaintiff in such a suit to be an assignee and does not provide against whom the suit is to be instituted; the same would thus cover a suit by the plaintiff as an assignee, not only against the debtor but also against the assignor i.e. the defendant No.1;

(viii) that the plaintiff has sued the defendants No.2 to 4 as guarantors under Order XXXVII Rule 1(2)(b)(iii) of CPC.

3. I have enquired from the counsel for the plaintiff, whether the plaintiff has pleaded that it is a Government Company within the meaning of Section 617 of the Companies Act, which, for a company to be qualified as a Government Company, requires not less than 51% of the paid-up share capital to be held by the Central Government or by the State Government or a company which is a subsidiary of a Government Company so defined.

4. The counsel for the plaintiff states that though the plaint does not expressly plead so but it is pleaded in para 1 of the plaint that the plaintiff is a Government Undertaking. It is also stated that the plaintiff is a subsidiary of IFCI Limited initially established by IFCI Act, 1948 and on repeal thereof registered as a company under the Companies Act.

5. I have enquired from the counsel for the plaintiff, as to how the factoring transaction as contended by him is different from a bill purchase or a bill discounting transaction as prevalent since time immemorial.

6. Though the counsel for the plaintiff states that it is different but on explanation of the counsel, there does not appear to be any difference.

7. It is also the contention of the counsel for the plaintiff that the plaintiff, even if unable to fall under Order XXXVII Rule 1(2)(b)(iv) of CPC for the reason of non-registration of the assignment under Section 19 of the Factoring Regulation Act, would in any case be entitled to institute the suit against the defendant No.1 on the basis of a written contract with the defendant No.1.

8. I have drawn the attention of the counsel for the plaintiff to judgment dated 16th August, 2017 of this Court in C.R.P. no.79/2016 titled ***Shradha Wassan Vs. Kamal Arora*** where, referring to earlier judgments, it has been held that once a suit under Order XXXVII of CPC cannot be maintained on the basis of a cheque not presented for payment, the same cannot be permitted to fall under Order XXXVII of CPC by treating the cheque as a written contract and that the Legislature having provided a specific classification for a suit under Order XXXVII of CPC to lie on the basis of a cheque, if as per law, it does not lie on the basis of a cheque, it cannot be made to so lie treating the same as a written contract. I have thus enquired from the counsel for the plaintiff that if the suit under Order XXXVII Rule 1(2)(b)(iv) of CPC, which has been incorporated in the CPC by the Factoring Regulation Act only, is not maintainable for the reason of the plaintiff having not complied with the requirements for maintaining a suit thereunder, why should the same be permitted to lie under Order XXXVII CPC by treating the transaction as a written contract and on which basis, the suit could in any case have been filed without the said amendment to the CPC.

9. I also entertain doubts, whether the suit by the plaintiff as a factor or assignee against its assignor i.e. the defendant No.1 would qualify as a suit for recovery of receivables within the meaning of Order XXXVII Rule 1(2)(b)(iv) of CPC. 'Receivables' is defined in Section 2(p) of the Factoring Regulation Act as under:

> *"(p) "receivables" mean all or part of or undivided interest in any right of any person under a contract including an international contract where either the assignor or the debtor*

or the assignee is situated or established in a State outside India; to payment of a monetary sum whether such right is existing, future, accruing, conditional or contingent arising from and includes, any arrangement requiring payment of toll or any other sum, by whatever name called, for the use of any infrastructure facility or services."

10. Section 7 of the Factoring Regulation Act provides for assignment of a receivable due and payable by any debtor to any factor. The same leads to the conclusion that it is only a suit against the 'debtor' which would qualify as a suit for recovery of receivables and not a suit against the assignor.

11. The counsel for all the defendants, on being asked to respond, states that the defendants do not dispute their liability to the plaintiff. It is however stated that the defendant No.1 has been declared as a sick industry under the Reserve Bank of India Guidelines and a technical consultant has been appointed for rehabilitation of the defendant No.1. It is contended that an investor for the defendant No.1 is being searched for and whereafter the dues of the plaintiff will be paid.

12. In view of the aforesaid, though there is no impediment to a decree as sought being passed jointly and severally against the defendants, whether the suit were to be maintainable under Order XXXVII of CPC or not, but I deem it appropriate to clarify that my conclusions hereinabove about a suit under Order XXXVII Rule 1(2)(b)(iv) being maintainable by a factor against the debtor (and not against an assignee) and with respect to assignments registered under Section 19, be not treated as conclusive but only as highlighting the various issues. The counsel for the plaintiff

states that the said aspects have not been considered in any of the judgments.

13. Accordingly, a decree is passed in favour of the plaintiff and jointly and severally against the defendants for recovery of Rs.16,80,42,022.88 paise together with interest @ 13.75% per annum *pendente lite* and future. The plaintiff shall also be entitled to costs of the suit.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 13, 2017

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(corrected & released on 17th January, 2018)