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

\+ C.R.P. 229/2017 & CM No.37853/2017 (for stay).

TAURANT PROJECTS LTD ..... Petitioner

Through: Mr. Raman Gandhi, Adv.

versus

BAKSHI THE DRILLER ..... Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

<u>O R D E R</u>

% **24.10.2017**

<u>CM No.37854/2017 (for exemption).</u>

1. Allowed, subject to just exceptions.

2. The application stands disposed of.

<u>C.R.P. 229/2017 & CM No.37853/2017 (for stay)</u>.

3. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 19th August, 2017 in CivDJ/610064/2016 of the Court of Additional District Judge-05 (West), Tis Hazari Courts, Delhi) of dismissal of the application of the petitioner / defendant under Order VII Rule 11 of the CPC.

4. The suit, plaint wherein was sought to be rejected, was filed by the respondent / plaintiff against the petitioner / defendant and against Shri Dinesh Lalwani, Managing Director of the petitioner / defendant (who has not been made a party to this petition) for recovery of Rs.42,42,179/-, pleading (i) that the petitioner / defendant placed a Work Order dated 22nd April, 2011 on the respondent / plaintiff for installation of steel pipeline by horizontal directional drilling method at Agra at various work fronts as mentioned in the work order; (ii) that the petitioner / defendant, under the

said work order, had agreed to the rate of Rs.5,500/- per meter; (iii) that the respondent / plaintiff completed the work and sent the bill on 4th July, 2011 for Rs.43,25,419/- and which was acknowledged by the petitioner / defendant; (iv) that in the meanwhile the petitioner / defendant further placed a Work Order dated 4th June, 2011 though altered as 1st May, 2011 on the respondent / plaintiff for completion of certain installation work as mentioned therein and at the rate of Rs.5,350/- per meter; (v) that the respondent / plaintiff has completed the said work also and raised a bill for Rs.9,20,564/- on 29th July, 2011; (vi) that against the total outstanding of Rs.52,45,979/-, the petitioner / defendant has paid an amount of Rs.28,65,600/- only leaving a balance of Rs.23,80,379/-; (vii) that the petitioner / defendant never objected regarding performance and quality of work done by the respondent / plaintiff; (viii) however as soon as the petitioner / defendant raised a demand for the balance due, the petitioner / defendant, to cover up its illegalities of damaging the respondent / plaintiff's machinery, issued a notice dated 7th October, 2011 on baseless figures of transaction and claimed that the petitioner / defendant had made an excess payment of Rs.11,80,416/- and on certain other accounts; (ix) that the petitioner / defendant had issued a cheque for Rs.5,00,000/- dated 6th June, 2011 and the same was dishonoured on 7th June, 2011 on account of insufficiency of funds in the account of the petitioner / defendant; and, (x) that besides balance of Rs.14,59,815/- and Rs.9,20,564 under the two invoices aforesaid, a sum of Rs.18,61,800/- was also due from the petitioner / defendant to the respondent / plaintiff towards the value of the damages caused by the petitioner / defendant.

5. Hence the suit for recovery of Rs.42,42,179/-.

6. The defence of the petitioner / defendant as well as of its Managing Director Mr. Dinesh Lalwani to the suit was struck off for failure to file the written statement and the challenge to the said order having also failed, the said order has attained finality.

7. The petitioner / defendant and its Managing Director (who has chosen not to challenge the order) filed the application under Order VII Rule 11 of the CPC against the dismissal whereof this Revision Petition has been preferred, running into as many as 24 pages and in the nature of a written statement but seeking rejection of the plaint.

8. The counsel for the petitioner / defendant however states that he stated before the Suit Court that he is not pressing the other averments in the application and is pressing the application only on the ground of "Suit Court proceeding on the basis of unilaterally invoices and on no other ground". The counsel for the petitioner / defendant has relied on (i) ***Kashmiri Lal Surinder Kumar Vs. Veer Bhan Ramesh Kumar*** 2015 SCC OnLine Del 10344; (ii) ***Kesoram Industries and Cotton Mills Limited Vs. Commissioner of Wealth Tax (Central), Calcutta*** AIR 1966 SC 1370; and, (iii) ***Dunlop & Ranken Ltd. Vs. Hendall Steel Structures Ltd. Pitchers Ltd.*** (1957) 1 WLR 1102. The argument of the counsel for the petitioner / defendant is that the respondent / plaintiff "cannot possibly lead any other evidence except the invoices on which the suit has been filed and thus the plaint should be rejected".

9. I have enquired from the counsel for the petitioner / defendant as to under which clause of Rule 11 of Order VII he raises the said argument.

10. The counsel for the petitioner / defendant states that the said ground would fall under Order VII Rule 11(a) of the CPC i.e. the plaint not disclosing a cause of action.

11. To say the least, the said argument qualifies as a fantastic argument which is made *de hors* any application of law and the application as well as the argument are nothing but an attempt either to delay the disposal of the suit after the defence of the petitioner / defendant and its Managing Director has been struck off or to somehow or the other, in the guise of Order VII Rule 11 of the CPC, have a chance to contest the suit and which chance has been lost. I wonder that if this does not qualify as an abuse of the process of the Court, what else will. A litigant, after having his defence struck off for failure to file written statement, is not entitled to attempt to hoodwink the Court into giving such right to the litigant which has been lost and by invoking a different provision of law. It is perhaps for this reason that the counsel for the petitioner / defendant straightway, instead of making his arguments, chose to argue that "he should be given an opportunity to be heard" and that "notice of the petition be issued" instead of choosing to make arguments on the petition.

12. Notice of the petition is not to be issued mechanically, just on filing thereof. Without the petitioner / defendant satisfying this Court of any error within the confines of Section 115 of the CPC and calling for interference by this Court.

13. The counsel for the petitioner / defendant has referred to Section 34 of the Indian Evidence Act, 1872 which provides that entries in books of account, regularly kept in the course of business, are relevant whenever they

refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability. The counsel for the petitioner / defendant has argued that since the invoices raised by the respondent / plaintiff on the petitioner / defendant have been unilaterally raised by the respondent / plaintiff, mere proof of that cannot charge the petitioner / defendant with any liability and the respondent / plaintiff cannot possibly lead any other evidence.

14. In arguing so also, the counsel, at the stage of Order VII Rule 11 of the CPC, is presuming as to what evidence the respondent / plaintiff will lead and is choosing to ignore detailed averments otherwise given in the plaint of placing of the work order by the petitioner / defendant on the respondent / plaintiff and of part payments made by the petitioner / defendant to the respondent / plaintiff. It has to be adjudged after the respondent / plaintiff has led his evidence as to whether the respondent / plaintiff has proved its case or not. It has been repeatedly held including in ***Kuldeep Singh Pathania Vs. Bikram Singh Jaryal*** (2017) 5 SCC 345 that at the stage of Order VII Rule 11 of the CPC no mini trial is to be held. The Courts are not to prejudge the merits of the claim of the plaintiff.

15. The counsel for the petitioner / defendant, inspite of being called upon to cite any judgment where, invoking Section 34 of the Indian Evidence Act, the plaint has been rejected, has not shown any.

16. As far as the judgments cited by the counsel for the petitioner / defendant are concerned, ***Kashmiri Lal Surinder Kumar*** supra, the counsel for the petitioner / defendant himself states, is a case of dismissal of a suit inspite of one of the defendants being *ex parte*, for the reason of the plaintiff

having failed to prove its case; Section 34 of the Indian Evidence Act was relied on; ***Kesoram Industries and Cotton Mills Limited*** supra merely refers to ***Dunlop & Ranken Ltd.*** supra holding that issuance of the architect's certificate was just as much a necessity for investing a cause of action in the sub-contractor as it was in the main contractor and there is no right to be paid and there was no debt unless the architect had certified the amount to be paid for the work ordered. I may state that the said judgment emanated from the assessment under the Wealth Tax Act and was not concerned with a suit or any application under Order VII Rule 11 of the CPC.

17. I fail to see as to how either of the judgments help the petitioner / defendant. The invocation of the same is also for the sake of doing so. Without the respondent / plaintiff having an opportunity to prove its claim against the petitioner / defendant and its Managing Director, the claim cannot be rejected at the threshold.

18. No other argument has been urged.

19. The petition is dismissed with conditional costs of Rs.25,000/- payable to the Delhi High Court Bar Association Lawyers' Social Security and Welfare Fund, New Delhi and proof of such deposit to be submitted before the Trial Court for the petitioner / defendant to be able to participate in the suit to the limited extent permissible to it when its defence is struck off. If the proof of deposit of such costs is not shown, the petitioner / defendant shall not be entitled to such participation either.

RAJIV SAHAI ENDLAW, J

OCTOBER 24, 2017/'pp'..

(corrected & released on 27th December, 2017)