* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **RFA No. 354/2018**

% **4th July, 2018**

M/S SYNERGYTECH AUTOMATION PVT. LTD. and Anr. ....Appellants

Through: Ms. Shweta Pandey, Advocate.

versus

M/S SMC PNEUMATICS (INDIA) PVT. LTD. ..... Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No. 354/2018 and C.M. Appl. No. 16757/2018 (for stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the judgment of the trial court dated 18.1.2018 by which the trial court has decreed the suit filed under Order XXXVII CPC on account of appearance not being filed in time and the delay in filing appearance being not condoned. This is recorded in para 14 of the impugned judgment and which para reads as under:-

"14. In the present caes, summons of the suit under Order 37 Rule 3 CPC in the prescribed form was issued to the defendant. The defendant received the summons on 07.10.2017. Accordingly, as per record on 01.11.2017 an application was filed by putting appearnce as per Order 37 Rule (2) sub-rule (3) CPC. The appearance was filed with an application for condonation of delay. The facts mentinoed in the appearance were disputed by the learned counsel for plaintiff. On 12.12.2017 vide detailed order it was held that defendant was infact served on 12.09.2017 and there was delay of 41 days. The appearance filed by the defendnat was not signed by any of the defendnats. The complete ingredients mentioning the address of service of summons for judgment were also not mentioned in the application. There was no authority given by the defendant No.1 to the Counsel for putting up of apperance. The delay according to defendant from 07.10.2017 to 01.11.2017 also not reasonably explained. The appearance was held not be in accordance wiht law."

2. While issuing notice in this appeal on 27.4.2018 the following order was passed with respect to non-maintainability of the subject suit under Order XXXVII CPC.

"**C.M. Appl. No. 16758/2018 (for exemption)**

1. Exemption allowed, subject to all just exceptions.
C.M. stands disposed of.

RFA 354/2018 and C.M. 16757/2018 (for stay)

2. Learned counsel for the appellant states that the suit filed for recovery of money was not maintainable under Order 37 CPC because the amount which was claimed in the suit was the balance due at the foot of an account, and balance due at the foot of account is not a written contract or a negotiable instrument etc. for the suit to be maintainable under Order 37 CPC. Reliance is placed upon the judgment delivered by this Court in the case of ***IFCI Factors Limited Vs. Maven Industries Limited and Ors., 2015 (255) DLT 32***.

3. Learned counsel for the appellant, at this stage, does not press for interim orders, inasmuch as, no execution proceedings have been filed.

4. Notice be issued to the respondent on filing of process fee, both in the ordinary method as well as by registered post AD, returnable on 4th July, 2018. *Dasti*."

3(i). A reading of the plaint shows that suit which has been filed for recovery of Rs.43,08,000/- is filed being the claim of the balance due at the foot of the account. Respondent/plaintiff claimed amounts to be payable to the respondent/plaintiff under different invoices as per which the respondent/plaintiff is said to have supplied industrial goods to the appellants/defendant. The various purchase orders with their numbers and dates have been given in para 5 of the plaint. Appellants/defendants has filed along with the appeal paper book from pages 255 onwards the statement of account filed by the respondent/plaintiff in the trial court. This statement of account shows that on 1.4.2016 the amount claimed against the appellants/defendants was Rs.31,25,407/- and which on account of payment of three cheques stood reduced to the suit Principal amount of Rs.29,25,407/-. It is however noticed that after the aforesaid entries there are various other debit and credit entries towards cheques receipts which have been encashed or some cheques which were dishonoured and ultimately the balance due at the foot of the account as on 8.1.2016 is shown to be Rs.31,25,407/-. The suit is filed on 19.8.2017.

(ii). It is, therefore, clear that the amount claimed in the suit is the balance due at the foot of the account and the amount claimed in the suit is not a liquidated amount arising from a negotiable instrument or a written agreement. In view of this position the ratio of the judgment passed by this Court in the case of ***IFCI Factors Limited Vs. Maven Industries Limited and Ors., 2015 (255) DLT 32*** will squarely come into play.

4. Therefore, applying the ratio of the judgment passed in the case of ***IFCI Factors Limited (supra)***, and the fact that the amount claimed by the respondent/plaintiff is not based on any dishonoured negotiable instrument or a liquidated amount arising from a written contract, therefore the suit itself was not maintainable under Order XXXVII CPC. Once the suit was not maintainable under Order XXXVII CPC, there does not arise any issue of delay in filing the appearance and decreeing of the suit on account of delay in filing appearance being not condoned.

5. In view of the aforesaid discussion, since the suit was not maintainable under Order XXXVII CPC, and though such a suit can be dismissed as non-maintainable, however in the interest of justice it is ordered that the subject suit filed by the respondent/plaintiff will be

treated as an ordinary suit filed for recover of money and not one which has to be decided as per the procedure under Order XXXVII CPC.

6. This appeal is therefore allowed and the impugned judgment dated 18.1.2018 is set aside. The subject suit filed by the respondent/plaintiff will now be tried and decided as an ordinary suit for recovery of moneys.

7. Parties to appear before the District and Sessions Judge, West, Tis Hazari Courts, Delhi on 8th August, 2018 and the District and Sessions Judge will now mark the suit for disposal to a competent court in accordance with law.

JULY 04, 2018 **VALMIKI J. MEHTA, J**

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