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IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA No.743/2018

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5th September, 2018

M/S MIST AVENUE PVT. LTD.

.... Appellant

Through: Mr. Anil Airi, Senior Advocate
with Mr. Ravi K. Chandna,
Advocate, Ms. Priyanka
Nayyar, Advocate, Mr. Satyam
Bhatia, Advocate and Mr.
Ravinder Singh, Advocate.

versus

M/S. JMS STEELS & POWER CORPORATION & ANOTHER

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.36119-20/2018(exemption)

1. Exemption allowed subject to just exceptions.
C.M.s stand disposed of.

C.M. Nos.36118/2018(condonation of delay in filing)

2. For the reasons stated in the applications, delay of 256
days in filing the appeal is condoned.

C.M. stands disposed of.

RFA No.741/2018 and C.M. No.36117/2018(stay)

3. This Regular First Appeal under Section 96 of Code of the Civil Procedure, 1908 (CPC) is filed by the defendant no.1 in the suit impugning the Judgment of the Trial Court dated 18.9.2017 by which trial court dismissed the leave to defend application filed by the appellant/defendant no.1 under Order 37 Rule 3 CPC and has decreed the suit for recovery of an amount of Rs.89,50,244/- alongwith interest @ 10% per annum.

4. The facts of the case are that the respondent no.1/plaintiff filed the subject suit under Order 37 CPC pleading that the appellant/defendant no.1 represented that it is a Real Estate and Infrastructure Development Firm that and the respondent no.2/defendant no.2 was working as the contractor for the appellant/defendant no.1 for the project of the appellant/defendant no.1, namely MIST being developed at Plot no.1, Sector-143-B, Noida. The appellant/defendant no.1 approached the respondent no.1/plaintiff for a supply of 200 tons of steel for carrying on the construction for MIST project. Between the defendants, it was agreed that the purchase orders would be generated and issued by the defendant no.2/respondent no.2. Respondent

no.1/plaintiff supplied necessary goods and invoices were raised upon the respondent no.2/defendant no.2 stating in those invoices C/o Mist. The purchase orders and the bills issued thereupon after supply of materials, are detailed in para 7 of the plaint, and which para 7 reads as under:-

“7. That the Plaintiff after supplying the steel, as per the above mentioned two purchase orders, to Defendant no.2, issued several bills/invoices in respect of the material supplied in accordance with the purchase orders generated by Defendant no.-2. The details of bills/invoices raised by Plaintiff in respect of two purchase orders abovementioned are herein under:-

The details of the bills/invoices that are raised against the purchase order no.POR/1415/00006381 dated-06.02.2015 are as under:-

S. No.	Date	Particulars of Bill raised	Amount
1.	12.02.2015	1410	Rs.12,35,198/-
2.	12.03.2015	1567	Rs.12,74,331/-

The details of the bills/invoices that are raised against the Purchase order no-POR/1415/00007279 dated-20.03.2015 are as under:

S. No.	Date	Particulars of Bill Raised	Amount
1.	27.03.2015	1629	Rs.15,08,357/-
2.	29.04.2015	1630	Rs.14,72,269/-
3.	02.04.2015	02	Rs.13,34,319/-
4.	27.05.2015	148	Rs.10,34,103/-
5.	29.05.2015	155	Rs.10,91,667/-

Original/Certified copy of invoices of Rs.89,50,244/- issued by the Plaintiff is being filed as document along with the list of documents of the present suit.”

5. The appellant/defendant no.1 in discharge of its liability from time to time made various payments and which were duly reflected in the books of account of the respondent no.1/plaintiff. There however remained a balance due of Rs.89,50,244/- as on 6.1.2016. The appellant/defendant no.1 in discharge of its partial liability issued two cheques drawn on Axis bank bearing nos.037274 and 037272 dated 4.5.2015 and 9.5.2015 for Rs.14,72,269/- and Rs.13,34,319/- respectively but these cheques were not presented at the request of the appellant/defendant no.1. These two original cheques were filed alongwith the plaint. The liability of the appellant/defendant no.1 and the respondent no.2/defendant no.2 was pleaded to be joint and several. The subject suit was hence filed for recovery of Rs.89,50,244/- alongwith interest.

6. The appellant/defendant no.1 in response to summons for judgment filed its application seeking leave to defend. It was pleaded by the appellant/defendant no.1 that it had no privity of contract with the respondent no.1/plaintiff. The appellant/defendant no.1 pleaded

that the liability was of the respondent no.2/defendant no.2 on which invoices were raised.

7. Trial court has dismissed the application seeking leave to defend by observing that the appellant/defendant no.1 cannot deny its liability and cannot deny privity of contract inasmuch as the appellant/defendant no.1 had undoubtedly been making payments to the respondent no.1/plaintiff from time to time, including the two cheques which were referred to in para 9 of the plaint and which were filed along-with the suit plaint. Trial court has reasoned in the impugned judgment that if the appellant/defendant no.1 was not liable, then there was no reason why the appellant/defendant no.1 would have issued cheques from time to time for payment to the respondent no.1/plaintiff as reflected in the ledger account of the respondent no.1/plaintiff. Trial court also records that the appellant/defendant no.1 does not dispute in its leave to defend application that the two cheques as stated in para 9 of the plaint were issued by the appellant/defendant no.1. The relevant observations of the trial court in this regard are contained in para 13 to 15 of the impugned judgment and these paras read as under:-

“13. The arguments advanced by Counsel for defendant no.-1 that defendant no.-1 had no privity of contract with the plaintiff or that defendant no.-2 was liable to pay for the goods supplied by the plaintiff are also without any merits. Plaintiff has placed on record statement of ledger account which shows that defendant no.-1 had been making payments to the plaintiff from time to time. Plaintiff has given a number of cheques issued by the defendant no.-1 in favour of plaintiff from time to time. Statement of account of the defendant no.-1 also show transfer of money by RTGS by defendant no.-1 in the accounts of the plaintiff on 11.12.2014, 13.12.2014 and 10.02.2015. These payments are besides other payments made through cheques and demand drafts on 16.12.2014, 13.01.2015, 21.01.2015, 10.02.2015, 11.02.2015 and 03.03.2015. All these transactions clearly indicate that the material were being supplied by the plaintiff to the site address of defendant no.-1 and defendant no.-1 had been making payments directly to the plaintiff. Therefore, the defence raised by defendant no.-1 that there is no privity of contract between the parties or that the goods were supplied to defendant no.-2 are without any substance and does not give rise to any triable issues.

14. Defendant no.-1 has also not denied in the application for leave to defend about the issuance of two cheques to the plaintiff. If there was no privity of contract between the parties, why these cheques issued by the defendant no.-1. Defendant no.-1 has failed to give any explanation in this regard. Rather, defendant no.-1 has taken a stand that the suit under Order 37 is not maintainable as the plaintiff did not present these cheques for encashment. In my considered opinion, the present case is not merely based on the aforesaid two cheques but is also based on the purchase orders issued by defendant no.-2 and invoices raised by plaintiff for supply of materials.

In Lohmann Rausher Gmbh Vs. Medisphere Marketing Pvt Ltd.(2004) 117 DLT 95(DB), it was held that invoices are a complete contract within the contemplation of Order 37 Rule 2 CPC. It is not the case of the defendants that invoices do not confirmed to the purchase orders. All features pertaining to the contract of sale of goods are reflected in the invoices and these invoices are complete contract, required by law where the contract pertains to sale of goods.

15. The invoices issued by the plaintiff have been addressed to the site address of defendant no.-1 and the goods have been received by defendant no.-2 acting as an agent of defendant no.-1. Therefore, both the defendants are under an obligation to make payments of the goods supplied by the plaintiff”
(underlining added)

8. In my opinion, no fault can be found in the impugned judgment because the appellant/defendant no. 1 was admittedly the owner of the project. It is the owner of the project being the appellant/defendant no. 1 who had made itself jointly and severally liable because admittedly various payments have been made by the appellant/defendant no.1 to the respondent no.1/plaintiff and as detailed in the ledger account of the respondent no.1/plaintiff, with the fact that two original cheques issued by the appellant/defendant no.1 in favour of the respondent no.1/plaintiff have been filed alongwith the suit plaint. Clearly therefore, trial court was justified in holding that there was liability of the appellant/defendant no. 1.

9(i) Learned senior counsel for the appellant/defendant no.1 argued by placing reliance upon Clause 28 of the Construction Contract entered into in November, 2004 between the appellant/defendant no. 1 and the respondent no.2/defendant no. 2 to

argue that the relationship between the appellant and respondent no. 2 were of '*principal to principal basis*' and therefore material purchased in question was only the liability for payment by the respondent no.2/defendant no.2 and not the appellant/defendant no. 1.

(ii) I however cannot agree with this argument urged by the appellant/defendant no.1 because if there was no liability of the appellant/defendant no.1 then there was no reason why appellant/defendant no.1 would have repeatedly issued various cheques from time to time for making payment to the respondent no. 1/plaintiff, and as discussed in detail by the trial court in paras 13 and 14 of its impugned judgment.

10. I may note that an appeal was filed by the respondent no. 2/defendant no. 2 in the suit against the self same impugned judgment of the trial court dated 18.9.2017, and that appeal of defendant no.2 in the suit, respondent no. 2 herein, being RFA 402/2018, was dismissed by a detailed judgment dated 11.5.2018. In the judgment dated 11.5.2018 it is observed that liability of both the defendants in the suit i.e. appellant/defendant no.1 and the respondent no.2/defendant no.2 is joint and several.

11. The principles with respect to grant of leave to defend have been recently summarized by the judgment of the Supreme Court in the case of *IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd.*, (2017) 1 SCC 568, and the relevant paras of this judgment read as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec's* case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in *Milkhiram's* case, as follows:

17.1. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the Plaintiff is not entitled to leave to sign judgment, and the Defendant is entitled to unconditional leave to defend the suit.

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the Plaintiff is not entitled to sign judgment, and the Defendant is *ordinarily* entitled to unconditional leave to defend.

17.3 Even if the Defendant raises triable issues, if a doubt is left with the trial judge about the Defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the Plaintiff is entitled to judgment forthwith.

17.6 If any part of the amount claimed by the Plaintiff is admitted by the Defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the Defendant in court."

12. In terms of the ratio of the judgment of the Supreme Court in the case of *IDBI Trusteeship Services Ltd. (supra)* once the defences are frivolous and vexatious and do not raise any genuine triable issues, application seeking leave to defend has to be dismissed. The defence of the appellant/defendant no. 1 was clearly frivolous or vexatious, and it did not raise a genuine triable issue, because if there was no liability of the appellant/defendant no.1, then, where was the question of making payments regularly by the appellant/defendant no.1 to the respondent no.1/plaintiff.

13. There is no merit in the appeal. Dismissed.

SEPTEMBER 05, 2018/Ne

VALMIKI J. MEHTA, J