

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

+ **RFA No.980/2017 and C.M. No.42738/2017 (stay)**

% **6th March, 2018**

AMIT AGARWAL Appellant

Through: Mr. Pinaki Addy, Advocate.

versus

RELIGARE SECURITIES LTD. Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. When notice was issued in this RFA on 24.11.2017 the following order was passed:-

"C.M. Appl. Nos. 42739-40/2017 (for exemptions)

Exemptions allowed, subject to all just exceptions.

C.Ms. stand disposed of.

RFA No. 980/2017 and C.M. Appl. No. 42738/2017 (for stay)

1. Learned counsel for the appellant places reliance upon a judgment delivered by this Court in the case of *IFCI Factors Limited Vs. Maven Industries Limited and Ors., 2015 (255) DLT 32*, to argue that the subject suit filed by the respondent/plaintiff could not have been instituted under Order 37 CPC, inasmuch as, the amount claimed in the suit is the amount claimed as a balance at the foot of an account and not an amount which is a debt or a liquidated specified amount as stated in a written instrument or a dishonoured cheque, etc. It is argued that once the suit itself was not maintainable under Order 37 CPC there did not arise an issue of the procedure under Order 37 CPC being applied of seeking leave to defend and refusing the grant of leave to defend.

2. In view of the arguments urged on behalf of the appellant, till further orders unless varied by the Court there shall be stay of operation of the impugned order dated 27.9.2017 passed by the Court of Dr. Neera Bharihoke, ADJ-01, Saket Courts, New Delhi, in CS No. 6188/16 titled as M/s Religare Securities Limited Vs. Amit Aggarwal.
3. Notices be issued to the respondent on filing of process fee, both in the ordinary method as well as by registered AD post, returnable on 6th March, 2018. Dasti.
4. Trial court record be requisitioned.”

2. In the morning this matter has already been passed over twice for awaiting the counsel for the respondent. Even on the third call, counsel for the respondent is not present and only the officer of the respondent is present who had sought the pass-over. In view of the order passed on 24.11.2017 in my opinion there is no need for adjourning of this appeal which can be disposed of.

3. By the impugned judgment the suit has been decreed because the application for condonation of delay for entering appearance under Order XXXVII CPC of the appellant/defendant was dismissed on 11.9.2017. The Order XXXVII CPC suit has been decreed for Rs.49,42,248.58/-.

4. A reading of the plaint shows that though the suit is filed under Order XXXVII CPC, however there is no averment in the plaint as to which is the negotiable instrument or a written agreement

containing the liquidated amount claimed in the suit, and on the basis of which the suit plaint is filed. Suit is filed on the basis of the balance due at the foot of the running account and this becomes clear from paras 8 to 12 and 16 to 18 of the plaint and which paras read as under:-

“8. In terms of the said Agreement, the plaintiff maintained a running account of the Defendant for all the trade done/dealings entered into by the Defendant from time to time on the Stock Exchange. The Defendant replenished the Margin Account as and when it fell deficient and paid the various amounts from time to time.

9. That as per statutory guidelines, for every transaction the Plaintiff issues a contract note to its client, such as the Defendant, which contains the details of the said transaction, such as quantity sold, name of scrip, rate, etc. Apart from the above, the Plaintiff sent quarterly statement of account to the Defendant. Thus, the Defendant through such Contract notes was additionally aware of the transactions carried by him at all times and he never disputed the outstanding amount in his trading account on account of such transactions. The Plaintiff submits that there is a clear acceptance of the trading done and the liability accruing there from on the part of the Defendant.

10. That despite being in full knowledge of his negative running account, as is clear from the account statement as on 04.05.2009 and contract notes, the Defendant failed to clear the outstanding due and payable by the Defendant to the Plaintiff company.

11. That due to the trading done by the Defendant, his running account showed a negative balance of Rs.49,42,248.58 (Rupees Forty Nine Lacs Forty Two Thousand Two Hundred Forty Eight and Paise Fifty Eight only). The said amount is due and payable by the Defendant to the Plaintiff as on 04.05.2009.

12. That the Plaintiff made repeated demands to the Defendant to pay the outstanding amount due and payable by the Defendant to the Plaintiff. But to no avail.

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16. The Defendant is liable to pay Rs.49,42,248.58 (Rupees Forty Nine Lacs Forty Two Thousand Two Hundred Forty Eight and Paise Fifty Eight only) as on 04.05.2009 being the outstanding amount due and payable by the Defendant to the Plaintiff.

17. That the Plaintiff is entitled to interest @ 24% p.a. on the above outstanding amount of Rs.49,42,248.58 (Rupees Forty Nine Lacs Forty Two Thousand Two Hundred Forty Eight and Paise Fifty Eight only) w.e.f. 05.05.2009 till payment of the said amount by the Defendant to the Plaintiff.

18. That the Plaintiff has filed the present suit under the provisions of order XXXVII CPC. The amount claimed is an outstanding and liquidated amount based on the trade done by the defendant according to the provisions of said terms and conditions of the said Agreements which govern the relationship the Plaintiff and the Defendant.”

5. A reading of the plaint therefore makes it clear that suit is filed for recovery of an amount which is the balance due at the foot of the running account and the suit amount does not arise from any negotiable instrument or the suit amount is not a liquidated amount arising from a written contract acknowledging the liability of the suit amount to the plaintiff.

6. Once the suit was not maintainable as under Order XXXVII CPC, there did not arise any issue of filing of appearance within 10 days from service, and therefore the impugned judgment could not have decreed the suit treating the suit as an Order XXXVII CPC suit on account of non-filing of the appearance. Impugned judgment dated 27.9.2017 is set aside and it is directed that suit will be tried as an ordinary recovery of money suit.

7. List before the District & Sessions Judge, South-East, Saket Courts, New Delhi on 10th April, 2018 and the District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law.

8. Appeal is accordingly allowed and disposed of in terms of aforesaid observations.

MARCH 06, 2018
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VALMIKI J. MEHTA, J