

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

+ **RFA No. 186/2018**

% **26th September, 2018**

M/S TRITUS FOOD PVT. LTD. & ORS Appellants

Through: None.

versus

FOOD & FERRO Respondent

Through: None.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No. 186/2018 and C.M. Appl. No. 6371/2018 (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 07.09.2017 by which the trial court has dismissed the leave to defend application filed by the appellants/defendants under Order XXXVII CPC and decreed the suit for recovery of Rs. 20,67,107/- along with interest at 6% per annum.

2. When the appeal first came up for hearing on 19.02.2018, it was noticed that the suit was not maintainable under Order XXXVII CPC, and therefore the following order was passed:-

“C.M. Appl. No. 6372/2018 (for exemption)”

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

C.M. Appl. No. 6373/2018 (for delay)”

2. For the reasons stated in this application, the delay of 39 days in re-filing the appeal is condoned, subject to just exceptions.
C.M. stands disposed of.

RFA 186/2018 and C.M. Appl. No. 6371/2018 (for stay)”

3. It has been held by this Court in the judgment in the case of *IFCI Factors Ltd. Vs. Maven Industries Limited and Others 225 (2015) DLT 32* that an order 37 CPC suit cannot lie for seeking the balance due at a foot of a running account.

4. Notice be issued to the respondent on filing of process fee, both in the ordinary method as well as by registered AD post, returnable on 23rd May, 2018. Dasti.”

2. The sole respondent is the plaintiff in the trial court and on the first returnable date of hearing in this appeal the service report was that the premises of respondent/plaintiff were locked. Accordingly for today, which is the third date of hearing, it was ordered that the respondent/plaintiff be served, besides by registered AD post, also by affixation. The service report by registered post is

that there is no such person or company existing at the address of the respondent/plaintiff, although the address at which the service was sought to be effected is the same address which is mentioned by the respondent/plaintiff itself in the plaint. Respondent/Plaintiff has however been served by affixation in terms of the last Order dated 23.05.2018.

3. A reading of the subject plaint filed by the respondent/plaintiff shows that the subject suit was filed on account of the fact that the respondent/plaintiff pleaded that it supplied to the appellants/defendants dry fruits and other food items for the years 2010 to 2012. The paras 3 and 4 of the plaint refer to the invoices and the payments made, and thereafter paragraphs 5 and 6 state that balance due from appellants/defendants to respondent/plaintiff is that which is shown at the foot of the account, and which was not paid, and for which amount the subject suit was filed. Paras 5 and 6 of the plaint read as under:-

“5. That during the financial year of 2011-2012 plaintiff had supplied total goods worth Rs.28,32,915/- (Rs.Twenty Eight Lacs Thirty Two Thousand Nine Hundred Fifteen only) and during this period payments in different denominations have been received by the plaintiff for a sum of Rs.22,27,199/- (Rs.Twenty Two Lacs Twenty Seven Thousand One Hundred Ninety Nine only).

6. That as on 31/03/2102 a sum of Rs.20,67,107/- (Rs.Twenty Lacs Sixty Seven Thousand One Hundred Seven only) and thereafter till date no payments have been received from the side of the defendants.”

4. In para 13 of the plaint, the respondent/plaintiff has not stated as to how the suit is maintainable under Order XXXVII CPC as it is not stated that the suit is filed on the basis of a particular dishonoured negotiable instrument or a particular written contract containing a liquidated liability. Para No. 13 only makes a bland statement that the suit is filed under Order XXXVII CPC.

5. I have in the judgment in the case of *IFCI Factors Ltd. v. Maven Industries Limited and Others 225 (2015) DLT 32* held that a suit under Order XXXVII CPC will not lie for claiming the amount due shown as the balance due at the foot of the account because a suit under Order XXXVII CPC lies either on the basis of a dishonoured negotiable instrument or on a written contract containing a liquated liability. Adopting the ratio of the judgment in the case of *IFCI Factors Ltd. (supra)*, it is held that the subject suit was not maintainable under Order XXXVII CPC. Once the suit was not maintainable under Order XXXVII CPC, then there did not arise any

issue of grant or refusal of leave to defend, and consequent decreeing of the suit by the impugned judgment by dismissing the leave to defend application.

6. In view of the aforesaid discussion this appeal is allowed. Impugned Judgment of the trial court dated 07.09.2017 is set aside. It is held that the subject suit was not maintainable under Order XXXVII CPC. The subject suit filed by the respondent/plaintiff will now be tried as an ordinary suit for recovery of moneys.

7. Parties to appear before the District and Sessions Judge, Central District, Tis Hazari Courts, Delhi on 02.11.2018 and the District and Sessions Judge will mark the suit for disposal to the competent court in accordance with law.

SEPTEMBER 26, 2018/AK VALMIKI J. MEHTA, J