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

+ **CS(COMM) 846/2017**

ITC LIMITED

..... Plaintiff

Through: Mr. Anil Kher, Senior Advocate with
Mr. Kunal Kher and Ms. Subiya Akbar
Warsi, Advocates.

versus

VIKAS RASTOGI

.....Defendant

Through: Mr. S.S. Gulia, Advocate with Mr. Imran
Khan and Ms. Prabha Mishra,
Advocates.

Reserved On: 09th July, 2018

Date of Decision: 20th July, 2018

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

I.A. 4608/2018

1. Present application has been filed under Order VIII Rule 10 CPC read with Order XIII-A of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. It is pertinent to mention that the present suit has been filed for recovery of Rs.1,77,35,973.91/-. The prayer clause in the present suit is reproduced hereinbelow:-

- “a) Pass a decree, in favour of Plaintiff and against the Defendant for Rs. 1,77,35,973.91/- (Rupees One Crore Seventy Seven Lakhs Thirty Five Thousand Nine Hundred Seventy Three and Paise Ninety One Only);*
- b) Award interest on the decretal amount against the Defendants @ 18% p.a., and direct the Defendant to pay the interest at the said rate from 01.04.2015 till the time the whole of the amount is paid to the Plaintiff;*
- e) award the costs of the proceedings to the Plaintiff;*
- d) Pass such other appropriate orders and/or directions as this Hon’ble Court may deem fit and proper in the facts and circumstances of the present case.”*

2. Vide order dated 27th April, 2015, status quo order was passed in favour of the plaintiff with regard to defendant’s immovable property situated in Allahabad. Relevant paragraph of the order is reproduced hereinbelow:-

“Consequently, till further orders, the defendant, his agents, representatives, nominees and assigns are restrained from creating any third party interest or parting with the possession of immovable property situated at 78, Beli Road, above Vijaya Bank, near Jagram Chauraha, New katra, Allahabad-211002, Uttar Pradesh.”

3. Since despite service, the defendant failed to file a written statement, the defendant’s right to file written statement was closed vide order dated 3rd February, 2017.

4. The present application being I.A No.4608/2018 was filed on 6th April, 2018.

5. On 9th July, 2018, the learned counsel for the defendant prayed for an adjournment on the ground that he wanted to file an appeal challenging the order dated 3rd February, 2017. However, the request for adjournment was declined as despite passage of more than one and a half years no steps had been taken by the defendant to get its appeal listed.

6. The contentions and submissions advanced by learned counsel for the plaintiff are as under:-

- i. The plaintiff is a leading business company having business interests in various fields including lifestyle and retail business of branded apparels and other accessories.
- ii. The defendant is engaged in the business of distribution of garments and other products.
- iii. The defendant approached the plaintiff for being appointed as a distributor for distributing plaintiff's branded apparels. Vide mutual agreement dated 26th September, 2003, arrived between the parties, the defendant was appointed as one of plaintiff's distributors. The agreement was initially for a period of two years. It was extended from time to time.
- iv. The defendant in accordance with the agreements started placing orders for goods on the plaintiff, which were duly supplied by the plaintiff and invoices/bills were raised on the defendant. The defendant made an on account payment from time to time.
- v. However, the defendant failed to make payment against the entire supplies and became irregular in making the due payment to the plaintiff and thus committed a breach of the agreement. Further some

of the cheques issued by the defendant to the plaintiff were dishonored.

- vi. The defendant vide letter dated 16th November, 2011 admitted and acknowledged that a sum of Rs.1,41,61,246.50/- was due and payable to the plaintiff on 31st October, 2011.
- vii. The defendant is also liable to pay VAT due on such purchase to the plaintiff as on 31st October, 2011.
- viii. The plaintiff on 28th August, 2012, asked the defendant to make payment of the amount due towards unreturned stocks/goods.
- ix. The distribution agreement between the parties finally expired on 25th September, 2013 and was not renewed any further.
- x. Further on various occasions during the period November, 2011 to January 2014, the plaintiff gave credit/adjustments to the defendants on account of sales returns and/or by accepting the claims of the defendant.
- xi. The plaintiff filed the present suit for recovery on 24th April, 2015.

7. The defendant during the course of the hearing handed over a copy of his reply to I.A 4608/2018 on 6th July, 2018, stating that the suit was barred by limitation as the defendant's acknowledgement was dated 16th November, 2011, though the suit had been filed on 24th April, 2015.

8. Learned counsel for defendant further contended that the following claims of the defendant's had not been cleared by the plaintiff

A. Reimbursement of the gift vouchers = Rs. 7,29,270/-

B. Payment of the margin differences of the Wills Lifestyle branded apparel to be paid to different parties who were working under the distributorship of the defendant. = Rs. 64,77,338/-

9. This Court while dealing with an application under Order VIII Rule 10 CPC in **CS(OS) 873/2015 Samsung Electronics Company Limited &Anr. Vs. Mohammed Zaheer Trading As M/s. Gujarat Mobiles &Ors.** has culled out the relevant law as under:-

"10. The Supreme Court in C.N. Ramappa Gowda Vs. C.C. Chandregowda, (2012) 5 SCC 265 has interpreted the Order VIII Rule 10 CPC as under:-

"25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect [Ed.: It would seem that it is the purpose of the procedure contemplated under Order 8 Rule 10 CPC upon non-filing of the written statement to expedite the trial and not penalise the defendant.] of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written

statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial."

11. A Coordinate Bench of this Court in *Nirog Pharma Pvt. Ltd. Vs. Umesh Gupta and Ors.*, 235 (2016) DLT 354 has held as under:-

"11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to prove its contents.

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28. The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to linger on. Accordingly, if the defendant fails to pursue his case or does so in a lackadaisical manner by not filing his written statement, the courts should invoke the provisions of Order VIII Rule 10 to decree such cases."

12. Another Coordinate Bench of this Court in *Satya Infrastructure Ltd. and Ors. Vs. Satya Infra & Estates Pvt. Ltd.*, 2013 III AD (Delhi) 176 has held as under:-

"4. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record....."

10. In the present case, the plaintiff has placed on record the letter of the defendant dated 16th November, 2011, copy of dishonor memo showing dishonor of defendant's cheque dated 8th August, 2011, copy of consignment receipts, copy of letters sent by the defendant to the plaintiff along with tax calculations for the year 2010 and 2011. The acknowledgement letter of the defendant dated 16th November, 2011 is reproduced herein below:-

*"To,
M/s. Vikas International,
353/1, Madhav Kunj,
Ram Mohan Plaza,
Near Katra Market,
Allahabad -2.*

Date: 16.11.2011

Sub: Balance Confirmation of receivable balance

Dear Sir,

As per our books of accounts, an amount Rs.1,41,61,246.50 at BSP (Rupees One Crore Forty One Lacs Sixty One Thousand Two Hundred Forty Six and paise Fifty Only) is receivable from

you as on 31.10.2011. Please confirm the above balance by signing in the space specified below.

Please note that in case we do not get any reply within 7 days of this letter, the above balance would be deemed to be correct.

Thanking you,

Yours faithfully,

ITC LIMITED

Sd/-

Sandeep Verma

I hereby confirm the above balance subject to adjustment of pending claims.

For

Sd/-

Authorised Signatory

Seal & Signature”

(emphasis supplied)

11. It is pertinent to mention that it is the plaintiff's case that it gave credit/adjustment to the defendant on account of sales returns from November, 2011 to January, 2014, after the date of acknowledgement.

12. In any event, since agreement between the parties expired on 25th September, 2013 and present suit was filed within three years therefrom, this Court is of the view that the present suit is within the period of limitation.

13. Further, the defences taken by the defendant in his reply regarding non-reimbursement of gift vouchers and payment of margin differences by the plaintiff under the Distributorship agreement cannot be taken into account as in the absence of a written statement, there is no foundation for the said defences.

14. Consequently, this Court is of the opinion that the defendant has no defence and it has not paid the plaintiff for the goods supplied by it under the agreement dated 26th September, 2003.

15. Accordingly, the present application is allowed and the suit is decreed in favour of the plaintiff and against the defendant for Rs.1,77,35,973.91/- along with pendent lite and future interest @ 6% per annum. The plaintiff is also held entitled to actual costs of litigation including lawyer's fees. The plaintiff is given liberty to place on record the exact costs incurred by it in adjudication of the present suit. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

JULY 20, 2018

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