

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

+ **RFA No.402/2018**

% **11th May, 2018**

B.L. KASHYAP & SONS LTD. Appellant

Through: Mr. Abhimanyu Mahajan,
Advocate with Ms. Anubha
Goel, Advocate and Mr. A.
Ghosh, Advocate.

Versus

M/S JMS STEEL & POWER CORPORATION & ANR.

.... Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. No.19476/2018 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.19477/2018 (for condonation of delay)

2. For the reasons stated in the application, delay of 111
days in re-filing the appeal is condoned.

C.M. stands disposed of.

RFA No.402/2018 and C.M. No.19475/2018 (stay)

3. By this Regular First Appeal filed under Section 96 of
the Code of Civil Procedure, 1908(CPC), the defendant no.2 in the

suit (which was filed by the respondent no.1/plaintiff under Order XXXVII CPC), impugns the judgment of the trial court dated 18.9.2017 by which trial court has dismissed the leave to defend application filed by the appellant/defendant no.2 and has decreed the suit for a sum of Rs.89,50,244/- along with interest at 10% per annum. Moneys claimed by the respondent no.1/plaintiff are on account of the respondent no.1/plaintiff selling its goods being 200 tonnes of steel.

4. The facts of the case are that the respondent no.1/plaintiff filed the subject suit pleading that the appellant/defendant no.2 raised upon the respondent no.1/plaintiff two purchase orders for supply of 200 tonnes of steel. The purchase orders are dated 6.2.2015 and 20.3.2015. The steel which was sold to the appellant/defendant no.2 was on account of appellant/defendant no.2 being a contractor for the project owned by the respondent no.2/defendant no.1 being developed at plot no.1, Sector 143-B, Noida, Uttar Pradesh. The name of the project of the respondent no.2/defendant no.1 was "MIST", and for this project the appellant/defendant no.2 was the contractor for construction in terms

of an agreement entered into between the appellant/defendant no.2 and the respondent no.2/defendant no.1. In terms of the purchase orders on the supply of goods being made, the respondent no.1/plaintiff issued invoices upon the appellant/defendant no.2. The details of these invoices are contained in para 7 of the plaint and this 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 registered 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 a document along with the list of documents of the present suit.”

5. In terms of the averments made in the plaint, the payment for the goods sold and supplied by the respondent

no.1/plaintiff to the appellant/defendant no.2 was to be paid by the respondent no.2/defendant no.1. Respondent no.2/defendant no.1 is said to have issued two cheques in part-payment of Rs.14,72,269/- and Rs.13,34,319/- drawn on Axis Bank, Sector-44 Noida Branch but the respondent no.2/defendant no.1 told the respondent no. 1/plaintiff not to present these cheques till intimation is given for presenting of these cheques. No intimation was received by the respondent no.1/plaintiff for deposit of these cheques and inspite of pursuing the defendants for making the payment the amount due of Rs.89,50,244/, the payment was not made, and therefore the subject suit was filed under Order XXXVII CPC.

6. The basis for filing of the subject suit under Order XXXVII CPC is under two heads. Firstly, entitlement for filing the suit under Order XXXVII CPC is on the basis of two cheques for the amounts of Rs.14,72,269/- and Rs.13,34,319/-, and the other amount being the total amount of the invoices would be the basis for filing the suit under Order XXXVII CPC as the invoices are in the nature of written contracts containing a liquidated amount inasmuch as no payment whatsoever has been made under the subject invoices and it

is not as if that the suit is filed for the balance due at the foot of a running account.

7. The subject suit filed under Order XXXVII CPC was contested by the appellant/defendant no.2 as also by the respondent no.2/defendant no.1, both of whom filed their leave to defend applications. This Court is only concerned with the judgment being passed against the appellant/defendant no.2/contractor as this appeal is filed only by the appellant who is the contractor and was the defendant no.2 in the subject suit.

8. A reading of the plaint along with the leave to defend application and impugned order shows that the following indubitable facts appear on record and conclusions can be drawn that:-

(i) Two purchase orders which were placed upon the respondent no.1/plaintiff, were admittedly only and only drawn upon the appellant/defendant no. 2 and not upon the respondent no.2/defendant no.1. The purchase orders are filed at pages 56 and 57 of the paper book of the appeal and these documents show that the purchase orders are admittedly placed only by the appellant/defendant no. 2 upon the respondent no.1/plaintiff.

At this stage, I reject the argument urged on behalf of the appellant/defendant no. 2 that the purchase orders are not placed by the appellant/defendant no.2 inasmuch as merely because the delivery address of the goods to be supplied is written as c/o the address of the site of the respondent no. 2/defendant no. 1/owner of the project would not mean that the purchase orders would be of the respondent no. 2/defendant no. 1/owner of the project when on the face of the purchase orders they are issued only by the appellant/defendant no.2. Surely once the purchase orders are issued by the appellant/defendant no.2, then the appellant/defendant no.2 cannot argue that it has not issued the orders merely because the delivery address of the goods is stated to be at a site owned by the respondent no.2/defendant no.1 and at which site the appellant/defendant no.2 was making construction in terms of the agreement of construction entered into between the appellant/defendant no. 2 and the respondent no. 2/defendant no. 1.

(ii) The invoices which are issued by the respondent no.1/plaintiff are upon the appellant/defendant no. 2 and not upon the respondent no.2/defendant no.1. These invoices are placed from pages 59 of the

paper book of this appeal and these invoices show the buyer specifically as the appellant/defendant no.2 M/s B.L. Kashyap & Sons Limited. Even the consignee is the appellant/defendant no.2 in terms of these invoices except that the address is given as c/o the site of the respondent no. 2/defendant no.1.

I reject the argument of the appellant/defendant no.2 that merely because the consignee in the invoices issued is though shown as the appellant/defendant no.2 but the delivery is at the site of respondent no.2/defendant no.1, only for this reason the respondent no.2/defendant no.1 will become buyer of the goods.

(iii) The liability of the appellant/defendant no.2 will be because the invoices for its total value are written contracts containing the liquidated amount of liability of the appellant/defendant no.2 for payment to the respondent no. 1/plaintiff. As already stated above, the suit amount claimed is not the amount as the balance due at the foot of a running account but the amount of invoices themselves are claimed in the suit because no payments whatsoever were made under the subject invoices to the respondent no. 1/plaintiff. Suit under Order XXXVII CPC was therefore maintainable as against the

appellant/defendant no.2 on the basis of the invoices which are written contracts containing the liquidated amount payable by the appellant/defendant no.2 to the respondent no.1/plaintiff.

(iv) Even with respect to the cheques issued, though the cheques are issued by the respondent no.2/defendant no.1 yet an Order XXXVII CPC suit for the amount of cheques would also lie against the appellant/defendant no.2 because Order XXXVII Rule 1 CPC does not in any manner state that the cheques which are issued for payments have to be of the person against whom liability is claimed. Obviously this is so as per Order XXXVII Rule 1 CPC because as per Section 2(d) of the Indian Contract Act, 1872 consideration under a contract need not flow/pass only between the parties to a contract. Also it may be noted that even if cheques were not presented, would not mean that the suit would not be maintainable under Order XXXVII CPC because Order XXXVII Rule 1 CPC does not require the cheques to be dishonoured cheques for filing of the Order XXXVII CPC suit.

9. The fact that there is a joint and several liability of the appellant/defendant no.2 with the respondent no.2/defendant no.1

will not mean that to enforce this joint and several liability, the subject suit could not have been filed both against the appellant/defendant no.2 and the respondent no.2 herein. Once liability is joint and several of the appellant/defendant no.2 with the respondent no.2/defendant no.1, and as stated above Section 2(d) of the Indian Contract Act permits passing/payment of consideration by a person who is not a party to the contract, therefore merely because respondent no.2/defendant no.1 had agreed to be liable to make the payment of the goods purchased by the appellant/defendant no.2, this would not mean that the appellant/defendant no.2 would no longer be liable and liability will only be of the respondent no.2/defendant no.1.

To the aforesaid reasoning the added aspect is that even if a cheque is required first to be dishonoured cheque for suing under Order XXXVII CPC, and in case where the cheque is not presented and hence not dishonoured, yet the cheque will still be a written agreement containing the liquidated amount as per Order XXXVII Rule 1 Sub-Rule 2, and therefore a cheque which is not presented will be treated as a written contract containing the liquidated debt or demand in money payable by the defendant, and hence on an

unpresented cheque the suit was maintainable under Order XXXVII CPC against the appellant/defendant no.2.

10. The principles of grant of leave to defend though are not as those contained in the impugned judgment which relies on the judgment of the Supreme Court in the case of *Mechalec Engineers and Manufacturers Vs. Basic Equipment Corporation AIR 1977 SC 577* because the principles with respect to grant of leave to defend are now contained in the recent judgment of the Supreme Court in the case of *IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., (2017) 1 SCC 568*, but even when the principles laid down in the case of *IDBI Trusteeship Services Ltd.(supra)* are applied, yet the appellant/defendant no.2 is held will not be entitled to leave to defend because the defences which are raised by the appellant/defendant no.2 do not raise genuine triable issues for the reasons as stated above. The defences in fact are clearly frivolous and vexatious defences, raised only in order to deny the just dues of seller of goods being respondent no.1/plaintiff. The principles laid down by the Supreme Court with respect to grant of leave to defend have been crystallized by the Supreme Court in paras 17 to 17.6 of the judgment

in the case of *IDBI Trusteeship Services Ltd.(supra)* and these paras 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."

11. I would like to at this stage state that this Court is empowered under Order XLI Rule 24 CPC to give additional

reasoning than as given by the trial court and in fact the conclusion of the trial court and a decree of the trial court can be upheld by the appellate court by applying totally independent reasoning in terms of the powers conferred in the appellate Court under Order XLI Rule 24 CPC.

12. In view of the above decision, I do not find any merit in the appeal. Dismissed.

MAY 11, 2018
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VALMIKI J. MEHTA, J



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