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

% Delivered on: 29th November, 2019

\+ **RFA 337/2019 & CM APPL No.17611/2019**

ZASHA ADVERTISING PVT LTD ..... Appellant
Through: Mr.Dhruv Kapur and Mr.Maharshi Kalra, Advocates.

versus

ABHIJIT ROY ..... Respondent
Through: Mr.Vikram Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal is preferred by the appellant/plaintiff against the order dated 07.01.2019 passed by the learned Additional District Judge-4/ South-West District, Dwarka Courts, New Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.*18/2019* whereby the suit of the appellant under Order *XXXVII* CPC for recovery of Rs.*4,71,320/-* against the respondent/defendant was dismissed in *limine*.

2. The brief facts are:

a) on 26.05.2018 the Respondent placed purchase order upon the Appellant at Delhi for taking the Appellant's service for branding AC bus with effect from 27.05.2018 for a period of one month at the rate of Rs.*78,000*/- excluding GST per bus per month;

b) on 02.07.2018 being satisfied by the Appellant's services, the Respondent placed another purchase order dated 02.07.2018 for continuing the above-mentioned services for another period of one month;

c) on 17.07.2018 in order to discharge the Respondent's liability as per purchase order dated 26.05.2018, the Respondent issued a cheque bearing no.000003 dated 17.07.2018 of Rs.3,68,160/-, drawn on Punjab & Sind Bank, Branch New Alipore, Kolkatta in favour of the Appellant. However, the Respondent requested the Appellant not to present the said cheque for encashment as the Respondent had been running into financial crunch;

d) after repeated requests and reminders for making the payment of the outstanding amount by the Appellant's officials, the Respondent made part payment of Rs.*1,20,000*/- to the Appellant against the purchase order dated 26.05.2018;

e) on 20.08.2018 thereafter, in order to discharge the Respondent's liability as per the purchase order dated 02.07.2018, the Respondent issued a cheque bearing no.000022 dated 20.08.2018 of Rs.*3,68,160*/-, drawn on Punjab & Sind Bank, Branch New Alipore, Kolkatta in favour of the Appellant. However, the said cheque got dishonored upon its presentation by the Appellant with its banker;

f) on 11.10.2018 thereafter the Appellant and its officials approached the Respondent repeatedly with request to pay the due amount to the Appellant. After much persuasions, the Respondent paid an amount of Rs.*70,000*/- against the purchase order dated 26.05.2018. The Respondent also instructed the Appellant to present the cheque bearing No.000022 dated 20.08.2018 for an amount of Rs.3,68,160/-, drawn on Punjab & Sind Bank, Branch NewAlipore, Kolkatta in the last week of October, 2018 with promise and undertaking that the same would be honored upon its presentation. Further the Respondent also undertook and promised to pay the balance amount as soon as possible;

g) on 02.11.2018 the above stated cheque bearing no.000022 dated 20.08.2018 of Rs.*3,68,160*/-, drawn on Punjab &Sind Bank, Branch New Alipore, Kolkatta was presented for clearance by the Appellant to its Banker, namely Federal Bank, Marathahalli Branch (FMH), Bangalore within the statutory period, the said cheque was dishonored due to stopping of payment by the Respondent. The said cheque and returning memo dated 02.11.2018, containing the remarks "*payment stopped by the drawer*" was received by the Appellant thereafter;

h) on 05.11.2018 The Appellant had also caused a legal notice to be served upon the Respondent, calling upon the Respondent to pay the abovementioned amount;

i) on 06.12.2018 the Respondent, replied to the said legal notice, wherein making certain false and frivolous allegations, however admitting the abovementioned amount and further made payment of a sum of Rs.*75,000*/- to the Appellant. Hence the sum of Rs.*4,71,320*/- is still due and payable by the Respondent to the Appellant;

j) on 05.01.2019, abovesaid Civil Suit No.*18/2019* under order *XXXVII* of CPC was filed before the District Judge, South West, Dwarka Courts, Delhi and which was marked to the learned Trial Court;

k) on 07.01.2019 the learned Trial Court dismissed the suit without issuing notice for non-maintainability of the same holding the learned Trial Court lacks territorial jurisdiction and the suit is not maintainable in the present form; hence the present appeal.

3. The suit has been dismissed on two grounds *viz* ***a)*** territorial jurisdiction; and ***b)*** the purchase order being in the name of *Sharma's Advertising Private Limited* and whereas suit has been filed in the name of *Zasha Advertising Private Limited.*

4. Qua the territorial jurisdiction, learned Trial Court had noted:-

> *"3. As per averments contained in the plaint in para 4 of the plaint itself, plaintiff has stated that defendant represented himself to be proprietor of Kreations & Koncepts and running said concern from the office at 734 A, K.L Saigal Road, new Alipore, Block-P, Kolkatta-700053. Neither any agreement between the parties appears to be executed within the jurisdiction of this court nor any proof has been annexed with the plaint which shows that cause of action had arisen at the office address of the plaintiff i.e. within the jurisdiction of this Court, Prima facie, the present suit appears to be not maintainable before this court on account of territorial jurisdiction as the address of the defendant is that of Kolkatta. Even the cheque in question bearing no.000022 dated 20.08.2018 for an amount of Rs.3,68,160/- (Rupees Three Lakhs Sixty Eight Thousand One Hundred and Sixty) purportedly issued by the defendant was drawn on Punjab & Sind Bank New Alipore Branch, Kolkata and same was presented for clearance by the plaintiff to its banker namely Federal Bank, Marathahalli Branch Bankner Branch (FMB), Bangalore."*

5. The suit of the appellant was dismissed in *limine*. A bare perusal of the plaint would reveal, respondent alleges to have placed the purchase order(s) at the registered office of the appellant situated within the territorial jurisdiction of this Court, *per* paragraph No.22 of the plaint. Further, admittedly there was no clear agreement between the parties as to where the payment was to be made and in the absence of such agreement, per settled law, it is the debtor who has to chase the creditors. Admittedly, the creditor is based in Delhi.

6. It was too early a stage to form an opinion qua the territorial jurisdiction and to dismiss the suit. Even otherwise, if the learned Trial Court was of the view it does not have territorial jurisdiction to entertain the suit, it ought have to acted *per* order *VII* rule *10/10A* CPC. Further in

M/s.Alphabetics Private Limited vs Lohia Jute Press AIR 2004 Delhi 374 it was noted:-

> *"5. In terms of Order 14 Rule 2 CPC once a suit has been tried on all the issues, it is required of the Court to give findings on all such issues. However, in my opinion, the facts and circumstances of a case may warrant the court to refrain itself from giving findings on all the issues as it may prejudice the trial of the case in the Court where it is filed after the plaint is returned.* ***Once the court comes to a finding that it had no jurisdiction to try the suit, in my opinion, it would have been an exercise in futility to decide other issues on the merits of the case.*** *The findings on the other issues after the plaint was directed to be returned for presentation in appropriate court would have prejudiced one of the parties and the trial court has rightly not given findings on other issues framed by it. I am, therefore, not in agreement with learned counsel for the appellant that the impugned judgment is bad only because the findings on other issues have not been given by the learned Trial Court.*
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> *8.* ***Learned counsel for the appellant states that her oral request may be considered by this Court as request/application under Order 7 Rule 10A CPC.*** *Counsel for the respondent has agreed that the respondent would not insist upon a notice being served upon them by the Bombay Court and the respondents would appear in the Court in Bombay pursuant to the directions given by this Court. Learned counsel for the appellant is, however, not aware as to in which court in Bombay the plaint is to be presented after it is returned by the Court in Delhi. She requests for a short adjournment to inform the Court as to in which Court the plaintiff intends to present the plaint after it is returned by the Court in Delhi. At request, adjourned to 19th August, 2003."*

7. Thus a perusal of plaint discloses a part of cause of action here, hence the suit ought not to have been dismissed in *limine*.

8. Coming to contention ***b)*** the suit been dismissed on the ground the purchase order and legal notice bear the name of M/s.Sharma's Advertising Private Limited whereas the suit has been filed in the name of M/s.Zasha Advertising Private Limited and hence there was no cause of action for the present company to file this suit, and the learned Trial Court noted:-

> *"4. Furthermore, a perusal of material placed on record reveals that the Board Resolution authorizing Shri Rajesh Sharma, Authorized Representative of the plaintiff appears to be on the letter head of IM/s*

> *Zasha Advertising Pvt Ltd whereas the documents relied upon by the plaintiff i.e. Purchase Order dated 26.05.2018 of IM/s Koncepts & Kreations is in the name of M/s Sharma's Advertising Pvt Limited. Further, the photocopy of cheque is also issued in the name of M/s.Sharma Advertising Pvt Ltd and not in the name of the plaintiff M/s.Zasha Advertising Pvt Ltd. Surprisingly, even the legal notice issued to the defendant by the Advocate for the plaintiff starts from the words "Under the instructions from and on behalf of our client,Sharma Advertising Private Limited" . Further, reply to the defendant's letter dated 06.12.2018 also reveals that M/s Sharma Advertising Pvt Ltd received part payment out of total sum of Rs.5,45,320/-. It is manifest from perusal of plaint that all the relevant documents by way of which the plaintiff is, claiming recovery are in the name of M/s Sharma Advertising Pvt. Ltd and not in the name of plaintiff. The arguments of learned counsel that name of the plaintiff company was earlier M/s Sharma Advertising and which has been got changed to M/s Zasha Advertising Pvt Ltd with the consent of Registrar of Companies (ROC) is also not of any help to the plaintiff. A copy of certificate issued by the ROC has been placed on record is dated 19.04.2018 and all the documents relied upon by the plaintiffs appear to be prepared/issued thereafter. It is not understandable when documents are after the date of change of name with ROC then why name of M/s Sharma's Advertising Pvt Ltd is appearing on the documents and not the name of M/s Zasha Advertising Pvt Ltd. No plausible explanation could be furnished on behalf of the plaintiff in this regard. Hence, I do not find any substance in the arguments advanced. The present suit, therefore, not maintainable before this court. The same is, therefore, dismissed in limine."*

9. It is the submission of the appellant earlier the name of the appellant was M/s.Sharma's Advertising Private Limited and they had applied for the change of the name of the company. Admittedly, M/s.Sharma's Advertising Private Limited and M/s.Zasha Advertising Private Limited are not different companies and as a matter of fact both the names are of *same* company. It is also not the case of the respondent M/s.Zasha Advertising Private Limited is a different company than M/s.Sharma's Advertising Private Limited. The entire transaction has been carried out by the appellant in earlier name of the company as the business dealings with the respondent were going on prior to the change of the name. *It is the respondent who placed the purchase order in the old name of the company*. The name of both the companies are also

embodied in the memo of parties in the plaint, which perhaps was not noticed by the learned Trial Court while passing the impugned order. *Prima facie* change of name of the company though has come into existence but in fact it is the very same company with the same Board of Directors and in the control of same Management.

10. Section 23 of the Companies Act, 1956 reads as under:-

> *"**23. Registration of change of name and effect thereof**.*
> *(1) Where a company changes its name in pursuance of section 21 or22, the Registrar shall enter the new name on the Register in the place of the former name, and shall issue a fresh certificate of incorporation with the necessary alterations embodied therein; and the change of name shall be complete and effective only on the issue of such a certificate.*
> *(2) The Registrar shall also make the necessary alteration in the memorandum of association of the company.*
> *(3) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it; and any legal proceedings which might have been continued or commenced by or against the company by its former name may be continued by or against the company by its new name.*

11. A bare perusal Sub clause *(3)* Section 23 (*supra*) clarifies that change of name obviously will not debar the company under the new name, to sue for any claim under the old name; as a mere change of name has no other consequential legal effect.

12. The change of name of a company shall never affect its rights or obligations, as in the present case, any rights or obligations, carried out by the Appellant in its previous name shall not affect its rights and obligations by merely changing its name and which shall pass on to the same company under the new name. Moreso, it is alleged the purchase order were received when application for change of name was pending before Registrar of Companies, though such application, if accepted would relate to the date of application.

13. Thus, the learned Trial Court ought to have given a chance to the appellant to lead its evidence qua territorial jurisdiction, which appear to be a mixed question of law and fact; needs to be decided after evidence The learned Trial Court rather acted in a hurry to dismiss the suit on mere technicalities, moreso, when respondent in its reply to legal notice had rather admitted its liability.

14. In view above, the impugned order dated 07.01.2019 passed by learned Trial Court is set aside. The suit of appellant is restored to its original number.

15. Both the parties to appear before the learned Trial Court/Successor Court on 16.12.2019, at 10.00AM for further proceedings in accordance with law. It will be purely in the domain of the learned Trial Court to treat the appearance of respondent during these appeal proceedings, as *appearance* under Order *XXXVII* CPC and to call upon the appellant to apply for summons for judgment, in accordance with law.

16. The learned Trial Court not to be influenced by any observation of this Court on merits of respective claims of either side.

17. The appeal stands disposed of in terms above. Pending application(s), if any, are also disposed of. No order as to costs.

18. Copy of this order be sent forthwith to the learned Trial Court/ Successor Court for information and compliance.

YOGESH KHANNA, J.

NOVEMBER 29, 2019

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