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

\+ **RFA No. 84/2017**

% ***25th January, 2019***

M/S ASIAN INSTITUTE OF MEDICAL SCIENCES PVT. LTD.

..... Appellant

Through: Mr. Prabhat Kumar, Advocate (M. No.9312315121) with Mr. Shivam Tyagi, Advocate (M. No.9643137262).

Versus

M/S PES INSTALLATIONS PVT. LTD.

..... Respondent

Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant impugning the Judgment of the trial court dated 01.12.2014 by which the trial court has dismissed the leave to defend application filed by

the appellant/defendant in an Order XXXVII CPC suit filed by the respondent/plaintiff for recovery of Rs. 12,23,366/- with interest.

2. A suit under Order XXXVII CPC lies only if either there exists a dishonoured negotiable instrument or there is a written contract stating a liquidated liability which has to be paid. In the present case, the suit has not been filed either on the basis of a dishonoured negotiable instrument or as per a liquidated liability arising from a written contract. The amount claimed by the respondent/plaintiff is the balance due at the foot of the account. The amount due on account of the balance due at the foot of the account is clear from a reading of paras 8 and 12 of the plaint and these paras read as under:-

> "8. That on completion of the job/work Defendant assured the Plaintiff to clear the complete outstanding amount at the earliest but it is a matter of great regret that till date the outstanding amount which is now overdue, has not been clear by the Defendant. Thereafter Plaintiff made several requests on phone calls, e-mails, sms and sent reminder letter for the outstanding payment stands in the accounts of Plaintiff against the Defendant but on each and every occasion the Defendant without any reasonable ground neglected the payment on one pretext or another. Further, on few occasions Defendants was good enough to assured the plaintiff that Defendant will issue the cheque within next few days in favour of the plaintiff, but the Defendant never issued any such cheque till date. That the plaintiff made various representations dated 21-02-2007, 07.03.2007, 20.03.2007 and 01.06.2007 to the Defendant company alongw with detailed ledger account showing debit balance of Rs.12,23,366/-

(Rupees Twelve Lakh Twenty Three Thousand Three Hundred Sixty Six only) against the Defendant and some of them were even acknowledged by the Defendant company, but of no avail.

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12. That as per the books of the Plaintiff, the Defendant is liable to pay a sum of Rs. 12,23,366/- (Rupees Twelve Lakh Twenty Three Thousand Three Hundred Sixty Six only) being the balance amount outstanding against the supply and installation of Modular Operation Theatres & allied works done by the Plaintiff at the site of Defendant"

3. Since the suit was not filed on the basis of a dishonoured negotiable instrument or a written contract containing a liquidated liability, in para 13 of the plaint there is no reference as to how the suit has been filed under Order XXXVII CPC. Para 13 of the plaint reads as under:-

"13. That the present suit is being filed under Order XXXVII Rule 2 of C.P.C. and the plaintiff declares that no relief which does not fall within the ambit of this rule, has been claimed in the plaint."

4(i). I have had an occasion to consider the aspect of non-maintainability of the suit under Order XXXVII CPC filed on the basis of the amount claimed by the respondent/plaintiff which is the balance due at the foot of the account, with the written contract being only a historical fact, in the judgment in the case of ***IFCI Factors Ltd. v. Maven Industries Ltd. & Ors., 225 (2015) DLT 32.*** I have held in

this judgment that an amount claimed being the balance due at the foot of the account cannot be the subject matter of an Order XXXVII CPC suit.

4(ii). Therefore, applying the ratio of the judgment in the case of ***IFCI Factors Ltd. (supra)*** it is held that the subject suit filed under Order XXXVII CPC was not maintainable as an Order XXXVII CPC suit had to be tried only as an ordinary suit.

5. In view of the aforesaid discussion, this appeal is allowed. The impugned Judgment of the trial court dated 01.12.2014 is set aside. The suit filed by the respondent/plaintiff will be treated as an ordinary suit for recovery of moneies, and will be heard and decided in accordance with law.

6. The amount deposited by the appellant/defendant in this Court alongwith accrued interest thereon be released back to the appellant/defendant.

7. Parties to appear before the District & Sessions Judge, Central, Tis Hazari Court, Delhi on 20th February, 2019 and the

District & Sessions Judge will now mark the suit for disposal to a competent court in accordance with law.

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

JANUARY 25, 2019 **VALMIKI J. MEHTA, J**
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HIGH COURT OF DELHI
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