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

% ***Date of Decision : 26th September, 2022***

\+ **CS(COMM) 570/2020 & I.A. 12629/2020 (O-XXXIX R-1 & 2 of CPC), I.A. 12630/2020 (O-XXXVIII R-5 of CPC), I.A. 3032/2021 (u/S 151 CPC), I.A. 4610/2021 (O-XXXVII R-4 of CPC)**

HINDUSTAN UNILEVER LIMITED ..... Plaintiff
Through: Mr. Darpan Wadhwa, Sr.Advocate with Mr. Dheeraj Nair, Mr. Manish K.Jha, Mr. Kumar Kislay and Ms. Shruti Dass, Advocates.

versus

SETHI AGENCIES & ORS. ..... Defendant
Through: Ms. Richa Singh, Ms. Jyoti Nambiar and Mr. Chandermani Grover, Advocates for D-3.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (ORAL)

I.A. 13993/2021 (of the defendant no.3 u/O-XXXVII R-3(5) of CPC)

1. By way of the present judgment, I shall decide the leave to defend application filed on behalf of the defendant no.3 under Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908 (CPC).

2. The present suit is a summary suit under Order XXXVII of the Code of Civil Procedure 1908 (CPC) for recovery of Rs.8,60,83,128/- along with interest.

3. In the suit, it has been pleaded that:

(i) Defendant no.1 is a partnership firm of which the defendants no.2 and 3 are the partners. Plaintiff entered into Redistribution

Stockist Agreement with defendant no.1 firm for a period of five years with effect from 1st April, 2016. As per the said Agreement, the defendants used to issue purchase orders for different products of the plaintiff.

(ii) The orders were issued through the dedicated software of the plaintiff called *Unify*. Based on the aforesaid purchase orders, the plaintiff used to deliver products to the defendants and raise invoices thereupon.

(iii) Between 9th December, 2020 and 12th December, 2020, the defendants through the aforesaid software *Unify*, placed certain orders on the plaintiff's system. The products that were ordered were duly delivered to the defendants warehouse at A-114A, Panchsheel Vihar, Khirki Extension, New Delhi-110017. Against the aforesaid purchase orders, the plaintiff had raised 76 invoices between 9th December, 2020 to 12th December, 2020 for a total sum of Rs.8,60,83,128/-.

(iv) Parties had entered into an Electronic Clearing Service (ECS) payment arrangement through an E-mandate/ACH mandate between the bankers of plaintiff and defendants in favour of the plaintiff. As per the E-mandate arrangement, the defendant no.1 gave plaintiff's bank authority to make debits from the defendant's account with respect to sums of money owned by the defendant no.1 to the plaintiff in respect of goods supplied by the plaintiff to the defendants.

(v) In terms of the aforesaid arrangement, plaintiff's Bank, State Bank of India initiated debit from the defendant no.1's bank account towards 76 invoices between the 9th December, 2020 to 12th December, 2020 for a sum of Rs.8,60,83,128/- .

(vi) However, all the e-debit transactions were returned dishonoured on 14th December, 2020, 16th December, 2020 and 17th December, 2020 on account of "Clear Balance Funds not available".

4. On the basis of the aforesaid pleadings, the present summary suit was filed on behalf of the plaintiff under Order XXXVII of the CPC against the defendants for recovery of sum of Rs. Rs.8,60,83,128/-.

PROCEEDINGS IN THE SUIT

5. Summons in the suit were issued on 23rd December, 2020 and Court receivers were appointed to visit the Rajouri Garden and Gautam Nagar premises of the defendants where the goods were lying, prepare inventory, seize the products supplied by the plaintiff and produce the said products before the Court.

6. Service was affected to the defendants no.1 and 3 through email along with the plaint on 9th February, 2021 and a memo of appearance was filed within the stipulated time. On 9th March, 2021, the defendant no.3 undertook to maintain *status quo* with respect to the title and possession of his undivided share in the property bearing no. V-38, 2nd Floor, Rajouri Garden, New Delhi and property bearing no. 130, Sudarshan Complex, 1st Floor, Gautam Nagar, New Delhi and the defendant no. 2 was directed to maintain *status quo* with respect to his share in the property bearing H.no. 117/1, Ground floor, Sudarshan Road Gautam Nagar, New Delhi-110048.

7. Vide order dated 17th December, 2021 it was recorded that the defendant no.2 had been served through WhatsApp on 25th February, 2021

and *vakalatnama* has been filed by counsel for the defendant no.2 on 2nd March, 2021. Counsel on behalf of the defendant no.2 had entered appearance in the present suit on 2nd March, 2021. Since the defendant no.2 did not file the memo of appearance in the prescribed format vide order dated 13th January, 2022, a decree was passed in favour of the plaintiff and against the defendant no.2 for a sum of Rs.8,60,83,128/-.

8. Subsequently, on 4th September, 2021, I.A. No. 13993/2021, being the application seeking leave to defend under Order XXXVII Rule 3(5) of the CPC was filed on behalf of the defendant no.3. Pleadings have been completed in the said application.

<u>SUBMISSIONS OF THE DEFENDANT NO.3</u>

9. The following grounds have been taken by the defendant no.3 in the leave to defend application:

I. The defendant no.3 was not a partner of the defendant no.1 firm at the time of transaction with the plaintiff.

II. Pre-institution mediation under Section 12A of Commercial Courts Act has not been complied with.

10. In respect of the submission that the defendant no.3 was not a partner of the defendant no.1 firm at the time of transaction with the plaintiff, the counsel for the defendant no.1 has submitted as follows:

i. That father of the defendant no.3 and the defendant no.2 were partners in the defendant no.1 firm.

ii. Late Sh. Neeraj Sethi, the father of the defendant no.3 expired on 13th February, 2019 and thereafter, the defendant no.3 became a partner in the defendant no.1 firm by partnership deed dated 14th February, 2019.

iii. Subsequently, the defendant no.3 resigned as a partner on 27th June, 2020. Therefore, at the time when the transaction took place with plaintiff, the defendant no.3 was not a partner in the defendant no.1 firm.

11. In respect of the submission that the plaintiff did not did not resort to pre-institution mediation, the counsel for the defendant no.1 has submitted as follows:

i. The present suit is a commercial suit under the Commercial Courts Act, 2015.

ii. The provisions of Section 12A of Commercial Courts Act makes pre-institution mediation in respect of a commercial suit mandatory in nature.

iii. Since the plaintiff has not complied with the provisions of Section 12A of Commercial Courts Act, the plaint is liable to be rejected under Order VII Rule 11of the CPC.

iv. Reliance in this regard has been placed on the judgment of the Supreme Court in ***Patil Automation Private Limited And Ors.* v. *Rakheja Engineers Private Limited***, 2022 SCC OnLine SC 1028**.**

<u>SUBMISSIONS OF THE PLAINTIFF</u>

12. Opposing the present application, the senior counsel appearing on behalf of the plaintiff has made the following submissions:

i. The partnership deed dated 14th February, 2019 is on record which shows that the defendant no.3 has replaced his father in the defendant no.1 firm as a partner.

ii. The resignation letter dated 27th June, 2020 is a self-serving document created by the defendant no.3. This is evident from the fact that on 24th September, 2020, the defendant no.3 himself has written a letter on the letterhead of the defendant no.1 firm addressed to the plaintiff with regard to the declaration for collection via ACH mandate.

iii. In the application seeking leave to defend, no mention whatsoever has been made that the goods have not been received by the defendants.

iv. The judgment in ***Patil Automation*** (supra) is not applicable in the facts of the present case as in the present case urgent reliefs were sought along with the plaint and therefore, the requirement of pre-institution mediation under Section 12A of Commercial Courts Act was not mandatory. Further, the aforesaid judgment has a prospective operation and hence, would not apply to suits filed before 20th August, 2022.

OBSERVATIONS AND FINDINGS

13. I have heard the counsels for the parties.

14. The defendants themselves have filed a copy of the partnership deed dated 14th February, 2019, in terms of which, the defendant no.3 has been inducted as a partner in the defendant no.1 firm upon the demise of defendant no.3's father, Sh. Neeraj Sethi on 13th February, 2019. Late Sh. Neeraj Sethi was earlier a partner in the defendant no.1 firm.

15. As regards the contention of the defendant no.3 that he had resigned as a partner from the defendant no.1 firm, the senior counsel appearing on behalf of the plaintiff has correctly referred to the letter dated 24th September, 2020, written by the defendant no.1 firm to the plaintiff

company confirming the existing ACH mandate provided by the defendant no.1 firm in favour of the plaintiff. The said letter has been signed by the defendant no.3 as a partner of the defendant no.1 firm. The defendant no.3 has nowhere denied the aforesaid letter or his signatures on the said letter. In view of the above, it is clear that the letter dated 24th June, 2020 in terms of which the defendant no.3 had resigned from the defendant no.1 firm is a manufactured and a self-serving document. Even if it is assumed that the defendant no. 3 has actually resigned and was not a partner of the defendant no.1 firm, he would be liable as a partner in defendant no.1 firm on account of the aforesaid letter written by him to the plaintiff in terms of the principle of '*holding out*' provided in Section 28 of the Indian Partnership Act.

16. The senior counsel on behalf of the plaintiff has taken me through the details of the various purchase orders that were placed by the defendants on the portal of the plaintiff company (Page no.49 of the plaintiff's documents). He has also taken me through various invoices (page no.51-227 of the plaintiff's documents) that were raised by plaintiff company on the defendants. All the aforesaid invoices bear the stamp of the defendant no.1 firm and therefore, show that the invoices were duly received by the defendants.

17. Attention of the Court has been drawn to the various emails issued by the State Bank of India, the banker of the plaintiff to show that the E-mandates issued by the defendants towards the due payment to the plaintiff had been declined on account of balance not being available in the account of the defendants. The defendant no.3 has nowhere disputed these facts in the leave to defend application.

18. Counsel for the defendant no.3 had drawn my attention to paragraph

2(k) of the affidavit filed in support of the leave to defendant application to submit that the defendant no.3 had neither ordered goods from the plaintiff nor issued the ECS in favour of the plaintiff and there is no privity of contract between the plaintiff and the defendant no.3.

19. In light of the letter dated 24th September, 2020 written by the defendant no.3 to the plaintiff, the aforesaid averments made in the leave to defend have no credibility. Clearly, it is the defendant no.3 who had written to the plaintiff with regard to the ACH mandate. Further, the aforesaid averments in the leave to defend do not rebut the averments made in the plaint that the goods were duly delivered by the plaintiff to the defendants along with the invoices. This fact is borne from the stamp of the defendants on the various invoices that were sent along with the goods.

20. As regards the plea taken by the defendants with regard to non-compliance of Section 12A of the Commercial Courts Act, Section 12A itself provides that it does not apply to a suit where urgent interim reliefs are sought. In ***Patil Automation*** (supra), the Supreme Court was not seized of a case where urgent interim relief was contemplated. Further, the Supreme Court has also clarified in paragraph 92 of the said judgment that the declaration that Section 12A of the Act is mandatory would be effective from 20th August, 2022.

21. Admittedly, the present suit was been filed in 2020 along with applications under (i) Order XXXIX Rule 1 and 2 of CPC; (ii) Order XXXVIII Rule 5 of CPC seeking defendants to furnish security and attachment of properties; and (iii) Order XL Rule 1 of CPC for appointment of a Receiver.

22. On the very first hearing of the suit on 23rd December, 2020, this

Court had appointed Court Receivers to visit the premises of the defendants and prepare an inventory of the goods lying therein. It may be pertinent to mention here that as per the Report filed on behalf of the Court Receivers, the premises at Rajouri Garden and Gautam Nagar as well as the warehouse at Panchsheel Vihar of the defendants were found locked.

23. In view of the aforesaid discussion, it is clear that the defence raised on behalf of the defendant no.3 is in the nature of moonshine. In ***IDBI Trusteeship Services Limited* v. *Hubtown Limited,*** (2017) 1 SCC 568**,** the Supreme Court has elucidated the principles on which the leave to defend has been granted in summary suits filed under Order XXXVII of the CPC. Paragraph 17 of the said judgement is reproduced below:

> *"17. Accordingly, the principles stated in para 8 of Mechelec case [Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case [Milkhiram (India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698 : (1966) 68 Bom LR 36] , 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."

24. In view of the discussion above, I am of the view that the defendant no.3 has no substantial defence and the leave to defend application does not raise any plausible defence or triable issue. The defence raised is completely frivolous and vexatious. Therefore, the present case is squarely covered by paragraph 17.5 of the judgment of the Supreme Court in ***IDBI Trusteeship Services Limited*** (supra).

25. Counsel for the defendant no.3 has relied upon the judgment of the Supreme Court in ***Kashyap & Sons Ltd.*** **v.** ***JMS Steels & Power Corpn.***, (2022) 3 SCC 294. In view my finding above that the defendant has been

unable to place any substantial defence or triable issues, the aforesaid judgment would be of no assistance to the defendant no.3. Therefore, no case for grant of leave to defend is made out and the suit is liable to be decreed in favour of the plaintiff and against the defendant no.3.

26. Accordingly, the present application is without any merit and is dismissed.

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27. In light of the application of the defendant no.3 seeking leave to defend having been dismissed, the plaintiff has become entitled to a decree forthwith.

28. In view of the fact that despite entering memo of appearance, no leave to defend has been filed on behalf of the defendant no.1, a decree is liable to be passed against the defendant no.1.

29. Accordingly, a decree is passed in favour of the plaintiff and against the defendants no.1 and 3 jointly and severally for recovery of sum of Rs.8,60,83,128/- along with the interest @ 7% per annum with effect from 31st December, 2020 till its realization.

30. The plaintiff shall also be entitled to costs of the present suit.

31. Vide order dated 9th March, 2021, the defendant no.3 undertook to maintain *status quo* with regard to title and possession of his undivided share in respect of the property bearing no. V-38, 2nd Floor, Rajouri Garden New Delhi and property bearing no. 130, Sudarshan Complex, 1st Floor, Gautam Nagar, New Delhi. Vide the aforesaid order, the defendant no.2 was also restrained from creating third party rights with respect to his share in property bearing H. No. 117/1, Ground Floor, Sudarshan Road Gautam Nagar, New Delhi-110048.

32. In view of the decree being passed in favour of the plaintiff and against the defendants no.1 and 3, the share of the defendants in the properties at (i) V-38, 2nd Floor, Rajouri Garden New Delhi and property bearing no. 130, Sudarshan Complex, 1st Floor, Gautam Nagar, New Delhi, (ii) H. No. 117/1, Ground Floor, Sudarshan Road Gautam Nagar, New Delhi-110048 and (iii) A-114A, Panchsheel Vihar, Khirki Extension, New Delhi-110017 shall stand attached in terms of provisions under Order XXXVII Rules 5 & 6 of the CPC, subject to any prior mortgage in respect of the said properties.

33. Decree sheet be drawn up.

34. Accordingly, all the pending applications stand disposed of.

AMIT BANSAL, J.

SEPTEMBER 26, 2022

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