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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 17th May, 2023

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RFA(OS)(COMM) 9/2018

M/S GREEN FACADE SOLUTIONS

PVT LTD

..... Appellant

Through: Mr. Ishan Khanna and Mr.
Rounak Singh, Advs.

versus

M/S ODEON BUILDERS PVT LTD Respondent

Through: Mr. Rarunesh Tandon, Mr.
Rahul Chanhani and Mr.
Anurag Yadav, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

AMIT MAHAJAN, J.

1. The present appeal, under Section 13 of the Commercial Courts Act, 2015, has been filed challenging the order dated 19.02.2018, passed by the learned Single Judge in CS (Comm) No. 916 of 2016 (hereafter '**the impugned order**'). The learned Single Judge, by way of the impugned order, rejected the plaint and dismissed the suit instituted by the plaintiff / appellant (herein), for recovery of ₹2,54,73,672/- along with interest.

2. The appellant is engaged in the business of aluminium fabrication and is also the supplier and installer of aluminium facades for all types of residential as well as commercial projects.

3. It claims that the work orders were received from the defendant / respondent (herein) in respect of various works to be executed at (a) Agro Mall, Rohtak; (b) OPD, Rohtak; (c) ITI, Rohtak; (d) CSOI Club, Delhi; (e) Soulstice Educational, Gurgaon; (f) Rewari; (g) Maandi Farm, Delhi; and, (h) Club House. However, full payments were not made by the defendant

which led to the plaintiff filing the suit for recovery of the outstanding amount. The summons were issued and the pleadings were stated to be complete.

4. The defendant filed an application being I.A. No. 1544 of 2017 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereafter '**the CPC**') for rejection of the plaint. The pleadings in the said application were also stated to be complete.

5. The application, however, was pending and the matter was listed before the learned Joint Registrar for completion of pleadings in the pending applications and for filing of their respective affidavits of admission / denial of documents.

6. The matter was listed on 10.01.2018, before the learned Joint Registrar, wherein it was noted that the affidavit of admission / denial was filed by the plaintiff; however, the defendant sought further time for filing an affidavit of admission / denial and a last opportunity was granted to the defendant for filing the same.

7. Since the pleadings with respect to the pending applications were complete, the matter was put up before the Court on 19.02.2018. On the said date, the learned Single Judge decided the application under Order VII Rule 11 of the CPC and passed the impugned order, which led to filing of the present appeal.

8. Learned counsel for the appellant submits that the plaint could not have been rejected on the principles of Order VII Rule 11 of the CPC. He submits that for the purpose of deciding an application under Order VII Rule 11 of the CPC, the averments made in the plaint are to be taken as correct. The Court is to decide the application by taking all the averments made in the

plaint to be true. It has to reach a conclusion that no cause of action is made out only on the basis of averments made in the plaint.

9. He submits that in the present case, the Court has gone into the merits of the dispute and has rejected the plaint on grounds which are alien for the purpose of consideration of an application under Order VII Rule 11 of the CPC.

10. He submits that one of the grounds taken by the learned Single Judge is that the plaintiff has not filed any document from which the plaintiff can prove its claim in trial.

11. The Court has gone into the correctness of the documents filed along with the plaint, which it is argued, could not have been done at the stage of deciding an application under Order VII Rule 11.

12. He further submits that the admission / denial was yet to be done by the defendant and therefore, in the absence of any denial of the documents filed by the plaintiff, the learned Single Judge could not have commented on the said documents.

13. Learned counsel for the respondent submits that the learned Single Judge, after having carefully perused the plaint as well as the documents in support of the plaint, has rightly reached the conclusion, that the suit was required to be disposed of summarily.

14. He further submits that there is no cause of action in favour of the plaintiff and no document has been filed, which would show that any amount was payable by the defendant.

Conclusion

15. The law in relation to the consideration of application filed under Order VII Rule 11 of the CPC is well settled. For the

purpose of deciding an application under Order VII Rule 11 of the CPC, only the averment in the plaint and the documents filed with the plaint are to be considered and the said documents are believed to be correct for the purpose of ascertaining whether the cause of action exists.

16. The Hon'ble Apex Court in ***Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I & Anr.:*** (2004) 9 SCC 512, held as under:

“139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed.”

17. In ***D. Ramachandran v. R.V. Janakiraman & Ors.:*** (1999) 3 SCC 267, the Hon'ble Apex Court held that:

“8. We do not consider it necessary to refer in detail to any part of the reasoning in the judgment; instead, we proceed to consider the arguments advanced before us on the basis of the pleadings contained in the election petition. It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter.”

18. It is not in dispute that the defendant was yet to file an affidavit for admission / denial of documents, filed by the plaintiff. Therefore, without there being any affidavit of such nature, no enquiry could have been initiated by the learned Single Judge to get into the veracity of the documents filed, even if the same were photocopies.

19. Moreover, the enquiry, which the Court is required to conduct while examining the application under Order VII Rule 11 of the CPC, should not be in a way of a detailed examination of the documents filed in support of the plaint. The averments made in the plaint are to be taken as correct.

20. It is true that after the trial, if the plaint is not found to be supported with the adequate evidence, it is within the power of the Court to dismiss the suit. The Court is also within its power to impose appropriate cost on the plaintiff.

21. It is also significant that the learned Single Judge, while dismissing the suit, held that *“The plaintiff, in the present case is found to have failed to place any pleading or material before this Court on the basis of which it can be said that plaintiff has any prospect of succeeding.”*

22. It appears that the exercise undertaken by the learned Single Judge was the one as envisaged under Order XIII-A of the CPC.

23. Order XIII-A of the CPC reads as under:

“ORDER XIII-A
SUMMARY JUDGMENT

1. Scope of and classes of suits to which this order applies.—

(1) This order sets out the procedure by which Courts may decide a claim pertaining to any Commercial Dispute without recording oral evidence.

(2) For the purposes of this Order, the word “claim” shall include—

(a) part of a claim;

(b) any particular question on which the claim (whether in whole or in part) depends; or

(c) a counter-claim, as the case may be.

(3) Notwithstanding anything to the contrary, an application for summary judgment under this Order shall not be made in a suit in respect of any Commercial Dispute that is originally filed as a summary suit under Order XXXVII.

2. Stage for application for summary judgment.—An applicant may apply for summary judgment at any time after summons has been served on the defendant:

Provided that, no application for summary judgment may be made by such applicant after the court has framed the issues in respect of the suit.

3. Grounds for summary judgment.—The court may give a summary judgment against a plaintiff or defendant on a claim if it considers that—

- (a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and*
- (b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.*

4. Procedure.—(1) An application for summary judgment to a court shall, in addition to any other matters the applicant may deem relevant, include the matters set forth in sub-clauses (a) to (f) mentioned hereunder:—

- (a) the application must contain a statement that it is an application for summary judgment made under this Order;*
- (b) the application must precisely disclose all material facts and identify the point of law, if any;*
- (c) in the event the applicant seeks to rely upon any documentary evidence, the applicant must,—*
 - (i) include such documentary evidence in its application, and*
 - (ii) identify the relevant content of such documentary evidence on which the applicant relies;*
- (d) the application must state the reason why there are no real prospects of succeeding on the claim or defending the claim, as the case may be;*
- (e) the application must state what relief the applicant is seeking and briefly state the grounds for seeking such relief.*

(2) Where a hearing for summary judgment is fixed, the respondent must be given at least thirty days' notice of:—

- (a) the date fixed for the hearing; and*
- (b) the claim that is proposed to be decided by the Court at such hearing.*

(3) The respondent may, within thirty days of the receipt of notice of application of summary judgment or notice of hearing (whichever is earlier), file a reply addressing the matters set forth in clauses (a) to (f) mentioned hereunder in addition to any other matters that the respondent may deem relevant:—

- (a) the reply must precisely—*
 - (i) disclose all material facts;*
 - (ii) identify the point of law, if any; and*
 - (iii) state the reasons why the relief sought by the applicant should not be granted;*
- (b) in the event the respondent seeks to rely upon any documentary evidence in its reply, the respondent must—*
 - (i) include such documentary evidence in its reply; and*
 - (ii) identify the relevant content of such documentary evidence on which the respondent relies;*

- (c) *the reply must state the reason why there are real prospects of succeeding on the claim or defending the claim, as the case may be;*
- (d) *the reply must concisely state the issues that should be framed for trial;*
- (e) *the reply must identify what further evidence shall be brought on record at trial that could not be brought on record at the stage of summary judgment; and*
- (f) *the reply must state why, in light of the evidence or material on record if any, the Court should not proceed to summary judgment.*

5. *Evidence for hearing of summary judgment.—(1) Notwithstanding anything in this Order, if the respondent in an application for summary judgment wishes to rely on additional documentary evidence during the hearing, the respondent must:—*

- (a) *file such documentary evidence; and*
- (b) *serve copies of such documentary evidence on every other party to the application at least fifteen days prior to the date of the hearing.*

(2) *Notwithstanding anything in this Order, if the applicant for summary judgment wishes to rely on documentary evidence in reply to the defendant's documentary evidence, the applicant must:—*

- (a) *file such documentary evidence in reply; and*
 - (b) *serve a copy of such documentary evidence on the respondent at least five days prior to the date of the hearing.*
- (3) *Notwithstanding anything to the contrary, sub-rules (1) and (2) shall not require documentary evidence to be:—*
- (a) *filed if such documentary evidence has already been filed; or*
 - (b) *served on a party on whom it has already been served.*

6. *Orders that may be made by Court.—(1) On an application made under this Order, the court may make such orders that it may deem fit in its discretion including the following:—*

- (a) *judgment on the claim;*
- (b) *conditional order in accordance with Rule 7 mentioned hereunder;*
- (c) *dismissing the application;*
- (d) *dismissing part of the claim and a judgment on part of the claim that is not dismissed;*
- (e) *striking out the pleadings (whether in whole or in part); or*
- (f) *further directions to proceed for case management under Order XV-A.*

(2) *Where the Court makes any of the orders as set forth in sub-rule (1)(a) to (f), the court shall record its reasons for making such order.*

7. *Conditional order.—(1) Where it appears to the Court that it is possible that a claim or defence may succeed but it is improbable that it shall do so, the Court may make a conditional order as set forth in rule 6(1)(b).*

(2) *Where the Court makes a conditional order, it may:—*

(a) *make it subject to all or any of the following conditions:—*

(i) *require a party to deposit a sum of money in the Court;*

(ii) *require a party to take a specified step in relation to the claim or defence, as the case may be;*

(iii) *require a party, as the case may be, to give such security or provide such surety for restitution of costs as the court deems fit and proper;*

(iv) *impose such other conditions, including providing security for restitution of losses that any party is likely to suffer during the pendency of the suit, as the Court may deem fit in its discretion; and*

(b) *specify the consequences of the failure to comply with the conditional order, including passing a judgment against the party that have not complied with the conditional order.*

8. *Power to impose costs.—The Court may make an order for payment of costs in an application for summary judgment in accordance with the provisions of sections 35 and 35A of the Code.”*

24. It is apparent that the learned Single Judge has rendered findings on some of the questions, which were under controversy in the suit.

25. It is contended that it was not permissible for the learned Single Judge to decide the issues without striking any issues and without permitting the parties to lead evidence.

26. In terms of Order XIII-A Rule 2 of the CPC, the parties are permitted to file an application for summary judgment at any time after the summons are served on the defendant. It is, however, no longer *res integra*, as is apparent from the language of Order XIII-A of the CPC, that a summary judgment cannot be rendered except pursuant to an application moved by a party. The procedure for filing and disposal of such an application is provided in Order XIII-A of the CPC.

27. Sub-rule 2 of Rule 4 under Order XIII-A of the CPC specifically provides that the respondent is required to be given at least 30 days prior notice of hearing of the application and the

claims that are proposed, are to be decided by the Court.

28. The respondent is entitled, on receipt of such notice, to file a reply to the specific matters as put forth in the said application. The parties are also entitled to rely upon additional documentary evidence.

29. The impugned order, from its plain language, appears to have been passed as a summary judgment, however, without following the procedure as set out in Order XIII-A of the CPC.

30. This Court, in a recent decision in the case of ***Surya Food And Agro Limited v. Om Traders & Anr. : 2023/DHC/000494*** has held that the procedure envisaged under Order XIII-A of the CPC embodies the principle of natural justice, which is essential for rendering a fair decision in any action.

31. The Court relied upon the judgment passed by the coordinate Bench of this Court in ***Bright Enterprises Private Ltd. & Anr. v. MJ Bizcraft LLP & Anr.: 2017 SCC OnLine Del 6394*** where in it was held as under:

“21. Apart from this, we are of the view that the learned Single Judge has gone wrong in invoking the provisions of Order XIII A CPC for rendering a summary judgment. It is true that Rule 3 of Order XIII A CPC empowers the Court to give a summary judgment against a plaintiff or defendant on a claim if it considers that - (a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and (b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence. But, in our view, this power can only be exercised upon an application at any date only after summons have been served on the defendant and not after the Court has framed issues in the suit. In other words, Order XIII A Rule 2 makes a clear stipulation with regard to the stage for application for summary judgment. The window for summary judgment is after the service of summons on the defendant and prior to the Court framing issues in the suit.

22. The provisions relating to summary judgment which enables courts to decide claims pertaining to commercial

disputes without recording oral evidence are exceptional in nature and out of the ordinary course which a normal suit has to follow. In such an eventuality, it is essential that the stipulations are followed scrupulously otherwise it may result in gross injustice. As pointed out above, a specific period of time has been provided during which an application for summary judgment can be made. That period begins upon the service of summons on the defendant and ends upon the court framing issues in the suit. Even if we were to accept, which we do not, the argument of the respondents that the Court had suo moto powers to deliver summary judgment without there being any application, those powers also would have to be exercised during this window, that is, after service of summons on the defendant and prior to framing of issues. In addition to this, we also reiterate that, in our view, a summary judgment under Order XIII A CPC is not permissible without there being an appropriate application for summary judgment. The contents of an application for summary judgment are also stipulated in Rule 4 of Order XIII A. The application is required to precisely disclose all material facts and identify the point of law, if any. In the event, the applicant seeks to rely on any documentary evidence, the applicant must include such documentary evidence in its application and identify the relevant content of such documentary evidence on which the applicant relies. The application must also state the reason why there are no real prospects of succeeding or defending the claim, as the case may be.

23. Rule 4(2) of Order XIII A also requires that where a hearing for summary judgment is fixed, the respondent must be given at least thirty days' notice of the date fixed for the hearing and the claim that is proposed to be decided by the Court at such hearing. Rule 4(3) of Order XIII A makes provision which enables the respondents to file a reply within the stipulated time addressing the matters set forth in clauses (a) to (f) of the said sub-rule. In particular, the reply of the respondent ought to precisely disclose all the material facts and identify the point of law, if any, and the reasons why the relief sought by the applicant for summary judgment should not be granted. Just as in the case of the applicant, the respondent is also given the opportunity to rely upon documentary evidence in its reply which must be included in the reply and the relevant content identified. The respondent's reply is also required to give reason as to why there are real prospects of succeeding on the claim or defending the claim, as the case may be. Importantly, the reply must also concisely state the issues that should be framed for trial and that it must identify what further evidence would be brought on record at trial that could not be brought on record at the stage of summary judgment. The reply should also state as to

why in the light of the evidence or material on record, if any, the Court should not proceed to summary judgment."

32. This Court had concurred with the view taken in the earlier decision in ***Bright Enterprises Private Ltd. & Anr. v. MJ Bizcraft LLP & Anr.*** (*supra*). It was explained that proceedings before the Court are adversarial in nature and are not inquisitorial.

33. It is not disputed that no application was filed by the defendant under Order XIII-A of the CPC. The impugned order was passed disposing of the application filed under Order VII Rule 11 of the CPC, which as discussed above, was required to be decided taking the averments made in the plaint as correct.

34. In our opinion, the learned Single Judge has decided the application under Order VII Rule 11 of the CPC on the principles as envisaged in Order XIII-A of the CPC, though in the absence of any such application under the said order.

35. For the reasons stated above, the appeal is allowed. The impugned order is set aside.

36. We clarify that this order will not preclude the respondent from moving an appropriate application under Order XIII-A, if otherwise such recourse is available in law.

37. All the contentions of the parties are reserved.

AMIT MAHAJAN, J

VIBHU BAKHRU, J

MAY 17, 2023

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