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

Date of decision: 19.12.2023

+ CM(M) 1270/2022

NEW INDIA COLOUR COMPANY LTD Petitioner

Through: Ms. Kajal Chandra, Ms. Perna Chopra, and Ms. Sakshi Anand, Advocates

versus

M/S BHARAT PRINTS AND ANR. Respondents

Through: Mr. Ashutosh Kumar, Advocate

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+ CM(M) 1999/2023 & CM APPL. 62854/2023

NEW INDIA COLOUR COMPANY LTD. Petitioner

Through: Ms. Kajal Chandra, Ms. Perna Chopra, and Ms. Sakshi Anand, Advocates

versus

M/S BHARAT PRINTS & ANR. Respondents

Through: Mr. Ashutosh Kumar, Advocate

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM(M) 1270/2022



1. These petitions under Article 227 of the Constitution of India impugn the orders dated 15.11.2022 and 21.11.2023 passed by the District Judge (Commercial-11), Central District, Tis Hazari Courts, New Delhi ('Trial Court') in CS (Comm) No. 548 of 2022 titled '*New India Colour Company v. M/s Bharat Prints & Anr.*' ('summary suit').
2. The Trial Court vide order dated 15.11.2022 issued notice in the application filed by the Petitioner under Order XXXVII Rule 2(3) read with Section 151 of the Code of Civil Procedure, 1908 ('CPC') and gave an opportunity to the Respondents to file its reply. The Petitioner is aggrieved by the grant of the opportunity to the Respondents. This order is impugned in CM(M) 1270/2022.
 - 2.1. The Trial Court by its subsequent order dated 21.11.2023 dismissed the said application filed under Order XXXVII Rule 2(3) CPC and this order is impugned in CM(M) 1999/2023.
3. By the present petitions, the Petitioner herein seeks direction to the learned Trial Court to decree the said summary suit under the provisions of Order XXXVII Rule 2(3) CPC read with Section 151 of CPC.
4. The Petitioner herein is the plaintiff and the Respondents herein are defendant nos. 1 and 2 respectively in the said summary suit, pending adjudication before the Trial Court.
 - 4.1. The said summary suit has been filed under Order XXXVII CPC for recovery of sum of Rs. 59,27,089/- along with 18% interest per annum.
5. The learned counsel for the Petitioner herein states that the Trial Court vide order dated 13.09.2022 allowed the Respondent's application



under Order XXXVII Rule 3(1) CPC after condoning the delay of 42 days in entering appearance. She states that the Respondents were directed to pay costs of Rs. 10,000/- (Rupees Ten Thousand only) to the Petitioner herein within two (2) weeks.

5.1. She states it is matter of record that the Respondents failed to pay the costs of Rs. 10,000/- within the time granted and therefore, the plaintiff had filed its 2nd application under Order XXXVII Rule 2(3) [on 15.11.2022] for seeking a decree against the Respondents, which came up for hearing on 15.11.2022 before the Trial Court.

5.2. She states that on 15.11.2022 the Trial Court despite taking note that the cost of Rs. 10,000/- has not been paid within two (2) weeks failed to exercise its jurisdiction by not decreeing the suit under Order XXXVII Rule 2(3) CPC. She states the Petitioner is aggrieved by the non-passing of the decree as the spirit of time bound disposal Order XXXVII CPC has been overlooked. She states that this order has been impugned in CM(M) 1270/2022 (first petition).

5.3. She states that during the pendency of the first petition, the Trial Court has by its subsequent order dated 21.11.2023 dismissed the 2nd application filed by the Petitioner herein, under XXXVII Rule 2(3) CPC. She states the order dated 21.11.2023 has been challenged in the CM (M) 1999/2023.

5.4. She states that the Petitioner herein filed an application under Order XXXVII Rule 3(4) CPC seeking summons for judgment, which was allowed on 27.09.2022 and summons were issued to the Respondents.



5.5. She states that the Respondents herein have filed an application under Order XXXVII Rule 3(5) CPC, seeking leave to defend on 01.09.2022 and then on 24.09.2022. She states that both these applications have been filed even prior to the issuance summons for judgment. She states that therefore, the filing of the application(s) under Order XXXVII Rule 3(5) CPC by the Respondents is *non-est*. She states procedurally the application seeking leave to defend should have been filed by the Respondents after 27.09.2022.

5.6. She states that therefore, the Trial Court in the facts of this case must proceed to decree the suit and has failed to exercise its jurisdiction.

5.7. She relies upon the following judgments in support of her contentions:

- i. *Sewa Ram v. Firm Modaram Tulsiram*, 2001 SCC OnLine Raj 424
- ii. *S.S. Steel Industry v. Shri Guru Hargobind Steels*, 2019 SCC OnLine Del 9964
- iii. *Pearl Polymers Ltd. v. Scorpion Business (India) Ltd.*, 1999 SCC OnLine Del 1042

6. In reply, the learned counsel for the Respondents states that Respondents remains ready and willing to remit the costs of Rs. 10,000/- imposed by the Trial Court *vide* order dated 13.09.2022.

6.1. He states that the aspect of the Respondents remaining ready and willing to pay the costs is duly the recorded in the impugned orders dated 15.11.2023 and 21.11.2023.

6.2. He states that since the said costs have to be paid over to the Petitioner; Respondents have been unable to remit the said costs as the account details of the Petitioner are unavailable to the Respondents.



6.3. He states that the Respondents have been duly represented in the suit proceedings and an application seeking under Order XXXVII Rule 3(5) CPC seeking leave to defend was duly filed by the Respondents on 24.09.2022. He relies upon the liberty granted by the Trial Court vide order dated 13.09.2022.

6.4. He states that the arguments on the Respondent's application seeking leave to defend under Order XXXVII Rule 3(5) CPC have remained pending since September, 2022 as the Petitioner is unwilling to address arguments before the Trial Court due to the pendency of this petition i.e., CM(M) 1270/2022 before this Court.

7. This Court has considered the submissions of the parties and perused the record.

8. The subject matter of CM(M) 1270/2022 is a direction sought to the Trial Court to adjudicate on an application filed by the plaintiff under Order XXXVII Rule 2(3) CPC for decreeing the suit. The said application has already been dismissed by the Trial Court *vide* order dated 21.11.2023 and therefore, CM(M) 1270/2022 has effectively become infructuous. However, since the Petitioner has impugned the order dated 21.11.2023 separately in CM(M) 1999/2023 the issue is being adjudicated in the said petition.

9. To appreciate the controversy, it would be relevant to set out the sequence of events;

(i) On 13.09.2022, the Trial Court allowed the application filed by the Respondents under Order XXXVII Rule 3(1) of CPC to enter appearance subject to payment of costs of Rs. 10,000/- payable to the Petitioner.



(ii) On 16.09.2022, the Petitioner filed an application under Order XXXVII Rule 3(4) CPC for summons for judgment; with an advance service on the Respondents.

(iii) On 24.09.2022, the Respondents without waiting for issuance of summons for judgment, in anticipation filed an application under Order XXXVII Rule 3(5) CPC seeking unconditional leave to defend.

(iv) On 27.09.2022, the Trial Court allowed Petitioner's application (dated 16.09.2022) and issued summons for judgment upon the Respondents.

(v) In the interregnum, however, the Respondents failed to remit the costs of Rs. 10,000/- to the Petitioner which were to be paid on or before 27.09.2022.

(vi) Therefore, when on 15.11.2022 the matter came up before the Trial Court, the Petitioner filed a fresh application under Order XXXVII Rule 2(3) CPC seeking a decree in the suit on two (2) grounds. Firstly, non-payment of costs of Rs. 10,000/-; secondly, that no application or communication has been filed by the Respondents 'after' 27.09.2022 for seeking leave to defend.

(vii) On 21.11.2023, the Trial Court has dismissed the Petitioner's 2nd application filed under Order XXXVII Rule 2(3) CPC and recorded its satisfaction that Respondents remains ready and willing to pay costs of Rs. 10,000/-.

10. This Court will firstly deal with the objection of non-payment of costs within two (2) weeks and its effect if any, on the right of the Respondents to continue to participate in the suit proceedings.



10.1. The Trial Court has recorded on 15.11.2022 and again on 21.11.2023 that the Respondents have offered before the Court to hand over the costs to the Petitioner, however, the same has been declined. Even before this Court, the Respondents have again offered costs; however, the Petitioner has declined to accept the same.

10.2. The order of the Trial Court dated 13.09.2022 while imposing costs did not issue any pre-emptory direction that upon non-payment, the Respondents will be non-suited. Therefore, in the opinion of this Court the Respondents cannot be denied the opportunity to participate in trial and the suit cannot be decreed on this ground. Further, this Court is satisfied that Respondents remains ready and willing to pay the costs.

10.3. In the facts of this case, since the costs is not accepted by the Petitioner even before this Court, the Respondents are directed to deposit FDR in the name of concerned Court, before the Trial Court in the sum of Rs. 10,000/- on or before 09.01.2024.

11. With respect to the second objection of the Petitioner that since the summons for judgment were issued on 27.09.2022, the application filed by the Respondents for seeking leave to defend on 24.09.2022 (prior in time) is non-est; this Court is unable to accept this contention of the Petitioner.

11.1. The Trial Court vide order dated 13.09.2022 directed the Respondents to either file a fresh application under Order XXXVII Rule 3(5) CPC for seeking leave to defend or issue in writing to the Petitioner if the Respondents intend to rely upon the prior application already filed for seeking leave to defend on 01.09.2022.



11.2. It is a matter of record that the Respondents acting upon the leave granted in the order dated 13.09.2022, filed an application under Order XXXVII Rule 3(5) CPC seeking unconditional leave to defend on 24.09.2022.

11.3. Thus, on 24.09.2022 the Petitioner were duly put to notice that the Respondents have disputed the claim in the suit and seek unconditional leave to defend. This application of the Respondents has been pending on the board of the Trial Court since 15.11.2022. It has not been heard due to the opposition of the Petitioner herein.

11.4. The Respondents filed the application seeking leave to defend under Order XXXVII Rule 3(5) CPC on the basis of the advance service of Petitioner's application under Order XXXVII Rule 3(4) CPC without waiting to be formally served with summons as per Form no. 4A in Appendix-B of CPC. However, the pre-emptive filing by the Respondents cannot be considered as non-filing; as it sought to be contended by the Petitioner herein.

11.5. Since the application of the Respondents under Order XXXVII Rule 3(1) CPC stood allowed, further proceedings in the summary suit were to be governed as per Order XXXVII Rule 3(6) CPC. In fact, Order XXXVII Rule 2(3) CPC cease to have any application.

11.6. Since, the Respondents have applied for leave to defend, the Trial Court could not have decreed the summary suit as prayed for without adjudicating the said application.

12. In the facts of this case except for the initial delay of 42 days, the



Respondents have not been negligent in participating in the proceedings. To the contrary, the Respondents have filed application(s) seeking leave to defend twice on 01.09.2022 and 24.09.2022. The Respondents were served with the application for summons for judgment on 16.09.2022 and without waiting to be served by a process server immediately applied for the leave to defend.

13. The judgments relied upon by the Petitioner neither restrict the right of the Trial Court to condone the delay under Order XXXVII Rule 3(1) CPC nor opine upon the effect of the defendant applying for leave to defend prior to service of summons for judgment as per Form No. 4A in Appendix-B of CPC.

14. The statement made by the learned counsel for the Respondents that he relies upon the application filed under Order XXXVII Rule 3(5) CPC dated 24.09.2022 for seeking leave to defend is taken on record. The procedural defect in the Respondents applying for leave to defend before receipt of service of summons for judgment; and the irregularity in filing the application under Order XXXVII Rule 3(5) CPC before service of summons for judgment is hereby regularized.

15. The learned Trial Court is requested to proceed to adjudicate the application dated 24.09.2022 filed by the Respondents under Order XXXVII Rule 3(5) CPC in accordance with law. The parties are directed to appear before the Trial Court on 09.01.2024 on the date already fixed.

16. In these facts and circumstances, this Court find no infirmity in the order of the Trial Court dated 15.11.2022 declining to entertain the



application under Order XXXVII Rule 2(3) CPC.

17. This Court, therefore, is of the opinion that there is no error of jurisdiction by the Trial Court in its order dated 21.11.2023 insofar as it dismisses the application filed by the Petitioner under Order XXXVII Rule 2(3) CPC.

18. Accordingly, the present petitions are hereby dismissed. Pending applications if any, stands disposed of.

MANMEET PRITAM SINGH ARORA, J

DECEMBER 19, 2023/hp/MG

Click here to check corrigendum, if any