

(2012) 08 DEL CK 0150

Delhi High Court

Case No: CS (OS) No. 2109 of 2002

M/s Associates India Financial
Services (P) Ltd.

APPELLANT

Vs

M/s Atwal and Associates and
Others BC+

RESPONDENT

Date of Decision: Aug. 9, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 1, Order 37 Rule 2
- Evidence Act, 1872 - Section 34

Hon'ble Judges: Valmiki J Mehta, J

Bench: Single Bench

Advocate: P.K. Bhalla, for the Appellant; Varun Jain, for the Respondent

Final Decision: Allowed

Judgement

Valmiki J Mehta, J.

I.A. Nos. 11370/2003 (U/o 37 R 5 CPC by D-1)

I.A. No. 5498/2003 (U/o 37 R 5 CPC by D-3)

I.A. No. 5499/2003 (U/o 37 R 5 CPC by D-4)

I.A. No. 791/2004 (U/o 37 R 5 CPC by D-2)

1. These are applications filed by all the four defendants for leave to defend in a suit filed under Order 37 of Code of Civil Procedure, 1908 (CPC) for recovery of Rs.44,83,209/- . It is trite that suit under Order 37 is maintainable on three counts. One is that there is a dishonoured negotiable instrument in favour of the plaintiff. Second is that a liquidated demand arises from (i.e as specified in) a written contract with interest arising and thirdly on a written contract of guarantee and which also has to contain the liquidated demand.

2. The subject suit is a suit filed by a Finance Company. A reference to the plaint shows that the plaintiff makes averments with respect to granting of finance for a sum of Rs.66,06,200/- for certain commercial equipment. A hire purchase agreement is referred to, which is signed by the defendants on 28.9.2000. There is a reference to a demand promissory note of the same date for Rs.66,06,200/-. There is also a mentioning of a guarantee executed by defendant Nos. 2 and 3 in favour of the plaintiff of the same date. The averments made in the plaint also admit the fact that after grant of the original loan, there were various repayments made by defendant No. 1, however, since there were defaults in payments of certain installments, the amount which is claimed in the suit, is said to have become due. The amount which is claimed in the suit even as per the plaint is not the amount which is the amount mentioned in the agreement dated 28.9.2000, but the amount is the balance due at the foot of the account. No doubt remains in this regard inasmuch as para 13 of the plaint reads as under:-

13. That as per the accounts maintained by the plaintiff company the defendants are liable to pay a sum of Rs. 44.83.209/- (RUPEES FORTY FOUR LACS EIGHTY THREE THOUSAND TWO HUNDRED NINE ONLY) (Jointly and severally) towards principal, interest, penal interest and other charges after adjusting the payment made by the defendants as on 30.11.2002.

(emphasis added)

3. Admittedly, there is no other averment in the plaint as to how the amount claimed in the suit of Rs.44,83,209/- arises from a particular written agreement. In an Order 37 suit the amount claimed in the suit may be the principal amount plus interest arising therefrom, however, once again the plaint makes no reference to a specific particular principal amount which has been stated as a liquidated amount in a written agreement payable to the plaintiff, and the balance claimed in the suit is only interest arising thereafter.

4. The object of an Order 37 CPC suit is that on the basis of the documents specified therein the liability towards the plaintiff is admitted. Only when the liability which is admitted in the dishonoured instrument or in the written document containing a liquidated demand as payable to the plaintiff, suits can be filed under Order 37 CPC. Those suits claiming amounts which are only balances due at the foot of account cannot be treated as falling under Order 37 CPC because the suit claim is based on the account and the amount claimed is not a liquidated amount arising/payable to the plaintiff on an instrument on the limited types which are the subject matter of Order 37 CPC. Entries and statements of account have necessarily to be proved as per Section 34 of the Evidence Act,1872 for the balance at the foot of the account to be arrived at. The present suit plaint also makes no mention of any written acknowledgment of debt, which may have amounted to a written agreement containing the liquidated demand with interest arising.

5. I have had an occasion to examine the aspect as to whether a suit such as the present can be said to be one under Order 37 CPC in the judgment of M/s K&K Health Care Pvt. Ltd. Vs. M/s Pehachan Advertising, RFA 202/2011 decided on 23.1.2012, in which, I have observed that such type of suit cannot be filed under Order 37 CPC. Paras 2 to 5 of that judgment are relevant and which read as under:-

2. The subject suit for recovery of money was filed by the respondent/plaintiff for recovery of monies on the cause of action of non-payment of bills by the appellant/defendant. The bills were raised by the respondent/plaintiff on the appellant/defendant on account of advertisements issued in newspapers by the respondent/plaintiff on behalf of the appellant/defendant. The suit which was filed under Order 37 CPC, claimed the amounts due under the bills which were stated to be "written contracts containing liquidated demand", though simultaneously admitting that after the bills were raised various payments were made towards the bills. The details of bills and payments made, when first filed by the respondent/plaintiff, were as under:-

Accounts Statement of M/s K & K Health Care Pvt. Ltd. from 01.07.2005 to 15.11.2005

Date	Particulars	Amount (Dr)	Amount (Cr)	Balance (Dr)
15.06.2005	Balance	32,372.25		
	B/F			
30.07.2005	Bill No. 07/020	290,652.00		
11.08.2005	Bill No. 08/010	66,376.00		
13.08.2005	Bill No. 08/019	72,127.00		
18.08.2005	Bill No. 08/022	72,127.00		
25.08.2005	Bill No. 08/035	288,609.00		
05.09.2005	Bill No. 09/003	72,127.00		
08.09.2005	Bill No. 09/005	99,418.00		
08.09.2005	Bill No. 09/008	5,254.00		
07.11.2005	Ch. No. 527736		87,652.00	

10.11.2005	Ch. No.	254,453.00
	527738	
	Total	999,062.25
		342,105.00
		6,56,957.25

3. Subsequently, on the appellant/defendant stating and detailing other payments, a fresh statement of account was filed by the respondent/plaintiff reflecting the position of bills and payments as under:-

M/s K & K Health Care Pvt. Ltd. Ledger Account from 01.04.2005 to 7.11.2005

Date		Particulars	Debit	Credit	Balance
01.04.2005	Dr	Opening Balance	9,54,722.81		9,54,722.81
11.04.2005	Cr	Ch. No. 860348		100,000.00	2,112,065.25
30.05.2005	Cr	Ch. No. 474952		200,000.00	1,912,065.25
06.06.2005	Dr	Bill No. 06/015	72,126.91		1,098,976.63
09.06.2005	Cr	Ch. No. 474974		100,000.00	1,812,065.25
16.06.2005	Dr	Bill No. 06/018	73,199.07		1,72,175.70
23.06.2005	Dr	Bill No. 06/031	72,126.91		1,026,849.72
29.06.2005	Cr	Ch. No. 464018		100,000.00	1,712,065.25
30.06.2005	Cr	Ch. No. 464025		100,000.00	1,612,065.25
30.06.2005	Dr	Bill No. 06/059	73,199.07		1,245,374.77

22.07.2005	Cr	Ch.	100,000.00	1,512,065.25
		No.		
		464062		
30.07.2005	Dr	Bill	290,651.96	1,536,026.73
		No.		
		07/020		
05.08.2005	Cr	Ch.	64,313.00	1,447,752.25
		No.		
		464078		
06.08.2005	Cr	Ch.	65,183.00	1,318,256.25
		No.		
		464079		
08.08.2005	Dr	Bill	66,376.25	1,674,529.89
		No.		
		08/010		
13.08.2005	Dr	Bill	72,126.91	1,608,153.64
		No.		
		08/019		
18.08.2005	Dr	Bill	72,126.91	1,746,656.80
		No.		
		08/022		
25.08.2005	Dr	Bill	288,609.18	2,035,265.98
		No.		
		08/035		
26.08.2005	Cr	Ch.	64,313.00	1,383,439.25
		No.		
		464160		
29.08.2005	Cr	Ch.	65,268.00	1,252,988.25
		No.		
		464161		
09.09.2005	Cr	Bill	72,126.91	2,107,392.89
		No.		
		09/003		
09.09.2005	Cr	Bill	99,418.18	2,206,811.07
		No.		
		09/005		
09.09.2005	Dr	Bill	5,254.18	2,212,065.25
		No.		
		09/008		
21.10.2005	Cr	Ch.	4,632.00	1,248,356.25
		No.		
		527737		

24.10.2005	Cr	Ch.	58,521.00	1,189,835.25
		No.		
		527732		
27.10.2005	Cr	Ch.	63,591.00	1,126,244.25
		No.		
		527734		
27.10.2005	Cr	Ch.	63,591.00	1,062,653.25
		No.		
		522233		
30.10.2005	Cr	Ch.	63,591.00	999,062.25
		No.		
		527735		
07.11.2005	Cr	Ch.	87,652.00	911,410.25
		No.		
		527736		
10.11.2005	Cr	Ch.	254,453.00	656,957.25
		No.		
		527738		

Total Outstanding Rs.656,957.25

This latter statement of account is a part of the statement of account running into a total number of eight pages. This second statement of account, in addition to the two payments reflected in the first statement of account, admitted and reflected as many as five other payments. The fact that payments have been made as reflected in aforesaid two statements of account is not in dispute between the parties. The suit really therefore is a suit for the balance due at the foot of the account and is not one which is only and only on the basis of the amounts contained in the bills. The suit thus could not have been filed under Order 37 CPC as the amount claimed in the suit was not the amount as mentioned in the bills which are stated to be written contracts containing the liquidated demands of moneys payable.

4. Learned counsel for the respondent relies upon a decision of learned Single Judge of this Court in the case of M/s. Lohmann Rausher GmbH. Vs. M/s. Medisphere Marketing Pvt. Ltd.; 2005 2 AD (Del) 604 to argue that the suit on the basis of invoices is maintainable under Order 37 CPC. Of course, I am bound by the decision of the learned Single Judge and therefore a suit on the basis of invoices can be said to be maintainable under Order 37 CPC, however, in the present case the suit is not based on the invoices only but the amount claimed in the suit is the balance due at the foot of a running account i.e. after giving adjustment/credit for certain payments made for the invoices/bills. The suit is therefore definitely not only on the basis of invoice amounts alone for the same to be covered under Order 37 CPC. Also, in my opinion, in an appropriate case this issue will have to be examined

whether a suit under Order 37 CPC can be filed on the basis of invoices alleging the same to be "written contracts containing a debt or liquidated demand? - the necessary requirement of Order 37 CPC. The whole purpose of the provision of Order 37 Rule 1 CPC entitling filing of the suit on a debt or liquidated demand was that there is an agreement showing that there is an admitted liability and a liquidated liability or debt which is claimed in an Order 37 suit. When an Order 37 suit is filed on bills, the bills only reflect goods supplied and therefore I feel that it cannot be said that bills should be taken as agreements containing liquidated demands or an acknowledgment or promise to pay or an admitted liability or such other factor so as to bring the claim as "claim for debt or liquidated demand arising on a written contract" as found in Order 37 CPC.

5. In view of the above, I need not go into the merits of the matter inasmuch as the plaintiff cannot arm-twist a defendant by filing a suit under Order 37 CPC, and argue in the trial Court and also before this Court, that it has a *prima facie* strong case on merits and therefore the impugned order granting conditional leave to defend must be sustained. Merely because a plaintiff/respondent feels it has a strong case on merits cannot mean that the suit can be filed under Order 37 unless the mandatory requirement of basing the suit on one of the four requirements of Order 37 Rule 1 sub Rule 2 is complied with. If the suit is not maintainable under Order 37, there does not arise an issue of any conditional leave to defend as was granted by the trial Court.

(underlining added)

6. The present suit is pending since the year 2002 i.e 11 years. In these 11 years, in my opinion, there has been a gross wastage of judicial time on account of the plaintiff insisting that the suit be treated under Order 37 CPC. It is quite obvious that the suit is not maintainable under Order 37 CPC. Even today, I put it to the counsel for the plaintiff that how can a suit which claims the balance at the foot of the account can be a suit under Order 37 CPC because the balance which is claimed at the foot of the account is not supported by a written document admitting such liability to be payable and whereupon this liability would be a liquidated demand arising out of a written contract. Counsel for the plaintiff insisted on arguing that the suit is maintainable under Order 37 CPC. Since the suit is not maintainable under Order 37 CPC, I allow these applications and grant unconditional leave to defend with payment of costs of Rs.25,000/- to these defendants, who have been put to unnecessary expenditure with respect to filing of the applications for leave to defend in a suit which is quite clearly not maintainable under Order 37 CPC.

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Since I have allowed the applications for leave to defend, the defendants will now file the written statement within six weeks from today. Replication be filed within four weeks thereafter. Counsel for the plaintiff states that admission/denial of

documents has been already done in this suit.

List for framing of issues on 19th November, 2012.