

**HIGH COURT OF DELHI**

**Date of Decision: 31.01.2024**

**CORAM: JUSTICE RAJIV SHAKDHER**

**And JUSTICE AMIT BANSAL**

RFA(OS)(COMM) 1/2024 & CM 2284/2024 (stay)

**ABHAY KUMAR JHA ..... Appellant**

**VERSUS**

**M/S BOSCH ..... Respondent**

**Legislation:**

Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908 (CPC)

**Subject:** Appeal against dismissal of application for leave to defend in a summary suit involving recovery of dues based on invoices for supply of goods and services.

**Headnotes:**

Dismissal of Leave to Defend Application – Appellant's application under Order XXXVII Rule 3(5) CPC for leave to defend against respondent's recovery suit dismissed by Single Judge – Suit based on three invoices for supply of goods and services with outstanding dues of Rs. 2,81,92,694.16 including 18% interest per annum [Paras 1, 5-6].

Acknowledgement of Debt – Appellant's emails post-dating payment of Rs. 57.12 lakhs seeking time to make payments, considered as acknowledgment of liability – Single Judge observed no plausible defence or triable issues raised by appellant [Paras 7, 10].

Decree for Principal Amount – Decree passed for principal amount of Rs. 1,49,02,560.75 with 7% per annum interest – Appellant challenged decree, claiming prior payment of Rs. 57.12 lakhs and non-receipt of goods/services [Paras 8-9, 17].

Conditional Leave to Defend – Defence of non-receipt of goods/services found “improbable” but possible – Conditional leave to defend granted upon deposit of principal amount and bank guarantee for interest [Paras 17-19, 23].

Pre-Suit Interest – Pre-suit interest awarded at 7% per month from invoice due date – Respondent's claim for interest subject to trial as based on disputed legal notice [Paras 20-22].

Appeal Disposed with Directions – Appellant to deposit Rs. 1,49,02,560.75 and furnish bank guarantee for interest – Non-compliance to result in judgment for respondent in line with Single Judge's decision [Paras 25-27].

Observations Non-Binding on Suit Adjudication – Observations made for deciding appeal, without bearing on final suit adjudication [Para 31].

**Referred Cases:**

- IDBI Trusteeship Services Ltd. v. Hubtown Ltd., (2017) 1 SCC 568

**Representing Advocates:**

**Mr. Jitendra Kumar Jha for appellant**

**Mr. Anirudh Bakhru, Mr. Nareeb Nawab, Ms. Apurva Bhutani, Ms. Neeharika Chauhan, Mr. Yashwardhan Singh, Ms. Sejal Tayal, and Ms. Pragya Choudhary for respondent**

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**HON'BLE MR. JUSTICE AMIT BANSAL**

**AMIT BANSAL, J.:**

1. By way of the present appeal, the appellant who was the defendant in the suit, impugns the judgment dated 9<sup>th</sup> November, 2023 passed by the learned Single Judge whereby the application filed on behalf of the appellant under Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908 (CPC) seeking grant of leave to defend has been dismissed.
2. Issue Notice.
3. Notice is accepted by the counsel appearing on behalf of the respondent.
4. With the consent of the respondent (the original plaintiff), the appeal is taken up for disposal.
5. The present appeal arises out of a summary suit under Order XXXVII filed on behalf of the respondent under CPC seeking recovery of Rs.2,81,92,694.16/- . The suit was premised on three invoices raised by the respondent on the appellant for supply of goods and services related to upgradation of software systems, as detailed in the table below: -

<b>Invoice Date</b>	<b>Invoice No.</b>	<b>Description</b>	<b>Invoice Amount (in INR)</b>	<b>Amount Due (in INR)</b>
20.04.2017	5290019389	Service-ELicens e	97,75,000.00	95,65,060.80
25.04.2017	5290019479	Material	30,37,499.95	30,37,499.95

28.04.2017	5290019570	Service Extended Warranty	23,00,000.00	23,00,000.00
Total			1,51,12,499.95	1,49,02,560.75

6. The respondent claimed the aforesaid amount of Rs.2,81,92,694.16/after adding interest rate of 18% per annum from the due date of payment of the aforementioned three invoices till the date of filing the suit.
7. The learned single judge took note of the fact that the appellant had not disputed the emails dated 27<sup>th</sup> November, 2017, 14<sup>th</sup> March, 2018 and 20<sup>th</sup> April, 2018, sent by the appellant to the respondent seeking further time to make the payments. The learned single judge also took note of the fact that the aforesaid emails were sent by the appellant after 29<sup>th</sup> June, 2017, when as per the appellant, he had made payment of Rs.57.12 lakhs to settle all outstanding dues of the respondent. Accordingly, he held that no plausible defence or triable issues have been raised by the appellant and accordingly, rejected the application for leave to defend.
8. Consequently, a decree for the principal amount of Rs.1,49,02,560.75/- was passed in favour of the respondent along with interest @ 7% per annum from the time when the invoices became due till the payment was received by the respondent.
9. Assailing the aforesaid judgment of the Single Judge, learned counsel for the appellant has submitted that the learned Single Judge has failed to take note of the fact that a sum of Rs.57.12 lakhs had already been paid by the appellant to the respondent. He further states that the respondent *vide* its emails dated 22<sup>nd</sup> September, 2017 and 24<sup>th</sup> October, 2017 had only made a demand of Rs.23 lakhs, which was much less than the amount claimed in the suit. It is further submitted that since the appellant never received the legal notice dated 26<sup>th</sup> June, 2020 sent on behalf of the respondent, he could not take the defences taken in the application for leave to defend, at an earlier point of time.
10. *Per contra*, learned counsel for the respondent submits that the respondent sent various emails to the appellant calling upon the appellant to pay the amount under the invoices. The appellant never disputed the amount of the invoices and sought two to three weeks' time to make the payments. It is further submitted that the learned Single Judge took note of the fact that the sum of Rs. 57.12 Lakhs was paid by the appellant to the respondent on

29<sup>th</sup> June, 2017 and thereafter the appellant had written the aforesaid emails dated 27<sup>th</sup> November, 2017, 14<sup>th</sup> March, 2018 and 20<sup>th</sup> April, 2018 acknowledging his liability.

11. Furthermore, it is submitted on behalf of the respondent that the two emails dated 22<sup>nd</sup> September, 2017 and 24<sup>th</sup> October, 2017 demanding Rs. 23 lakhs were sent as they related to only one of the invoices for a sum Rs. 23 lakhs, which was due for more than 120 days. But the fact remained that there were two other unpaid invoices amounting to Rs. 1.3 crores.
12. We have heard the counsels for the parties and perused the material on record.
13. The principles with regard to the grant of leave to defend under a summary suit filed under Order XXXVII of the CPC have been laid down by the Supreme Court in ***IDBI Trusteeship Services Ltd. v. Hubtown Ltd.***, (2017) 1 SCC 568. The said principles are set out herein below:

*“17. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in Milkhiram's case, 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.”*

14. The record of the suit would show that *vide* emails dated 26<sup>th</sup> July, 2017 and 15<sup>th</sup> September, 2017, the respondent specifically asked the appellant to clear outstanding dues in respect of the three invoices. In the email dated 15<sup>th</sup> September, 2017, it was specifically stated that the payment of Rs. 23 lakhs in respect of one of the invoices was due for more than 120 days and the remaining payment of Rs. 1.3 crores in respect of the other two invoices was due for more than 120 days.
15. Subsequently, emails dated 27<sup>th</sup> November, 2017, 14<sup>th</sup> March, 2018, and 20<sup>th</sup> April, 2018, were sent on behalf of the respondent, again calling upon the appellant to pay the amounts due under the invoices. All of the three of the aforesaid emails dated 27<sup>th</sup> November, 2017, 14<sup>th</sup> March, 2018, and 20<sup>th</sup> April, 2018 were duly replied to by the appellant seeking further time to make payments. Pertinently, in the aforesaid replies, the appellant did not dispute the amount due or the fact that goods/services were not supplied.
16. All of the aforesaid emails were exchanged between the parties after 29<sup>th</sup> June 2017, the date on which the appellant claims the amount of Rs.57.12 lakhs was paid by the appellant to the respondent.
17. Although the foregoing discussion would show that the respondent has a strong case for recovery of the claimed dues, i.e., the principal amount, without a trial, the suit could not have been decreed since the defence put forth by the appellant is that he did not receive the goods and services. There are, even as per learned counsel appearing on behalf of the respondent, no receipts on record. Ordinarily, when services or goods are delivered, some documentation would be generated to show dispatch/delivery. This aspect attains criticality with regard to goods that the respondent claims to have supplied. Respondent, concededly, has not placed on record, goods/lorry receipts or other evidence which would establish the transportation of goods to the consignee i.e., the appellant.
18. Learned counsel appearing on behalf of the respondent submits that since replies to the emails dated 27<sup>th</sup> November, 2017, 14<sup>th</sup> March, 2018 and 20<sup>th</sup> April, 2018, did not dispute receipt of goods or services, documents evidencing the same were not placed on record.
19. It is important to note that the appellant claims that he had entered other transactions with the respondent apart from those captured in the three invoices referred to in the plaint. Given this position, in our view, the defence

raised by the appellant may be “improbable” but it still raises a possibility of its being correct and hence would be covered under the situation envisaged in paragraph 17.4 of the aforementioned judgment in **IDBI Trusteeship Services Ltd** (supra).

20. The learned Single Judge has also awarded pre-suit interest @ 7% per month on the aggregate value of the invoices, from the time when the invoices became due till the payment is received by the respondent.

21. Interest, for the period obtaining prior to the institution of the suit, can be granted, ordinarily, in the following circumstances: firstly, if the claim is based on a statute; second if there is an express or implied contract subsisting between the parties justifying payment of interest; and thirdly, if there is in place custom or usage having the force of law. Reference in this regard may be made to the judgments in **Bengal Nagpur Railway Company v. Ruttanji Ramji**, 1937 SCC OnLine PC 94; **Union of India v. West Punjab Factories Ltd.**, 1965 SCC OnLine SC 68; **Central Coop. Bank Ltd. v. S. Kamalaveni Sundaram**, (2011) 1 SCC 790.

22. In the present case, there was no contract between the parties that provided for payment of interest. Therefore, the pre-suit interest could only be claimed by the respondent if there was a valid demand by the respondent from the appellant. The only demand for interest by the respondent from the appellant in the present case is premised on the legal notice dated 26<sup>th</sup> June, 2020, the receipt of which has been denied by the appellant. This aspect would have to go to trial. Interest concerning pre-suit period could not have been awarded by the learned Single Judge in a summary proceeding. 23. In our view, the ends of justice would be met if conditional leave to defend is granted to the appellant upon deposit of the principal amount of Rs.1,49,02,560.75/- before the Registrar General of this Court so as to secure the interest of the respondent and a bank guarantee in respect of the interest amount.

24. Both the parties shall file their respective calculations towards the amount of interest due in terms of the decree within one week from today and thereupon, the Registrar General shall determine the interest amount due in terms of the decree. For the aforesaid purposes, the matter be listed before the Registrar General of this Court on 8<sup>th</sup> February, 2024.

25. Accordingly, the present appeal is disposed of with the following directions: -

i. The appellant shall deposit a sum of Rs.1,49,02,560.75/-before the Registrar General of this Court within four weeks from today. ii. The appellant shall furnish a bank guarantee towards the interest amount, as determined by the Registrar General, within a period of four weeks from today.

26. Subject to the appellant complying with the aforesaid conditions, the appellant shall be entitled to grant of leave to defend the suit.
27. Upon the failure of the appellant to comply with the aforesaid conditions, the respondent would be entitled to judgment and decree in terms of the impugned judgment.
28. Accordingly, the impugned judgment passed by the learned Single Judge stands modified to the aforesaid extent.
29. List the suit before the Single Bench on 18<sup>th</sup> March, 2024.
30. The appeal, along with the pending application, stands disposed of.
31. Needless to state any observations made herein are only for the purpose of deciding the present appeal and would have no bearing on the final adjudication of the suit.

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