

SUPREME COURT OF INDIA

Whirlpool of India Ltd.

Vs.

H B Leasing & Finance Co. Ltd.

C.A.No.6477 of 2008

(R.V.Raveendran and J.M.Panchal JJ.)

03.11.2008

ORDER

1. Leave granted. Heard both sides.
2. The appellant is the defendant in CS (OS) No.1279 of 1996 on the file of High Court of Delhi, filed by the respondent for recovery of Rs.4,70,01,913/-.
3. As the defendant did not cross examine the plaintiff's witnesses in spite of several opportunities, the Trial Judge ordered on 11.9.2006 that defendant had forfeited its right to cross examine the plaintiff's witnesses.
4. The defendant filed IA No.3594/2007 seeking an opportunity to cross examine the plaintiff's witnesses and seeking consolidation of the said suit with Civil Suit No.2649 of 1991 filed by the defendant against the plaintiff. The said application was rejected by the Trial Judge on 1.8.2007.
5. Thereafter the case was posted for defendant's evidence. The defendant did not tender its witness (DW1) for cross-examination and costs levied were also not paid. Therefore by order dated 7.9.2007, the trial Judge closed the defendant's evidence.
6. Feeling aggrieved by the orders dated 1.8.2007 and 7.9.2007 the defendant filed FAO (OS) No.15/2008. A Division Bench of the High Court, by detailed order dated 11.1.2008 dismissed the said appeal. The said order dated 11.1.2008 is challenged in this appeal by special leave.
7. The learned counsel for the respondent raised a preliminary objection. He contended that the appellant had attempted to mislead this court by producing a short order which was totally different from the actual order, as the impugned order. He therefore submitted that the appellant should be penalized by dismissal of the appeal itself.

8. The learned counsel for the appellant however pointed out that in IA No.1/2008 filed with the SLP On 15.1.2008, the appellant had disclosed that what was produced was not the true and correct copy of the order; that as they were filing the SLP in a hurry as the suit was listed for final hearing in the week commencing 14.1.2008, they did not wait for the receipt of the certified copy; and that as the appellant had not received the certified copy or ordinary copy of the impugned order at the time of filing the SLP, it was producing only the gist of the order pronounced on 11.1.2008 as noted by its counsel.

9. It should however be noted that by 28.1.2008 when the matter came up for preliminary hearing, the appellant had received the certified copy of the impugned order but had failed to produce it. The interim stay was granted by this Court on the basis of the incorrect order that was produced by the appellant. The non-production of a true copy of the impugned order even on 28.1.2008 is a serious lapse. The copy of the order produced was completely different from the order that was actually passed. If the actual order as passed had been produced, in all probability, this court might not have granted the interim stay. Be that as it may. For this lapse, the appellant needs to be penalized and we do so by levying costs of Rs.50,000/-.

10. Coming to the merits, the appellate order dated 11.1.2008 sets out the reasons as to why the appeal against the orders dated 1.8.2007 and 7.9.2007 was rejected. We find no infirmity in the said order. In the normal course, we would not have granted leave. But if an opportunity is not granted, the suit is likely to be decreed for a huge sum without the benefit of the evidence of defendant and that would put the defendant to prejudice and irreparable loss. The learned counsel for appellant has also assured that if one last opportunity is granted to the defendant to cross-examine plaintiff's witnesses and to let in its own evidence, they will not seek further time. To show its bonafides, the appellant offered to pay Rs.2,00,000/- as costs. The learned counsel for respondent submitted that the same would not compensate the respondent for the delay. Be that as it may.

11. To do complete justice between the parties we feel that one final opportunity should be granted to the defendant to cross examine the plaintiff's witnesses and also by tendering its witness for cross examination by the plaintiff. But that can only be on punitive terms.

12. We therefore permit the defendant to cross examine the plaintiff's witnesses subject to payment of Rs.2,50,000/- as costs. We also permit the defendant to lead evidence by tendering its witness/es for cross examination subject to payment of another Rs.2,50,000/- as costs. We also make it clear that the defendant will have only one opportunity to cross examine the plaintiff's witnesses and one opportunity to tender its witnesses. If the defendant fails to make use of those opportunities, it will forfeit its right to cross examine the plaintiff's witnesses or tender its witnesses as the case may be.

13. The parties agree to appear before the High Court on 17.11.2008 and take further orders in CS (OS) No.1279/1996. We request the High Court to have the cross examination of the plaintiff's witnesses completed on 17.11.2008 (subject to any further order by the High

Court) and thereafter fix an appropriate early date for the defendant to tender its witness/es for cross examination by the plaintiff.

14. The costs awarded in this appeal, (in all Rs.5,50,000/-) shall be paid by appellant directly to the respondent and a copy of the receipt for payment of the costs shall be filed before the Trial Judge on 17.11.2008.

15. Appeal is disposed of accordingly.