

# DELHI HIGH COURT

Sunder Industries, M/s.

Vs.

M/s. General Engineering Works, (Delhi)

C.R. No. 1165 of 1981

(Sultan Singh, J.)

7.1.1982

## JUDGEMENT

### Sultan Singh, J.

1. This revision under Section 115 of the Civil Procedure Code is directed against the judgment and order dated 10-13-1981 of the Subordinate Judge, 1st Class, Delhi granting leave to the petitioners-defendants to contest the suit filed by the respondent-plaintiff under Order 37 of the Civil Procedure Code for the recovery of Rs. 6500 subject to the petitioners furnishing bank guarantee for the amount in suit.

2. Briefly the facts are that M/s. General Engineering Works plaintiff-respondent alleging itself to be a unit the proprietors of which are M/s. Hindustan Development Corporation Ltd. a company registered under the Companies Act, filed this suit for the recovery of Rs. 6500/-. The plaintiff alleges that the defendants placed orders for the supply of G.I. wire against which the goods were supplied of the value of Rs. 10,280, that the defendants issued cheque for the said amount on 5-3-1980 which was dishonored, that subsequently the defendants paid a total sum of Rs. 4580 on various dates leaving behind a sum of Rs. 5700 as the balance due from them on account of the dishonored cheque of Rs. 10,280, that the defendants issued a further cheque of Rs. 5700 on 9-8-1980 which was also dishonored. The plaintiff thus claimed the sum of Rs. 6500 detailed below from the defendants:

1. Amount of the dishonoured cheque No. 680828 dt. 9-8-80 :	Rs. 5700/-
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2. Limple interest at 18% p.a.	Rs. 690/-
3. Legal notices fee and Misc.	Rs. 110/-
Total:	Rs. 6500/-

3. The plaintiff filed this suit under Order 37 of the Civil Procedure Code. The defendants entered appearance. The plaintiff took out summons for judgment supported by an affidavit dated 5-8-1981. The defendants filed an application for leave to defend supported by an affidavit dated 24-8-1981 alleging that the plaintiff was not a legal entity and as such the suit was not maintainable, that the plaint did not disclose the authority and right of the person who had signed and verified the plaint and instituted the same, that the suit was based on the original consideration for the balance of price of goods and as such it was not maintainable under Order 37 of the Code, that there was no agreement for payment of interest at 18% per annum, that if the suit was on the basis of dishonored cheque dated 9-8-1980 for Rs. 5700, the interest would be payable from the date of dishonor of cheque at 6% per annum under the Negotiable Instruments Act, that the claim for Rs. 110 towards alleged legal notices fee and Misc. charges was too vague and unintelligible and was not maintainable for recovery in a summary manner, that the goods supplied against post dated cheque dated 5-3-1980 for Rs. 10,280 were below the agreed specification inasmuch as the goods supplied were of 21+ gauge while the agreed specification was 22+ gauge, that there was a difference of Rs. 1000 per metric tone in the two specifications and after negotiations with Mr. S.K. Jain and Mr. I.D. Gupta of the plaintiff, it was agreed to give a credit for Rs. 1285 to the defendants on this account, that the cheque dated 9-8-1980 for Rs. 5700/- was not given to the plaintiff towards the bill dated 12-2-1980, that the said cheque was a post dated cheque towards another order placed in March 1980 for the supply of one metric tone of G.I. wire of 24+ gauge at Rs. 9000 per metric tone which goods were not supplied by the plaintiff and therefore, the defendants suffered a loss of Rs. 2000, that the cheque dated 9-8-1980 was obtained from the defendants by the plaintiff in blank both in respect of its date and amount towards price of the subsequent order placed in March 1980, that the goods were not supplied but the plaintiff had fraudulently filled in the blank cheque and therefore, the cheque was without consideration and the suit as such was

not maintainable.

The plaintiff in reply denied the various allegations of the defendants. The plaintiff further submitted that it was a legal entity and the suit was maintainable, that the transaction between the parties were done in the name of General Engineering Works and as such the suit was maintainable. It was further averred that the cheque for Rs. 5700 dated 9-8-1980 was issued by the defendants towards the balance of price of goods which was subsequently dishonored. It was denied that the cheque was blank in respect of its date and amount, and that no Order was placed by the defendants in March 1980 for the supply of the other goods as alleged. The trial Court after "observing that there was no explanation on behalf of the plaintiff as regards its status and also observed that the plaintiff failed to establish that it can maintain a suit in the present form if may fail (sic). It was further observed that the defendants have raised a triable issue. In spite of these observations the trial Court granted leave to contest subject to the defendants furnishing bank guarantee for the suit amount.

4. The defendants are entitled to obtain leave to defend on disclosing facts which may be deemed sufficient to entitle them to defend the suit and the Court may grant leave unconditionally or upon such terms as may appear it to be just as provided in Order 37, Rule 3(5) of the Civil Procedure Code Further it has been provided in Order 37, Rule 3(6) of the Code that if the defendant is permitted to defend on furnishing security and on his failure to do so the plaintiff would be entitled to judgment forthwith. Thus it has to be seen whether the defendants in their application for leave to defend disclosed facts which entitle them to defend the suit. The crucial objection raised by the defendants is that the plaintiff was not a legal entity and as such the suit was bound to fail. The plaintiff in the suit is M/s. General Engineering Works. Para 1 of the plaint reads as under:-

"That the plaintiff is a Unit the proprietors of which are Messrs Hindustan Development Corporation Ltd. a company registered under the Companies Act. having its office in New Delhi and running its business activities in Delhi."

5. *Prima facie* the proprietors of the plaintiff are M/s. Hindustan Development Corporation Ltd. as alleged in the plaint. The plaintiff is neither a limited company nor a partnership concern. It, therefore, appears that the plaintiff is not

a legal entity and as such would not be entitled to institute the suit in the name of M/s. General Engineering Works. In other words it must be held that the defendants have disclosed a fact which it proved to be correct would non suit the plaintiff and the suit would be dismissed. This ground alone it appears to me is sufficient to grant the defendants unconditional leave to defend. The reason is simple, if conditional leave to defend is granted to the defendants and they failed to comply with the condition the consequence would be that the plaintiff would be entitled to judgment forthwith which would be contrary to law and without jurisdiction.

Although the objection as regards legal entity of the plaintiff was taken in the application for leave to defend but no step appears to have been taken by the plaintiff up to this date for bringing on record any matter to show that General Engineering Works was a legal entity entitled to institute the suit. This is however a matter which can be gone into after the grant of leave to the defendants and filing of the written statement by them. The trial Court has not taken into consideration this important aspect of the case that if the plaintiff was not a legal entity it was not entitled to a decree under Order 37 of the Code. The learned counsel for the petitioners-defendants next submits that the affidavit in support of summons for judgment is not an affidavit in law. He further submits that the affidavit on behalf of the plaintiff in reply to the application and affidavit for leave to defend is also not an affidavit in law as both these affidavits were not verified in accordance with law and were of no use. His contention is that these two affidavits cannot be looked into to determine if the defendants were not entitled to leave to defend. He submits that the verifications are such that these affidavits cannot be looked into. The verification on the affidavit in support of summons for judgment reads as under :-

"Verified at Delhi on this 5th day of August, 1981 that the contents of my above affidavit are true and correct to my best knowledge and belief and nothing has been concealed there from." Similarly the verification on the affidavit in reply to the application for leave to defend reads as under:-

"Verified at Delhi on this 23rd day of September 1981 that the contents at all the aforesaid paras and sub-paras of my above affidavit are true and correct to my personal knowledge, knowledge from the records and the information received and the legal advice sought and believe to be true and correct and

nothing has been concealed there from."

6. Order 19, Rule 3 (1) of the Civil Procedure Code provides, "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated". Thus affidavits are either affirmed as true to knowledge, or from information received provided the source of information is disclosed, or as to what the deponent believes to be true provided the grounds for such belief are stated. If the affidavits lack such verification it is of no use. In *A. K.K. Nambiar v. Union of India*,<sup>1</sup> it has been observed that if affidavits were not properly verified they cannot be admitted in evidence. It, therefore, must be held that two affidavits filed on behalf of the plaintiff are valueless. In any case as the main dispute is about the legal entity of the plaintiff, the defendants are entitled to unconditional leave to defend.

7. The learned counsel for the plaintiff-respondent submits that an order granting leave to defend subject to condition cannot be interfered in revision. He relies upon *United Industries v. M/s. Dalwadi and Co.*,<sup>3</sup> in support of his contention. In that case the trial Court on the consideration of the plaint and the affidavits, was not satisfied that a *bona fide* triable issue was raised by the affidavits in reply and entertained a doubt as to the genuineness of the defense. In the circumstances of that case the trial Court had refused to grant unconditional leave to defend and the High Court thought proper not to interfere with the discretion exercised by the trial Court. The facts of the present case are however entirely different.

The learned counsel then relies upon *University of Delhi v. Hafiz Mohd.*<sup>3</sup> a judgment given by five Judges of this Court. This case relates to an appeal against the order of a Single Judge while exercising ordinary original civil jurisdiction. It has been observed therein that while exercising jurisdiction under Section 115 of the Code it is not open to the High Court to interfere even if the decision was wrong in law. There is no dispute to this proposition of law. But the question is that the trial Court in the present case has committed an illegality in the exercise of its jurisdiction ignoring the fact that the plaintiff was not a legal entity and as such it appears at this stage that the trial Court had no jurisdiction to proceed with the suit.

8. The order of the trial Court directing the defendants to furnish bank guarantee

is, therefore, quashed and the defendants are granted unconditional leave to defend the suit parties are left to bear their own coats.

Petition allowed.

Cases Referred.

1.AIR 1970 Supreme Court 653(652),

2.AIR 1969 Gujarat 18

3. AIR 1972 Delhi 102 (FB),