

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

% **Decided on: 30.05.2017**

+ **CS(OS) 1849/2015**

VATECH GLOBAL CO. LTD Plaintiff

Through: Mr. Vinod Khurana, Mr. Mohinder
Vig and Mr. Nitin Sen, Advocates.

versus

UNICORN DENMART LTD & ORS Defendants

Through: Mr. Suhail Dutt, Sr. Advocate along
with Ms. Gunjan Kumar and Mr.
Azhar Alam, Advocates.

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

I.A. 25396/2015 (by defendants u/O 37 R 3 (5) r/w S. 151 CPC for leave to defend) I.A No. 25397/2015 (under Section 5 of Limitation Act seeking condonation of delay in filing the application under Order 37 Rule 3(5) CPC)

1. The present suit has been filed by the plaintiff under Order 37 CPC.

It is submitted that plaintiff is an international company incorporated under the laws of Republic of Korea and having its registered office at 13, Samsung 1-ro 2-gil, Hwaseong-si, gyeonggi-do, 445-170, Korea. Mr. Sookeun Park is the Representative Director of Plaintiff and is authorised to sign and verify the pleadings and to institute the present suit on its behalf. A

Copy of Board Resolution dated April 24, 2015 authorising Mr. Sookeun Park, has been placed on record.

2. The plaintiff is dealing with manufacturing of high tech dental 2D and 3D digital imaging Equipments and software headquartered in S. Korea. Plaintiff is engaged in designing, manufacturing and marketing state-of-the-art digital imaging products for dental CBCT etc. The plaintiff's business has an international existence. Defendant no. 1 is Unicorn Denmart, a Company incorporated under the Company's Act, 1956, and is engaged in the business of providing goods and services in range of dental equipments and is based at New Delhi having its registered office in Delhi. Defendant no. 2, Mr. Shammi Gumbhir, is the Managing Director of defendant no. 1 and Defendant no. 3, Mrs. Achla Gumbhir, is Whole time Director of defendant no. 1. Defendant no. 2 is involved jointly with other defendants in the management of defendant no. 1 and they all are jointly and severally responsible for the conduct of defendant no. 1. They had entered into a business relationship in 2009. The plaintiff had exported dental devices to defendants to market and sell them in India.

3. It was agreed between them that the defendants shall pay 50% of the advance of the required devices/equipments and on the release of that

advance, the plaintiff shall execute the order and send the devices to the defendants and then the defendants shall within two months from the date of bill of lading, release the balance 50% amount to the plaintiff. This practice continued between the parties since 2009 and the email dated 05.11.2014 of the defendants confirmed the said fact. In the year 2014 in the month of September, defendant no. 1 placed an order for purchase of dental devices including “Intra Oral Sensor” and “Digital X- Ray System”. As per the standard practice between them, the plaintiff raised the performa invoices for that purpose.

The details are as follows:-

S.No.	Performa Invoice No. (PINo.I	Dated	Commercial Value
1.	VG141015-IN-Unicorn-01	15 th Oct 2014	US\$ 176,250.10
2.	VG141031-11	31 st Oct 2014	JPY28,320,600.00
3.	VG141125-IN-Unicore-03	25 th Nov 2014	US\$317,300.00
4.	VG141126-14	26 th Nov 2014	JPY1 8,525,234.00

4. It is also submitted by the plaintiff that the defendants released 50% of advance based on the performa invoices and details are as under:-

Pro Inv No.	Value-of-PI	Amount-Transferred	Date-of-Transfer
VG141015- INUnicorn-01	US\$ 176,250.10	US\$88,125	27 th October 2014
VG141031-11	JPY28,320,600.0 0	JPY14,160,30 0	6 th Nov 2014
VG141125-IN-Unicore-03	USS 317,300.00	US\$158,650	23 rd Dec 2014
VG141126-14	JPY1 8,525,234.0 0	JPY7,551,945. 25 JPY1,710,672. 00	2 nd Dec 2014 5 th Dec 2014

5. Bank statements that the amount was transferred against each mentioned Performa Invoices and credited to the plaintiff's bank account were also enclosed by the plaintiff along with the suit.

6. It was contended that thereafter the plaintiff executed the order and raised the Commercial Invoices as per the details below:-

S.no.	Commercial Invoice no.	Performa Invoice no.	Total Commercial value	INR
1.	VG141029- VG141015- USD dated 29 th October 2014	VG141015-IN- Unicorn-01 dtd 15 Oct 2014	USD \$176,250.10	1,11,03,756.30 (@63.00)
2.	VG141226- INOI dtd 26 th Dec 2014	VG141125-IN- Unicore-03 dated 25 Nov 2014	USD \$317,300	1,99,89,900.00 (@63.00)
3.	VG141119- INOI dtd 19 th Nov 2014	VG141031- 11 dtd 31 Oct 2014	JPY 28,320,600.00	1,47,26,712.00 (@ 0.52)

4.	VG141209- INOI dtd 11 th Dec 2014	VG141126- 14 D 26 Nov 2014	JPY 18,525,234.00	96,33,121.68 (@ 0.52)
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7. Certified copies of these commercial invoices is also been placed on record by the plaintiff. It is contended that the performa invoices and the commercial invoices are exclusive agreements wherein the payment terms are clearly depicted. It is submitted that as per the findings in the case **Iron And Steel Company Ltd. v Nada Brothers 113 (2004) DLT37**, these invoices are written contracts within the meaning of sub-clause (2) of Rule 2 of Order 37.

8. It is further contended that the items as invoiced in the performa and commercial invoices for which an advance of 50% had been received, were sent to the defendants and dispatched as per the details indicated through Carrier Agent. The copies of packaging list for each outstanding Commercial Invoice are also enclosed by the plaintiff along with the plaint. It is submitted that all these items were delivered to the defendants as per schedule and in perfect manner and the bills of ladings are also enclosed with the plaint. Despite repeated reminders, the defendants did not pay the balance payment of 50% value as mentioned in the invoices and the

outstanding payments were not cleared and they remain outstanding and the details of outstanding are as follows:-

S.no.	Commercial Invoice no.	Total Value	Outstanding Amount	Amount in INR
1.	VG141029-INOI	\$176,250.10	\$88,125.00	5,551.875
2.	VG141226-INOI	\$317,300.00	\$158,650.00	99,94,950.00
3.	VG141119-INOI	JPY28,320,600.00	JPY14,160,300.00	73,63,356.00
4.	VG141209-INOI	JPY18,525,234.00	JPY9,262,616.75	48,16,560.71

9. The reminders were sent on 4th Nov2014, 27th Nov 2014, 2nd Dec 2014, 3rd Dec 2014,12th Dec 2014, 15th Dec 2014, 16th Dec 2014, 17th Dec 2014, 22nd Dec 2014, 29th Jan 2015, 9th Feb 2015, 26th Feb 2015,10th Mar 2015 and the last email was sent on 20th March, 2015. It is further submitted that the defendants vide their email dated 13th December, 2014 have acknowledged their liability to pay but sought time for making payment.

The plaintiff has relied on the averments of the email which reads as under:-

“This has reference to your call yesterday. We are running short of cash flow because of yearend billing, so we are transferring your old payment shortly but as far as 50% of the new Order is concerned, it will be towards the end of the year only.”

10. It is submitted that the defendant no. 2 had again vide email dated 9th February, 2015 communicated to the plaintiff that “*We also want to settle this payment issue at the earliest*”, which confirms that the amount is still outstanding. It is submitted that these facts clearly show that the defendants despite admitting the outstanding payments and thereby acknowledging its liability did not pay. It is submitted that the defendants were pressurising the plaintiff to sign exclusive dealership agreement on its own terms because they wanted to become an exclusive dealer of the plaintiff, however, it was not acceptable to the plaintiff. When the plaintiff informed the defendants of the appointment of another dealer i.e. M/s Chesa, in southern India it was vehemently objected by the defendants apparent from their email dated 26th February, 2015. Defendants, thereafter, did not pay the balance money. A reminder dated 10th March 2015 was sent asking the defendants to clear the balance payment but money was not paid. A legal notice dated 6th May, 2015 was also sent to the defendants giving one more opportunity to the defendants to resolve the matter and pay the overdue amount but the defendants did not reply the same.

Last and final reminder was sent by the plaintiff on 23rd May, 2015 but despite that, the payment was not released by the defendants.

11. It is submitted that the case of the plaintiff falls under Order 37 of CPC. On these facts, it is prayed that a money decree be passed in favour of the plaintiff and defendants be directed to clear the outstanding payment of USD \$88,125.00, USD \$158,650.00, JPY14, 160,300.00 and JPY 9,262,616.75 totalling to equivalent amount of Rs. 2,77,26,742- along with interest of Rs. 14,68,444 worked out at 14% from the due date (which is 60 day from the Bill of Lading date till 31st May 2015, the suit filling date) and also *pendente lite* and future interest @ 14% from 1st June 2015 till the date of actual payment of the decretal amount.

12. The defendants were duly served of the said suit. They put in their appearances and summons for judgment was sent to them. Defendants filed applications under Order 37 Rule 3(5) along with the application for condonation of delay of 25 days in filing the said application along with reply affidavit for leave to defend the case. All the defendants have also adopted the reply affidavit filed by defendant no. 2 in their affidavits. The reply affidavit is filed by Mr. Mukesh Aneja, AGM-Accounts & Finance with Defendant No. 1 Company with the submission that he has been

authorised by Board Resolution to file it and claims to be conversant with the facts of the present case. The defendants have not denied their relationship with the plaintiff and have also not denied that as per practice, whenever they used to place an order with the plaintiff, on the basis of the supply invoices, they used to release 50% of advance and the balance amount was to be released on the supply of the goods within 60 days from the date of the bill of lading.

13. It is however submitted that parties have decided to enter into a Distributorship Agreement and it was entered on 04.09.2009. However, it was entered into with one of the subsidiary/sister concern of the plaintiff, registered at Singapore viz. Vatech Asia HQ Pte. Ltd, on the request of plaintiff. Under the said Distributorship Agreement, as per Section 3.3(i), the defendants were required to make all efforts to promote and develop demands for the sale of the products. Under the Distributorship Agreement, the defendants were also required to maintain its sales and field engineering personnel. The Company also extended a warranty for replacing, repairing, or giving credit for any of the products, which was within the warranty period, and returned to the Company. Defendant no. 1, in pursuance of the said Agreement, started marketing the products of the plaintiff company in

full earnestness and also appointed extra personnel and created huge demands for the products of the plaintiff and procured orders despite the fact that the plaintiffs equipments were costly and were not in extensive use in India and plaintiff was an unknown entity in India at that time. Defendant no. 1 was able to create huge market for the plaintiff's goods within September 2009 to December 2009 i.e. 4 months and placed order of about Rs. 23,11,100/- and during the last six years, defendant no. 1 has imported about Rs. 35.80 crore worth of products from the plaintiffs. This shows that defendant no. 1 is working hard for creating the demand of the plaintiff's goods and as such increased the market demand of the plaintiff's products. In 2014, the plaintiff wanted to appoint another distributor in complete disregard to the understanding between them and thereby taking away the exclusive rights of defendants to import, market and sell the products of the plaintiff's in India. Defendant No.1 asked the plaintiff to enter into Distributor Agreement directly with them instead of through its sister concern. It is also submitted that plaintiff has breached the agreed terms of the understanding by appointing another dealer for the sale of their products in India and they are thus liable to pay damages to defendant no. 1.

14. For replacement of defective parts during warranty period, the plaintiff was to supply the spare parts. The plaintiff started delaying the supply of spare parts which needed replacement during the warranty period. On account of the failure of the plaintiff to supply the spare parts, defendant no. 1 had to replace it from the stocks of the new products and this has caused huge loss to defendant no. 1 as the replacement was done free of cost during the warranty period. This has caused immense discomfort to its customers and exposed defendant no. 1 to unwarranted litigations. The plaintiff had also failed to sign the service agreement to protect the interest of its customers. The plaintiff is also guilty of causing loss by inducing the defendant no. 1 to develop market for their products with promise to give exclusive dealership rights to import to defendant no.1. On this inducement/promise and understanding, defendant no. 1 had worked vigorously and had invested a lot of money and so plaintiff is liable to pay damages and cannot be allowed to take advantage of its own wrong.

15. It is submitted that the suit on the basis of invoices is not maintainable under the provisions of Order 37 of CPC. Except the mails on which the plaintiff has relied, every other e-mail exchanged between the parties also

need to be proved especially those e-mails which were exchanged between the period August 2014 till filing of the present suit.

16. It is further contended that the summons of judgment was not accompanied by the affidavit of the plaintiff, but was accompanied by the affidavit of the lawyer of the plaintiff. It is submitted that in terms of Order 37 Rule 3 (4) CPC read with Appendix B Form No. 4A, the requirement of summons of judgment being accompanied by the affidavit of the plaintiff, is mandatory and no decree under Order 37 can be passed where summons of judgment is not supported by affidavit of plaintiff. Reliance is placed on the findings in the case *Satish Kumar vs. Prism Cement Ltd.*, 107 (2003) DLT 36. It is further argued that an Advocate cannot act in a dual capacity, of an Attorney and of plaintiff and so the affidavit filed by the counsel for the plaintiff cannot be considered as having being filed by the plaintiff. Reliance is placed on *Baker Oil Tools (India) Pvt. Ltd. vs Baker Hughes Ltd. & Anr*, 2011 (47) PTC 296 (Del.) and *Columbia Pictures Industries, Inc. and Others vs. Siti Cable Network Ltd.*, 2001 (60) DRJ 11 (DB). It is further submitted that Directors cannot be sued for the liability of Company under Order 37 of CPC. Relying on *Simba F.R.P.(P) Ltd. vs. Department of Tourism, Lucknow, Uttar Pradesh*, 1995 III AD (Delhi) 473, it is argued

that summary suit cannot be filed on the basis of invoices, which is only a correspondence between parties and does not constitute a contract. Since there is no written contract, the case should be treated as normal suit and leave to defend be granted. It is submitted that following triable issues have arisen in favour of defendants;

(a) Suit against defendant nos. 2 to 4 solely on the grounds that they were Director of defendant no. 1 Company is bad for mis-joinder and it cannot be tried summarily,

(b) plaintiff need to lead evidence to prove that subsequent to the Distributor Agreement entered into with its subsidiary, the terms of said agreement were subsequently extended to all future marketing and distribution and sale of products by defendant no. 1 exclusively.

(c) The plaintiff has not filed any document except the invoices to demonstrate that any payment is due and payable by the Defendant No. 1 to it. In any case the claims filed by the Plaintiff do not fall under the provisions of Order 37 of Code of Civil Procedure, 1908. Claim on the basis of said invoices cannot be considered to be in the nature of debt, unless an adjudication is made with regard to the fact that supplies, etc. were made in accordance with the agreed terms.

(d) Plaintiff is selectively making reference of the mails exchanged between the parties. For a proper appreciation of the disputes between the parties reference has to be made to other mails also which were exchanged between the parties more particularly the mails that were exchanged between the period August 2014 till filing of the present Suit.

(e) Plaintiff has resiled and breached the agreed terms of the understanding between the parties under which Defendant No.1 imported, marketed and sold the products of the Plaintiff for almost 6 years, during which period the Defendant No.1 purchased goods of about Rs. 35.80 crore from the Plaintiff;

(f) Disputes arose between the parties on account of the breaches of the agreed terms committed by the Plaintiff, whereby:

i. The Plaintiff in complete disregard of the agreed terms appointed dealers for sale of its products within India. On account of said breach the Plaintiff is liable to pay damages to Defendant No. 1;

ii. Plaintiff further breached the agreed terms of the understanding between the parties and delayed or failed to supply spare parts, causing immense discomfort to the customers and also exposed Defendant No.1 to unwarranted litigation;

iii. the Plaintiff failed to sign a Service Agreement, which was required to protect the interests of the customers who have purchased products of the Plaintiff through Defendant No.1. The said proposed Service Agreement was refused to be signed by the Plaintiff on an allegation of the same being far from international standards

(g) Plaintiff is also guilty of inducement and causing losses to Defendant No. 1. Plaintiff induced Defendant No.1 to develop market for the products of the Plaintiff by making entire investment on promise of giving exclusive right of import, marketing and sale of its products within the territory of India for a period of 15 years. Defendant No. 1 thus worked vigorously and made huge investments to develop market for the products of Plaintiff, and in fact in a period of 6 years sale of products of Plaintiff rose from being NIL to about 16.50 crore in the year 2014. Yet in complete breach of the understanding the Plaintiff appointed another dealer disregarding the understanding of exclusivity;

(h) On account of the breaches committed by the Plaintiff, it is liable to pay damages to Defendant No.1, in regard where to a suit is being filed by Defendant No.1 against the Plaintiff.

(i) the Plaintiff is also guilty to breach the understanding between the parties whereby free of cost and timely spares were to be provided to the customers, which was critical to ensure that the market created by Defendant No. 1 did not suffer credibility. Timely supply of spares was all the more critical as services was being provided by the Defendant No. 1.

(j) the Plaintiff cannot be allowed to take advantage of its own wrong whereby the Plaintiff, having induced the Defendants to enter into an understanding with it, subsequently resile from the said agreed terms. The defendants have prayed that leave to defend be granted to them.

17. The defendants have also filed an application under Section 5 of Limitation Act for condonation of delay of 25 days in filing the leave to defend. It is submitted that they had handed over the whole of their record to their counsel. Since the record was bulky as there were number of emails which were exchanged between the parties and since the Courts were also closed in between for the Deepawali, the delay in filing the application has occurred. It is prayed that the delay be also condoned.

18. It is submitted on behalf of the plaintiff that defendants have not disclosed any reasonable ground for condonation of delay and their applications are liable to be dismissed on this ground alone. It is further

submitted that defendants have not disputed any of the fact necessary for decreeing the suit in favour of the plaintiff. That the defendants have not denied the fact that the amount Rs. 2,77,26,742/- is due towards them. It is further submitted that suit under Order 37 can be filed on the basis of invoices as the invoices are independent contracts between the parties. It is further submitted that there was no exclusive distribution contract between the plaintiff and the defendants. It is submitted that the defendants are withholding their money with the sole intention to force the plaintiff to sign the exclusive Distributorship Agreement with them to which the plaintiff is not agreeing.

The Distributorship Agreement dated 04.09.2009 referred to by the defendants was even otherwise valid only for 2 years and not for 15 years. It is submitted that Appendix 'A' of the agreement (filed by the defendants) clearly states "*Duration: 24 calendar months from the date of endorsement*" and Article 2.03 of the said agreement also envisages that it was not an exclusive dealership agreement. It is submitted that the said clause states, "*Selling Rights Reserved: Notwithstanding anything to the contrary stated herein In this agreement the company reserves the right to sell; either directly or through any of its branch, agent, or distributors any of Its*

product, within any territory, throughout the world." which clearly shows that under this Distributorship Agreement, defendant no. 1 was not appointed as an exclusive dealer in India. It is submitted that against a written agreement, no oral evidences are admissible and the oral contentions cannot change the terms and conditions of any written agreement. It is submitted that defendant nos. 2 to 4 are all actively involved in the working of defendant no. 1 and, therefore, they are necessary parties and even otherwise the suit cannot be defeated on ground of mis-joinder of the parties in view of Order 1 Rule 9 CPC. It is submitted that application for leave to defend does not disclose any triable issue and is liable to be dismissed and the plaintiff is entitled for the decree. It is further contended on behalf of the plaintiff that the affidavit which accompanied the summons for judgment was a technical affidavit. It is submitted that the plaintiff had issued vakalatnama in favour of the firm (M/s Khurana & Khurana) of Advocates and any of the partner of the said firm can act as a Power of Attorney of the plaintiff. It is submitted that since the facts of the case are admitted and no substantive issue exists between the parties, there is no bar to passing a decree in terms of Order 37 CPC and the issue raised by defendant is just a trivial issue and cannot defeat the claim of the plaintiff. It is further

submitted that the Court has the power to ask the defendants to deposit the admitted due amount even while granting leave to defend to the defendants. Reliance is placed on the findings in the case of *Southern Sales & Services & Ors. vs. Sauermilch Design & Handels GMBH*, (2008) 14 SCC 457.

19. I have heard the parties and given due consideration to the rival contentions.

20. For the reasons disclosed in the application for condonation of delay, the delay in filing the present application is condoned.

21. First and foremost, argument of the defendants is that the suit is liable to be treated as ordinary suit because no decree can be issued by this Court under Order 37 CPC where there is a non-compliance of Order 37 Rule 3 (4) CPC read with Appendix B Form No. 4 A. It is argued that in the present case, the summons for judgment was not supported by the affidavit of the plaintiff but the Advocate of the plaintiff has filed its affidavit. It is submitted that in the *Baker Oil Tools (India) Pvt. Ltd (supra)* case before this Court, the issue which came up was whether an Advocate can act in dual capacity. It is submitted that in that case, as is clear from the facts, respondent nos. 1 and 2 had engaged the services of solicitor company known as M/s Remfry & Sagar and two Power of Attorneys were executed

by the respondent nos. 1 and 2 nominating Advocates with their specific names who were working for the said solicitor company. M/s Remfry & Sagar had acted in a dual capacity of a client when he also gave the evidence on behalf of the respondent company on the factual matrix of the case. This Court relied on the Bombay High Court judgment in ***Oil and Natural Gas Commission vs. Offshore Enterprises Inc.***, AIR 1993 Bombay 213 wherein the issue of dual capacity was dealt. The defendants have relied on following extract of ***Oil & Natural Gas Commission*** (*supra*) reproduced as under:-

“.....In this background, I formulated the following questions for consideration of this Court in this respect.

(i) Whether an Advocate is entitled to act as Constituted Attorney of a party with authorisation to sign the pleadings and affidavits on behalf of the suitor as well as to act and plead for the party concerned in the same litigation;

(ii) Whether the existing practice followed by firm of Advocates/Solicitors/Attorneys particularly in case of non-resident clients as aforesaid is in conformity with law and the recognised rules of professional ethics;

7. It is well settled law that the constituted attorney of a suitor has no right of audience in Court or to cross-examine witnesses. The Constituted Attorney is merely entitled to 'act' and 'appear' for a party but has no right to 'plead' in a Court. The expressions 'act' and 'appear' do not mean 'right to plead' as such. It has been so held by our High Court in the case of A.S. Patel v. National Rayon Corporation Limited, MANU/MH/0123/1955: AIR1955Bom262 . It is permissible for an Advocate to act as a 'recognised agent' or a Constituted Attorney by virtue of Power of Attorney executed in his favour by a suitor and

sign vakalatnama pleadings and affidavits on behalf of the donor of Power of Attorney to the extent provided in the Code of Civil Procedure as aforesaid. In all such cases the signature of Constituted Attorney on pleadings, affidavits, vakalatnama and other documents is liable to be equated to signature of a party itself for all practical purposes. It follows that in all such cases the plaintiff or the defendant is deemed to have signed the pleading by the hand of his Constituted Attorney. The pleadings are required to be verified and declared by the signatory thereof with reference to personal knowledge of the averments made therein or on basis of information and belief. The question to be asked is as to whether an advocate who acts as Constituted Attorney of a suitor in pursuance of power of attorney from his client is entitled to combine his role of a constituted attorney with that of an advocate in the same cause simultaneously. Members of the Bar are governed by the provisions contained in the Advocates Act 1961, well known principles and doctrines recognised for generations and are rightly described as partner in Administration of justice. Advocates in their professional capacity are enjoined to act with complete impartiality and detachment and not entitled to identify themselves with the clients or the cause personally. The paramount duty of an Advocate is to assist the Court in its task of administering justice. In, the event of there being any conflict between interest and duty, the Advocate must yield in favour of his duty to assist the cause of fair and impartial justice. An Advocate is expected to be fair and reasonable towards his opponent. All these principles bind the Advocates in discharge of their professional duties. Advocates belong to noble profession of law. On the other hand, a constituted attorney is entitled to identify himself with the donor of Power of Attorney and act in the same manner as the suitor-litigant is entitled to act. An Advocate is governed not merely by written provisions of the Advocates Act 1961 but also by traditions of the Bar built up for generation during the course of administration of justice for centuries.

It is provided by Order III Rule 4 of the Code of Civil Procedure that a vakalatnama should be signed by the party or by his recognised agent in favour of the pleader. The question to be asked illustratively is as to whether the pleader acting in his capacity as constituted attorney of a litigant can sign such vakalatnama as a client in his own favour as an Advocate or in favour of the firm in which such constituted attorney himself is one of the partners. The answer is in negative. The question to be asked is as to whether the two roles can be combined? The question to be asked is as to whether it is not inherent in the scheme and the provisions of Code of Civil Procedure and implicit in the provisions contained in Order III Rule 4 of the Code of Civil Procedure and other connected provisions that advocate who acts or appears or pleads before the Court in a professional capacity must have a client with separate and distinct identity. The answer to these questions is obvious. For all practical purposes, the recognised agent of a suitor is on par with the suitor or client himself; an Advocate is not, as an Advocate is an independent person with a specific role in administration of justice. In certain situations advocates are permitted to accept power of attorneys from a client for purpose of acting in a suit or matter, sign pleadings, vakalatnama and affidavits on behalf of plaintiff or defendant as case may be. An Advocate may be appointed as a Receiver in a suit or a cause. No one can object to the Advocate accepting these assignments permissible under the law. The question still remains as to whether the advocate who is holding a power of attorney from a client to act and appear in a suit or matter can also act in the professional capacity in the same proceedings at the same time. The answer to this question is of too obvious and has to be in negative. Detachment and impartiality expected of an Advocate is likely to be jeopardised when an Advocate acts in both the capacities. The risk in allowing combination of two roles is far too serious. I must therefore, construe the Code of Civil Procedures harmoniously and in a manner so as to prevent

confusion, anomaly and misunderstanding. In my opinion, law does not permit the combination of two capacities in the same cause. Law prohibits such combination and rightly so.

8. It is unfortunate that a totally wrong practice has grown up in our Court where one or the other partner of a solicitors' firm signs pleadings and affidavits on behalf of a foreign client in pursuance of authorisation contained in the power of attorney and the same firm of Advocate/Solicitors acts, appears and pleads in a professional capacity. The said practice is not sanctioned by law. To my mind such a practice is opposed to law.

On principle, the Advocate cannot act in dual capacity and cannot be a mixture of two characters. No express provision is required to be enacted in this behalf. With great respect, the implication from the scheme of the Code interpreted in light of well recognised rights and obligation of the Bar is too obvious. It is unfortunate that the wrong illegal practice referred to in opening part of this order and the questions formulated by the Court has continued so far.

10. It is not sufficient that an Advocate acts impartially. It is also necessary that the Advocate must always appear to act impartially. The basic principle of acting impartially and mere representation of a client consistent with duty to opponent and Court keeping reasonable distance from arena of conflict would be jeopardised if the Advocate acts in professional and non-professional capacity both in the same matter and at the same time. Practices and procedures of the Court must serve the administration of justice and rule of law in keeping with its noble ideals, traditions and objectives. The Court are required to interpret various provisions of various Acts and rules in manner so as to avoid anomalies as far as possible. Shri Ajit P. Shah, the learned counsel for the

Bar Council has invited attention of the Court to the fact that a constituted attorney is entitled to identify himself with the interest of his client and give instruction to the Advocate representing the client before the Court. It would be strange if the lawyer constituted attorney gives necessary instruction in the matter to himself or his co-partners. Taking an overall view of all the relevant provisions pointing out to the Court and their objectives as indicated above, I have no hesitation in accepting each of the submissions urged on behalf of Bar Council of Maharashtra and Goa and interpret the relevant provisions so as to infer prohibition of combination of two capacities by necessary implication.

11. It makes no difference that the power of attorney is executed in favour of one or other partner of the firm of the Advocate and the litigation is in fact conducted by another partner of the advocate's firm. If the vakalatnama is executed by a client in favour of firm of advocates it follows that all the partners of the said firm are engaged as Advocates by the client concerned. It makes no difference to the situation that the vakalatnama is accepted in writing only by one of partners of the firm. All the partners need not place their signatures on the vakalatnama. Each and every partner of Advocates' firm is enjoined to act in such cases in professional capacity or no other capacity. No conflicting role can be assumed by one or other partners of the same firm in respect of the same cause or the matter.

12. There is an additional facet. On close scrutiny of Order III Rule 4 of the Code and other connected provisions, I hold that an Advocate acting in professional capacity must be independent of the suitor or his constituted Attorney. Rule of professional ethics framed by the Bar Council clearly provide in terms that no one can accept a brief or appear as an advocate if he is likely to be a witness in the case. Affidavits may be filed under Order XIX Rule 2 of the Code of Civil Procedure. On several occasions Affidavits are filed, by the constituted

attorney of the suitor. Pleadings can be signed and verified by a Constituted Attorney. Once the constituted attorney of a suitor files an affidavit, he can be summoned by the Court at the instance of other side or suo motu for cross-examination. The very possibility of the advocate holding power of Attorney being summoned as a witness in such cases is sufficient to infer implied prohibition on combination of two capacities. Rule 13 of the rules of Bar Council cannot be treated as exhaustive. The said rule is illustrative and does not take care of all situations. Even if an Advocate is not likely to be called as a witness, he cannot combine the two roles as discussed above. I find considerable force in each of the submissions made by Shri Ajit P. Shah on behalf of the Bar Council of Maharashtra and Goa. I accept each of the submissions made on behalf of Bar Council. Practice prevailing in our Court in case of foreign or non-resident clients whereby the Advocates' firm acts in a professional capacity and one or two partners of the same firm obtain power of Attorney with authorisation to sign pleadings and affidavits etc. is opposed to law as aforesaid. It is not possible to put judicial imprimatur on such a practice. Even if no personal affidavits are filed by the Advocate concerned in pursuance of the power of Attorney, the Advocate cannot combine the two capacities and the two roles.

15. In view of above I therefore, answer the questions formulated by the Court at the commencement of hearing of this proceedings as under:

(a) An Advocate is not entitled to act in a professional capacity as well as constituted attorney of a party in the same matter or cause. An Advocate cannot combine the two roles. If a firm of Advocates is appointed as Advocates by a Suitor, none of partners of the Advocates' firm can act as recognised agent in pursuance of a power of attorney concerning the same cause.

(b) The existing practice followed by the firm of advocates/solicitors/attorneys particularly in case of non-resident clients combining the two roles is opposed to law and is required to be discontinued forthwith.

(c) The Prothonotary and Senior Master, High Court shall not accept any vakalatnama in favour of a firm of advocates where one or the other partner of the same firm also holds a power of attorney from the Plaintiff or the Defendant or any other suitor before the Court in the same cause”.

22. It is argued that compliance of Order 37 Rule 3 (4) is mandatory and where summons for judgments is not in terms of Order 37 Rule 4 and Appendix B Form No. 4 A, the defect in summons for judgment cannot be cured subsequently by filing affidavit of the plaintiff.

23. It is further submitted that in the case of ***Columbia Pictures Industries*** (*supra*) also, the Court has held that an Advocate cannot act in dual capacity of an Advocate as well as a client on the basis of the Power of Attorney and since the summons of judgment were defective, suit be treated as normal suit.

24. It is however argued on behalf of the plaintiff that the Distributorship Agreement dated 04.09.2009 was between Vatech Asia, Singapore and there was no Distributorship Agreement between plaintiff and the defendants, it is also argued that even otherwise the said Contract was for 24 months and has

already expired and the document also does not state anywhere that the defendants were given exclusive distributorship of the products. It is further argued that the defendants have not denied their liability anywhere. There is no denial that the invoices were not raised, 50% advance money was not released and that the goods were not supplied and thus any defence which the defendants are not trying to raise are moonshine. It is further argued by learned counsel that affidavit accompanying the summons for judgment is a technical affidavit, and because the vakalatnama is in the name of firm of the Advocates, any of the partner of the said firm can act as Power of Attorney and that it's a technical issue and not fatal to the suit. It is argued that findings in *Columbia Pictures Industries (supra)* and *Baker Oil Tools (supra)* are distinguishable. *Simba F.R.P (supra)* case is also distinguishable on the facts of the present case.

25. The Court deals with grant of leave to defend under Order 37 Rule 3 CPC. It reads as under:-

“3. Procedure for the appearance of defendant.- (1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in court an address for service of notice on him.

(2) *Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.*

(3) *On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.*

(4) *If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.*

(5) *The defendant may at any time within ten days from the service of such summons for It's affidavit or otherwise d such facts as may be deemed sufficient to entitle him to defend , apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court or judge to be just:*

*Provided that leave to defend shall not be refused unless the court-is-satisfied.*hat the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:*

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

(6) *At the hearing of such summons for judgment,—*

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the court or judge may direct him to give such security and within such time as may be fixed by the court or judge and that, on failure to give such security within the time specified by the court or judge or to carry out such other directions as may have been given by the court or judge, the plaintiff shall be entitled to judgment forthwith.

(7) The court or judge may, for sufficient cause shown by the defendant, excuse the delay the defendant in entering an appearance or in applying for leave to defend the suit.

(emphasis supplied)

The principles governing the grant of leave has been discussed elaborately by the Apex Court in the case ***Mechelec Engineers & Manufacturers vs. Basic Equipment Corporation***, AIR 1977 SC 577. In para 8, the Court has summarised it as under:-

*“8 In **Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee** 49 C.W.N. 246 , Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :*

(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign

judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence.

26. The plea of defendants is that there is no written contract between the parties and, therefore, the case is not covered under Order 37 of CPC. Summary suit is a remedy available to the plaintiff where the suit is based on the bills of exchange, hundies and promissory notes or the ones in which a Plaintiff seeks only to recover a debt or liquidated demand in money payable on a written contract, an enactment, where the sum to be recovered is a fixed sum of money or in nature of any debt except penalty, a guarantee

- in respect of a debt or liquidated demand. There is no dispute to the fact, in the present case, that the defendants had placed an order upon the plaintiff and as per the practice, followed by both for a long period, the defendants paid advance money equivalent to 50% of the total value of the goods for which invoices were raised. There is also no dispute that the goods were supplied under these invoices to the defendant and thereafter commercial invoices were raised by the plaintiff.

27. The defendants have raised the defence that the plaintiff had entered into an exclusive Distributorship Agreement through its sister concern with the defendants but it, in violation of the said agreement, appointed M/s Chesa as its distributor in southern India.

The plaintiff, however, has argued that there never was any agreement of exclusive distributorship with the defendants. The agreement of distributorship, which was executed by its sister concern in favour of the defendants was only an agreement for distributorship and not an exclusive distributorship and this agreement was operative for two years and that period has already expired. It is further argued that even otherwise, the defendants cannot withhold the money to pressurise the plaintiff to enter into an exclusive Distributorship Agreement with the defendants. On

examination of the relevant document, it is clear that the contentions and arguments of plaintiff find support from these documents. The alleged Distributorship Agreement (Article 2.03 & Appendix A) clearly envisages that it was not an exclusive Distributorship Agreement and was valid for 2 years only. The defendants have failed to place on record any other documents to show that the plaintiff or its sister concern had entered into an exclusive Distributorship Agreement with it. Defendants cannot withhold the money with the object of pressurising the plaintiff to enter into any agreement. Once it has, against invoices, released the advance money (50% of the value) and received the good without any demur or complaint, the defendants are liable to pay the balance due amount raised by plaintiff against commercial invoices. The invoices, as is clear from the document itself, are a valid contract between the parties. It contains offer, acceptance and the consideration of such agreement as defined in Section 2 (h) of the Indian Contract Act, 1872. Reliance of defendants on *Simba (supra)* is misplaced since facts are entirely different. The court has observed in para 6 as under:-

(6) From a perusal of the correspondence it cannot be said that the same constitutes a written contract which could be made the basis of a suit under Order xxxvii Civil Procedure Code. It cannot be said that there was "consensus of mind

which led to a contract". In the instant case, there was an offer, counter offer in which different terms and conditions were specified and agreement had not been reached on all the terms such as freight, advance, delivery, etc.

COUNSEL for the petitioner had relied on Air 1992 Delhi I titled M/x.Punjab Pen House Vs. Mis. Samrat Bicycle Ltd. in support of the contention that written contract could be on the basis of correspondence exchanged. In the case cited a suit under Order xxxvii Civil Procedure Code was held to be maintainable based on an invoice since the invoice embodied all the terms and conditions of the contract. It was the admitted position between the parties that the supply of the goods had been under the terms and conditions as per the invoice. In the case before us the invoice does not contain the terms and conditions of the contract and it cannot be said that all the terms and conditions of supply had been agreed to between the parties in the correspondence exchanged."

(emphasis supplied)

From perusal of the invoices in this case, it is apparent that the documents contains all the terms and conditions of the Contract. This case, in fact, find support from **Punjab Pen House** (*supra*) distinguished on facts by Court in **Simba** (*supra*). Therefore, I hold that invoices formed a valid Contract between the parties. Also this Court, in **Iron and steel** (*supra*) after considering catena of judgments held that invoices which contains description of goods, quantity of goods supplied, its value and payment terms, are written contracts within the meaning of sub-clause (2) of Rule 2 of Order 37 CPC.

28. The other contention of the defendants is that it had suffered losses for the act of the plaintiff. Defendant has already filed a suit of Rs. 5 crores for such losses and damages, which is pending trial and thus this matter is already subjudice.

29. The defendants have also argued that where there is a violation of the legal provisions, a decree in terms of Order 37 CPC cannot be passed and even the suit is liable to be dismissed. It is argued that the plaintiff had failed to comply with provisions of Order 37 Rule 3 (4) read with Appendix B Form No. 4 A as summons of judgment is not supported by the affidavit of the plaintiff and a defective summons of judgment was served on defendants and defect cannot be cured and so suit be treated as normal suit and no decree can be passed under Order 37 CPC.

30. There is no dispute to the factual position in this case. The summons for judgment was not accompanied by the affidavit of the plaintiff. The procedure prescribed under Order 37 has to be followed.

Order 37 Rule 3(4) CPC requires:-

“....., the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B.....”

31. This provision requires that the summons for judgment shall be served in Form No. 4 A of Appendix B. Form no. 4A Appendix B is reproduced as under:-

“Form No. 4A

“In the....Court, atSuit

No.....of 19....XYZ.....Plaintiff

Versus

ABC.....Defendant

Upon reading the affidavit of the plaintiff the Court makes the following order, namely:

Let all parties concerned attend the Court of Judge as the case may be on theday of....19...., at....O'clock in the forenoon on the hearing of application of the plaintiff that he be at liberty to obtain judgment in this suit against the defendant (or if against one or some or several, insert names) for Rs....and for interest and costs.

Dated the...day of ...19...”

32. It requires the Court to pass an order only on the basis of the affidavit of the plaintiff. In the present case, the affidavit supporting summons of judgment is of an Advocate. In *Baker Oil case (supra)*, also in *Oil and Natural Gas Commission (supra)* and *Columbia Pictures (supra)*, the Courts have categorically held that an Advocate cannot act in dual capacity and so cannot file an affidavit on behalf of the plaintiff and where firm has been engaged all the partners of the firm can act only as counsel of plaintiff

and are incapable of filing affidavit in lieu of plaintiff. By necessary implications, it can be said that summons of judgment has to be accompanied by the affidavit of the plaintiff or his duly authorized Attorney, and the counsel's affidavit is not a sufficient compliance of Order 37 Rule 3(4) CPC read with Appendix B Form No. 4 A. In the present case, there is no affidavit of the plaintiff company and the summons of judgment carries the affidavit of his Advocate. There is thus apparent violation of the provisions of Order 37 Rule 3(4) read with Appendix B Form No. 4 A. This court in the case **Satish Kumar** (*supra*) has clearly held that such a defect is incurable. The Court has held as under:-

Para 8. "Now the next question is as to whether the said defect appearing in the summons for judgment can be cured subsequently simply by filing an affidavit subsequently by the plaintiff, copy of which, of course was furnished to the defendant. In the opinion of this Court and for the same reason that the summons for judgment issued in this case were defective and in valid for want of affidavit, the most appropriate and legal course for the trial court was to have issued a fresh summons for judgment Along with a copy of the affidavit rather than to all upon the plaintiff to file an affidavit and reply upon the same for the purpose of passing a decree. The very fact that the learned trial court had not decreed the suit at once after supply of the copy of the affidavit to the defendant and had posted the case for arguments and disposal of the application moved by the defendant on several dates itself shows that the court was entertaining a serious doubt about the validity of the summons for judgment issued by it else if the trial court treated the subsequent filing of the affidavit a compliance of the provisions

of Sub-rule 4 of Rule 3 of Order xxxvii of the Code, it would have then and there notified the defendant that the defendant will be deemed to have been served with the summons for judgment on that date and then he could be called upon to file a leave to defend application, if any, within ten days from the said date. However, nothing of the sort was done and the court kept on adjourning the matter for hearing and disposal of the application moved by the defendant. In the opinion of this Court learned trial court has erred in relying and acting upon the subsequent affidavit and treating the same as due compliance for issuing the summons for judgment and passing the decree. The defendant was not obliged to file a leave to defend application against an invalid and defective summons for judgment. Having regard to the entire background of the matter and the defect appearing in the summons for judgment, in all fairness the court ought to have exercised its jurisdiction and discretion in allowing the application rather than dismissing it.

33. In the present case, as is evident, the plaintiff even did not make any effort to substitute the affidavit of its Advocate with that of its own.

34. In view of the above discussions, it is apparent from the totality of facts and circumstances of the case, more particularly the issue that the summons for judgments suffers with legal infirmity, I am satisfied that it is a fit case to grant leave to defend to the defendants.

35. I am satisfied that on the facts of the case, where the document shows that the defendants owes Rs. 2,77,26,742 to the plaintiff, while granting the leave to defend to the defendants, defendants are directed to deposit the said money with the Registrar General within six weeks from the date of the

order and it is a pre-condition to the grant of leave to defend. In case, the money is not deposited by the defendants within the stipulated period, application for leave to defend shall be considered to have been dismissed and the plaintiff shall be liable for the decree. The money be kept in fixed deposit, till further orders.

Both the applications stand disposed of.

CS(OS) 1849/2015

Matter be put up before the Roster Bench, subject to orders of Judge in-Charge (Original Side) for 12.07.2017.

**DEEPA SHARMA
(JUDGE)**

MAY 30, 2017
SS

