

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

Date of decision: 8th April, 2013.

+ **CS(OS) 631/2010 & I.A. No.13606/2011 (u/O 37 R-3 CPC)**

M/S. TTK PRESTIGE LTD.

..... Plaintiff

Through: Ms. Vasudha Arya, Ms. Samridhi
Chawla and Rajesh Sharma,
Advocates.

Versus

M/S. INDIA BULLS RETAIL SERVICES LTD. Defendant

Through: Mr. Chetan Sharma, Sr. Adv. with
Mr. Ankit Shah and Mr. Arnar
Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

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08.04.2013

I.A. No.4674/2012 (of defendants for leave to defend)

1. The plaintiff has instituted this suit under Order XXXVII of Civil Procedure Code, 1908 for recovery of Rs.20,52,551.78 with *pendente lite* and future interest at 24% per annum pleading:

(i) that the plaintiff, as per the orders placed by the defendant on the plaintiff, sold/supplied and delivered pressure cookers, pressure pans, non-stick cook wares, appliances and other kitchen utensils manufactured by the plaintiff to the defendant through its various

branch offices and the defendant had acknowledged the receipt of the same; the acknowledged copies of the invoices vide which the sales were made, are filed as annexures B-1 to B-7 to the plaintiff;

(ii) that the defendant has made partial payments only, leaving a balance principal sum of Rs.14,77,761.81 due to the plaintiff. The plaintiff, in para 6 of the plaint, has given the particulars of the invoices/delivery/challans raised on the defendant and as per which:

(a) a sum of Rs.2,09,972.30 is due under the three invoices total amount for the goods delivered at Ludhiana, Punjab Branch of the defendant;

(b) a sum of Rs.82,846/- is due out of the invoice for Rs.1,78,638.87 for the goods delivered at Jaipur, Rajasthan branch of the defendant;

(c) a sum of Rs.1,20,520.86 is due out of the invoices for the total amount of Rs.1,46,742.96 for the goods delivered at Ahmedabad branch of the defendant;

(d) a sum of Rs.1,44,310.96 is due towards the total value of the invoices for the goods delivered at another branch at Ahmedabad of the defendant;

(e) a sum of Rs.4,69,735.61 is due towards the total value of the invoices for the goods delivered at Pune branch of the defendant;

(f) a sum of Rs.2,28,194.68 is due towards the total value of the invoices for the goods delivered at Shahdara, New Delhi branch of the defendant;

(g) a sum of Rs.2,22,181.70 is due towards the total value of the invoices for the goods delivered at Shalimar Bagh, New Delhi branch of the defendant.

(iii) that the amount of the said invoices was agreed to be paid within 30 days from the date of the invoices and the defendant had agreed to interest @ 24% per annum on over-due bills;

(iv) that a sum of Rs.5,74,789.97 (Rs.20,52,551.78 – Rs.14,77,761.81) is due towards interest till the date of institution of the suit.

2. Summons for appearance and thereafter summons for judgment were delivered on the defendant. The defendant has sought leave to defend on the following grounds:

(a) that the plaintiff has based its claim on its own ledger entries,

without showing any admission of the defendant towards any liability;

(b) that the defendant, as per the Procurement Orders placed on the plaintiff, was entitled to raise credit notes/memos on the plaintiff towards insufficient/wrong supply;

(c) that the plaintiff is to debit the credit notes/memos raised by the defendant from the outstanding payment due;

(d) that the plaintiff has failed to take the credit notes/memos into consideration and since at different points of time credit notes/memos were raised, there can be no case of proper supply of goods;

(e) that the defendant disputes any liability to the plaintiff;

(f) that the suit is barred by limitation;

(g) that there are instances of short supply, return of goods, substandard goods supply, non billing, wrong billing etc. on the part of the plaintiff;

(h) that all payments for the goods supplied have already been made;

(i) that in the retail trade there is a process of reconciliation which is usually carried out at the end of each month; assuming that any

amount at all is due to the plaintiff, the same can only be quantified after the process of reconciliation is carried out by the defendant;

(j) that the plaintiff has failed to specify the invoices against which the amount remains outstanding;

(k) that the plaintiff has not pleaded any written contract which is a *sine qua non* for an action under Order XXXVII of CPC;

(l) that the instant suit would require detailed examination of documents;

(m) that no rate of interest for outstanding payment has been agreed to between the parties in any document.

3. The senior counsel for the defendant and the counsel for the plaintiff have been heard.

4. The senior counsel for the defendant has at the outset drawn attention to the invoices annexures B-1 to B-7 on which the suit is based and has shown the same to be pertaining to supplies made at Ludhiana, Jaipur, Ahmedabad, Pune and Delhi and containing the following clause:

“in case of dispute _____ Court will have jurisdiction”

and referring to the Court of the place where the supplies were made. It is thus argued that this Court would have jurisdiction only qua the amount

claimed for the goods supplied at Delhi. It is further argued that the suit is based on a unilateral claim of the plaintiff and without any admission thereof by the defendant. Upon attention of the senior counsel for the defendant being drawn to the stamp which each of the invoices bears of 'Piramyd Retail Ltd.', of receipt of the goods to which invoices pertain and it being enquired as to why the said stamp of 'Piramyd Retail Ltd.' (of which the defendant is the successor) do not amount to admission of receipt of goods of the value mentioned therein, the senior counsel for the defendant draws attention to the clause "subject to verification and checking" which each of the said stamps contain. It has however been enquired from the senior counsel as to whether upon verification and checking any discrepancy in the goods received under the said invoices was pointed out. The senior counsel fairly states that he has no instructions. Needless to state that there is no plea in the leave to defend application, of any protest against the invoices, after verification and checking, having been lodged and neither any particulars thereof given nor any document by which such protest many have been made, filed.

5. As far as the argument, of the suit being not maintainable under Order XXXVII of CPC because of the same being not based on the written

contract is concerned, this Court in *Punjab Pen House Vs. Samrat Bicycles Limited* AIR 1992 Del. 1, *Corporate Voice Private Limited Vs. Uniroll Leather India Limited* (1995) 60 DLT 321, *Beacon Electronics Vs. Sylvania and Laxman Limited* (1998) 45 DRJ 439 and *M/s. KIG Systel Limited Vs. Fujitsu ICIM Ltd.* AIR 2001 Del. 357 has held such invoices duly acknowledged by the defendant to be forming a written contract within the contemplation of Order XXXVII of CPC. The defendant, in the face of the written contract acknowledging the receipt of the goods of the value mentioned in each invoice, was required to specifically plead that upon verification and checking the goods were not found to be as mentioned in the said invoice and were rejected. No such plea has been taken. A general plea, of the defendant being entitled to and having raised credit notes/memos for the defects/short supply/delay in supply etc, without even giving the particulars of the said credit notes/memos and without filing the copies of the said credit notes/memos before this Court, does not amount to disclosing a substantial defence to the claim for recovery of amounts due under the said invoices and such vague and general plea has to be held to be a moonshine and vexatious.

6. Faced therewith, the senior counsel for the defendant states that in

fact reconciliation of accounts is underway at the end of the defendant and till now a sum of approximately Rs.4.40 lakhs has been found to be due to the plaintiff and the defendant is agreeable to deposit the principal suit amount in this Court as a condition for grant of leave to defend.

7. The defendant in a suit under Order XXXVII of CPC cannot so lure the Court into granting leave to defend, if otherwise no ground therefor is made out.

8. The only real ground for leave to defend, as far as the claim for principal amount is concerned, which survives is the objection as to the territorial jurisdiction of this Court. The senior counsel for the defendant in that regard has also contended that the claim for supplies made at Delhi is only of Rs.2,28,194.68 and Rs.2,22,181.70 i.e. total Rs.4,50,376.38 which will be below the minimum pecuniary jurisdiction of this Court and the suit will have to be transferred to the Court of appropriate pecuniary jurisdiction.

9. Attention of the senior counsel for the defendant is again invited to the clause quoted supra qua jurisdiction which is does not mention the words such as 'exclusively' or 'only' and it has been enquired whether the same can restrict the right of the plaintiff to only approach the Court mentioned in the respective invoices inasmuch as else this Court where the

registered office of the defendant is situated, it is not controverted, has territorial jurisdiction. No answer has been forthcoming.

10. The Supreme Court in *Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.* (2004) 4 SCC 671 was concerned with such clauses and has held that it is pertinent to see whether there is ouster of jurisdiction of other Courts; that where words like “alone”, “only”, “exclusive” and the like have been issued, there may be no difficulties; even in the absence of such words an agreement of exclusive jurisdiction if otherwise evidenced from the intention of the parties can be deciphered. I am however in the facts of the present case unable to decipher any such agreement between the parties to the exclusive jurisdiction of the Courts mentioned in the respective invoices. The plaintiff, under the arrangement with the defendant, was making delivery of goods for sale at retail outlets of the defendant in the various cities. The clause qua jurisdiction appears to be more enabling than restrictive. When the parties agree to sale and supply of goods at various destinations, in the absence of the words ‘only’ or ‘exclusively’, ‘alone’ the parties cannot be presumed to have agreed to the jurisdiction only of the Courts at the place of supply inasmuch as that is likely to result in an anomalous situation. The clauses in the invoices rather appear to be with

the motive that if the disputes were only with respect to the supply of goods at one jurisdiction, to enable the institution of the proceedings in that jurisdiction and not to, when the disputes relate to supplies at numerous places as has happened, requiring the parties to on identical disputes, fight in different Courts. The Policy of India is not to encourage multiplicity of litigation and the conduct of the parties is to be deciphered in accordance with the said Public Policy only.

11. Though the defendant has pleaded and the senior counsel for the defendant has also argued that there is no agreement as to the rate of interest but all the invoices duly acknowledged by the defendant are found to contain the following clause:

“interest at 24% per annum will be levied for payment over 30 days”.

The transaction between the parties being commercial and the parties being large corporate houses with their open eyes having agreed to the said terms and conditions, I am not inclined to interfere with the said agreement at least for the pre-institution period. However, interest *pendente lite* and future is restricted to @ 10% per annum being the average rate of interest offered by Nationalized Banks on fixed deposits during the said time.

12. It may be recorded that the senior counsel for the defendant has not

addressed arguments on any of the other pleas in the application for leave to defend and hence need is not felt to deal therewith. Even otherwise, the suit claim is found to be within the period of limitation as all the invoices are of the year 2008 and the suit was instituted in the year 2010.

13. It may also be recorded that as far as the suit for recovery of the price of goods supplied at Jaipur and Parimal Garden, Ahmedabad is concerned, it is not for the full amount of invoices raised for supplies at the said destinations but for the balance thereon. The invoices of the total value stand acknowledged as aforesaid by the defendant. The plaintiff itself is admitting receipt of part of the price of the invoices and has made a claim for the balance only. The defendant has not pleaded that the balance due is anything other than as pleaded by the plaintiff. Thus, the said claim is also found to be within the ambit of Order XXXVII of CPC.

14. The leave to defend application of the defendant is thus not found to be indicating that the defendant has a substantial defence to raise and rather the application for leave to defend and the argument is indicative of the defence put up being frivolous and vexatious.

15. Accordingly, the application for leave to defend is dismissed.

16. Axiomatically, the suit of the plaintiff for recovery of

Rs.20,52,551.78 with interest @ 10% per annum on Rs.14,77,761.81 from the date of institution of the suit till the date of payment is decreed in favour of the plaintiff and against the defendant. The plaintiff shall also be entitled to costs of the suit as per schedule.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

APRIL 08, 2013

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