

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **I.A. No. 14953/2012 (O.XXXVII R.3(5) CPC) in CS(OS) 2219/2011**
% Reserved on: 22nd October, 2013
Decided on: 1st November, 2013

T L VERMA & CO PVT LTD. Plaintiff
Through: Mr. Sunil Malhotra, Advocate.

versus

GAMMON INDIA LTD. Defendant
Through: Mr. Ritesh Agrawal, Advocate.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

I.A. No. 14953/2012 (u/Order XXXVII Rule 3 (5) CPC)

1. By this application the Defendant seeks leave to defend inter alia on the ground that the suit filed by the Plaintiff does not disclose any cause of action within the jurisdiction of this Court. The Plaintiff is based in Chandigarh, the Defendant has its registered office in Mumbai and admittedly the goods were supplied at Alwar, Jaisalmer and Jodhpur. The supply orders were placed and issued by the Defendant Company from its Mumbai office. Thus no cause of action having arisen in Delhi, this Court has no jurisdiction to entertain the present suit. Further the present suit cannot be classified under Order XXXVII CPC as the Defendant has never raised any invoice or issued a cheque to the Plaintiff and consequently there

was no occasion to return the same as unpaid by the bankers of the Defendant. The Defendant never admitted its liability. In fact the Plaintiff Company supplied defective material which was neither as per the IS code nor the specification informed and thus the same was rejected causing heavy loss to the Defendant Company. The Plaintiff Company was required to provide Test Certificate with every consignment as per the purchase order which were not provided by them. Further in most of the consignments, 20-30% of the material was found broken and could not be utilized by the Defendant Company. The Defendant Company has no office, employee or staff at second floor Ahluwalia Chambers, Sector-16-17 LSC Madangir, Delhi and the same is only a correspondence address. Thus leave to defend be granted.

2. Learned counsel for the Plaintiff on the other hand contends that this Court has territorial jurisdiction to entertain the suit in terms of Section 20 CPC as the Defendant Company is working for gain at Delhi. Further the defence sought to be raised are moonshine, sham, bogus and no triable issue is made out. In the plaint, the Plaintiff has clearly stated that the office of the Defendant is situated in Delhi. The orders were placed from Delhi and even the cause of action arose at Delhi. The contention of the Defendant that no

invoices were raised is incorrect. The defence now being taken up that the goods were rejected as being not of proper quality and in broken condition, is not borne out from the record as no intimation of the rejection of goods was sent by the Defendant Company to the Plaintiff and thus this plea is unsustainable. The Defendant has not released payments against any of the invoices raised by the Plaintiff till date despite communications. It is for the first time in the leave to defend application, the Defendant is taking the plea regarding the quality of the material mala fide and mischievously. Vide emails dated 26th August, 2009 and 30th October, 2009 the Purchase Officer of the Defendant admitted and acknowledged the liability to pay the amount of Rs. 35,89,039/- to the Plaintiff, copy of which email was also endorsed to the General Manager and Managing Director of the Defendant. Reliance is placed on *Easter Industries Ltd. vs. Vasudevaya Text Pvt. Ltd. and another*, *FAO No. 797/2003* decided on 13th November, 2007; *Narender Gupta vs. Reliance Polycrete Ltd. and others*, 178 (2011) DLT 196; *Modipon Limited vs. Singhal Transport Corpn*, 183 (2011) DLT 195 and *Srodeep Polymers Ltd. vs. SCJ Master Batches*, 179 (2011) DLT 595.

3. I have heard learned counsel for the parties.

4. The Plaintiff has filed the present suit under Order XXXVII CPC for recovery of Rs. 45,65,835/- along with interest. The case of the Plaintiff is that the Plaintiff Company having its registered office at Chandigarh, supplies and distributes glasses and plywoods. The Defendant is a civil engineering construction company executing works pertaining to construction of bridges, ports, power stations, dams and other civil works in India and abroad and had undertaken certain works at Jodhpur, Alwar and Jaisalmer. The Defendant approached the Plaintiff for supply of glass and related materials for the works to be executed by it at the three places mentioned above. The Plaintiff agreed to supply the requisite quantity of material. For the Jodhpur site, the Defendant raised two purchase orders dated 24th December, 2008 and 27th December, 2008 on the Plaintiff for supply of plain glasses and figured glasses as per the specifications. The Plaintiff sent the consignment consisting of eight cases of glass and raised the invoice dated 25th December, 2008 on the Defendant for an amount of Rs. 3,48,818/- however, no payment has been made to the Plaintiff against the invoice dated 25th December, 2008. The Defendant also placed purchase orders for supply of glasses which were sent vide Lorry Receipt No. 2604 dated 29th December, 2008 and the invoice was raised for an amount of Rs.

4,02,484/-. Another consignment was sent at Jodhpur vide invoice dated 16th January, 2009 for an amount of Rs. 4,76,990/-. Further materials were sent vide invoices dated 16th January, 2009 and 2nd March, 2009 to the Defendant for an amount of Rs. 4,76,990 and Rs. 1,31,036/- however, no payments have been received. Similarly for the Alwar site materials were supplied vide invoices dated 2nd January, 2009, 19th January, 2009 , 24th January, 2009, 2nd February, 2009, 6th February, 2009, 2nd March, 2009. For the Jaisalmer site goods were supplied vide invoices dated 2nd February, 2009, 27th February, 2009 and 25th March, 2009. Since the Defendant failed to make the payments, negotiations were entered into. Vide emails dated 26th August, 2009 and 30th October, 2009 the Defendant admitted and acknowledged its liability for a payment of amount of Rs. 30,85,039/-. The email dated 30th October, 2009 was also endorsed to the General Manager and Managing Director of the Defendant. Further the legal notice dated 2nd November, 2010 was also sent to the Defendant under the Provisions of Sections 430 and 433 of the Companies Act however, still the Defendant failed to make the payment. Thus the Plaintiff filed the present suit for passing of a decree for an amount of Rs. 30,85,039/- with interest thereon @

24% per annum which makes the total of Rs. 45,65,834/- and also the interest pendente lite and future.

5. The first and foremost issue which arises is whether this Court has jurisdiction to entertain the present suit. Admittedly, the Plaintiff is based in Chandigarh and the Defendant in Mumbai. The goods were supplied at Rajasthan. However, a perusal of the communications between the Plaintiff and the Defendant placed on record show that the Defendant had been placing the purchase orders from its Delhi office, that is, Ahluwalia Chambers, 16/17, LSC, Madangir, New Delhi-110062. The communications also give the phone numbers and email address of the Delhi office. Once the purchase orders have been placed by the Defendant from its office at Delhi and the Defendant is operating from Delhi it can safely be held that the Defendant is working for gain at Delhi and thus this Court has jurisdiction to entertain the present suit. I find no merit in the plea of the learned counsel for the Defendant that there was no office of the defendant at Delhi and the same was only a correspondence address.

6. The Plaintiff has placed on record the original invoices issued by the Plaintiff to the Defendant as noted above. A perusal of the invoices shows that it contains a clause that 'all disputes subject to Chandigarh jurisdiction

only.’ In the present case there is no cause of action which arose in Chandigarh and it is only the Plaintiff Company which is situated at Chandigarh. It is well settled that by consent, the parties cannot confer the jurisdiction on a court which does not have the jurisdiction however, the parties may subject themselves to one particular Court out of the courts which have jurisdiction to entertain the suit. As noted above the Court at Chandigarh has no jurisdiction to entertain the suit as per Section 20 CPC and in view thereof the parties cannot by agreement confer the jurisdiction on the court at Chandigarh.

7. The defence now taken by the Defendant is that the goods were defective as they did not conform to the IS specifications and 20-30% goods were broken in each consignments however, no material has been placed on record by the Defendant to show that on receipt of the goods the Defendant objected to either the inferior quality of the goods or that they were broken. The goods having been accepted, the Defendant cannot now proceed to take this defence and thus the same is liable to be rejected being sham and bogus. The Plaintiff has not only placed the invoices on record but has also placed on record the emails dated 26th August, 2009 and 30th October, 2009 to show the acknowledgment of the liability. The Hon’ble Supreme Court in *M/s.*

Mechelec Engineers & Manufacturers Vs. M/s. Basic Equipment Corporation (1976) 4 SCC 687 noted with approval the decision in *Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee* 49 C.W.N. 246 , laying down the following principles applicable to cases covered by Order XXXVII C.P.C.:

- (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.

8. In view of the facts noted above, I find no reason to grant leave to defend to the Defendant.

Application is dismissed.

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In view of the fact that this Court has already declined the leave to defend to the Defendant, a decree for recovery of a sum of Rs. 30,85,039 along with interest @ 9% from the date of admission, that is, 26th August, 2009 till the realization is passed in favour of the Plaintiff and against the Defendant. The Plaintiff is also entitled to cost of Rs. 25,000/-.

Suit is accordingly disposed of. The registry shall prepare the decree sheet accordingly.

(MUKTA GUPTA)
JUDGE

NOVEMBER 01, 2013
‘vn’