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

+ **CS(OS) 969/2014**

% *Date of Decision : 16th September, 2014*

R.S SOLUTIONS Plaintiff

Through: Mr.Pardeep Dhingra and Mr.Sachin
Sood, Advocates

versus

DAN BLOCKS BRAKES INDIA PVT LTD Defendant

Through: Mr.S.K. Bhattacharya, Ms.Seema Sharma
and Ms.Rekha Sharma, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (ORAL)

IA.No. /2014 (Leave to Defend)

1. Let the application be registered and numbered.
2. Plaintiff has filed the present suit under the provisions of Order XXXVII of the Code of Civil Procedure for recovery of Rs.41,91,111 together with interest.
3. Summons in the suit were issued to the defendant in the prescribed form. Thereafter defendant entered appearance and an application for summons for judgments was filed by the plaintiff.
4. Present application has been filed by the defendant seeking leave to defend.
5. As per the plaint, the plaintiff is engaged in the business of manufacturing and supplying industrial packaging materials such as Corrugated packing sheet, wrapping paper sheet, foam and other products used for packing.

The plaintiff was established in the year 2003. The defendant is engaged in the business of export and import of automobiles and auto ancillaries. The plaintiff also supplied packaging materials to the defendant's sister concern i.e. Roulunds Braking (India) Private Limited. The defendant approached the plaintiff to acquire packing materials/items i.e. 230X230mm and 300X250 mm corrugated sheets. The plaintiff informed the defendant of the possible market rates, which would be charged for supplying each item i.e. Rs.1.35P for 230X230mm corrugated sheets and Rs.1.55P for 300X250mm corrugated sheets. Rates were negotiated between the parties and mutually accepted at Rs.1.20 and Rs.1.35, respectively. After negotiations of the rates, the defendant placed the first purchase order bearing no.5700021785 dated 26.2.2011 in favour of the plaintiff.

6. It is the case of the plaintiff that as and when purchase orders were placed goods were supplied to the defendant. At no point of time the defendant raised any objection with respect to the rates fixed for supply of goods as agreed between the parties.
7. 4.50 lakhs corrugated packing sheets (230mmX230mm) at the rate of Rs.1.20 for each piece in the total sum of Rs.5.40 lakhs was supplied and delivered to the defendant. Similarly 3.00 lakhs corrugated sheets (300mmX250mm) at the rate of Rs.1.35 for each piece, amounting to a total sum of Rs.4,05,000/- was supplied and delivered to the defendant. In terms of purchase Order dated 26.2.2011 the defendant was to make the payment to the plaintiff within 45 days of delivery of the goods. On delivery of the packaging material, as per the purchase order, the plaintiff handed over invoice to the defendant, who duly acknowledged the receipt of the packaging material by affixing on the copy of the original invoice the seal of material received, which also bears date and signature of

defendant's representative. Defendant was also to provide Form H for the goods supplied to enable the plaintiff to get tax exemption from the Sales Tax Department as the goods supplied were against Form H. Reliance is placed on the invoice raised by the plaintiff, duly approved and acknowledged by the defendant. After successful delivery of goods in terms of first purchase order dated 26.2.2011 the defendant issued another purchase order bearing no.5700022162 dated 5.3.2011 for the supply of goods, as detailed below:

- (i) 11,20,000 quantity of corrugated packaging sheet (230mmX230mm) at the rate of Rs.1.20 for each piece and amounting to a total of Rs.13,44,000/-.
- (ii) 8,30,000 quantity of corrugated packaging sheet (300mmX250mm) at the rate of Rs.1.35 for each piece and amounting to a total of Rs.11,20,500/-.

8. The delivery of the packaging materials/ item in terms of the second purchase order of 5.3.2011 was also made, invoices were raised, the goods were acknowledged by the representative of the defendant. Thereafter, the plaintiff raised various invoices from time to time for amounts due arising out of the second purchase order. The defendant made bill to bill payment upto 31.3.2011.
9. Being satisfied with the material supplied by the plaintiff third purchase order No.5700024699 dated 15.4.2011 in favour of the plaintiff for 3,00,000 wrapping paper sheet (265x355mm) at the rate of Rs.1.35 lacs each amounting to Rs.4.5 lacs was raised. The goods were supplied. A forth purchase No.5700025604 dated 29.4.2011 for supplying of 4,50,000 wrapping paper sheet (265X355 mm) at the rate of Rs.1.35 lacs

amounting to a total of Rs.6,07,500/- was made. The plaintiff while effecting the delivery of the packing materials / item in terms of the fourth purchase order also raised the invoices and delivered the same to the defendants on delivery of the goods, who acknowledged receipt of the goods and the dues by affixing on the copy of the original invoice the seal of material received which also bore date and signature of defendant's representative.

10. After receiving the goods the payments were not forthcoming on one pretext or the other and the defendant kept delaying the payments with respect to the goods supplied by the plaintiff under the second and forth purchase order.
11. A fifth purchase order No.5700027154 was issued by the defendant in favour of the plaintiff for 100,000 quantity of wrapping paper sheet (265X355mm) at the rate of Rs.1.35 lacs each amounting to a total of Rs.1,35,000/-. The defendant pressurized the plaintiff by sending e-mails stating that the urgency of the material and the plaintiff left with no alternative supplied the same to the defendant, who acknowledged receipt of the goods and the dues by affixing on the copy of the original invoice the seal of material received which also bore date and signature of defendant's representative.
12. During this period although the goods were supplied by the plaintiff to the defendant, as demanded by the defendant in terms of 6th purchase order being Order No.5700027721 dated 6.6.2011, 7th purchase order being Order No.5100004063 dated 10.6.2011, 8th purchase order being Order No.5100004117 dated 18.6.2011, 9th purchase order being Order No.5700030226 dated 19.7.2011 and 10th purchase order being Order No.5700031072 dated 2.8.2011, but no payments were forthcoming.
13. The bills raised by the plaintiff duly acknowledged by the defendant, have

been placed on record.

14. In the application for leave to defend the stand taken by the defendant is that plaintiff has cheated the defendant, as the suit is based on over-charged invoices raised by the plaintiff upon the defendant. This is the first ground on which leave is sought.
15. Leave is also sought on the ground that the bills raised are of much higher price as compared to goods available in the market with the same specification.
16. Leave is also sought by the defendant on the ground that till 31.3.2011, the defendants made payments to the plaintiff bill to bill in the sum of Rs.25,72,275/-; and in the meanwhile, the defendant received quotations from another company dealing with supply of the same packaging material and upon noticing the difference in the quotation in the same material, the defendant was constrained to check the rates with various suppliers for similar products and all the suppliers quoted a low rate as compared to the plaintiff. The defendant company made due diligence in the market and was surprised to find that the plaintiff had actually been billed almost four times as compared to the market price. The defendant also realised that the specification agreed between the plaintiff and the defendant had also not been fulfilled by the plaintiff in the supply of goods.
17. Since the entire defence of the defendant has been raised in paragraph (ii) of grounds of leave to defend. Relevant paragraphs i.e. (ii) (f), (g), (j) and (k) are reproduced below:

“f) That in the meantime the defendant got quotations from another company dealing with the supply of the same packing materials. Upon noticing the difference in the quotations for the same materials, the defendant checked the

rates with various suppliers for similar product and surprisingly, all of them quoted very low price as compared to plaintiff, the defendant company made a due diligence in the market and was surprised to find that the plaintiff had actually been billing them almost 4 times for the said materials compared to the same material with the same specification and strength in the market. Hence, it proves that the plaintiff has knowingly cheated to defendant by representing false and overly.

- (g) Upon the said market survey, it also came to light that as per the specification agreed between plaintiff and defendant, the GSM of Wrapping Sheet should be 90 GSM. However, when the GSM was checked, it was found to be around 60-63 GSM to be precise was against agreed specification of 90 GSM. The plaintiff was called and defective products were shown to them for which they agreed. This could have jeopardize business of company in international market as defendant is in 100% EOU. The sample of the material supplied by the plaintiff is annexed hereto and marked as **ANNEXURE D-2.**
- (j) Based on all above facts, the defendant called the plaintiff company on 19/06/2012 and brought to their notice that the rates charged by them are almost 3 or 4 times higher as compared to market rates. The defendant also showed plaintiff the market rates of similar specifications and of same manufacture along with sample or product / wrapping paper. At least defendant convicted plaintiff about the overcharging of rates and the variations in the specifications by plaintiff and for which plaintiff agreed upon.

- (k) Defendant issued a debit note of the excess billed amount of Rs.39,81,600/- to the plaintiff vide debit note dated 13.7.2012. The said debit note was also handed over to the plaintiff when the plaintiffs' representative visited the defendant company on 26/07/2012. A true copy of the Debit Note dated 13.07.2012 is annexed hereto and marketed as **ANNEXURE D-3**. A true copy of the particular page of the Visitors' Register dated 26.7.2012 is annexed hereto and marked as **ANNEXURE D-4**.

18. The defendant seeks unconditional leave to contest the suit. The arguments of counsel for the plaintiff can be summarized as under:

- (i) Price and product was duly agreed upon by the parties, release orders were placed in writing by the plaintiff, goods supplied were duly acknowledged and the bills with acknowledgements have been placed on record.
- (ii) During the entire period when the goods were supplied, no objections were raised by the defendant either with respect to the quality or price.
- (iii) Large number of e-mails, copy of which have been placed on records were addressed to the defendants, not a single reply to the e-mails has been received.
- (iv) The legal notice was also not replied to;
- (v) and the sales-tax forms also not supplied.

19. The argument of counsel for the defendant can be summarized as under:

- (i) Poor quality of goods and not as per the specification.
- (ii) Plaintiff over-charged the defendants.
- (iii) Goods supplied were four times costlier than the market

rates.

- (iv) Pursuant to meeting the plaintiff agreed and a debit note was issued to the plaintiff.

20. The parameters for deciding an application for leave to defend are well settled by the Apex Court in the case of *M/s.Mechalee Engineers & Manufacturers Vs. M/s.Basic Equipment Corporation* AIR 1977 SC 577. The Apex court has drawn up the parameters to be considered by the court while dealing with the application for leave to defend. Relevant praras of the judgment reads 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 37 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, shews 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.”

21. In the case of **V.K. Enterprises Vs. Shiva Steels** reported at (2010) 9 SCC 256 it was observed by the Apex court as follows:

“8. Order XXXVII C.P.C. has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted. What is required to be examined for grant of leave is whether the defence taken in the application under Order XXXVII Rule 3 C.P.C. makes out a case, which if established, would be a plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence would have been plausible had it not been for the fact that the allegations relating to the interpolation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the issuance of the cheque had never been

disputed on behalf of the Petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means.

9. Against such cogent evidence produced by the plaintiff/respondent, there is only an oral denial which is not supported by any corroborative evidence from the side of the Petitioner. On the other hand, the ledger book maintained by the Respondent and settled by the Petitioner had been produced on behalf of the Respondent in order to prove the transactions in respect of which the cheque in question had been issued by the Petitioner.

10. In our view, the defence raised by the Petitioner does not make out any triable issue and the High Court, has dealt with the matter correctly and has justifiably rejected the Petitioner's application under Order XXXVII Rule 3 C.P.C. and the same does not call for interference by this Court. The Special Leave Petition is, therefore, dismissed, but without any order as to costs."

22. In *Defiance Knitting Industries (P) Ltd. v. Jay Arts* reported at (2006) 8 SCC 25 the court observed that "if the court is satisfied that 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, it may refuse leave to defend altogether."
23. While considering the application for leave to defend, the Court must consider as to whether the defendant has been able to raise a strong and bona fide defence or whether the defence sought to be raised by the defendant is sham, moonshine and mala fide. In case it is seen that the defence is sham, moonshine and mala fide, the application for leave to defend is to be dismissed and the suit is to be decreed. On the other hand, in case a triable issue is raised indicating a fair and bonafide defence, the Court must consider granting conditional leave; and in case a strong

defence is raised by the defendant, the defendant would be entitled to unconditional leave.

24. In the present case, while the plaintiff has placed copies of the release orders and all bills evidencing receipt of goods by the defendant in support of his plea that goods were duly supplied on the basis of the representation of defendant. As per the leave to defend application the defendant made payments to the plaintiff, till such time the goods were as per the specifications and till such time the defendant was not aware that the defendant has been over-charged by the plaintiff.
25. Grounds (ii) (f), (g), (j) and (k) extracted above would show that the defendant has failed to give any date as to when the defendant got quotations from the other companies and as to when the defendant came to learn that they were being over-charged. Surprisingly paragraphs even do not mention as to when the defendant at the first time realized that the goods were not being supplied as per the specification. Absence of any date or particulars would show that a weak defence and sham is sought to be raised by the defendant. It is also surprising that in case the defendant found that the goods either to be not as per specification or in case the defendant found that they were being over-charged, why repeated release orders were placed on the plaintiff and goods were continuously accepted. There is not a single endorsement on any of the bill nor any letter of protest was issued to the plaintiff that the goods were not as per the specifications or the defendant was being over-charged.
26. The fact that the defendant made payments as per their own showing upto the year 2011, pursuant to the purchase order dated 26.2.2011, would show that the parties had agreed to the price. The plaintiff has stated on affidavit that not a single objection was received with regard to either the price or the specification. Along with the leave to defend a copy of the

debit note with the copy of the visitors' register has been placed on record to show that the plaintiffs' representative had visited the defendant. Along with the leave to defend not a single letter/communication has been placed on record to show that during the entire period, which period is unclear as no dates have been mentioned by the defendant, to show that the defendant has informed the plaintiff about the poor quality of goods or over-pricing of goods. Thus the debit note seems highly unreliable.

27. On the contrary the plaintiff has placed on record copies of all the 27 bills and e-mails addressed to the defendant requesting for the payment but the defendant chose to remain silent. A legal notice was also issued to the defendant, but no response thereto was received. In my view, in case the defendant was dissatisfied either with the quality of the goods or assuming even the rates were on higher side, the defendant would surely have protested either in response to any of the e-mails or at least in response to the legal notice, but no such communication was addressed, nor such communication has been filed along with the leave to defend.
28. In my view the defence raised by the defendant is sham and moonshine and is not bona fide. Resultantly, the plaintiff must succeed. Accordingly, the application for leave to defend is dismissed. The suit [CS(OS) 969/2014] is decreed in favour of the plaintiff and against the defendant with pendente lite and future interest @ 10%.
29. Decree sheet be drawn up accordingly.

G.S.SISTANI, J

SEPTEMBER 16, 2014

msr /ssn