

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

% *Judgment pronounced on: 29th October, 2015*

+ **I.A. No.3888/2014 in CS (OS) 669/2012**

ANIL MAHESHWARI Plaintiff
Through Mr.R.K.Kohli, Adv. with Ms.Mamata
Pal, Adv.

versus

LAMBDA EASTERN TELECOMMUNICATION LIMITED
..... Defendant
Through Mr.S.Shantanu, Adv. with Mr.Pratap
Shanker & Ms.A.Shivani, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff has filed the present suit for recovery of Rs.53,79,037/- along with pendente lite interest and cost.
2. The case of the plaintiff is that he is carrying on his business operations in the name and style of Supreme Industrial Corporation and engages in business of electrical wires, cables, switchgears, switch boxes and electrical accessories of the similar type.
3. The defendant is engaged in manufacturing of PIU and other items mainly for telecom towers who has been contracting with large power distribution units and industry to lay and install electrical lines. From the year 2008, the defendant has been in active trade relations with the plaintiff for supply of electrical and allied items. As per agreed terms between the parties, the material was supplied against the purchase orders to be sent by the defendant to the plaintiff and supply

was to be made to the Kundli Project as well as to the Gurgaon Project of the defendant. The payment against the bills was to be made upon delivery of material and receipt of the bills from the plaintiff. The plaintiff used to receive purchase orders from the defendant and the material used to be delivered soon upon those purchase orders. Bills were raised and initially payments were received in satisfaction of the out.

4. During the period from June 2010 to August 2011, the plaintiff received purchase orders, from the Kundli Project and the Gurgaon Project of the defendant. The material was duly delivered and received by the defendant. Necessary taxation documents were also duly exchanged. But starting from June 2010, the defendant stopped following the payment as per terms against the material supplied.

Between 29th June, 2010 and until 17th February, 2011, when the last of the supplies was made, the plaintiff supplied material to the defendant of the sum of Rs.55,02,199/- the defendant released payment for the sum of only Rs.12,75,510/-. A payment of Rs.2,34,068/- was due in respect of delivery made to Gurgaon Project as on 3rd August, 2011, after which no payment was received by the plaintiff.

5. A copy of the running account as on 31st March, 2011 for Kundli Project and 30th September, 2011 for Gurgaon Project, as maintained by the plaintiff in the ordinary course of its business, of transactions between plaintiff and the defendant has been placed on record. The supplies were made to the defendant's Kundli Project, a sum of Rs.42,26,689/- is outstanding, while for the Gurgaon Project another sum of Rs.2,34,068/- is outstanding.

6. The plaintiff had several times represented to the officials of the defendant to expedite payments, but received no positive response. Looking at the attitude of the defendant, the plaintiff had to address a legal notice to the defendant through its counsel. By the said notice dated 21st October 2011, the plaintiff called upon the defendant to release the entire payment along with interest within four weeks but no reply was received by the plaintiff. Thus, in total the defendant owes a sum of Rs. 44,61,777/- to the plaintiff.

7. The last bill raised by the plaintiff for the goods supplied to the defendant in the ordinary course of their dealings was on 16th March, 2011 for Kundli Project and on 3rd August, 2011 for Gurgaon Project. The plaintiff claimed that the defendant is also liable to pay as per the terms of trade the interest for non-payment @ 24% p.a. commencing 15 days after the date of last transaction as under:

Project	Principal amount outstanding	Interest payable from	Amount of interest
Kundli	42,27,709/-	1.04.2011	889,556/-
Gurgaon	2,34,068/-	19.08.2011	27,703/-

8. The present suit is being filed under Order XXXVII CPC. The material was supplied by the plaintiff to the defendant under invoices which were duly acknowledged and which invoices give clearly the terms of trade between the plaintiff and the defendant, in addition, the plaintiff also relies on the statements of running accounts kept in the books of the plaintiff maintained in the ordinary course of business.

The amount payable by the defendant to the plaintiff by way of principal comes to Rs.44,61,777/- and by way of pre-suit interest to Rs.917,260/-. The suit is being valued accordingly for the sum of the

above principal and pre-suit interest, which comes to Rs.53,79,037/-. An ad valorem court fee of Rs.64,853/- has been paid.

Application for Leave to Defend

9. Upon service, ultimately the defendant filed the application under Order XXXVII Rule 3(5) CPC for grant of leave to defend alongwith detailed affidavit on behalf of the defendant on the following grounds :

- a) The defendant company is working and operating from its office in Haryana i.e. at 478-EPIP, Industrial Area, Kundli (Haryana) and is carrying its ordinary course of business from that place only. Thus, this Court lacks territorial jurisdiction.
- b) The plaintiff had violated the terms of the purchase order and supplied defective and sub-standard material to the defendant company due to which the defendant company had to suffer huge financial loss. The defendant company vide its letter dated 31st October, 2011 addressed to the plaintiff had informed its grievances to the plaintiff about the sub-standard materials supplied.
- c) The plaintiff as per the purchase orders supplied certain Electrical Accessories to M/s Indus Towers Ltd. which is the client of the defendant company which rejected the material as supplied by the defendant and withheld the payment of the defendant company to the tune of approximately three crores consequent thereof the defendant company sent legal demand notice dated 11th October 2012 to its client i.e. Indus Tower Ltd.

d) The plaintiff company has raised frivolous invoices against the defendant company and relied on mails without admitting the fact that payment has been made to it.

10. The plaintiff has filed the reply to the affidavit filed by the defendant in support of its application seeking leave to defend stating that the defendant has raised wrong, false, frivolous and vague grounds in its application for grant of leave to defend who tried to mislead the Court. The plaintiff has denied each and every ground made in the application. It is stated that despite of admission about its liabilities, false grounds are raised. There is even sufficient ground to contest the suit therefore, the decree is to be passed in summary suit of the plaintiff.

11. Order 37 Rule 3 of the Civil Procedure Code lays down:

“(1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.”

12. In ***M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation***, reported in 1977 SC 577 the Supreme Court has evolved the following principles which are to be followed while considering the question of granting leave to defend:-

“(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 defence.

(b) If the defendant raises a triable issue indicating that he has a fair or bonafide 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 had 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."

13. With regard to grounds of territorial jurisdiction of this Court is concerned, it is not denied that the defendant has its registered office at Delhi and the invoice issued by the plaintiff against the defendant clearly stated that "All disputes are subject to Delhi Jurisdiction only".

Reliance is placed on the following judgments:-

- (i) ***Ashok Parshad v. M/s Mahalaxmi Sugar Mills Co. Ltd.***,
CS (OS) No. 2542/1997 decided on 13th September, 2013,
relevant para 6 reads as under:-

"6. There is no dispute that the goods were supplied by the plaintiff to the defendant from time to time on the specific orders of the defendant. There is also no dispute that the orders were received by the plaintiff at Delhi and the goods were supplied from Delhi to the defendant through the transport carriers. The submission of the defendant that since the communication of the acceptance of the order was received at Iqbalpur, the court at Iqbalpur has the jurisdiction and not Delhi, is entirely erroneous. The acceptance of the order at Delhi and the delivery of goods at Delhi to the transport carriers for onward delivery to the consignee i.e. the defendant, would bring into the formation of the contract at Delhi. The delivery to the transport carriers was to be taken as delivery to the consignee as per Section 39 of the Sale of Goods Act, 1930."

- (ii) ***J.C. Enterprises (Regd.) v. Ranganatha Enterprises***, 178 (2011) DLT 689, relevant para 13 whereof reads as under:-

"13. If the goods are handed over to the carrier for delivery directly to the consignee, the property in the goods passes to the consignee, the moment they are delivered to the carrier/courier for the purpose of delivering them to the consignee, since the consignee thereafter has no control in those goods and the carrier/courier is bound to deliver them only to the consignee. Section 23(1) of the Sale of Goods Act, 1930 provides that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. Sub-section 2 of this Section, to the extent it is relevant, provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier for the purpose of transmission to the buyer and does not reserve the

right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Since the goods handed over to the courier at Delhi were deliverable to the Defendant and not to the order of the Plaintiff or his agent, the Plaintiff did not reserve any right of disposal of those goods, while handing them over to the courier. Therefore, the property in the lottery tickets handed over by the Plaintiff to the courier at New Delhi passed to the Defendant, the moment the goods were handed over to the courier for delivery to him and, therefore, the tickets shall be deemed to have been delivered to the Defendant at New Delhi. Section 39(1) of the Sale of Goods Act, to the extent it is relevant, provides that where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer. Since the lottery tickets for price of which the present suit has been filed were delivered to the Defendant at Delhi through R. South Couriers, the part of cause of action arose in the jurisdiction of this Court and, therefore, in view of the provisions contained in Section 20(c) of the Code of Civil Procedure, Delhi Court has jurisdiction to try the suit."

- (iii) ***Indian Tarpaulins Industries by Partner C.N. Mohan Rao v. G.Krishnamurthi & Parties and V.Prakash Rao***, A.S. No. 839/1988 decided on 5th March, 2003, relevant para 13 reads as under:-

"13. The lower Court on an erroneous view has found that the said Court had no jurisdiction to entertain the suit. It is true that the plaintiff is carrying on its business at Madras, and the first defendant buyer was carrying on its business at Kakinada. It is also true that the first defendant offered to purchase the 25 tarpaulins as found under Ex.A1 order at Kakinada, but the said order was accepted by the plaintiff at Madras. Apart from that the said consignment was placed in the

hands of the common carrier M.G. Brothers, Kakinada, as found under Ex.A1. Ex.A3 invoice reads thus:

"Our responsibility ceases as soon as the goods entrusted to the carriers/Railways in good condition."

It is not in dispute that the said consignment was entrusted to the common carrier M.G. Brothers as agreed between the parties under Ex.A1. Section 39(1) of the Sale of Goods Act, 1930 reads as follows:

"39. Delivery to carrier or wharfinger

(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer."

A reading of the said provision would make it abundantly clear that when the seller is authorised to deliver the goods to a carrier, whether named by the buyer or not, for the purposes of transmission to the buyer, a prima facie delivery of the goods to the buyer has to be deemed. In the instant case, the name of the common carrier for transmission of the goods to the buyer was clearly set out under Ex.A1 purchase order, and pursuant thereto, the plaintiff has entrusted the goods to the common carrier at Madras. It has to be noted that the place of purchase is Madras, where the goods were delivered to the common carrier. Under such circumstances, it is needless to state that a part of the cause of action has arisen at Madras, which would enable the plaintiff to institute the suit in the City of Madras. Thus, the suit filed by the plaintiff was well within the territorial jurisdiction of the Civil Court at Madras. For the foregoing reasons, the judgment and decree of the lower Court have got to be necessarily set aside."

14. It is submitted that the plaintiff never supplied defective or sub-standard material to the defendant, therefore there is no question of violation of the terms of the purchase order by the plaintiff as at no time or stage the defendant raised this issue before it was raised for the first time before this Court. The letter dated 31st October, 2011 is an afterthought and it is fabricated by the defendant in order to raise the defence. Neither the plaintiff nor its counsel ever received the letter dated 31st October, 2011 from the defendant.

15. The plaintiff has also denied that the defendant's client M/s Indus Tower Ltd. had rejected the material supplied by the defendant or that the said firm withheld the payment to the defendant to any extent much less Rs. 3 crores. It is submitted that the plaintiff is not concerned as to whom the defendant had supplied the material purchased from the plaintiff. The same is also an afterthought and merely an excuse for not making the payment. There is no connection between dealings of the plaintiff and the defendant company.

16. It is denied that the defendant had suffered loss running in crores due to sub-standard material supplied by the plaintiff.

17. Admittedly, the defendant had never raised any issue that the plaintiff had supplied defective and sub-standard material to the defendant. It was for the first time the defendant has raised the present issue before this Court in the present suit. The defendant had vide e-mail dated 17th January, 2011 intimated the plaintiff that the defendant shall be releasing payment of the plaintiff. However, later on the defendant backed out and now the defendant is taking false ground.

18. It is also matter of record that at one stage an official of the defendant namely Shri G.N Thirumalesh had e-mailed to the plaintiff

on 23rd March, 2011 informing that they had released the payment and directed the plaintiff to check up with one Mr. Simrath, official of the defendant. But no payment was actually released.

19. Copies of the e-mails exchanged between the parties are reproduced here as under :

First Mail:

"FW : PaYment Reminder-Lambda Kundli.

Saturday, December 24, 2011

4.30 PM

Subject	FW : PaYment Reminder-Lambda Kundli
From	SUPREME INDUSTRIAL Corp.
To	simrath.nagpal@lambdagroup.co.in
Sent	Wednesday, January 19, 2011 11:35 AM

From :SUPREME INDUSTRIAL Corp.[mail to:supreind@gmail.com]

Sent: 17 January 2011 21:33

To : 'Simrath Nagpal'

Subject: RE: PaYment Reminder-Lambda Kundli.

Sir,

From the last week of Dec. you are assuring us that the entire due payment will be released by the end of this week- till the completion of 90 days we never ask you and we anxiously waiting for the release of payment at the time of its due. We also do certain commitments on behalf of this and every time we feel dishearted .Please make sure this time to release our due payments as per the payment reminder.

Anil Maheshwari 9810215204

Supreme Industrial Corporation

1716 Dariba, Chandni Chowk,

Delhi-110006

Telefax 01123284821, 23260991

Email supreind@gmail.com,sic1989@yahoo.in

From :Simrath Nagpal [mail to:simrath.nagpal@lambdaeastern.co.in]

Sent: 17 January 2011 17:28

To : supreind@gmail.com; Vikas Rathor
Subject: RE: PaYment Reminder-Lambda Kundli.

Sir,
Your payment will be done in this weekend
Simrath Nagpal

From : SUPREME INDUSTRIAL Corp. [mailto:supreind@gmail.com]
Sent: Monday, January 17, 2011 4:47 PM
To : Vikas Rathor
Cc : Simrath Nagpal
Subject: RE: PaYment Reminder-Lambda Kundli.

Dear Sir,
Please find the quotation enclosed in the attachment

Regards

Anil Maheshwari 9810215204
Supreme Industrial Corporation
1716 Dariba, Chandni Chowk,
Delhi-110006
Telefax 01123284821, 23260991
Email supreind@gmail.com, sic.1989@yahoo.in

Second Mail :

From: simrath@ideacellular.blackberry.com
Date: Wed, 23 Mar 2011 15:25:52+0000
To: G N Thirumalesh <thiru.narayan@lambdaeastern.co.in>
'supreind@gmail.com' <supreind@gmail.com>
ReplyTo: simrath@ideacellular.blackberry.com
Cc: Simrath Nagpal <simrath.nagpal@lambdaeastern.co.in>
Subject: Re: RTGS Detail

Sir
I already give the detail of payment detail in trailing mail.

Regards,
Simrath Nagpal
08059222080

From: G N Thirumalesh <thiru.narayan@lambdaeastern.co.in>

Date: Wed, 23 Mar 2011 20:40:02+0530

To: 'supreind@gmail.com' <supreind@gmail.com>

Cc: Simrath Nagpal <simrath.nagpal@lambdaeastern.co.in>

Subject: Re: RTGS Detail

Your payment got released already. Check with simrath for details. I was in meeting with Indus hence could not lift your call.

From: SUPREME INDUSTRIAL Corpn. <supreind@gmail.com>

To: GN Thirumalesh

Sent: Wed Mar 23 17:08:22 2011

Subject: FW: RTGS Detail

Dear Sir,

As I had a talk with you yesterday about our payment and you assured me to see into this –we have sent you entire payment details. Today when we tried to talk to you we didn't find any response from you. In this critical position we don't know what to do. The payment which you have made how you have select the bill lot of other old bills are pending we are unable to understand?

Regards

Anil Maheshwari-9810215204

SUPREME INDUSTRIAL CORPORATION,

1716, Dariba, Chandni Chowk,

Delhi-110006

Telefax 01123284821,23260991,

Email supreind@gmail.com., sic.1989@yahoo.in

From: SimrathNagpal

{mailto:simrath.nagpal@lambdaeastern.co.in}

Sent: 23 Mar 2011 16:46

To: supreind@gmail.com

Cc: Sandeep D Wagh

Subject: RTGS Detail

Sir,

Pls find below RTGS detail in which we made RTGS on 24/3/11 afternoon. It will reflect in your account on 25/3/11 morning.

1427	22.12.10	SUPREME INDUSTRIAL CORPORATION	214311.0 0	214311.00	STATE BANK OF INDIA	Chandni Chowk, Main Branch, Delhi- 110006	10820061 603	SBINNO 000631	24.03.2011
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Regards
Simrath Nagpal
Asst. Manager (Purchaser)
Lambda Eastern Telecommunications Limited
478,E.P.I.P., Kundli-131028
Dist.Sonepat
Mobile: +918059222080"

20. The defendant by its e-mail dated 25th March, 2011 also expressed apology for delay in making payment and intimated the plaintiff that the defendant shall be releasing the payment of the plaintiff by first week of April, 2011. But despite such apology, the defendant had chosen not to make the payment and then raised false ground in the application for leave to defend. Copies and e-mails have been placed on record. During the hearing, there was no denial on the part of the defendant's counsel.

21. In the case of **Lohmann Rausher Gmbh v. Medisphere Marketing Pvt. Ltd.** (2004) 117 DLT 95 decided by this Court speaking through Mr.Justice Pradeep Nandrajog it has been held in para 15 and 18 that invoices are a complete contract, required by law, where the contract pertains to sale of goods. Para 15 and 18 reads as under:-

"15. It is apparent that a suit which seeks to recover a debt or a liquidated demand in money payable by the defendant arising out of a written contract is maintainable under Order XXXVII Rule 1 as a summary suit. It is no longer res-integra that invoices/bills are "written contracts" within the contemplation of Order XXXVII Rule 2. Reference could conveniently be made to decisions of this court reported as *Punjab Pen House v. Samrat Bicycles Limited*, AIR 1992 Delhi 1; *Corporate Voice Private Limited v. Uniroll Leather*

India Limited, 60 (1995) DLT 321; *Beackon Electronics v. Sylvania & Laxman Limited*, 1998 (3) AD (Delhi) 141; and *KIG Systel Limited v. Fujitsu ICIM Ltd.*, AIR 2001 Delhi 357.

18. It is not the case of the defendant that the invoices do not conform to the purchase order. As noted, the invoices raised contain the description of the goods, quantity and price. As noted, conditions of payment stand reflected in the invoice. Additionally, delivery address also finds mentioned in the invoice. All features pertaining to a contract of sale of goods are to be reflected in the two invoices. The invoices are a complete contract, required by law, where the contract pertains to sale of goods."

22. The defendant has failed to raise any triable issue in its application for granting of leave to defend in favour of the defendant. The grounds raised by the defendant are moonshine, false and afterthought.

23. Consequently, the application of the defendant being I.A. No.3888/2014 for leave to defend is dismissed. The suit of the plaintiff is decreed for a sum of Rs.42,27,709/- and Rs.2,34,068/- against the outstanding amount from 1st April, 2011 and 19th August, 2011 of two projects of Kundli and Gurgaon respectively along with simple interest @ 12% p.a. payable from the respective due dates till the date of payment received. The plaintiff is also entitled for costs.

**(MANMOHAN SINGH)
JUDGE**

OCTOBER 29, 2015