IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5078 OF 2015

M/s. Ferro Steels, a registered partnership firm .. Petitioner

Vs

M/s. Veendeep Oil Tek Exports, a partnership firm .. .. Respondent

Mr. Harnam S. Khalsa, Advocate for the petitioner.
Mr. Swanand Ganoo a/w Wasim Qureshi i/b Rajesh Ravindran, Advocate for respondent.

CORAM : R.G.KETKAR,J.
DATE : 02/07/2015

PC:

1. Heard Mr. Harnam Khalsa, learned counsel for the petitioner and Mr. Swanand Ganoo, learned counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant has challenged the Judgment and order dated 13.3.2015 passed by the learned Judge, City Civil Court, Gr. Mumbai in Summons for Judgment No.235 of 2012 in Summary Suit No.3092 of 2012 (High Court Summary Suit No.874 of 2012). By that order, the learned trial Judge granted conditional leave to defend subject to depositing sum of Rs.24,91,234/- in the Court within four weeks. After depositing the amount, the defendant is permitted to file written statement within four weeks. The learned trial Judge further directed that on depositing the amount by the defendant within four weeks in the Court, the amount

shall be invested in the nationalised Bank initially for a period of one year and continued to renew the same for the like period until further orders. It was also made clear that on failure of the defendant to deposit the amount within four weeks, the respondent-plaintiff is at liberty to apply for further reliefs.

3. In support of this Petition, Mr. Khalsa reiterated the submissions that were advanced before the trial Court. He submitted that basically suit instituted as a summary suit is not maintainable as it is based on alleged purchase order dated 18.3.2009. He submitted that the said order is not received by the defendant. It does not amount to a concluded contract. Summary suit based on purchase order dated 18.3.2009 is, therefore, not maintainable. He submitted that the defendant has neither received any purchase order dated 18.3.2009 nor any reminder. He submitted that Fax transmitted on various dates, i.e. 4.4.09, 15.6.09, 5.10.09, 14.4.10, 28.7.10, 4.10.10 and 1.11.10 were not received by the defendant. He submitted that the summary suit instituted by the defendant, namely, Summary Suit No.809 of 2011 in this Court, was disposed of by this Court on 17/2/2012 in terms of Consent Terms.

4. Mr. Khalsa submitted that the plaintiffs had issued cheque of Rs.25,00000/- as guarantee to reassure the defendant of payment of outstanding dues and not for supply of fresh goods. He submitted that Associate Companies of the plaintiffs were

liable to pay sum of Rs.19,69,583/-. Associate Companies of the plaintiffs have not released the said amount. The plaintiffs have raised this claim only after summary suit instituted by the defendant in this Court against the sister concern of the plaintiffs, viz. M.M.Tekno Engineers was decreed. He submitted that the plaintiffs have manipulated documents after the suit was decreed in favour of the defendant. He further submitted that the affidavit in support of Summons for Judgment is also defective in the sense that the affidavit was affirmed at Mumbai on 26.6.2012 and address of Notary is of Navi Mumbai. There is no entry made in the register maintained by the Notary.

5. Mr.Khalsa further submitted that the defendant has good defence to the claim on merits by the plaintiff and, therefore, is entitled to unconditional leave to defend. In any case, the defendant has raised triable issue indicating that he has a fair and bonafide or reasonable defence, although not a positively good defence and, therefore, the defendant is entitled to unconditional leave to defend. In other words, he submitted that the case of the defendant is squarely covered by clauses (a), (b), (c) of paragraph 8 of the decision of the Apex Court in the case of Mechelec Engineers & Manufacturers Vs. Basic Equipment Corporation, AIR 1977 SC 577. The said decision is also considered subsequently by the Full Bench of this Court in the case of Jyotsna K. Valia vs. T.S. Parekh and Co., 2007 (3) Bom.

C.R. 772. For all these reasons, he submitted that the impugned order cannot be sustained and deserves to be interfered with.

6. On the other hand, Mr. Ganoo supported the impugned order. He submitted that in the rejoinder filed in Summary Suit No.809 of 2011, the defendant admitted an amount of Rs.25,00000/- was received by the plaintiffs therein as advance from M/s M/s. Veendeep Oil Tek Exports (plaintiffs herein). In other words, in rejoinder, the defendant did not set up the case that cheque of Rs.25,00000/- was given as a guarantee. He also invited my attention to paragraphs 10, 11 and 16 of the affidavit-in-rejoinder dated 16.9.2011 filed on behalf of the defendant (plaintiff therein) in Summons for Judgment No. 148 of 2011 in Summary Suit No.809 of 2011. In paragraph 10, defendant stated that an amount of Rs. 25 lakhs was received by it as advance from the plaintiff herein, an associate company of the defendant (M/s M.M.Techno Engineers) for purchase of goods. However, details of goods to be supplied by the plaintiffs therein (defendant herein) were not furnished. It is further stated that “because of the subsequent relations of the defendant and the plaintiffs due to nonsettlement of outstanding bills of the plaintiffs, M/s Veendeep Oils have not furnished particulars of the goods to be supplied by the plaintiffs against the above payment. Under these circumstances, a sum of Rs.24,91,234/- (Rs. 25 lacs less amount outstanding against M/s Veendeep) is

lying with the defendant in the credit amount of M/s Veendeep Oil Tek. We have not adjusted this amount against the defendants for want of advice from M/s Veendeep Oil Tek**".**

7. Mr.Ganoo further submitted that the defendant claims that cheque was signed by the plaintiffs as guarantee to reassure the defendant of payment of outstanding dues of associate companies of the plaintiffs. However, between 2009 and 2015 no steps were taken by the defendant for claiming the amount. He submitted that the defendant has merely denied receipt of purchase order dated 18.3.2009. However, there is no explanation as to how the defendant received cheque of Rs.25,00000/- which was sent along with purchase order dated 18.3.2009. In other words, he submitted that mere denial of the defendant is not sufficient unless the defendant explains in what circumstances the cheque is received. He submitted that the purchase order constitutes contract between the parties and summary suit based on that is maintainable. In support of this submission, he relied upon the decision of this Court in the case of Jatin Koticha Vs. VFC Industries Pvt Ltd, 2008 (3) All MR 367. In any case, the suit is based on Section 70 of the Indian Contract Act, 1872 as the defendant enjoyed the benefits of non-gratuitous and hence liable to pay the amount. For all these reasons, he submitted that no case is made out for invocation of powers under Order 227 of the Constitution of India.

8. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, it is the case of the plaintiffs that they had sent purchase order dated 18.3.2009 to the defendant enclosing therewith cheque bearing no. 943244 dated 18.3.2009 for Rs.25,00000/-. It is not disputed by the defendant that it had received the cheque of Rs.25,00000/-. It is also material to note that the plaintiffs had thereafter sent letter dated 22.3.2009 and several Fax messages on various dates. In the reply, the defendant has denied receipt of the letter dated 18.3.2009 and reminders. However, there is no specific denial about receipt of fax messages. Mr. Khalsa submitted that the reminder will include fax messages as well. It is not possible to accept this submission. The defendant has not explained in what circumstances they have received cheque of Rs. 25,00000/-. Perusal of letter dated 18.3.2009 shows that cheque of Rs.25,00000/- was sent along with that letter. If the cheque of Rs.25 lakhs is received, it necessarily follows that even the letter dated 18.3.2009 is received by the defendant. Mere denial on the part of the defendant will not mean that they have established nonreceipt of the letter as well. That apart, it is also not possible to believe that the defendant did not receive any of the fax messages sent by the plaintiffs. This assumes importance as there was no response to the fax messages disputing the case

made out by the plaintiffs that they had placed order for purchase of materials enclosing therewith cheque of Rs.25 lakhs. Understood thus, in my opinion, denial of the defendant about receipt of the letter dated 18.3.2009 as also other letter dated 22.3.2009 and the fax messages, is the defence raised solely with a view to denying the liability.

9. It is also material to note the case made out by the defendant in affidavit-in-rejoinder of Mr. Pankaj Sheth dated 16.9.2011 filed in Summons for Judgment No.148 of 2011 in Summary Suit No.809 of 2011. In paragraphs 10, 11 and 16 it is stated thus:

> “10. In reply to para 12 of the 'Affidavit in reply' I say that an amount of Rs. 25 lakhs was received by the plaintiff as advance from M/s Veendeep Oil-Tek Exports, an associate company of the defendant for purchase of goods. However, details of goods to be supplied by the plaintiffs were not furnished by them. It appears that because of the subsequent strained relations of the defendants and the plaintiff due to non-settlement of outstanding bills of the plaintiffs, M/s Veendeep Oils have not furnished particulars of the goods to be supplied to them by the plaintiffs against the above payment. Under these circumstances a sum of Rs. 24,91,234/- (Rs.25 lacs less amount outstanding against M/s . Veendeep) is lying with us in the credit account of M/s Veendeep Oil Tek. We have not adjusted this amount against the defendants for want of advice from M/s Veendeep Oiltek.
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> 11. In reply to para 14 of the Affidavit in reply, I say that the amount of Rs.11,810 mentioned by the defendant as recoverable from the plaintiff is not outstanding against the plaintiffs. On the basis of the fabricated accounts, this amount is shown as recoverable. I confirm that a sum of Rs.98,24,411/- as detailed in the present plaint dated 8.3.2011 is recoverable from the defendants by way of principal and a sum of Rs. 29,50,553/- is recoverable from

them by way of interest.

> I say that an amount of Rs.24,91,234/- is lying with the plaintiff in the credit account of M/s Vendeep oiltek and could be adjusted against the outstanding dues of the defendant only on receipt of an advice from M/s. Veendeep Oiltek.
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> 16. I say that contention of the defendant in para 25 of the affidavit that they are entitled to receive an amount of Rs.11,81,108/- from the plaintiffs is false and concocted. As for amount of Rs.24,91,234/- lying with the plaintiffs in the credit of account of M/s Veendeep Oiltek exports. I have made the position clear in para 11 herein above. This amount can be adjusted against the outstanding dues to the defendants on receipt of an advice from M/s Veendeep Oiltek to this effect."

Thus, defendant admitted receipt of Rs. 25 lakhs from the plaintiffs. However, the defendant did not come with the case that the plaintiffs had issued cheque as guarantee to reassure the defendant of payment of outstanding dues of associate companies of the plaintiffs.

10. In the case of Mechelec Engineers and Manufacturers (supra), the Apex Court approved the decision of Calcutta High Court in the case of Smt. Kiranmoyee Dassi V. Dr. J. Chatterjee, 49 C.W.N. 246 and approved the proposition laid down therein. Paragraph 8 of that decision reads as under :

> "8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee ,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) :
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> (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."

11. Mr. Khalsa submitted that the case of the defendant is squarely covered by clauses (a), (b), (c). I am not in a position to accept this submission as basically the defendant has not satisfactorily established in what circumstances the cheque of Rs.25 lakhs was received. I have already held that the defendant

received purchase order dated 18.3.2009 along with cheque of Rs.25 lakhs. In view thereof, I am satisfied that the case of the defendant is covered by clause (e), extracted herein above and, therefore, the learned trial Judge was justified in granting conditional leave to defend. In the same decision, it was also held that the order of granting conditional leave to defend is discretionary order. In view thereof, I do not find any merit in the submissions of Mr Khalsa.

12. Mr. Khalsa submitted that Summary Suit is not maintainable as it is not based on a concluded contract. On the other hand, Mr. Ganoo relied upon the decision of this Court in the case of Jotin Koticha (supra) and contended that it is not the requirement of law that it should be a written contract signed by both the parties. What is necessary is that the suit should be based on a written contract. He further submitted that Section 70 of the Contract Act lays down that obligation of person enjoying benefit of non-gratuitous act where a person lawfully did anything for another person, or delivers anything to him, not intending to do so gratuitously – such other person enjoyed benefit thereof, latter was bound to make compensation to former in respect of, or to restore, thing so done or delivered.

13. In the case of Jatin Koticha (supra), the learned Single Judge of this Court in paragraphs 5 and 6 has observed thus:

"5. Now it is clear that there is no written contract signed by both the parties relied on by the plaintiff. It is not the requirement of the law that it should be a written contract signed by both the parties. What is necessary is that the suit should be based on a written contract. That, one can find in this case, in the form of invoices which were raised on the defendants along with delivery of the goods in pursuance of each purchase order. The invoices, as stated above, contained the terms and conditions. There is a clear parole acceptance of the invoice on the part of the defendants. The defendants accepted delivery of the goods along with the invoice without any demur or suggestion that they do not accept any of the terms whether pertaining to the rate, price, quantity etc. It makes no difference therefore that the invoices are not signed by both the parties. I am of view that the invoices must be treated as a written contract and the suit based on such invoices is a suit based on the written contract. This view is fortified by the Madras High Court reported in The Madras Law Journal Reports 1988 page 187 (Lucky Electrical Stores, by partner Mahendra Kumar Shah and Anr. v. Ramesh Steel House by Partner Babulal , where the Chief Justice M.N. Chandurkar, rejected the contention similar to the one applied by the defendants in this case. The relevant observation reads thus:

> ...What is necessary for the purposes of this case is that a liquidated demand in money must arise on a written contract. A written contract or a contract in writing need not always be a contract signed by both parties. The Court of Appeal in (T.A. Ruf and Co. Ltd. v. Pauwels) , was called upon to construe the words "contract in writing". The facts of that case were that by contract dated 28th February, 1918 Pauwels had sold to Ruf and and Company a quantity of soap. The terms of the contract were contained in a sold note signed only by Pauwels. At the foot of the sold note were the words "Please confirm the above". A dispute arose under the contract as to non-delivery of part of the soap and was referred to arbitration in accordance with the Clause contained in the note. In the award made by the arbitrators there was a recital that "by a contract in writing made by Alphonse Pauwels with T.A. Ruf and Co. Ltd., dated the 28th day of February, 1918, Alphonse Pauwels contracted to sell and deliver" a certain quantity of soap to Ruf and Co. at a certain price and that a dispute had arisen which was referred to arbitration. By the award which was against the purchasers the purchasers were directed "to pay the

> costs of the reference, arbitration and award, including 361.15s. our fees and expenses in regard to the said arbitration, as we consider that their conduct in not confirming in writing the contract was probably the cause of the dispute". This award was sought to be set aside on the ground that "it is bad in law and shows error on its face and shows further that there was no legal contract binding on the parties". The Divisional Court ordered the award to be set aside on the ground that on the face of the award the arbitrators had treated as a contract in writing binding upon both parties that which was signed by one of the parties only and was therefore not a contract in writing. Ruf and Company appealed against this judgment. Warrington, L.J., in his judgment referred to the fact that though written confirmation was not sent by the purchasers, the arbitrators had come to the conclusion that there was a parol acceptance by Ruf & Co. of the terms of the sold note, and observed as follows:

"Taken in conjunction with the rest of the award they seem to me to indicate that the arbitrators found that Ruf and Co." had confirmed the contract though not in writing, and if so they may quite properly refer to the contract as a "contract in writing". Although the memorandum of it was signed by one party only.

Duke, L.J. in a separate judgment observed at page 670:

As to the suggestion which was made that the words "contract in writing" import a contract made by means of a writing or writings signed by both parties, 1 do not think the words necessarily have that meaning. A document purporting to be an agreement may be an agreement in writing sufficient to satisfy the requirements of an Act of Parliament though it is only verified by the signature of one of the parties: (In Re Jones) . Here the question is one of a bargain for the sale of goods. I doubt whether the objection which is here set up to avoid a business transaction would have been sufficient to support a special demurrer before the passing of the Common Law Procedure Acts".

The appeal was allowed and the award was restored. There is, therefore, sufficient authority to indicate that even though the invoice of the bill is not signed by the other party to the contract, as a result of the acceptance of the goods delivered in pursuance of the invoice the demand for the price of goods admittedly received by the purchaser on the basis of the invoice must be held to arise on "written contract".

6. Besides above, the facts of the present case indicate that the suit must be treated as a summary suit since it is based on an enactment. In this case the facts clearly show that the goods were delivered by the plaintiff to the defendants and the defendants enjoyed the benefit of that, therefore they are liable under Section 70 of the Contract Act to pay compensation in respect of such goods to the plaintiff. Section 70 reads as follows:

> Obligation of person enjoying benefit of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

A similar view was taken by this Court in an unreported judgment of this Court in (Summons for Judgment No. 23 of 1976 in Suit No. 1405 of 1975) decided on 9.4.1976. This view is followed by another Single Judge of this Court in (J.K. Enterprise v. Prithviraj Ratanchand Mehta and Anr.): AIR1991Bom162".

14. As I have already held that the purchase order is received by the defendant, Summary Suit based thereon is perfectly maintainable. Even otherwise, summary suit is based on Section 70 of the Indian Contract Act as admittedly the defendant has received the cheque of Rs.25 Lakhs. Defendant is liable to return that benefit to the plaintiffs. In view thereof, I do not find any merit in the petition. Reliance placed by Mr. Khalsa on the decision of Jyotsna K. Valia (supra) does not assist the defendant. Hence, Petition fails and the same is dismissed.

(R.G.KETKAR, J.)