IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 17 OF 2013
IN
SUMMARY SUIT NO. 195 OF 2013

Mumbai International Airport Pvt. Ltd. .. Plaintiff
Vs.
Kingfisher Airlines Ltd. .. Defendant

Mr.Zal Andhyarujina i/b Naik Naik & Co. for plaintiff.

Mr.Mustafa Doctor, senior advocate a/w. Mr.Rohaan Cama i/b Bachubhai Munim & Company for defendant.

CORAM : K.R.SHRIRAM, J.
Reserved for orders on : 13TH JULY, 2015
For pronouncement on : 10TH AUGUST, 2015

P.C.

1 The plaintiff has been appointed pursuant to an agreement dated 4.04.2006 with the Airport Authority of India to operate, manage and develop Chhatrapati Shivaji International Airport (the Airport). The agreement was called Operation, Management and Development Agreement (OMDA). Pursuant to the said agreement, the plaintiff is permitted to collect retain and appropriate charges, dues and levies including aeronautical charges, charges for non-aeronautical services, charges for essential services and passenger service fee from the users of the airport and the airlines. The defendant being a commercial airline and having used the airport was liable

to pay to the plaintiff landing charges and parking charges (L & P) and passenger service fees (PSF) - both security and facilitation components. The claim in the suit is for these charges.

2 In the present suit, the plaintiff is seeking to recover an amount of Rs.35,55,71,532/- towards L & P charges and PSF (Security and facilitation) charges together with contractual rate of 18% per annum on annual interest on unpaid invoices. Pursuant to the OMDA, the plaintiff also entered into a State Support Agreement (SSA) dated 26.04.2006 with the Government of India. Admittedly, the defendant is not a party to either OMDA or SSA. As on 31.12.2011, as the defendant's outstanding to the plaintiff accumulated to Rs.86,58,00,000/-, the plaintiff's representatives and the defendant's representative's had a meeting on 4.01.2012 (Exh. 'K' to the plaint). It is recorded in the minutes of the meeting that the defendant agreed that the plaintiff's outstanding as on 31.12.2011 was Rs.86,50,00,000/- and towards the outstanding amount, the defendant agreed to issue 10 post dated cheques in the sum of Rs.5 crores each to be deposited every fortnight and all these cheques would be handed over by 5.01.2012. Subsequently, the defendant made payments from time to time and as per the communication dated 17.04.2012, the defendant admitted it owed Rs.52.75 crores (page 655), 30.06.2012 Rs.37.24 crores (page 657), 30.09.2012. Rs.25.15 crores (page

666) and finally by a communication dated 6.11.2012-Rs.22.59 crores. It is the plaintiff's case that the OMDA, the SSA, and the communications dated 18.01.2012, 17.04.2012, 23.07.2012, 22.10.2012 and 6.11.2012 between the parties constitute a written contract. According to the plaintiff, these are the communications under which the defendant has admitted that it owes money to the plaintiff and they also form part of the contract.

3 The plaintiff's particulars of claim are at Exhs.Y-1 and Y-2 to the plaint. During the course of arguments, the counsel for the plaintiff stated that for the purpose of this summons for judgment, they would restrict their claim to the principal outstanding of Rs.17,14,41,804/- which is at Exh.Y-1 to the plaint. Exhibit Y-2 is the break-up for the figures mentioned at Exh.Y-1.

4 The counsel for the plaintiff submitted that as per the communication dated 6.11.2012, the defendant had admitted that a sum of Rs.22.59 crores was due and payable and therefore, the defendant has acknowledged its liability and therefore, the summons for judgment is maintainable and has to be allowed.

5 The defence of the defendant is that :

(a) the plaintiff cannot go beyond what is stated in the plaint. In the plaint, the plaintiff has stated that OMDA, SSA and the correspondences listed therein form the written contract. This does not include Exh.K, i.e., minutes of meeting dated 4.01.2012, but during oral submissions, the plaintiff's counsel states that Exh.'K' is the contract and not OMDA, SSA etc. This cannot be permitted.

(b) In the alternative, the admission of liability for Rs.22.59 crores mentioned in the e-mail dated 6.11.2012 is not specific to the suit claim. According to the defendant, the defendant had paid a sum of Rs.68,24,17,780.88 as on account payments towards L & P charges and PSF (facilitation and security) as these were the payments which were required to be made by the plaintiffs to the Government authority.

No amount is therefore payable under the heads claimed in the plaint viz., L & P and PSF (facilitation and security).

(c) The plaintiff had in the additional affidavit filed a statement of outstanding as on 31.12.2012 and the figures and the dues mentioned therein for the invoices that were raised and amounts that were received do not tally with Exh.Y-2. Therefore, as to whether the amounts are payable by the defendant to the plaintiff under these heads of claim in the plaint and how the plaintiff has apportioned the Rs.68.24 crores that they had received has not been produced by the plaintiff. According to the plaintiff, this is very necessary because some of the claims that the plaintiff alleges to have against the defendant, requires to be referred to arbitration. The counsel for the plaintiff did not dispute the fact that some heads of claim between the plaintiff and the defendant which is not covered under the suit are required to be referred to arbitration.

6 Though extensive arguments were made, it is settled position that Order 37 of the Code of Civil Procedure, 1908 is a special provision. When a plaintiff files a suit under Order 37 what the plaintiff is seeking is a summary decree. A decree in a summary suit is to be granted provided it fulfills the criterion laid down under Order 37 of CPC. The underlying principle behind a summary suit is in commercial matters, when arising under a written contract and the claim is for a liquidated sum or debt and defence is moonshine, the plaintiff, should be entitled to a summary decree. Merely filing suit itself is not a sufficient ground for passing of a summary judgment.

7 First of all, the plaintiff's claim in the suit is based on the OMDA, SSA (to both of which the defendant is not a party) and the communications dated 18.01.2012, 17.04.2012, 23.07.2012, 22.10.2012 and 6.11.2012. But

the counsel for the plaintiff argued that he is pitching his contract on the minutes of meeting dated 4.01.2012 (Exh.'K') which is not even the basis for the suit to be within Order 37. The plaintiff has not even chosen to amend the plaint.

Moreover, in the enclosure to Exh.K, which according to the plaintiff is the basis of its claim, the outstanding amount towards L & P charges is shown as Rs.3,953.85 lakhs (Rs.39.54 crores) as on 31.12.2011, whereas, the plaintiff in enclosure 'A' to the additional affidavit has stated that the outstanding balance as on 31.12.2012 for L & P charges is Rs. 32.85 crores. There is a difference of about Rs.7 crores.

Even when one compares the said statement enclosure A to the additional affidavit with Exh.Y-2 to the plaint, the figures and the dates of invoices etc. do not tally. The defendant has given its chart in which they have highlighted those which tally and it appears that more than 50% do not tally. Moreover, in the affidavit in reply, the defendant has taken a stand that they had made various on account payments since 18.01.2012 aggregating to Rs.682,417,780.88 to the plaintiff and these payments were made towards the heads of L & P charges and PSF (facilitation and security) as these were payments which were required to be made by the plaintiff to the Government authorities and no amount is outstanding under these heads from the defendant to the plaintiff. Though the plaintiff has filed a rejoinder, they have not denied these averments of the defendant.

8 In the affidavit in reply, the defendant has also stated that reconciliation of accounts between the parties is necessary to ascertain which of the amounts claimed under Exhs.Y-1 and Y-2 to the plaint remained unpaid, particularly because the amounts claimed under Exhs.Y-1 and Y-2 includes claim towards interest on number of accounts including claim of interest on amount already paid by the defendant to the plaintiff even prior to filing of this present suit. In the rejoinder, the plaintiff has not denied the same. These are all triable issues.

9 In paragraph 7(e) of the reply, it is stated that the amount of Rs.22,15,85,280.51 which the defendant has stated in its email dated 22.10.2012 as outstanding relates to several heads of claim. Even this has not been denied in the rejoinder. Further, in the additional affidavit filed by the plaintiff, paragraph 8 reads as under :

> 8 The opening balance of outstanding dues as on January, 2012 was Rs.53.41 crores pertaining only to the heads of payment for whose recovery the present suit is filed. Enclosed herewith and marked as **"Annexure A"** is a Statement showing the opening Balance as on January 2012. I say that Annexure A contains the details of the billings done post January 2012 for the services availed by the defendant on account of above said 3 heads (i.e. billings done during January 2012 to Dec. 2012). The amount of

> Rs.52,95,75,698/- received as above was adjusted towards the prior dues as well as the services availed during the aforesaid period (i.e. billings done during Jan.2012 to Dec.2012). I crave leave to refer and to rely upon relevant material in support thereof when produced.

The plaintiff has not even explained how these amounts have been adjusted and under what heads.

10 Leave is declined when the court is of the opinion that grant of leave would merely enable the defendant to prolong the litigation by seeking untenable and frivolous defences. The Court has to see whether the defence raises a real issue and not a sham one in the sense that if the facts alleged by the defendant are established, there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given.

11 If there is a triable issue in the sense that there is fair dispute to be tried as to the meaning or correctness of the documents on which the claim is based or uncertainty on the amount which is actually due or whether the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses, leave should not be denied.

12 Paragraph 3 of the judgment of the Apex Court in the matter of ***Raj***

Duggal Vs. Ramesh Kumar Bansal 1991 Supp.(I) SCC 191 reads as under :

> 3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

13 Having considered the pleadings of the plaintiff and the affidavits in reply, rejoinder, further affidavit of the plaintiff and after hearing the counsels for the plaintiff and the defendant, I am unable to persuade myself to grant a summary decree. In my view, there are many triable issues as to (a) what is the real written contract between the parties; (b) what is the amount actually due under the heads of claim in the suit etc. I am also satisfied that the defendant should be permitted to interrogate/cross-examine the plaintiff's witnesses on the apportionment of the amounts paid under the

different heads.

14 The counsel for the plaintiff tried to persuade to say that the defendant has admitted that a sum of Rs.22.15 crores is payable to the plaintiff under various heads and therefore the defendant should be directed to deposit the entire sum or atleast deposit 50% of that amount in Court.

15 First of all, it is a triable issue whether any amount is payable under the heads of claim made in the suit. Secondly, whether the amounts outstanding would come under those claims which require parties to refer their dispute for arbitration or not is also an issue.

Therefore, in my view, the defences raised by the defendant cannot be termed as untenable or frivolous or illusionary or moonshine. The Apex Court in the matter of ***Mechelec Engineers and Manufacturers Vs. M/s. Basic Equipment Corporation***[1] in paragraph 8 has stated as under :

> 8 The opening balance of outstanding dues as on January,In Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee(1), 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

1 1977 AIR SC 577

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".

16 Therefore, taking into account the overall consideration of the matter and the fact that the defendant has admitted that it owes a sum of Rs.22.15 crores to the plaintiff, in my view, though I have come to a conclusion that the defendant has shown such set of facts to infer that at the trial of the action he may be establish a defence, still a case is made out to direct the suit be expedited and disposed of within one year from today.

17 The summons for judgment is rejected. The suit transferred to the list of commercial cause suits. The defendant to file written statement within four weeks. Within two weeks thereafter, parties to file their respective affidavit of documents and complete discovery and inspection.

18 Stand over to 21.09.2015 for framing of issues.

(K.R. SHRIRAM, J.)