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

SUMMONS FOR JUDGMENT NO. 14 OF 2014
IN
SUMMARY SUIT NO. 52 OF 2014

Huntsman Advanced Material (India)
Private Ltd. .. Plaintiff
Vs.
Rajit Paints Ltd. .. Defendant

Mr.Zubin Behramkudin i/b Gandhar Ulhas Raikar for plaintiff.

None for defendant.

CORAM : K.R.SHRIRAM, J.

RESERVED FOR ORDERS ON : 28TH JULY, 2015
FOR PRONOUNCEMENT ON : 10TH AUGUST , 2015

P.C.

1 The plaintiff has filed a suit as unpaid seller of goods sold and delivered to the defendant.

2 The plaintiff is a manufacturer and supplier of various industrial chemicals and allied products. The defendant from time to time placed orders with the plaintiff for supply of chemicals known as Araldite GZ and Accelerator. Between 30.10.2010 to 13.01.2011, the plaintiff delivered various quantities of goods and raised invoices. The procedure followed by

the parties is that the defendant as and when it required the goods, would place an order which would be confirmed by the plaintiff by issuing a document called an 'order acknowledgment' to the defendant. The said order acknowledgment contained, *inter-alia,* the name of the orderer, delivery address, invoice receiver, details of the goods and the value. The plaintiff had raised 11 such order acknowledgments upon the defendant. The plaintiff would thereafter supply the goods and raised invoice upon the defendant. The plaintiff to cover the 11 supplies, raised 11 invoices. Copies of the order acknowledgments are at Exh.A-1 to Exh.A-11 and the invoices are from Exh.C-1 to C-11 to the plaint. The invoice on the reverse provided the terms and conditions of sale, two of which are very relevant to the present suit. There are *'terms of payment'* which provides *'interest on delayed payments will be charged @ 25% per annum on invoices not paid before due date'* and complaint regarding the supplies made should be reported within 15 days from date of receipt of the goods; that details of discrepancies and shortages in and damages to consignments should be recorded in the carrier's delivery book by the consignee to substantiate the claim of the claimant against the carrier as and when preferred and should be intimated within 7 days.

It is the case of the plaintiff that the defendant paid a sum of Rs.11,42,440/- after the 5th invoice was raised and the plaintiff adjusted the said amount against the first invoice, second invoice and partly against the third invoice. A statement of the invoices raised and amount paid and adjusted is at Exh.'B' to the plaint.

3 The defendant never raised any complaint whatsoever. As the defendant did not make any further payment, the plaintiff kept calling upon the defendant to make payments and the defendant kept on assuring the plaintiff that they would made payment and kept seeking time as the defendant was facing some financial pressure. In fact, the defendant had also made a part payment of Rs.30 lakhs by issuing three post dated cheques of Rs.10 lakhs each towards discharge of part liability but when these cheques were presented for payment, the cheques were dishonured and returned with remark *"payment stopped by the drawer"*.

4 The defendant, in the meanwhile, by an email dated 5.03.2011 informed the plaintiff that they were planning to pay Rs.25 lakhs in that month by RTGS. It is necessary to mention that the defendant has also requested in the said email to the plaintiff to move one more load of the plaintiff's product to the defendant's Delhi Warehouse. This point is required to be highlighted because as per the pending invoices for which the plaintiff is claiming the earliest supply was made on or about 30.10.2010 and last on or about 13.01.2011. One of the defence taken in the affidavit in reply is that

the goods supplied were of substandard quality. The fact that the defendant requested the plaintiff as late as 5.03.2011 to supply another load of goods shows that this defence is bogus and specious and only an after thought. The defendant, in fact, by their email dated 2.03.2012 have acknowledged their liability to the plaintiff in the sum of Rs.98.87 lakhs which is the claim amount and agreed to pay the same in 10 installments. It is necessary to quote the said message together with the earlier message dated 29.02.2012 from the defendant to the plaintiff which reads as under :

> *"03/02/2012 02:58 PM*
>
> *To, <rohitnagrath@rajitpaints.com>,*
> *"Tushar Dash"*
> *<tushar_dash@hutsman.com>*
>
> *Subject Re: Proposed Plan*
>
> *Dear Tushar,*
> *Waiting for your reply. Also confirm price for GT 7004 & 7071, I am trying to arrange LC in this month.*
>
> *Regards,*
>
> *Rohit Nagrath*
>
> ***From** : rohitnagrath@rajitpaints.com*
> ***Send** : Wednesday, February 29, 2012 2:30 PM*
> ***To** : Tushar Dash*
> ***Subject** : Re: Proposed Plan*
>
> *Dear Tushar,*
>
> *As discussed we are committed to clear the over due payment of Rs.98.87 Lakhs in 10 installments. We will start paying*

installments from April onwards. At present we are tremendous financial pressure and unable to bear the interest burden. I will request you to convince your finance department to not charge interest on the over due payment.

We also want to start further dealing on LC terms and we will appreciate if you can offer us 90 days terms. We have long association with Huntsman and I am sure with your extended support we will resume mutually fruitful business.

Looking forward for your confirmation.

Regards,

Rohit Nagrath"

5 Though nobody appeared for the defendant when the matter was called out, the defendant has filed an affidavit in reply, affirmed on 18.03.2014. The defence taken by the defendant are (a) the plaintiff failed to disclose cause of action against the defendant, (b) the claim is barred by limitation and (c) the goods supplied were of inferior quality.

6 At the outset, it is necessary to observe that in the affidavit in reply as filed seems to be incomplete. Paragraphs 17, 18, 19 and 20 only states *"as regards the contents appearing in paragraphs.........................."*

As regards the failure to disclose cause of action, the plaint certainly discloses, the cause of action.

7 As regards the defence of limitation, the earliest invoice for which the plaintiff is claiming is dated 30.10.2010. The due date mentioned in that invoice for payment is 19.12.2010, i.e., 60 days. The last one is dated 13.01.2011 and payment due date is 14.03.2011. In each invoice, the defendant has been given 60 days to make the payment. The defendant had also made part payment of the earliest invoice. Leave under Section 12 has been obtained on 25.11.2013. Therefore, none of the invoices raised by the plaintiff can be termed as time barred.

8 As regards the allegation of inferior goods supplied, as mentioned earlier, the last supply of the plaintiff to the defendant was on or about 13.01.2011. The defendant, by an email dated 5.03.2011, was requesting the plaintiff to move one more load of the goods. As per the terms of conditions of the invoice, the defendant had only 15 days to raise complaints but even after almost two months of the last supply, the defendant was requesting the plaintiff to supply materials. The earliest supply was made on or about 30.10.2010 more than 4 months earlier. Therefore, it is quite clear that the stand that the goods were of inferior quality is nothing but an after thought.

9 Having considered the pleadings and the submissions of the counsel for the plaintiff, it is quite obvious that the plaintiff had pursuant to written

agreement in the form of order acknowledgment had supplied materials to the defendant. The defendant has received the same. The plaintiff has also received the invoice and further has acknowledged liability as can be seen from the email quoted above. Therefore, it is rather obvious that the defence raised by the defendant is nothing but a sham and moonshine purely with an intention to prolong the matter and avoid payment to the plaintiff. The defendant has no defence whatsoever and the plaintiff, in my view, is entitled to a summary decree.

10 As per the terms and conditions mentioned in the invoice, interest was payable at 25% p.a. whereas in the particulars of claim, the plaintiff is claiming interest only at 18% p.a. The plaintiff certainly is entitled to interest as claimed. At the same time, in the interest of justice and as an expression of grace, the defendant can be permitted to raise a defence at the trial of the suit by filing a written statement but subject to complying with the conditions as mentioned below :

(i) The defendant to deposit with the Prothonotary and Senior Master, a sum of Rs.1 crore within six weeks from today.

(ii) Upon the defendant depositing the said amount, the Prothonotary and Senior Master to invest the same in fixed deposit with a nationalized bank initially for a period of six months.

(iii) Simultaneously with depositing the amount of Rs.1 crore with the Prothonotary and Senior Master, the defendant to file its written statement. Within two weeks after filing of written statement, parties to file their respective affidavit of documents and also complete discovery and inspection.

(iv) One week thereafter, the suit to be placed for framing of issues.

(v) If the defendant does not deposit the amount of Rs.1 crore as directed above, the suit to be placed for ex-parte decree after six weeks from today.

Liberty to apply.

(K.R. SHRIRAM, J.)