IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 18 OF 2013
IN
SUMMARY SUIT NO. 2169 OF 2012

The State Trading Corporation of India Ltd. …Plaintiff / Applicant
vs.
M/s.Shalimar Rexine India Ltd. & Ors. ...Defendants

Mrs.S.I. Shah i/b. M/s.S.I. Shah & Co. for Plaintiff.
Mr.Jafar Shaikh for Defendants.

CORAM : S.C. GUPTE, J.

16 FEBRUARY 2015

P.C. :

This Summary Suit is filed on the basis of a written contract of a corporate guarantee dated 5 December 2006 as well as dishonoured cheques.

2 By an agreement dated 1 November 2006, the Plaintiff and Defendant No.1 executed an agreement for export of rexine to certain foreign buyers identified by the Defendant. The agreement *inter alia* provides for the responsibility of Defendant No.1 to obtain export orders from foreign buyers in the name of the Plaintiff and transfer of such orders in the name of Defendant No.1 for the purposes of execution. The agreement provides for a particular mode of payment in respect of the export orders. It stipulates that the shipping documents will be prepared and signed by Defendant No.1 to the Account of the Plaintiff and then submitted to the Plaintiff, who, in turn, shall present the documents for negotiation to their bank; after negotiation of export bills and drawal of post-shipment credit upto 90% from the negotiating bank, the funds shall be released to Defendant No.1 with the Plaintiff retaining 1.5% of CIF value of the export towards a trading margin plus 5% towards interest, bank charges, etc. and the balance shall be paid to Defendant No.1 against postdated cheques of an

equivalent amount. The agreement requires Defendant No.1 to furnish such postdated cheques, which shall be retained by the Plaintiff till realization of export proceeds from the foreign buyers and final settlement of the accounts. In the event of non-receipt of export proceeds on the due date or on expiry of the usance period from the foreign buyers, the Plaintiff was entitled to encash the cheques. In pursuance of this agreement, a corporate guarantee was executed by Defendant No.1 in favour of the Plaintiff on 5 December 2006. The corporate guarantee provided *inter alia* that in consideration of the agreement dated 1 November 2006 between the parties, Defendant No.1 undertook to indemnify and keep the Plaintiff indemnified against all claims arising out of or in relation to the export orders. The agreement provided that Defendant No.1, on demand, shall pay this stipulated amount within 15 days from the date of issuance of such demand without demur or protest or without recourse of any nature whatsoever. In pursuance of these documents, 33 post dated cheques were deposited by Defendant No.1 with the Plaintiff, particulars of which have been given in Exhibit-J to the plaint. These cheques aggregate to a total sum of Rs.29,18,82,733.97. It is the case of the Plaintiff that in pursuance of the agreements between the parties, Defendant No.1 obtained various orders from the foreign buyers, under which rexine was exported through the Plaintiff in the years 2007, 2008 and 2009. It is the case of the Plaintiff that the foreign buyers defaulted in payment of the export proceeds at the due dates of bills / invoices raised by the Plaintiff. It is the case of the Plaintiff that accordingly, the Plaintiff deposited 27 out of the 33 cheques deposited by Defendant No.1 with the Plaintiff, aggregating to Rs.23,50,68,092/-. These cheques were dishonoured for payment by the bankers of Defendant No.1 on the grounds “payment stopped by drawer”, “exceeds arrangement”. The Plaintiff relies on the return memos issued by the bank. The Plaintiff also claims to have deposited the other six cheques (which are dated between 6 August 2008 to 5 May 2009) in its bank and that these cheques were also dishonoured for payment by the bankers of Defendant No.1. The Plaintiff, accordingly, has filed the present summary suit for recovery of a sum of Rs.42,34,83,532.96 comprising of a principal sum of Rs.33,58,28,238/- and interest of Rs.8,76,55,294.96.

3 The Summons for Judgment is opposed by the Defendants by filing a reply. In the reply, in the first place, the Defendants submit that there is no liability owed by Defendant Nos.2 and 3, who are Directors of Defendant No.1 company, in their personal capacity. It is submitted that all the documents, even if they be signed by Defendant Nos.2 and 3, are signed for and on behalf of Defendant No.1. Secondly, it is submitted that the summary suit is not maintainable even against Defendant No.1 on the ground that the originals of invoices, etc. are not produced by the Plaintiff. Thirdly, it is submitted that there is an arbitration clause contained in the agreement between the parties dated 1 November 2006, requiring the Plaintiff to refer all disputes and differences arising out of or relating to the agreement of 1 November 2006 to arbitration under the Rules of Arbitration of Indian Council of Arbitration, New Delhi. Fourthly, it is submitted that the cheques, which are the subject matter of the present suit, were all given with blank dates and the rubber stamps of dates have been put in subsequently on the cheques and that the cheques were all meant to be a security for the payment due to the Plaintiff towards the export proceeds. There are some other defences on merits suggested in the affidavit in reply, which are, in any event, not worthy to even take note of. Indeed, they were not even urged at the hearing by the learned Counsel for the Defendants. Lastly, at the hearing of the Summons for Judgment, it is submitted by the learned Counsel for the Defendants that the suit is barred by limitation *inter alia* for the reasons that the transactions of export sales were of the years 2006, 2007 and 2008, as also some of the cheques bear dates of more than three years prior to the filing of the present suit.

4 As far as the defence concerning Defendant Nos.2 and 3 is concerned, the Plaintiff has been unable to show that these Defendants are, in any way, bound to perform the contract in their personal capacity or are liable to pay the amounts under either the corporate guarantee or the dishonoured cheques. The documents, on which reliance is placed by the Plaintiff, are signed by these Defendants clearly in their capacity as Directors of Defendant No.1 and there is nothing on record to indicate that these Defendants are personally liable to the Plaintiff under these documents. In any event, the defence raised on their

behalf does raise bona fide triable issues, for which these Defendants deserve unconditional leave to defend.

5 As far as the defence offered by Defendant No.1 is concerned, the suit having been based on a corporate guarantee admittedly executed, and cheques admittedly issued, by Defendant No.1, non-production of originals of invoices is clearly immaterial. As for the arbitration clause contained in the agreement dated 1 November 2006, it is trite law that an agreement of arbitration does not in itself constitute a defence to a suit before an ordinary civil court. If a party relies upon an arbitration agreement, which purportedly covers the subject matter of the dispute in a suit, it is for that party to make an appropriate application to the Court under Section 8 of the Arbitration and Conciliation Act, 1996 and apply for reference of the parties to arbitration. This evidently has not been done in the present suit. The agreement of arbitration, thus, does not constitute any defence to the Plaintiff's claim in the suit. Accordingly, there is no merit whatsoever in this defence either.

6 As regards the cheques being a security and allegedly bearing blank date when they were originally issued, there is hardly any defence. The cheques were admittedly issued to cover the amounts respectively payable against particular invoices. They were issued in pursuance of an agreement between the parties, which *inter alia* required Defendant No.1 to hand over such cheques to the Plaintiff. No doubt that these cheques were meant to be a security for payment of the export proceeds by third party foreign buyers, but then for that very reason the Plaintiff was well within its rights to enforce the security by presenting the cheques when the liability, for which they formed the security, was not discharged. The agreement itself provides that these cheques shall be encashed in the event of non-receipt of export proceeds. The defence that the cheques were in the nature of a security and, therefore, not capable of sustaining a summary suit, is devoid of any merit whatsoever. The cheques may have been issued with dates kept blank. That was obviously on the footing that a case for their presentation would arise only in the event of a future default. In such a case, it is the payee who is authorised to fill in the date. There is no dispute raised as to

the authority of the Plaintiff to do so in the present case. In that case, the cause of action arises on the date of their dishonour, which was admittedly within three years of the suit. There is no bona fide defence, on merits, to the liability arising under the respective cheques.

7 As for the defence of limitation, six cheques, which are drawn between 6 August 2008 and 5 May 2009, are clearly issued more than three years prior to the date of the suit and the defence of limitation insofar as these cheques are concerned, thus, can be said to give rise to triable issues for the determination of this Court. As for the other cheques, namely, 27 cheques bearing the date '27 May 2009', these cheques are obviously within the period of limitation. Their presentation and dishonour were within three years prior to the filing of the present suit.

8 Having regard to the above discussion, the Defendants have neither made out a fair or a bona fide defence nor disclosed a set of facts in their affidavit for leave to defend, which calls for an opportunity being given to the Defendants to try and make out a defence at the trial of the suit except as regards payment due in respect of 6 cheques drawn between 6 August 2008 and 5 May 2009. However, in the facts of the circumstances of the case and to give the Defendants an opportunity to make out a defence at the trial of the suit, interests of justice would be served if the Defendants are granted leave to defend on condition of depositing the entire principal amount due in respect of 27 cheques of 27 May 2009 in this Court.

9 Accordingly, the following order is passed :

(i) Defendant Nos.2 and 3 are granted unconditional leave to defend the suit. The suit is transferred to the list of 'Commercial Causes' as far as these Defendants are concerned. The Defendants to file their written statement within a period of six weeks from today.

(ii) Defendant No.1 is directed to deposit a sum of Rs.23,50,68,092/- in this Court within a period of eight weeks from today.

(iii) Upon such deposit being made, Defendant No.1 shall be entitled to leave to defend the suit.

(iv) On such amount being deposited, the suit shall be transferred to the list of Commercial Causes as against Defendant No.1.

(v) Written statement to be filed by Defendant No.1 within a period of six weeks thereafter.

(vi) Place the suit for directions after 14 weeks.

10 The Summons for Judgment is, accordingly, disposed of.

(S.C. Gupte, J.)