IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 597 OF 2013

M/s. Agio Pharmaceuticals Ltd.)
a Company incorporated under the provisions of the)
Companies Act, 1956, and having its registered and corporate)
office at A-38, Nyandjyot Industrial Estate,)
Safedpool, Kurla-Andheri Road, Mumbai-400 072)..Plaintiff

vs.

M/s. Kojach Ltd.)
having its Corporate office at 503, Fuller Road,)
P.O. Box No. 3159, Kumasi, Accra, Ghana)..Defendant

Mr. Vishnu R. Doiphode, instructed by M/s. V.M. Doiphode & Co., for the Plaintiff.
None for the Defendant.

CORAM : S.J. KATHAWALLA, J.
DATE : 26th AUGUST, 2015

ORAL JUDGMENT:

1. By this Suit, the Plaintiff – M/s. Agio Pharmaceuticals Ltd. seeks judgment and decree against the Defendant – M/s. Kojach Ltd. directing the Defendant to pay to the Plaintiff a sum of US $ 1065827.12 and US $ 9285.67 towards freight plus US $ 326000 towards cost of goods manufactured at the request of the Defendant as per the particulars of claim annexed and marked Exhibit-AB to the Plaint with further interest thereon at the rate of 18 per cent from the date it is due till payment and/or realization. The Plaintiff first attempted to serve the writ of summons on the Defendant through the Bailiff of the Sheriff of Mumbai through

registered post AD. However, the packet containing the writ of summons was returned with the postal remark thereon as "not known". An affidavit dated 23rd January, 2014 to this effect is on record. One more attempt was made to serve the writ of summons on the Defendant through the Bailiff of the Sheriff of Mumbai through registered post AD. However, the packet containing the said writ of summons was once again returned back to the office of the Sheriff of Mumbai. An affidavit to this effect dated 20th December, 2014, is filed on behalf of the Plaintiff. The writ of summons was thereafter served on the Defendant by substituted service i.e. through publication in the news papers. The Affidavit proving service dated 23rd July, 2015 was tendered in Court on 4th August, 2015 and taken on record. Since the Defendant failed to appear despite service through publication, this Court by its order dated 4th August, 2015 directed that the Suit be placed for ex parte decree on 24th August, 2015. In view thereof, the suit today is for final hearing for ex parte decree.

2. The Plaintiff has filed an affidavit of documents, a compilation of documents and an affidavit of examination-in-chief of Mr. Madhusudan Govindprasad Ruia, Chairman and Managing Director of the Plaintiff (PW-1). PW-1 has, on behalf of the Plaintiff, submitted as follows :

3.1 That the Plaintiff is a Company incorporated and registered under the Companies Act and having its registered and corporate office at the address mentioned in the cause title of the Suit and is engaged in the manufacture, export and distribution of pharmaceutical products.

3.2 That the Defendant is a Company having its Corporate office at the address mentioned in the cause title and is in the business of manufacture, import and distribution of pharmaceutical products in Ghana.

3.3 That the Defendant vide its four purchase orders dated 8th July, 2008 had requested the Plaintiff to supply pharmaceutical products mentioned therein. PW-1 has tendered photo copies of the said four purchase orders. He has further deposed that the contents of the said purchase orders are true and correct and he can identify the signature thereon. The said purchase orders are taken on record and marked Exhibit P-1 Colly.

3.4 That the Plaintiff entered into an agreement dated 11th September, 2008 with the Defendant for supply of pharmaceuticals products. PW-1 has tendered a photo copy of the Agreement dated 11th September, 2008 and has deposed that the contents of the said agreement and the signature made thereon are true and correct. The said agreement is taken on record and marked Exhibit P-2.

3.5 That in anticipation of the execution of the said agreement, the Plaintiff manufactured and supplied to the Defendant the pharmaceutical material in 14 containers till December, 2008. The Plaintiff received an e-mail dated 17th December, 2008 from the Defendant for increasing the quantity of supply and accordingly the Plaintiff started dispatching material including the additional material as per the e-mail dated 17th December, 2008 in another 13 containers, making a total supply of material in 27 containers for a total sum of US $ 13,90,483.02 including one invoice of US $ 8242.90 which was airlifted on 16th

January, 2009 excluding freight of US $ 9285.67 . PW-1 has tendered a photo copy of the e-mail dated 17th December, 2008 sent by the Defendant. The same is taken on record and marked Exhibit P-3. PW-1 has also tendered photo copies of the list of invoices, packing lists and Bills of Lading. The said photo copies of invoices, packing lists and Bills of Lading under which 27 containers were supplied are taken on record and marked Exhibit P-4 Colly. PW-1 has further tendered a chart showing pharmaceutical products supplied in 27 containers to the Defendant. The same is taken on record and marked Exhibit-P-5.

3.6 That the price agreed was FOB Mumbai and the corresponding Bills of Lading were furnished to the Defendant through Plaintiff's Bankers against 90 days credit. The Defendant retrieved the documents from his bankers on an understanding that the payment would be made within the stipulated period of 90 days as agreed.

3.7 That all the shipments were made during the period 2008 to August 2009 covered under 27 Bills of Lading. Subsequently the goods were cleared and the containers were released after destuffing them as is evident from the Landing Certificate dated 29th March, 2011. PW-1 has tendered a photo copy of the landing certificate dated 29th March, 2011 issued by MAERSK LINE. The same is taken on record and marked Exhibit P-6.

3.8 That the Plaintiff did not receive the payment after expiry of the credit period of 90 days and thus took up the matter with the Defendant several times over telephone and through e-mails. The Defendant vide e-mail dated 22nd May, 2009 forwarded a cash flow statement conveying the schedule of payments of the outstanding dues to the Plaintiff in four installments spread over a period of four months between May, 2009 and August, 2009. In terms of the aforesaid cash flow statement, the Plaintiff was to make payment of a total sum of US # 13,00,000 within a period of four months and the Plaintiff believed that the Defendant would honour the payment schedule projected in the cash flow statement. PW-1 has tendered a copy of the e-mail dated 22nd May, 2009. The same is taken on record and marked Exhibit P-7.

3.9 That thereafter out of the total outstanding sum of Rs. US $ 13,90,483.902, the Defendant made payment of US # 2,30,490 during the calendar year 2009 through their Bank leaving a balance US $ 11,59,993.20 including the freight.

3.10 That on 30th August,2010, Mr. Kojo, Managing Director of Defendant visited India and held meetings with the Plaintiff during which he promised to pay to the Plaintiff at least US $ 50,000 every month to clear the huge outstanding overdue and promised to send US $ 89,713.40 and also promised to send remittance within 10 days from 1st September, 2010. Thereafter an e-mail dated 21st September, 2010 was received by the Plaintiff from the Defendant stating that they are arranging to send TT copy of remittance. PW-1 has tendered a copy of the e-mail dated 21st September, 2010. The same is taken on record and marked Exhibit P-8.

3.11 That to avoid making payments, the Defendant sent an e-mail dated 6th December, 2010 to the Plaintiff stating that they cannot raise money since they cannot clear the products and put them in the market and that they will not be able to make payment until the required information is received from the Plaintiff. PW-1 has tendered a copy of the said e-mail dated 6th December, 2010. The same is taken on record and marked Exhibit P-9.

3.12. That the Plaintiff by its e-mail also dated 6th December, 2010 responded to the Defendant's above email stating that the Defendant has failed and neglected to send remittance which is long overdue and requested the Defendant to take the matter seriously and not to divert issues by sending irrelevant e-mails. The Plaintiff has reminded the Defendant that the total payment made in the said calendar year of 2010 was only to the tune of US $ 69165. PW-1 has tendered a copy of the said e-mail dated 6th December, 2010. The same is taken on record and marked Exhibit P-10.

3.13 That on 18th January, 2011, an e-mail was received by the Plaintiff from the Defendant. By the said email, the Defendant sought certain information from the Plaintiff to submit the same to the Ghana Food and Drugs Board to enable them to clear the goods from the Tema Port which they have been unable to clear since September, 2010. PW-1 has tendered a copy of the said e-mail dated 18th January, 2011 received from the Defendant. The same is taken on record and marked Exhibit P-11.

3.14 The Plaintiff by its reply dated 24th January, 2011 recorded that the defendant was diverting the issue which was never discussed at the time of visit of Mr Kojo during August 2010 in which meeting he had agreed to pay at least US $

50,000 every month to settle the huge outstanding overdue and will send US # 89,713.40 and also arrange to pay for the goods manufactured for him and still lying with the Plaintiff. PW-1 has tendered a copy of the said e-mail dated 24th January, 2011 . The same is taken on record and marked Exhibit P-12.

3.15 That the Defendant sent a letter dated 31st January, 2011 to the Plaintiff conveying that two original Bills of Lading No. MAEU 858626211 and MAEU 528792020 are being handed over to the Bankers to return the same to the Plaintiff. PW-1 has tendered a copy of the said letter dated 31st January, 2011 . The same is taken on record and marked Exhibit P-13.

3.16 That further payment of US $ 25000 was made by Defendant during July, 2011 in two installments, which was appropriated by the Plaintiff against the outstanding amount. PW-1 has tendered copies of the said bank advice/advice memos dated 14th July, 2011 and 28th July, 2011 regarding remittance aggregating to US$ 25,000 The same are taken on record and marked Exhibit P-14 (colly.).

3.17 That by its e-mail dated 2nd August, 2011 addressed to the Plaintiff, the Defendant asked them to treat the aforesaid payment of U S $ 25000 towards further business. However the Plaintiff had already appropriated the said amount towards past liability of US $ 1,065,827.12 plus amount of US $ 9,285.67 towards pending debit notes for freight being the amount outstanding against the supplies made by the Plaintiff during the period August 2008 to August 2009. PW-1 has tendered a copy of the said e-mail dated 2nd August, 2011 . The same is taken on record and marked Exhibit P-15.

3.18 That the Plaintiff made a written representation dated 19th September, 2011 to the High Commission of India at Ghana setting out the total outstanding dues from the Defendant and requested them to take up the matter with the Defendant. PW-1 has tendered a copy of the said representation dated 19th September, 2011. The same is taken on record and marked Exhibit P-16.

3.19 That on the same day, the Plaintiff addressed a letter to the Manager, CAL Bank Ltd., at 23, Independence Avenue, P.O. Box No. 14596, Accra, Ghana bringing to the notice of the Bankers of the Defendant the amounts which had remained unpaid by the Defendant to the Plaintiff and requesting them to intervene and assist the Plaintiff to recover the outstanding dues from the Defendant. PW-1 has tendered a copy of the said letter dated 19th September, 2011 addressed by the Plaintiff to the Manager, CAL Bank Ltd. The same is taken on record and marked Exhibit P-17.

3.20 That the Plaintiff through M/s. Hegal Law Company issued a legal notice dated 20th September, 2011 to the Defendant setting out some of the aforestated facts and calling upon the Defendant to pay the outstanding dues to the Plaintiff. PW-1 has tendered a copy of the said notice dated 20th September, 2011. The same is taken on record and marked Exhibit P-18.

3.21 That the Managing Director of the Defendant by his e-mail dated 20th October, 2011 addressed to the Managing Director of the Plaintiff acknowledged receipt of the above legal notice and made a personal appeal not to take the legal route but to sit and resolve the differences. PW-1 has tendered a copy of the said e-mail dated 20th October, 2011 . The same is taken on record and marked Exhibit P-19.

3.22 That the High Commission of India at Accra, Ghana addressed a letter dated 19th October, 2011 to the Managing Director of the Defendant inter alia calling upon the Managing Director of the Defendant to look into the matter and take immediate steps to settle the long outstanding dues of the Plaintiff under intimation to the High Commission. PW-1 has tendered a copy of the said letter dated 19th October, 2011. The same is taken on record and marked Exhibit P-20.

3.23 That by an e-mail dated 24th October, 2011, the Managing Director of the Defendant addressed a letter to the Chairman of the Plaintiff Company wherein he acknowledged having received a letter from the Indian High Commission and requested the Chairman of the Plaintiff Company to inform the Defendant whether they had decided to continue with the legal route or were wanting to sit and resolve the matter. PW-1 has tendered a copy of the said e-mail dated 24th October, 2011 . The same is taken on record and marked Exhibit P-21.

3.24 That the Managing Director of the Defendant by his e-mail dated 9th March, 2012, addressed to the Plaintiff informed the Plaintiff that the Defendant is ready to restart the business with the Plaintiff on payment of 50 per cent advance and 50 per cent towards old dues to enable the Defendant to earn something and at the same time clear the old dues. PW-1 has tendered a copy of the said e-mail dated 9th March, 2012. The same is taken on record and marked Exhibit P-22.

3.25 That the Plaintiff by his e-mail dated 27th March, 2012, informed the

Defendant that the Defendant has not remitted the long outstanding overdue amount of US $ 1,065,827 plus freight and requested the Plaintiff to arrange the remittances. PW-1 has tendered a copy of the said e-mail dated 27th March, 2012 . The same is taken on record and marked Exhibit P-23.

3.26 That a reminder to the e-mail dated 2nd May, 2012 was also sent by the Plaintiff to the Defendant. PW-1 has tendered a copy of the said e-mail dated 2nd May, 2012. The same is taken on record and marked Exhibit P-24.

3.27 The Deputy High Commissioner, Indian High Commission, Accra, Ghana wrote a letter dated 22nd October, 2012 to the Managing Director of the Defendant reminding him that a period of exactly one year had elapsed since the High Commission had first written to him about the non-payment of the Plaintiff's dues by the Defendant and called upon him to resolve the matter at the earliest. PW-1 has tendered a copy of the said email dated 22nd October, 2012. The same is taken on record and marked Exhibit P-25.

3.28 The Plaintiff sent a legal notice through their Advocates dated 4th April, 2013 to the Defendant calling upon them to make good the outstanding arrears due to the Plaintiff. PW-1 has tendered a copy of the said letter dated 4th April, 2013. The same is taken on record and marked Exhibit P-26.

3.29 That the Plaintiff made a written representation dated 15th April, 2013 to the High Commissioner of the Republic of Ghana at New Delhi regarding long outstanding dues payable by the Defendant to the Plaintiff. PW-1 has tendered a copy of the said representation dated 15th April, 2013 . The same is taken on record and marked Exhibit P-27.

3.30 PW-1 has also tendered a certificate under section 65 (B) of the Indian Evidence Act, 1872 qua the emails received by the Plaintiff from the Defendant and the emails sent by the Plaintiff to the Defendant. The same is taken on record and marked Exhibit-P-28.

3.31 That Defendant is therefore liable to pay to the Plaintiff an outstanding amount of US $ 1065827.12 and US $ 9285.67 towards freight plus US $ 326000 towards cost of goods manufactured at the request of the Defendant along with interest thereon at the rate of 18 per cent more particularly stated in the particulars of claim filed separately in the compilation of documents.

3.32 That the Suit be therefore decreed as prayed.

4. I have perused and considered the facts set out in the Plaint and the evidence of PW-1. I have also gone through the documents which are marked as Exhibits P-1 Colly to Exh. P-28. I am satisfied from Exhibit P-1 Colly. to Exh P-5 that the Plaintiff has supplied the pharmaceutical products/material to the Defendant as set out in the invoices under 27 containers . It appears from the e-mail dated 22nd May, 2009 (Exh. P-7) sent by the Defendant to the Plaintiff that the Defendant had given a proposal to the Plaintiff qua the remittances that would be made by the Defendant to the Plaintiff. From Exh. P-8 i.e. the e-mail dated 21st September, 2010 received from the Defendant it becomes clear that the Defendant had promised to send to the Plaintiff the TT copy as soon as possible. From Exhibits P-9 and P-11 it appears that the Defendant had come up with an excuse

that they cannot make payments until their goods are cleared. Such a stand was never taken earlier. Instead as can be seen from the e-mail dated 6th December, 2010 sent by the Plaintiff to the Defendant (Exh. P-10) and the e-mail dated 24th January, 2011 (Exh. P-12) the Defendant has promised to pay the outstanding dues to the Plaintiff. From Exh. P-14 it is clear that the State Bank of India realised from the Defendant an amount of US$ 12,949 towards Plaintiff's invoice No. AGIO/EXP/140/2008-09 dated 7th November, 2008 and an amount of US$ 11,949 towards Plaintiff's Invoice AGIO/EXP/140/2008-09. However, at Exh. P-15, the Defendant once again requested the Plaintiff to treat the said amount as an advance for supply of further goods to the Defendant. As can be seen from Exhibits P-16 to P-18 and P-20, P-25, P-26 and P-27, the Plaintiff has repeatedly made representations to the High Commission of India, who in turn have requested the Defendant to clear the dues of the Plaintiff and the Plaintiff has also served a legal notice on the Defendant calling upon the Defendant to pay the outstanding dues. The Defendant appealed to the Plaintiff (Exhibits P-19, P-21 and P-22) to settle the matter amicably and gave an offer/proposal to the Plaintiff to re-start the business on the basis of the Defendant making payment towards 50 per cent advance qua fresh orders placed by them on the Defendant and 50 per cent against old dues payable by the Defendant to the Plaintiff which offer of course was not accepted by the Plaintiff.

5. In the circumstances, I am satisfied that the Plaintiff has established that the Defendant is liable to pay to the Plaintiff an outstanding amount US $ 1065827.12

and US $ 9285.67 towards freight plus US $ 326000 towards cost of goods manufactured at their request along with interest thereon @ 18% as more particularly stated in the particulars of claim annexed and marked Exhibit-AB to the Plaint.

6. In view thereof I pass the following order:

(i) The Suit is decreed in terms of prayer clause (a) which is reproduced hereunder:

> *"(a) pass judgment and decree against the Defendant directing the Defendant to pay to the Plaintiff a sum of US $ 1065827.12 and US $ 9285.67 towards freight plus US $ 326000 towards cost of goods manufactured at the request of the Defendant as per the particulars of claim with further interest thereon at the rate of 18 per cent from the date it is due till payment and/or realization."*

(ii) The Defendant shall also pay costs of this Suit to the Plaintiff.

(iii) Refund of Court fees, if any, as per Rules.

The Suit is accordingly disposed off.

(S.J. KATHAWALLA, J.)