

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

**SUMMONS FOR JUDGMENT NO.35 OF 2013
IN
SUMMARY SUIT NO.131 OF 2013**

Asmi Jewellery India Ltd.	).. Plaintiffs
Vs.	
Godrej Consumer Products Ltd.	).. Defendant

Mr.Piyush Raheja, Sunil Ganjan a/w Jayesh Mestry i/by RMG Law Associates for the plaintiffs.

Mr.Darius Khambata, Senior Advocate a/w Shreya Ramesh i/by Bharucha & Partners for the defendant.

WITH

**SUMMONS FOR JUDGMENT NO.45 OF 2013
IN
SUMMARY SUIT NO.359 OF 2013**

Laxmi Dia Jewel Pvt. Ltd.	)..Plaintiffs
Vs	
Godrej Consumer Products Ltd.	).. Defendant

Mr.U.P.Bobde i/by P.P.Kulkarni for the plaintiffs.

Mr.Darius Khambata, Senior Advocate a/w Shreya Ramesh i/by Bharucha & Partners for the defendant.

CORAM : K.R.SHRIRAM, J.

DATE : 11.08.2015

P.C.

For reasons to be recorded separately, both the summons for judgments are rejected. Un-conditional leave to the defendant granted. Defendant to file their written statement within 4 weeks. Within 2 weeks thereafter parties to file their respective affidavit of documents and also complete discovery and inspection.

Stand over to 30.9.2015 for issues.

REASONS

1 The claims in both the suits are similar. The defences in both the suits are similar. The defendant is also common though the plaintiffs are different. Therefore, it would be convenient to dispose of both the summons for judgments by this common order.

2 Both the plaintiffs claim to have sold, supplied and delivered to the defendant various items made in Gold. According to the plaintiffs the defendant had placed the purchase orders, based on which the goods were supplied and corresponding invoices raised and the defendant, based on sham defence is refusing to make payment and therefore, the plaintiffs are entitled to a summary decree.

3 The case of the plaintiffs in Summary Suit No.131 of 2013 is that

since 2004-2005 one of the sister company of the plaintiffs was selling goods to the defendant which included Gold coins and various jewellery products. For the said business, the officers and employees of the said sister company interacted and coordinated, at the relevant time, with one Mr.Amit Gaine who was introduced as Deputy General Manager of the defendant-company. Between July-2004 and December-2006 they claim to have had interactions by e-mail and telephone with Amit Gaine who placed orders upon the said sister company. The sister company supplied as requisitioned and were also paid.

4 The plaintiffs therefore, started doing business with the defendant through Amit Gaine. It is submitted that one Mr. Anuj Awasthi of the defendant informed the plaintiffs that Mr.Amit Gaine along with one Mr.K.D.Dotiwalla and one Mr.K.V.Kumar will be dealing with the plaintiffs and were authorized by the defendant to place orders upon the plaintiffs and as Amit Gaine interacted with the plaintiffs for placing several orders thereby indicating that he had the defendant's authority to place such orders and the defendant not having communicated to the plaintiffs that the said Mr.Amit Gaine did not have the authority to place such orders, Mr.Amit Gaine is assumed to have the apparent authority or atleast ostensible authority. It is the case of the defendant that Amit Gaine did not have any

authority to place any orders on the plaintiffs and that too of such large quantity of Gold and that Mr. Anuj Awasthi has made no such representation. In my view, on this ground alone, the defendant is required to be given un-conditional leave to defend because whether Gaine had any authority at all is a triable issue.

5 The plaintiffs also stated that the purchase orders were all signed by Mr.K.V.Dotiwalla and Mr.K.V.Kumar. It is the defendant's case that the signatures have been forged as the said Mr.Dotiwalla and Mr.K.V.Kumar have not signed any purchase orders. This is another ground for leave to defend to be granted. It is also stated that the purchase orders said to have been placed on the plaintiffs were all bogus and a fraud has been played by the said Gaine on the plaintiffs and the said Gaine is now in judicial custody based on a complaint filed by the defendant with the Economic Offences Wing.

6 But as far as the plaintiffs are concerned, Gaine had ostensible authority. His action binds the defendant especially since there is no dispute that the goods were delivered. This is incorrect because the defendant has disputed that any goods were delivered to the defendant or to their account.

7 The fact that fraud has been played by Gaine and separate criminal proceedings have been filed against him are also not disputed. The stand of the plaintiffs is that Mr.Gaine had authority to commit to the transaction in question on behalf of the defendant and the defendant cannot now disclaim its liability on the ground that it was defrauded by Gaine and in any event, even if there was any such fraud, it was an internal matter between Gaine and the defendant and the plaintiffs have to be paid by the defendant. On this point, Mr.Raheja counsel for the plaintiffs relied upon the decision of the Court of Appeal in ¹Uxbridge Permanent Benefit Building Society Vs. Pickard to submit that a principal is liable for the fraud of his agent within the scope of the latter's authority whether or not fraud is committed for the benefit of the principal or the agent. It is true that the court of appeal has held so, but it is held so based on the facts and circumstances of the case. It was the case where a solicitor's managing clerk obtained an advance in the sum of £ 500 upon a mortgage of property by producing to the society's solicitors a fictitious deed. It was not proved that the solicitor's clerk actually forged the deed but it was contended that it was a forged document. It was also contended that the solicitor could not be made liable for the fraudulent act of his clerk where a fraud involved forgery. The court held

1 1939 (2) ALL ER 344 (CA)

that as a fact that the clerk had ostensible authority for all that he did in the matter, the master was liable despite the fact that the fraud involved forgery. Therefore, in that case the court came to a conclusion on evidence that the managing clerk put, in charge of that office, as he was, was unquestionably given, in fact, full authority to conduct of the business of a solicitor's office on behalf of, and in the name of his principal. In page-347 of the said citation it is observed as under :-

“The managing clerk, put in charge of that office, as he was, was unquestionably given in fact full authority to conduct the business of a solicitor's office on behalf of, and in the name of , his principal. That authority would cover, not merely acting for clients, but also carrying through all transactions which would normally be carried through by a solicitor- namely, completion of conveyancing business with third parties, dealings with clients, and the obtaining from such third parties, upon completion of the transaction, of sums of money, and the giving of receipts therefor. With regard to that part of the office activities, there is no question of the relationship of solicitor and client between the solicitor and the third party. Nevertheless, the authority of a clerk occupying the position of the principal to deal with third parties in circumstances where the third parties are going to change their position as the result of the transaction in progress, or which appears to be in progress, cannot be denied.”

8 Therefore, this court before holding the defendant liable, has to come to a conclusion that the said Gaine was given in fact full authority to place orders on the plaintiffs and that the said Gaine placed the order in the

normal course of his employment. The defendant has denied that Gaine had any authority. The defendant has also denied that they made any representation to the plaintiffs that the said Gaine had any authority to do what he did. This undoubtedly, raises a triable issue.

9 Mr. Raheja relied on an e-mail dated 12.6.2008 at Exhibit B-6 to the plaint. The said e-mail is from Mr. Anuj Awasthi of the defendant. According to Mr. Raheja this e-mail indicated that Gaine had the authority from the defendant. I am afraid it cannot be accepted. The e-mail simply reads as under :-

“Dear Seema,
Please find attached PO. Please confirm if the same is ok,
then I'll send the signed hard copy.
If the PO is ok, then send us the invoice for 75% advance
payment.
Regards
Anuj Awasthi”

10 Mr. Raheja thereafter relied on few other e-mails of Gaine but none of them indicate anywhere that he had any authority from the defendant. Moreover, some of the purchase orders are rather curious for e.g., purchase order at Exhibit E-8 dated 23.1.2010 is for 410 pieces of 50 grams of Gold coins, i.e., 20.5 k.g. of gold and the delivery is to be made to one Mini Yash Stores and to be delivered to one Tushar Desai. It is rather strange to

suggest that the defendant would want 20.5 k.g. of Gold to be delivered to a shop and that too, to one Tushar Desai who is not the employee of the defendant. In fact, by reading the purchase order, the plaintiffs should have been alarmed and should have made inquiries. The ledger copy relied upon by the plaintiffs at Exh.F is addressed to Amit Gaine and again curiously ledger is maintained in the name of “Amit Gaine-Godrej Consumer Products Pvt. Ltd.” and it is not ledger account of “Godrej Consumer Products Pvt. Ltd.”

The counsel for the plaintiffs stated that Amit Gaine has been using official e-mails and official letter-heads of the defendant and therefore, Amit Gaine is deemed to have authority from the defendant. This suggestion is unacceptable. Just because an employee has misused the company documents and used the company e-mail ID for playing a fraud does not mean that he had authority from the company.

11 Mr.Bobde learned Counsel for the plaintiffs in Summary Suit No.359 of 2013 supported the submissions of Mr. Raheja and submitted that it was not the first time that the plaintiffs in that suit had dealt with Gaine with their dealings going back to 2008. In this suit there was only one purchase order in question that remains unpaid viz. Purchase Order- PO No.SMB/09-10/086 dated 5.1.2010 for Rs.2,61,50,112/-. The said purchase order is at

Exhibit-A to the plaint purportedly signed by one K.Y.Kumar, General Manager, purchase. The defendant in the affidavit in reply has denied that the said purchase order has been signed by Mr.K.Y. Kumar.

12 At the end of the day the question that comes up is whether Gaine had the authority or whether Gaine made fraudulent mis-representation and whether the employer, i.e., the defendant by words or conduct has induced the plaintiffs to believe that Gaine was acting in the lawful course of the employers' business. This is a triable issue. The stand of the defendant, like Mr.Bobde submitted, does not prima facie appears to be an after thought. This is because the plaintiffs in Summary Suit No.131 of 2013 by a letter dated 15.2.2010 called upon the defendant to pay Rs.6,33,82,946/- and in reply by their letter dated 12.3.2010, the defendant denied the liability and made it clear that Gaine had no authority and a fraud has been played. This is the stand which the defendant also took before the Economic Offences Wing and Gaine is in judicial custody. What is necessary to note that despite the stand of the defendant in March-2010, plaint in Summary Suit No.131/2013 has been declared only on 28.12.2012 and lodged on 2.1.2013, almost close to 3 years. In the case of Summary Suit No.359/2013, the plaintiff filed an FIR against the officers and Directors of defendant on 11.3.2010, whereas the plaint has been declared and lodged only on

8.1.2013. This court in the matter of ²Bankay Bihari B.Agrawal Vs. Bhagwanji Meghji & Ors. has held that though indolence on the part of the plaintiffs is no ground for granting un-conditional leave to defend, but it is a relevant factor to be considered together with the merits of the defence as affecting the exercise of judicial discretion to grant un-conditional or conditional leave to defend or to refuse leave to defend the suit.

Paragraphs-30 & 31 of the said Judgment read as under :-

“30. A Division Bench of this court had occasion to deal with a somewhat connected argument in (Steel Engineering Co. & Ors. v. Jawarharlal Dalamchand), Appeal No.99 of 1972 in Summary Suit No.43 of 1972 (per Tulzapurkar & Mukhi, JJ, dated 19th September, 1972). The argument that was made was that the summary suit itself had been filed almost three years after the claim in the suit had become due and, therefore, the defendant should be entitled to unconditional leave to defend the suit on the ground that the expedition that becomes due to a vigilant claimant under Order 37 cannot be claimed by the indolent plaintiff. The Division Bench rejected the contention by observing that the circumstance that a summary suit is filed almost at the fag end or three years' limitation after the claim became due is, by itself, no ground for granting unconditional leave to defend the suit. The Division Bench thereafter observed :

“It is conceivable that this circumstance, taken along with the other circumstances in the case, may render an issue raised by the defendants a triable one, but the circumstances that there has been delay in filing the suit almost three years after the claim has become due cannot, in our view, be a ground for granting unconditional leave to defend. It is also not possible to subscribe to the view that the summary procedure under Order XXXVII cannot be claimed by a plaintiff who has filed his suit at a belated stage, for it is quite conceivable that

² 2001(2) Bom.C.R. 86

such refrain on the part of the plaintiff might be due to the fact that he might desire to save costs of the litigation and might try to avoid visit (of) such costs on the defendant and there might be several other reasons which could legitimately refrain the plaintiff from not taking legal action immediately after the claim becomes due”.

With great respect, we are in total agreement with the view expressed in this judgment. The thinking is unmistakable : that indolence on the part of the plaintiff, per se, is no ground for granting unconditional leave to defend, but is a relevant factor to be considered together with the merits of the defence as affecting the exercise of judicial discretion to grant conditional or unconditional leave to defend or to refuse leave to defend the suit. In our view, with respect, this judgment correctly lays down the law and we are in agreement with it.

31 We are not inclined to accept the contention for the plaintiffs that in the exercise of the discretion to grant conditional leave or refuse leave to defend the suit, the discretion is to be moulded only by the nature of the defence. In our view, the judgments of the Supreme Court in (Santosh Kumar v. Bhai Mool Singh), A.I.R 1958 S.C. 321 and in M/s.Machalec Engineering (supra) do not lay down any such proposition of exclusion as contended by the defendants.”

In my view, the delay in filing the summary suits is also a factor that has to be kept in mind to grant un-conditional leave in the present suits.

13 The plaintiffs had also filed Company Petitions under Sections 433 & 434 of the Companies Act 1956 against the defendant being Company Petition No.389 of 2011 and Company Petition No.306 of 2010. Both the

company petitions came to be dismissed by this Court by a judgment pronounced on 5.5.2014. All the documents relied upon in these suits were relied upon in the company petitions and submissions identical to the submissions made before this court, were made by the plaintiffs in the company petitions and the defendant also took the same defence that the defendant took in this court. The company court analyzed all the submissions and the documents and came to the conclusion that the matters cannot be determined in summary jurisdiction and requires taking evidence.

Paragraph-16 of the said judgment reads as under :-

“I am unable to accept Mr.Joshi's submission that so long as Gaine had the `ostensible' authority to accept delivery, that is sufficient. These are, as I have noted, matters that cannot be determined in a summary jurisdiction. They demand the taking of evidence. At each stage, the non-conforming nature of the transactions in questions will need to be examined. I do not believe it is at all possible to conclude that there is an ascertained and undisputed debt, or that GCPL has no substantial or bona-fide defence. Certainly its defence cannot be said to be spurious, speculative or specious.”

14 In fact the plaintiffs have conveniently not disclosed all the documents that were relied upon by the defendant in their affidavit in reply in the company petition, in this plaint. It is also settled law that while deciding a petition under Sections 433 & 434 of the Companies Act, the principles applicable to the granting of leave to defend the summary suit

filed under order 37 of the CPC are required to be considered and the company court draws upon the analogy of a summary suit under order 37 of the CPC. The company court if it reaches the conclusion that, had it been exercising ordinary original civil jurisdiction, it would have granted unconditional leave to defend, it must dismiss the winding up petition. This proposition can be found in ³S.M.patel Iron Traders Private Limited Vs. Sugam Construction Private Ltd. , in ⁴N.Radhakrishnan (Major) (Retd.) Vs. ACME décor India Pvt. Limited, in ⁵Sanjay Khanna Vs. Discovery Communications India and unreported judgment of Bombay High Court in ⁶Khyati Realtors Pvt. Ltd. Vs. M/s. Zenal Construction Pvt. Ltd. and in ⁷Videocon Industries Limited Vs. Intesa Sanpaolo S.P.A.

15 Therefore, the converse would also apply, i.e., while deciding an application for leave to defend in summary suit, the principles and considerations considered while deciding a company petition can be drawn.

In the company petition filed by the plaintiffs, the company court has concluded that the correspondence relied upon by the plaintiffs is not sufficient to conclude that Gaine had ostensible authority to accept delivery and that these are matters that cannot be determined in summary

3 (2011) 162 Comp Cas 298

4 2003(68) DRJ 340

5 (2002) SCC OnLine Del 1230

6 COMPANY PETITION NO.243 OF 2012 DECIDED ON 29.8.2013

7 APPEAL (L) NO.29/2014 IN COMPANY PETITION NO.528/2012 DECIDED ON 18/19 JULY 2014

jurisdiction. The company court has also concluded that evidence will have to be recorded and that the defence of the defendant is substantial and bonafide. The court has also concluded that the defence cannot be said to be spurious, speculative or specious. In the circumstances, in my view, unconditional leave has to be granted.

(K.R. SHRIRAM, J.)