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

SUMMONS FOR JUDGMENT NO. 5 OF 2014
IN
SUMMARY SUIT NO. 21 OF 2014

Global Airport and Ground Services
Pvt. Ltd. .. Plaintiff
Vs.
Kingfisher Airlines Ltd. .. Defendant

Mr.Yashpal Jain a/w. Ms.V. Mehta i/b Nikhil M. Sansare for plaintiff.

Mr.Gaurav Mehta i/b Bachubhai Munim & Co. for defendant.

CORAM : K.R.SHRIRAM, J.
RESERVED ON : 22ND JULY, 2015
PRONOUNCED O N : 14TH AUGUST 2015

P.C.

1 The plaintiff has filed this suit claiming a sum of Rs.2,81,87,699/- together with interest @ 18% p.a. or at any rate as this Court may deem fit on the said sum from the date of the suit until payment/realization.

2 The claim of the plaintiff is for a liquidated sum towards consideration for ground handling and cargo handling services rendered to the defendant under the agreements/Letters of Indent (LOI's) entered into by and between 1.03.2010 and September 2012, between the plaintiff and the defendant.

3 In or about April 2010, the defendant agreed to engage the services of the plaintiff at some of the airports from where the defendant used to operate its flights. The plaintiff and the defendant executed 13 LOIs to record the understanding between the parties with respect of all the material/principal aspects in relation to the rendition of services by the plaintiff to the defendant. Separate LOIs were entered into to record the specifications and requirements for a particular airport depending on the traffic and number of flights operated.

4 It was also contemplated in the LOIs that the LOIs will be substituted by definitive agreements to be entered into between the parties at a later stage. The LOIs at the same time also detailed the material aspects and the nature of services to be rendered as well as provisions for payment of charges for services rendered and the liability of the parties in the event of default etc. Clause 16 of the LOIs provided for the disbursement on or by the plaintiff on behalf of the defendant. Clause 17 & 17.1 deals with settlement of charges and provided that invoices for services rendered would be raised every fortnight and once certified by the Airport Manager, would be forwarded to the defendant's Regional Finance Office who would clear the invoices within 30 days from the receipt thereof. Clause 17 also provided that in the event, the invoices were not cleared within the

stipulated period of 30 days, then interest at the rate of 18% per annum would be payable from the 31st day of receipt of such certified invoices till the date of payment. Clause 19 provided for exclusive jurisdiction for Courts of Mumbai.

5 Copies of the 13 LOIs are at Exh.'B' to 'N' to the plaint. The plaintiff rendered services at all the designated areas under the LOIs and the parties executed definitive agreements for operation/rendering of services at 9 Airports. The agreements more or less reflected what was there in the LOIs and the copies of the 9 agreements are at Exhs.'O' to 'W' to the plaint. As regards, the balance four LOIs, it is the case of the plaintiff that the parties mutually agreed that as the plaintiff was rendering services at the Airports under the 9 agreements there was no need to execute new agreements for rendering of services. The plaintiff, however, continued to provide and the defendant continued to accept services under all the 13 LOIs including the four LOIs for which the agreements were not entered into. The plaintiffs continued to raise invoices every fortnight in accordance with the LOIs/the agreements and the plaintiff kept making on account payments. Often the defendant made lumpsum payments without specifying or identifying any particular invoice. The plaintiff, therefore, adjusted the amount so received as against the amounts due to it by the defendant.

6 In or about December 2010, the defendant started defaulting in the payment of its dues under the LOIs/agreements. The plaintiff, however, continued to render services and raised invoices and it is averred in the plaint that no disputes and or demurs were raised by the defendant regarding the services rendered or the invoices. The plaintiff and the defendant continued to exchange correspondence on the outstanding and by their letter dated 16.03.2012, the plaintiff notified the interest clause of the agreements and LOIs and demanded interest at the rate of 18% p.a. on the outstanding amount due and payable to it by the defendant. The defendant neither replied nor approached the plaintiff to clear the outstanding dues. The plaintiff, therefore, vide letter dated 21.06.2012 terminated two agreements, both dated 1.04.2010 with respect to the services being rendered at Jaipur and Mangalore Airports, respectively. The plaintiff received a text message from one Murli Ramchandran, Sr. Vice-President, ground Services, an official of the defendant, stating that the defendant wished to terminate its remaining agreements/LOIs. The plaintiff responded to the said Murali Ramchandran requesting him to send an official termination letter and also called upon him to explain when the defendant would settle the outstanding dues and also handover TDS certificates for the deductions already made by the defendant while making payments to the plaintiff. It was also brought to the notice of the defendant that though the defendant has been deducting tax

at source, the amounts are not being deposited by the defendant with the Income Tax Department. Thereafter, the plaintiff and the defendant met and it was decided that the defendant would release Rs.10-15 lakhs on an average every month in order to clear the plaintiff's outstanding dues. The plaintiff was requested to continue rendering services in certain Airports. As the defendant continued to default in its payments, the plaintiff discontinued rendering services totally at all the Airports and the contractual relationship between the plaintiff and the defendant came to an end.

7 As per the records maintained by the plaintiff, the outstanding payable by the defendant was Rs.2,57,37,956/- excluding TDS and default interest. The plaintiff sent a reconciliation statement to the defendant recording the outstanding payable by the defendant as on 29.11.2012. As the defendant did not respond, the plaintiff continued to send reminders and finally the defendant sent a reconciliation statement to the plaintiff. By an email dated 12.08.2013, the defendant forwarded its statement of account as per its books regarding the amounts payable to the plaintiff. In the statement, the defendant has acknowledged and admitted that it is liable to the plaintiff to the extent of Rs.1,97,04,803/- plus Rs.26,05,143/- towards TDS amounts. The suit is filed by the plaintiff restricting its claim to this admitted amount of Rs.1,97,04,803/- plus Rs.26,05,143/- together with interest on the amount

of Rs.1,97,04,803/- at 18% per month after the date on which payment became due till 30.11.2013.

8 The plaintiff has based its suit on the basis of the LOIs/agreements and the acknowledgment of liability being a liquidated sum receivable from the defendant.

The defendant, though served with the summons for judgment and the plaint, did not file any reply and the counsel for the defendant stated that the defendant does not wish to file any reply and they would argue on demurer. The counsel for the defendant submitted that there was no written contract, the invoices were not raised and in the email dated 12.08.2013, there is no promise to pay and as the plaintiff has not produced copies of the invoices, the suit is not maintainable. The counsel also submitted that Order 37 of the Code of Civil Procedure is not applicable in case of implied contract.

9 It is not the case of the plaintiff that the suit is based on an implied contract. The suit is based on written agreements viz. 13 LOIs read with 9 agreements relating to 9 of the LOIs.

10 As regards remaining four LOIs, it is averred in the plaint that the defendant stated that there was no need to enter into further agreements

because the LOIs are already in place and the parties have entered into agreements for the Airports covered under those four LOIs. The defendant has not denied the factual position as averred. Therefore, the contention of the counsel for the defendant that there is no written contract cannot be accepted. Therefore, the defence that Order 37 does not apply to implied contract also should fail.

11 As regards non-production of the invoices, in my view, it is not necessary at all. It is not the case of the defendant that the invoices were not raised or invoices were inflated etc. The defendant has not filed any affidavit disputing the averments made on the amounts outstanding, as per the invoices raised by the plaintiff. The defendant has also acknowledged that a sum of Rs. 1,97,04,803/- plus TDS of Rs. 26,05,143/- was payable to the plaintiff. Therefore, I see no reason why the plaintiff should have even produced the invoices because the plaintiff is only claiming the amount as acknowledged by the defendant as payable to the plaintiff. Once the defendant informs the plaintiff that an amount of Rs.1,97,04,803/- plus Rs.26,05,143/- (Towards TDS) was payable, there is no need for the plaintiff to file the invoice. The defendant has promised to pay the amount. The fact that the defendant has informed that the amount of Rs.1,97,04,803/- plus Rs.26,05,143/- (TDS) is payable to the plaintiff that itself meets the

requirement. The counsel for the defendant also submitted that in the email dated 12.08.2013, the defendant has requested the plaintiff to do the reconciliation at their end and share a copy of the same and the plaintiff has not done the reconciliation or shared a copy. In my view again this is a specious defence because the plaintiff is just accepting what the defendant says. The plaintiff would have had do the reconciliation and shared it with the defendant only if the plaintiff was disputing the statement sent by the defendant. Therefore, this argument also is not acceptable.

12 The counsel for the defendant submitted that certain part of the claim in the first six pages of the attachment to the defendant's email of 12.08.2013 were barred by limitation and the last invoice is dated 31.07.2011 and the first is dated 21.03.2010. The counsel for the plaintiff states that the statement given alongwith email of 12.08.2013 is a statement of account for the period beginning 1.03.2013 regarding all the 9 Airports. The counsel states that from the statement many payments have been made and what has not been paid begins only for the period from 31.05.2011 and the suit has been lodged on 20.12.2013. The counsel for the defendant did not contradict the same. Therefore, the submissions of the defendant' counsel that part of the claim is barred by limitation cannot be accepted.

13 The counsel for the defendant did not counter the point in paragraph 10 of the plaint where clause 9 of the agreements between the parties is reproduced. Clause 9 reads as under :

> *"In the event of any dispute or claim concerning the scope, meaning, construction or effects of this Agreement, the parties shall make all reasonable efforts to resolve disputes, the parties may elect to resolve the dispute through arbitration (either by single arbitrator or a panel of arbitrators). In the event that the parties fail to agree to an arbitration process laid in Arbitration and Conciliation Act, 1996, the dispute shall be settled in accordance with the laws of India or jurisdiction set out in Exh.B, by the courts set out in Exhibit B without regard to principles of conflict of laws".*

This clause cannot bar the Court from exercising its jurisdiction because the clause only provides in case of disputes, the parties may elect to resolve the disputes through arbitration and in the event that the parties fail to agree to an arbitration process laid in Arbitration and Conciliation Act, 1996, the dispute shall be settled in accordance with the laws of India or jurisdiction set out in Exh.B. First of all, the defendant had acknowledged the amount payable to the plaintiff and the plaintiff is only claiming that amount. Therefore, there is no dispute.

Secondly, clause 9 provides for the parties to have an option to elect to go for arbitration, but none of the parties have elected. The clause as read also does not provide that there is a binding agreement between the parties to refer to arbitration any dispute. Therefore, the said clause will not come in the way of this Court exercising its jurisdiction.

14 The written agreements are in place and the defendant has acknowledged its liability. The amounts have also been settled between the parties and has observed by the Full Bench of this Court in ***Jyotsna K. Valia Vs. T.S. Parekh & Co.*** [1] a summary suit is maintainable on a settled account duly confirmed by the plaintiff. In fact, the Full Bench has also stated that settling of accounts gives rise to a written contract on a fresh cause of action, with an implied promise to pay the amount settled. Paragraph 29 of the said judgment reads as under :

> *29. In so far as the 'settled account is concerned,' it is no doubt true as noticed by the learned single Judge, that the various judgments adverted to, for holding that the summary suit would lie on a settled account, either of the Privy Council or of the Supreme Court did not arise from suits filed as summary suits. However, after the judgment of the Privy Council (Elvira L. Rodrigues) Sequeira (supra) which has been considered by the Supreme Court in Hiralal & Ors. (supra), a summary suit on a settled account, duly confirmed by the Defendant is maintainable as it is an acknowledgement by the Defendant in the ledger in which mutual accounts have been entered and the accounts settled between them. Such settling of accounts gives rise to a written contract on a fresh cause of action, with an implied promise to pay the amount settled. A summary suit would therefore lie on 'Settled accounts duly confirmed by the defendants. Issue (1) is answered accordingly.*

1 2007(4) Mh.L.J. 517

15 The counsel for the defendant also submitted that under the writing, namely, the email dated 12.08.2013, relied upon by the plaintiff, the stated cause of action for the claim in the suit did not contain any promise to pay and was merely a statement of account and an acknowledgement and hence the suit is not maintainable as a summary suit.

16 In my view, the statement of account rendered by the defendant should be considered as not only an acknowledgement for the money owed but should be even read as an implied promise that the money owed would be repaid by the defendant. Such an obligation which is implied from the statement of account does create a liability to pay a liquidated sum of money and can be enforced by instituting a summary suit. In the judgment of this Court in the matter of ***Manekchand Mohanlal Poonawala vs Shah Bhimji Kundanmal And Company***[2] it is held that it is not correct to state that implied obligations to pay debt or liquidated demand in money when they arise on a written contract cannot be good causes of action for institution of summary suits. Paragraphs 7, 8 and 9 of the judgment read as under :

> *7 The question is as to whether the Khata Pete receipt in this case is not a written contract within the meaning of Rule 2 cited above. In this connection it may at once be noticed that the writing does not contain express promise to repay the sum of Rs. 13,000 mentioned in the writing. Even so it is apparent that the writing contains an implied*

2 1969(71) Bom. L.R. 370/1969 Mh.L.J.698

promise to repay the sum of Rs. 13,000 mentioned therein. This is so because the writing is made in lender's book by the debtor and the debtor states that the amount is received on Sarafi account and is credited to the account of the creditor in the ledger of the debtor. The rate of interest is also mentioned. The writing relates to a fresh loan and has no reference to adjustment or otherwise of accounts of previous dealings. It bears a 4-anna revenue stamp. It is quite clear that the parties did not intend the writing to be and it is not merely a receipt. The Writing was executed to create an obligation and promise to repay the amount mentioned therein.

8 Now, it is true that prior to the amendment of Rule 2, a summary suit could be instituted in all cases where a debt or liquidated demand in money arose on contract, express or implied. It is quite clear that previously a written contract was not a necessary condition for institution of a summary suit to recover debt or liquidated demand in money. Where express or implied obligation to pay debt or liquidated demand in money arose, even on an oral contract, a summary suit could be instituted. Under the amended Rule, summary suits cannot be instituted when such debt or demand in money arises on oral contracts. Mr. Karanee, however, is not right in his submission that the deletion of the phrase "express or implied" from amended Rule 2 indicates that when implied obligation to pay debt or liquidated demand in money arises on a written contract, a summary suit cannot be filed. Obligations arising on a written contract can in some parts be express and in other parts be implied by law or otherwise. Such implied obligations', if they create a liability to pay debt or liquidated demand in money, can be enforced by instituting- a summary suit having regard to the language of the amended Rule 2. In my view, it is not correct that implied obligations to pay debt or liquidated demand in money when they arise on a written contract cannot be good causes of action for institution of summary suits.

9 As I have already stated, the Khata Pete receipts

> *ordinarily executed by debtors in favour of lenders must be held to contain an implied promise to repay the money mentioned in such receipts. These obligations to repay must be held to arise on a written contract. Under the circumstances, the contentions made by Mr. Karanee are rejected.*

17 In the circumstances, what stands out is that the defendant has acknowledged that a sum of Rs.1,97,04,803 plus Rs.26,05,143 (TDS) is payable to the plaintiff. Clause 17.1 of the LOIs/agreement provides for interest @ 18% p.a. from the 31st day if the invoices are not paid within 30 days. The defendant has not made out any bona-fide or reasonable defence raising any triable issue. I have arrived at this conclusion because the defendant has no defence whatsoever. Whatever defences that were raised orally by the counsel for the defendant, as noted above, are not sustainable. The same are sham and moonshine.

18 In the circumstances, the plaintiff is entitled to judgment in terms of prayer clause (a) which reads as under :

> *"(a) this Hon'ble Court be pleased to order and decree under Order XXXVIII of the Code of Civil Procedure, 1908 directing the defendant to pay the sum as is more particularly stated in the particulars of claim annexed hereto at **Exhibit "OO"** and to pay to the plaintiff interest at the rate of 18% per annum or at any rate as this Hon'ble Court may deem fit and proper on the outstanding amount of Rs.2,81,87,699/- from the date of institution of this present suit till realization."*

19 The plaintiff is also entitled to cost in the sum of Rs.1 lakh.

20 Decree be drawn up accordingly.

21 The summary suit stands disposed as decreed. Refund, if any, of court fees, as per rules.

(K.R. SHRIRAM, J.)