

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3378 OF 2016

JAY PHARMA LABORATORIES
AND ANR.

...Petitioners

Versus

ALKEM LABORATORIES LTD.

...Respondent

....
Mr. P.N. Patil i/b. L.S. Deshmukh, Advocate for the Petitioners.
....

CORAM : R. G. KETKAR, J.

DATE : 06th APRIL, 2016

P.C.

1. Heard Mr. Pramod Patil, learned Counsel for the petitioners, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 25.1.2016 passed by learned Judge, presiding over Court Room No.28 of the Bombay City Civil Court at Bombay in Summons for Judgment No.226/2012 in Summary Suit No.4320 of 2011. By that order, the learned trial Judge granted conditional leave to defend to the petitioners, hereinafter referred to as defendants, subject to their depositing sum of

Rs.12 Lacs in the Court within four weeks from the date of the order. After depositing said amount, the defendants are permitted to file written statement within four weeks from the date of the order. The learned trial Judge directed to deposit the said amount in the Nationalized bank, initially for the period of one year and continue to renew the same for the like period until further orders. The learned trial Judge further directed that on failure to deposit the amount within four weeks, the plaintiffs will be at liberty to apply for further reliefs. Accordingly the Summons for Judgment was disposed of.

3. The respondent, hereinafter referred to as the 'plaintiff' has instituted Summary Suit under Order 37 of CPC initially on the Original Side of this Court *inter alia* for decree against the defendants to pay a sum of Rs.19,77,033.90/- along with interest at the rate of 16% per annum or at any other rate, from the date of the Suit till payment and realization of the amount.

4. During pendency of the suit, the plaintiff took out Summons for Judgment No.226/2012. In support of summons for judgment, the plaintiff filed affidavit of Divya Mewani, authorized signatory. On behalf of the defendants, application

for leave to defend was taken out on 13.1.2014. The plaintiff filed rejoinder to the reply-cum-leave to defend application filed by the defendants. By the impugned order, the learned trial Judge granted conditional leave to defend to the defendants, as indicated earlier. It is against this decision, the defendants have instituted the present petition.

5. Mr. Patil submitted that the plaintiff is the manufacture of pharmaceutical drugs. The Directorate of Medical Education and Research, Mumbai [for short "DMER"] invited tenders from the manufactures for supply of drugs and pharmaceutical to institution under the control of DMER, on certain terms and conditions. The rate contract was valid for two years or until further orders which ever is earlier. The defendant was appointed as a distributor by the plaintiff. He submitted that the suit is instituted neither on negotiable instrument nor on the bill of exchange, but, is instituted on the basis of the contract. In particular in paragraph-27, the plaintiffs specifically asserted that the suit is instituted under Order 37 Rule 2 of CPC on the basis of the contract in writing evidenced by the documents mentioned in the suit. He has

invited my attention to the terms and conditions of the tender and in particular clause-2.6 dealing with performance certificate from concerned Food and Drugs Administration. Clause-2.7 dealing with valid certificate from the concerned Food and Drugs Administration. Annexure III whereunder the manufacture was authorized to appoint one distributor/agent/dealer for quoting rates. Such authorized distributor/agent/dealer was to furnish all necessary documents of his manufacturer and his own, amongst others Drug License of his manufacturer. Clause-2.11 laid down furnishing information in respect of products for which quality control data required as indicated in the schedule in proforma. Clause 9.4 laid down that the maximum period permitted between the date of manufacture and date of supply of drugs shall not be more than $\frac{1}{4}$ of the whole life period of such drugs.

6. Mr. Patil submitted that on 14.12.2007, DMER accepted the offer given by the plaintiff for supply of injection for the purpose of rate contract. The period of rate contract for supply of injection was 14.8.2007 to 13.8.2009. On 30.6.2008 the defendant placed order with the plaintiff for supply of

20000 vials of Clavam Injection 1.2 grams, as per the DMER terms and conditions.. He invited my attention to the invoice dated 30.8.2008 as also circular dated 24.10.2008 issued by the Assistant Director (Purchase) of DMER wherein the plaintiff's drug licence No.DD-146 was ordered to be considered for accepting supply of Amoxycillin + Clavulanic Acid.

7. Mr. Patil invited my attention to clause 11.3 of the tender which laid down that if the rate contract holder fails to supply the store within the stipulated period and according to terms and conditions or fails to replace rejected store by the concerned Direct Demanding Officer (for short, 'D.D.O'), within such time as may be stipulated by D.D.O., the concerned D.D.O. shall be entitled to purchase such stores from any other source after confirmation of the DMER at such price which ordinarily should not be more than 10% of rate contract price, unless otherwise properly satisfied by concerned D.D.O. to the satisfaction of DMER. He further submitted that the performance certificate is required to be sent by the tenderer as also he has to put his stamp and signature on the performance certificate.

8. Mr. Patil invited my attention to paragraph-3 of the plaint where the plaintiff asserted that defendant No.1 placed order of 20,000 clavam injections 1.2 gm on the plaintiff. However, the plaintiff suppressed the fact that the tender was invited by DMER for supply of drugs and pharmaceutical and more particularly the terms and conditions of the said tender. In fact, these facts were brought on record by the defendants in their application for leave to defend. He invited my attention to paragraph-3 onwards of the application which highlighted invitation of tender by DMER and the terms and conditions of said tender. He submitted that as the plaintiff has suppressed these facts, the defendants are entitled to unconditional leave to defend. He has taken me through the application and in particular paragraph-15 where reference is made to clause-9.4 of the terms and conditions of the tender as also the assertion that the defendants could not supply the drugs to DMER and the State Government.

9. Mr. Patil submitted that the learned trial Court has not dealt with this aspect in the impugned order. In paragraph-8, the learned trial Judge merely observed that the defendant

placed purchased order. The supply of medicine was also not in dispute. Defendants issued cheques No.296113 and 2961116 and that issue of another set of cheques was not in dispute. The licence No.DD-16 is validated by the Government. He submitted that the learned trial Judge failed to appreciate that the plaintiff has filed complaint under Section 138 of Negotiable Instruments Act, 1881 on account of dishonor of cheques. The complaint was dismissed by the learned Magistrate and the defendants were acquitted. Aggrieved by the order of acquittal, the plaintiff preferred appeal against acquittal in this Court, which was also dismissed. As the learned trial Judge did not consider various aspects in the impugned order, the same deserves to be set aside. In any case the defendants are entitled to unconditional leave to defend. He relied upon the decision of the Apex Court in the case of ***M/s. Mechelec Engineers & Manufactures vs. M/s. Basic Equipment Corporation, (1976) 4 SCC 687*** and submitted that the case is clearly covered by principle (b). He submitted that the defendants have raised triable issue indicating that they have a fair or bonafide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendants are entitled to

unconditional leave to defend. He also relied upon provisions of Section 43 of the Sale of Goods Act, 1930 (for short, 'Act') to contend that unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. He, therefore, submitted that the defendants are not bound to return the drugs supplied and are entitled to retain the same as they have intimated the plaintiff to collect the drugs and despite this intimation the plaintiff failed to collect the goods.

10. I have considered the submissions advanced by learned Counsel for the petitioners. I have also perused the material on record. By the impugned order, the learned trial Judge granted conditional leave to defend subject to depositing Rs.12 Lacs in the trial Court within four weeks from the date of order. In paragraph-8 of the impugned order, learned trial Judge has noted that the purchase orders placed by the defendants were not in dispute. The supply of medicine was also not in dispute. Mr. Patil submitted that the validity of the licence was

effective from 24.10.2008. With the assistance of Mr. Patil, I have gone through the application filed by the defendants seeking leave to defend. In the entire application, there is no contention that because the period of drug expired, the Government refused to accept the drugs. What is contended in paragraph-15 is that because of violation of condition of clause-9.4, the defendant could not supply the drugs.

11. It is material to note that the entire application is silent about rejection of drugs by the State Government on the ground that the drugs were supplied after the expiry period. What is significant to note that the period of rate contract is from 14.8.2007 to 13.8.2009 and by circular dated 24.10.2008 the Assistant Director (Purchase) of DMFR issued instructions to consider the the plaintiff's drug licence No.146 for accepting supply of Amoxycillin + Clavulanic Acid. Thus, it is not brought on record by the defendants that the State Government rejected the supply of drugs by the defendants. In other words, the defendants had retained the drugs supplied by the plaintiff. Reliance placed on Section 43 of the Act does not advance the case of the defendants. The defendants have not referred to any

agreement as contemplated by Section 43. No material is placed on record to show that the defendants having right to refuse to accept the goods, have refused to accept the goods. No material is placed on record to show that the defendants had intimated its refusal to accept the goods to the plaintiff.

12. Section 70 of the Contract Act casts obligation on person enjoying benefit of non-gratuitous act. Section 70 reads thus :

“70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

13. Perusal of above section clearly shows that where a person lawfully does anything for another person, **or delivers anything to him**, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In the present case, the defendants have not placed any material on record either to indicate that

they have returned the drugs supplied by the plaintiff or that the Government refused to accept the delivery of the drugs made by the defendants. The defendants are, therefore, bound to compensate the plaintiff. By not making payment and retaining the drugs supplied by the plaintiff clearly amounts to unjust enrichment.

14. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Mr. Patil relied upon the decision of the Apex Court in the case of **M/s. Mechelec Engineers** (supra). In my opinion, after considering the material on record, the case falls in principle (e) of the said decision. In view thereof and for the reasons stated in paragraph-8 of the impugned order, I do not find that any case is made out for interfering with the impugned order. Hence, the petition fails and the same is dismissed. Order accordingly.

15. At this stage, Mr. Patil orally applies for extension of six weeks time for depositing the amount as also for filing written statement as per the impugned order. He further assures that the defendants will not seek extension of time. He further states that the learned trial Judge may be directed to

decide the suit uninfluenced by the observations made in the impugned order and in this order. In view thereof, on the oral application made by Mr.Patil, notwithstanding dismissal of the Writ Petition, time to deposit amount as also file written statement as per the impugned order is extended for a period of six weeks with express understanding that no further extension of period will be sought. Learned trial Judge will decide the suit on the basis of the evidence on record and in accordance with law uninfluenced by the observations made in the impugned order and in this order. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)