

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3425 OF 2016

M/S. DRUSHTI ENGINEEERS AND
DEVELOPERS

...Petitioner

Versus

M/S. J. K INFRA UTILITIES PVT. LTD.

...Respondent

....

Mr. Deval K. Anja, Advocate for the petitioner.

Mr. Rajiv Hingu, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 18th MARCH, 2016

PRONOUNCED ON : 31st MARCH, 2016

P.C.

1. Heard Mr. Deval Anja, learned Counsel for the petitioner and Mr. Rajiv Hingu, learned Counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 18.2.2016 passed by the learned Judge, presiding over Court room No.24 of Bombay City Civil Court at Bombay in Summons for Judgment No.370/2015 in Summary Suit No.962/2015. By that order, the

learned trial Judge granted leave to defend to the defendant subject to depositing principal sum of Rs.6,71,641/- and retention money of Rs.1,34,519/- total amounting to Rs.8,06,160/-, in the Court within one month from the date of the order, failing which the respondent, hereinafter referred to the 'plaintiff', shall be entitled to a decree as prayed for. In the event the amount, as directed, is deposited by the defendant, it shall file its written statement within 30 days from the date of such deposit and the plaintiff shall be at liberty to withdraw said amount, subject to furnishing sufficient security for restoring said amount in the Court with interest @ 9% per annum in the event suit fails. The Summons for Judgment and application for leave to defend was disposed of accordingly.

3. The defendant floated the tender for plumbing work. The plaintiff offered lower rate and after several meetings and bargains, final meeting was held and the work order was issued by the defendant to the plaintiff on 15.9.2011. It is the case of the defendant that the plaintiff was responsible for executing an agreement on the stamp paper within one week as per the format mentioned in the 'Article of Agreement'. The plaintiff had

agreed to abide by the decision of the defendant as final in case of any disputes. The work order constitutes of several important terms and conditions, including the condition, regarding 5% retention amount of each Running Account Bill [for short, 'R. A. bill']. It is the case of the defendant that from the entire work in progress, it had time and again objected to the quality and standard of the work. The consultant appointed jointly had occasioned several personal meetings to rectify the faults. However, there was no improvement. The defendant had issued letter/notice dated 24.11.2013 to the plaintiff. The plaintiff however instituted the suit for recovery of the alleged dues by sending alleged emails for balance payment. In fact the defendant has suffered loss at the hands of the plaintiff due to deficient service and negligence.

4. The defendant filed application for leave to defend along with supplementary written statement. By the impugned order, the learned trial Judge granted leave to defend as indicated earlier. It is against this decision, the defendant has instituted the present petition.

5. Mr. Anja strenuously contended that the learned trial

Judge committed serious error while passing the impugned order. The learned trial Judge has imposed stringent conditions by directing the defendants to deposit the entire claim amount and further permitting the plaintiff to withdraw the same. The learned trial Judge failed to appreciate that the defendant has raised several triable issues which require leading of the extensive evidence and examination of witnesses. The learned trial Judge also failed to appreciate that the Summary Suit is not maintainable as there is no admitted debt or any claim. The learned trial Judge also failed to appreciate that the plaintiff was claiming performance of the contract (work order) and, therefore, it ought to have instituted suit for specific performance and not the summary suit.

6. Mr. Anja submitted that clause at IX(a) of the work order dated 15.9.2011 lays down that the entire work shall be guaranteed as per the specifications against faulty workmanship, defective materials and shortfall in capacities for a period of 12 months from the date of issue of Virtual Completion Certificate by the Consultant. In the present case admittedly the consultant has not issued Virtual Completion

Certificate.

7. Mr. Anja submitted that the plaintiff had issued tax invoice dated 18.6.2013 which was received subject to verification of the contents, as is evident from the endorsement made by the defendant on 16.10.2013 on that invoice. He had invited my attention to the communication dated 24.11.2013 addressed by the defendant to the plaintiff. He further submitted that the plaintiff relied upon email dated 25.7.2013, 24.8.2013, 23.11.2013 and others. All these emails were sent to one Mr. Gurbani. The defendant did not receive these emails. He therefore submitted that the impugned order deserves to be set aside.

8. On the other hand, Mr. Hingu supported the impugned order. He submitted that Mr. Gurbani is in the employment of the defendant. The plaintiff had sent emails to Mr. Gurbani who was in-charge of the project. At no point of time the defendants made grievance about the non-receipt of emails. He submitted that on 7.2.2014 a letter was addressed to the defendant and in that kind attention of Mr. Gurbani was also invited. He submitted that emails were sent to Mr. Gurbani requesting him

to expedite the issue of Virtual Completion Certificate as retention money could be claimed by the plaintiff after defect liability period of 12 months was over. He submitted that the plaintiff was insisting for issuing such certificate in view of clause (IX)(a) of the work order dated 15.9.2011. He submitted that the learned trial Judge considered the material on record and observed that from 18.6.2013 till 9.5.2014, the defendant maintained a complete silence though being aware that the plaintiff is making repeated demands. As also, there is no explanation as to why the defendant did not raise protest about the goods of sub-standard quality and work of defective nature and for the first time such issues were raised in reply dated 9.5.2014. He further submitted that the defendant did not produce the letter dated 24.11.2013 before the trial Court and for the first time it is produced in this Petition. He therefore submitted that no case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Clause IX(a) dealing with guarantee

and defects liability, of work order dated 15.9.2011 reads thus ;

“IX. GUARANTEE AND DEFECTS LIABILITY

a) The entire work shall be guaranteed as per the specifications against faulty workmanship, defective materials and shortfall in capacities for a period of 12 months from the date of issue of Virtual Completion Certificate by the Consultant.”

10. The plaintiff has instituted the suit on the ground that as per the work order dated 15.9.2011, it had executed the entire work and raised invoices for total amount of Rs.29,53,365.10 inclusive of VAT and service tax. Out of this amount, the defendant paid Rs.21,72,235.40 leaving balance of Rs.6,46,610/- excluding the retention amount of Rs.1,34,519/- which was to be retained by the defendant @ 5% of each invoice till the completion of entire work.

11. After completion of the entire work, the plaintiff demanded sum of Rs.6,71,369/- from the defendant repeatedly, however, the defendant did not make the payment. Initially, the plaintiff did not claim defective money due to defect liability period of 12 months. After expiry of that period, the plaintiff demanded that amount. However, the defendant did not pay the

amount. In paragraph-10 of the impugned order, the learned trial Judge referred to the correspondence exchanged between the parties and observed that from 18.6.2013 till 9.5.2014 the defendant maintained a complete silence though being aware that the plaintiff is making repeated demands and no explanation is tendered as to why at very first instance no such claim was made or reply was given to the demand letter by the plaintiff and as to why the claim about goods of substandard quality or work of defective nature was not made and that no reply was given to the demand letter issued by the plaintiff.

12. In paragraph-11, the learned trial Judge dealt with the case of the defendant that as the plaintiff did not rectify the work, it was compelled to get said repair done through some other agency due to which it has incurred cost of more than Rs.9,00,000/-. The learned trial Judge observed that under the contract, the plaintiff was duty bound to make necessary repairs or rectify the defects, without calling plaintiff to do the same and without disclosing its intention to appoint another contractor, the defendant was not justified in appointing another contractor to carry out such rectification. There is nothing on

record to show that at any time the defendant claimed that substandard goods were used and that those repairs were required and the plaintiff refused to carry out the repairs.

13. In paragraph-12, the learned trial Judge dealt with the submission advanced on behalf of the plaintiff about allegation of defective work and use of goods of substandard quality during the warranty period. In paragraph-13, the learned trial Judge noted that though the plaintiff was repeatedly demanding the outstanding amount, the defendant maintained complete silence. Though the defendant alleged that the work was of defective nature, nowhere any particulars of alleged defect were furnished and that though it was claimed that the goods were of substandard quality, nowhere the defendant gave particulars of quality defects of goods or which brand goods were required to be supplied. In paragraph-14, the learned trial Judge noted that invoice of goods purchased by the plaintiff shows that they were branded and it was for the defendant to show that those brands were substandard. Mr. Hingu submitted that the communication dated 24.11.2013 was not produced by the defendant in the trial Court. Mr. Anja fairly did not dispute this

fact and submitted that it is produced for the first time in this Court.

14. Though the defendant contended that it did not receive any emails from the plaintiff, on the ground that they were sent to Mr. Gurbani, it is not possible to accept this submission as emails were sent by the plaintiff to Mr. Gurbani and even letter dated 7.2.2014 was addressed to said Mr. Gurbani. Right from 25.7.2013, the plaintiff was requesting payment towards final RA bill dated 18.6.2013 amounting to Rs.6,46,610/- which was submitted to the defendant for certification and payment. The certification was not made because of which the the payment was delayed. The defendant was requested to expedite the bill for certification at the earliest.

15. After considering the material on record, the learned trial Judge held that the defence raised is as and by way of afterthought. Insofar as the principal amount and retention money is concerned, there is no defence with the defendant and the contention so raised is illusory and moonshine. The learned trial Judge accordingly granted leave to defend subject to depositing principal amount as also retention money. The order

passed by the learned trial Judge is based upon material on record. In the case of ***Mechelec Engineers and Manufacturers vs. Basic Equipment Corporation, AIR 1977 SC 577***, the Apex Court approved the decision of Calcutta High Court in the case of Smt. Kiranmoyee Dassi vs. Dr. J. Chatterjee, 49 C.W.N. 246 and laid down the following principles to be followed while considering the question of granting leave to defend :

“(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or

furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.”

16. After considering the material on record, I do not find that the learned trial Judge has committed any error in exercising the discretion. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

17. At this stage, Mr. Anja orally applies for extension of time of 30 days for complying the impugned order. He assures that no further extension would be sought. In view thereof, notwithstanding dismissal of the Petition, time to comply the impugned order is extended by a period of 30 days subject to understanding that no further application for extension shall be entertained. Order accordingly.

(R. G. KETKAR, J.)