IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12894 OF 2016

Rajesh Shah ..Petitioner.

Vs

Hitech Specialities Solutions Limited .. Respondent

Mr.Amrut Joshi a/w S.Ayer, Ms Debashree Mandpe i/b Ganesh and Company, Advocates for petitioner.

Mr. Shyam Kapadia a/w Ms Shruti Katakey, Ms Vidhi Kothari i/b Crawford Bayley and Co., Advocates for Respondent

CORAM : R.G.KETKAR,J.
DATE : 02/12/2016

PC:

1. Heard Mr. Amrut Joshi, learned counsel for the petitioner and Mr. Shyam Kapadia, 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 'defendant', has challenged the Judgment and order dated 16.8.2016 passed by the learned Judge, City Civil Court, Gr. Bombay, in Summons for Judgment No.251 of 2014 in Summary Suit No.209 of 2013 taken out by the respondent, hereinafter referred to as 'plaintiff'. By that order, the learned trial Judge granted conditional leave to defend the suit subject to the defendant depositing the amount of Rs.33,44,745/- in the Court within four weeks from 16.8.2016. The learned trial Judge also made it clear that on failure of the defendant to deposit the amount within four weeks, Summons for

Judgment will be made absolute. The learned trial Judge also issued direction for investing the amount so deposited by the defendant.

3. Plaintiff has instituted Summary suit under Order 37, Rule 1 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), inter-alia, for recovery of Rs. 33,44,745/- along with interest at such rate as the Court may deem fit from the date of filing of the suit till realization thereof. The plaintiff has contended that on 29.10.2010, the suit contract was executed between the parties. Clause 1 thereof provided that the defendant expressed his interest to market the product, aquastop, a construction chemical product for water proofing through the plaintiff. Clause 2 thereof provided that the plaintiff and the defendant agreed to diligently work towards marketing of the defendant product. Clause 5 requires the plaintiff to pay an amount of Rs. 36 lakhs as an advance to the defendant to enable him to procure raw material and create infrastructure. Clauses 6 and 7 obligated the defendant to effect supplies of his products to the plaintiff. Under Clauses 8, 9 and 10, the defendant was obliged to give necessary technical assistance, technical training and share technical information and data with the plaintiff.

4. The plaintiff came with the case that they paid Rs.36 lakhs to the defendant. The defendant effected supplies of materials worth Rs. 2,55,255/-. The defendant thereafter did not supply

materials for the remaining amount. The plaintiff, therefore, instituted suit for recovery of balance amount of Rs.33,44,745/-. The plaintiff also enclosed particulars of claim at Exhibit-J.

5. The plaintiff took out Summons for Judgment and filed affidavit of Mr.K.S.Ramakrishnan in support thereof. The defendant filed affidavit in support of leave to defend against filing of Summons for Judgment. By order dated 10.12.2014, the learned trial Judge granted conditional leave to defend subject to depositing the amount of Rs.33,44,745/- in the Court within six weeks. The defendant took out Notice of Motion for setting aside the order dated 10.12.2014 as he was not heard. The defendant took out Notice of Motion No.16 of 2015 for condoning delay in taking out motion for setting aside order dated 10.12.2014. That motion was dismissed on 14.8.2015. The defendant instituted Writ Petition No.1239 of 2016 challenging the order dated 10.12.2014. By order dated 20.4. 2016, by consent of the parties, the order dated 10.12.2014 was set aside subject to the defendant deposing costs of Rs. 15,000/- and permitting the plaintiff to withdraw that amount unconditionally. The trial Court was directed to decide the Summons for Judgment keeping in mind the decision of this Court in the case of Bankay Bihari G.Agrawal Vs. Bhogwanji Meghji, 2001 (1) Mh.L.J.345.

6. After remand, by the impugned order the learned trial Judge has granted conditional leave to defend, as indicated

earlier. It is against this order, the defendant has instituted the present petition.

7. In support of this petition, Mr. Joshi has taken me through the suit contract dated 29.10.2010 and in particular Clauses 3 to 6, 12 and 13 thereof. He submitted that basically the plaintiff had advanced Rs.36 lakhs for procuring raw-materials and/or creating infrastructure facilities that the defendant thinks it immediate necessity. He has also taken me through the correspondence exchanged between the parties. He submitted that having regard to complexities involved in packaging of the product as per the required set sizes, the defendant consistently reminded the plaintiff for a proper dispatch schedule in order to plan out the stock of printing and packing material. However, the plaintiff failed to provide a proper dispatch schedule. The plaintiff's staff was grossly incompetent and inadequate. Despite this, the defendant assured the plaintiff that it will develop new products. The defendant reiterated vide his e-mail dated 17.4.2011 calling upon the plaintiff to come up with a proper dispatch schedule as the orders for packing and printing need to be accordingly streamlined. The defendant in fact developed new products, namely, Mr. Wonderseal, Mr. Aquaseal and Mr. Shield, and sent the samples on or about 18.5.2011. The plaintiff approved those samples. The said fact is, however, suppressed by the plaintiff.

8. The plaintiff had placed order of 250 sets of Aquastop, 150 of which were to be sent to Mumbai and 100 to Vadodara with separate pricing of the packs. The defendant expressed its inability to prepare separate pricing of the packs unless material required was prepared accordingly as the case with Mr. Wonderseal and Mr. Aquaseal. Printing labels and containers in small quantities is time consuming, expensive and not feasible. Despite such an urgent instruction/order, which was due to the thumping success of Aquastop at one of the projects of the plaintiff, the defendant was prepared to deliver. However, on 29.7.2011 itself, the order was modified in as much as instead of 250 sets of Aquastop (150 for Mumbai and 100 for Vadodara), the plaintiff wanted only 100 sets of Aquastop at Mumbai and 100 sets of Aquaseal and 100 sets of Wonderseal for Vadodara. This is suppressed from the trial Court by the plaintiff. As if the aforesaid was not enough, the defendant was later asked to hold on to the supply at Vadodara. This definitely sent the defendant's planning and logistical issues haywire. Ultimately 100 sets of Aquastop was confirmed. The same were dispatched through the transported M/s V. Trans vide Motor Receipt No.298064 dated 1.10.2012, a date which was confirmed by the plaintiff much in advance. Shockingly however on the same day, the order was cancelled without any prior intimation and without provocation and that too vide an email. The defendant was

forced to call back the material at its own cost to avoid demurrage charges and product deterioration and pilferage. The question, therefore, of any incompetency and deficiency as alleged or at all by the plaintiff could not and did not arise.

9. Mr. Joshi submitted that the learned trial Judge has not considered events that took place in the year 2011 which clearly shows capacity of the defendant to manufacture and supply the goods to the plaintiff for marketing. He submitted that basically delivery was to be made. Clause 6 of the contract provided quantities of the products in installments. The phased schedules of delivery of the products was to be informed by the plaintiff to the defendant separately. He further submitted that the learned trial Judge failed to appreciate that the suit was not for recovery of debt or liquidated damages. In other words, he submitted that the suit is not maintainable under Order 37 of C.P.C. He further submitted that while remanding the matter to the trial Court, this Court specifically required trial Court to consider decision of Bankay Bihari G. Agarwal (supra). He has taken me through paragraphs 4 to 7 to contend that the learned trial Judge was not justified in condoning the delay in filing Summons for Judgment.

10. On merits, he submitted that the defendant has raised several triable issues and, therefore, the learned trial Judge should have granted unconditional leave to defend. In support of

his submission, he relied upon the decision of Defiance Knitting Industries (P) Ltd Vs. Jay Arts, (2008) 8 S.C.C. 25 and in particular paragraphs 12 to 14 thereof. He further submitted that the defendant has raised a triable issue that there is a fair dispute to be tried as to interpretation of contract dated 29.10.2010 on which the plaintiff has instituted the suit.

11. On the other hand, Mr. Kapadia has supported the impugned order. He submitted that basically after supply of material worth Rs.2,55,000/- the defendant did not supply any goods. He has invited my attention to letter dated 21.3.2012 addressed by the plaintiff to the defendant and in particular paragraph 3 thereof as also response of the defendant dated 30.3.2012. He also relied upon the decision of the Apex Court in the case of IDBI Trusteeship Services Ltd Vs. Hubtown Ltd, 2016 SCC Online SC 1274 = 2016 (12) SCALE 24 and in particular paragraphs 22, 23, 28 to 32, 36. He submitted that the Apex Court has considered its earlier decision in M/s Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, (1976) 4 Supreme Court Cases 687 as also decision of Mikhiram (India) (P) Ltd Vs Chamanlal Bros, AIR 1965 SC 1698. The Apex Court observed that the decision of M/s Mechelec Engineers and Manufacturers was rendered on the basis of unamended order 37, Rule 3. The Apex Court considered unamended Order under Order 37, Rule 3 and amended Order under Order 37, Rule 3 and

ultimately has observed that even if the defendant raises triable issue, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security so as to protect the plaintiff's interest. The Apex Court has held that if the defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires. In paragraph 32, the Apex Court has observed that it is not easy to say in many cases whether the defence is a genuine one or not and, therefore, it should be left to the discretion of the trial Judge who has experienced of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the trial Judge is of the opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. It is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously by granting conditional leave to defend and therefore no case is made out for invocation of powers under

Article 227 of the Constitution of India. He submitted that the Apex Court has observed in paragraph 36 that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case.

12. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the parties entered into contract of 29.10.2010. Clauses 3,4,5,6,12 and 14 read thus:

> “3. CSIL, on its part will do everything to make the products successful and sought out in the market.
>
> 4. Both Shield and CSIL agree that the products supplied by Shield and marketed by CSIL will be during the period of this arrangement done using Shield's brand name. However, CSIL will be mentioned in the wrapper used on the containers as marketed by.
>
> 5. CSIL will immediately place an order equivalent to Rs.35 lacs (rupees thirty six lacs) and the amount will be paid as advance to Shield. Shield will use this money to procure raw materials and/or to create infrastructure facilities that Shield think it immediate necessity.
>
> 6. CSIL will draw quantities of the products in installments. The phased schedules of delivery of the products will be intimated by CSIL to Shield separately. Shield will ensure supply of the quantities at the agreed supply schedules, Mode of delivery will be by road.
>
> 12. Shield will warranty the products supplied by it to their quality for a period of five (5) years. Necessary inscription to this effect will be made on the wrapper covering the containers subject to conditions applicable.
>
> 14. This arrangement will continue for a period of six to eight months from this date. A review of the progress will be held then and suitable action taken. This however does not restrict Shield and CSIL in discussing matters that would

enhance the results."

It is also not in dispute that the plaintiff paid Rs.36 lakhs in pursuance of the contract to the defendant. Clause 14 provided that the arrangement will continue for a period of six to eight months from 29.10.2010. A review of progress will be held then and suitable action taken. It is in that context material to consider the correspondence exchanged between the parties. On 31.3.2012, the plaintiff addressed a letter to the defendant. Paragraph 3 thereof reads thus

> "3. In order to protect the interest of CSIL you are hereby called upon to do the following within two weeks of receipt of this letter.
>
> a. Provide a list of inventory which has been purchased using the advance amount of Rs.36 lakhs;
>
> b. Appoint time for inspection of the semi-finished products worth approximately 33 lakhs lying with you;
>
> c. Give possession of the semi-finished products-not the finished products approximately worth Rs. 33 lakhs to CSIL immediately upon inspection and;
>
> d. Give the detailed records of the purchase orders, invoices of the raw materials in order to assess the exact amount of money spent on raw materials;"

13. Perusal of paragraph 3, extracted herein above, clearly shows that the plaintiff wanted the defendant to provide a list of inventories which was purchased using advance amount of Rs. 36 lakhs. The plaintiff also sought inspection of the semi-finished products worth Rs.33 lakhs approximately lying with the defendant. The plaintiff called upon the defendant to hand over

possession of semi finished products, i.e. not finished products, worth Rs. 33 lakhs upon inspection and finally to give detailed record of the purchase orders/invoices of raw-material in order to assess the exact amount of money spent by the defendant on raw-material.

14. The defendant gave reply on 30.3.2012. The defendant came with the case that before signing the contract, during preliminary discussions between the parties, it is made clear that the defendant will not part with details of the ingredients or raw-material being used in manufacturing products nor would allow any executive or representative of the plaintiff to visit defendant's factory premises to inspect raw material as well as manufacturing process. It was also contended as under:

> “Moreover based on our preliminary discussions, no following provisions are made in the MOU”:
>
> 1. To give names and details of the Raw Materials or ingredients or semi finished goods or supply any of these to DSIL.
>
> 2. To permit the inspection of the raw materials and semi finished goods.
>
> 3. To give detail record of the purchase orders etc and the accounts of the raw material sin quantity or value wise.”

Perusal of the response dated 30.3.2012 shows that the defendant came out with the case of preliminary discussions before signing MOU. It is relevant to note that what is set out in the communication dated 30.3.2012 was not translated actually into contract. Thus, the reason given in the communication of

30.3.2012 as regards preliminary discussions and the parties agreeing in that regard, is not at all supported by clauses of contract dated 29.10.2010. In fact, Clause 12 thereof provided that the defendant will share all technical information and data with the plaintiff in order to enable the plaintiff to effectively counter market queries. By addressing letter dated 21.3.2012 the plaintiff wanted to ensure capacity of the defendant to supply materials as agreed. The plaintiff went to the extent of even calling upon the defendant to supply semi-finished products or even raw-materials worth Rs. 33 lakhs. Instead of replying paragraph 3, extracted herein above, the defendant came with excuse that no such provision was made in the contract. Perusal of the reply dated 30.3.2012 prima facie indicates that the defendant had no capacity to supply goods worth Rs. 33 lakhs, otherwise in response which was given after more than 1.1/2 year from 29/10/2010 the defendant would have come out with the case of delivering materials sought by the plaintiff. The defendant neither supplied raw materials nor even semi finished products.

15. The learned trial Judge has considered this aspect in paragraphs 8 to 11. In paragraph 12, the learned trial Judge noted that the contract was to be continued for a period of 6 to 8 months from 29.10.2010 and by that time the defendant had supplied goods worth Rs.2,55,255/-. The learned trial Judge has

considered the correspondence on record including plaintiff's letter dated 21.3.2012 and the defendant's letter dated 30.3.2012. In paragraph 14, the learned trial Judge specifically recorded a finding that the plaintiff had placed order equivalent to Rs. 36 lakhs and paid that amount as advance. It was expected from the defendant to complete contract by supplying the goods within a period of 6 to 8 months. Even by 30.3.2012, the defendant did not supply the goods of Rs. 33 lakhs. The learned trial Judge, therefore, recorded a finding in paragraph 15 that prima facie that there is nothing on record that the defendant is and was ready to supply the goods worth Rs. 36 lakhs to the plaintiff.

16. In paragraph 20, the learned trial Judge has held that the plaintiff has advanced Rs. 36 lakhs to the defendant and there is implied promise to supply the goods worth Rs. 36 lakhs within 6 to 8 months.

17. In the case of IDBI Trusteeship services Ltd (supra), the Apex Court has observed in paragraphs 36 and 37 as under:

> .”36. It is thus clear that O.XXXVII has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that Milkhiram’s case is a direct authority on the amended O.XXXVII provision, as the amended provision in O.XXXVII Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice

being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order XXXVII to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

37. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram's case, as follows:

If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court. “

Applying the tests laid down by the Apex Court in IDBI Trusteeship services Ltd (supra), in my opinion, the learned trial Judge was justified in passing the impugned order thereby conditional leave to defend to the defendant to deposit Rs 33,44,745/-. Mr. Joshi submitted that the defendant supplied 100 sets of Aquastop on 1.10.2012. The plaintiff, however cancelled the order. The question of defendant was incompetent or deficient did not arise. The defendant has raised triable issues of law and facts. For the reasons recorded earlier, I do not find any merit in this submission. The learned trial Judge has properly exercised the discretion judiciously. 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.

(R.G.KETKAR, J.)