

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

**SUMMONS FOR JUDGMENT NO.18 OF 2015
IN
SUMMARY SUIT NO.37 OF 2015**

Anuj Shrikant TiberewalaPlaintiff/Applicant

V/s.

M/s.Aahi Chemicals & Ors.Defendants

Mr.Sharan Jagtiani i/by D.P.Desai for plaintiff/applicant.

Mr.Abhijeet A.Desai a/w Mr.Vrushali L.Mainad for defendant nos.2 to 4.

CORAM : K.R.SHRIRAM,J

DATE : 2.5.2016

P.C.:-

1 The plaintiff has approached this Court for a summary decree in the sum of Rs.4,08,08,411/-. The plaintiff has filed the suit on the basis of 53 invoices which according to the plaintiff are the written contracts.

2 The plaintiff had sold and delivered to the defendants various quantities of methanol covered under 53 invoices. The total amount raised under the 53 invoices is Rs.3,85,54,037/-. Copies of the invoices are annexed to the plaint. In certain invoices the payment term is mentioned as immediate and in certain, it is shown as 60 days credit. The invoices also mention that if the payments are not made within the due date, interest @ 21% p.a will be charged.

Invoices also mentioned 'subject to Mumbai jurisdiction'.

3 The plaintiff also states that after persistent follow up, the defendants issued 9 cheques of Rs.10 lakhs each towards part discharge of their admitted liability. All the cheques when deposited, were returned unpaid with the remark "payment stopped by drawer". It is the plaintiff's case that the defendants did not make any payment despite repeated follow up and the plaintiff is claiming principal amount of Rs.3,85,54,037/- plus interest @ 18% p.a. though the invoices mentioned 21% p.a. totalling to Rs.4,08,08,411.42/- as on the date of the suit.

4 The defence raised by the defendants in their sur-rejoinder is the issue of jurisdiction but the primary defence is that they are entitled to sum of Rs.3 crores from the plaintiff as damages. According to the defendants for the earlier deals with the plaintiff they had paid amount in excess of Rs.15 crores towards the purchase they made, but this amount they are not paying because they have raised a debit note for Rs.3 crores. In the reply the defendants have given break up of Rs.3 crores as under :-

- (a) Rs.47,00,944/- due to shut down of the defendants' plant because of breaches by the plaintiff ;
- (b) Rs.18,30,000/- due to damage caused to the machineries

because of forced shut down due to reason attributable to the plaintiff ;

(c) Rs.80 lakhs because of false rumors spread by the plaintiff ;

(d) Rs.1 crore due to mental suffering.

5 According to the defendants the plaintiff used to come to the office of the defendants and shout and make abusive language and that caused mental suffering. Though these amounts do not total to Rs.3 crores, even assuming it is so, we cannot accept any of these defences. All these defences are bogus, moonshine, misconceived and not acceptable. First of all the so-called debit notes are brought in for the first time in the sur-rejoinder but those are nothing but hand written statement maintained in the note book of the defendants which does not make any sense. These cannot be even accepted as debit notes. Secondly, these are all nothing but bald allegation without any evidence in support. Thirdly, there is no correspondence to substantiate any of these allegation. Therefore, these are all nothing but after thought.

6 The amounts claimed by defendants are also in the nature of unliquidated damages. The following observations of the Supreme Court in relation to the nature of a claim for unliquidated damages for breach of contract, in the case of ***Union of India Vs. Raman Iron***

Foundry¹, are instructive in this behalf :

“ Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6 (e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we, find it stated by Wightman, J., in *Jones v. Thompson*, (1858) 27 LJQB 234. "Ex parte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in *O'Driscoll V. Manchester Insurance Committee*. (1915) 3 KB 499. Swinfen Eady, L. J., said in reference to cases where the claim was for unliquidated damages "..... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given. The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh V. Taher Mallik*, 45 Cal WN 519 = (AIR 1941 Cal 639); *S. Milkha Singh V. M/s. N.K. Gopala Krishna Mudaliar*, AIR 1956 Punj 174 and *Iron and Hardware (India) Co. v. Firm Shamlal and Eros*, AIR 1954 Bom 423, Chagla, C.J., in the last mentioned case, stated the law in these terms:

" In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

This statement in our view represents the correct legal position and has our full concurrence."

1. AIR 1974 SC 1265

Therefore, alleged claim for damages can hardly be a defence.

7 One more point which is taken up is issue of jurisdiction in the sur-rejoinder. This issue is also a non-issue because the plaintiff has obtained leave under clause-12 of this Court and the invoices in any event provide 'subject to Bombay jurisdiction'.

8 In the circumstances, in my view, the defence is moonshine, misconceived and after thought. The defendants have no defence whatsoever on merits to the claim of the plaintiff. The plaintiff in my view, should be entitled to a summary decree.

9 Nevertheless, I am still inclined to give an opportunity to the defendants to build up a defence and defend his suit. Such a leave to defend can be granted provided the defendants' deposit with the Prothonotary & Senior Master, High Court, Bombay, a sum of Rs.4 crores within a period of four weeks from today. In case the defendants do not deposit the amount as mentioned above, the matter to be listed for directions on 13.6.2016. In case the defendants' deposit, then, within two weeks thereafter, the defendants to file their written statement and serve copy thereof upon the plaintiff. Within two weeks of filing the written statement the parties to file their

respective affidavit of documents and give inspection of the original documents to each other. Within 2 weeks subsequent thereto the parties to file their statement of admission and denial with reasons for denial. Suit thereafter to be listed for issues on 25.7.2016.

10 Summons for Judgment accordingly stands disposed.

(K.R.SHRIRAM,J)