

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

**SUMMONS FOR JUDGMENT NO. 70 OF 2015
IN
SUMMARY SUIT NO. 606 OF 2015**

Komax Solar Inc.,
Through its Authorised Representative
Mr.Eugene Winters .. Applicant/Plaintiff
Vs.

PV Power Technologies Pvt. Ltd.
Through its Director
Mr.Aalok Sanghvi & Anr. .. Defendants

Mr.Bharat Gandhavi i/b Tejesh Dande & Associates for applicant/plaintiff.

Mr.Rohaam Cama a/w. Mr.Sanjay Udeshi, Mr.Netaji Gawade i/b M/s. Sanjay Udeshi for defendant nos. 1 and 2.

**CORAM : K.R.SHRIRAM, J.
DATE : 29TH MARCH, 2016**

P.C.

1 This suit has been filed by the plaintiff claiming a sum of Rs.1,04,58,838/- equivalent to approximate US\$ 1,45,302.00.

2 It is the case of the plaintiff that defendant no.1 had, on 7th August 2010, issued a consolidated purchase order for supply of solar equipment including certain parts called Xcell Stinger, Xcell Tool kit, Installation Kit, etc. for a total value of US\$ 15,50,000.00. In the purchase order and admittedly, defendant no.1 had made it clear that the payments will be made

by defendant no.2 which is a new company to be incorporated and not by defendant no.1. Subsequently, on 6th October 2010, defendant no.2 issued two separate purchase orders one for US\$ 9,29,000/- and the other for US\$ 6,21,000/-. The plaintiff issued a confirmation note for the first purchase order for US\$ 9,29,000/-. As regards second no confirmation was sent. As per the terms and conditions agreed between the parties, defendant no.2 was to pay 20% along with purchase orders, 70% before shipment and the balance 10% after installation of the equipments that were supplied. Admittedly, defendant no.2 has paid 90% of the amount covered in the first purchase order, i.e., 90% of US\$ 929,000. The claim in the suit also is for the remaining 10% plus certain other charges.

3 It is the case of the plaintiff that admittedly the plaintiff has, as per the written contract, installed the equipments and the balance 10% and other charges are payable, which the defendants have not paid, hence there is a debt and a summary suit is maintainable and therefore, the plaintiff is entitled to a summary judgement. Both the defendants have filed two separate affidavits in reply and both the affidavits are dated 22nd February 2016.

By an order dated 8th February 2016, the defendants were directed to file their reply within two weeks, i.e., before 22nd February 2016. The

defendants complied with the Court's directions but served a copy thereof upon the plaintiff in the morning of 23rd February 2016. The plaintiff was directed to file a rejoinder within one week. One week expired on 1st March 2016. We are on 29th March 2016 and no rejoinder is filed. The counsel for the plaintiff stated that they have drafted affidavit in rejoinder and forwarded for instructions sometime in 2nd March 2016 but they have not received any response. The counsel sought an adjournment which was declined because the plaintiff has had almost four weeks to file the rejoinder and no extension also was sought earlier. An adjournment is sought only when the matter is called out.

4 The defence taken on behalf of the defendants is that :

- (a) there is no privity of contract with defendant no.1;
- (b) the claim of the plaintiff is barred by Law of Limitation;
- (c) defendant no.2 has paid 20% of the amount covered under the second purchase order and therefore, the plaintiff has a surplus of US\$ 31,3000/- in total which could be adjusted under the first purchase order;
- (d) the plaintiff had an obligation to disclose this fact in the plaint but the plaintiff has chosen to suppress the fact. On this ground, unconditional leave to defend the suit be granted.

5 The defendants have also disputed other charges and have stated that there is no debt as regards the other charges are concerned including the interest component.

6 As regards the privity of contract with defendant no.1, in paragraph 4 of the plaint itself, it is stated as under :

“.....It was clearly provided in the Purchase Order that 20% of the sale consideration was to be paid in advance, while 70% of the sale consideration was to be paid before shipment and the balance 10% after installation of the said equipment. The plaintiff submits that the defendant no.1 in the said PO itself had declared that the payments shall be made by their new Company and not by the defendant no.1, the plaintiff further agreed to pay installation cost as per the actual invoice value raised by the plaintiff.”

There is no averment anywhere in the plaint that there was a contract entered into between the plaintiff and defendant no.1. On this ground alone, unconditional leave ought to be granted for defendant no.1.

7 As regards defence no.2, i.e., ground of limitation, the terms and conditions states that 10% is payable after installation. It is not clear from the plaint as to when the installation was completed. The plaint proceeds on the basis that the invoice was raised in December 2012 while the terms and conditions relied upon by the plaintiff states 10% was due after installation of the said equipment. Moreover, the invoice at page 71 of the plaint states it is raised in August-2012. As per the contract, issuance of invoice is not the

trigger point for payment. Therefore, when does the balance 10% payment becomes payable to decide limitation is a triable issue. On this ground alone unconditional leave to defend has to be granted.

8 As regards the payment made under the second purchase order, the defendants have, in the affidavit in reply, stated how and when the amounts were remitted to the plaintiff. In paragraph 7(xi) of the summons for judgement, defendant no.2 has stated that they have paid the amounts as under :

Sr.No.	Payments received by the plaintiff	Amounts (USD)
1.	20% advance payment on First Purchase Order	USD 185,800 (Rs.83,51,654.00/-)
2.	20% advance payment on Second Purchase Order	USD 124,200 (Rs.56,11,046/-)
3.	70% advance payment of first Purchase Order	USD 650,300 (Rs.2,87,57,892/-)
	TOTAL :	USD 960.300 Rs.4,27,20,592/-

9 Under the first purchase order, the total amount payable is US\$ 9,29,000/-. Therefore, this would leave a surplus of US\$ 31,000 (approx.) with the plaintiff. The counsel for the plaintiff submitted that 20% advance was not refundable. At the same time, it is the case of the defendants that no confirmation of the second order was issued by the plaintiff. Even in the plaint, though the plaintiff has referred to confirmation of the first purchase

order, they are totally silent about the second purchase order. Moreover, the plaintiff had an obligation to disclose as to whether 20% advance was paid under the 2nd purchase order. I am assuming this to have been paid because there is no rejoinder filed by the plaintiff. These are, in any event, all triable issues which cannot be decided in a summary manner.

10 Paragraph 8 of the judgement in ***M/s. Mechelec Engineering & Manufacturers Vs. M/s. Basic Equipments Corporation***¹ reads as under :

8 In Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee(1), Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253):

"(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, shews 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

1 (1976) 4 Supreme Court Cases 687

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".

11 Further, there is an uncertainty as to the amount actually due or whether at all it is due. The Apex Court in **Raj Duggal V/s. Ramesh Kumar Bansal**² at paragraph 3 held as under :

3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona-fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

2 1991 Supp (1) Supreme Court Cases 191

12 Having considered the averments in the plaint, the reply and the fact that the plaintiff's despite having four weeks to file a rejoinder, chose not to file a rejoinder, in my view, the defence raised by the defendants cannot be brushed aside as moonshine or sham or illusory. In my view, unconditional leave to defend the suit has to be granted and is hereby granted.

13 The defendants to file the written statement within four weeks from today. Within two weeks thereafter, parties to file their respective affidavits of documents and compilation of documents with details of the documents in the schedule. Within two weeks thereafter parties to give inspection of their respective documents, file and exchange statements of admission and denial with reasons for denial. These directions to be complied strictly failing which parties will be put to terms.

14 The suit to be listed for issues on 7th June 2016.

(K.R. SHRIRAM, J.)