

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

**SUMMONS FOR JUDGMENT NO.77 OF 2015
IN
SUMMARY SUIT NO.329 OF 2015**

M/s.Hazel Mercantile LimitedPlaintiff

V/s.

M/s.Suraj Sales CorporationDefendant

Mr.Vivek Kantawala a/w Mr.Amey Patil i/by M/s.Vivek Kantawala & Co. for the plaintiff.

Mr.Ankit Tripathi i/by R.D.Tanna for the defendant.

**CORAM : K.R.SHRIRAM,J
DATE : 2.8.2016**

P.C.:-

1 The plaintiff had appointed the defendant as a consignment stockist as per the terms and conditions contained in an agreement dated 17.9.2007. That agreement was valid for one year upto 30.9.2008. It was also agreed that the agreement may be extended/renewed by mutual consent for such period on such further conditions by exchange of letter. If not renewed within one month of expiry, it is understood that the agreement was mutually extended for further period of one year upto 2009. The said agreement also provided that the defendant shall sell the goods at a price communicated by the plaintiff and can sell the goods only after receiving advance payments from the customer. In case the defendant extended any credit facility to

its customer, the defendant has to do it at his own risk and cost.

Clause-12 also provided as under :-

“12 The jurisdiction for any suit or legal proceedings under this agreement shall be the courts in the city of Mumbai and the consignment stockiest expressly agrees for the same.”

2 On 1.10.2009 the plaintiff and the defendant entered into a fresh agreement on identical terms. The agreement was valid from 1.10.2009 to 30.9.2010. There was no fresh agreement signed but as per clause-2 the agreement was mutually extended for a period of one year upto 2011. The plaintiff supplied materials to the defendant during the extended period upto 30.9.2011. The defendant kept making payments from time to time and the outstanding payments from the defendant as on 1.4.2012, as per the ledger of the plaintiff was Rs.8,58,24,609.56/-. Between 1.4.2012 and 31.3.2013 the defendant paid a sum of Rs.6,48,83,649.56 leaving a balance of Rs.2,09,40,960/-. It is the case of the plaintiff that they have forwarded the plaintiff's ledger account, copy whereof is at Exhibit-C to the plaintiff, to the defendant. The defendant in response, by his letter dated 12.5.2013 has confirmed that this amount of Rs.2,09,40,960/- was due and payable to the plaintiff. It will be useful to reproduce the said letter which reads as under :-

"I am in receipt of your letter dated 12th April, 2013 alongwith the confirmation of accounts. We acknowledge receipt of the same & regret for delay in making your outstanding payment of Rs.2,09,40,960/- due to unavoidable reason at our end.

First of all, I am very much thankful to you for providing me business opportunity. I am extremely sorry for delay in making your payment. In this matter I would like to state that a big amount of my onward collection is stuck up in 2 customers since a very long time. However they have promised us to clear their outstanding in next two months. Therefore, I personally request you to please bear with me till 30th June, 2013. I personally assure you to clear your outstanding in next two months positively. I have already sent to you all the sales-tax forms-F for the business done by me till date."

3 As the defendant did not make any payment, the plaintiff sent a notice through his advocate dated 16.1.2015. No reply has been received. The plaintiff therefore, has filed the present suit claiming a sum of Rs.2,09,40,960/- together with interest thereon @ 18% p.a. from 1.4.2013 till 27.3.2015. The counsel for the plaintiff confirmed that there is no provision in the agreement or the invoices or delivery challan for payment of interest at all.

4 The defendant has filed an affidavit in reply affirmed on 5.7.2016. The defence raised are as under :-

- (a) This court has no jurisdiction ;
- (b) That plaintiff has not been able to establish the transaction of delivery of goods to the defendant and in absence thereof, question of exercising any right does not arise ;
- (c) While admitting that certain chemicals and metal products were received by the defendant, it is stated that they were not in good order or quality ;
- (d) The defendant will require atleast 2 years to make the payment due to the plaintiff subject to confirming quality in respect of the goods.

5 Though in paragraph-7 while dealing with paragraph-10 of the plaint, defendant has denied the contents of the letter dated 12.5.2013, he has not denied having issued the letter, copy whereof is at Exhibit-D to the plaint. In fact, in paragraph-3 it is stated that the said letter was issued from Rajasthan.

6 Therefore, what emerges is the defendant having admitted that they issued the letter at Exhibit D to the plaint dated 12.5.2013, the defendant has acknowledged having received the statement of account, copy whereof is at Exhibit-C to the plaint and defendant has agreed to pay outstanding within 2 months.

7 As regards the plaintiff's ledger account also, the defendant has not denied anywhere that the amount is payable or what according to the defendant was the amount payable. In paragraph-5 of the reply it is stated that the ledger account demonstrated by the plaintiff at Exhibit C of the document which is in their control and therefore, the defendant cannot offer any comment on that. But nowhere in the affidavit the defendant has stated that amount of Rs.2,09,40,960/- was not payable to the plaintiff.

8 Now what remains to be dealt with is the issue of jurisdiction and the issue of quality including proof of delivery.

9 On the issue of jurisdiction the agreement expressly provides for jurisdiction of courts in Mumbai. The amount claimed is in excess of Rs.1,00,00,000/-. Therefore, this court has jurisdiction to receive, try and dispose of the suit. The counsel for the defendant submitted that the agreement came to an end on 30.9.2010 but clause-2 of the agreement also provides that if not renewed within one month of expiry, it is understood that the agreement was mutually extended to one year upto 2011. Therefore, supply having been made during the validity of agreement, the issue of jurisdiction is a non-issue.

10 As regards the proof of delivery and quality issue, the defendant, except making a bald statement in the reply, has not produced any correspondence to show that they raised any issue of quantity or quality with the plaintiff. In my view, these are nothing but after thought raised to avoid payment of legitimate dues. In the letter dated 12.4.2013 the defendant has admitted that sum of Rs.2,09,40,960/- was due and payable to the plaintiff. The material has been supplied upto September-2011. The defendant has not raised any objection at any time regarding quality and quantity. In fact, there is not even a statement made that they raised these issues. Therefore, in my view, the defence raised by the defendant is nothing but moonshine and baseless.

11 The Apex Court in *M/s. Mechelec Engineers & Manufactures vs. M/s. Basic Equipment Corporation*¹ in paragraph 8 has stated as under :-

“8. In Smt. Kiranmoyee Dassi v. Dr. J. Chatterjee, Das J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 CPC in the form of the following propositions :

(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.

1. (1976) 4 SCC 687

(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 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."

12 The defendant has not raised any semblance of even a triable issue to be entitled for leave to defend. Nevertheless I would grant the defendant conditional leave to defend and the condition being deposit Rs.2,09,40,960/- with the Prothonotary & Senior Master, of this Court within six weeks from today. If the amount is deposited the Prothonotary & Senior Master to invest the amount in a fixed deposit with a nationalized bank initially for a period of one year and to be renewed year to year until the hearing and final disposal of the suit. Upon depositing, the defendant shall file written statement within two weeks from the date of deposit. Within one week thereafter parties to file their respective affidavit of documents and also give inspection of the documents relied upon by them and within

one week thereafter parties to exchange statement of admission and denial with reasons for denial. Suit to be listed for issues after 12 weeks.

13 If the defendant did not deposit the amount as mentioned above, the suit to be placed for directions after six weeks.

Summons for Judgment stands disposed.

(K.R.SHRIRAM,J)