

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 811 OF 2017

Valia Retail Pvt. Ltd. & ors.

... Petitioners /
(Orig. Defendants.)

V/s.

M/s. Ankit Advertising Pvt. Ltd.

... Respondent
(Orig. Plaintiff)

...

Mr. Dakshesh Vyas a/w Ms. Radha Kapadia i/b. M/s. Thakore Jariwalla & Associates for the petitioners.

Ms. Shyamli Hajela i/b. H & M Legal Associates for the respondent.

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CORAM : R. G. KETKAR, J.

DATE : 22 FEBRUARY, 2017.

P.C. :

1. Heard Mr. Vyas, learned counsel for the petitioners and Ms. Hajela, learned counsel for the respondent at length.

2. By this petition under Article 227 of the Constitution of India, the petitioners hereinafter referred to as defendants have challenged the Judgment and order dated 24th November, 2016 passed by the learned Ad-hoc Judge, City Civil Court, Gr. Bombay in Summons for Judgment No. 58 of 2016 in Summary Suit No.1047 of 2014. By that order, the learned trial Judge granted defendants conditional leave to defend the suit, subject to depositing a sum of Rs.7,39,600/- in the trial Court within six

weeks from date of order. After depositing the said amount, the defendants are permitted to file written statement within six weeks. The Registrar of the Court is directed to invest the amount in the Nationalised Bank initially for a period of one year and continue to renew the same from time to time until further orders. It was further clarified in the event of failure of defendants to deposit the amount within six weeks, the respondent hereinafter referred to as plaintiff is at liberty to apply for further reliefs.

3. In support of his petition, Mr. Vyas strenuously contended that though the suit is based on invoices, in view of decision of this Court in ***IAL Logistics India [A Division of IAL Container Line (India) Ltd.] vs. Quantum International & ors.***¹, the Summary suit is not maintainable. He invited my attention to the Para-16 (a) of the written statement to contend that the plaintiff was supposed to publish advertisement of the brand “VEAURA” on Page 3 of the Newspaper “Bombay Times” specifically on the right side but instead these advertisements were published randomly and the advertisements did not get the visibility which was supposed to get thereby defeating the very purpose of publication. In other words, the publication of advertisements covered by invoices at Exhibits A-1 to A-4 of the plaint was not as per the specification of the

¹ 2011(5) Mh.L.J. 931

defendants and consequently the learned trial Judge was not justified in granting conditional leave to defend the suit. He submitted that the defence raised by the defendants raises trial issues and cannot be termed as illusory and moonshine. The impugned order was passed without considering the defence set up by the defendants.

4. Mr. Vyas invited my attention to para-3 of the plaint and submitted that the plaintiff did not even assert that the advertisements were issued as per specification given by the defendants. As the suit proceeds on vague averments, it cannot be treated as Summary Suit under Order XXXVII of the Code of Civil Procedure, 1908 (for short, “CPC”).

5. Mr. Vyas also relied upon Section 28(b) of the Indian Contract Act, 1872 (for short “the Act”) which lays down every agreement which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent. Mr. Vyas submitted that clause (1) at the foot of invoices at Exhibits A-1 to A-4, requires lodging of a complaint about the invoices within a week from presentation is hit by Section 28(b) of the Act. He, therefore, submitted that the defendants are entitled to unconditional leave to defend the suit.

6. On the other hand Ms. Hajela supported the impugned order. She invited my attention to the invoices at Exhibits A-1 to A-4 raised on 4th December, 2012, 16 December, 2012 and 31st December, 2012, all these invoices were received by the defendants. She submitted that as per Clause (1) at the foot note of every invoice, the complaint as regards these invoices is to be made within a week from presentation. Though the invoices were received by the defendants by December, 2012 no complaint was lodged as per Clause (1) which is at the foot note of the invoices. Apart from this, on 9th December, 2013, the plaintiffs issued notice to the defendants. Though that was duly served on the defendants, the defendants did not reply the said notice. She also invited my attention to the various e-mails exchanged between the parties. In fact, the defendants sought details as regards Bank accounts maintained by the plaintiff. In 2014, as far invoice at Exh. A-5 is concerned without any objection, the defendants had paid amount covered by that invoice. She further submitted that no point of time the defendants raised objections which are sought to be raised for the first time in para-16 of the written statement dated 24 February, 2016. She submitted that defence raised by the defendants is clearly an after thought. She, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival contentions and the various submissions advanced by the parties. I have also perused the material on record. It is not in dispute that the plaintiff had issued invoices on 4th December, 2012, 15th December, 2012 and 31st December, 2012. It is also not disputed that the invoices were received by the defendants Clause (1) at the foot note of each invoice reads thus;

“Any complaint about this bill must be lodged within a week from presentation”

It is also not in dispute that the defendants did not raise any complaint as regards invoices at Exhibits A-1 to A-4. It is also not in dispute that on 9th December, 2013 the plaintiff had issued notice to the defendants calling upon them to make payment of invoices at Exhibits A-1 to A-4. Though this notice was received, the defendants did not reply the said notice. It is also evident from the record that the e-mails were exchanged between the parties as regards the payment of outstanding amount. The defendants called upon the plaintiff to give details of the bank account obviously with a view to paying that amount. As the defendants did not make the payment, the plaintiff instituted suit under Order XXXVII of CPC. For the first time in reply dated 24th February, 2016, the defendants have raised contention as regards, “not publishing advertisement as per the specification given by them”. It is also material to note that the

defendants did not bring any material on record as regards specification allegedly given by them to the plaintiff. In para 14 of the impugned order, the learned trial Judge has dealt with defence that the plaintiff did not publish the advertisements properly. The learned trial Judge held that all those defences are not acceptable at this stage. No fault can be found with the reasons given in para 14 of the impugned order.

8. Mr. Vyas relied on provision of section 28(b) of the Act which reads thus;

“which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”

In my opinion, the argument is wholly misconceived and section 28(b) is not at all applicable to the facts of the present case. Clause (1) at the foot note of each invoice extracted hereinabove cannot be considered as agreement in restraint of any legal proceedings. The question is whether the defendants have lodged a complaint within one week from receipt of the invoices. Admittedly, in the present case the defendants did not raise any objection and did not lodge any complaint. Considering the conduct of the defendants, it is evident that the defence raised by them is illusory and moonshine. No fault can be found with the impugned order.

9. Mr. Vyas relied on decision in *IAL Logistics India [A Division of IAL Container Line (India) Ltd.] vs. Quantum International & ors.*² In that case, the learned single Judge observed that the summary suit apart from based on the invoices/Air Bills is also based on oral agreement or promise which cannot be decided unless evidence is recorded. In view thereof a decision of *IAL Logistics India [A Division of IAL Container Line (India) Ltd.] (supra)* is not applicable to the facts of the present case. Hence petition fails and the same is dismissed.

10. At this stage upon instructions Mr. Vyas orally seeks extension of time by eight weeks for depositing the amount as per the impugned order as also for filing written statement and not for challenging the impugned order. As the defendants seek eight weeks extension for complying the order, notwithstanding dismissal of the writ petition, time for depositing the amount as also for filing written statement is extended by eight weeks subject to clear undertaking that no further extension shall be sought. All contention of the parties on merits in the suit are expressly kept open.

(R. G. KETKAR, J.)