

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

**SUMMONS FOR JUDGMENT NO. 4 OF 2013
IN
COMMERCIAL SUIT NO. 52 OF 2012**

Su-Raj Diamonds N.V. .. Plaintiff
Vs.
Aviraj Gems & Ors. .. Defendants

**WITH
NOTICE OF MOTION IN COMMERCIAL DIVISION NO.4 OF 2012
IN
COMMERCIAL SUIT NO. 21 OF 2012**

Suraj Diamonds N.V. .. Plaintiff
Vs.
Aviraj Gems & Ors. .. Defendants

Mr.Rohaam Cama a/w. Mr.Mahesh Londhe i/b Sanjay Udeshi & Co. for plaintiff.

Mr.Rajesh Maravoor i/b Maravoor Wamorkar and Co. for defendant nos.2, 4 and 5.

Mr.Rajmani Varma i/b Navdeep Vora Associates for defendant nos.3 and 6.

**CORAM : K.R.SHRIRAM, J.
DATE : 04TH SEPTEMBER 2017**

P.C.

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1 Plaintiff had supplied consignments of diamonds to defendant no.1.
Defendant Nos.2 to 6 are Partners of defendant no.1. Nobody has entered

appearance for defendant no.1. Defendant Nos.2 to 6 are split into two groups though all are closely related to each other. Defendant nos.3 and 6 are together and defendant nos.2, 4 and 5 are together.

2 Admittedly, plaintiff had supplied four consignments of diamonds to defendants and raised four separate invoices. Plaintiff has filed a separate suit being Suit No.413 of 2012 with respect to remaining three invoices.

3 Before I deal with the suit invoice, it should be noted that in Suit No.413 of 2012, plaintiff has taken out a notice of motion being Notice of Motion No.602 of 2012 for various reliefs as mentioned therein. That notice of motion is still pending. Defendants have raised a preliminary issue of jurisdiction and the Court was pleased to frame preliminary issue under Section 9A of the Code of Civil Procedure, 1908. While framing this preliminary issue, after hearing the parties and considering the facts and circumstances of the case, the Court was pleased to pass an order under Sub-section 2 of Section 9A and directed defendants to deposit a sum of Rs.2,06,68,338/-. The Court granted an option to defendants to furnish a bank guarantee for the said amount in favour of Prothonotary and Senior Master, High Court, Bombay. If defendants wished to furnish bank guarantee, it should also include interest thereon @ 10% per annum.

4 Both sets of defendants filed two separate Appeals and both Appeals have been dismissed and it is stated that it was not carried over to the Apex Court. Therefore, order dated 26th June 2015 has attained finality. Defendants Nos.2 to 6 have neither deposited the amount of Rs.2,06,68,338/- nor given a bank guarantee in compliance with order dated 26th June 2015.

5 This background has been given because Mr.Maravoor appearing for defendant nos.2, 4 and 5 stated that the amount under the order of deposit dated 26th June 2015 included the invoice which is the subject matter of this suit.

I do not agree with Mr.Maravoor because at the outset, in paragraph 2 of the said order dated 26th June 2015 it is noted as under :-

“2 Admittedly, the plaintiff had supplied 4 consignments of diamonds to the defendants and raised 4 invoices. The present suit pertains to 3 invoices and for the 4th one, a separate Summary Suit is filed. Against that invoice, the defendants have also made part payment. That summary suit is also tagged with this suit.”

Moreover, there is an order dated 17th April 2017 in the present suit that the orders passed on 26th June 2015 and 20th January 2016 are passed in notice of motion No.602 of 2012 in Suit No.413 of 2012 and not in Summons for Judgment No.413 of 2013 in Summary Suit No.391 of 2012. It is also clarified that the summons for judgment taken out in the summary

suit can be heard independently.

6 Plaintiff is suing under a contract as evidenced by their invoice dated 13th May 2008 by which plaintiff supplied various quantities of diamonds to defendant no.1 totaling US\$ 1,99,360/-. Admittedly, defendants paid a sum of US\$ 19,325/- to plaintiff on or before 17th July 2009. That left a balance of US\$ 1,80,035/- to be paid under the suit invoice by defendants to plaintiff. Despite notice from plaintiff's advocate, this amount of US\$ 1,80,035/- or any other amount has not been paid. Hence the present suit.

7 In the affidavit in reply filed by various defendants and also has admitted by the respective counsels in Court, admittedly plaintiff has supplied to defendant no.1 diamonds as mentioned in the invoice dated 13th May 2008 and annexed to the plaint.

8 At the same time, each of defendant Nos. 2 to 6 have passed on the blame to the other and making allegations against each others that they do not have diamonds but the other person has. Therefore, admittedly, defendants have received diamonds from plaintiff. Based on the affidavit in reply filed itself, I would have given a summary decree but defendant nos.2 to 6 have raised an issue of jurisdiction on the basis that the invoice at

Exh.'B' to the plaint provides “*The Antwerpen Tribunal of Commerce is solely competent in case of litigation*”.

9 According to defendant nos.3 and 6 this is an arbitration clause. In my view, this cannot be an arbitration clause. Moreover, an application under Section 8 of the Arbitration and Conciliation Act, 1996 has not been taken out on behalf of defendant nos.3 and 6. This objection, therefore, cannot be even considered.

10 Defendant Nos.2, 4 and 5, however, have raised an issue of jurisdiction saying that the dispute under this invoice referred to Antwerpen Tribunal of Commerce. At the same time, in each of the affidavits in reply of defendant nos.2, 4 and 5, in paragraph 9, the said defendants have stated as under :

“9 The Plaintiffs are carrying on their business from Belgium. The goods were manufactured and dispatched from Belgium. The moneys are alleged to be payable at Belgium. The notice issued by the Plaintiff being Exhibit-'E' to the plaint is also from Belgium for payment of money to Belgium. As per the terms of the transaction, the Tribunal of Commerce at Belgium has 'sole' jurisdiction in respect of the litigation. Substantial cause of action are also in Belgium and hence this suit is not maintainable in this Hon'ble Court unless the Plaintiff first obtains leave to institute the suit under Clause 12 of Letters Patent Act. The Plaintiff has not applied and obtained leave under Clause 12 and therefore, the suit is not maintainable and consequently the Defendants are entitled to unconditional leave to defend this suit.”

(emphasis supplied)

11 Admittedly, in this case, plaintiff has obtained leave under Clause XII

of Letters Patent. Therefore, objection of jurisdiction raised by defendant nos.2, 4 and 5 should also fail.

12 At the same time, when I considered Petition filed by plaintiff for leave under Clause XII, the ground raised is that defendant nos.2 to 6 have their residential addresses at Gujarat but since the actual cause of action has arisen within the jurisdiction of this Court, leave under Clause XII was required.

Therefore, in my view, for the moment, we cannot shut the jurisdiction issue. The counsels for defendant Nos.2 to 6 did not raise any other defences except those noted above.

13 At the same time, defendants have admitted that plaintiff has supplied diamonds as covered under the invoice at Exh.'B' to the plaint. The Apex Court in ***IDBI Trusteeship Services Limited Vs. Hubtown Limited***¹ in paragraph 17 has laid down the factors to be considered while hearing an application for summons for judgment. Paragraph 17 reads as under :

17 *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:*

17.1 *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*

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entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

17.2 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;

17.3 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;

17.4 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.

17.5 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;

17.6 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.

14 In this case, defendants having admitted entire amount payable to plaintiff, leave to defend can be granted provided defendants deposit the outstanding amount of US\$ 1,80,035/- with the Prothonotary and Senior

Master, High Court, Bombay within six weeks from today.

If the amount is deposited with the Prothonotary and Senior Master, High Court, Bombay, defendants will be permitted to file written statement within two weeks of depositing the amount and the registry would take the same on record subject to removal of office objection, if any.

15 Summons for judgment accordingly stands disposed.

16 The suit be listed for directions on 24th November 2017.

(K.R. SHRIRAM, J.)