IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO.25 OF 2014
IN
COMMERCIAL SUIT NO.61 OF 2012

The State Trading Corporation of India Ltd. ....Plaintiff

Vs.

M/s. Space Mercantile Co. Pvt. Ltd.
(In Liquidation) and Ors. ....Defendants

Mr. Pradeep Sancheti, senior Advocate a/w. Ms. S.I. Shah i/b. S.I. Shah and Co. for plaintiff.
Mr. Anuraag Gokhale for defendant no.1 (in liquidation).
Mr. Manish Bohra i/b. A.S. Khan and Associates for defendant no.2.
Mr. Dhananjay Anant Athavale for defendant no.4.

CORAM : K.R.SHRIRAM, J.
DATE : 28th SEPTEMBER, 2017

P.C.:

1 Plaintiff is one of the agencies of Government of India nominated for export of various items under the Foreign Trade Policy. Defendant no.1 (in liquidation) approached plaintiff and expressed its desire to associate with plaintiff for export of gold jewelery. By a letter dated 20th December, 2006, defendant no.1 (in liquidation) gave a proposal whereby they agreed to route all its exports through plaintiff and the exports shall be on 120 days D.A. Basis. Defendant no.1 (in liquidation) undertook to pay trade margin of 1.5% of CIF value of the invoice and also the insurance charges to cover foreign buyer's risk. Thereafter, plaintiff and defendant no.1 (in liquidation) entered into an agreement dated 30th May,

2007 whereby,

(a) defendant no.1 (in liquidation) agreed to procure foreign buyers who shall make the payment against every export order on 120 days D.A. Basis from the date of bill of lading/airway bill;

(b) realisation of the export proceeds from the foreign buyers shall be the responsibility of defendant no.1(in liquidation);

(c) the shipping documents will be prepared and signed by defendant no.1 (in liquidation) A/c STC (plaintiff) and then submitted to plaintiff, who in turn shall present the documents for negotiation to their bank;

(d) after negotiation of export bills and drawal of post-shipment credit upto 90% from the negotiating bank by plaintiff, the funds shall be released to defendant no.1 (in liquidation) after plaintiff retains 1.5% on CIF value of the export as trading margin plus 5% towards interest, bank charges, etc.;

(e) defendant no.1 (in liquidation) shall issue post dated cheques equivalent to the amount released to them after negotiation of the documents and the said cheques shall be retained by plaintiff till realisation of export proceeds from the foreign buyer and final settlement of the accounts;

(f) it was also agreed that the cheques shall be encashed by plaintiff in the event of non receipt of export proceeds on the due date or on expiry of usance period;

(g) plaintiff shall recover interest on post-shipment credit from the date of release of funds till realisation of export bills on its due date at rates to be informed by plaintiff to defendant no.1 (in liquidation) from time to time plus 3% p.a. penal interest for delayed realisation.

2 Clause 16 of the agreement provides that defendant no.1 (in liquidation) undertakes the sole responsibility for settlement of claim for delay, non performance of the agreement and/or any quantity, quality and all other claims of the foreign buyer and 16(d) provides "………… In the event foreign buyer fails to honour its contractual obligations, defendant no.1 alone shall bear all the risks and costs for the same."

3 This was followed by personal guarantee from defendant no.4. Defendant no.1 (in liquidation) also issued corporate guarantee dated 6th June, 2008. Defendant no.1 (in liquidation), from the records, it appears had issued four post dated cheques for Rs.1,85,77,745/-, Rs.15,60,63,799, Rs.6,73,82,053/- and Rs.77,33,046/-. These cheques were issued prior to defendant no.1 (in liquidation) being liquidated by an order dated 29th February, 2016. The payments from the foreign buyers did not come through and therefore, plaintiff deposited the cheques. The cheques were dishonored. By a letter dated 20th December, 2010, the Advocates for plaintiff also issued a demand notice upon defendants to which there has

been no reply. This was followed by further demand notices to which also there was no reply. Plaintiff also filed complaints under Section 138 of the Negotiable Instruments Act, 1881 which complaints are still pending. Simultaneously, plaintiff also filed a company petition no.37 of 2012 for winding up of defendant no.1(in liquidation) for non-payment of debt which is the subject matter of this suit. This Court by an order dated 16th January, 2013 was pleased to admit the petition because by a letter dated 13th September, 2008, copy where is at Exhibit 'F' to the plaint, defendant no.1 (in liquidation) acknowledged the liability to pay the amounts mentioned therein. In the said letter, defendant no.1 (in liquidation) has also acknowledged that there was a sum of USD 7,573,285 due and payable to plaintiff. Defendant no.1 (in liquidation) had also given a schedule as to how they would make the payment. The post dated cheques have been dishonored. After the winding up petition was admitted, notice was issued but still defendant no.1 (in liquidation) did not reply. This Court by an order dated 29th February, 2016 passed an order winding up of defendant no.1 (in liquidation).

4 It is, therefore, quite clear that defendant no.1 (in liquidation) has acknowledged its liability and had issued post dated cheques for a total sum of Rs.24,97,56,643/-.

5 The Apex Court in ***IDBI Trusteeship Services Ltd. vs. Hubtown Ltd.***[1] in paragraph 18 has laid down the principles to be considered while hearing the summons for judgment/leave to defend application. The same reads as under :

> *"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 :*
>
> *a. If the defendant satisfied the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendnat is entitled to unconditional leave to defend the suit;*
>
> *b. 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 defendnat is ordinarily entitled to unconditional leave to defend;*
>
> *c. 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;*
>
> *d. 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;*
>
> *e. If the defendnat has no substantial defence and/or raises no genuine traible 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;*
>
> *f. 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."*

1. 2017 (1) SCC 568

6 In my view, defendant no.1 (in liquidation) has admitted a sum of Rs.24,97,56,643/- as due and payable to plaintiff. To that extent, certainly plaintiff is entitled to a summary decree. The counsel for Official Liquidator of defendant no.1 submitted that Official Liquidator has no instructions on pre-liquidation transactions of the company.

The suit, therefore, as against defendant no.1 (in liquidation) is decreed in the sum of Rs.24,97,56,643/-.

7 So far as defendant nos.2 and 3 are concerned, there is nothing on record to even suggest that defendant nos.2 and 3 are personally liable to plaintiff. Therefore, unconditional leave is granted to defendant nos.2 and 3.

8 So far as defendant no.4 is concerned, Mr. Sancheti submitted that defendant no.4 had given a personal guarantee, copy whereof is at Exhibit 'C' to the plaint and hence liable.

The guarantee expressly states that it shall remain valid for a period of one year from the date of execution and the same shall be extended from time to time on being called upon by plaintiff before expiry of the validity and the guarantee shall be extended for further period as may be required for six months on each occasion without any recourse and/or reference. There is nothing on record to show that the guarantee was extended. There is no date of execution given in the guarantee. Even assuming we take the date of execution to be the date on which the stamp paper was purchased, still there is nothing on record to suggest that plaintiff called upon defendant no.4 before expiry to extend the validity of the guarantee. In my view, therefore, unconditional leave has to be granted to defendant no.4 as well.

9 In the circumstances, the following order is passed :

> (a) decree is granted to plaintiff against defendant no.1 (company in liquidation) in the sum of Rs.24,97,56,643/- and for the balance amount, defendant no.1 is permitted to defend the suit.
>
> (b) unconditional leave to defend is granted to defendant nos.2,3 and 4.
>
> (c) all written statements to be filed and copy served within six weeks from today.

10 Summons for judgment accordingly stands disposed.

11 Suit be listed for directions on 10th November, 2017.

(K.R. SHRIRAM, J.)