Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.54 OF 2016
IN
COMMERCIAL SUIT NO.138 OF 2015

Neu World Resources, Mumbai.	…	Applicant
In the matter between		
Neu World Resources, Mumbai.	…	Plaintiff
Vs.		
Mahesh S. Parekh, Proprietor of Shreeji Trade Corporation, Mumbai.	…	Defendant

Mr. Ranbir Singh, a/w. Ms. Kripa Jethva, i/by Ms. Madhavi Deshpande and Mr. Manish Upadhye, for the Applicant-Plaintiff.

Ms. Priyanka Kothari, a/w. Ms. Siddhi Doshi, i/by M/s. Bilawala & Co., for the Defendant.

CORAM : S.C. GUPTE, J.

DATE : 19TH JUNE 2017.

P.C. :

1. This Summons for Judgment is taken out in a money suit, which is based on dishonoured cheques as also a writing executed by the Defendant acknowledging the debt and promising to pay. Signing of the cheques as such is not disputed by the Defendant. It is the case of the Defendant that these cheques were caused to be issued by force and coercion. Whereas there are no particulars of the alleged force or coercion, there is abundance of uncontroverted evidence on record to support the consideration for the suit cheques, as discussed below.

2. In the first place, the suit claim seeks to recover payment due on dishonoured cheques, which are issued towards price of goods sold and delivered. The sale of goods and price are contained in and evidenced by the Tax Invoices, which are annexed as Exhibits “6” to “34” to the rejoinder. First 26 invoices, out of these 29 invoices, are all signed by the Defendant *(the last 3 invoices would be dealt with a little later below)*. The Defendant does not dispute receipt of goods covered by these 26 invoices. In fact, there is an admission in his reply to the Summons for Judgment that the Plaintiff was an importer of the goods, which were covered by these invoices, whilst the Defendant was the buyer of the same and that the goods were duly received by the Defendant. The Defendant even admits that the goods covered by these 26 invoices were sold by him to various third parties. In paragraph No.10 of his affidavit-in-reply, the Defendant has deposed about the trade practice in the business of import and sale of material, which envisages loading of goods from the godown of the seller by the importer into the vehicle of the buyer. Once the goods are imported, the buyer sells them to third parties. There are various corresponding invoices issued in the present case by the Defendant, which cover sale of these goods by the Defendant to the third parties. The Plaintiff’s case in this behalf, in paragraph No.7 of the plaint, has been admitted

as true by the Defendant in paragraph No.35 of his affidavit-in-reply. The only defence raised by the Defendant in relation to these invoices is that the invoices were inflated and were not as per the oral agreement between the parties. There are no particulars of such oral agreement. In any event, it is not permissible to prove a contemporaneous oral agreement, which is at variance with the written contract.

3. Secondly, it is pertinent to note that, on or about 8th May 2012, when the total outstanding dues of the Defendant towards the price of the goods sold and delivered were in the region of Rs.4.06 crores, the Defendant issued eight cheques of Rs.50,00,000/- each, aggregating to a sum of Rs.4 crores. It is the Plaintiff's case that there was a request on the part of the Defendant to deposit these cheques on the last day of validity. On the other hand, it is the defence of the Defendant in his reply that these cheques were obtained by fraud and coercion. Apart from the fact that there are absolutely no particulars of any such fraud or coercion, this defence appears to have been raised for the first time by an e-mail of 13th October 2012, that is to say, more than five months after the cheques were issued. In the e-mail of 13th October 2012, the defence is two fold : firstly, it is submitted that these

cheques were kept for security purpose and secondly and in the same breath, it is claimed that these cheques were taken from the Defendant forcefully. The two statements are clearly inconsistent. Quite apart from these facts, around the time when these cheques would have expired, that is to say around 7th August 2012, when the total outstanding was to the tune of Rs.5.22 crores, the Defendant not only issued "Stop Payment Instructions", but, thereafter, followed up the same by issuance of nine fresh cheques of Rs.50,00,000/- each, aggregating, once again, to Rs.4.5 crores. There is, in fact, a covering letter of 17th August 2012, forwarding these cheques. As far as this covering letter is concerned, once again, in the e-mail of 13th October 2012, an omnibus stand is taken by the Defendant in a oneliner, namely, *"on 17th August 2012, you have forced me to write a letter and as per your choice"*. Once again, there are no particulars concerning the alleged force used by the Plaintiff.

4. Thirdly, there is a clear admission and acknowledgment by the Defendant at the foot of the Ledger Account of the Defendant as of 3rd September 2012 maintained by the Plaintiff, which shows the total outstanding dues by the Defendant to the Plaintiff in the sum of Rs.5.09 crores. This Ledger Account discloses total debit entries of

Rs.14,46,49,676/- against credit entries aggregating to Rs.9,37,15,000/-. Interestingly, the only reply to this Statement of Account given by the Defendant is in the form of a bare denial. The Defendant does not dispute his signature at the foot of the Ledger Account. He simply claims that, *'all signatures were obtained under force and coercion and not by the Defendant's free will'*.

5. Fourthly, it is pertinent to note that, not only did the Defendant issue nine cheques of Rs.50,00,000/- each on the second occasion, along with the covering letter, and admit and acknowledge the Statement of Account, but he even proceeded to issue four more cheques on 5th September 2012 of Rs.50,00,000/- each. According to the Plaintiff, this was because, after the issuance of the last nine cheques and admission and acknowledgment of liability on 3rd September 2012, there were further sales amounting to Rs.2.39 crores in the first week of September 2012. Thus, as of 5th September 2012, there was a total outstanding amount due, on account of principal, by the Defendant to the Plaintiff is in the sum of Rs.7.07 crores. These cheques were followed by 2 more cheques issued on 10th September 2012 of Rs.25,00,000/- and Rs.35,00,000/-. As far as the earlier four cheques and further two cheques, as referred above, are concerned,

the Defendant has not dealt with the same in his e-mail of 13th October 2012. In between, there were payments made through R.T.G.S. by the Defendant to the Plaintiff on 10th September 2012, 21st September 2012 and 25th September 2012, aggregating to Rs.36,00,000/-.

6. It appears that, on complaints filed by the Plaintiff before the Economic Offences Wing as also before the Court of Metropolitan Magistrate, there were criminal proceedings initiated against the Defendant. The Defendant also appears to have been apprehended and taken into custody in pursuance of the proceedings. After he was released on bail, a fresh writing was issued by the Defendant, addressing the same to the Plaintiff, acknowledging a total liability of Rs.6.55 crores as on the date of the writing, i.e. 20th April 2013, and offering to pay the same in installments referred to in the said writing. In his reply to the Summons for Judgment, the Defendant has simply contested this writing by claiming that the writing was obtained from him by force and coercion. There are, once again, no particulars given in respect of the alleged force or coercion. There is also no complaint lodged in respect of any such force or coercion. Nearly eight months after the execution of this writing, the Defendant filed a Criminal Writ Petition challenging his prosecution in Criminal Court. In the Criminal

Writ Petition, it is claimed by the Defendant that he was terrorized by threats administered to him in Marine Drive Police Station on 20^{th} April 2013 and upon being so terrorized, had no choice to prepare a letter in the Police Station admitting his liability. It is too far-fetched to accept this case as a credible defence, particularly in the face of the voluminous evidence referred to above.

7. In the light of the foregoing narration, it is palpably clear that the defence raised by the Defendant contesting the consideration of the dishonoured cheques, is moonshine and nominal and does not inspire any confidence.

8. Insofar as the alleged claim of inflated prices is concerned, it is important to note that the invoices were contemporaneously accepted without any demur. For the first time, a complaint in this behalf was addressed by the Defendant to the Plaintiff in the e-mail of 13^{th} October 2012, after the first batch of cheques was dishonoured for payment upon presentation.

9. A feeble attempt was made at the hearing of the Summons for Judgment by learned counsel for the Defendant that, the Defendant

had to sell the goods at prices lower than the prices at which they were sold by the Plaintiff to the Defendant. Apart from the fact that the alleged lower prices fetched by the goods sold by the Defendant is neither here nor there, there neither any such contention raised at any time earlier to filing of his defence, nor any credible material produced or referred to in this behalf. Learned counsel for the Defendant has tried to compare one or two invoices respectively issued by the Plaintiff to the Defendant and by the Defendant to third parties to compare the prices. The comparison does not show that the goods had to be sold at a loss, as alleged.

10. As far as the last three invoices are concerned, there is a defence raised by the Defendant that the goods covered by these invoices were not received by the Defendant. Even this defence, which also has come belatedly, is clearly in the teeth of admitted material on record. The goods covered by these three invoices had, in fact, been sold by the Defendant to various third parties. All these sales have been evidenced by invoices, which are produced on record by the Defendant himself. These invoices bear reference to the corresponding invoices issued by the Plaintiff to the Defendant in respect of the goods sold by them.

11. The only other defence raised by the Defendant is of cash payment of about Rs.90,00,000/-. This defence is raised for the first time by the Defendant in the Statement of Account annexed by him to his reply to the Summons for Judgment. The statement indicates that there were cash payments made on 2nd April 2012, 18th April 2012, 29th May 2012, 4th June 2012, 11th June 2012, 12th June 2012, 14th June 2012, 18th June 2012, 5th July 2012 and 18th July 2012, aggregating to Rs.90,00,000/-. On the other hand, there is a statement produced by the Defendant, which is part of the documents produced before the Police by the Defendant, and which purports to be a ledger account of the Plaintiff maintained by the Defendant. This statement does not indicate any cash payment made by the Defendant to the Plaintiff. There is yet another statement produced by the Defendant as part of his Criminal Writ Petition. This statement, which contains daily entries of cash / cheques paid by the Defendant, shows a total amount of Rs.90,00,000/- paid by the Defendant to the Plaintiff in one go on 30th June 2012. The inherent improbability of any such case of cash payment apart, the material on record before the Court clearly inspires no confidence as far as this particular defence is concerned.

12. On these facts, this Court would be perfectly justified in making the Summons for Judgment absolute and passing a decree in favour of the Plaintiff. However, with a view to give one opportunity to the Defendant, only by way of mercy, to bring home his defence at the trial of the Suit, this Court is rather inclined to grant a conditional leave to the Defendant to defend the Suit, subject to and upon payment of the entire principal amount claimed by the Plaintiff. Accordingly, the following order is passed :-

"O R D E R"

(i) The Defendant is granted leave to defend the Suit, subject to and upon payment of a sum of Rs.7.10 crores within a period of twelve weeks from today.

(ii) Upon deposit of the aforesaid amount by the Defendant, if any, the Prothonotary and Senior Master of this Court shall invest the same in a Fixed Deposit of any Nationalized Bank, initially for a period of one year, to be renewed thereafter from time to time, so as to abide the orders that may be passed in the Suit.

(iii) The Plaintiff will be at liberty to apply to the Court for withdrawal of the amount deposited by the Defendant, as the Plaintiff may deem fit. All the rights and contentions of the parties on merits, in this behalf, are kept open.

(iv) The Defendant will be entitled to file his written statement within a period of four weeks from the date of depositing the amount referred to in clause (i) above.

(v) Suit to come up on Board for directions after sixteen weeks.

(vi) The Summons for Judgment is disposed of in the above terms.

[S.C. GUPTE, J.]