

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.72 OF 2016

IN

SUMMARY SUIT NO.562 OF 2016

Bhavin Arvind Anandjiwala

... Plaintiff

v/s

Arcoy India Pvt.Ltd.

... Defendant

Mr Bharat Joshi for Plaintiff.

Mr Rohaan Cama with Mr Prathamesh Kamath and Mr C.N. Mehta i/b
M/s MMK Law Associates for Defendant.

CORAM : B.P. COLABAWALLA, J.

DATE : NOVEMBER 6, 2017

ORAL ORDER :-

1. This Summons for Judgment has been filed seeking a judgment against the Defendant in the sum of Rs.1,22,08,472/- which is the principal amount due and payable. The claim in the present Suit is based on goods sold, supplied and delivered and which form the subject matter of three invoices annexed at Exhs.'B', 'C' and 'E' to the plaint. The first invoice is of Rs.66,15,440/- whereas the second invoice is in the sum of Rs.92,05,162/-. As far as the third invoice is concerned, the same is in the sum of Rs.15,87,870/-.

2. It is the case of the Plaintiff that the Defendant placed purchaser orders through e-mail on the Plaintiff for supply of 3 mm thick Arcofloor Butyl Rubber Sheets and other items of the required quantity, quality and rate. The first purchase order dated 5th April 2013 was received by the Plaintiff. According to the Plaintiff, under this purchase order, the goods were supplied under Invoice No.007E dated 29th April 2013 in the sum of Rs.66,15,440/-. Under this very purchase order (first purchase order), goods were also supplied under Invoice No.009E dated 25th May 2013 in the sum of Rs.92,05,162/-. It is not in dispute that the aforesaid goods were collected by the Defendant and the receipts of these goods have not been disputed before me.

3. Thereafter, the Defendant also placed a second purchase order dated 11th June 2013 mentioning the specific quality and quantity and agreed rate of the ordered goods. Pursuant to this purchase order, the Plaintiff supplied the ordered goods and raised their Invoice No.033E dated 21st August 2013 in the sum of Rs.15,87,870/-. These goods have also been duly delivered to the

Defendant and there is no dispute between the parties as to the delivery of the said goods.

4. After the delivery of the aforesaid goods, the Defendant issued Form 'H', a prescribed form under the Central Sales Tax Act, known as Certificate of Export which is issued by the purchaser for claiming concession from payment of Central Sales Tax on export goods. Two 'H' forms dated 30th April 2013 and 4th August 2013 were issued by the Defendant in favour of the Plaintiff for not charging Central Sales Tax for sale of goods. The first 'H' form was pertaining to the first two Invoices viz. Rs.66,15,440/- and Rs.92,05,162/-. The second 'H' form was issued for the third invoice viz. Rs.15,87,870/-. Both these 'H' forms are also annexed to the plaint at Exhs.'H' and 'G' respectively. It is the case of the Plaintiff that thereafter part payments were made by the Defendant to the Plaintiff in the sum of Rs.52,00,000/- as more particularly set out at Exh.'H' to the plaint. This amount was appropriated by the Plaintiff towards the first invoice and the balance claim is made in the present Suit. No payment was forthcoming from the Defendant and therefore, the present Suit was filed as a Summary Suit.

5. Once the Suit was filed and the writ of summons was served upon the Defendant, the Defendant filed its appearance through an Advocate. It is in these circumstances, the Plaintiff has filed the present Summons for Judgment. To oppose this Summons for Judgment, the Defendant has filed its affidavit in reply to which a rejoinder a sur-rejoinder as well as a sur-sur-rejoinder have been filed. It is on the basis of these pleadings that I have heard learned counsel for the parties.

6. In this factual backdrop, Mr Bharat Joshi, learned counsel appearing on behalf of the Plaintiff, submitted that there was no real dispute in the present case. He stated that admittedly the goods under the three invoices as mentioned earlier were duly supplied by the Plaintiff to the Defendant. This fact is clearly admitted by virtue of the fact that the Defendant has issued two 'H' forms which forms the subject matter of the three invoices. He submitted that after the goods were supplied, the Defendant even made part payment in the sum of Rs.52,00,000/- and thereafter defaulted in making any payment. It is in these circumstances, he submitted that there is no

real dispute with reference to the balance claim of the Plaintiff and therefore, the Plaintiff is entitled to a judgment forthwith against the Defendant as claimed in the Summons for Judgment.

7. On the other hand, Mr Cama, learned counsel appearing on behalf of the Defendant, basically raised four contentions before me. The first contention raised by Mr Cama was that the goods supplied by the Plaintiff to the Defendant were inherently defective. The goods were purchased by the Defendant from the Plaintiff for export to certain parties in Jordan as well as Morocco. Once these goods were supplied to the foreign parties, the Defendant was informed that the goods supplied by the Plaintiff were highly defective and in fact two debit notes were issued in relation to the goods supplied by the Plaintiff to the Defendant. In this regard, he brought to my attention the correspondence in that regard as well as the debit notes raised by the Defendant on the Plaintiff in April 2015 and December 2015 respectively (pages 280 and 281 of the paper-book). The first debit note of April 2015 is in the sum of Rs.25,00,000/- whereas the second debit note dated 31st December 2015 is approximately for Rs.38,00,000/-.

8. The second contention raised by Mr Cama was that the delivery by the Plaintiff was delayed and as per the purchase orders, the Plaintiff was entitled to penalty for delayed delivery of 5 % of the ordered value, if delay occurred in supplying the said goods. Mr Cama submitted that in the facts of the present case, there was a gross delay in supplying the goods and therefore the Plaintiff was liable to pay penalty as per the contract in the sum of Rs.16,54,394/- as more particularly set out at page 49 of the paper-book.

9. The third contention raised by Mr Cama was that because of the defective goods being supplied by the Plaintiff to the Defendant, the reputation of the Defendant had greatly suffered and for that, the Defendant was entitled to claim damages from the Plaintiff in the sum of approximately Rs.3.6 crores as more particularly set out in the affidavit in sur-rejoinder filed on behalf of the Defendant.

10. Lastly, Mr Cama submitted that it was the understanding between the parties that the Defendant and its sister concern viz. M/s

Arcoy Industries India Pvt.Ltd. were to be treated as inter-changeable entities and in fact Arcoy Industries India Pvt.Ltd. had paid certain amounts to the Plaintiff and which the Plaintiff was not entitled to receive and had to be adjusted against the dues payable by the Defendant herein. Looking to all these facts, Mr Cama submitted that the Defendant had a good and substantial defence in the present Suit and therefore there was no question of either signing judgment in favour of the Plaintiff and even passing a conditional order requiring the Defendant to deposit any sums before leave is granted.

11. I have heard the learned counsel for the parties at length and perused the papers and proceedings in the present Suit. At the outset, I must mention that there is no dispute with reference to the delivery of the said goods. The three basic defences that are raised are – (1) the quality of the goods was defective; (2) the delivery of the said goods were delayed and which it was not entitled to receive; (3) as per the understanding between the parties, the payments made by Arcoy Industries India Pvt.Ltd. to the Plaintiff and which it was not entitled to receive, were to be adjusted against the dues that were payable by the Defendant. What must be noted here is that as far as

the quality of the goods is concerned, the Defendant has already raised two debit notes, one in the sum of Rs.66,15,440/- and the other in the sum of Rs.38,00,000/-. These debit notes themselves quantify the actual loss suffered by the Defendant for the alleged defective supply of goods by the Plaintiff to the Defendant. This figure comes to approximately Rs.63,00,000/-. Over and above this, the Defendant has also claimed that the Plaintiff is liable to pay penalty of Rs.16.5 lacs for delayed delivery of the said goods. If one were to add this to the figures mentioned in the debit notes, the same would come to Rs.79.50 lacs (approximately). This would still leave a balance of approximately Rs.43,00,000/- due and payable by the Defendant to the Plaintiff.

12. To overcome this hurdle, Mr Cama submitted that a sum of Rs.27,53,207/- that was paid by the Arcoy Industries India Pvt.Ltd. to the Plaintiff was to be adjusted against the dues payable by the Defendant to the Plaintiff. In this regard, he placed reliance on page 131 of the paper-book being the affidavit in sur-rejoinder filed by the Defendant. Mr Cama further submitted that in any event, the Defendant had a bonafide and genuine counter claim for damages for

the loss of reputation of the Defendant in the sum of Rs.3.6 crores as more particularly pleaded in the sur-rejoinder filed on behalf of the Defendant and therefore the Defendant was entitled to unconditional leave to defend the Suit.

13. I am unable to accept both these submissions. As far as the issue of adjustment is concerned, I am prima facie not satisfied with the argument of Mr Cama. If Arcoy Industries India Pvt.Ltd. has any claim against the Plaintiff, it can do so in an independent proceeding. Prima facie, I am not satisfied, at least from the documents on record, that there was any such agreement between the parties that the alleged amounts payable by the Plaintiff to Arcoy Industries India Pvt.Ltd. were to be adjusted against the dues payable to the Plaintiff by the Defendant. The Defendant and the said Arcoy Industries India Pvt.Ltd. are two separate legal entities in law and without any proof of the so called agreement as canvassed by Mr Cama, I am unable to accept this submission.

14. Even as far as the claim for damages for loss of reputation is concerned, I find that this argument, at least at this stage, is

unacceptable. Firstly, the damages have to be pleaded and proved with proper evidence. Secondly, I find that this claim for damages is made for the first time in the affidavit in sur-rejoinder. After going through the correspondence on record, I do not find anything to indicate that prior to the filing of the Suit, the Defendant had brought to the Plaintiff's notice that because of the alleged defective goods supplied by it, the Defendant had suffered a loss of reputation and goodwill and would be holding the Plaintiff responsible for the same. This being the case, I do not find that this is a fit case where unconditional leave ought to be granted to the Defendant to defend the present Suit. As stated earlier, admittedly, in the facts of the case, the goods worth Rs.1,74,08,472/- have been supplied by the Plaintiff to the Defendant. Against this, the Plaintiff has made payment of only Rs.52,00,000/- (Exh.'H', page 23 to the plaint). Even if I were to hold that there was substance in the Defendant's debit notes as well as the penalty for delayed payment, there would still be an outstanding amount of Rs.43,00,000/- as claimed by the Plaintiff from the Defendant.

15. In this factual matrix, I pass the following order :-

(a) On the Defendant depositing in this Court a sum of Rs.43,00,000/- within a period of eight weeks from today, the Defendant shall be entitled to leave to defend the present Suit;

(b) If the aforesaid deposit is made within the stipulated period, the Defendant shall file its written statement within a period of four weeks thereafter and the Suit shall be transferred to the list of commercial cause.

(c) In the event the Plaintiff fails to deposit the sum of Rs.43,00,000/- or any part thereof within the stipulated period, the Plaintiff shall be entitled to apply to this Court for an ex-parte decree after obtaining a non-deposit certificate from the Prothonotary and Sr. Master of this Court.

16. Summons for judgment is disposed off in the aforesaid terms. No order as to costs.

(B.P. COLABAWALLA, J.)