

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

**NOTICE OF MOTION NO.608 OF 2014
WITH
NOTICE OF MOTION NO.1351 OF 2014
IN
SUIT NO.169 OF 2014**

Townley Group International Pty Ltd.)....Applicant

IN THE MATTER BETWEEN :

Kalyani Forge Ltd.)....Plaintiff

V/s.

Cosco Shipping Co. Ltd. and Ors.)....Defendants

Mr.A.M.Vernekar a/w Ms.Sangeeta Kahar i/by Narichania & Narichania for the plaintiff.

Mr.Rahul Narichania, Senior Advocate a/w Mr.Vishal Muglikar, Mr.Zoeb Cutlerywalla and Mr.Vikram Kamath i/by Koachhar & Co. for defendant no.3-applicant.

CORAM : K.R.SHRIRAM,J

DATE : 6.7.2017

P.C.:-

1 The plaintiff sometime in July-2012 purchased for import into India various machineries/equipments on Ex-works basis from one Unidrive Pty. Ltd., Australia. Since the equipments were purchased on Ex-works basis the plaintiff was required to make arrangements to move the equipments from Unidrive's factory in Australia to Mumbai. For this purpose the plaintiff entered into a contract with defendant no.3 for dismantling, packing, loading, shipping and delivering the machinery/equipments to Mumbai. Part

of the equipments included 2 large frames. After exchange of correspondence and communications the plaintiff and the defendant no.3 agreed that the consideration payable to defendant no.3 for completing the work under the contract will be A\$ 7,23,000/-. The plaintiff initially made payment of A\$ 400,000/- and later paid balance amount of A\$ 323,000. There were issues in between as to when that amount was to be paid etc. but for the purpose of this Notice of Motion, we need not go into those details.

2 Defendant no.3 shifted the goods as agreed but when it came to transportation of the 2 frames the defendant no.3 sent an e-mail to the plaintiff stating that the local trucking operator had increased their price and therefore, it is difficult for the defendant no.3 to stick to the original amount of A\$ 7,23,000/-. Defendant no.3 initially demanded A\$ 100,000/-, which was increased to A\$1,43,000/- and finally stopped at A\$ 2,02,000/-. The defendant no.3 did not hand over the bills of lading covering the 2 frames and insisted on payment of A\$ 2,02,000/- as pre condition for release of the bills of lading.

3 The plaintiff when they approached defendant no.2 as owners of defendant no.1-vessel for delivery of the goods without bills of lading, defendant no.2 refused to part with the goods, and

rightly so, without surrender of bills of lading. At the same time, defendant no.2 for delivery without bills of lading, insisted on security to the extent of value of the cargo lest defendant no.3 made claim against them. The plaintiff approached this Court by filing this suit.

4 Plaintiff thereafter, filed this suit and offered to secure defendant no.2 by furnishing a bank guarantee for A\$ 4,88,890/- being the value of the cargo. This was later reduced to A\$ 202,000/- against the defendant no.3 handing over the original bills of lading. As recorded in the order dated 18.10.2013 read with order dated 29.10.2013, plaintiff furnished bank guarantee in favour of Prothonotary & Senior Master in the sum of A\$ 202,000/- and upon the said bank guarantee being furnished, defendant no.3 handed over the bills of lading and plaintiff cleared the cargo.

5 Mr.Vernekar appearing for the plaintiff submitted that due to the delay in taking delivery of the cargo, plaintiff also had to incur a sum of Rs.21,68,460/- as demurrage charges. That amount also is claimed in the suit.

6 Prior to passing of the order dated 29.10.2013 defendant no.3 had lodged this Notice of Motion in which prayer clauses-(a), (b) & (c) read as under :-

“(a) Pending the hearing and final disposal of the above Suit, this Hon'ble Court be pleased to recall/set aside the order dated 18th October 2013 passed by this Hon'ble Court in Notice of Motion (L) No.1902 of 2013 ;

(b) In the alternative and without prejudice to prayer clause (a) above, pending the hearing and final disposal of above Suit, this Hon'ble Court be pleased to modify the order dated 18th October 2013 passed by this Hon'ble Court in Notice of Motion (L) No.1902 of 2013 by directing the plaintiff to pay the Defendant No.3 viz. Townley Group International Pty. Ltd., AUD 202,000 (Australian Dollar Two Hundred Two Thousand only) as a condition precedent for taking delivery of the cargo covered under the Original Bill of Lading No.MELSHA02EN13BB01 dated 26th April 2013 ;

(c) That pending the hearing and final disposal of the present Notice of Motion, this Hon'ble Court be pleased to stay the operation and implementation and/or effect of the order dated 18th October 2013 passed by this Hon'ble Court in Notice of Motion (L) No.1902 of 2013.”

7 In the order dated 29.10.2013 passed in the Notice of Motion, paragraph 5(iii) reads as under :-

“The said Bank Guarantee furnished by the plaintiff shall enure for the benefit of the Defendant No.3 and shall remain alive for a period of 6 months after the final judgment and decree passed by this Court in the suit. It is, however, made expressly clear that at the hearing of the present Notice of Motion if the Court comes to the conclusion that the sum of AUD 202,000/- is payable to the Defendant No.3, the Bank Guarantee issued shall stand invoked forthwith by the Prothonotary & Senior Master and the amounts shall be paid to the Defendant No.3 with interest accrued thereon till payment”.

8 Though Mr.Vernekar initially raised an objection stating that the defendants cannot argue this Notice of Motion and seek payment of A\$ 202,000/- because that is not the relief sought in the Notice of Motion, Mr.Narichania pointed out that the relief as sought in the Notice of Motion has been considered to have been modified in view of liberty granted by this Court in the order dated 29.10.2013. I would agree with Mr.Narichania.

9 The question that comes for consideration is whether the Court should conclude at this stage that A\$ 202,000/- is payable by plaintiff to defendant no.3 and Prothonotary & Senior Master should be directed to encash the bank guarantee and pay over A\$ 202,000/- to defendant no.3.

10 It should also be noted that after this Notice of Motion was taken out, the defendant no.3 filed written statement and Counter claim and prayer clause-(a) of the Counter claim is the same as what is being sought by defendant no.3 in this Notice of Motion. Written statement to the Counter claim has also been filed. What requires to be considered in the Counter claim is whether the defendant no.3 proves that it is entitled to the amount of A\$ 202,000/-.

11 It is the case of defendant no.3 that plaintiff had admitted

and agreed to pay sum of A\$ 202,000/- in correspondence exchanged even before the two frames were shipped and also during the time the two frames were in transit to India. Mr.Narichania took the Court through the correspondence exchanged between the parties and also submitted that plaintiff was economical with truth and has not produced all the documents or even details of the documents. Mr.Narichania submitted that once plaintiff had agreed to pay A\$ 202,000/-, they cannot today renege on that agreement. Mr.Narichania stated that whatever the plaint states that plaintiff had not agreed to make payments to the defendant no.3 of the amount of A\$ 202,000/- or that plaintiff refused to succumb to defendant no.3 or to its extortionist way or that only amount agreed was A\$ 723,000/- and no further amount was payable are all bald statements and there are no documents to support them.

12 In my view, there are averments in the plaint stating that plaintiff had not agreed to pay the sum of A\$ 202,000/- because the parties had agreed for lumpsum consideration of A\$ 7,23,000/-. Plaintiff has annexed certain communications to the plaint in which plaintiff has expressed that the amount is being increased by defendant no.3 without any basis. Though Mr.Narichania submitted that these were internal comments and is not reflected in any e-mail sent to defendant no.3, in my view, the points raised cannot be

disposed summarily without a trial. I am not able to come to a conclusion at this stage that an amount of A\$ 202,000/- was payable by plaintiff to defendant no.3. Defendant no.3 having filed Counter claim and plaintiff having filed defence to the Counter claim, if the prayer as orally submitted by defendant no.3 relying upon paragraph-5(iii) of the order dated 29.10.2013 is granted, in effect it would amount to decreeing the Counter claim without giving an opportunity to plaintiff to defend the Counter claim.

13 It should be noted that when the order dated 29.10.2013 was in place, defendant no.3 had not filed written statement or Counter claim.

In my view, it will not be correct to grant the relief as sought and effectively decreeing the Counter claim.

14 Therefore, I cannot accept the submissions of Shri Narichania, counsel for the defendant no.3, to direct the Prothonotary & Senior Master to encash the bank guarantee and pay over the amount of A\$ 202,000/-.

Notice of Motion stands accordingly disposed.

15 The Suit and the Counter claim be listed for issues on 25.7.2017.

NOTICE OF MOTION NO.1351 OF 2014

1 In view of what I have held in the earlier Notice of Motion, issues as to whether plaintiff has suppressed documents or made false statement in its plaint or affidavits can be decided along with the main suit.

2 The right of the defendant no.3 to raise this point as an issue is kept open.

3 Notice of Motion accordingly, disposed.

(K.R.SHRIRAM,J)