

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISIONSUMMONS FOR JUDGMENT NO.96 OF 2016
IN
COMMERCIAL SUMMARY SUIT NO.253 OF 2016

H. Rahman Export & ImportPlaintiff

V/S

Aarya International Corp.Defendant

Mr. Kunal Mehta i/by Crawford Bayley & Co., for Plaintiff.

Mr. Simil Purohit a/w Ms. Jesal Shah i/by Daru Shah and Co., for Defendant.

CORAM : B.P. COLABAWALLA, J.**DATE : 9th October, 2017****P.C. :**

1. This summary suit has been filed seeking recovery of a sum of US \$ 2,83,099 being the aggregate sum of UD \$ 1,54,000 together with interest accrued thereon at the rate of 18% per annum.

2. It is the case of the Plaintiff that this suit is instituted by the Plaintiff to recover a debt and a liquidated demand in money due and payable by the Defendant to the Plaintiff on the basis of a written contract for a refund of advance paid for sale of goods which had not been delivered by the Defendant to the Plaintiff and the losses incurred on account of non-delivery of the goods. According to the Plaintiff, the terms and conditions for making this claim are contained in and

evidenced by an email dated 14.02.2014 as well as an invoice (Exhibit 'C' and 'D' respectively to the Plaint). After this suit was filed, the Defendant entered their appearance. Thereafter, the present summons for judgment was filed, to which the Defendant has filed a reply and has inter alia contended that amongst other things the present suit is not maintainable as a summary suit as there is no written contract between the parties. Even on merits, the Defendant has sought to contend that the transaction in question was completely different from the one pleaded in the suit and has sought to explain the same in para 8 of the affidavit-in-reply.

3. I have heard the learned Counsel for the parties at some length. The case of the Plaintiff hinges on Exhibits 'C' and 'D' to the Plaint. It was argued before me by the learned Counsel for the Plaintiff that two invoices were raised by the Defendant and the Plaintiff for US\$ 100,000 each. Under these invoices, 50% of the amount was paid by the Plaintiff and the balance was to be paid within 7 days on receipt of the fuel oil that was to be supplied by the Defendant to the Plaintiff. Since the Defendant failed to supply the oil, the Plaintiff was entitled to the refund of US \$ 100,000 that was paid by the Plaintiff to the Defendant.

4. To my mind, at least prima facie, this would not constitute a

written contract. The Plaintiff may be entitled to the refund of US \$ 100,000, but that by itself, with nothing more, would not fall within Order XXXVII of Civil Procedure Code, 1908. To get over this hurdle, the learned Counsel for the Plaintiff placed reliance on Exhibits 'C' and 'D' of the Plaint. I find that nowhere in these documents the Defendant had agreed to refund US \$ 100,000 to the Plaintiff. In fact, the invoice annexed at Exhibit 'D' does not even bear the signature of the Plaintiff. Further the receipt of this invoice has been categorically denied by the Defendant in their affidavit-in-reply. Even this invoice make a claim for damages in the sum of US \$ 54,000 which would clearly not fall within the purview of Order XXXVII of Civil Procedure Code, 1908.

5. Looking to the totality of the facts of the case, I find that triable issues arise in the present matter. In these circumstances, unconditional leave to defend the suit is granted to the Defendant. The suit is transferred to the list of commercial causes. The Defendant to file its Written Statement within a period of four weeks from today.

6. The summons for judgment is accordingly disposed of.

(B.P. COLABAWALLA, J.)