IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2694 OF 2018

Olive Tree Trading Pvt. Ltd.	]	
A company incorporated under	]	
the Companies Act, 1956,	]	
having its registered office at 2406,	]	
East Street, Pune 411 001.	]	**... Petitioner**

Versus

F.lli De Cecco Di Filipro - FAra S.	]	
Martino S.P.A,	]	
a company incorporated under the	]	
laws of Italy having its registered	]	
office at Zona Industriale 66015	]	
Fra S. Martino (Cheiti) Italy.	]	**... Respondent**

- Mr.Ashish Kamat a/w. Mr.Kunal Mehta i/b. Crawford Bayley & Co. for the Petitioner.
- Mr.Darshit Jain i/b. Mr.Nilesh Parekh for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 23rd MARCH, 2018.

ORAL JUDGMENT :

1] Rule. Rule made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr.Kamat, learned counsel for the Petitioner and Mr.Jain, learned counsel for the Respondent.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 6th September 2017 passed by the 9th Jt. Civil Judge Senior Division, Pune, below the application at Exhibit-21 in Special Summary Suit No. 153 of 2016.

3] The application at Exhibit-21 was filed by the present Petitioner, who is the Defendant before the trial Court for unconditional leave to defend the suit under Order-37 Rule-3 of Code of Civil Procedure *(for short, "C.P.C.")*. The trial Court has allowed the Petitioner to defend the suit but subject to the Petitioner depositing the claim amount or giving the bank guarantee of the claim amount within two months and file written statement.

4] While challenging this order of the trial Court, the submissions of learned counsel for the Petitioner are three fold. In the first place, it is submitted that, the suit filed on the basis of stand alone invoices cannot be maintainable in the summary form. Secondly, it is submitted that, in view of prior proceedings initiated by the Petitioner against the Respondent, seeking damages and also the specific performance, and as such triable issues being raised and that too before filing of this suit by the Respondent, the trial Court should have granted the unconditional leave. Thirdly, it is submitted that, there is no admission of liability, as such, on the part of the Petitioner, and in that view of the matter, the condition imposed by the trial Court of deposit of the claim amount or furnishing of the bank guarantee cannot be tenable.

5] Per contra, learned counsel for the Respondent has supported the order of the trial Court by pointing out that the Summary Suit can be maintainable on the basis of the invoices alone. Secondly, it is submitted that, merely because there is a prior proceedings or even the claim in the nature of counter claim, that will not affect either the maintainability of the suit in the summary form on the condition imposed by the trial Court. Lastly, it is submitted that, when there is clear admission in the earlier proceedings, initiated by the Petitioner himself, that such invoices were raised, the trial Court has rightly granted the leave to defend only on condition of furnishing the bank guarantee or depositing the claim amount. It is submitted that, for compliance of the impugned order, the Petitioner has sought the extension of time twice in order to get the requisite bank guarantee and now therefore, the Petitioner is precluded from challenging the impugned order, that too, in writ jurisdiction.

6] Now, in order to appreciate properly the submissions advanced by learned counsel for both the parties, it would be necessary to consider the facts, which led to the filing of this suit.

7] According to the Petitioner, the Petitioner was the sole importer and distributor of the Respondent in India. The Petitioner has built a large base of customers and market for the Respondent's food products in India. However, according to the Petitioner, without valid reason and justification, the Respondent breached the contract of sale and distributorship of the Petitioner and appointed another distributor, by name, "Saksham Impex Private Limited" and supplied goods on or about July/August 2015 at heavily discounted rate. As a result, the Petitioner sustained the huge loss. He could not sell products as the customers were diverted to the new distributor and therefore, the Petitioner was constrained to file the suit in the District Court at Pune for the declaration that the contract between the parties is subsisting and the purported termination of the contract is not binding on the Petitioner. A further relief of permanent injunction and specific performance of the contract was also claimed.

8] In that Suit itself, the Petitioner has, in paragraph No.6 of the plaint, stated as follows:

> *"6.....As such, Defendant No.1's appointment of Defendant No.2 is wrongful and in breach of the suit contract. As*

> *regards the issue of pending payment under* ***two invoices*** *(borne out from correspondence), the* ***Plaintiff submits that it has always been ready and willing to pay the same.*** *However, in light of the breach of the suit contract, the Plaintiff legitimately believes that it is, strictly in addition to specific performance, entitled to claim compensation from Defendant No.1. Therefore, the Plaintiff has rightfully withheld the said payment. ... ...”*
>
> *(emphasis supplied)*

9] Thus, from the averments in this paragraph No.6 of the plaint of that suit, it can be noticed that the Petitioner is not disputing that the payment of two invoices is pending; on the conversely, he has also admitted that the Petitioner has always been ready and willing to pay the same.

10] In this backdrop, when the Petitioner is accepting and admitting that such invoices are pending and the Petitioner is ready and willing to pay the said amount, the question for consideration is whether the Summary Suit on the basis of pending invoices, which are admitted to be pending by the Petitioner, can be tenable or not? In this respect, learned counsel for the Respondent has rightly placed reliance on the judgment of this Court in the case of *Jatin Koticha V/s. VFC Industries Pvt. Ltd.*[1], wherein also, the suit was filed as a

1 2007 SCC Online Bom 1092

Summary Suit on the basis that the invoices are in the form of written contract as contemplated by Order-37 of the C.P.C.. When the issue was raised, as to, whether such suit can be tenable on the basis of the invoices, which were not signed by both the parties; it was categorically held by this Court that, "the invoices contained the terms and conditions. There is a clear parole acceptance of the invoices on the part of the defendants. The defendants accepted delivery of the goods along with the invoice without any demur or suggestion that they do not accept any of the terms whether pertaining to the rate, price, quantity etc.. It makes no difference therefore that the invoices are not signed by both the parties and I am of the view that the invoices must be treated as a written contract and the suit based on such invoices is a suit based on the written contract".

11] It was further held that, the above said view is fortified by the view taken by the Madras High Court in the case of *Lucky Electrical Stores, by partner Mahendra Kumar Shah V/s. Ramesh Steel House by Partner Babulat*[2], wherein, in paragraph No.12, it was held that, "when the suit is filed on the basis of the invoices, it would be too superficial a view to hold that no written contract exists between the parties". It was also further held that, "even though the

2 1988-1-L.W.. 574

invoices or bills are not signed by either party to the contract, as a result of the acceptance of the goods delivered in pursuance of the invoices, the demand for the price of goods admittedly received by the purchaser on the basis of the invoices, must be said to arise on a written contract".

12] Here, in the case, the Petitioner is also not disputing the pending invoices or the receipt of the goods. Conversely further admits that the Petitioner has always been ready and willing to pay the amount mentioned in the invoices.

13] Hence, no question arises of maintainability of the suit on the basis of stand-alone invoices.

14] The submission of learned counsel for the Petitioner however is that, the averments made by the Petitioner in the suit filed by the Petitioner against the Respondent admitting the pending invoices do not amount to the admission of liability. These averments only amount to the admission of pending invoices but not of liability of paying the amount mentioned in the invoices. Such admission can also be explained by the Petitioner. To substantiate this submission, learned counsel for the Petitioner has relied upon the judgment of the Hon'ble Apex Court in the case of *Akshaya Restaurant V/s. P.*

Anjanappa & Anr.[3], wherein holding that, "there can absolutely no two opinions that the admissions can be explained and inconsistent pleas can also be taken".

15] In my considered opinion, the question is whether at this stage one can accept these contentions; especially when the Petitioner himself has stated in the earlier suit that the Petitioner has always been ready and willing to pay the amount mentioned in the invoices. The Petitioner might have contended, in that suit, that, the Petitioner has rightfully withheld the said payment but when there is admission of the fact that this payment is due from the Petitioner to the Respondent, then it has to be held that the trial Court has rightly granted the leave subject to deposit of the claim amount. The question whether the Petitioner has right to withhold that payment or not, is a triable issue and as the Petitioner has raised the triable issue, Petitioner has been granted and not denied the leave to defend the suit.

16] Coming to the next contention raised by learned counsel for the Petitioner that, as the Petitioner has already raised the triable issue, in view of the prior proceedings filed in the Court at Pune, for damages, specific performance, injunction etc and thereafter,

3 1995 Supp. (2) SCC 303

withdrawing that suit and taking the necessary steps in the Court at Italy, there were definitely bonafide triable issues raised by the Petitioner and in such situation, when the claim of the Petitioner for damages is also pending, the leave to defend the suit should have been unconditional.

17] However, as stated above, as the Petitioner has raised certain issues and which the trial Court considered as the "triable issues", in view of proceedings initiated by the Petitioner against the Respondent by filing the suit in the Court at Pune and may be now taking the action in the Court at Italy, that is the reason why the summons for judgment, without granting leave to defend, was not allowed but conversely leave was granted to decide all these issues, which are triable between the parties, which might have been raised by the Petitioner earlier and by the Respondent subsequently. However, it cannot act as a cause for dispensing with the condition of furnishing the bank guarantee or the deposit of the claim amount, in view of the fact that the invoices raised by the Respondent and in respect of which the Summary Suit is filed are pending for clearance, as per the own admissions of the Petitioner.

18] Learned counsel for the Respondent has in this respect rightly placed reliance on the judgment of this Court in the case of

Suraj Sanghi Finance Ltd. V/s. Credential Finance Ltd. & Ors.[4], wherein it was held in paragraph No.5 that, "merely because the defendant has filed a counter claim, that would not detract or result in suit filed as Summary Suit being treated as Regular Suit". The very difference between the Regular Suit and the Summary Suit is that, in the Summary Suit, leave to defend is not granted unconditionally, as a matter of fact. Whereas, in Regular Suit, such leave is not necessary. Therefore, if the existence of the counter claim cannot render the suit as Regular Suit, thereby implying that a Summary Suit is maintainable despite counter claim, the leave to defend such suit cannot be unconditional. It has to be granted, after considering the material on record and after ascertaining about the admission of liability.

19] Learned counsel for the Respondent has then relied upon the judgment of this Court in the case of *Elegant Capitals Pvt. Ltd. V/s. In Cablenet (Andhra) Ltd.*[5], wherein this Court has relied upon the judgment of the Hon'ble Apex Court in the case *Indian Bank V/s.ABS Marine Products (P) Limited*[6], wherein also, the bank has filed the claim for the ascertained sum due from the borrower by filing a Summary Suit and the claim of the borrower was for damages which

4 2002(4) Mh.L.J. 770
5 2012(1) Mh.L.J. 962
6 2006 (5) SCC 72

required firstly a determination by the Court as to whether the bank was liable to pay damages and thereafter, assessment of quantum of such damages. It was held that, there was absolutely no connection between the subject matter of the two suits and they are in no way concerned. A decision in one does not depend on the other. In such situation, it was held that, the Summary Suit definitely is maintainable and it is not affected in any way because of the counter claim filed by the defendant. In the said case, the submission advanced by learned counsel for the Defendant that, the Defendant is entitled to unconditional leave on the ground that it has filed a counter claim against the Plaintiff was rejected.

20] Here, in the case also, merely because the Petitioner has filed such claim for damages against the Respondent, does not mean that Petitioner should be entitled to unconditional leave to defend in this suit, in the face of the clear facts which are admitted in the suit filed by the Petitioner himself in the District Court at Pune.

21] Thus, in the present case, according to the legal position discussed above, the suit on the basis of the invoices is maintainable in the summary form. Secondly, the Petitioner has admitted the fact that, the payment of these two invoices is pending and the Petitioner has always been ready to pay the same. Now whatever defences he has for not payment of such payment of invoices, they can be raised as triable issues in the present suit. The Petitioner can also raise the triable issue in view of the earlier proceedings filed by him, but that does not relieve him from the liability of depositing the claim amount in the Court or furnishing the bank guarantee.

22] Considering the entire facts and material on record, the impugned order passed by the trial Court granting the Petitioner such conditional leave and also giving sufficient time to the Petitioner to comply with the said condition, therefore, does not call for any interference.

23] Writ Petition hence being without merits, stands dismissed.

24] Rule discharged.

25] It is clarified that, whatever observations made here-in-above are only for the purpose of deciding this Writ Petition and the trial Court will not be influenced by them in any way.

26] All the contentions of the respective parties are expressly kept open.

[DR.SHALINI PHANSALKAR-JOSHI, J.]