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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 6 OF 2018

IN

COMMERCIAL SUMMARY SUIT NO. 829 OF 2017

Duflon Industries Pvt. Ltd. ... Plaintiff

vs.

FAAB Industries & Ors. ... Defendants

Mr. Bhavik Manek a/w. Ms. Ekta Tripathi i/b. MDP & Partners for the Plaintiff.
Mr. Nirman Sharma a/w. Mr. Aditya Pimple and Mr. Sachin Choudhari for the Defendants

CORAM : A.K. MENON, J.
DATE : 3rd OCTOBER, 2018

P. C.

1. This Summary Suit is based on what the plaintiff urge is a written acknowledgment of liability to pay amounts claimed by the plaintiff towards the price of goods sold and delivered through purchase orders and invoices and pursuant to a Master Distributor Agreement dated 12th June, 2015("MDA"). The MDA was valid for a period of three years from the date of execution of the agreement i.e. 1st June, 2012 as per clause 7.1. of the MDA. Clause 10 of the MDA contained a dispute resolution clause.

2. The defendant no. 1 is partnership firm and the relationship between the parties under the MDA was that of seller and buyer and not of principal and agent.

This aspect is also not seriously disputed, except that the defendant has contended that its response is subject to interpretation of the MDA. I may observe here that there is no dispute as to the fact of execution of the agreement, placement of purchase orders, raising of invoices and the correspondence exchanged between the parties.

3. Vide the MDA, the defendant was appointed as the exclusive Master Distributor for the products and at locations specified in the agreement. The defendant was required to purchase parts exclusively from the company as specified in the clause 3.5 of the MDA and the plaintiff was obliged to direct prospective buyers, existing customers and enquiries to the distributor specified in clause 5. 9 of the MDA. The distributor was to bid for all projects and sales within its territory and the plaintiff was not to compete with the distributor in such bidding. The credit period was mutually to be reviewed from time to time but at the discretion of the company. In this respect the decision of the Managing Director of the plaintiff company was final as mentioned in clause 6.4 of the MDA.

4. The case of the plaintiff is that the sum of Rs.1,34,97,544.87 ps is now due and payable as on date of suit comprising of a principal sum of Rs.92,37,362.32 ps and interest Rs.42,60,182.55 ps due as of 23rd June, 2017 computed @ 21% per annum. The rate of interest is said to be as per the agreement contained in tax invoices raised by the plaintiff.

5. According to the plaintiff and as canvassed by Mr. Manek, the plaintiff manufactured and supplied products and materials from time to time and as per the relevant specifications which the defendant no.1 accepted and utilised without any demur or protest. Numerous invoices were raised amounting to Rs.7,36,27,148.22 ps. Physical delivery of goods is not disputed. The plaintiff also repurchased some goods already supplied by them to defendant no. 1 for Rs. 1,10,65155/-. Credit has been duly given for the said amount and there is no dispute in that respect. It is submitted that defendant no. 1 is presently liable to pay a sum of Rs. 1,34,97,544.87 ps.. The details of the invoices which remain unpaid are set out in paragraph 11 of the plaint with all particulars. Copies of purchase order and invoices 10 each in number are also annexed to the plaint.

6. Mr. Manek submitted that the defendant has never questioned the quality and quantity of the product and therefore they were obliged to pay the entire amount. In view of the delay beyond 120 days interest is claimed @ 21 % per annum as per the invoices. Mr. Manek submitted that the last payment made by the defendant was on or about 8th September, 2015 in a sum of Rs.8,51,239.27 ps after which no amounts had been received. He submitted that statement drawn up by the plaintiff for the period 30th April, 2012 to 24th April, 2017 indicates that sum of Rs.92,37,362.32 ps remained due and payable as principal sum, the value of adjustments towards repurchase is also seen to be given on 31st March, 2017 in the said statement.

7. The account statement as of 31st March, 2016 was sent to the defendant on 27th May, 2016 by the plaintiff's Finance and Accounts department and the accounts department of the defendant no. 1 had after going through the accounts statement vide email dated 1st June, 2016 confirmed that the closing balance as per the first defendant's records was Rs. 1,07,38,149.55 ps. Attached to the email was a statement setting out a closing balance which reflected debit of Rs.10,738,149.55 ps.

8. The plaintiff have since called upon defendant to pay sum of Rs. 1,10,65,155/- vide demand notice dated 1st August, 2017. Vide letter dated 25th August, 2017 defendant no. 1 denied the liability, inter alia contending that no particulars of the amount claimed in the demand notices had been provided. They contended that no amounts are due and payable from defendant no. 1 to plaintiff and that the plaintiff had in complete breach of the spirit of the MDA caused enormous and irreparable damage and loss to the defendant.

9. A grievance was made that after some years of execution of the MDA and during its subsistence, the plaintiff contacted clients directly, without informing the defendant instead of directing business to the defendants as contemplated in the MDA. This was in breach of an express agreement to the contrary. The defendant demanded the sum of Rs. 1,00,00,000/- as compensation for loss and damage. Vide a second demand notice on 13th September, 2017 the plaintiff repeated their demand to which there was no reply. Ultimately the suit came to be filed.

10. After the summons for Judgment was served the defendant filed a Notice of Motion under Section 8 of the Arbitration and Conciliation Act being Notice of Motion No. 1333 of 2018. The Notice of Motion was heard by this Court on 8th August, 2018 and was dismissed inter alia recording a finding that the defendant had not followed provisions of dispute resolution clause and therefore the plaintiff was permitted to continue the suit. That is how the Summons for judgment is taken up for hearing today. The pleadings in the Summons for Judgment are complete. An affidavit in reply dated 29th August, 2018 of one Mr.Ayaz Baig defendant no. 2 has been filed.

11. Mr. Sharma made reference to averments in paragraph 6, 14, 22, 23, 29, 32, 35, 42 of the reply and submitted that the suit is barred by the law of limitation. Mr.Sharma submitted that in view of clause 13 of the MDA which provides for limitation of action the suit claim is barred. Clause 13 is reproduced below for ease of reference.

> *"13. LIMITATION OF ACTION : Without extending any other time period provided for in this contract, any controversy or claim arising out of, or related to this contract, including, but not limited to the breach thereof must be commenced within one year after the course of action has occurred."*

12. Considering the 120 days credit under the MDA and the dates of invoices, the cause of action had arisen on 31st July, 2015 and the suit is barred having been filed beyond one year. Perusal of the plaint reveals that the suit was declared on 30th October, 2017. Thus it was submitted by Mr. Sharma that the suit should have

been instituted within one year from the date on which the cause of action had arisen and which the plaintiff had failed to do and therefore the defendant is entitled to unconditional leave on this ground alone.

13. On merits Mr. Sharma submitted that defendant no. 2 was a qualified mechanical engineer but had joined the company as Senior Manager and had 7 years experience. The plaintiff was then manufacturing parts of pumps, valves and nozzles had not yet commenced manufacturing 'Lined piping systems'. The deponent with his knowledge of lined piping systems, took the initiative of developing the plaintiffs' business and was instrumental in developing the technology. He was promoted as General Manager and in 2011 he desired to resign from the company when he was persuaded not to commence independent business and it was proposed that he continue as an exclusive distributor so that he would continue to penetrate the market for 'lined piping systems'.

14. Mr. Sharma submitted that after the MDA was executed, the defendant put in tremendous efforts to develop the market and he relied upon the increase in business which he attributed to such efforts. He submitted that despite all assurances, without any notice to the defendants and in breach of the MDA, the plaintiff contacted customers directly from January 2015 onwards without involving the defendant as a result goods partly purchased by the defendant under MDA could not be sold to the customers. As a result of the breach of the terms of MDA by the plaintiff, payment could not be made since sales were a precondition for payment of invoices. In other words, the defendants were liable to

make payment only subject to the promise to honor the exclusivity convenant in the MDA. He submitted that it is in recognition of its clear breach of the MDA, that the defendant repurchased some goods. Although stock valued at Rs.1,10,65,155/- was repurchased, some remaining stock was not repurchased for reasons best known to the plaintiff. According to Mr. Sharma the defendant suffered loss of profit. Surprisingly although the breach of the MDA is said to have resulted in a loss save and except for the solitary demand of Rs.1 crore in response to first demand notice, no demand was made and no proceedings have been initiated.

15. Mr. Sharma submitted that although email dated 1st June, 2017 is sought to be set up as admission of liability, liability was denied. He submitted that pre litigation admissions could not be treated as unqualified admissions. In this behalf he relied upon judgment of this Court in Summons for Judgment No.31/2016 in Commercial Suit No. 403 in which a single Judge of this Court had observed that the purported admission of liability was not what the Court had to consider. In the course of submissions the Court considered Paragraph 17.6 of the judgment in *IDBI Trusteeship Services Limited vs. Hubtown Limited*[1] and observed that the admission contemplated in *Hubtown (supra)* is an admission either in the pleadings of the defendant or as may be found by the Court. In that case the Court observed that it is not expected to consider pre-suit admissions of the parties which are matters of contest and even if such admission is contested, the effect of the said admission was a matter to be considered like any other defence by assessing plausibility versus probability.

1 **(2017) 1 SCC 568**

16. Mr. Sharma then relied upon decision of the Supreme Court in Civil Appeal No. 8194 of 2015 in *State Bank of Hyderabad vs. RABO Bank* [2] in which the Supreme Court observed, while making reference to the decision of that Court in *Raj Duggal vs. Ramesh Kumar Bansal (1991) Suppl (1) SCC 191* that leave to defend shall always be granted when there is a triable issue as to the meaning or correctness of the documents on which a claim is based or facts which are of such nature that entitle the defendant to cross examine the plaintiff or his witnesses.

17. I do not find how these judgments are of any assistance to the defendant since the factual context in the present case cannot be compared to those in the two cases cited. I may observe that part of the defence has already been considered in my order dated 8th August, 2018 while rejecting the application under section 8. The principal defence however has been that the liability was disputed in the reply to demand notice dated 25th August, 2017 and that losses were caused to the defendant as a result of breach of the provisions of the MDA. To that extent, the defence is consistent. However what remains to be seen is the conduct of a party who has allegedly suffered losses and damage and reason why such party would refrain from taking any steps against the plaintiff should its claim be a genuine one. In this behalf the first response to the plaintiff's claim in this behalf is relevant. In reply to the demand notice, the defendant contended that the plaintiff began directly contacting and dealing with the defendant's client and customers without informing the defendants and therefore they have suffered loss of Rs.1,00,00,000/-. Despite this demand made no steps were taken to initiate the Dispute resolution

2 **(2015) 10 SCC 521**

process.

18. Even after the second demand notice dated 13th September, 2017 was sent to the defendants, the defendant does not rely on any correspondence to indicate that they were pursuing the claim for damages. The defendant has annexed to its affidavit in reply emails which according to it were relevant to its defence. This includes the email dated 2nd January, 2015 from the plaintiff to certain customers informing them of the fact that from 1st January, 2015 defendant no. 1 ceases to be a Master Distributor. This aspect has not been highlighted by the defendant or the plaintiff. It is seen that the MDA had a fixed duration. As per Clause 7.1 the agreement was valid for three years from the date of its execution. The agreement was executed on 1st June, 2012. and appears to have been terminated 6 months prior to its expiry by efflux of time. Reasons for termination were not mentioned. However, there is no doubt termination took effect as of 1st January, 2015. A communication dated 2nd January, 2015 is seen to be addressed by a customer to defendant no. 2 seeking clarification of the status of liners orders, apparently with defendant no. 1. in view of the termination of the MDA.

19. In the light of the termination of the MDA on 9th January, 2015 the defendant no. 2 has addressed email to the plaintiff expressing surprise and dismay at the conduct of the plaintiff in having approached customers directly. Defendant no. 2 had alleged that the plaintiff was trying to "decimate" his business after his having put in efforts for over three years. The footnote of the email however is revealing and states as follows :

> *"After we spoke, I am much settled from within. Because like u said, I always believed Rajen can never let anything harm me, leave harming me. And I am glad to say, that feeling and belief continues. Just a request, when we announce the same again, it has to go from Duflon to get the confidence of the market back."*

20. The footnote indicates that working relationship was being patched up once again. It is further to this email and this comment by defendant no. 2 that the accounts department of the defendant addressed the email dated 1st June, 2016 copy of which is in the affidavit in reply, The email is addressed to various addressees including those in accounts department of the plaintiff and it records that there is a difference in the closing balances and admitting a sum of Rs. 1,07,38,149.55 ps is payable to the plaintiff. The email dated 1st June, 2016 is addressed after the 9th January, 2015 email at Exhibit C of the affidavit in reply. Should there have been genuine dispute and grievance, the defendants had sufficient time to dispute liability and take appropriate action including by initiating arbitration but even after an year and a half of expressing dismay and a feeling of being let down by the plaintiff, who it was alleged had decimated the defendant's business, the defendants have vide their email dated 1st June, 2016 have confirmed the balance in the account.

21. The judgment of this court in the case of *Sachin Corporation and Another (supra)* was clearly in facts of the case viz. there were two documents, the pages of which were different and a controversy arose as to which the relevant document was and thus it led to a triable issue. In the present case admission of liability is

evident and unconditional. In the circumstances, its obvious that the defence is moonshine. Thus I am of the view that the defendants are liable to be put to terms before being allowed to defend the suit and accordingly, I pass the following order :

(i) Defendant shall deposit in this Court a sum of Rs. 1 crore within a period of 8 weeks from today.

(ii) If such deposit is made, defendant shall file a written statement within the aforesaid period of 4 weeks thereafter.

(iii) If the amount is deposited, the same shall be invested in a fixed deposit of a nationalised bank for one year and one day and shall be renewed from time to time till further orders.

(iv) If a written statement is filed, parties shall exchange affidavit of documents within four weeks of filing written statement.

(v) Discovery and inspection to be completed forthwith there after.

(vi) List the suit for framing issues on 14^{th} January, 2019.

(A.K. MENON, J.)

Rajeshwari Ramesh Pillai

Digitally signed by Rajeshwari Ramesh Pillai
Date: 2018.10.05 11:08:33 +0530