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

SUMMONS FOR JUDGMENT NO. 27 OF 2014
IN
SUMMARY SUIT NO. 62 OF 2014
(COMMERCIAL SUIT NO. 50 OF 2014)

Itochu Corporation ...Plaintiff/Applicant
Vs.
Narendra Plastics Pvt.Ltd. ...Defendant

WITH
SUMMONS FOR JUDGMENT NO. 28 OF 2014
IN
SUMMARY SUIT NO. 63 OF 2014
(COMMERCIAL SUIT NO. 49 OF 2014)

Itochu India Pvt.Ltd. ...Plaintiff/Applicant
Vs.
Narendra Plastics Pvt.Ltd. ...Defendant

Mr.Zal Andhyarujina, Aditya Mehta, Rachyeta Shah, Aditi Thakur I/b. Cyril Amarchand Mangaldas for Plaintiffs.
Mr.Gaurav Joshi, Senior Advocate with Simil Purohit, Raj Panchmatia, Ayush Agarwala and Parth Gokhale I/b. Khaitan & Co. for Defendant.

CORAM : S.C. GUPTE, J.

DATE : 15 FEBRUARY 2018

P.C. :

These two summonses for judgment are taken out in commercial suits, the facts of which are not very different. For the purposes of this order, we will take Summons for Judgment No.27/2014 in the first case, as the lead case. The facts of the case may, accordingly, be set out as follows:

2 The Plaintiff is a company duly organized and existing under the laws of Japan having its office in Tokyo, Japan. In February 2008, the Plaintiff acquired a shareholding in the Defendant company. The Plaintiff holds 36.3% of fully-paid up equity shares of the Defendant. In November 2011 onwards, the Plaintiff supplied raw materials to the Defendant, which were used for manufacture of plastic bags produced by the Defendant. The contracts for supplies of goods were entered into by way of sale notes raised by the Plaintiff. The goods were shipped by the Plaintiff and invoices were raised from time to time, which *inter alia* included payment terms. On 27 September 2012, vide its email of even date, the Defendant acknowledged its liability to pay USD 10,065.206.94 to the Plaintiff. After taking into account certain offsets, by an email dated 21 January 2013, the Defendant confirmed the dues payable in the sum of USD 9,020,385.22 to the Plaintiff. Once again, by its letter dated 29 April 2013, the Defendant acknowledged its outstanding dues to suppliers, including the Plaintiff. Since the outstandings were not cleared, the Plaintiff issued demand notices between June and August 2013. In the meantime, the supplies of raw materials were withheld by the Plaintiff. On 20 September 2013, the parties entered into a Memorandum of Understanding ("MOU") recording *inter alia* the terms of future supplies. The parties agreed for release of Fixed Deposits worth INR 300 Million lying in the name of the Defendant company, firstly, towards future supplies of raw materials (Rupees 160 Million) and secondly, towards working capital of the Defendant (Rupees 140 Million). On 16 January 2014, purportedly in pursuance of the MOU, the Defendant issued a cheque for Rs.3.20 crores to the Plaintiff claiming the sum to be in full and final settlement of all its dues owed to the Plaintiff herein as well as the Plaintiff in the companion suit. The Plaintiff

herein as also the companion Plaintiff did not accept the cheque or that the amount of Rs.3.20 crores represented full and final settlement of their dues. (By this date, the total dues of both the Plaintiff herein and the companion Plaintiff had aggregated about to Rs.63.62 crores.) In the premises, the present suit is filed by the Plaintiff for recovery of a sum of about Rs.49.30 crores in accordance with the particulars of claim annexed as Exhibit-K to the plaint.

3 There is practically no defence to the original debt of USD 9,020,385.22. After the disputes between the parties arose, there is a vague and general allegation on the part of the Defendant that the goods were not supplied in accordance with the contract specifications. The Defendant does not, contemporaneously or at any time before these disputes arose, dispute the receipt or quality of goods sold and supplied by the Plaintiff to the Defendant or the correctness of the invoices raised or the aggregate outstanding as of 19 September 2013. The defence as to quality can only be termed nominal or moonshine. There is absolutely no material placed in support of such defence.

4 The only defence, which is pressed at the hearing of the summons for judgment, is that on 20 September 2013, the parties arrived at a mutual settlement, which is recorded in the MOU of that date. It is submitted that under this MOU, certain amounts out of the fixed deposits of the Defendant kept with the bank and which were subject to joint instructions of the parties, were to be utilized in a particular manner, namely, a sum of Rs.16 crores from out this deposit was to be utilized to the extent of 80% towards future supply of raw materials by the Plaintiff to the Defendant and 20% towards full and final settlement of all past dues, if

any, owed by the Defendant to both the Plaintiff herein and the Plaintiff in the companion suit. It is submitted that in compliance with this settlement, the Defendant also forwarded a cheque in the sum of Rs.3.20 crores (20% of Rs.16 crores) to both the Plaintiffs but that the cheque was wrongly refused by the latter.

5 With a view to test the bonafides of the defence offered to the summons for judgment, it is necessary to set out the MOU. It is important to note that, as mentioned above, as of the date of the MOU, the outstandings of both the Plaintiffs aggregated to Rs.63.62 crores. The MOU provided as follows:

> <u>Memorandum of Understanding (MOU) to release Fixed Deposits of INR 300 Mn</u>
>
> This MOU is being executed on 20th day of September, 2013 between Narendra Plastic Pvt.Ltd. (the "Company"), 7th floor, Corporate Avenue, Sonawala Road, Goregaon (East), Mumbai 400 063 and ITOCHU Corporation ("Itochu"), 2-5-1, Kita-Aoyama, Minato-ku Tokyo 107-8077 who hereby agree to use INR 300 Mn lying in Fixed deposits with Banks in the name of the Company as under:
>
> (i) Rs.160 million for the purpose of paying to Itochu or ITOCHU India Pvt.Ltd. towards future supply of raw materials against which Itochu or ITOCHU India Pvt.Ltd. will supply raw materials on competitive terms to the extent of 80% of such payment on pro rata basis.
>
> (ii) Rs.140 million of the Share Subscription Amount solely for working capital of the Company always subject to the prior report of detailed usage thereof to Itochu.

As is very obvious, the MOU provides *inter alia* for utilization of Rs.160 Million (Rs.16 crores) for the purpose of paying to *Ituchu* (the Plaintiff herein) or *Ituchu India Pvt.Ltd.* (the Plaintiff in the companion suit) towards future supply of raw materials. It is also obvious that the expression “to the extent of 80% of such payment on prorata basis” refers to supply of raw materials on competitive terms by the two Plaintiffs. The expression qualifies supply of raw materials and not the payment towards future supply of raw materials. In other words, against future supplies of raw materials on competitive terms, 80% payment to be adjusted on prorata basis from the amount of Rs.16 crores, obviously meaning thereby than balance 20% would be actually paid towards such supplies. In the face of a clear and unequivocal provision to this effect, learned Counsel for the Defendant would have us believe that what this meant was that 80% of the payment was to be adjusted towards future supplies and 20% was to be adjusted towards the old supplies. There are clearly two difficulties which stare one in the face, if this were to be the interpretation of the MOU. Firstly, it goes against the plain tenor of the provision of Clause 1 in the MOU and secondly, even if 20% of payment was to be adjusted towards past supplies, such payment would not discharge the old liability or even reach anywhere near such discharge. It is preposterous to believe that a claim of about Rs.63 crores was compromised in this fashion by two commercial entities. The simple thing to provide in such a case, if that were to be the actual intent of the parties, was to provide in this MOU that by this means the entire past outstanding of the Plaintiff stands discharged, The MOU does not make any reference to any past outstanding of the Plaintiff. It simply makes a provision for future supplies to be made by the Plaintiff to the Defendant presumably in the context of the fact that the Plaintiff had a financial stake in the Defendant for the purpose of making future supplies and helping the company towards its working capital. Admittedly, there was a deposit of Rs.30 crores held in the name of the

Defendant company, which was subject to joint instructions of the parties for its disposal. This amount of Rs.30 crores was agreed to be utilized for two distinct purposes, namely, Rs.16 crores for the purpose of paying to the Plaintiffs for the future supplies of raw materials and Rs.14 crores towards working capital of the Defendant subject to a prior report of detailed usage thereof to the Plaintiff herein. The contention now raised by the Defendant concerning its interpretation of the MOU was nearly after four months of signing of the MOU and was promptly rejected by the Plaintiff.

6 On these facts, as is very obvious. though the Defendant may be said to have raised a triable defence, the defence does not either appear to be plausible or bonafide. It clearly appears to be an afterthought and does not inspire confidence of the court as to its bonafides. As the Supreme Court has held in the case of **IDBI Trusteeship Services Ltd. vs. Hubtown Ltd.**[1], the defendant is not entitled to unconditional leave in every case where he raises a triable issue. He must further indicate that he has a fair or reasonable defene, although not positively a good defence. In that case, the plaintiff is not entitled to sign judgment and the defendant is ordinarily entitled to unconditional leave to defend. Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions not only as to time or mode of trial but also as to payment in court or furnishing of a security. So also, even in a case where the defendant raises a plausible defence, which is but improbable, it is permissible to the court to impose a condition on the defendant of payment into the court or furnishing of a security. In the present case, as I have noted above, the defence raises a gaping doubt as to its bonafides or

1 **2016 SCC OnLine SC 1274**

genuineness and good faith of the Defendant. The defence is hardly plausible. But even if one were to concede that it does display a degree of plausibility, it is clearly improbable. In either case, the facts of the case clearly warrant a conditional leave on deposit of the entire principal amount.

6 Accordingly, the summons for judgment is disposed of in terms of the following order:

(I) The Defendant is granted leave to defend on and subject to the condition of deposit into this court of Rs.49,30,39,313.62 within eight weeks from today.

(II) The amount, if any, deposited by the Defendant shall be invested by the Prothonotary & Senior Master of this court in Fixed Deposit/s of Nationalised Bank/s initially for a period of thirteen months and renewable thereafter from time to time and to abide by orders to be passed in the present suit.

(III) The Defendant shall file written statement within four weeks of such deposit.

(IV) The suit to appear on board for directions after twelve weeks.

7 The companion suit, Summary Suit No.63 of 2014, is filed by an Indian company in which the Plaintiff in Summary Suit No.62 of 2014 has a stake. The facts of the two suits are not very different. The only difference is in the array of parties (the Plaintiff being different, as noticed

above) and the sums due and payable; whereas the principal sum due and payable in Summary Suit No.62 of 2014 is Rs.40,30,39,313.62, it is Rs.14,32,23,090.52 in Summary Suit No.63 of 2014. The defence, even here, is the same as in Summary Suit No.62 of 2014. As the defence is discussed above, it is apparent that the same is based on the MOU of 20 September 2013 and is common to the two suits. For the same reasoning as in the case of Summary Suit No.62 of 2014, the summons for judgment in Summary Suit No.63 of 2014 may be disposed of by grant of a conditional leave. It is accordingly ordered as follows:

(I) The Defendant is granted leave to defend on and subject to the condition of deposit into this court of Rs.14,32,23,090.52 within eight weeks from today.

(II) The amount, if any, deposited by the Defendant shall be invested by the Prothonotary & Senior Master of this court in Fixed Deposit/s of Nationalised Bank/s initially for a period of thirteen months and renewable thereafter from time to time and to abide by orders to be passed in the present suit.

(III) The Defendant shall file written statement within four weeks of such deposit.

(IV) The suit to appear on board for directions after twelve weeks.

(S.C. GUPTE, J.)