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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUMMONS FOR JUDGMENT NO. 55 OF 2018
IN
COMM SUMMARY SUIT NO. 115 OF 2017

Avron Chemical Pvt Ltd ...Plaintiff
Versus
Ganesh Benzoplast Ltd ...Defendant

Mr Sharan Jagtiani, *with Surbhi Agarwal, i/b Prerak P Choudhary, for the Plaintiff.*
Mr SA Bhagwat, *with C Solanki, i/b Amey Deshpande, for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 14th December 2018

PC:-

1. No part of the following order is to be seen as a reflection on Mr Bhagwat for the Defendant. He has, as far as I can tell, done all that could reasonably be expected on behalf of the Defendant. As will shortly become evident, the difficulty is that the Defendant has sought to make out a defence that is in a state of constant evolution, more than something of a work in progress. It has shifted stands up to the stage of what is perhaps best described as an Affidavit in Sur-sur-sur-Rejoinder, tendered only this morning. The peril of filing of so many Affidavits is the risk of self-annihilation through inexplicable contradictions and inconsistencies.

2. The suit is carefully placed, as indeed it had to be, under Order XXXVII Rule 2 of the Code of Civil Procedure 1908 for an amount of Rs. 9,00,62,452/- and further interest. The particulars of claim are at Exhibit "R" to the plaint. These show that the principal amount is Rs. 7,43,19,644/-. This is the first figure to be borne in mind. The claim is made, and this is abundantly clear from Exhibit "R" at page 77, the particulars of claim, as also from the tabulation below paragraph 12, on the basis of 78 invoices aggregating to exactly this principal amount, all from 14th May 2011 to 6th September 2011. The importance of these dates is soon evident.

3. The parties have had a business and commercial relationship for some time. The Plaintiff periodically supplied certain chemicals, mostly toluene, to the Defendant. The Plaintiff invoiced the Defendant. For some time, the arrangement continued without disruption. Paragraph 4 of the plaint says that at some point the Defendant applied or was required to apply to the Board of Industrial & Financial Reconstruction (**"BIFR"**) under the erstwhile Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**"). This resulted in the formulation of a rehabilitation scheme by the BIFR. The Plaintiff challenged that scheme, or at least the BIFR's orders on it, in this Court, and then carried the matter to the Supreme Court. The Plaintiff was not successful in its attempts to dislodge the scheme. Today, that matters not at all. There is no doubt that the scheme itself received sanction from the Delhi High Court by an order dated 4th December 2015. What is material is that the scheme itself fixed a cut-off date for the rehabilitation of company, that is to say for payment by the Defendant company of all its debts in accordance with that scheme. That cut-off date was initially 31st March 2010 and this was later altered to 31st March 2011. About this there is no dispute at all. There can be none. These are matters on record.

4. The date of 31st March 2011 assumes importance because (and again the Plaintiff has clearly disclosed this in paragraph 5 of the Plaint), on 1st April 2011, there came to be executed by the Plaintiff, the Defendant and one of the Defendant's principal officers, one Raunak Pilani an agreement of that date. This agreement in recital 6 set out the amounts that were admittedly due *as of that date*. There is a figure mentioned in handwriting of Rs. 8,46,90,030/- due as on 31st March 2011. Leaving aside the provisions in that agreement to secure the Plaintiff's claim, clause 21 specifically contemplated that the Plaintiff would continue to make payments to the Defendant thereafter. Obviously this involved making payments after the BIFR-scheme-mandated cut-off date of 31st March 2011.

5. According to the Plaintiff, it made supplies under the 78 suit invoices, but not only under those invoices. There were indeed many more and the Defendant made payment of some of these and these payments, Mr Jagtiani for the Plaintiff submits, clearly stand outside the frame of the BIFR scheme. I believe he is correct because, and again this is not disputed, the BIFR scheme accepted the stated figures given by the Plaintiff to the Defendant and provided for payment of that amount in specified instalments up to the year 2020. Logically, it must follow that if the Defendant made payment to the Plaintiff of even a single invoice over and above the amount in the BIFR scheme, then clearly the Defendant accepted its liability to do so; and accepted that post-cut-off-date invoices were *not* covered by the BIFR Scheme. Such later invoices after the cut-off date could not be legitimately be said to be swept into the BIFR scheme.

6. I note this because in the Affidavit in Reply that was filed to the Summons for Judgment begins by saying that *all* dues to the Plaintiff, and all its invoices, irrespective of the period, are covered by the BIFR Scheme. Paragraph (g) at pages 113-114 makes this clear when it references the Delhi High Court order of 4th December 2015 sanctioning the BIFR Scheme. In this paragraph, the Defendant has stated that it must pay the entire dues to the Plaintiff "as per the scheme". This necessarily implies that in the scheme itself there were dues that were payable and that there was some provision made or a schedule set for their repayment. The scheme itself is annexed to this Reply and the relevant portion is to be found at page 181 in relation to the dues of the Plaintiff. This portion mentions the Plaintiff by name. It notes its objection. It shows an amount due of Rs. 846.09 lakhs and this corresponds exactly to the amount in the recitals of the Tripartite Agreement dated 1st April 2011. This amount, i.e. an amount due before the cut-off date, was payable in five equated annual instalments of Rs. 169.38 lakhs each.

7. Even from this simplified narration of facts, it is difficult to see how invoices *after* 1st April 2011 could possibly be covered by the scheme. This would not stand to logic or reason because the scheme proceeded on the basis of a known debt (the repayment of which was split into equated instalments) and could not have contemplated liabilities yet unknown or yet to be incurred.

8. The Plaintiff filed a Rejoinder and then came a most peculiar Sur-Rejoinder from the Defendant on 27th August 2019. Here the Defendant claimed that it paid an amount of Rs. 5,77,91,066/- and that this shows its bona fides. But these payments were also payments *under the scheme* and not after it, and this furnishes no defence at all to the present claim as mounted. The Plaintiff filed a Further Affidavit and in this annexed two sets of statements. It said clearly that its suit invoices were for the post-scheme period and that the suit related only to this period and to nothing covered by the BIFR scheme. It re-emphasized that the entire claim was on the basis of the unpaid invoices (a sub-total of the total amount of post-scheme invoices, some payments having been received and credited) all being after the scheme's cut-off date.

9. Mr Bhagwat was persuaded to tender to me a fresh Affidavit made yesterday, containing what I can only describe as the third or fourth incarnation of the defence. Now the Defendant says in paragraph 4 that since it has "already made payments to the tune of Rs. 19,49,27,470" therefore nothing is due. The Defendant said no such thing earlier. Then the Defendant goes on to say that there are accounts from April to September 2011 including the suit invoices which are admittedly after the cut-off date of 31st March 2011.

10. I am unable to understand how this could possibly furnish a defence. If the payment of Rs. 19.49 crores (approximately) is for a period *after* April 2011 then clearly the Defendant accepts that it has a liability that stands outside the BIFR scheme for invoices raised after the cut-off date of 31st March 2011. The annexures to this Affidavit, unverified and unsigned though they are, are even more telling. The first set is simply a listing of invoices, which is considerably less than helpful. The second is more interesting because it purports to show payments made. These payments are, interestingly, from 1st April 2011 onwards and apparently for the supplies made after that date. This seems to me to be some sort of melange of dues under the scheme and dues after the scheme, all left undifferentiated. This is like a Government statistic. What it tells us is merely interesting. What it does not tell us is crucial. Not one of the 78 odd invoices listed in the plaint is shown in this list as having been paid. I asked Mr Bhagwat to show me that a single one of the 78 suit invoices was in this list of 'paid invoices'. He received no instructions enabling him to do so.

11. There is no doubt nor any denial that those 78 invoices were in fact raised. There is no doubt or dispute about the supply of goods. There is no dispute about the quality of goods. If in addition to this there is no evidence of payment of those invoices then to my mind there is only a single result that must follow, and that is a decree.

12. The Summons for Judgment must be made absolute, for I see absolutely no defence whatsoever on merits.

13. The Suit is accordingly decreed in the amount of Rs. 7,43,19,644/- being the principal amount. The invoices mention interest at the rate of 24% per annum. The claim has been made at 18% per annum. This being a commercial suit, in what I believe, despite all attempts by the Defendant, continues to be the commercial capital of the country, I will accept that rate. But further interest from the date of the suit will run at 12% per annum simple interest until payment or realization.

14. The compilation of documents tendered by Mr Jagtiani is taken on record and marked **Exhibit "P1"** in evidence. The original documents will be returned to the Plaintiff under Rule 306 of the Bombay High Court (Original Side) Rules and upon these being substituted with a set of authenticated photocopies.

15. The suit having been filed in the Commercial Division, under the amended Section 35 of the Commercial Courts Act, 2015 the Plaintiff is entitled to a decree in costs. If the costs are not to be awarded, reasons must be recorded.

16. Mr Jagtiani tenders a statement of costs including court fees and legal expenses. The amended Section requires me to award such costs as I believe are reasonable. I will accept the figure of Rs. 8,50,000/- as costs. The decree for costs will not carry interest.

17. The Summons for Judgment and the Summary Suit are both disposed of in these terms.

18. Decree to be drawn expeditiously.

(G. S. PATEL, J)