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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUMMONS FOR JUDGMENT NO. 67 OF 2018
IN
COMM SUMMARY SUIT NO. 122 OF 2018

European Gateways SARL ...Plaintiff
Versus
Bonton Holidays Pvt Ltd (Multinational Travel Management Co.) ...Defendant

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Mr Karl Tamboly, *with Shruti Maniar & Simantini Mohite, i/b Solomon & Co., for the Plaintiff.*
Mr Vikhil Dhoka, *i/b Solicis Lex, for Defendant No. 1.*

CORAM: G.S. PATEL, J
DATED: 21st November 2018

PC:-

1. Heard.

2. The Suit is filed under Order 37 Rule 2 of the Code of Civil Procedure, 1908. The Plaintiff is a Luxembourg-based company. It provides various travel-related services such as hotel accommodation, transport, logistics, guide, sight-seeing tours and so on. The Defendant is an Indian company with its registered office in Mumbai. It also provides travel and tourism services. It sends tourist groups on what are known as package tours to various international destinations. In 2013, the Defendant decided to extend its services to destinations in Europe. It did not at that time have established or known agents in Europe. By then the Plaintiff already had a reputation as a reliable destination management company, particularly in Europe. The Defendant engaged the services of the Plaintiff to provide various travel-related services for tour groups to Europe. This association began in 2013.

3. The Defendant would send tourists to Europe, where the Plaintiff would provide diverse services including hotels, local transportation, sight-seeing and logistics. After these were provided, the Plaintiff would invoice the Defendant, which paid the Defendant against each invoice. In 2013, the Defendant sent two tourist groups to Europe. The Plaintiff provided services, and raised invoices after the tours were complete. The Defendant paid these. Two further groups followed in 2014. Both tours were successfully completed, and the Defendant paid the Plaintiff its invoices for these as well. In 2015, the Defendant sent four groups of tourists to Europe. Up to this point, the Defendant paid the Plaintiff's invoices on a back-to-back basis.

4. By 2016, traffic volumes had increased substantially. The Defendant proposed modifications to the terms of engagement. The Defendant also requested the Plaintiff to extend a credit facility. On 21st April 2016, the Defendant sent an email to the Plaintiff proposing new terms. Further correspondence followed which, according to the Plaintiff, constitutes a written contract. The acceptance of this proposed contract is at page 22. At this stage, I note that the Defendant today relies on the terms and conditions suggested in this email correspondence (thus not disputing the existence of the contract) to claim that the contract so concluded confers exclusive jurisdiction on Courts in Luxembourg. The submission is that this Court, therefore, has no jurisdiction to entertain the Suit. Reliance is placed on Clause 19 of an attachment to an email at page 55 of the Plaint. It is also pointed out that the Plaintiff has its office in Luxembourg.

5. This, in my view, is entirely an argument without substance. The Defendant is admittedly a company with its registered office in Mumbai. As a general principle regarding jurisdiction and place of suing, a plaintiff can always travel to where a defendant resides or carries on business. This is true whether the suit is brought in a civil court under Section 20 of the Code of Civil Procedure, 1908, or, in the case of a Chartered High Court on its Original Side, under Clause XII of the Letters Patent. It is never open to a defendant to say that a plaintiff should *not* come to where the defendant is but that the plaintiff should instead require the defendant to travel to where the plaintiff is On the face of it, the submission is a complete inversion on several centuries of settled law. That apart, I believe it is far too well settled to require further discussion that parties cannot by contract confer jurisdiction on a Court that does not otherwise have it.[1] No part of the cause of action has or can be said to have arisen in Luxembourg. On the other hand, the Defendant is in Mumbai, where a substantial part of the cause of action arises.

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1 *ABC Laminart (P) Ltd & Anr v AP Agencies, Salem*, (1989) 2 SCC 163; *Hakam Singh v Gammon (India) Ltd*, (1971) 1 SCC 286; *RSDV Finance Co (P) Ltd v Shree Vallabh Glass Works Ltd*, 1993 2 SCC 130.

This Court's jurisdiction cannot be wholly ousted in this fashion. This Court undoubtedly has jurisdiction to entertain the Suit.

6. Indeed, this was the principal plank of Mr Dhoka's argument for the Defendant, and it is not difficult to see why. The Plaintiff states that after this agreement, and pursuant to it, the Defendant paid the Plaintiff an amount of €20,000/- as an initial booking advance and the Plaintiff then began providing services to tour groups the Defendant sent to Europe. Between April 2016 and September 2016, the Defendant sent several such tour groups. These were provided accommodation, sight-seeing, transportation etc. The details are set out in paragraph 5 of the Affidavit in Support, where group numbers, date of arrival and date of departure are given. There were, between 6th May 2016 and 28th July 2016, seven groups so serviced. The Plaintiff invoiced the Defendant for all these groups. After the seventh group, an eighth group No. EG723-BON was to arrive on 25th July 2016. The Plaintiff made the necessary preparations, and raised an invoice for €69.620,00/-. At the very last minute, on 28th July 2016 itself, the Defendant told the Plaintiff that the group booking was cancelled and required all arrangements made in Europe to be cancelled. The agreed terms of payment required the Defendant to give 30 days' prior notice of cancellation, i.e., 30 days before the scheduled date of arrival. Since this was not done, according to the Plaintiff, the entire invoice amount of €69.620 was payable.

7. Paragraph 7 of the Affidavit in Support then sets out the details of the invoices including the dates and amounts. The total invoice amount for nine invoices comes to €482.663,00. There is a separate invoice for Swiss Francs 35,702.00. In addition, there is an invoice of 28th July 2016 for GBP 2,275 for some London tours. The Defendant made payment of GBP 2,635.00 through Kesari Tours Private Limited on 31st August 2016, i.e., an excess payment of GBP 360.00. The Plaintiff has set off this amount.

8. The Plaintiff says that the Defendant did not make payment promptly of these invoices despite several reminders. Between May and September 2016, there was further correspondence between the parties. The Defendant admitted its liability to Plaintiff in this correspondence. For instance, in paragraph 12.2 of the Affidavit in Support the Plaintiff relies on its email of 6th June 2016, a copy of which is at page 38, Exhibit "E" to the Plaint. In that email, one Ashish Shah of the Defendant clearly stated that all dues of the Plaintiff would be cleared. Indeed, the Defendant did make some payment even thereafter. Exhibit "G" to the Plaint at page 45 is a copy of a trail of correspondence of June 2016. The Defendant's Vice President one Rahul Thakur said on 15th June 2016 that they would try and close all payments by 22nd June 2016. Matters came to such a state that the Plaintiff had to contact the Defendant's Executive Director on 19th June 2016. A few further payments followed, but the pending dues were not cleared.

9. In the course of making arrangements, the Plaintiff had contracted with third party service providers for facilities such as bus coaches etc. Much is sought to be made by the Defendant that in one such case, the bus coach sub-contractor abandoned a group of senior citizen tourists. The reason given, at least as reported by the media and annexed by the Defendant itself, at Exhibit "O" to the

Affidavit in Reply, is that the Defendant had not paid the Plaintiff's dues.

10. Such payments as the Defendant made between November 2015 and 16th September 2016 were in different currencies but were not invoice-specific. They were made either directly by or through Kesari Tours Private Limited on the Defendant's behalf. On 14th September 2016, the Defendant's ninth tour group EG723-BON arrived in London. The Plaintiff invoiced the Defendant on 16th September 2016 for €47,616,00. On 17th September 2016, this ninth group was left without further bus coach service. The Plaintiff has received no payments thereafter.

11. On 5th October 2016, the Plaintiff sent a notice through its Advocates under Section 433 and 434 of the Companies Act, 1956 demanding €212,480.00. The Defendant did not reply. It did not meet the demand. The Plaintiff filed Company Petition (St) No. 998 of 2016. This was transferred to the National Company Law Tribunal on 1st February 2017 and was renumbered as TCP No. 516 of 2017. The Plaintiff sent a demand notice in Form 3 on 7th March 2017 for €213,080.671 with interest at the rate of 24% per annum. On 30th June 2017 before the Company Petition could be admitted, the Plaintiff withdrew it with liberty to file appropriate proceedings. It then filed Company Petition No. 1502 of 2017 before the National Company Law Tribunal in Mumbai. This was disposed of by an order dated 15th May 2018, and the Bench held that it could not segregate one claim out of the total claims made.

12. The present Suit was filed before the order passed by the National Company Law Tribunal. A Writ of Summons was served. The Defendant entered appearance. Hence this Summons for Judgment.

13. The decree sought against the Defendant is in the amount of Rs. 2,05,22,291.48/- as per the Particulars of Claim, Exhibit "O" to the plaint at page 96. Interest is claimed at the rate of 24% per annum, although the invoice does not contain any specified rate of interest. The aggregate invoice amount in rupees comes to Rs. 1,63,33,703.42/- after giving credit for the amounts paid and using the foreign exchange conversion rate as of 12th October 2017.

14. Apart from the question of jurisdiction mentioned above, the other dispute raised is about the alleged deficiency of service. This is no defence at all. It is not the Defendant who has ever had a complaint against the Plaintiff. What the Defendant relies on is a consumer complaint filed by one of the affected tourists (left without bus services, part of the ninth group of tourists) against the Defendant. In that complaint at page 85 of the Affidavit in Reply, the tourists, Maruti and Mrudula Sulay, complained about the Defendant's deficiency of service. Now the Defendant does not accept that its services were in any way deficient and, therefore, does not accept the correctness of these complaints. I do not see how the Defendant can say that the complaints by the tourists are correct *vis-à-vis* the Plaintiff but incorrect *vis-à-vis* the Defendant. There is, apart from this, no defence at all and in particular no explanation for the repeated commitments to make payment, and perhaps more pertinently that on account payments were made after the Plaintiff raised demands and sent reminders.

15. The reliance by the Defendant on the decision of the Supreme Court in *IDBI Trusteeship Services Ltd v Hubtown Limited*[2] is misplaced. On the contrary it is correctly invoked by the Plaintiff. In considering the law laid down by an earlier Bench in *Mechelec Engineers* and holding that it is no longer good law, the Supreme Court set out in the clearest possible terms the ambit of the relevant portions of Order 37. In particular, *Hubtown* considered the amended provisions of Order 37 Rule 3, i.e., the procedure for the appearance of the Defendant. The relevant portion of the *Hubtown* decision can be profitably reproduced:

> "**18.**Accordingly, the principles stated in paragraph 8 of Mechelec's (AIR 1977 SC 577) case will now stand superseded, given the amendment of O. XXXVII R.3, and the binding decision of four Judges in Mikhiram's (AIR 1945 SC 1698) case, as follows:
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> > a. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;
> >
> > b. if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign

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2 (2017) 1 SCC 568.

judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

c. 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 both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

d. if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

e. if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

f. if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even

> if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

16. In my view, the present case falls clearly within clause (e). The defence is frivolous and perhaps even vexatious. It is wholly unsubstantiated and raises no genuine triable issue. Indeed, it is difficult to conceive what is the issue on which parties could possibly proceed to trial. The suit is, therefore, correctly brought within the frame of Order 37 as a Summary Suit, one that admits of no defence.

17. In this view of the matter, the Summons for Judgment is made absolute.

18. The Suit as filed by the Plaintiff is decreed in the amount of Rs. 1,63,33,703.42/- with interest at the rate of 6% per annum from the date of the Suit till payment or realisation.

19. The invoices relied on by the Plaintiff were all sent by email. A compilation is taken on record and marked **<u>Exhibit "P1"</u>** in evidence. Copies of email correspondence are taken on record and marked **<u>Exhibit "P2"</u>** in evidence.

20. Decree to be drawn expeditiously.

(G. S. PATEL, J)