Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL SUIT NO. 331 OF 2017
WITH
SUMMONS FOR JUDGMENT NO. 100 OF 2018
AND
NOTICE OF MOTION (L) NO. 911 OF 2018

Shree Durga Iron & Steel Co Ltd ...Plaintiff
Versus
Rawalwasia Textile Industries Pvt Ltd & Ors ...Defendants

Mr Mayur Khandeparkar, *i/b Law Juris, for the Plaintiff.*
Mr PC Kansara, *with Bhakti Kansara, for Defendants Nos. 1 to 3.*

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

PC:-

1. Heard.

2. The Plaintiff obtained leave under Clause XII of the Letters Patent prior to the execution of the suit. I granted that leave on 7th July 2017 on the basis of the averments in paragraph 23 of the plaint. Those averments are that the Defendants placed an order for supply of materials on the Plaintiff at the Plaintiff's office in Mumbai and the entire transaction thus took place within the jurisdiction of this Court.

3. The suit itself is brought on a High Seas Sales Agreement (**"HSSA"**) dated 24th May 2014, an invoice No. SD/SURAT/HSS/31/14/15 dated 15th September 2014 and a later debit note of 24th December 2014 for stevedoring charges. The HSSA in question at pages 58-59 contains in clause 12 a jurisdiction clause or a forum selection clause saying that the sale is subject to Mumbai jurisdiction.

4. When Mr Kansara for the Defendants seeks revocation of the leave, he submits that the law is settled that parties cannot by contract confer jurisdiction on a Court that did not otherwise have it. This is correct. In other words, if there are two Courts that have jurisdiction it is open to the parties to select one. But the parties cannot by virtue of a contract go to a Court wholly without jurisdiction. It is also equally settled that the question of jurisdiction is decided on the averments made in the plaint. Apart from anything else, I find that the assertions of the Plaintiff in paragraph 23 are not specifically traversed either in the Affidavit in Reply to the Summons for Judgment that was later filed nor in the Affidavit in Support of the present Notice of Motion for revocation. This being the case, it is not possible to hold in favour of Mr Kansara that this Court has no jurisdiction, i.e., that no part of the cause of action arose within the jurisdiction of this Court.

5. The Notice of Motion is dismissed. There will be no order as to costs. This Court has the jurisdiction to entertain and try the suit.

6. I now take up the Summons for Judgment.

7. The suit was filed under the provisions of Order XXXVII Rule 2 of the Code of Civil Procedure 1908 for an amount of Rs. 1,74,75,752/- in terms of the amended particulars of claim at Exhibit "B" at page 100. Those particulars make it clear that the claim is mounted on the basis of the HSSA at pages 58-59 and the resultant invoice at page 60 and a later debit note at page 61 for stevedoring charges. Since there is a dispute raised in the Affidavit in Reply that there is no agreement for stevedoromg charges, it is best to get it out of the way immediately. This is easily done. Clause 11 of the HSSA itself says, under the caption of "**Import/Stevedore Duties**" that it is for the buyer, i.e., the Defendants, to arrange clearance of goods, customs duties clearing charges etc. The defence is without merit.

8. As to the transactions in the suit, the case of the Plaintiff is that the Defendants ordered from the Plaintiff various quantities of Indonesian Steam Coal (non-coking). The Plaintiff invoiced the Defendant, and raised debit notes for stevedoring charges. Until paragraph 10, all this is by way of background material, for no part of the claim is founded on these past transactions.

9. The relevant portion of the plaint for the present purposes is paragraph 10. Here the Plaintiff says that in September 2014, the Defendants placed an order for 27,000 MT of the very goods and it was in this context that the parties executed the subject HSSA dated 15th September 2014, with the goods to be supplied on a vessel MV *Jag Aarati* from Kandla. The Plaintiff invoiced the Defendants on 15th September 2014 in the amount of Rs. 1,63,29,680/- and then raised a debit note for Rs. 11,46,072/- for stevedoring charges. This is the foundation of the claim and there can be no dispute that this, and only this, is the claim presented. It is true that the Plaintiff has referenced and annexed previous documents but no part of the money claim is based on the earlier transactions.

10. The next important reference is to the correspondence between the parties and here Mr Khandeparkar for the Plaintiff draws my attention to the notice sent by the Plaintiff's Advocates to the Defendants and, more particularly, the reply received dated 8th July 2015 which is at pages 80 to 84 of the Plaint. In this reply, in paragraph 6 a defence was taken that actual lifting details were not confirmed and then there is a denial of the agreement altogether. What is important here is not what is stated, but rather what is not; for there is no mention in this response of any cross debit note by the Defendants on the Plaintiff.

11. The writ of summons having been served, the Defendants entered appearance. The Plaintiff filed the present Summons for Judgment and there are now Replies and Rejoinders including further Affidavits since there was a previous Summons for Judgment which was withdrawn.

12. Before proceeding further, I note that Mr Khandeparkar on instructions withdraws the suit unconditionally as against Defendants Nos. 2 and 3, they being joined as directors of Defendant No. 1.

13. The principal defence to the Summons for Judgment are two. The first is the jurisdictional issue which I have dealt with in the context of the Notice of Motion for revocation of leave and that need not be repeated.

14. The second is the Defendants' reliance on a debit note that it claims it sent to the Plaintiff and which the Plaintiff, according to the Defendants, accepted, leaving no liability at all in the hands of the Defendants to the Plaintiff. Part of the confusion that is sought to be created by the Defendants of course arises from the fact that the Plaintiff, for reasons that are not at all clear to me, thought it fit to refer to a number of historical transactions. In a summary suit none of this was necessary. Of all the civil actions known to us, this is one where less is invariably more. The debit note claimed by the Defendant is the one that is at pages 92-93 of the plaint itself. This debit note references the vessel *MV Jag Aarati*, the one that is named in the invoice in suit. It is pointless for the Defendants to refer to the other debit note. That relates to the prior transaction, and has no bearing on the suit claim.

15. What is the case as regards the debit note? If indeed this debit note is demonstrated to have been sent, received and accepted according to its tenor, then of course there would be great difficulty for the Plaintiff. It is for this reason that Mr Khandeparkar points out that in the Advocates' reply to the Plaintiff's notice (at pages 80-84) there in mention of the debit note at all. This is curious because the debit note purports to be dated 31st January 2015, i.e., of a date several months *prior* to the reply from the Defendants' Advocate. The Plaintiff has been able to show from the Affidavit in Rejoinder at page 140 that this debit note is clearly a complete afterthought. There is nothing at all to show that the Defendants sent it to the Plaintiff on 31st January 2015 or shortly thereafter. It seems to have been put into despatch only in September 2015, i.e. well after the Advocates' reply, that is to say after the Defendants were put to notice of the claim being mounted by the Plaintiff.

16. Mr Khandeparkar points out in addition that the debit note itself is on the face of it demonstrably incorrect. In fact, he goes on to say that it is arithmetically inaccurate. The figure in the backdated debit note is meant only to bolster a false claim and wipe out an undeniable liability.

17. Other than this debit note, I find no defence whatsoever. There is indeed nothing at all on the merits of the claim, the supply of the goods or the invoice value. The debit note is not one that can or should be believed. There is no explanation why a document of January 2015, if indeed it was sent in the ordinary course, was not referenced several months later by the Defendants' Advocate. It is not explained how the amount in the debit note can possibly be a correct computation on the basis of the figures in the covering or forwarding letter itself (at page 91 of the plaint).

18. Having regard to these circumstances, I am unable to hold that the Defendants have made out any case for leave to defend. The defence is moonshine. It is not probable. It is not even plausible.

19. Having regard to these circumstances, the following order:

(a) The plaint is to be amended without verification to delete the names of Defendants Nos. 2 and 3;

(b) The Summons for Judgment as against Defendants Nos. 2 and 3 stands withdrawn;

(c) The Summons for Judgment is made absolute as against the sole surviving Defendant.

20. Mr Khandeparkar states that authenticated copies of the documents are tendered. These are taken on record and marked **Exhibit "P1"** in evidence. The Plaintiff is exempted from filing the originals since these are lodged with the Customs Authorities.

21. The suit having been filed in the Commercial Division, there will have to an order of costs under amended Section 35 of the CP. That section says that if the costs are not to be awarded, reasons are to be recorded but otherwise the successful party is entitled, as a matter of right, to costs.

22. A statement tendered by Mr Khandeparkar is taken on record and marked "X" for identification with today's date. I am accepting in the statement the amount of Rs.8,52,000/-. There will thus also be a decree of costs against the sole Defendant in this amount but without interest.

23. The claim of the Plaintiff as decreed will carry interest at the rate of 12% per annum on the principal amount from the date of the suit till payment or realization.

24. The Summons for Judgment and the Suit are disposed of in these terms.

25. Decree to be drawn up expeditiously.

(G. S. PATEL, J)