*   IN THE HIGH COURT OF DELHI AT NEW DELHI

+   CS (COMM) No. 1099/2016

%   9th March, 2018

M/s REEBOK INDIA COMPANY ..... Plaintiff
Through: Mr. Niraj Singh, Advocate.

versus

H. REHANULLA SHARIF ..... Defendant
Through: Mr. Avneesh Garg and Mr. Pravin Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

I.A. No. 11669/2017 (for delay)

1. There is no opposition to this application which is allowed.

I.A. stands disposed of.

CS (COMM) No. 1099/2016 and I.A. No. 11575/2017 (under Order XXXVII Rule 3(5) CPC) with I.A. No. 13564/2016 (under Order XXXVII Rule 4 CPC)

2. By the subject leave to defend application, the defendant in the suit filed under Order XXXVII CPC, seeks unconditional leave to defend.

3. The facts as per the suit plaint which is filed under Order XXXVII CPC is that plaintiff seeks a money decree for a sum of Rs.1,13,10,000/- as the balance amount payable under a written contract dated 6.5.2013 and also a further sum of Rs.38,45,961/- on account of differential tax/VAT paid by the plaintiff on account of non-supply by the defendant to the plaintiff of the C-Forms as was obligated upon the defendant in terms of the aforesaid agreement dated 6.5.2013.

4. The facts of the case are that plaintiff has pleaded in the suit that the defendant as a sole proprietor of M/s Sai Sales approached the plaintiff for a franchisee agreement to be entered into between the parties for the plaintiff to supply to the defendant shoes and other sports apparels of Reebok brand. In terms of business arrangement between the parties plaintiff supplied goods to the defendant. Defendant was to supply the C-Forms to the plaintiff in addition to the price of the goods purchased by the defendant from the plaintiff.

5. Plaintiff discontinued the existing business model and offered an alternative business model to the defendant after 30.11.2012, but this was not suitable to the defendant, and therefore

the business relationship between the parties stood terminated on 30.11.2012.

6. Parties on 6.5.2013 entered into a full and final settlement agreement whereby in terms of this agreement dated 6.5.2013 the defendant agreed to pay a sum of Rs.1,30,00,000/- to the plaintiff in full and final satisfaction of the dues of the plaintiff. The defendant also agreed to provide the C-Forms under the Central Sales Tax Act, 1956 as the defendant was to pay the necessary sales tax.

7. As per the plaint the plaintiff pleads that defendant has paid only an amount of Rs.65,00,000/- in terms of the agreement dated 6.5.2013 leaving a balance due of the sum of Rs.65,00,000/-. It is this principal amount along with interest which is claimed in the suit. In the suit the plaintiff also claims an amount of Rs.38,45,961/- which the plaintiff had to pay to the sales tax authorities on account of the defendant not providing the requisite C-Forms with respect to the transactions which were subject matter of the agreement dated 6.5.2013.

8. By the leave to defend application defendant seeks unconditional leave to defend. One defence which is raised and

argued before this Court on behalf of the defendant is that under the business relations which were put to an end with effect from 30.11.2012 the plaintiff had to collect goods which were dropped in the warehouse of the defendant of about Rs.4 crores and the plaintiff promised to give huge discounts to the defendant to dispose of the stock and this was because plaintiff requested the defendant to retain the stock with the defendant for some time. The second ground urged in the leave to defend application is that by the present suit the plaintiff cannot claim the amount of Rs.38,45,961/- inasmuch as there is no such liquidated liability specified in the agreement dated 6.5.2013 entered into between the parties. The third defence raised in the leave to defend application is that at the time of entering into of the agreement dated 6.5.2013 it was agreed that defendant will only pay the amount on the defendant being able to sell the stocks which were supplied by the plaintiff to the defendant. As regards supply of C-Forms the defendant has pleaded that it was because of the fault of the plaintiff that the defendant could not obtain the requisite C-Forms. It is also pleaded that the suit is barred by time. Finally, the defendant has pleaded lack of territorial jurisdiction of this Court, but at this stage, the counsel for the defendant specifically gives up this issue. No other ground is argued or urged before this Court except what is stated above for granting leave to defend.

9. The first aspect is as to whether the suit is not maintainable under Order XXXVII CPC because in the agreement dated 6.5.2013 there is no amount which is stated of the sum of Rs.38,45,961/- and which amount the plaintiff claims to have paid as the sales tax dues to the appropriate authority on account of failure of the defendant to supply the C-Forms. In this regard, it is an undisputed position that in terms of Clause 8 of the agreement dated 6.5.2013 the defendant undertook to supply the necessary C-Forms to the plaintiff. This Clause 8 reads as under:-

> "(8) Notwithstanding anything contained in this Agreement, the Franchisee agrees that in the event the Franchisee fails, or has failed, to submit Form-C for any period, the Franchisee shall be liable to pay RIC for the differential sales tax/VAT along with the interest, penalties or other loss incurred by RIC on account of the same."

10. Therefore, it is clear that there was a liability upon the defendant to supply the plaintiff with the necessary C-Forms and failing which the defendant will be liable to pay the differential sales tax. Admittedly the defendant has not supplied the C-Forms to the

plaintiff. It is also relevant to note that the defendant in the leave to defend application has not at any place denied that the liability which has been fastened upon the plaintiff and paid by the plaintiff for non-supply of C-Forms does not crystallize to the amount of Rs.38,45,961/-. Therefore on the one hand the agreement dated 6.5.2013 requires the defendant to submit the C-Forms and which C-Forms were not supplied, on the other hand the monetary value of the C-Forms though not specifically stated in the agreement dated 6.5.2013, however the crystallized amount of Rs.38,45,961/- being the amount paid by the plaintiff to the sales tax department is not disputed by the defendant in the present leave to defend application. In my opinion as per Clause 8 of the agreement dated 6.5.2013 the liability of differential tax will be borne by the defendant and this is in so many clear words provided in this Clause 8. Therefore the contention of the defendant is rejected that plaintiff is not entitled to the amount of Rs.38,45,961/- as claimed in the present suit.

11. On the issue of any agreement between the parties of liability of plaintiff to give discounts to the defendant, it is not in dispute that the subject agreement dated 6.5.2013 has admittedly been

entered into between the parties because defendant does not deny that defendant has executed this agreement dated 6.5.2013, and this is not even the case as argued before this Court on behalf of the defendant today. Once there is a written agreement between the parties, then what are the terms of the agreement can only be seen from the terms of the agreement in view of Section 91 of the Indian Evidence Act, 1872. In view of Section 91 of the Indian Evidence Act no party to an agreement is entitled to plead that the terms of the agreement are not those terms as stated in the agreement but are some other terms. Section 92 of the Indian Evidence Act follows Section 91 of the Indian Evidence Act and provides that no parol evidence is permissible to add or to subtract or to modify etc the written terms of an agreement by pleading that the terms as stated in the agreement are different than what was agreed upon. Therefore in view of specific provisions of law being Sections 91 and 92 of the Indian Evidence Act the argument urged on behalf of the defendant that, there was a simultaneous agreement entered into along with the agreement dated 6.5.2013 that plaintiff will give huge discount to the defendant for selling the stocks or the defendant will only clear the liability when the defendant clears the stocks with it, are arguments which the defendant is legally barred from raising and are therefore rejected.

12. The last ground which is urged before this Court on behalf of the defendant is that suit is barred because the agreement in question is dated 6.5.2013 and the subject suit has been filed on 30.5.2016. This argument of the defendant of the suit being barred by time is again a completely frivolous and vexatious argument because a suit for recovery has to be filed within three years when the amount is payable as per the dates of payments fixed by the agreement dated 6.5.2013. If amounts are payable not on the date of entering into of the agreement dated 6.5.2013, but on future dates, then it is only on the future dates when the amounts are not paid would the cause of action accrue to the plaintiff for alleging non-performance of the terms of the agreement dated 6.5.2013. In para 2 of the agreement dated 6.5.2013 the liability to be cleared by the defendant is in terms of the various cheques which start from 31.5.2013 with the other cheques being dated 30.6.2013, 31.7.2013 and 31.8.2013. The liability of the defendant in favour of the plaintiff would have arisen only on non-clearance of the cheque dated 31.5.2013 given under Clause 2(a) of

the agreement dated 6.5.2013. This Clause 2 of the agreement dated 6.5.2013 reads as under:-

> "(2) The Parties agree that the Franchisee shall handover post dated cheques of the following amounts to RIC within seven days from the date of execution of this Agreement:
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> a) Cheque dated May 31, 2013 for an amount of Rs. 1,00,00,000/- (Rupees One Crore Only) in favor of Reebok India Company;
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> b) Cheque dated June 30, 2013 for an amount of Rs. 20,00,000/- (Rupees Twenty Lakh Only) in favor of Reebok India Company;
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> c) Cheque dated July 31, 2013 for an amount of Rs. 5,00,000/- (Rupees Five Lakh Only) in favor of Reebok India Company; and
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> d) Cheque dated August 31, 2013 for an amount of Rs. 5,00,000/- (Rupees Five Lakh Only) in favor of Reebok India Company;"

13. Three years from 31.5.2013 comes to an end on 1.6.2016, but the present suit is filed on 30.5.2016 i.e within the three years period of limitation. Therefore the argument urged on behalf of the defendant that suit is barred by limitation is on the face of it without substance and is rejected.

14. The principles with respect to grant of leave to defend have been recently crystallized by the Supreme Court in the judgment in the case of ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., (2017) 1 SCC 568.*** The relevant paras of this judgment crystallizing the position with respect to grant or non-grant of leave to defend is stated in paras 17 to 17.6 of this judgment and which paras read as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec's* case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in *Milkhiram's* case, as follows:

17.1. 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.

17.2 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 judgment, and the Defendant is *ordinarily* entitled to unconditional leave to defend.

17.3 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.

17.4 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.

17.5 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.

17.6 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."

15. In terms of the ratio of the judgment of the Supreme Court in the case of ***IDBI Trusteeship Services Ltd. (supra)*** once a Court finds the defence to be frivolous or vexatious or that defence is

not a substantial defence and there is no genuine triable issue, then Court is entitled to dismiss the leave to defend application.

16. As already discussed above the pleas of the suit being barred by limitation or pleas of a contract other than what is stated in the agreement dated 6.5.2013 are clearly frivolous and vexatious defences and do not raise any triable issue. Also the defendant cannot contend with respect to non-payment of liability of C-Forms because Clause 8 specifically provides that either C-Forms will be given or liability incurred by the plaintiff will be paid and this liability is not denied by the defendant to be the sum of Rs.38,45,961/-. Therefore the defendant is not entitled to leave to defend on the vexatious defences raised which do not raise any genuine triable issues or substantial defences.

17. The subject suit is a commercial suit under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. Section 35 CPC has been amended by the legislature with respect to commercial cases filed under this Act. Courts are mandated to impose actual costs as also costs under different headings including for the defendant frivolously defending

the suit. Accordingly while dismissing the leave to defend application, and in view of the fact that plaintiff has been harassed by the frivolous defences of the defendant who in spite of his liability is failing to pay the requisite amount to the plaintiff, the leave to defend application is dismissed with actual costs i.e plaintiff besides being entitled to court fee and other expenses incurred towards filing of the suit, the plaintiff will also be entitled to all costs paid to its Advocates and any other costs for pursuing this litigation. Necessary affidavit in this regard be filed by the plaintiff within four weeks and which costs shall form the costs in terms of the decree which is passed in this suit.

18. Accordingly the leave to defend application is dismissed, and consequently therefore the suit of the plaintiff is decreed for a sum of Rs.65 lacs plus a sum of Rs. 38,45,961/-. In the present case the subject instrument is a written instrument containing liquidated amount on the basis of which suit under Order XXXVII CPC is filed and therefore it could have equivalence to entitlement to file a suit under Order XXXVII CPC on the basis of a dishonoured negotiable instrument. In view of the fact that transaction is a commercial transaction and defendant has dishonestly and obdurately failed to pay

the dues of the plaintiff, hence the plaintiff will be entitled to *pendente lite* and future interest till payment at 18% per annum simple and which rate this Court fixes in exercise of powers under Section 34 CPC read with Section 80 of the Negotiable Instruments Act, 1881 which provides that for a dishonoured negotiable instrument interest at 18% is payable. Decree sheet be prepared.

MARCH 09, 2018 **VALMIKI J. MEHTA, J**

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