

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 16th November, 2018.**

+ **CS(COMM) 927/2016 & IA No.11845/2018 (of defendant u/O XXXVII R-3(5) CPC)**

SASUMOROV ENTERPRISES PVT LTD **Plaintiff**

Through: Mr. K.S. Lather and Mr. Mukul
Lather, Advs.

Versus

ODEON BUILDERS PVT LTD **Defendant**

Through: Mr. Karunesh Tandon, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The application of the sole defendant for leave to defend this suit for recovery of Rs.4,06,35,429/- filed under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) is for consideration.
2. The counsel for the defendant and the counsel for the plaintiff have been heard and the counsel for the defendant has also been heard in rejoinder.
3. The plaintiff has instituted the suit *inter alia* pleading (i) that the defendant approached the plaintiff for supply of TMT Bar (FE 500) by placing Purchase Orders dated 6th May, 2013, 26th July, 2013 and 1st October, 2013 on the plaintiff; (ii) that the said Purchase Orders were placed by the defendant for the project of the defendant at Panchkula; (iii) that pursuant to various meetings and discussions between the parties at

Panipat, Haryana, it was agreed that the plaintiff would supply the goods as required by the defendant for the price as mentioned in the invoices raised by the plaintiff from time to time; (iv) that the plaintiff delivered the goods subject matter of the invoices and which goods were accepted by the defendant, without raising a dispute as to quality, quantity or price; (v) that the plaintiff raised invoices on the defendant (a) dated 26th May, 2013, 31st May, 2013, 1st June, 2013, 1st June, 2013, 1st June, 2013 & 3rd June, 2013 for supplies made against Purchase Order dated 6th May, 2013; (b) dated 16th August, 2013, 16th August, 2013, 16th August, 2013, 19th August, 2013, 28th August, 2013, 28th August, 2013 & 28th August, 2013 for supplies made against Purchase Order dated 26th July, 2013; and, (c) dated 16th October, 2013, 16th October, 2013, 27th October, 2013 & 27th October, 2013 for supplies made against Purchase Order dated 1st October, 2013, of the total value of Rs.2,34,77,082/-; (vi) that though the payment against the invoices was to be made within sixty days of delivery and the defendant was otherwise liable to pay interest @ 24% per annum but the defendant paid only a sum of Rs.1 lakh in May, 2014; (vii) that after adjusting an amount of Rs.28,767/- against Debit Note dated 19th August, 2013 and an amount of Rs.2,061/- against Debit Note dated 28th August, 2013 raised by the defendant, a principal amount of Rs.2,33,46,254/- with interest is due from the defendant to the plaintiff; (viii) that the defendant, vide email dated 12th September, 2014 admitted liability to the plaintiff in the sum of Rs.2,34,46,254/-; (ix) that the defendant is also liable for interest as agreed; (x) that as on the date of institution of the suit, besides the principal amount of Rs.2,33,46,254/-, a sum of Rs.1,72,89,175/- was due from the defendant

to the plaintiff towards pre-suit interest @ 24% per annum i.e. a total sum of Rs.4,06,35,429/-.

4. The suit was entertained under Order XXXVII of the CPC and summons for appearance and on the defendant entering appearance, summons for judgment were issued to the defendant.

5. The Part-I file, besides the plaint, contains an affidavit dated 1st July, 2017 filed by the defendant in support of the leave to defend application, besides the reply of the plaintiff thereto. The counsel for the defendant during the arguments has referred to the said affidavit. However, Part-II file containing the applications contains a separate application for leave to defend and affidavit in support thereof. The counsel for the defendant has explained that the defendant had earlier filed an affidavit only and was subsequently permitted to file an application.

6. Though this is a technical default on the part of the defendant but since the counsel for the plaintiff has not raised an objection in this regard, the affidavit in support of the application for leave to defend in Part-I file with reference to which the counsel for the defendant has argued, has been considered.

7. The first contention of the counsel for the defendant is, that this Court does not have territorial jurisdiction. The counsel for the defendant has drawn attention to paras 4&5 of the plaint, where the plaintiff has pleaded discussions with the defendant held at Panipat and the goods supplied by the plaintiff to the defendant being delivered at Panchkula. The counsel for the defendant has also sought to draw attention to the Purchase

Orders placed in this regard to show that the same also were not placed from Delhi.

8. Attention of the counsel for the defendant has however been invited to the memorandum of parties of the suit where the defendant is described as having its registered office at New Delhi and to para 25 of the plaint pleading so and also pleading (a) that the defendant carries on its business from its registered office; (b) that the meetings were held between the parties at the registered office of the defendant at New Delhi; (c) that the balance confirmation of the defendant was issued from its registered at New Delhi; (d) that the correspondence exchanged by the defendant with the plaintiff was from its office at New Delhi; and, (e) that the cause of action has accrued to the plaintiff at Delhi.

9. There is no denial of the aforesaid facts.

10. The counsel for the defendant has drawn attention to ***Sonic Surgical Vs. National Insurance Co. Ltd.*** (2010) 1 SCC 135, a case relating to the jurisdiction vis-à-vis Section 17 (2) of the Consumer Protection Act, 1986. On the same being pointed out to the counsel for the defendant, he states that the provisions are *pari materia* and has referred to Section 17(2) of the Consumer Protection Act, as set out in the judgment itself. However, the same is not found to be *pari materia* to Section 20 of the CPC. Moreover, the Supreme Court was not concerned with a case, where the registered office of the respondent was situated at the place jurisdiction of which was invoked and/or with a case where a part of cause of action had accrued at the place of which jurisdiction was invoked.

11. The counsel for the plaintiff in response to the aforesaid argument has referred to *A.B.C. Laminart Pvt. Ltd. Vs. A.P. Agencies, Salem* (1989) 2 SCC 163 and has argued that the plaintiff has invoked the jurisdiction under Section 20A of the CPC.

12. The counsel for the defendant does not controvert that the registered office of the defendant is at New Delhi.

13. Once the registered office of the defendant is at New Delhi, in my view, the defendant cannot be entitled to leave to defend on the ground of this Court not having territorial jurisdiction, particularly in the light of the averments invoking territorial jurisdiction of this Court in para 25 of the plaint. The said argument of the counsel for the defendant is found to be *mala fide*, inasmuch as had the plaintiff invoked the territorial jurisdiction either of Panchkula or of Panipat, the defendant was likely to raise objection as to territorial jurisdiction of those Courts also. Moreover, no prejudice is pleaded or argued to be suffered by the defendant by territorial jurisdiction of the Court, where the registered office of the defendant is situated, being invoked.

14. The next contention of the counsel for the defendant, to seek leave to defend, is that the suit has been filed under Order XXXVII of the CPC on the basis of admission contained in an email, purportedly of the defendant and as appearing at page 45 of the Part-III file; the counsel for the defendant has argued that the said email is addressed from Punit Bansal to Mukesh Gupta, Deepak Garg and Deepak Bansal, who are all employees/officers of the defendant and not addressed to the plaintiff and

the plaintiff can thus not have any claim on the basis thereof. It is also contended that the said email is forged and fabricated and the defendant, in the leave to defend application has denied the same. Attention in this regard is drawn to para 7 of the affidavit aforesaid in support of application for leave to defend pleading (I) that the signatures appearing on the account confirmation statement appended to the email dated 12th September, 2014 aforesaid are not of Punit Kumar Bansal, who is alleged to have sent the email; (II) that there is no question of the Purchase Department of the defendant sending the alleged email confirming the amount due and payable by the defendant; (III) that the alleged email is a forged and concocted document as is evident from the fact that though it is dated 12th September, 2014 but the last entry appearing in the account statement enclosed therewith is of 27th October, 2013 and because the plaintiff, in para 8 of the plaint has pleaded that part payment of Rs.1 lakh was made by the defendant in the month of May, 2014; had any such email been sent on 12th September, 2014, the entry of Rs.1 lakh would be contained therein.

15. I may highlight, that the defendant has not taken the plea that the e-mail address from which the said email has been sent is not the email address of Punit Bansal.

16. The counsel for the plaintiff, in reply has drawn attention to the fact that the email aforesaid, besides being addressed to Mukesh Gupta, Deepak Garg and Deepak Bansal who are admitted to be the employees of the defendant, is also addressed to “me”. The counsel for the plaintiff has also drawn attention to page 106 of Part-III file being another print of the said email, which on top also contains another email dated 26th August, 2014

sent from sasumorovepl@gmail.com to Manish Gupta, Rajesh Bansal and Punit, enclosing therewith attachment of ledger and seeking confirmation thereof with seal and sign. The counsel for the plaintiff has argued that the said email was sent by the plaintiff to the defendant and in response whereeto, the email dated 12th September, 2014 was sent by the defendant.

17. Page 106 of the Part-III file also shows the email dated 12th September, 2014 having been addressed to “me”. The counsel for the plaintiff has stated that it is evident from the use of the word “me”, that the said email has been received at email address of sasumorovepl@gmail.com.

18. The counsel for the plaintiff has also drawn attention to the Certificate under Section 65B of the Indian Evidence Act, 1872 filed by the plaintiff with respect to the said email.

19. The counsel for the plaintiff has further argued that the statement of account appended to the email dated 12th September, 2014 is for the financial year 1st April, 2013 to 31st March, 2014 and thus the question of the payment of Rs.1 lakh made by the defendant to the plaintiff in May, 2014 being reflected therein does not arise.

20. The counsel for the defendant, in rejoinder has argued that even though the statement of account purportedly appended to the email is from 1st April, 2013 to 31st March, 2014, since email is dated 12th September, 2014, the same should have contained the statement till that date.

21. I am afraid, the aforesaid contention has no merit. Such confirmation of accounts is sought, also by the clients from their Advocates, prior to submitting the Income Tax Returns and returns under the Companies Act

and is always for the financial year and not upto date and till which date the accounts for the subsequent period have not been closed/audited.

22. Rather, I have enquired from the counsel for the defendant, whether the defendant has taken any plea with respect to receipt of email dated 26th August, 2014 in response where to the email dated 12th September, 2014 has been sent. At least, in the leave to defend application, no such plea has been taken and no oral argument can be addressed with respect thereto.

23. I have also enquired from the counsel for the defendant, whether the defendant has placed a statement of its ledger/account books along with its leave to defend application, showing the position of the transactions with the plaintiff which have not been disputed by the defendant in the leave to defend application.

24. The counsel for the defendant replies in the negative.

25. Once the defendant has not disputed the transactions, amounts due whereunder are claimed by the plaintiff, it was incumbent on the defendant to produce its statement of account to disprove the email dated 12th September, 2014, to show the status of the said transactions in the books of the defendant statutorily required to be maintained. The defendant, without producing the same, cannot be heard to contend that the statement of account confirmation enclosed to e-mail dated 12th September, 2014 to the plaintiff could never have been sent by the defendant and is contrary to books of account of the defendant. The silence of the defendant in this regard entitles the Court to, while considering the application for leave to defend, draw adverse inference against the defendant. A defendant cannot

be permitted to convert a summary suit to a ordinary suit, by mere denial and by contending that the onus is on the plaintiff to prove. Order XXXVII of the CPC, if so interpreted, will defeat the legislative intent and will make the procedure for disposal of suits of the class intended to be summarily decided, longer rather than shorter. Order XXXVII is concerned with commercial suits, claim wherein is based on documents. A mere denial of the document cannot entitle the defendant to leave to defend. The defendant, in the leave to defend application, is required to plead all surrounding circumstances concerning the document, to create a doubt as to authenticity of the document. If the defendant does not plead so and/or does not produce documents which in the ordinary course of the transaction ought to be with the defendant, leave to defend has to be refused.

26. From the addresses of the e-mail dated 12th September, 2014 also including “me”, the argument of the counsel for the defendant, of the said e-mail being not addressed to plaintiff, falls. As far as the plea of the defendant in the application for leave to defend, of the email having been forged and fabricated by the plaintiff is concerned, merely because the defendant in the application for leave to defend, without given any details or particulars which could have been given, pleads so, cannot entitle the defendant to leave to defend. E-mail, which is the prevalent mode of correspondence in most of the corporate sector, has to be given the same if not more weightage as the correspondence in physical form. Just like the Court, on mere denial of the defendant of the communication in physical form purporting to emanate from the defendant would not grant leave to defend, without the defendant producing other evidence which in the

ordinary course of business ought to have been produced to negate such communication purportedly emanating from the defendant, similarly an email purportedly emanating from the email account of the official of the defendant cannot be disputed by mere denial and cannot entitle the defendant to leave to defend.

27. The defendant has not filed any Certificate under Section 65B of the Evidence Act of its employee Puneet Bansal from whose email account, the email dated 12th September, 2014 purports to emanate. Once the defendant was denying the email, it was incumbent upon the defendant to file Certificate under Section 65B of the Evidence Act with respect to the email account from which the email purported to emanate, to show that the said e-mail did not emanate from that account. Section 88A of the Evidence Act creates a presumption of the veracity of the contents of an electronic message and which has not been rebutted by the defendant in this case.

28. If a mere denial by the defendant in a summary suit, of the written contract as evident from e-mails on which the summary suit is based, were to be held to require grant of leave to defend, the same will negate the advancement in technology and the ease of doing business through electronic communications. Supreme Court in *Shafhi Mohammad Vs. State of Himachal Pradesh* (2018) 2 SCC 801 has held that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices. It was further held that the threshold admissibility of an electronic evidence cannot be ruled out on any technicality, though reliability of electronic evidence is to be determined in the facts and circumstances of a fact situation. The Division Bench of this

Court also, in *Rakesh Kumar Vs. State* 183 (2009) DLT 658 held that (i) normal rule of leading documentary evidence is the production and proof of the original document itself; (ii) secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act; under Sub-clause (d) of Section 65, secondary evidence of the contents of a document can be led when the original is of such a nature as not to be easily movable; (iii) computerised operating systems and support systems in the industry cannot be moved to the Court; (iv) information is stored in those computers on magnetic tapes (hard disc); (v) electronic record produced there from has to be taken in the form of a print out; (vi) Section 65B(1) makes admissible without further proof, in evidence, print out of a electronic record contained on a magnetic media subject to the satisfaction of the conditions mentioned in the section; (vii) Section 65B(4) provides for an alternative method to prove electronic record by allowing the proof of the conditions set out in Sub section (2) by means of a certificate issued by the person described in Sub-section (4) and certifying contents in the manner set out in the sub-section; (viii) the said sub-section makes admissible an electronic record when certified that the contents of a computer printout are generated by a computer satisfying the conditions of Sub-section (1), the certificate being signed by the person described therein; (ix) additionally, irrespective of compliance of the requirements of Section 65B, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 & 65. I may record that Supreme Court in *Shafhi Mohammad* supra has held that requirement of certificate under Section 65B(4) is not always mandatory.

29. No merit worthy of grant of leave to defend is also found in the contention that the Purchase Department of the defendant could not have sent the account confirmation to the plaintiff. The plaintiff as supplier of goods would be in contact with the Purchase Department only of the purchaser i.e. the defendant and the communication seeking confirmation of account to the Purchase Department of the defendant and the confirmation of account effected by the Purchase Department of the defendant is in the normal course of business and nothing odd is found therein. It is also not the case as aforesaid of the defendant that the account confirmation sent by its Purchase Department is contrary to its books of accounts.

30. The next contention of the counsel for the defendant is, that the invoices are false. Attention is drawn to the Purchase Orders produced before this Court by the plaintiff and which contain a term "Test Report required for above said material". It is stated that the material supplied by the plaintiff was not accompanied with the Test Report and was thus rejected by the defendant.

31. I have enquired from the counsel for the defendant, whether the defendant has pleaded and proved such rejection.

32. The counsel for the defendant has drawn attention to para 6 of the affidavit aforesaid in support of the application for leave to defend where the defendant has pleaded (A) that the delivery shown against Bills No.4 to 10 was of different sizes of TMT Bars and was not in consonance with the time schedule prescribed for delivery and was also not in terms of the quantity prescribed; (B) that the falsity of the invoices is apparent as neither the material has been delivered within the time schedule prescribed nor the

materials delivered were in consonance with the quantity required to be delivered pursuant to the Purchase Orders; (C) that the material delivered against the purchase order dated 26th July, 2013 was also not in consonance with the quantity prescribed under the said order; (D) that the “bill has been created to reach to their ill motive of extracting money on the wrongful account from the defendant”.

33. I have enquired from the counsel for the defendant, whether any notice of rejection has been pleaded and filed and whether any document has been produced by the defendant of return of the material.

34. The counsel for the defendant, while replying in negative, states that the delivery of the material was not accepted and the material was returned; thus the question of rejection and/or of any document does not arise.

35. I have further enquired, whether any communication in this regard has been sent or pleaded.

36. The answer is again in the negative.

37. The counsel for the plaintiff points out that the plaintiff, prior to the institution of the suit, had issued a notice for winding up of the defendant and to which no reply was given by the defendant.

38. The counsel for the plaintiff has also drawn attention to the invoices, each of which bears the stamp/seal of the defendant along with signatures and has contended that the said stamp/seal and signatures were obtained in acknowledgement of receipt of goods thereunder.

39. Needless to state, the defendant in its affidavit in support of the leave

to defend application has not rendered any explanation with respect to the said stamp/seal of the defendant on the invoices and/or the signatures purportedly of the defendant thereon.

40. The counsel for the plaintiff has also drawn attention to C-Forms of the total value of Rs.3,00,84,641/- and has explained that there were other supplies also by the plaintiff to the defendant and the C-Forms, besides relating to the subject supplies, are also of other supplies. It is contended that on the assurance of the defendant to submit C-Form to the plaintiff, the defendant has offered a rebate of 2% on Central Sales Tax which would otherwise have been levied on the sales made to the defendant.

41. The counsel for the defendant has contended that the said C-Forms were given in blank and in advance.

42. I have enquired from the counsel for the defendant, whether the defendant, at any time made a demand in writing on the plaintiff for return of C-Forms of the quantities which were not delivered.

43. The counsel for the defendant states that it was not required and therefore there is no plea in that regard in the application for leave to defend.

44. The counsel for the plaintiff, with reference to the statement of account of the defendant for the year 1st April, 2013 to 31st March, 2014, has also pointed out therein the debit notes aforesaid for Rs.28,767/- and Rs.2,061/- of which adjustment has been given by the plaintiff in its claim against the defendant.

45. The counsel for the defendant has also argued (i) that the email dated

12th September, 2014 has not been sent from the registered office but has been sent from Haryana office of the defendant; (ii) that there was no need for the defendant to file statement of account because it is the plea of the defendant that whatever was due from the defendant to the plaintiff has been paid; (iii) that the plaintiff in the plaint has not pleaded the email dated 26th August, 2014 in response to which email dated 12th September, 2014 purports to be; and, (iv) that the Test Report was the basic requirement.

46. No other argument has been urged in support of the application for leave to defend.

47. No merit is found in any of the arguments urged by the counsel for the defendant for leave to defend, applying the test of ***IDBI Trusteeship Services Limited Vs. Hubtown Limited*** (2017) 1 SCC 568. The defendant is not found entitled to leave to defend.

48. The plaintiff is thus entitled to a decree for recovery of the principal amount of Rs.2,33,46,254/-.

49. As far as the claim of the plaintiff for the relief of pre-suit, *pendente lite* and future interest @ 24% per annum is concerned, though undoubtedly the invoices of the plaintiff on the defendant contain a clause to the said effect but considering the prevalent rates of interest, even qua commercial transactions, the claim for interest @ 24% per annum is found to be excessive. The plaintiff is found entitled to pre-suit interest @ 15% per annum, from expiry of 60 days of the date of each of the invoices and till the date of institution of the suit, and is awarded interest *pendente lite* and future @ 9% per annum. The plaintiff shall also be entitled to costs of the

suit. Professional fee assessed at Rs.2,00,000/-.

50. Resultantly, the application of the defendant for leave to defend is dismissed and a decree is passed in favour of the plaintiff and against the defendant for recovery of Rs. 2,33,46,254/- with pre-suit interest @ 15% per annum from expiry of 60 days of the date of each of the invoices and till the date of institution of the suit, and with interest@ 9% per annum *pendente lite* and future on the principal amount. The plaintiff shall also be entitled to costs of the suit as aforesaid.

Decree sheet be drawn up.

NOVEMBER 16, 2018

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RAJIV SAHAI ENDLAW, J.