

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 22nd October, 2018

+ CS(COMM) 1479/2016 & IAs No.13676/2016 (u/O XIII A CPC), 257/2018 (of defendant u/O I R-10 CPC), 258/2018 (for condonation of 79 days delay in re-filing IA No.258/2018), 3118/2018 (of Vivek Prakash u/O I R-10(2) CPC) & 14067/2018 (for modification of order dated 14th August, 2018)

AVNET TECHNOLOGY HONG KONG LTD. Plaintiff

Through: Mr. Tanmay Mehta and Mr. Asit Tiwari, Advs.

Versus

PANTEL TECHNOLOGIES PVT. LTD. Defendant

Through: Mr. Mrinal Bharti and Mr. Manish Shekhari, Advs.

Dr. Ashutosh and Mr. Bharat Beriwal, Advs. for applicant Vivek Prakash.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for recovery of Rs.2,42,64,586/- comprising of principal amount of Rs.2,20,58,715/- and pre-suit interest @ 12% per annum of Rs.22,05,871/- and for *pendente lite* and future interest @ 12% per annum.

2. The suit was entertained. On failure of the defendant to file written statement, vide order dated 11th August, 2017, the right of the defendant to file written statement was closed. However, till date neither any order allowing the suit under Order VIII Rule 10 of the Code of Civil Procedure, 1908 (CPC) nor any order relegating the plaintiff to lead evidence has been made owing to pendency of an application filed by the defendant under Order I Rule 10 of the CPC for impleadment of one Vivek Prakash as a

defendant to the suit and another application, also under Order I Rule 10 of the CPC filed by the said Vivek Prakash for impleadment in the suit.

3. The counsel for the plaintiff, counsel for the defendant and the counsel for the said Vivek Prakash have been heard on the applications as well as on the feasibility of allowing the suit under Order VIII Rule 10 of the CPC.

4. The counsel for the plaintiff has at the outset drawn attention to the orders dated 7th December, 2017 and 9th March, 2018 to the effect that the impleadment application of Vivek Prakash will be taken up for hearing only after the decretal amount has been deposited and after Vivek Prakash appears in the Court. Till date, neither has the decretal amount been deposited nor has Vivek Prakash appeared in the Court. Today also, he is not personally present. The counsel for Vivek Prakash today also is unable to give an undertaking to the Court that the decretal amount shall be deposited, as already directed and seeks an adjournment for the said purpose. Adjournment is denied since the counsel has been given enough time on such grounds.

5. In view of the earlier orders, the question of hearing the counsel for Vivek Prakash on his application under Order I Rule 10 of the CPC does not arise. However, the counsel for Vivek Prakash has been assisting and joining the counsel for the defendant in his arguments.

6. The counsel for the plaintiff has, in support of his contention that the suit is entitled to be decreed forthwith under Order VIII Rule 10 of the CPC and that the application of the defendant for impleadment of Vivek Prakash, Coramandel Electronics and Coraamandal Electronics Pvt. Ltd. as parties to the suit is liable to be dismissed, has drawn attention to the following pages of Part-III file:

- (i) page 10, being the purchase order dated 16th March, 2015 placed by the defendant on the plaintiff of the total value of USD 392,868;
- (ii) page 14, being the invoice dated 28th March, 2015 of the plaintiff on the defendant for USD 392,868;
- (iii) page 15, being the delivery order of DHL Logistics Pvt. Ltd. with instructions to deliver the goods subject matter of invoice dated 29th April, 2015 to the defendant;
- (iv) page 16, being the tracking report showing delivery of goods subject matter of delivery order aforesaid on 29th April, 2015 at 14:01 hours;
- (v) page 31, being the email dated 16th September, 2015 of Vivek Prakash at vp@pentacompute.com to the plaintiff disagreeing with the assertion that the payment was overdue 137 days stating that the defendant had come in physical possession of the stocks only in 1st week of August because of problems in the import documentation and mis-match in declaration of stocks vis-à-vis of physical stocks shipped and assuring “we are going to propose a new payment plant to Mr. Mohit Jain by Sunday – after our weekly sales review on Saturday. We have never gone back to AVNET for either the expenses incurred OR the business opportunity loss because of import challenges on this consignment because we respected the faith in our new business reposed by AVNET and Mr. Mohit Jain. In the same spirit, we request your good offices to cooperate with us and allow us to come up with a viable payment plan by next Monday”;

- (vi) page 28, being the email dated 20th October, 2015 of Vivek Prakash at vp@pentacompute.com to the plaintiff confirming that payment against 50% of the shipment will be made within October, 31 as discussed and for the balance quantity, the sales funnel development was under progress and exact update will be shared in November 1st week and further assuring that best was being done to settle the balance payment as well within 31st December, 2015;
- (vii) page 35, being the email from vp@pentacompute.com to the plaintiff stating that documents for the remittance had been submitted;
- (viii) numerous reminder emails sent by the plaintiff to the defendant;
- (ix) page 46, being the email dated 2nd May, 2016 of vp98765@gmail.com to the plaintiff enclosing therewith the draft copy of the reply to the demand notice got sent by the plaintiff to the defendant;
- (x) page 47, being the remittance document dated 25th November, 2015 showing transfer of USD 61,158 to the plaintiff; and,
- (xi) draft reply on behalf of defendant stating, (a) that defendant had nothing to do with the demand in question because (1) the purchase order was placed upon the express personal guarantee of Vivek Prakash who was then working with the defendant but was now working with Coraamandal Electronics Pvt. Ltd.; (2) the purchase order was placed on the plaintiff for the express purpose of manufacturing “Penta” branded desktop PC(s) by Coraamandal Electronics Pvt. Ltd.; however the invoicing was done by the plaintiff on the defendant because the plaintiff was not ready to bill directly to Coraamandal Electronics Pvt. Ltd. because of its internal process

constraints; (3) therefore, the responsibility for settling this matter “now” rests with Coraamandal Electronics Pvt. Ltd. and not with the defendant; (b) that the purchase order was an air shipment for immediate sales in the months of April and May, 2015; (c) that the said shipment got stuck with Customs Authority at Chennai for reasons attributable to the plaintiff i.e. discrepancy in the description in the purchase order and in the invoice and mis-declaration of goods; (d) that owing to the said delay, the goods could be released only in August, 2015; (e) that owing to the said delay, there was a loss of sales opportunity and no sales could be effect in April and May, 2015 for which the consignment was imported; (f) that the goods were liable to be re-exported to the plaintiff but only to help the plaintiff in the interest of business relationship, the terms of supply were renegotiated; (g) that this renegotiation included joint efforts to sell the consignment in local India market; (h) that all the said renegotiations were on best efforts basis; (i) that debit notes were subsequently raised by the defendant on the plaintiff and the plaintiff also became liable to pay sales commission to the defendant; (j) that there was still some unsold delivery which was liable to be returned to the plaintiff and which unsold delivery was still lying in the ‘bonded warehouse’ incurring demurrage; (k) that the part remittance of USD 61,248 was made to the plaintiff only after assurances were received from the plaintiff towards acceptance of debit notes of the value aggregating USD 281,802; (l) however, in the meanwhile, the plaintiff chose to invoke the credit insurance process.

7. The counsel for the plaintiff has argued, (I) that the aforesaid chronology of events show that the reasons given in the draft reply annexed to the email dated 2nd May, 2016 and original of which has not been received till date are contrary to what had transpired till then; (II) that the Advocate by whom draft reply was sent is today appearing for the applicant Vivek Prakash, showing collusion between the two; and, (III) that the aforesaid documents show that there is no need for the plaintiff to be relegated to lead evidence after the right of the defendant to file written statement has been closed and the plaintiff is entitled to a decree forthwith under Order VIII Rule 10 of the CPC.

8. The counsel for the defendant has argued (A) that the goods were delivered, not to the defendant but to Coraamandal Electronics Pvt. Ltd.; (B) that part payment was made by Coraamandal Electronics Pvt. Ltd. to the plaintiff; (C) that Vivek Prakash, who at the time of placing of the purchase order was Vice-President of the defendant, has since joined Coraamandal Electronics Pvt. Ltd. and is a necessary and proper party; (D) drawn attention to page 23 of Part III file being the email of the plaintiff stating that the email sent to Vivek Prakash at vp@pentacompute.com were being bounced back and asking for new email of Vivek Prakash; and, (E) that the defendant is not liable for the amounts claimed in the suit.

9. I have enquired from the counsel for the defendant, that Vivek Prakash having abused the office of the defendant and having used the seal of the defendant company as well as letter heads and purchase orders of the defendant company for the purposes, not of the defendant but of somebody else, what action has been taken by the defendant against Vivek Prakash.

10. The counsel for the defendant states that no action has been taken against Vivek Prakash by the defendant. The same is sought to be explained by stating that action was not taken because of having become barred by time but the counsel for the defendant when asked to explain, as to how the claim of the defendant of cheating against Vivek Prakash has become barred by time, withdraws the said contention and states that limitation is not an issue for not initiating any action against Vivek Prakash by the defendant.

11. Mr. Bharat Beriwal, Advocate whose draft reply to the legal notice was enclosed to the email dated 2nd May, 2016 and who is now appearing for Vivek Prakash, on enquiry, as to whether he stands by the said reply dated 18th April, 2016 states that he stands by the said draft reply. On further enquiry, as to under whose instructions, he had drafted the said reply, he states that Vivek Prakash along with Mr. Chaudhary had come to his office to get the draft reply prepared.

12. Mr. Bharat Beriwal, Advocate in the draft reply has shown the defendant as his client.

13. On enquiry from him that if Vivek Prakash and Mr. Chaudhary had got the draft reply prepared, why has he shown the defendant as his client, he says he neither sent the reply nor signed it and the same had not attained finality.

14. The aforesaid shows that the reply, on the basis of which the defendant is now seeking that the case should be put to evidence and/or that the defendant is not liable for the monies and some other persons are, also was never sent and the Advocate who sent the same does not stand by it.

15. Even if the averments in the said draft reply were to be considered, what falsifies the case of the defendant is that in the email at page 31, dated

16th September, 2015, of Vivek Prakash at vp@pentacompute.com to the plaintiff, though it was stated that the defendant had incurred substantial financial costs to clear the assignment and had suffered loss of business owing to the delay but had still assured payment and in terms thereof on 20th October, 2015 forwarded the payment terms and made part payment. The same discloses that the failure, even if any on the part of the plaintiff in fulfilling the terms of the purchaser order placed by the defendant on the plaintiff, was novated by the defendant and the defendant had agreed to pay the price as per the invoice.

16. The applications of the defendant and of Vivek Prakash for impleadment are dismissed and are evidently only to defeat passing of the decree.

17. The aforesaid also shows that the test as laid down in ***International Airport Authority of India Vs. Arvind Khanna*** 1995 (33) DRJ (DB), ***Balraj Taneja Vs. Sunil Madan*** (1999) 8 SCC 396, ***C.N. Ramappa Gowda Vs. C.D. Chandregowda*** (2012) 5 SCC 265, ***Nirog Pharma Pvt. Ltd. Vs. Umesh Gupta*** 2016 SCC OnLine Del 5961 and ***Anil Kumar Goel Vs. Arun Kumar Goel*** MANU/DE/2820/2017 of, whether to relegate the plaintiff to evidence after closing the right to file a written statement or to allow the suit forthwith is satisfied and the plaintiff is entitled to a decree forthwith.

18. Considering the transaction to be a commercial one, the claim of the plaintiff for pre-suit, *pendente lite* and future interest @ 12% per annum is found to be justified.

19. Accordingly, a decree is passed in favour of the plaintiff and against the defendant, for recovery of Rs.2,42,64,586/- along with *pendente lite* and future interest @ 12% per annum on the principal amount of Rs.2,20,58,715/- till the date of realisation.

OCTOBER 22, 2018
'bs'..

RAJIV SAHAI ENDLAW, J.

