

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12809 OF 2018

ATCO Interiors Private Limited
vs.

...Petitioner

Just Right Middle East FZCO

...Respondent

Ms. Armin Wandrewala a/w. Akshay Vani I/b. MLS Vani & Associates, for the Petitioner.

Mr. Ramgopal Tripathi I/b. Mr. J.R. Vakil & Associates, for the Respondent.

CORAM : M. S. SONAK, J.

DATE : MARCH 11, 2019

ORAL JUDGMENT

. Heard Ms. Wandrewala, learned counsel for the Petitioner and Mr. Tripathi, learned counsel for the Respondent.

2. Rule.

3. Rule made returnable forthwith with consent and request of learned counsel for the parties.

4. The challenge in this Petition is to the order dated 16th August, 2018 to the extent this order imposes condition upon the Petitioner for deposit of entire principal amount claimed as a pre condition in leave to defend the suit. This amount comes to Rs. 27.30 lakhs.

5. Ms. Wandrewala submits that this is a case where the Respondent/Plaintiff suppressed the material particulars including the email communication in relation to the transaction in question. She points out that even the reply to Advocate's notice came to be suppressed. She further submits that in this case learned trial Judge has come to the conclusion that the triable issues are involved. She submits that once such a finding is entered, there was no question of imposing any condition upon the Petitioner and unconditional leave to defend was required to be granted. She submits that the Petitioner has already spent an amount of Rs. 15 lakhs or thereabout towards the custom duty for clearing the goods in question. She points out that whatever supply was made was of scrap goods and the Petitioner is finding it difficult even to store such goods with them. On instruction she states that the Petitioner has no objection if such goods are taken away by the Respondent. For all these reasons, she submits that condition imposed is illegal or in any case harsh & unreasonable. She submits that this is a case where unconditional leave to defend ought to have been granted.

6. Mr. Tripathi submits that from the correspondence now

placed on record by the Petitioner, it is evident that the Petitioner has retained the goods in question. He points out that this is not a case where orders were placed for any new goods but the entire contract was to supply old goods. He points out that so called dispute have been raised belatedly. He points out that basic case in the affidavit in respect of the application seeking leave to defend was that the Petitioner had agreed to act as an Agent for the Respondent. He submits that there is absolutely no material produced by the Petitioner in respect of such *ex-facie* false defence. He submits that in fact the defence raised by the Petitioner is in the nature of moon shine and this was a fit case where no leave ought to have been granted. For all these reasons Mr. Tripathi submits that this Petition may be dismissed. In the alternate and without prejudice, Mr. Tripathi submits that this is a fit case where the Petitioner should be called upon to deposit 50% of the amount claimed in the suit.

7. Rival contention now fall for determination.

8. In the impugned order, learned trial Court, at paragraph 17 has no doubt stated that there is a triable issue involved in the

suit. However, this is preceded by certain observations that the Petitioner has already taken the goods in his custody. The learned trial Judge has observed that the issue relating to the quality of goods as also the relationship of Principal and Agent are required to be decided upon trial.

9. This is a case where invoice was raised for 45,494 US Dollars by the Respondent. This is also a case where the Petitioner has released the goods from the custom authorities and thereafter commenced correspondence on the issue of quality of goods. In the correspondence, there is no reference to the issue of Principal and Agent. The email dated 27th November, 2013 states that the Petitioner had told not to send unfinished, semi processed wallpapers, which is absolutely useless for them as they were neither wallpaper mfg. Co nor involved in selling any scrap.

10. However, the fact remains that this was not a case for purchase of any new goods. This was a case where the order was placed for purchase of old goods. The Petitioner now states that these are not even old goods but in the nature of scrap and therefore useless. Undoubtedly, that these are all triable issues.

But it cannot be said at this stage that the Petitioner has made out a case of such a degree that they should be granted unconditional leave to defend. Admittedly, the Petitioner is holding the goods in question. Admittedly, this was not a case where the Petitioner had required the Respondent to supply the brand new goods.

11. Considering all the aforesaid aspects, the interest of justice would be met if the Petitioner is required to deposit an amount of Rs. 15 lakhs as a condition precedent to defend in the suit. The condition for deposit of the entire principal amount of Rs. 27.30 lakhs in the peculiar circumstance of the present case, does appear to be unreasonable and harsh as contended by Ms. Wandrewala. Accordingly, the impugned order is modified and the direction for deposit of Rs. 27.30 lakhs is substituted with the direction to deposit Rs. 15 lakhs before City Civil Court, Mumbai.

12. At the request of Ms. Wandrewala, the time limit for deposit of Rs. 15 lakhs is now extended by a period of four weeks from today. Once the amount of Rs. 15 lakhs is deposited within four weeks from today, the Petitioner shall have further four weeks time to file written statement in the matter.

13. It is made absolutely clear that none of the observations in the impugned order or for that matter the present order need influence the learned trial Court whilst deciding the suit on merits. Accordingly, the suit will have to be decided on its own merits in accordance with law, uninfluenced by the observation in the impugned order or for that matter in the present order.

14. Further it is made clear that except substitution of the amount of Rs. 27.30 lakhs with Rs. 15 lakhs and extension of time limit, the rest of the impugned order remain undisturbed.

15. Rule is made partly absolute to the aforesaid extent.

16. There shall however no order as to cost.

17. All concerned to act on the authenticated copy of this order.

(M. S. SONAK, J.)