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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 7 OF 2018
IN
COMM SUMMARY SUIT NO. 180 OF 2017

Augment Enterprises Pvt Ltd …Plaintiffs
Versus
Eskaybee International Pvt Ltd & Ors …Defendants

Mr Shyam Mehta, Senior Advocate*, with Mr Sharan Jagtiani, Mr Kiran Jain, Ms Neeta Solanki, Mr Ish Jain and Ms Amita Kamble, i/b Kiran Jain & Company, for the Plaintiffs.*
Mr Sunny Jain*, for Defendant No.1.*
Mr Vinay Sharma*, Defendant No.2 in person*.

CORAM: G.S. PATEL, J
DATED: 8th January 2019

PC:-

1. Heard.

2. The conduct of the 1st Defendant in this matter does not just leave much to be desired: it leaves everything to be desired. The Suit itself was filed as a Summary Suit under Order XXXVII of the Code of Civil Procedure 1908 ("**CPC**") on 8th December 2016. It has been adjourned for one reason or the other ever since. Even now, as the following narrative will show, the 1st Defendant only seeks endless further adjournments — to obtain instructions, ascertain with its banks whether an alleged payment of the claim has been made, file further Affidavits in Reply, and so on. As we shall see, there is absolutely no answer to certain crucial documents annexed to the Plaint itself.

3. Before I turned to a narrative in the matter, Mr Mehta for the Plaintiffs has instructions that the Summons for Judgment is not pressed against Defendants Nos. 2 and 3. There is a separate claim for damages against them. Defendants Nos. 2 and 3 are therefore granted unconditional leave to defend. All contentions are left open.

4. The 4th Defendant is sister concern of 1st Defendant. Though served, it never entered appearance and the Plaintiffs are entitled separately to a decree against the 4th Defendant under Rule 89 of the Bombay High Court Original Side Rules. As against 4th Defendant the Suit will be set down for an *ex parte* decree tomorrow, 9th January 2019.

5. The present Summons for Judgment will thus proceed against 1st Defendant.

6. Briefly stated, the Suit is for recovery of the price of goods sold and delivered. Mr Mehta has instructions following an amendment to the Plaint to restrict his claim today, and I will return to that shortly.

7. The Plaintiff was previously known as RSBL Spot Trading Private Limited. It deals as a trader and importer of various grades of polymers and plastics. Defendants Nos. 1 and 4 are sister concerns also in the same sector. Between September and October 2014, the Plaintiffs sold, supplied and delivered to 1st Defendant diverse amounts of HDPE, PUC and Polymer goods under various invoices and excise invoices. These imported goods were stored at the warehouses of the 1st Defendant at Bhiwandi, the warehouse of 2nd Defendant at Mundra, and the 3rd Defendant's warehouses at Panvel and Khurja. Of the total import of 6984.125 MT, the Plaintiffs sold goods weighing 3952.25 MT to the 1st Defendant. That transhipment and delivery was thus with the Plaintiffs' consent; and it matters not at all from which warehouse this quantity was moved to the 1st Defendant. The Plaintiffs say that there were additional goods at the 2nd Defendant's warehouse in Mundra, the 3rd Defendant's warehouse in Khurja and at the warehouses of the 1st Defendant. The Plaintiffs did not consent to the release of the goods from the warehouses of Defendants Nos. 2 and 3. Having done so, those two Defendants are liable to the Plaintiffs in damages. The rival contentions of the Plaintiffs and Defendants Nos. 2 and 3 in that regard are kept open.

8. As regards the quantity received by the 1st Defendant, the 4th Defendant issued nine post-dated cheques in the aggregate amount of Rs.26.40 crores to discharge the liability of the 1st Defendant to the Plaintiff. These cheques were dishonoured.

9. I do not believe it is necessary in view of what follows to get into the minutiae regarding the importation of these goods. It is sufficient to note that there is no dispute as regards the invoices or the fact that the 4th Defendant did issue nine post-dated cheques on 12th August 2015. There is also no dispute that these cheques were dishonoured on presentment. The reason for dishonour was that the account was closed. The necessary particulars are set out in annexures to the Plaint from Exhibits "EE" to "MM-1" at page 165 to 182.

10. The Plaintiffs have also acknowledged that they received some payments as advances and other part-payments from the 1st Defendant between 1st April 2015 and 31st March 2016. This was adjusted with the value of the goods sold. Repeated demands for payments of the balance met with no response and ultimately on 8th December 2016 the Plaintiffs filed the present Suit.

11. The claim as originally filed was for Rs.32,54,50,515.00 with interest computed at 18% per annum. The Plaint has been amended twice since, on 14th June 2018 and 17th October 2018. It is relevant at this stage to look at a few documents introduced in the Plaint by means of these amendments. The reason is that these documents, in my view, are determinative and dispositive of the entire dispute. To begin with at page 355A, the Plaintiffs have included a revised statement (following the first amendment) accepting that they have received an amount of Rs.5,89,72,000/- between 11th August 2016 and 27th January 2017. Of this an amount of Rs.50 lakhs came by RTGS from the 1st Defendant. The remaining amount came from the 1st Defendant's other sister concern. Kookey Multi Trading Private Limited also by RTGS. The fact that these payments were made by RTGS will have some significance. Mr Mehta has instructions to state that the claim is reduced by this amount. I find a revised statement of claim in Rider-III at page 355, which now stands in the amount of Rs.26,64,78,515/- after giving credit for the amount received of Rs.5,89,72,000/- but including interest on the reduced principal. However Mr Mehta has instructions to go one step further. He draws my attention to Exhibit "EEE" at pages 355B and 355C. This is a signed statement of confirmation of account by the 1st Defendant of 1st April 2015. It acknowledges that an amount of Rs.24,51,6512.75 was due of that date. The next document is at Exhibit "FFF", pages 355D and 355E. It is a similar signed statement of confirmation of accounts one year later, as of 1st April 2016. The 1st Defendant has acknowledged that as of 1st April 2016 an amount of Rs.25,11,77,837.25 was due by it to the Plaintiffs. Mr Mehta instructions are to state that it is this figure of Rs.25,11,77,837.25 that may be taken as the total claim and the amount of Rs. 5,89,72,000.00 may be reduced from this, thus restricting his claim to Rs.19,22,05,837.25. The statement is noted.

12. The defence of the 1st Defendant on Affidavit in the Summons for Judgment from page 66 onwards, and one that is maintained across the Bar even today, is that nothing at all is payable to the Plaintiff and that the entire amount has been paid. In this context paragraphs 7 to 12 of the Affidavit in Support pages 70 to 72 are material and this is how they read:

> "7. It is further submitted that in respect of remaining imported goods weighing 309.375 MT these goods were also purchased by 1st Defendant for local purchaser with VAT and duty in respect of these goods were paid by Plaintiff. It is submitted that purchaser price in respect of all

the goods weighing 6984.125 has been paid to Plaintiff on a/c or in lump sum and not invoice wise as per their mutual understanding and there is no outstanding dues.

8. It is submitted that, as far as goods weighing 495 MT lying at the warehouse of 2nd Defendant at Mundra, goods quantity 3209.75 MT lying at the warehouse of 3rd Defendant at Panvel and goods quantity 247.50 lying in the warehouse of 3rd Defendant is concerned, all invoices are reflecting tin the ledger accounts of 1st Defendant of which payments were made on A/c or in lump sum to the Plaintiff as per the mutual understanding between Plaintiff and 1st Defendant.

9. It is submitted that, as far as good weighing 1180 MT and 742.50 is concerned, Plaintiff have raised invoices in the name of 1st Defendant and against the same 1st Defendant have made several payments to Plaintiff in the month of March to May 2015 through RTGS and bank LC. It is further submitted that as per the consignment the amount to be payable was only Rs. 14,31,41,967.00 (Fourteen Crore Thirty-one Lac Forty One Thousand Nine Hundred Sixty-seven Rupees and Sixty Paisa Only) but 1st Defendant has paid an additional amount of Rs.11,51,31,015.40 (Eleven Crore Fifty One Lakh Thirty One Thousand Fifteen Rupees and Forty Paisa Only) to Plaintiff which total amounts to Rs.25,82,72,983 (Twenty Five Crore Eighty Two Lakh Seventy Two Thousand Nine Hundred And Eighty Three Only). **Attached and Marked herewith as Exhibit "B" is the copy of ledger statement and Bank LC clearly showing amount of Rs.25,82,72,983 (Twenty Five Crore Eighty Two Lakhs Seventy Two Thousand Nine Hundred and Eighty Three Only) paid by 1st Defendant to Plaintiff**.

10. It is submitted that as the Plaintiff had raised invoice in the name of 1st Defendant for goods weighing 1180 MT and 742.50 MT and 1st Defendant have paid duty against the same, the question of without knowledge and written concern of the Plaintiff for taking delivery of the goods does not arises. It is submitted that after the payment is made there was no meaning in holding the cargo in warehouse.

11. **It is submitted that as far the nine post-dated cheques aggregating to Rs.26,40,00,000 (Twenty Six Crore Forty Lakhs Only) issued by Mr Minesh Shah authorised representative of 4th Defendant and one of the directors of 1st Defendant is concerned these cheques were only handed over to Plaintiff as security with clear instruction not to present the cheques in bank for realization.** Despite this fact, Plaintiff has presented the cheque in the Bank with ulterior motive and further in order to harass the Defendant. It is further submitted that in these three months i.e., March, April and May 2015, 1st Defendant have paid an amount of R.25,82,72,983 (Twenty Five Crore Eighty Two Lakh Seventy Two Thousand Nine Hundred and Eighty Three Only) to Plaintiff for the goods purchased from Plaintiff.

12. **It is submitted that these nine cheques were issued to Plaintiff only as security deposit and it is the Plaintiff who without any intimation and approval of 1st Defendant, deposited the same in bank for realisation.** It is further submitted that the bank account in respect of which the cheques was issued was closed by bank and not by 1st Defendant."

(*Emphasis added*)

13. Now, if, according to the 1st Defendant, payment was made to the Plaintiffs of the entire claim, then the 1st Defendant must show how that payment was made. It cannot be by the cheques issued on the 1st Defendant's behalf by the 4th Defendant, because those cheques admittedly were dishonoured. If, therefore, payment was not by cheque, but by some other mode, then that payment must be demonstrated. It is in this context that paragraph 9 of the Reply becomes relevant. This refers to Exhibit "B", which is at page 80. That is a printout styled as confirmation of accounts and it purports to show some payments being made. The difficulty with this statement is, first, that it is of 1st June 2015 and will therefore not explain a signed confirmation of accounts of one year later of 1st April 2016 (Exhibit FFF to the Plaint). Second, it is an unsigned statement. Third is unaccompanied by any bank statements or even any confirmation from the 1st Defendant's bankers that any payment was made by them into the Plaintiffs' bank accounts. There is a similar statement at page 187 dated 1st April 2015 but that does not carry the matter much further.

14. On behalf of the 1st Defendant an attempt is made to argue that the document at page 122 from Uco Bank dated 13th March 2015 shows amounts paid to the Plaintiffs. This argument is on the basis that cheques issued by the 4th Defendant were only as security. I cannot imagine what kind of security this was supposed to be if those cheques were issued on an account that was closed. This says much more about the 1st Defendant and 4th Defendant *bona fides*, or significant lack thereof, then any commercially viable understanding of what can constitute 'security'. The document at page 122 is also of no assistance because it too simply does not answer the signed statements of confirmation of accounts of 1st April 2015 (Exhibit EEE to the Plaint) and 1st April 2016 (Exhibit FFF to the Plaint).

15. This is the material point. There can be no dispute that those two confirmations of account annexed to the Plaint and referred to above were indeed signed by the 1st Defendant. As I have noted, these were brought on record by the Plaintiff on 17th October 2018. In any case, they could not have been documents of which the 1st Defendant was unaware. Yet 1st Defendant has not in a single Affidavit even dealt with these statements of confirmation of accounts. There is no explanation whatsoever about the confirmation of 1st April 2016. Logically, this means that the 1st Defendant must now demonstrate that *after* 1st April 2016 it has made payment by RTGS or some other mode into the Plaintiffs' account of the amount confirmed due on 1st April 2016. The 1st Defendant may show a confirmation from its bank that amounts have been paid under a letter of credit or it may show it in some other fashion. There is not even an attempt made to show this. Instead, I am repeatedly asked to look at documents all of which are dated prior to 1st April *2015*, as if this will explain a confirmation of accounts of 1st April *2016*. To say at this stage that the 1st Defendant will only now make the necessary inquiries with its bankers and obtain confirmations is utterly useless. Commercial matters are not be dealt with in this casual and cavalier a fashion. I do not think it is unreasonable to expect that commercial and mercantile transactions in these volumes are handled with care and with sufficient accuracy in record-keeping.

16. The long and short of the defence is that the 1st Defendant would have me believe that 'some' amount 'must have been paid' because there are documents of 2015 that show those payments, but it is unable to tell me today exactly what amount has been paid; and it is unable to show me how any amount has been paid after its confirmation dated 1st April 2016. It is also unable to explain if there is any payment made which has not been accounted for the Plaintiff after the amendment by which credit has been given in the amount of Rs.5,89,72,000.00.

17. This is no defence at all. There is not even the remotest possibility of this being a probable or plausible defence. It is the purest moonshine. I am aware that often Courts give parties an opportunity to make payment and then leave it to the Plaintiff on default to apply for an *ex parte* decree after obtaining a non-deposit certificate. Nothing in the conduct of the 1st Defendant persuades me that this is a course that I should adopt. I might have considered this had there been even a slight attempt to say either to me or even to Mr Mehta that some arrangement for payment would be made. The only instructions that Mr Jain for the 1st Defendant seems to have is to say that his clients will persuade the Plaintiffs to give up their claim. Mr Mehta is not open to such persuasion, and I am simply not persuaded that there is any merit in this at all.

18. The Summons for Judgment is made absolute. A decree will now immediately follow. As against 1st Defendant, the Summons for Judgment is made absolute and the Suit is decreed. in the amount of Rs. 19,22,05,837.25 with interest on this amount at the rate of 12% per annum from the date of the Suit till payment or realisation. This being a commercial suit, I do not believe that a lower rate of interest is even remotely justifiable. As against 4th Defendant it will be listed tomorrow, 9th January 2019 as undefended Suit.

19. There remains the question of costs as mandated by the amended Section 35 of the CPC. The Plaintiffs have paid the maximum *ad valorem* Court fees of Rs.3 lakhs on the Plaint. In addition there will have to an award of costs considered reasonable having regard to regular litigation costs and expenses. Mr Mehta states that having regard to the number of times this matter has been adjourned and the replies and rejoinders filed, costs have risen considerable. His attorneys' estimation is that the amount is likely to be in excess of Rs.15 lakhs. I will accept this as a figure in addition to the Court fees of Rs.3 lakhs that have been paid. There will be a decree for costs but without interest in the amount of Rs.18 lakhs as well recoverable presently from 1st Defendant. The original documents filed by the Plaintiffs are taken on record and marked Exhibit "P1" in evidence. These are to be returned. Copies of the documents are taken on record. Production of original documents is dispensed with.

20. Drawn up decree expedited. The summons for judgment and the suit are disposed of in these terms.

(G. S. PATEL, J)