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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL SUIT NO. 23 OF 2014

Kothari Products Ltd ...Plaintiff
Versus
Chetan Vora ...Defendant

Mr Cyrus Ardeshir, *with Aarohi Gursale, i/b VND Associates, for the Plaintiff.*

CORAM: G.S. PATEL, J
DATED: 17th January 2019

PC:-

1. Heard. The suit is listed for disposal as an undefended suit. The claim is for recovery of an amount of Rs. 3,99,04,532/- being an amount said to have been paid in excess to the Defendant in the circumstances set out below. The original claim was higher because it included interest of Rs. 3,48,93,355.04 with 18% per annum. Mr Ardeshir on behalf of the Plaintiff has instructions to leave the matter of interest, i.e., rate and the date from which it is to be computed to the Court, submitting only that this being a commercial transaction the Court, though not bound to it, should consider a commercial rate of interest.

2. There is an Affidavit of Service of the writ of summons of one Mr Kisan Naik, Bailiff and Mr Pandurang Patil, Clerk to the Advocates for the Plaintiff dated 23rd July 2014. It says that the writ of summonses along with a copy of the plaint was served on 6th June 2014 on one Mr Anand B Darekar, Office Assistant of the Defendant. Mr Darekar acknowledged service of the original writ of summons. A copy of this acknowledgement is endorsed on the docket of the summons under Mr Darekar's signature. There is also another Affidavit of 15th April 2016 of one Mr Rajesh Agawane employed by the Advocates for the Plaintiff that says that on 6th April 2007 he attempted to serve on the Defendant a copy of the Evidence Affidavit and a copy of the amended plaint. However, he found in 2016 that Mr Vora was unavailable at that address. I then find another Affidavit of Mr Agawane dated 9th June 2016 which says that by RPAD he forwarded the Plaintiff's Advocate's letter of 25th April 2016 along with a copy of the Evidence Affidavit, compilation of documents and amended plaint to the alternative address of the Defendant at Andheri (West). This was duly delivered to the Defendant and an acknowledgement card signed by the Defendant was returned. This is annexed to the Affidavit of Service. The Defendant is thus properly served not only with the writ of summons and plaint but also copies of the amended plaint, Evidence Affidavit, compilation of documents and Affidavit of Documents.

3. The Defendant has remained absent. He has not entered appearance.

4. The Plaintiff thus presses for a decree against the Defendant, there being no opposition to it. The facts sufficient for the purposes of the decree are thus. The Plaintiff company imports and exports various commodities such as polymer, dry fruits, pig iron, coal and so on. The Defendant is a proprietor of a concern named Midas International. It trades or used to trade at the relevant time in various metals including the pig iron.

5. In 2010, the Plaintiff periodically placed orders on the Defendant for the supply of various quantities of pig iron. Between them the Plaintiff and the Defendant had established a practice or a protocol for the supply of these goods and their invoices. The practice was that on receiving the Plaintiff's order, the Defendant would raise a *pro forma* invoice. On the basis of that *pro forma* invoice the Plaintiff would issue a Letter of Credit for the total amount of the invoice. These Letters of Credit were discounted by the Defendant claiming 100% of the value. In other words, the Defendant would receive payments under the Letters of Credit. He would then despatch the goods directly in favour of the consignee named on the *pro forma* invoice and issue a commercial invoice in the Plaintiff's name. The consignment was usually delivered within a few days of receipt of the commercial invoice in the hands of the Plaintiff.

6. The present Suit is based on four Letters of Credit and corresponding documents. Details of these are out in paragraphs 5(i) to 5(iv) of the plaint.

7. The Plaintiff says that it paid to the Defendant an aggregate amount of Rs. 45,28,03,923/- under these four Letters of Credit. Against this, goods worth Rs. 38,85,09,064/- in the aggregate, including applicable taxes were supplied, thus leaving an excess payment by the Plaintiff to the Defendant in the aggregate of Rs. 6,42,94,858/-. The Plaintiff has also received under other Letters of Credit that are not the subject matter of the suit some excess deliveries or quantities of pig iron valued at Rs. 2,18,90,326/-. Giving credit for these deliveries, according to the plaintiff, there is an excess payment of Rs. 4,24,04,532/-. On 31st March 2012, the Plaintiff received an amount of Rs. 25 lakhs from the Defendant. Of this Rs. 15 lakhs was transferred to the Plaintiff's account by RTGS and Rs. 10 lakhs was transferred in a separate account, thus making a total of Rs. 25 lakhs. According to the Plaintiff, therefore, an amount of Rs. 3,99,04,352/- was due as the principal amount as on the date of the suit. These figures and their computations are set out in Exhibit "S" at page 56.

8. The Plaintiff has filed Evidence Affidavit of one Mr Firdosh Mahuvawalla. There is also a compilation of original documents. The documents are taken on record and marked **Exhibit "P1" (collectively)** in evidence. The originals will be returned in accordance with Rule 306 of the Bombay High Court (Original Side) Rules upon these being substituted with authenticated copies.

9. In these circumstances, the Suit will have to be decreed in favour of the Plaintiff and against the Defendant in terms of prayer clause (a) in the principle amount of Rs. 3,99,04,532/-.

10. There will also be a decree for interest as claimed at 18% per annum because I am inclined to accept the submission of Mr Ardeshir that there is no reason that in such a situation the Defendant should have retained the excess payment in his hands. If there was a defence to be made it ought to have been entered here. The Plaintiff has been deprived of the use of the principal amount. This is not a question of assessing how much or at what rate the Plaintiff would have earned or benefited had it invested that amount, but more accurately how much it would have to pay had the Plaintiff been required to borrow that amount from the market. Money has a carrying cost not just an opportunity cost. If a man is deprived of an amount legitimately due to him, then it is not unreasonable to reckon the interest to which he is entitled on the basis of what he would have to pay to obtain that money from outside resources, and this is especially true in commercial disputes covered by the Commercial Court Act. There is no need for courts to any longer be coy or timorous about interest rate, and no court should blind itself to what it is that commercial market rates demand. I have no manner of doubt that interest would have at much higher rate than 18% per annum. This is the only commercially feasible way of approaching these matters.

11. There remains the question of costs, this being a commercial suit covered by the Commercial Courts Act. Section 35 of the Code of Civil Procedure 1908 as amended by the Commercial Courts Act makes it clear that the successful party is entitled as a matter of right to reasonable litigation costs including actual costs. Indeed if costs are *not* to be awarded this must be for good and stated reason. I can find no reason to decline costs. The record indicates that Rs. 3 lakhs has been paid by the Plaintiff as court fees. In addition, I estimate the costs of the Plaintiff having regard to the repeated attempts at service and to the fact that it has had to prosecute the suit at Rs. 5 lakhs.

12. There will thus be an order of costs against the Defendant but without interest in the aggregate amount of Rs. eight lakhs.

13. Suit decreed accordingly in terms of prayer clause (a) with further simple interest from the date of the suit at the rate of 18% per annum until payment or realization, and costs of Rs. Eight lakhs without interest.

14. Drawn up decree expedited.

15. Liberty to the Plaintiff to move in execution without awaiting sealing of the decree.

16. The suit is disposed of in these terms.

(G. S. PATEL, J)