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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUMMONS FOR JUDGMENT NO. 9 OF 2019
IN
COMM SUMMARY SUIT NO. 174 OF 2019**

Deugro Projects Pvt Ltd	...Plaintiff
<i>Versus</i>	
KEC International Ltd	...Defendant

Mr Abhishek Jebraj, *i/b Mani Prakash, for the Plaintiff.*
Mr Gautam Ankhad, *with Chirag Dave, & Saloni Vyas, i/b Legasis*
Partners, for the Defendant.

CORAM: G.S. PATEL, J
DATED: 30th April 2019

PC:-

1. The Plaintiff in this Commercial Division Summary Suit under Order 37 of the Code of Civil Procedure, 1908 seeks a summary judgment against the sole Defendant in the amount of about Rs. 3.58 crores and with interest. The writ of summons and a copy of the plaint having been served, the Defendants entered appearance. The Plaintiffs then filed Summons for Judgment, to which there is a reply and its rejoinder.

2. The Plaintiff's claim is under a works contract for transportation. In March 2017, the Plaintiff was asked by the

Defendant to transport four transformers and some 28 accessories from Mumbai to Afghanistan for a consideration of US\$ 650,000. By April 2017, the Plaintiff says, it delivered 19 of the 28 containers to a specified destination in Afghanistan. Some nine containers and four transformers were detained by Afghanistan customs. The four transformers were allowed to pass through, but the nine containers continued in detention. According to the Plaintiff, it was not told more than that there were irregularities in the declarations of the containers' contents. The Plaintiff says it sought instructions from the Defendant's local office in Kabul. The Plaintiff says it received neither instructions nor assistance. Instead, the Plaintiff alleges, the Defendant sent its local officials and the representatives of a third-party carrier to take custody of the nine containers in customs' detention, and even of the four transformers that had been allowed through.

3. Paragraphs 8 to 11 of the plaint are best reproduced below because, as we shall see, in themselves these averments in the plaint raise triable issues. This is how those paragraphs read:

"8. To the further and utter shock of the Plaintiff, the Defendant not only failed to give necessary instructions to resolve the situation but also uninformedly sent its local KEC officials and a third-party carrier, M/s. Goodrich Logistics, to take complete custody of the 9 containers that were held and surprisingly even the 4 cleared transformers. The failure of the Defendant Company to give any instructions and send a third party carrier to take custody of all the goods without instructions, is clearly borne out by the correspondence on 31 October 2017 from the Plaintiff Company to the Defendant Company. Hereto marked and

annexed as **EXHIBIT D** is a copy of the correspondence from the Plaintiff to the Defendant dated 31 October 2017. That the KEC local officials had forced the handover of cargo without any prior notice or providing reasons for doing so is also borne out by the internal communications of the Plaintiff Company on 31 October 2017. Hereto marked and annexed as **EXHIBIT E** is a copy of the internal correspondence of the Plaintiff dated 31 October 2017, showing that the Defendant prevented the Plaintiff from completing the assignment.

9. It is crucial to submit that on 31 October 2017, the Defendant Company in a one-line email merely told the Plaintiff company to hand over the 9 containers and 4 transformers to the third-party carrier Goodrich Logistics Private Limited. Importantly, the Defendant's at this juncture cast no liability whatsoever on the Plaintiff Company for negligence or failure in performing the contract and no reasons whatsoever were given as to why the Plaintiff was being forcefully prevented from completing the remaining part of the contract, which they were ready and willing to perform. A copy of this email dated 31 October 2017 from one of the Vice Presidents of the Defendant merely asking for the handover of remaining cargo, is hereto marked and annexed as **EXHIBIT F**. The Plaintiff was therefore prevented from completing the very end of its contract due to the Defendants unexplained actions, while a substantial portion of the contract already stood completed.

10. The Plaintiff's case for summary judgment is squarely rests on the fact that while handing over the goods, the Plaintiff made it clear to the Defendants as under:

- a) That the goods ere handed over on their instructions,
- b) That the goods were handed over in perfectly good condition,
- c) That Deugro would bear no liabilities over the handover,
- d) That full payment under the contract would be due.

A copy of the mail correspondence dated 31 October 2017, by which the Plaintiff told the Defendant that the goods were handed over without any liabilities and that payment would be due is hereto marked and annexed as **EXHIBIT G**.

11. The case of the Plaintiff for summary judgment is further strengthened by the fact that there has been implicit and explicit agreement by the Defendant that full payment is owed. This, particularly since there was no reply made to the correspondence of the Plaintiff making clear that full payment would be due."

(Emphasis added)

4. Clearly, to succeed in its claim, the Plaintiff must lead evidence on the very many assertions it makes, including what it supposedly 'made clear' (paragraph 10), the implications of the Defendant's replies, and so on. Significantly, the Plaintiff itself bases its claim on an agreement it says is at least partly 'implicit'. In particular, there is the Plaintiff's interpretation of the Defendants brief email of 31st October 2017 at Exhibit "F". What consequences this had in law and whether it entitles the Plaintiff to relief is a

matter for trial. The claim for a summary judgment is founded on the Plaintiff's case of what must be deduced. Without evidence, this is conjecture or surmise. The first sentence of paragraph 11, which speaks of an agreement both implicit and explicit said to be borne out by an alleged lack of a reply from the Defendant, is a submission that silence is an admission. In this case it is supposed to be an admission of a liability.

5. The Affidavit in Reply sets out over nearly 100 pages the large volume of correspondence and email between the parties. The Defendant alleges that there was a contractual breach by the Plaintiff disentitling it to any relief. There is a dispute as to the correctness of the invoices referenced by the Plaintiff. In paragraphs 14(f) to 14(j) of the Affidavit in Reply, the Defendant points out, among other things, that the claim is based on invoices at least some of which are entirely unconnected to the dispute. One such unconnected invoice is at page 50 of the plaint. This is the subject matter of a totally separate works contract. Another invoice at page 53 has a different place of loading. There are similar disputes about the invoices at pages 55 and 56.

6. In the plaint and in the Summons for Judgment, the Plaintiff alleges that the Defendant frustrated the Plaintiff's performance of the contract. If a party pleads frustration, this is always a mixed question of fact and law. That requires evidence.

7. The Defendant also points out that the entire plaint proceeds on an untenable and incomprehensible premise that although the

Plaintiff was blameless, Afghanistan customs wrongly withheld clearance of the nine containers in question, and equally inexplicably the Defendants moved in with another carrier or transporter to take charge of the entire consignment. There is also a case in the reply of a great delay of several months in completing the transportation. In paragraphs 13(ff) and (gg) of the reply, the Defendant sets up a specific case of delay by the Plaintiff, and references emails of September and October in this context. The Defendant says the delay was due to the Plaintiff's incompetence in furnishing a proper explanation to customs. That is why the Defendant engaged another contractor. The rejoinder raises disputes about the controversial invoices, and then alleges delivery was made 'within very good time given the difficult terrain, size of goods, security risks posed and poor roadways'.

8. To my mind, there are undoubtedly triable issues that will arise and that require evidence to be taken. It is unclear whether the Defendants have any liability at all to the Plaintiff. It is not possible to say that the defence is moonshine, sham, bogus, illusory, implausible or improbable. Prima facie, there was a delay and whether or not the Plaintiff was responsible for this is a matter that must await trial. There is no question of making the Summons for Judgment absolute or even putting the Defendants to terms.

9. The Summons for Judgment is dismissed. Unconditional leave to defend. The written statement is to be filed and swerved within the prescribed under the Commercial Courts Act reckoned from today.

10. Costs to be adjusted or awarded as costs in the suit.

(G. S. PATEL, J)