

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

***COMMERCIAL APPEAL NO. 223 OF 2019
in
SUMMONS FOR JUDGMENT NO. 86 OF 2018
with
NOTICE OF MOTION NO. 444 OF 2019
in
COMMERCIAL APPEAL NO. 223 OF 2019***

R.K. Metal Corporation and Ors. ... Appellants/Applicants

V/s.

Aura Impex Pvt. Ltd. ... Respondent.

Mr. Ramgopal Tripathi for the Appellants/Applicants.

Ms. Nayana Chipade I/b. Farooq Chawdhari for the Respondent.

***CORAM : PRADEEP NANDRAJOG, C.J. &
N.M. JAMDAR, J.***

DATE : 12 JUNE 2019.

P.C. :-

Request for adjournment is declined. On 10 April 2019 at the request of Counsel for Respondents, the Appeal was listed today.

2. Challenging in the Appeal is an order dated 24 October 2019 declining the Defendants leave to defend the Suit instituted by the Respondent under Order 37 of the Code of Civil Procedure. The Suit was instituted by the Respondent in the month of July 2015. Exact date not emerging clearly from the record. It is pleaded that goods were supplied under 10 invoices detailed in paragraph 3 of the plaint between the dates 2 February 2015 till 25 March 2015. Total value of the goods supplied under the 10 invoices was ₹ 1,32,70,615/- . In paragraph 4 of the plaint it is pleaded that payments for the earlier bills have been received. It is pleaded that on account of payments under the 10 bills raised, between 2 February 2015 and 25 March 2015, not being made within time it was agreed that interest in sum of ₹ 9,55,730/- will be paid. Thus, as pleaded in the plaint, together with interest, ₹ 1,40,28,978/- became payable. Further pleadings are that the Defendants issued three cheques one in sum of ₹ 1,20,28,978/- and two cheques in sum of ₹ 10,00,000/-. The first Defendant is the partnership firm and the second and the third Defendants are its partners. The Suit

is premised on 10 written documents being the 10 invoices as also the three cheques which are negotiable instruments.

3. Seeking leave to defend case pleaded is that ₹ 1,08,49,000/- was paid between the dates 8 April 2015 to 4 December 2015. It is further pleaded that the Plaintiff had issued a credit note in sum of ₹ 4,21,615/- on account of defective goods and short supplied goods. It is pleaded that only ₹ 24,21,615/- is due and payable and that also subject to the settlement of inferior goods/short deliveries made. Concerning the three cheques issued by the Defendants, it is pleaded that by playing fraud the Plaintiff obtained blank undated cheques. Alongwith affidavit seeking leave to defend, an annexure was filed detailing the dates when payments in sum of ₹ 1,08,49,000/-, as pleaded in the affidavit seeking leave to defend, were made

4. In response filed to the affidavit-in-support of the leave to defend motion, the Plaintiffs did not dispute the payments

received from the Defendants as pleaded in the motion seeking leave to defend. However, explanation thereof is in paragraph 5 of the response, which paragraph reads as under :-

“5. With reference to Para Nos. 2,3,4,5 & 6 of the said Affidavit in Reply, I specifically and vehemently deny the contents of the same in toto as alleged or otherwise. However in reply to the contents of Para Nos. 2,3,4,5 & 6 of the said Affidavit in Reply, I say and submit that in the financial years 2013-14 & 2014-2015, there are various transactions which took place between the Plaintiff and Defendants in respect of the purchase, sale and supply of materials. It is further stated that the Plaintiff has been maintaining Statement of Accounts in the name of the Defendant No.1 during its normal course of business recording the purchase, sale and supply of materials and payments received from the Defendants time to time. I further state and submit that as per the Statement of Accounts maintained by the Plaintiff in the name of the Defendant No.1 during its normal course of business, in the financial year 2013-2014, there was an outstanding amount of ₹27,54,184/- as on 27/03/2014. in the financial year 2014-2015, there was an outstanding amount of ₹2,03,77,978/- as on 26/03/2015 and in the financial year 2015-2016, there was an outstanding amount of ₹ 1,20,28,978/- as on 03/07/2015 against the Defendants after adjusting the amount received from the Defendants time to time at the filing of the above Suit. I further state and submit that as far as interest is concerned, it is clearly mentioned in each and every invoice that interest will be recovered @ 24% per annum on overdue unpaid

bills, therefore an interest of ₹ 20,00,000/- accrued against the Defendants. That's why the Defendants had issued 3 cheques bearing Nos.030715 for the sum of ₹ 1,20,28,978/- towards Principal amount, 150715 for the sum of ₹ 10,00,000/- and 160715 for the sum of Rs.10,00,000/- towards interest as mentioned in the plaint in order to discharge their legally enforceable debt/liability. It is pertinent to mention herein that it is admitted fact that the Defendants paid ₹ 25,00,000/- on various occasions between 09/09/2015 to 04/12/2015 after filing of the above Suit and the said entries are reflecting in the Statement of Accounts maintained by the Plaintiff in the name of the Defendant No.1 during its normal course of business. I therefore state and submit that after adjusting the said amount of ₹ 25,00,000/- paid by the Defendants to the Plaintiff after filing of the above Suit, there is still an outstanding amount of ₹ 95,28,978/- towards Principal amount plus ₹ 20,00,000/- towards interests which comes to ₹ 1,15,28,978/-. I state and submit that at no point of time, the Defendants have raised any demur and / or objection in respect of quality of materials, therefore no question of giving any credit note to them, much less for the amount of ₹ 4,21,615/-. I crave leave of this Hon'ble Court to refer to and rely upon the Statement of Accounts, Invoices, Tax Audit Reports under Income Tax Act, documents relating to Sales and Excise, when produced.”

6. Declining leave to defend vide impugned order dated 24 January 2019, the learned Single Judge has reasoned that the defence of the cheques having been obtained fraudulently was sans

any pleadings of fact.

7. We agree with said part of the reasons on account of the fact that to simply state that the opposite party played a fraud if no pleadings in the eyes of law. Fraud is a matter of law to be inferred from facts. The facts must relate to the acts of the opposite party which constitute fraud. In the affidavit-in-support of the motion seeking leave to defend, no acts attributable to the Plaintiffs where from fraud could be inferred is pleaded. However, that was not end of the matter. The issue was to be decided by the learned Single Judge in reference to the fact that in the plaint it was a positive assertion made that payments for bills/invoices raised earlier had been received by the Plaintiff and that the suit amount was with respect to the bills being 10 in number raised between 2 February 2015 till 25 March 2015. The leave to defend, as noted above, was premise on the pleads that between 8 April 2015 to 4 December 2015, payments totaling ₹ 1,08,49,000/- were made. A look at the annexures annexed to the motion seeking leave to defend would

show that 10 payments were made between the months of September to December 2015.

8. In the response to the affidavit in support of the motion seeking leave to defend, the plea taken was that all these payments were with respect to the earlier bills.

9. In the plaint there being a positive assertion that previous bills were paid and the plaint being instituted in July, *prima-facie* required an inference to be drawn that payment tendered and received post July related to the 10 bills in question. That apart, a triable issue would certainly arise with respect to the payment made from 8 April 2015 onwards because as per the defence, the payments relate to the 10 bills in question.

10. There being no particulars pleaded in the motion seeking leave to defend regarding any credit or debit note and there being an admission that ₹ 24,21,615/- is payable under the 10 bills,

we dispose of the Appeal setting aside the impugned order dated 24 January 2019. The motion seeking leave to defend filed by the Appellants is allowed on the condition that within three weeks from today the Defendants would deposit ₹ 24,21,615/- with the Prothonotary and Senior Master, High Court, Original Side, Bombay, who on realization of the amount shall pay over the same to the Plaintiff No.1. This amount would be paid to the Plaintiff No.1 without any security. The amount tendered by the Defendants and received by the Plaintiff No.1 would be without prejudice to the rights and contentions of the parties. Written statement shall also be filed within eight weeks from today. The Summary Suit No. 180 of 2015 shall be restored.

11. Notice of Motion No.444 of 2019 stands disposed of accordingly.

N.M. JAMDAR, J.

CHIEF JUSTICE