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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS OMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 123 OF 2018
IN
COMM SUMMARY SUIT NO. 1295 OF 2018

Maldar Barrels Private Limited ...Plaintiff
Versus
Jugal Kishore Didwania ...Defendant

Mr Sharan Jagtiani, *with Mr Mayur Khandeparkar & Mr Rishabh Jaisani, i/b Rajani Associates, for the Plaintiff.*
Mr AM Saraogi, *with Mr Sushil Upadhyay, for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 4th February 2019

PC:-

1. The Plaintiff filed this suit in the Commercial Division of this Court under Order XXXVII of the Code of Civil Procedure 1908 on 3rd August 2018 seeking a summary judgment against the Defendant in the amount of Rs. 10,20,32,050/-, claiming this as the amount due under unpaid invoices raised for goods sold and delivered, and also for further interest at 18% per annum. Particulars of claim are set out at Schedule "I" at page 690. The original claim was for Rs. 4,68,59,518/- as the principal with interest at 21% per annum amounting to Rs. 5,51,72,532/- making in all an aggregate of Rs. 10,20,32,050/-. The principal is now reduced to Rs. 4,63,27,327/-. The interest as of 31st July 2018 at 21% per annum, the rate mentioned in the invoices in suit, amounts to Rs. 5,44,78,394.90 and the total is thus now Rs. 10,08,05,721.90. The Plaintiff presses for a decree in these terms.

2. The writ of summons having been served, the Defendant entered appearance. The Plaintiff filed a Summons for Judgment and there is a reply and a rejoinder.

3. I have heard Mr Jagtiani for the Plaintiff and Mr Saraogi for the Defendant.

4. According to the Plaintiff, between 2009 and 2013, the Plaintiff supplied the Defendant cold rolled coils or sheets and hot rolled coils or sheets under some 289 invoices. The invoices themselves, copies of which are annexed to the plaint as Exhibit "A" from pages 15 to 592, specified interest at the rate of 21% per annum. The aggregate amount of these amounts was Rs. 16,79,13,429/-. In paragraph 4.3 of the plaint, the Plaintiff acknowledges that the Defendant paid an amount of Rs. 12,10,53,911/- and that a principal amount of Rs. 4,68,59,518/- remained outstanding as on 14th October 2013. The Defendant last made payment of Rs. 2 lakhs on 14th October 2013. The Plaintiff says that the principal due of Rs. 4,68,59,518/- was admitted by the Defendant in a ledger confirmation for the financial year 2013-2014 forwarded under an email dated 10th December 2016 from the Defendant to the

Plaintiff. This document is at page 657 in Volume III. The covering email is to be found at Exhibit "K" at page 653 and it has two attachments for the years 2012-2013 and 2013-2014. The ledger for 2013-2014 is at page 657 and it confirms a closing balance of Rs. 4,68,40,461.71.

5. The Plaintiff also says that it furnished VAT confirmation certificates to the Defendant for goods supplied. These VAT confirmation certificates exactly correspond to the aggregate amount of the invoices. Details are set out in Exhibit "B" at pages 593-598. The necessary averments are in paragraphs 4.5 and 4.6 of the plaint. What is significant about this is not the issuance of these certificates, but that the Defendant has actually claimed and obtained a VAT set-off or rebate on the basis of these VAT confirmation certificates from the Sales Tax Department to the amount of Rs. 76,99,700/-. This cannot be denied. It is difficult to see, therefore, how the amounts due under the invoices can be disputed.

6. The plaint then says that from August to December 2016 the Defendant sent to the Plaintiff confirmations of the ledger account of the Defendant maintained by the Plaintiff in the Plaintiff's books for the financial years 2009-2010 to 2015-2016. These confirmations constitute, according to Mr Jagtiani, acknowledgement by the Defendant that an amount of Rs. 4,68,59,512/- was due and payable by the Defendant to the Plaintiff. Details of some of these ledgers and emails are set out in the plaint and annexed as Exhibits "C" to "K" to the plaint. Mr Jagtiani readily agrees that there is a typographical error in the opening balance shown for the year 2013. This has been rectified in an email at Exhibit "K". There is no dispute in regard to this and hence Mr Jagtaini's submission (set out at the forefront of this order) restricting his claim and reducing it by an amount of Rs. 5 lakhs.

7. On 7th June 2017, the Plaintiff asked the Defendant for a confirmation of accounts in accordance with the Plaintiff's ledger in the name of the Defendant for the period 2007-2008 until 2016-2017. A copy of this is at Exhibit "L".

8. There then followed on 17th April 2018, the Plaintiff's Advocate's notice demanding payment (Exhibit "M" pages 682-684) to which the Defendant replied through its Advocates on 24th April 2018 at Exhibit "N" (pages 685-689) but without giving any explanation as to why the amount was not due.

9. The Affidavit in Reply in the Summons for Judgment, in my view, discloses no defence at all. Apart from the issue of limitation, to which I will presently turn, and which is the substance of the averments in paragraphs 4 to 7 of the Affidavit in Reply, in paragraph 8 comes the most astonishing averment that none of the invoices show actual delivery. I am wholly unable to understand this simply because without delivery actually being made, there is no way in which the Defendant could have claimed a VAT set-off in any amount at all. Further, there is then no explanation why the Defendants repeatedly provided confirmations of the ledger balances due.

10. Paragraphs 9 and 10 of the Affidavit in Reply are, in my view, statements that ought to be rejected for the asking. Here the Defendant says that his office is too small and the material too heavy and that no such supplies could have ever been made. This does not reconcile with either the balance confirmations or the VAT set-off claimed. It also runs directly contrary to paragraph 11 where, without any regard to internal contradictions, the Defendant says that he is in possession of delivery challans and bills. He then claims that the delivery challans are different from the invoices on which the suit is based. The Affidavit in Rejoinder sufficiently deals with these allegations.

11. Returning to the question of limitation, the submission is that the bar of limitation is saved on account of the provisions of Sections 18 and 19 of the Limitation Act 1963 read with Article 26 of the Schedule to that Act. Sections 18 and 19 read:

> **Section 18 — Effect of acknowledgment in writing**
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> (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
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> (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

19. Effect of payment on account of debt or of interest on legacy — Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January, 1928, an acknowledgement of the payment appears in the hand-writing of, or in a writing signed by the person making the payment.

Explanation — For the purposes of this section,—

a. where mortgaged land is in possession of the mortgaged, the receipt of the rent of produce of such land be deemed to be a payment;

b. "debt" does not include money payable under a decree or order of a court."

12. Article 26 reads:

	Description of suit	Period of limitation	Time from which period begins to run
26	For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

13. There is no doubt that there have been periodic payments by the Defendant, the last of which was on 14th October 2013. Then there is email correspondence showing acknowledgements by the Defendant on various dates starting from 31st August 2016 for the financial years 2007-2008 to 2015-2016. The last of these acknowledgements, each of would therefore furnish a cascading set of starting points of limitation, is 10th December 2016. In any case, even if time is reckoned from the earliest of these confirmations or acknowledgements, 31st August 2016, the suit is within time; and time until that acknowledgement is extended on account of the part payment made on 14th October 2013. There is no specific denial of these documents of acknowledgement in the Affidavit in Reply.

14. I find Mr Saraogi's attempts to dispute these email confirmations to be entirely unpersuasive. Once it is shown that there is this email correspondence and there is no denial of any of it despite an opportunity in the Affidavit in Reply, then a Court will make of these documents exactly that which the documents themselves say. For example, Exhibit "G" at page 627 isan email dated 30th September 2016 from the Defendant to the Plaintiff and in this the Defendant says he is sending the Plaintiff the interest memo and invoice copy 2009-2010 of KC Industries and ledgers of 2008-2009 of Malldar and KC Industries. It appears that KC Industries is a sister concern of the Plaintiff but the fact that in this email there were multiple subjects does not mean that the confirmation of the Defendant's account in the Plaintiff's book is incorrect. The actual statement forwarded for the Plaintiff is to be found at page 634. What is important however is that at page 633 there is a listing of the attachments and it is clear from this and its preceding pages that there were separate attachments for each unit or concern. The Malldar/Plaintiff ledgers are separately noted at the foot of page 633. This is also true for another email of 2nd December 2016. This one has no comment in its body at all. It only has a single attachment and that is the Plaintiff's merged ledger for 2012-2013. Indeed that the Defendant was transacting with not just the Plaintiff but also it sister concerns is also evident from Exhibit "L" at page 658, a copy of an email from the Plaintiff to the Defendant which references all three companies, i.e. the Plaintiff and its two sister concerns. This email is not denied. Indeed none of the emails in question are denied. Further, each ledger statement is segregated for each of the concerns and what is annexed to the Plaint are only the ledger statements for the Plaintiff, not its sister units or concerns.

15. As to the question of the alleged difference between the invoices or any discrepancy in the invoices, what is annexed by the Defendant as Exhibit "A" to the Affidavit in Reply is only part of set of documents accompanying the main invoice. This set included copies of the delivery order, the weight card, test certificates and so on. The details in the bills that are annexed to Exhibit "A" correspond with the exact invoices annexed to the plaint and this is never explained in the Affidavit in Reply.

16. There is a final defence that on 29th October 2013 the Sales Tax Department directed the addressee to say that any dues to the Plaintiff should be paid to the Sales Tax Department. Mr Jagtiani points out that there is an order in Appeal setting aside the assessment order passed by the assessing authority and that the matter has been remanded. Even otherwise, I do not see how this has any bearing at all on the Plaintiff's claim in suit. Even if there exists such an attachment by the Sales Tax Department, that is surely a matter for execution and does not furnish any sort of a defence to the Summary Suit.

17. What then is to be made of a defence like this in a Summary Suit? It is of course always open to a Defendant to take every available defence. But I understand this to mean that each available defence must be one that has some root in credibility at the very least and it is not open to a Defendant to raise every kind of frivolous and false defence. I understand the submission made on limitation and this would have to be addressed, and it has. But when the Affidavit in Reply goes on to take defences such as an allegation of non-delivery of the goods and fails to reconcile this with the advantage taken by the Defendant himself to obtain an indirect tax rebate or set off, then the approach of the Defendant is entirely coloured. Similarly, there is the completely implausible, and in my view utterly frivolous, defence that the Defendant's office was too small and the goods too heavy. The less said of this the better.

18. In my view, the defence is the most complete moonshine. There is nothing in it that is even remotely plausible let alone probable. There is no case made out for leave to defend.

19. The Summons for Judgment is made absolute.

20. The documents of the Plaintiff are taken on record and marked **Exhibit "P1"** in evidence. The original documents will be returned to the Plaintiff upon these being substituted with the authenticated photocopies.

21. The Suit is decreed in the principal amount of Rs. 4,63,27,327/- and interest of Rs. 5,44,78,394/-, i.e. in the aggregate amount of Rs. 10,08,05,721.90. There will be further interest on the principal amount of Rs. 4,63,27,327/- at 18% per annum from 1st August 2018 until payment or realization.

22. There remains the question of costs, this being a Suit in the Commercial Division of this Court. Section 35 of the Commercial Courts Act demands that costs be awarded except for good and stated reason. The Plaintiff has paid the maximum ad valorem court fee of Rs. 3 lakhs on the plaint. It will be entitled to claim the entire amount as costs or, should it obtain a refund, the amount not refunded will be included in the decree for costs. Mr Jagtaini tenders a statement showing the legal fees and expenditure at Rs. 3.50 lakhs. I consider this to be eminently reasonable. There will, therefore, be a decree against the Defendant for costs but without interest in the amount of Rs. 6.50 lakhs, subject only to the adjustment for the refund of court fee, if any, sought by the Plaintiff.

23. Decree to be drawn expeditiously.

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

(G. S. PATEL, J)