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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(COMM) 708/2016**
UNI AIR CARGO PVT LTD Plaintiff

Through: Mr. Dhruv Tamta, Adv.

Versus

SHARONS LINK LOGISTICS AND OTHERS Defendants

Through: Mr. Pranav Sapra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **07.03.2019**

IA No.12613/2018 (of the defendants under Order XIII A of the CPC as applicable to commercial suits)

1. The defendants in this suit for recovery of Rs.1,00,28,089/- comprising of principal amount of Rs.49,70,684/- and pre-suit interest at 24% per annum of Rs.50,57,405/-, with future interest, seek summary dismissal of the suit.
2. This application came up first before this Court on 17th September, 2018 when notice thereof was ordered to be issued and opportunity given to file reply within four weeks thereof.
3. No reply was filed and when the suit and the application came up before this Court on 13th December, 2018, none appeared for the plaintiff. However, the counsel for the defendants informed that the counsel for the plaintiff had telephonically informed him that he would be seeking more time to file reply. Observing, that Order XIII A permits only 30 days for filing reply and the plaintiff had not made any case for grant of further time, the application was posted for hearing for today.

4. Even though the order dated 13th December, 2018 does not close the time for filing reply by expressly stating so, but even after 13th December, 2018, no reply has been filed.

5. Today, the counsel for the plaintiff along with Mr. Kuldeep Singh, Director of the plaintiff appears.

6. The counsel for the plaintiff states that neither Mr. Kuldeep Singh, Director of the plaintiff nor anyone else on behalf of plaintiff had been in contact with him for a very long time and Mr. Kuldeep Singh, Director of the plaintiff has got in touch with him yesterday only.

7. I have perused the plaint.

8. It is the case of the plaintiff, that (i) the plaintiff is engaged in the business of freight forwarding, custom clearance of imported goods on behalf of clients; (ii) the defendant no.3 Manish Verma was an employee of one of the clients of the plaintiff and informed the plaintiff that he had left the employment and had set up his own business; (iii) the defendant no.3 proposed that he was in a position to procure business of freight forwarding, custom clearance etc. from his clients and suggested that the plaintiff bears all expenses and provides services to the defendant no.3; (iv) the plaintiff used to raise bills on the defendant no.1 for services of consultancy provided regarding the business procured by the defendants and after clearing the payments of the plaintiff, the plaintiff and the defendants would share the profits of the plaintiff from the business procured from the clients of the defendants; (v) the plaintiff raised bills on the defendants from time to time but the defendants made only part payment and the profits of the plaintiff from the business so procured by the

defendants were shared equally between the plaintiff and the defendants; (vi) though the defendant no.3 Manish Verma had informed the plaintiff that he was the sole proprietor of defendant no.1 but subsequently it transpired that earlier the defendant no.2 Madhu Verma, being the wife of the defendant no.3 Manish Verma, was the sole proprietor of the said business and the defendant no.3 Manish Verma had become the sole proprietor of business in the name of defendant no.1 subsequently only; (vii) the defendants never paid the entire amount of the bills raised by the plaintiffs from time to time; (viii) the plaintiff, vide e-mails dated 15th April, 2014, 11th September, 2013, 28th August, 2013 and 20th August, 2013 asked the defendants to reconcile accounts but the defendants avoided; (ix) the defendants issued a cheque for Rs.5 lacs to the plaintiff which was dishonoured and with respect where to a complaint of offences under Section 138 of the Negotiable Instruments Act, 1881 was filed; (x) the plaintiff also filed a complaint of other offences committed by the defendants and FIR No.314/2014 was registered on the said complaint; (xi) as a counterblast, the defendants instituted Suit No.418/2014 in the Court of Additional District Judge, Patiala House Courts, New Delhi; (xii) since the defendants were making lumpsum payments in respect of services provided by the plaintiff, the plaintiff had been maintaining open, mutual and running account and books of accounts in the usual course of its business; (xiii) the defendants had also been maintaining the same; (xiv) the plaintiff had also been maintaining an account of defendant no.1 regarding transactions between the parties; (xv) as per the statement of accounts maintained by the plaintiff, a sum of Rs.1,00,28,089/- is outstanding; (xvi)

it was verbally agreed that the defendants shall pay interest at 24% per annum; (xvii) the defendants are jointly and severally liable; and, (xviii) as per the assessment and estimate of the plaintiff, the plaintiff is likely to the share of profit of more than Rs.30 lacs.

9. It is deemed appropriate to set out hereinbelow the cause of action paragraph of the plaint as under:

“19. That the cause of action for filing this suit arose of various dates. It first arose when the Defendants met the Plaintiff in January, 2011 and sought their help in the business. It then arose when the Plaintiff executed the work and raised bills on the Defendant from June 2011 to June 2013. It subsequently arose when the bills were not cleared in full. The cause of action then again arose when the Plaintiff wrote to the Defendant for clearing the payments and when they defaulted in August, 2013. The cause of action then arose when the plaintiff had filed a complaint u/s. 156(3) dated 15-5-2014, which has been converted into an FIR. The cause of action then again arose when the Respondent filed suit No.418/2014 & 2805/2014 on 16-8-2014. Since the Plaintiff and Defendant had a running business between them, therefore it being a running, mutual and open account, the cause of action is continuing one.”

10. A bare perusal of the plaint and summary whereof is recorded hereinabove would show that the plaint is vague and does not disclose as to how the suit claim is within time. Though in para no.17 of the plaint, the words “open mutual and running and books of accounts” are used but in the cause of action paragraph, the date of last entry in the same is not pleaded.

11. The counsel for the plaintiff, on being asked to show the accounts, has drawn attention to page 368 of Part-III A file being list of bills raised by the plaintiff on the defendants and to page 378 of Part-III A file being list of payments made by the defendants to the plaintiff from time to time.

12. The said separate pages do not constitute accounts of the plaintiff, even if electronically maintained and are merely list of bills raised and payment received and there are no mutual corresponding entries. Even otherwise, the last payment as per the list of payments received is shown as on 13th February, 2014 by way of cash of Rs.40,000/- and which is unbelievable. Though the exact date is not known but it appears that the parties have been litigating since sometime in the year 2014. The earlier three payments shown on 3rd, 4th, and 5th September, 2013 of Rs.20,000/-, Rs.10,000/- and Rs.58,000/- respectively are also in cash. With respect to the payment prior thereto, of Rs.2 lacs on 17th August, 2013, the counsel for the plaintiff though states that it is by cheque but no particulars of the cheque are mentioned.

13. I may record that the suit is found to have been instituted on 13th May, 2016 and re-filed on 30th May, 2016 and 31st May, 2016 and came up first before this Court on 2nd June, 2016 when the counsel for the plaintiff sought adjournment to bring the statement of account. Thereafter on 18th July, 2016, on the statement of the counsel for the plaintiff that statement of account had been filed, the Joint Registrar issued summons of the suit.

14. I may however record that the defendants are not seeking summary dismissal of the suit on the ground of limitation. Thus though the plaint does not specify the requisite test of disclosing that the suit claim is within

time, I refrain from expressing any final opinion on the aspect of limitation.

15. Before adverting to the ground on which the defendants seek summary dismissal of the suit, I may also highlight another anomaly. The bills raised on the defendants are admittedly with respect to the business procured by the defendants from others. The role of the defendants in such procurement would be only as an agent and no plea has been raised in the plaint as to how the suit claim is maintainable against the defendants as an agent and not against the clients of the defendants, whose business was procured by the defendants and transferred to the plaintiff. Ordinarily, a claim would lie against the principal and not against the agent.

16. Be that as it may, the ground on which the defendants seek summary dismissal of the suit, is of fabrication of documents.

17. The counsel for the defendants has drawn attention to (a) page 13 of Part-IIIA file being an invoice No.005884 dated 12th March, 2011 filed by the plaintiff and claimed to be raised on the defendants and which invoice during admission / denial of documents has been denied by the counsel for the defendants; and, (b) page 28 of Part-IIIB file being the invoice bearing the same number and date filed by the defendants before this Court and which the plaintiff has admitted during admission / denial of documents. While the invoice, copy of which has been filed by the defendants and admitted by the plaintiff, is for Rs.1,940.05 paise, the same invoice, copy of which has been filed by the plaintiff, is for Rs.4,140.05 paise. The counsel for the defendants states that same is the position with respect to a large number of other invoices.

18. The counsel for the plaintiff, though has not filed a reply to the application, has contended that the difference of Rs.2,200/- between the two invoices aforesaid is on account of Airline DO Charges which were subsequently claimed by the airline from the plaintiffs and which have been included in the invoice, copy of which has been filed by the plaintiffs.

19. I have enquired from the counsel for the plaintiff, whether the plaintiff has also filed a copy of the invoice for Rs.1,940.05 paise which was admittedly delivered by the plaintiff to the defendants.

20. The counsel for the plaintiff states that the said copy has not been filed in this Court though has been filed in another proceedings between the parties. It is also argued that in such other proceedings, the defendants have admitted the invoice for Rs.4,140.05 paise.

21. The counsel for the defendants controverts that the plaintiffs have filed the invoice for Rs.1,940.05 paise in any other court or that the defendants have admitted the invoice for Rs.4,140.05 paise in any other proceeding.

22. Again, in the absence of the reply of the plaintiff to the application and in the absence of any documents in support of the contention, the said argument of the counsel for the plaintiff cannot be accepted or be the basis for decision of the application for summary dismissal of the suit.

23. There is no explanation in the plaint also for different amounts of the invoices bearing the same number and date. The counsel for the plaintiff, inspite of enquiries also, is not able to show any proof of delivery of invoice for Rs.4,140.05 paise to the defendants.

24. It is thus quite evident that the claim of the plaintiff in this suit is based on invoices which do not tally with the invoices admittedly raised by the plaintiff on the defendants.

25. Though the counsel for the plaintiff at this stage draws attention to page 2 of the replication and contends that such explanation exists in consolidated reply to paras 1 to 13 of the Preliminary Objections in the written statement of the defendants but neither is the explanation found to be clear nor was it possible for the defendants to file any further pleading to the new pleas taken in the replication.

26. I may state that the plaintiff chose to file this suit, though for recovery of principal amount of Rs.49,70,684/-, by inflating the claim to above Rs.1 crore, as a commercial suit even though it is not the plea that interest at 24% per annum was ever charged and has to suffer the consequences thereof. If the plaintiff, by so inflating its claim, chooses to litigate as a commercial litigant, the plaintiff cannot be permitted to seek such indulgence of opportunities and pleas and be permitted to make out his case along the way. If such conduct of the plaintiff is tolerated by Commercial Divisions of the High Court, the Commercial Divisions of the High Court will be unable to deliver what has been mandated to them under the Commercial Courts Act, 2015. A commercial litigant has to be extra vigilant and has to ensure that his case is spelt out clearly in the pleadings so that the Court can adjudicate the same within the timelines mandated. The luxury of filing and then along the course of the suit himself finding what his case, is not available to a commercial litigant.

27. In the aforesaid state of affairs with respect to the claim for principal amount in the suit and in the face of there being a doubt as to the genuineness of the documents on the basis of which the plaintiff has sued, I am satisfied that the plaintiff has no real prospect of succeeding in the claim and I do not find any other compelling reason why the claim of the plaintiff should not be disposed of before recording of oral evidence, all within the meaning of Rule 3 of Order XIII A of the CPC as applicable to commercial suits.

28. The suit of the plaintiff is thus summarily dismissed. However, I refrain from imposing any costs on the plaintiff.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

MARCH 07, 2019

‘gsr’..

(corrected & released on 15th March, 2019)