Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

SUMMONS FOR JUDGMENT NO. 19 OF 2019
IN
COMM SUMMARY SUIT NO. 366 OF 2019

Yash Shah ...Applicant/ Ori.Plaintiff

In the matter between
Yash Shah ...Plaintiff

Versus

Premchand Mittal ...Defendant

Mr. Dharam Jumani, a/w Kiran Mohite, i/b Kiran Shrirang Mohite, for the Plaintiff.
Mr. Ramesh D. Kamble, for Defendant no.1.

CORAM: N. J. JAMADAR, J.
DATED : 28th FEBRUARY, 2020

Oral Order :-

1. This commercial division summary suit is instituted for recovery of sum of Rs.4,44,83,266.55 along with *pendente lite* and future interest on the principal amount of Rs.2,69,86,923.95 at rate of 24% p.a. till payment and/or realisation, on the basis of the invoices and balance confirmation.

2. The material averments in the plaint can be summarised as under.

(a) The plaintiff deals in the business of buying and selling shirting and fabric cloth material under the name and style of M/s. Yash Lifestyle, a proprietory concern. The defendant is the sole proprietor of M/s. Tirumala Enterprises. The defendant also deals in the business of cloth material. The defendant had placed orders for supply of the cloth material. In pursuance of the orders placed by the defendant the plaintiff had sold and delivered the goods over a period of time commencing from 2nd April, 2016 to 15th May, 2016. The defendant had committed default in payment of the price of the goods sold and delivered, over a period of time. The defendant had confirmed the outstanding amount by executing a balance confirmation letter on 1st April, 2016. The closing balance as of 31st March, 2016 was Rs.3,92,92,094/-. The invoices raised by the plaintiff to evidence the sale of the goods contain material terms of the contract including a stipulation for payment of interest at the rate of 24% p.a., in the event of delayed payment. The delivery of the goods is evidenced by the delivery challans. The defendant never raised any dispute about the description, quality and quantity of the goods. As the amount of Rs.2,69,86,923.95 along with interest of Rs.1,74,96,343.60 was outstanding, the plaintiff was constrained to institute the suit for recovery of the aforesaid amount along with further interest.

3. The writ of summons was served on the defendant. The defendant entered appearance. Thereupon the plaintiff has taken out this summons for judgment.

4. The defendant has resisted the claim by filing an affidavit-in-reply and sought an unconditional leave to defend the suit. The defendant has not disputed the transaction, as such, between the parties. The defendant has taken a bold defence that the defendant has paid the price of the goods sold and delivered by the plaintiff, in its entirety, and nothing is outstanding. It is the claim of the defendant that the defendant used to pay the price of the goods by various modes, including cash. The defendant claimed to have paid a sum of Rs.4,92,60,254/- to the plaintiff.

5. As the defence revolves around the factum of payment of the price of goods and there being no subsisting liability, it may be apposite to reproduce the contentions in the affidavit-in-reply as regards the amount, mode and manner of the alleged payment.

Sr. No.	Mode of Payment	Amount (Rs.)
1.	By cheques	1,25,85,577.00
2.	By NEFT transfer through ICICI Bank	1,63,000.00
3.	By NEFT transfer through Saraswat Bank	50,000.00
4.	By RTGS transfer through Saraswat Bank	45,84,237.00
5.	By RTGS transfer through one of the Business party of Defendant M/s. Sunrise to business	28,00,000.00

	party of plaintiff M/s. Brillanto Fabric as per the instructions of the plainitff	
6.	By goods returns to M/s. Brillanto Fabric, a business party of plaintiff as per the instructions of plaintiffs to return it to M/s. Brillnato Fabric	5,42,440.00
7.	By cash As insisted by the plaintiff against the dishonored of cheque drawn by the defendant in favour of the plaintiff being Cheque No.390678 dated 14.04.2016	14,36,000.00
8.	By cash During the period of demonetization of the Indian currency notes by the Government of India for the currency denomination of Rs.1000/- and Rs.500/-.	2,71,00,000.00
	Total	4,92,60,254.00

6. The defendant has endeavoured to support the contention by pressing into service the copies of the ledger account, statement of bank account of the defendant, copies of the purchase order, receipts evidencing payment through banking channels, copies of alleged confirmation of payment at the instance of the plaintiff and the alleged receipt executed by the plaintiff to acknowledge the payment of a sum of Rs.2,71,00,000/- in cash, in the form of demonetized currency notes of Rs.1000/- of Rs.500/- denomination.

7. In the backdrop of the aforesaid pleadings, I have heard Mr. Jumani, the learned Counsel for the plaintiff and Mr. Kamble, the learned Counsel for defendant no.1, at some length. Perused the material on record including the documents which the defendant pressed into service.

8. To begin with, it is imperative to note that there is no dispute about the jural relationship between the parties. Nor there is any controversy over the sale and the delivery of the goods by the plaintiff to the defendant. It was submitted across the bar that the claim in the instant suit does not touch the instances of delivery of goods, over which there is a dispute. The controversy essentially boils down to the question as to whether the defence sought to be raised by the defendant of payment of entire price of the goods sold and delivered under the invoices in question, is worthy of grant of an unconditional leave to defend the suit.

9. The law as regards the grant of leave to defend the suit is fairly crystalised. The Supreme Court in the case of ***IDBI Trusteeship Services Limited vs. Hubtown Limited***[1] restated the propositions, in paragraph 17, as under:

> "**17**. Accordingly, the principles stated in paragraph 8 of *Mechelec's* case will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in *Milkhiram's* case, as follows:
>
> **17.1** If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;
>
> **17.2** If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

1(2017) 1 Supreme Court Cases 568.

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

(emphasis supplied)

10. In the backdrop of aforesaid exposition of the legal position, it would be necessary to note the submissions in opposition to, and support of, the prayer of grant of unconditional leave. The learned Counsel for the plaintiff submitted that the defence of entire payment is neither fair nor bona fide. In the backdrop of the fact that the defendant had confirmed the balance as of 31st March, 2016 to the tune of Rs.3,92,92,945/-, the claim of the defendant that he subsequently discharged the entire liability is not supported by any of the documents which are relied upon by the defendant. The learned Counsel for the plaintiff submitted that the alleged payment, which are at Item nos.5 to 8 of the table, extracted above, can neither be said to have been substantiated, *prima facie,* nor attributable to the plaintiff. The reliance sought to be placed on behalf of the defendant in support of the said payment on the documents which are placed on record, was stated to be dishonest. The said documents were stated to be forged and fabricated to bolster up the defence of payment. As regards the defence of payment of a sum of Rs.2,71,00,000/- in the form of demonetized currency notes, the learned Counsel for the plaintiff urged that the said defence cannot be countenanced as with the withdrawal of those currency notes, they ceased to be a legal tender. Thus, the summons for judmgment be made absolute, urged the learned Counsel for the plaintiff.

11. As against this, the learned Counsel for the defendant urged that the plaintiff, with a view to dishonestly swallow the amount which has already been paid by the defendant and for which there is ample proof, has instituted this false suit. The learned Counsel for the defendant invited the attention of the Court to the documents at page nos.71 and 73, which allegedly evidence the payment of the amount to M/s. Brillianto Textile Mills Private Limited at the instance of the plaintiff. A strong reliance was sought to be placed on the receipt allegedly passed by the plaintiff on 22nd December, 2016, to acknowledge the payment of Rs.2,71,00,000/-, in cash, in the form of demonetized currency notes.

12. I have given anxious consideration to the rival submission. At the outset it needs to be noted that once the defendant acknowledges the sale and delivery of goods and sets up the defence of the payment of the entire price thereof, onus shifts on the defendant to establish the said fact. There is material on record to indicate that the payments were made by the defendant to the plaintiff towards the price of the goods through banking channels. There is not much controversy over the payment of the amount under Item nos.1 to 4 of the table, extracted above. The controversy revolves around the payment and/or adjustment of the amount under the rest four heads.

13. The adjustment of payment under Item no.6, of a sum of Rs.5,41,440/- was sought to be substantiated by banking upon an invoice dated 2nd August, 2016, raised by the defendant. It is the claim of the defendant that at the instance of the plaintiff the goods were delivered to M/s. Brillanto Textiles, a business associate of the plaintiff. From a bare perusal of the said invoice, if even taken at par, it is rather difficult to attribute the payment thereunder to the plaintiff. There is no material on record to indicate that at the instance of the plaintiff, the goods under the said invoice were delivered to M/s. Brillanto Textiles.

14. The payment of a sum of Rs.28,00,000/- to M/s. Brillanto Textiles Pvt. Ltd., through RTGS (Item 5) stands on a much weaker foundation. The defendant claims that the said amount was credited by M/s. Sunrise Impex, a business associate of the defendant in the account of M/s. Brillanto Textiles, a business associate of the plaintiff. The communication dated 28th April, 2016, sought to be relied upon in support of the said payment, does not reveal any role of the plaintiff in the payemnt of the said amount. A letter dated 30th April, 2016 was ought to be pressed into service to demonstrate that the said amount of Rs.28,00,000/- was received by M/s. Brillanto Textiles, on behalf of the plaintiff. The intrinsic evidence of the said document dated 30th April, 2016, dissuades the Court from giving much weight to the said document. It seems to have been addressed by the defendant to the plaintiff. In the course of normal business practice it should have been the other way round.

15. A sum of Rs.14,36,000/- (Item 7), is alleged to have been paid in cash upon the return of the cheque drawn by the defendant in favour of the plaintiff on 14th April, 2016, which was dishonoured on presentment. This is a matter for adjudication.

16. The last payment of the sum of Rs.2,71,00,000/-, in the form of demonetized currency notes, is sought to be established by placing reliance upon receipt dated 22nd December, 2016 allegedly passed by the plaintiff. The intrinsic evidence of the said document also, prima facie, renders it suspect. The letter is again addressed by the defendant to the plaintiff. It is on the letter-head of the defendant. The plaintiff allegedly acknowledged the receipt of a sum of Rs.2,71,00,000/- thereunder towards full and final payment. However, the total amount of the currency notes i.e. 200 notes of Rs.1000/- denomination and 142 notes of Rs.500/- denomination allegedly received thereunder comes to Rs.2,71,000,/-.

17. The learned Counsel for the defendant endeavoured to invite the attention of the Court to the admitted signatures of the plaintiff and compare the same with the signatures of the plaintiff on the aforesaid document. At this stage of the proceedings, it is rather hazardous to draw an inference on the basis of such comparison of signatures.

18. For a more substantive reason that the demonetized currency notes ceased to be a legal tender with effect from the Notification, dated 8th November, 2016, and the demonetized currency notes were to be exchanged in the prescribed manner, at specified banks and institutions only, it would be impermissible to accept the defence that the defendant had paid a huge sum of Rs.2,71,00,000/-, in cash, in the form of demonetized currency notes. The situation which thus emerges is that the defence of payment of the price of goods in the form of demonetized currency notes can not be said to be a *bona fide* defence.

19. Nonetheless, as the defendant has taken the ground of payment of the part of the price of the goods by way of adjustment through third parties and also of payment in cash in lieu of a dishonored cheque, the custody of which is stated to be with the defendant, the defendant deserves an opportunity to establish the defence. However, as the defence falls within the ambit of proposition 17.4 of the ***Hubtown*** (supra), the defendant can be granted leave to defend the suit only on the condition of payment of the principal amount plus some interest as there is no dispute about the fact that invoices contained a stipulation that interest would be charged at the rate of 24% p.a. for the delayed payment.

20. Hence, I am inclined to pass the following order.

- **(i)** Leave is granted to the defendant to defend the suit subject to the defendant depositing in this Court a sum of Rs.3,00,00,000/- (Rs.Three Crore only) within a period of eight weeks from today;
- **(ii)** If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file his written statement within a period of four weeks from the date of deposit;
- **(iii)** If this conditional order of deposit is not complied with within the stipulated period as mentioned earlier, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

21. The summons for judgment is made absolute in the aforesaid terms.

[N. J. JAMADAR, J.]