Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

SUMMON FOR JUDGMENT NO. 31 OF 2019
IN
COMM SUMMARY SUIT NO. 655 OF 2019

EUSU Logistics India Private Limited ...Applicant
In the matter between
EUSU Logistics India Private Limited ...Plaintiff
Versus
Tema India Limited & ors. ...Defendants

Mr. Sandesh Shukla, a/w Hafeez Patanwala, i/b Vivek Patil & Asso., for the Plaintiff.
Mr. Jehan Mehta, a/w Rajesh Dubey, for Defendant nos.1 to 5.

CORAM: N. J. JAMADAR, J.
DATED : 17th JANUARY, 2020

Oral Order:-

1. This commercial division summary suit has been instituted for recovery of a sum of Rs.1,08,71,081/- alongwith further interest at the rate of 18% p.a. from the date of institution of the suit till realisation, on the basis of the invoices raised by the plaintiff.

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

(a) The plaintiff – company deals in the business of handling and transportation of containers. Defendant no.1 is a company incorporated under the Companies Act, 1956.

Defendant no.2 is the Managing Director of defendant no.1 - company. Whereas, defendant nos.3 to 6 are the Directors of defendant no.1. Defendant no.1 had placed a work order with the plaintiff for transportation of Heat Exchanger Machine to Pengerang, Johor at Malaysia, under work order dated 18th July, 2016. The material terms of said contract have been incorporated in the said work order. The plaintiff had transported the equipments in two lots.

(b) The plaintiff had thereafter raised the invoices on 21st October, 2016, 7th November, 2016 and 22nd November, 2016 for the freight and detention charges. Initially the plaintiff had not raised invoices in respect of the detention charges claimed by M/s. Rameshwar Transport Co. Pvt. Ltd., as defendant no.1 undertook to remit the same. However, later on, the defendant acknowledged liability to pay the said amount towards detention charges claimed by M/s. Rameshwar Transport Co. Pvt. Ltd.. Hence, the plaintiff has claimed a sum of Rs.10,45,000/- towards the detention charges as well. Defendant no.1 has made part payment of Rs.93,63,276/-.

(c) As the amount remained outstanding, the plaintiff called upon the defendants to pay the balance amount alongwith interest at the rate of 18% p.a. in terms of the contract contained in the invoices for the belated payment. The defendants raised a false and untenable dispute about the damage allegedly caused to the equipments while being transported. Hence, the plaintiff was constrained to institute the suit for recovery of the aforesaid amount.

3. The writ of summons was served on the defendants. The defendants have entered appearance. Thereupon, the plaintiff has taken out a Summons for Judgment. The defendants have filed an affidavit-in-reply and sought an unconditional leave to defend the suit.

4. The substance of the resistance put-forth by the defendants is that the entire claim made by the plaintiff does not fall within the ambit of the provisions contained in Order XXXVII of the Code of Civil Procedure, 1908 ('the Code'). On the one hand, the plaintiff has claimed the amount towards the detention charges in respect of which no invoice was raised. On the other hand, out of the three invoices raised by the plaintiff, one invoice is in respect of a completely different transaction for which there is no purchase order. With regard to the claim of the plaintiff of having transported equipment in conformity with the conditions of the work order, the defendants contend that out of 30 exchangers transported and delivered by the plaintiff, 16 exchangers were damaged. The transportation of the exchangers in safe condition was the vital condition of the work order. The defendant no.1's client informed that 16 of the exchangers had suffered damages rendering them unworthy of being used for the purpose they were intended for. The plaintiff had undertaken to provide sea freight services in such a manner that the subject equipments would be delivered sans any damage. The equipment were stuffed inside the container in an incorrect manner. The lashing was done improperly. The proper slings were not employed resulting in heavy scratches on the surface of the subject equipments. The defendant's client deducted an amount Rs.44,60,000/- from the amount payable to defendant no.1 towards preliminary assessment of the damages, as final deduction towards damages was yet to be ascertained. Defendant no.1, thus, contested the liability to pay the freight charges on account of the alleged failure on the part of the plaintiff to transport the equipment in an undamaged condition. Defendant no.1 also contested the liability in respect of the detention charge claimed by the plaintiff under Invoice no.1025 dated 21st October, 2016, under the terms of the work order. The detention charges at the port of loading were to be borne by the transporter. On these amongst other grounds, the defendants contend that there is a very strong defence and multiple triable issues have been raised by the defendants. Thus, the defendants are entitled to an unconditional leave to defend the suit.

5. I have heard Mr. Shukla, the learned Counsel for the plaintiff and Mr. Mehta, the learned Counsel for the defendants, at some length. Perused the pleadings and the documents on record.

6. It was urged on behalf of the plaintiff that the defence sought to be raised by defendant no.1 of the equipment being damaged during transportation is not a fair and reasonable defence. The learned Counsel for the plaintiff would urge that the goods were loaded in the container in the presence of an officer of defendant no.1. Secondly, even the condition of the goods was certified by the customs authorities while issuing the custom clearance certificate. Thirdly, under the terms of the contract with the purchaser defendant no.1 was enjoined to obtain marine insurance of appropriate value to cover the risk of damage to the goods. The defendants have maintained a stoic silence about marine insurance and whether any claim is lodged with the insurer. Fourthly, even if the defence of defendant no.1 about the equipments having been damaged during transportation is considered to be a triable issue, the defendant can be granted leave on the condition of deposit of the amount covered by the invoices.

7. In contrast to this, the learned Counsel for the defendant submitted that two of the claims, enumerated in the particulars of claim, are clearly beyond the ambit of the previsions contained in Order XXXVII of the Code. From the own showing of the plaintiff, the plaintiff had not raised any invoice in respect of the detention charges of Rs.10,45,000,/- allegedly claimed by M/s. Rameshwar Transport Co. Pvt. Ltd. Thus, *ex facie,* the said claim does not fall within the ambit of a summary suit. The invoice dated 22nd November, 2016, is in respect of a totally different transaction. There is no purchase order in support of the said invoice. Therefore, in the present summary suit, the plaintiff cannot bank upon the said invoice.

8. On the principal defence that the plaintiff was at fault in transporting the equipments in such a manner that they suffered extensive damage, the learned Counsel for the defendants invited the attention of the Court to the communications received from the purchaser alongwith reports indicating the nature of the damage and the photographs in support thereof. The defence of defendant no.1 that the goods suffered extensive damage during transportation, according to the learned Counsel for the defendants, finds requisite support in the said communication and photographs. Thus, the defendant can be said to have made out a positive, reasonable and fair defence.

9. Before adverting to deal with the aforesaid submissions, it may be apposite to note the material terms of the contract between the parties as contained in the work order dated 18^{th} July, 2016. The following clauses of the work order have a material bearing on the determination of the question of grant of leave. They read as under:

Detention Payment	30 days credit period on entire ocean freight (Break Bulk + Containerized cargo) & other transportation, custom clearance charges 90 days from the date of original bill submission alongwith Bill of Lading & post shipment documents.
Cargo Examination/ Intimation to place vehicle	You shall send your representative for physical examination of material prior to selection/placement of vehicle with respect to drawing to check dimensions and all other concern details. We will intimate you 4 days prior to vehicle placement.
Loading/Unloading	Loading at our Achhad & Panoli works in Tema India Ltd. Scope & Unloading at Port of Discharge Johor Sea port, Malaysia in Hanjin scope.
Other Expenses	Necessary Transit Insurance for the Cargo if applicable will be arranged by us. However all misc. incidental expenses during transportation will be at your cost.
Vehicle Conditions	You have to submit FITNESS CERTIFICATE OF THE VEHICLE before placing vehicle. You will be providing above suitable vehicle in good condition with clear RTO formalities. We

	willnot be responsible for any break down or if your vehicle is seized by RTO for any reasons and you shall make alternate arrangement (under intimation to us) in such case to meet the delivery commitment. You will take utmost precaution to ensure that the job does not sustain any damages during transit.
Packing materials/ Lashing instructions	Soft lashing of the job with saddles wherever in scope of TEMA India Ltd wil be provided by TEMA India Ltd. While hard lashing of the job with vehicle will be in the scope of transporter. Proper packing like wooden sleeper (if any), wire ropes, chain, cotton wire rope, buckles etc., will be arranged by you at your costs at the time of loading. Steel wire ropes/chains, etc. shall be rust free in good condition and preferably with PVC tubing to prevent direct contact with TEMA equipment surface. Lashing with vehicle shall be done exactly as per transportation drawing already provided to you.

10. Further conditions are to be found in the general conditions. They read as under:

> "3. Shall provide shipping survey report including loading & discharging for heavy or oversized cargoes (CFR) to us.
> 4. Shall provide sufficient photos of loading/stuffing photos to us.
> 5. Shall provide empty container photos and acceptable container condition report to us.
> 6. Shall provide final shipping advice including vessel actual time of departure and estimated time of arrival after shipment effected duly onboard date to us."

11. From the aforesaid terms, it becomes evident that the parties were aware that the safe and undamaged transportation of the equipment was of material significance. In addition to the usual terms of transportation, payment therefor, the period for payment, the work order specifies the conditions under which the equipment were to be transported. The parties, in the aforesaid backdrop, can be said to have the knowledge about the specialized nature of the equipment and the precautions which were required to be taken in ensuring its safe and undamaged transportation.

12. At this juncture, it would be apposite to immediately notice the condition in which some of the equipments were allegedly received at the port of delivery. Though there are multiple communications between defendant no.1 and its client, it would be suffice to make reference to the reports of damage communicated to defendant no.1 by the purchaser. The first report was communicated on 22nd December, 2016, wherein the condition of each of the equipment, which was allegedly damaged, alongwith the photographs was communicated to the defendant no.1. The second report is dated 13th December, 2016. In the said report also the damage suffered by each of the items, with necessary particulars, is mentioned alongwith the photographs.

13. The situation which thus obtains is that there is contemporaneous record in the form of communication from the purchaser that the equipments were received in a damaged condition. The learned Counsel for the plaintiff attempted to wriggle out of the situation by advancing a submission that since the goods were loaded at the port of loading in the presence of an officer of defendant no.1, it would imply that defendant no.1 was satisfied with the manner in which the equipments were packed and loaded.

14. To lend support to this submission, the attention of the Court was invited to an assertion in the sur-rejoinder that the officer on behalf of the defendants was present at the port to verify the goods that would be loaded and had not verified each and every equipment. The presence of the officer of defendant no.1 at the time of the loading, in the backdrop of the aforesaid assertion, cannot be disputed. The question which warrants determination is whether the presence of the officer would relieve the plaintiff of its liability to transport the equipments in a safe and undamaged condition, especially when the work order specifies the conditions not only with reference to the vehicles to be used but also the stuffing and packing material that would be employed.

15. The second submission on behalf of the plaintiff that the condition of the equipment was certified by the Superintendent of Customs while issuing Custom Clearance Certificate also does not advance the cause of the submission on behalf the plaintiff. The Customs authorities are not expected to verify as to whether the goods were packed in a manner which would ensure their safe and undamaged transportation.

16. The learned Counsel for the plaintiff then urged that under the terms of the contract with the purchaser, the defendant no.1 was enjoined to have marine insurance of appropriate value. Attention of the Court was invited to the stipulation in the purchase order that the terms of purchase was based on, "CIF Johor Seaport, Malaysia (Marine Cargo Insurance, Institute Cargo Clause (A), shall extend to RAPID job site) basis according to ICC Incoterms® 2010 for Goods". The learned Counsel for the plaintiff also relied upon the ICC Incoterm Rules, 2010, which provide that the buyer should note that under CIP the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

17. Banking upon the aforesaid stipulation, it was strenuously urged on behalf of the plaintiff that the defendants have not divulged anything about the marine insurance having been taken to secure the safe freight of the equipment. Had the defendants obtained insurance for the requisite value, the damage could have been covered.

18. The aforesaid submissions are also in the realm of matters which warrant adjudication. The question as to whether the plaintiff had stuffed and packed equipments in conformity with the requirements communicated by the defendant and having regard to the nature of the equipments to be transported, is a matter for trial. The defendants, thus, can be said to have made out a positive, fair and reasonable defence, so far as the contention of the defendants that the transportation resulted in the damage to the goods.

19. In the backdrop of the aforesaid consideration, the defence sought to be raised by the defendants falls in paragraph 17.1 and 17.2 of the judgment of the Supreme Court in the case of ***IDBI Trusteeship Services Limited vs. Hubtown Limited***[1], which read as under:

> "**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."

20. The plaintiff has to surmount other challenges as well. From the very averments in the plaint, it becomes abundantly clear that the plaintiff had not raised the invoice in respect of

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1 (2017) 1 SCC 568.

the fourth count of the claim i.e. detention charges claimed by M/s. Rameshwar Transport Co. Pvt. Ltd. In paragraph 6 of the plaint, the plaintiff has made a categorical averment that the plaintiff had not raised any invoice for detention charges. The claim is based on alleged verbal assurance given by defendant no.1 to remit the said amount. Even, the liability to pay the detention charges, if viewed in the light of the terms of the work order, requires adjudication in the sense that the term provides that the detention payment at loading port shall be on account of the transporter. The learned Counsel for the plaintiff urged that the said term cannot be construed in such a manner that the transporter is left in the lurch, in the event, the transporter makes all arrangements for the vehicles and the consignor does not load the goods. This aspect also requires adjudication. The liability of the defendants under the Invoice no.2005 dated 22nd November, 2016, which appears to have been raised in respect of different transaction of air freight, is also contentious.

21. The upshot of the aforesaid consideration is that in respect of certain items of the claim, their tenability under Order XXXVII is disputable, and in respect of the invoices for transportation of the equipment by sea freight, the defendants have raised a positive defence that the equipments were delivered at the port of delivery in a damaged condition. Resultantly, the defendants are entitled to an unconditional leave to defend the suit. Conversely, the plaintiff is not entitled to Summons for Judgment.

22. Hence, the following order:

: **O r d e r** :

(i) The Summons for Judgment stands dismissed.

(ii) The defendants are entitled to an unconditional leave to defend the suit.

(iii) The defendants may file a written statement within a period of one month from today.

23. The summary suit be listed as per the CMIS date.

[N. J. JAMADAR, J.]