

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2020
Dated : 13.03.2020

Coram

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice KRISHNAN RAMASAMY

Original Side Appeal No.345 of 2019
& CMP No.27837 of 2019

Syrma Technology Private Limited,
Plot No.B27, Phase II, Zone 'B',
MEPZ-SEZ, Tambaram Sanatorium,
Chennai-600 045, India. ... Appellant/1st Defendant

Vs.

1.Powerwave Technologies Sweden AD (in bankruptcy)
Rep., by the Bankruptcy Administrator,
Niklas Korling, C/o Wistrand Advokabyra,
Govt. of Sweden, P.O.Box 7543,
SE 103 92 Stockholm, Sweden. ...1st Respondent/Plaintiff

2.State Bank of India,
Chennai Branch,
No.16, Whannels Road,
Egmore, Chennai-600 008. 2nd Respondent/2nd Defendant

Original Side Appeal is filed under Section 13(1) of the
Commercial Courts, Commercial Division and Commercial Appellate
Division of High Courts Act, 2015 read with Clauses 15 of the
Letters Patent against the order dated 20.12.2018 made in
A.No.7113 of 2018 in C.S.No.851 of 2015.

For Appellant :Mr.P.S.Raman,Sr.C., for
Ms.R.Charulatha, M/s Lakshmi
Kumaran and Sridharan

For 1st Respondent : Mr.P.V.Balasubramaniam for
M/s BFS Legal

Srinath Sridevan-Amicus Curiae

JUDGMENT

M.M.SUNDRESH, J.

This original side appeal has been preferred by the defendant in the suit filed for recovery of money on the failure of the appellant to make the supply in terms of the purchase orders. On an application in A.No.7113 of 2018 in C.S.No.851 of 2015 filed by the plaintiff/respondent seeking a summary judgment, the Commercial Division of this Court granted a decree in part.

2. Before going into the facts governing, it is imperative to appreciate the scope and ambit of Order XIII-A of the Commercial Courts Act, 2015, which deals with summary judgment in the light of the object behind the enactment.

3.Recommendations of the Law Commission:-

3.1.Two recommendations have been made by the Law Commission through its 188th and 253rd Reports. As per the 188th Report, the need to introduce the Commercial Courts, was expressed, acknowledging the then prevailing view that Indian Courts were slow to get off the block and proceed at a reasonable gallop. Keeping in mind the functioning of the Courts Abroad, U.S., and U.K., in particular, the Law Commission has expressed its views.

"With such rapid increase in commerce and trade, commercial disputes involving high stakes are likely to increase. Unless, there is a new and effective mechanism for resolving them speedily and efficiently, progress will be retarded. Foreign investors in India must be assured that the Indian courts are as fast as the Courts in the most developed countries of the world and that there are no longer any long delays in the judicial process.

With that in mind, the Law Commission thought it necessary to examine the feasibility of 'Commercial Division' in the High Courts in India on the model of the Commercial Division in the High Court in the United Kingdom and in US and other countries. In Chapter III of this Report, the manner in which the 'Commercial Divisions' have been set up in various countries and their functioning will be discussed. We may state that in the United Kingdom, the Commercial Division was started more than a hundred years ago in 1895 and gave confidence to the business community and contributed enormously to the

growth of commerce in London. In the United States, Commercial Divisions have been started only recently in or around the year 1993. Other countries too have or are following suit.

The purpose of this Report is to recommend the creation of "Commercial Division" with high-tech facilities like video-conferencing, on-line filing etc., in each of our High Courts so that they may handle 'commercial cases' of a high threshold value of (say) Rs.1 crore and above, or such higher limit as may be fixed by the High Court (but not in excess of Rs.5 crores) and fast tract basis."

3.2.By the 253rd Report, further in depth study was made by expanding the functioning of the Courts by viewing more countries, such as, Singapore, Ireland, France, Kenya among others. It was felt that it would be prudent to adopt the functioning of the Courts in UK, USA and Singapore.

"The Bill shall have a streamlined procedure to be adopted for the conduct of cases in the Commercial Division and in the Commercial Court by amending the Code of Civil Procedure, 1908 so as to improve the efficiency and reduce delays in disposal of commercial cases. The amended CPC as applicable to the Commercial Divisions and Commercial Courts will prevail over the existing High Court rules and other provisions of the CPC to the contrary. Some of the important changes proposed to the CPC are listed below.

iii. A new procedure for "summary judgment" to be introduced to permit the Courts to decide a claim pertaining to any Commercial Dispute without recording oral evidence, as long as the application for summary judgment has been filed before the framing of issues. Courts are also to be empowered to make "conditional orders" wherever necessary."

3.3.With particular reference to Paragraph 24.2 of Civil Procedure Rules of the UK.

"24.2. The Court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if--

(a) it considers that --

(i)that claimant has no real prospect of succeeding on the claim or issue; or

(ii)that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

3.4. This provision is made applicable to all the suits in United Kingdom. Suits there also would involve elements of discovery and investigation and thus, role for inquiry and interrogation is much more.

3.5. To be noted, there is no pari materia provision contained in the Civil Procedure Rules of the United Kingdom in paragraph 24.2. Rule 6 of Order XIII-A, which dealt with the other orders while exercising the power under Order XIII-A like Rule 7 of the Order XIII-A of the Commercial Courts Act, 2015, which speaks of conditional order.

3.6. Rule 19-a of the New York Rules:

"Rule 19-a deals with 'Statement of Material Facts on Motion for Summary Judgment'. This rule effective from 3.5.2002 reads as follows:

"Rule 19-a : Statement of Material Facts on Motion for Summary Judgment:

(a) Upon any motion for summary judgment OTHER THAN A MOTION PURSUANT TO CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement of the material fact as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment OTHER THAN A MOTION PURSUANT TO CPLR 3213 shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purpose of the motion unless controverted by the statement required to be served by the opposing party."

This rule was kept in mind and taken note of in the 180th Law Commission Report.

3.7. Lord Woolf Report:-

"The Woolf Report identified principles that a civil justice system must meet to ensure access to justice. According to the Woolf Report, the system should--

a) "be just in the results it delivers;

- b) be fair in the way it treats litigants;
- c) offer appropriate procedures at a reasonable cost;
- d) deal with cases with reasonable speed;
- e) be understandable to those who use it;
- f) be responsive to the needs of those who use it;
- g) provide as much certainty as the nature of particular cases allows; and
- h) be effective; adequately resourced and organised."

Law Commission also placed this on record.

4. 'Statement of Objects and Reasons' appended to the Commercial Courts Act, 2015.

"The intent is to have a streamlined procedure which is to be adopted for the conduct of cases in the Commercial Courts and in the Commercial Divisions by amending the Code of Civil Procedure, 1908 so as to improve the efficiency and reduce delays in disposal of commercial cases. The proposed case management system and provisions for summary judgment will enable disposal of commercial disputes in a time bound manner."

5. Thus, the Commercial Courts Act has been introduced with the intention to give qualitative and quantitative decisions. Interestingly, the enactment fixes responsibility on all the stakeholders including judiciary in achieving the avowed object.

6. Order XIII-A :

6.1. Order XIII-A speaks of summary judgment. As we are aware, the Act itself gives a clear cut mechanism to achieve quicker and speedy justice. Therefore, this provision is meant to give much faster decision than the one contemplated otherwise under the Act. This is obviously an exception. Therefore, the Court is expected to exercise the power sparingly, with caution. Sufficient safeguards have been given under the order itself and thus, eschewing an oral evidence has to be done subject to the other components of the provision.

6.2. When once Court proceeds further and gives a judgment under this order, there is no question of examining witnesses. We may remind ourselves that chief examination is being done only through the proof affidavit. In that scenario, the consideration of subsequent development which might require oral evidence may not be possible. There is also a possibility of a witness coming out with truth, though pleadings and documentary

evidence may indicate otherwise. An oral testimony can also explain the documentary evidence and the circumstances which brought them.

7. Order XIII-A Rule 2:

Now let us consider the provisions governing the summary judgment. Order XIII-A Rule 2 lays emphasis on the stage at which an application may be made. This provision makes it clear that an application may be filed for summary judgment at any time after summons has been served on the defendant. This has to be read along with the proviso. The proviso says that no application in summary judgment may be made after the issues are framed. Thus, if one reads the provision as a whole, what emerges is that an application may not be filed after framing of the issues. The first part speaks of the entitlement to file an application and the second is the outer limit. Though the legislation uses the words 'may' one has to see the preceding words 'no application for summary judgment'. The power being discretionary, any exercise has to be before framing of issues. Reason is, once issues are framed and taken note of to be answered, regular trial is the way out. We may profitably refer the aforesaid provision.

"Order XIII-A Rule 2 Stage for application for summary judgment:

An applicant may apply for summary judgment at any time after summons has been served on the defendant:

PROVIDED that, no application for summary judgment may be made by such applicant after the Court has framed the issues in respect of the suit."

8. Order XIII-A Rule 3 :

It deals with the grounds for summary judgment. Here again there are two elements, which are to be kept in mind. One "the real prospect of succeeding on the claim or defending" and the other "the existence of any other compelling reason". Order XIII-A Rule 3(a) is applicable to the applicant, who can either be the plaintiff or the defendant. He has to satisfy the Court with respect to the non existence of the real prospect. Thereafter, the respondent in the application has to convince the Court on the existence of any other compelling reason. These two factors will have to be considered by the Court. Once the Court considers that there is no real prospect of succeeding or defending the claim and there is no other compelling reason as to why the claim could not be disposed of before recording of the oral evidence, it may proceed thereafter and render a summary judgment after assessing the materials placed.

"3. Grounds for summary judgment.

The Court may give a summary judgment against

a plaintiff or defendant on a claim if it considers that--

(a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be, and

(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence."

9. Order XIII-A Rule 4.

Order XIII-A Rule 4 deals with the procedure to be followed. This provision imposes certain duties on both the applicant and the respondent. The compliance of the procedure is mandatory on the part of the parties. It is for the reason, the Court will have to be in a position to render a summary judgment on merit, if it considers the need to do so. Such compliance is also required to enable the Court to come to the conclusion on the necessity to render a summary judgment.

"4.Procedure.--

(1) An application for summary judgment to a Court shall, in addition to any other matters the applicant may deem relevant, include the matters set forth in sub-clauses (a) to (f) mentioned hereunder:--

(a) the application must contain a statement that it is an application for summary judgment made under this Order;

(b) the application must precisely disclose all material facts and identify the point of law, if any;

(c) in the event the applicant seeks to rely upon any documentary evidence, the applicant must,--

(i) include such documentary evidence in its application, and

(ii) identify the relevant content of such documentary evidence on which the applicant relies;

(d) the application must state the reason why there are no real prospects of succeeding on the claim or defending the claim, as the case may be;

(e) the application must state what relief the applicant is seeking and briefly state the grounds for seeking such relief.

(2) Where a hearing for summary judgment is fixed, the respondent must be given at least thirty days' notice of:--

(a) the date fixed for the hearing; and

(b) the claim that is proposed to be

decided by the Court at such hearing.

(3) The respondent may, within thirty days of the receipt of notice of application of summary judgment or notice of hearing (whichever is earlier), file a reply addressing the matters set forth in clauses (a) to (f) mentioned hereunder in addition to any other matters that the respondent may deem relevant:-

- (a) the reply must precisely--
 - (i) disclose all material facts;
 - (ii) identify the point of law, if any; and
 - (iii) state the reasons why the relief sought by the applicant should not be granted;
- (b) in the event the respondent seeks to rely upon any documentary evidence in its reply, the respondent must--
 - (i) include such documentary evidence in its reply; and
 - (ii) identify the relevant content of such documentary evidence on which the respondent relies;
- (c) the reply must state the reason why there are real prospects of succeeding on the claim or defending the claim, as the case may be;
- (d) the reply must concisely state the issues that should be framed for trial;
- (e) the reply must identify what further evidence shall be brought on record at trial that could not be brought on record at the stage of summary judgment; and
- (f) the reply must state why, in light of the evidence or material on record if any, the Court should not proceed to summary judgment."

10. Order XIII-A Rule 5:

This requires, the filing of additional document during evidence by the parties. This provision also once again reiterated the position with an idea to proceed further, instead of wasting time, by rendering the judgment on merit.

"Evidence for hearing of summary judgment. -

(1) Notwithstanding anything in this Order, if the respondent in an application for summary judgment wishes to rely on additional documentary evidence during the hearing, the respondent must:-

- (a) file such documentary evidence; and
 - (b) serve copies of such documentary evidence on every other party to the application at least fifteen days prior to the date of the hearing.
- (2) Notwithstanding anything in this Order, if the

applicant for summary judgment wishes to rely on documentary evidence in reply to the defendant's documentary evidence, the applicant must--

- (a) file such documentary evidence in reply; and
- (b) serve a copy of such documentary evidence on the respondent at least five days prior to the date of the hearing.

(3) Notwithstanding anything to the contrary, sub-rules (1) and (2) shall not require documentary evidence to be:—

- (a) filed if such documentary evidence has already been filed; or
- (b) served on a party on whom it has already been served."

11. Order XIII-A Rule 6:

It gives the option to the Court to pass any one of the orders mentioned thereunder while exercising the discretion. Obviously, it is a judicial discretion on assessment of the matter placed before it. Such a discretion has to be arrived at initially by assessing the materials placed before it.

"XIII-A Rule 6. Orders that may be made by the Court.

(1) On an application made under this Order, the Court may make such orders that it may deem fit in its discretion including the following:

- (a) Judgment on the claim;
- (b) conditional order in accordance with Rule 7 mentioned hereunder;
- (c) dismissing the application;
- (d) dismissing part of the claim and a judgment on part of the claim that is not dismissed;
- (e) striking out the pleadings (whether in whole or in part); or
- (f) further directions to proceed for case management under Order XV-A.

(2) Where the Court makes any of the orders as set forth in sub-rule(1)(a) to (f), the Court shall record its reasons for making such order."

12. Order XIII-A Rule 7:

This rule provides sufficient power to the Court to pass a conditional order. This power has to be exercised when "it appears" to the Court that it is possible that a claim or defence may succeed but it is improbable that it shall do so. If we read order XIII-A Rules 6 and 7 together, a clear picture would emerge. If it appears to the Court that a claim or defence may succeed and it is also probable, then the

application filed seeking a summary judgment will have to be dismissed. If it appears to the Court that it is possible but improbable as stated in Rule 7 of Order XIII-A of the Act, then it may consider passing a conditional order. If the Court considers that a plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, there is no other compelling reason as to why the claim should not be disposed of before recording of oral evidence, it may give a summary judgment. Alternatively, the Court can also consider striking out the pleadings either in whole or in part. This discretion is given to the Court before deciding to give a summary judgment. Therefore, the Court has to keep in mind and decide as to whether it is a fit case for striking out the pleadings dismissing an application and proceed further or a conditional order could be passed. After exhausting these stages, the question of granting a summary judgment would arise.

13. Thus, to conclude, we are of the view that when an application is filed under Order XIII-A, a Court is expected to keep in mind the provisions contained in Order XIII-A Rules 6 and 7 before considering a summary judgment under Order XIII-A Rule 3. We are conscious that Order XIII-A Rule 6 also speaks of a judgment on the claim both part or full. Order XIII-A Rule 7 read with other modes mentioned under Order XIII-A Rule 6 act as contraceptive to grant of summary judgment under Order XIII-A Rule 3.

14. We have already discussed the scope and ambit of Order XIII-A. Thus, we do not wish to repeat it except by holding that there is a remarkable difference in the word appears as mentioned under Order XIII-A Rules 7 and 3, which uses the words 'considers'. Further more, the Order XIII-A Rule 6 gives discretion to the Court. Therefore, looking from any perspective, it is not necessary that the Court will have to decide only two issues on an application filed under Order XIII-A viz., to allow it or dismiss it, while we hold that at the time of considering the application the Court can go into the merits of the case, which is exactly the object of the provision. However, the Court has to keep in mind the import of Order XIII-A Rule 6. It has to necessarily record a finding that it is proceeding under Order XIII-A Rule 3 instead of exercising its discretion otherwise provided under Order XIII-A Rule 6. Thus such a discretion when exercised has to be in tune with Order XIII-A Rule 6. While exercising such a power, it appears to the Court that it would come under the purview of Order XIII-A Rule 7, it should pass a conditional order. However, if it considers that an applicant has got no real prospect of succeeding and there is no other compelling reason, then it can proceed to give a summary judgment. There is a

mandated difference between the word "appears" and "considers". One is cursory and the other a bit more adjudicatory. The later requires more application of mind. Stage to "consider" follows "to appear".

15. Now let us consider the judgment governing the summary judgment.

15.1. Su-Kam Power Systems Ltd., V. Kunwer Sachdev and Others (C.S.No.1155 of 2018 dated 30.10.2019) (Delhi High Court)

"49. Consequently, this Court is of the view that when a summary judgment application allows the Court to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. It bears reiteration that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the Court the confidence that it can find the necessary facts and apply the relevant legal principles so as to resolve the dispute as held in Robert Hryniak (supra). 50. In fact, the legislative intent behind introducing summary judgment under Order XIII A of CPC is to provide a remedy independent, separate and distinct from judgment on admissions and summary judgment under Order XXXVII of CPC."

15.2. Bright Enterprises Private Limited V. Bizcraft Lip and another (2017 V169, PTC 596)

"21. The provisions relating to summary judgment which enables courts to decide claims pertaining to commercial disputes without recording oral evidence are exceptional in nature and out of the ordinary course which a normal suit has to follow. In such an eventuality, it is essential that the stipulations are followed scrupulously otherwise it may result in gross injustice. As pointed out above, a specific period of time has been provided during which an application for summary judgment can be made. That period begins upon the service of summons on the defendant and ends upon the court framing issues in the suit. Even if we were to accept, which we do not, the argument of the respondents that the Court had suo moto powers to deliver summary judgment without there being any application, those powers also would have to be exercised during this window, that

is, after service of summons on the defendant and prior to framing of issues. In addition to this, we also reiterate that, in our view, a summary judgment under Order XIII A CPC is not permissible without there being an appropriate application for summary judgment. The contents of an application for summary judgment are also stipulated in Rule 4 of Order XIII A. The application is required to precisely disclose all material facts and identify the point of law, if any. In the event, the applicant seeks to rely on any documentary evidence, the applicant must include such documentary evidence in its application and identify the relevant content of such documentary evidence on which the applicant relies. The application must also state the reason why there are no real prospects of succeeding or defending the claim, as the case may be."

15.3. Indus Cityscapes V. Karismaa Foundations (O.S.A.No.107 of 2019 dated 27.09.2019) (Delhi High Court D.B).

"84. There is an apparent overlap between the powers of the Civil Court to dispose a civil suit in a summary manner under Order XII Rule 6 of the Civil Procedure Code, 1908 and powers of the Commercial Courts / Commercial Division of High Court to dispose commercial dispute in a summary manner under Order XIII-A of CPC in the light of Order XV-A of CPC inserted to the Civil Procedure Code, 1908 by the Commercial Courts Act, 2015.

O.S.A.No.107/2019
94. In our view, the remedy under Order XIII -A of the Civil Procedure Code, 1908 as made applicable to a commercial dispute subsumes the remedy under Order XII Rule 6 of Civil Procedure Code, 1908 and enables a Commercial Court/ Commercial division of the High Court to pass a "summary judgment" independent of the procedure prescribed under Order XXXVII of CPC."

15.4. Patanjali Biscuits V. Hatsun Agro (OSA No.264 of 2019 dated 05.11.2019) (D.B.)

"10. Certainly, a full fledged trial of a suit will consume a lot of time of the court and therefore, unless there are cogent and strong reasons as envisaged under Order XIII-A of the Civil Procedure Code as applicable to

commercial disputes under the provisions of the Commercial Courts Act, 2015 (4 of 2016), inserted in the Code of Civil Procedure, the dismissal of the Application by the learned Single Judge in Application No.2920 of 2019, for summary judgment, is not sustainable."

15.5.Three Rivers District Council Vs. Governor and Company of Bank of England (2003 (2) AC 1) (House of Lords)

"94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be taken that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence."

15.6.Swain V Hillman & another (2001 All ER 91) (Court of Appeals)

"It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.

...

It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.

It is a matter to be dealt with by the judge at a trial and not at a summary hearing. Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding.

29. This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."

15.7. Royal Brompton Hospital V. Hammond (2001 EWCA P550)
(Court of Appeals):

"In reaching a conclusion as to whether a claim has real prospects of success it is necessary to take into account not only the evidence that is adduced on the application, but also the stage that the proceedings have reached, and the evidence that can reasonably be expected to be available at trial."

15.8. ED&F Man Liquid Products V. Patel (2003 EWCA 472)
(Court of Appeals):

"8. I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the Saudi Eagle that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under R.S.C. Order 14. Furthermore, both CPR 13.3(1) and 24.2 have provisions whereby, for the purposes of doing justice between the parties, the court can order that judgment be set aside under 13.3.1(b) if it appears to the court that there is some other good reason to do so, and, under 24.2(b) that summary judgment be withheld on the ground that there is some compelling reason why the case or issue should be disposed of at trial.

.....
10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In

some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable."

15.9. Doncaster Pharmaceuticals V. Bolton Pharmaceuticals (2007 FSR 63):

"Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

15.10. ICI Chemicals and Polymers V. TTE Training (2007 EWCA Civ. 725):

"If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

15.11. Global Asset Capital V. Aabar (2017 EWCA 37):

"In order to decide whether a case has a real prospect of success the court "must not conduct a 'mini-trial' and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process"

15.12. European Union V Syrian Arab Republic (2018 EWHC 1712):

"If the application gives rise to a short point of law or construction and the court is satisfied it has before it all the evidence necessary for its

proper determination, it should grasp the nettle and decide it."

15.13.Vedanta Resources Plc V. Lungowe (2019 UKSC 20) (House of Lords):

"The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue."

16. From the aforesaid judgments the Parliamentary intention is clearly seen in facilitating a quicker decision through the process. As discussed above, we have to read the entire provision contained in Order XIII-A as a whole. If the Court comes to the conclusion that the evidence is moonshine or smokescreen and it considers that Order XIII-A Rule 3 has been complied, then it can deliver a summary judgment on merit.

17.The question as to whether the case is complicated or not is not the concern of the Court especially in deciding an application filed invoking Order XIII-A of the CPC. Obviously, the respondent in the application has to produce his best evidence, which would be his "lead trump" as he would stand the chance of losing his case.

18. FACTS: Having understood the provision as aforesaid, let us now consider the facts.

18.1.There was a manufacturing services agreement between the appellant and the holding company of the first respondent. The said party was having series of transactions with the appellant. It went into liquidation in United States of America. After the initiation of the aforesaid proceedings, purchase orders have been placed by the first respondent with the appellant. It also went into liquidation. After the Administrator took charge of the first respondent, he found that certain amount was due towards the non supply of goods by the first respondent to the appellant. Thus, the present suit has been filed seeking recovery of the said amount.

18.2.In the written statement, the appellant took the following defence.

"3.11.As things stood thus, in December 2012, huge amount was outstanding from the Plaintiff's Holding Company, i.e., Powerwave Technologies Inc., to the Defendant No.1 as the Plaintiff's Holding Company had failed to make

payments to the Defendant No.1 in accordance with the terms of the MS Agreement. Upon enquiry, Mr.Heiko B.Juritz, Chief Procurement Officer of Powerwave Group informed the Defendant NO.1 that the payments could not be made due to some technical issues and assured that its dues to the Defendant No.1 will be shortly paid through its affidavits/subsidiaries, along with the payments payable against purchase orders placed/proposed to be placed for supply of Goods by such affiliates/subsidiaries.

.....
13.3. It is submitted that the plaintiff's Holding Company through the Plaintiff had also placed purchase orders on the Defendant No.1 in the months of March and April, 2013, worth USD 8,89,237.65. It is further submitted that the Plaintiff's Holding Company through the Plaintiff had paid additional sum of USD 9,14,474.29 to the Defendant No.1 in the months of April, 2013. It is relevant to note that in relation to the above mentioned purchase order, Powerwave Group insisted on supply of goods worth only USD 402,635.59 and had cancelled the aforesaid purchase orders to the extent of the differential amount and instructed the Defendant No.1 to adjust the excess amount towards dues of the Plaintiffs Holding Company. The Defendant No.1 accordingly effected supply worth USD 402,635.59 by May, 2013 to the Plaintiff to the complete to the satisfaction of Plaintiff's Holding Company."

18.3. In the counter affidavit filed to the application filed by the first respondent, the following averments have been made.

7.11. As things stood thus, to utter surprise and dismay of Defendant No.1 in December, 2012, one Mr.Heiko B. Juritz, Chief Procurement Officer of the Plaintiff's Holding Company, had informed Defendant No.1 that Plaintiff's Holding company i.e. Powerwave Technologies Inc., is in the process of filing a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States bankruptcy Court for the District of Delaware. It was also intimated and verbally assured the Respondent No.1/Defendant No.1 that the dues of the Plaintiff's Holding Company payable to the Defendant No.1 will be paid by its

affiliates/subsidiaries in the future, along with the payments payable against purchase orders placed/proposed to be placed for supply of Goods by such affiliates/subsidiaries.

7.12.It is submitted that it was noticed by the Defendant No.1 that the Plaintiff's Holding Company had filed the voluntary petition for bankruptcy on 28th January, 2013. It is pertinent to note that in the said bankruptcy petition, the Respondent No.1/Defendant No.1 was shown by the Plaintiff's Holding Company as its fifth largest unsecured creditor with a scheduled claim of USD 1,491,179.

7.13.It is pertinent to note that the Plaintiff's Holding Company in order to comply with its commitment and obligation to pay the amounts owed to the Respondent No.1/Defendant No.1, paid an amount of USD 37,194.70 to the Respondent No.1/Defendant No.1 through its direct subsidiary i.e., the Plaintiff, towards part payment of its total debt of USD 1,491,179/-."

7.16.It is relevant to note that as per the terms of the purchase orders placed by the Plaintiff's Holding Company, the Goods were to be shipped to Knarranagatsan 7, SE-164 40, Ksta, Sweden. However, contrary to the said agreement, the Plaintiff's Holding Company had requested the Defendant No.1 to ship some of the Goods worth USD 4,02,635.59 at PT Hallillintar Lintas Semesta at Dusit Mangga Dua, No.22, Jakarta 10730, Indonesia and APT Vostok LLP at 050057, Almaty, 201A Zharkov Street, Republic of Kazakisthan respectively. It is pertinent to note that the purchase order placed as exhibits by the Plaintiff clearly shows and proves that the goods are to be shipped to Sweden. It is submitted that even though it is not the responsibility of the Defendant No.1 to supply Goods to Kazakisthan and Indonesia respectively, in a good faith and also to have a cordial business relations with Powerwave Group, it had shopped the Goods at the places requested by the Powerwave Group.

7.19.It is submitted that on 17th December, 2013, a letter was issued by the Bankruptcy Administrator, on Plaintiff's behalf, to Respondent No.1/Defendant No.1, alleging that an amount of USD 600,297 remains pending for payment from Defendant No.1. It is submitted

that the Defendant No.1, immediately after receipt of the aforesaid letter, had intimated to the Powerwave Group for its necessary instructions. It is submitted that in response to the Defendants request, one Mr.Heiko B.Juritz, Chief Procurement Officer of the Plaintiff and Plaintiff's Holding Company, had verbally informed the Respondent No.1/ Defendant No.1 to not to bother about the letter and further instructed the Respondent No.1/Defendant No.1 to not to supply any Goods to Sweden or any other place and adjust the balance amount of USD 5,49,033.40, lying with the Respondent No.1/ Defendant No.1 against the dues of the Plaintiff's Holding Company to the Respondent No.1/Defendant No.1 and further assured that the pending amount would be paid by it in due course.

7.20.It is submitted that as per the instructions of the Plaintiff and the Powerwave Group, the Defendant No.1 had considered the balance purchase orders to have been cancelled and had adjusted the balance amount of USD 5,49,033.40 on 18th December, 2013 against the dues legally payable by the Plaintiff's Holding Company to the Respondent No.1/Defendant No.1."

18.4.Thus, the appellant took a plea that the entire contract was facilitated by the Holding company, as the first respondent is its subsidiary and the supply was made to a different place other than the one mentioned in the purchase orders on its advice. It was also agreed to have the set off apart from the dues of the appellant being specified by the first respondent. It is also not in dispute that the appellant is fifth largest creditor of the Holding Company. According to the appellant, its dues from the Holding company exceeds that of the dues payable to the first respondent. Therefore, it is a case of set off to the extent of the claim made by the first respondent which has been raised.

18.5.The suit was filed before the jurisdictional Court. Thereafter, it was transferred to the Commercial Division of this Court. The date of the plaint was 08.09.2015. Written statement was filed on 04.08.2016. The first respondent filed an application in O.A.No.7113 of 2018 on 24.07.2018. It was preceded earlier by another application in O.A.No.2015/2017 in C.S.No.851 of 2015 seeking the appellant to furnish security. The learned single Judge, after considering the relevant materials, decreed the suit in part inter alia holding that there is no need for oral evidence of the defendant and the defence as raised by the appellant is only a moonshine.

19.Submissions of the learned counsel for the Appellant:

Learned Senior Counsel appearing for the Appellant submitted that the question as to whether there exists set off or not is a matter for trial. There are specific averments in the written submissions and the affidavit filed. For non framing of the issues, the appellant cannot be made to suffer. The suit is pending from the year 2015 onwards. Even on the earlier occasion, the first respondent did not choose to file any application seeking summary judgment. It is the specific case of the appellant that the entire transaction starts from the placement of the orders through the Holding company. The fact that the Holding company was already under liquidation cannot be a factor. The plaintiff was not under the process of liquidation. There are averments to show that delivery was made as instructed by the holding company contrary to the place mentioned in the purchase orders. The learned single Judge was not right in holding that there were no sufficient averments. The entire scope of the order XIII-A will have to be considered and if the Court so pleases, it can also impose a conditional order. Therefore, the above original side appeal has to be allowed.

20.Submissions of the learned counsel for the first Respondent:

Learned counsel appearing for the first respondent submitted that the learned single Judge has rightly found that there is no need for oral evidence. The defences set up by the appellant is a mere moonshine and not a smokescreen. The transactions have been entered into after the holding company got into liquidation. The present name is also no longer in existence. Therefore, the appeal will have to be dismissed.

21.Heard Mr.P.S.Raman, learned Senior Counsel for M/s Lakshmi Kumaran and Sridharan, learned counsels for the appellant, and Mr.P.V.Balasubramaniam for M/s BFS Legal, learned cocounsel for the first respondent and perused the documents available on record.

22. As we are dealing with the scope and ambit of Order XIII-A, we appointed Mr.Srinath Sridevan as Amicus Curiae. The learned Amicus Curiae did an extensive research and produced materials. We also further perused the documents filed, the arguments made along with the written statement.

23. DISCUSSION :

23.1.From the submissions made and after going through the relevant records, the judgments produced and on perusing the judgments and appeal, we feel that it appears that there is a possibility of the defendant becoming successful though it is improbable that it shall do so. Hence, the case on hand would come under Order XIII-A Rule 7 warranting a conditional order. We may note that the learned single Judge has not considered this aspect.

23.2.We further find that there are triable issues in the suit. The first respondent itself earlier filed only an application seeking a direction to furnish security. This was filed on 04.01.2017. Only thereafter, application in O.A.No.7113 of 2018 in C.S.No.851 of 2015 has been filed on 24.07.2018 after 1 ½ years. Factually there is a deviation from the purchase order with respect to the place of supply made. Therefore, even on that ground, it would be the case, which would come under Order XIII-A Rule 7. In such view of the matter, while setting aside the judgment and decree of the Commercial Division, there shall be a conditional order that the appellant shall deposit a sum of Rs.2.8 crores(Rupees two crores and eighty lakhs only) to the credit of the suit in C.S.No.851 of 2015 in the name of the Registrar General, High Court, Madras-600 104, in an interest bearing deposit within a period of four weeks from the date of receipt of a copy of this judgment. We may request the learned single Judge to consider by issuing further directions to proceed for case management under Order XV-A. Accordingly, the Judgment and decree of the Commercial Division stands set aside and the Original Side Appeal stands allowed in part. Consequently, connected civil miscellaneous petition is closed. We make it clear that in the event of non compliance of the order aforesaid, the judgment and decree of the learned single Judge would get restored.

24.We place on record our appreciation for the excellent assistance rendered by the learned Amicus Curiae.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Registrar General,
High Court, Madras.

2.The Sub Assistant Registrar,
Original Side, High Court, Madras.

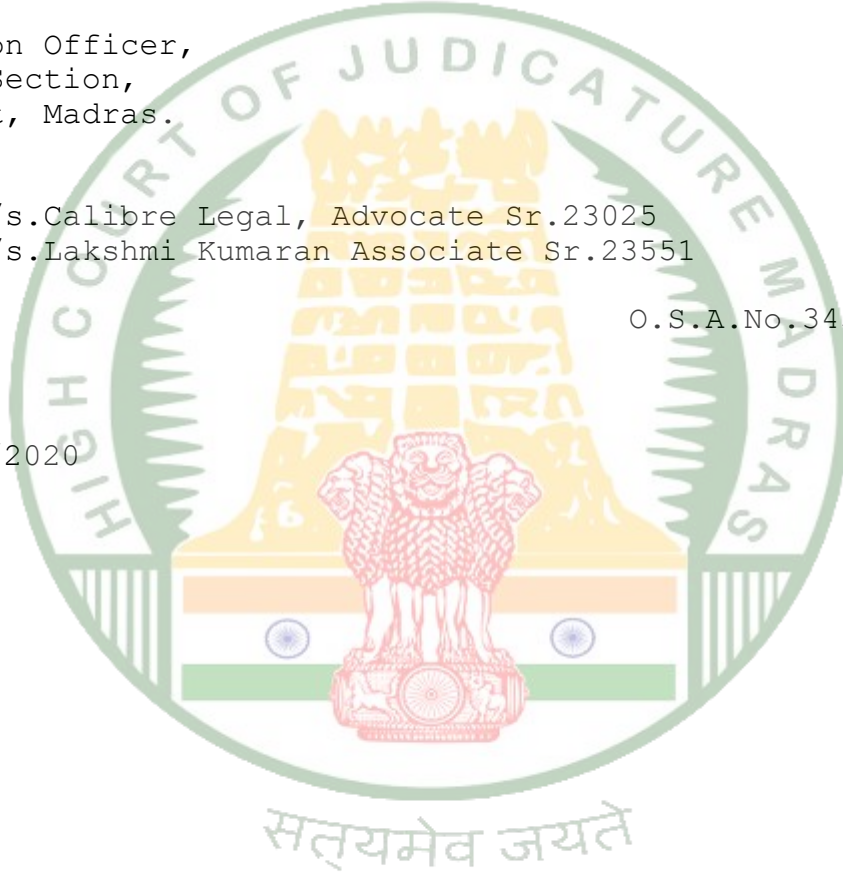
Copy to

The Section Officer,
Accounts Section,
High Court, Madras.

+lcc to M/s.Calibre Legal, Advocate Sr.23025
+lcc to M/s.Lakshmi Kumaran Associate Sr.23551

O.S.A.No.345 of 2019

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