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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4759 OF 2019**

Saybolt Inspection Services Pvt. Ltd. ...Petitioner(s)

V/s

Dorf Ketel Chemicals India

Pvt. Ltd. & Ors.

....Respondent(s)

Mr. Zacanias Joseph i/b Khaitan and Co. for the Petitioner.

Mr. Piyush Shah a/w Mr. Chirag Udakat a/w Kavan Gandhi for
Respondent No.1.

CORAM: NITIN W. SAMBRE, J.

DATE: MARCH 10, 2021

P.C.:-

1] The Petitioner has invoked provisions of Order 37 Rule 3 sub-rule (5) of the Civil Procedure Code, thereby seeking leave to defend in response to Summons for Judgment No. 79 of 2014, which prayer came to be allowed, subject to deposit of the amount of Rs 41,85,000/- vide impugned order dated 13/02/2019. As such, this Petition.

2] The learned Counsel for the Petitioner so as to make out a case of triable issue before the Court below would invite attention of this Court to certain documents exchanged between the parties, quality

inspection report and the probable defence set up in the application for leave to defend. Relying on the aforesaid material, it is the case of the Petitioner that there is enough documentary evidence at this stage available on record which could prima facie demonstrate that product supplied by the Respondents/Plaintiffs was defective and wisely, delivery of the product was given at belated stage so as to avoid immediate inspection/quality check up. According to him, the court below, while passing the order impugned, has recorded an incorrect finding of fact that the Petitioner has failed to place on record documentary evidence as regards third party liability read with admission as is reflected from pleadings in para 15 of the application for leave to defend. He would further urge that the Petitioner has satisfied the very requirement of sub-rule (5) of Rule 3 of Order 37.

3] The learned Counsel for Respondent No.1 would support the order impugned.

4] If we consider the scheme of Order 37 Rule 3 sub-rule (5), what is required to be appreciated is, whether Petitioner/Defendant has come out with probable defence which could prima facie give

impression to the court that triable case/issues could be made out. Petitioner is basically banking on exchange of communications and quality report so as to demonstrate that product which was supplied was nearing expiry date and as such did not deliver results as were expected. Of course, the said issue could be established by the Petitioner in the suit provided evidence to that effect is brought on record. However, at this stage, what is required to be noticed is, the product, as was ordered by the Petitioner, was duly delivered and though later in point of time, Petitioner without any objection has accepted the said delivery. So as to object to the claim of Respondents/Plaintiffs, plea is raised by the Petitioner about defectivity of the quality of product being not up to the mark as was required. The said issue, of course, as observed hereinabove, can be established at trial stage but it has to be inferred that there was transaction between the parties, goods were received by the Petitioner from the Respondents/Plaintiffs and loss, if any, suffered by the Petitioner can only be looked into after appreciation of evidence.

5] In the aforesaid backdrop, in my opinion, reasons furnished in the order impugned do not call for any interference. However, it is

required to be noted that while granting protection to the Petitioner on 30/9/2019, this Court has directed the Petitioner to deposit an amount of Rs 30 lakhs so as to show his bonafides. I am informed that the said amount of Rs 30 lakhs is already deposited by the Petitioner.

6] In the aforesaid backdrop and particularly having regard to the exchange of communications between the parties immediately after the receipt of delivery of the goods, in my opinion, it will be appropriate to modify the condition of deposit of Rs 41,85,000/- to that of Rs 30,00,000/-.

7] Petition stands partly allowed to the above extent.

8] Parties are at liberty to move before the court below seeking extension to deposit.

(NITIN W. SAMBRE, J.)