IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION NO. 1869 OF 2019
IN
COMMERCIAL SUMMARY SUIT NO. 688 OF 2018

Heena Metals Pvt. Ltd. .. Applicant

In the matter between :

Heena Metals Pvt. Ltd. .. Plaintiff
Vs.
Basant Global Trade Pvt. Ltd. .... Defendant

Mr.Rashid Khan i/b Ms. Sumi Soman for applicant/plaintiff.
Mr.Arsh Misra i/b M.V. Kini for defendant.

CORAM : N.J. JAMADAR, J.
DATE : 5th FEBRUARY 2021

ORAL ORDER :

1. This application is preferred by the plaintiff to incorporate amendments in the plaint under the provisions of Order VI Rule 17 of the Code of Civil Procedure, 1908 ('the Code').

2. The substance of the application is that the defendant, in reply to the summons for judgment and the written statement, has taken a stand that the plaintiff had resold allegedly rejected export goods to the defendant by raising invoice bearing No. PI/001/17-18, dated 11th August 2017 ('the questioned invoice'). The said defence is false to

the knowledge of the defendant. In fact, the said invoice was issued by the plaintiff at the request of the defendant for verification purpose only. Thus, the plaintiff be permitted to amend the plaint so as to bring the circumstances, under which the said questioned invoice was issued, on record. Initially, the plaintiff had also sought to incorporate an additional prayer in the form of prayer clause '(aa)' seeking a declaration that the questioned invoice purported to be for a sum of Rs.1,99,42,000/- is null and void and not binding upon the plaintiff.

3. The defendant resisted the application by filing an affidavit in reply. At the outset, it was contended that the application for amendment was misconceived as the plaintiff had admitted that the questioned invoice was, in fact, issued by the plaintiff. The application, and the relief sought by way of amendment, were also stated to be barred under the provisions of Order II Rule 2 of the Code as the plaintiff had deliberately omitted to sue and seek the relief of the declaration that the said questioned invoice was null and void and not binding upon the plaintiff, without the leave of the Court. Thus, the plaintiff is precluded from seeking the same relief afresh. It was further contended that as the falsity of the plaintiff's claim was borne out by the fact that the said invoice dated 11th August 2017 was issued by the plaintiff, the plaintiff withdrew the

summons for judgment. The plaintiff, therefore, cannot be now permitted to enlarge the scope of the summary suit by amending the plaint.

4. I have heard the learned counsel for the applicant-plaintiff and the learned counsel for defendant at some length.

5. The learned counsel for the plaintiff urged that the defendant had raised the defence that the goods were resold under the said questioned invoice in the pleadings filed before this Court, for the first time. The plaintiff had no opportunity to meet the said defence. Even otherwise, the suit is at a pre-trial stage. The amendment is necessary for adjudication of all the questions in controversy between the parties. Hence, the amendment be allowed.

6. In opposition to this, the learned counsel for the defendant strenuously urged that the proposed amendment is barred by the provisions of Order II Rule 2 of the Code. Moreover, if the amendment is allowed and the plaintiff is permitted to incorporate the additional prayer of declaration in respect of the questioned invoice, it would completely change the nature of the suit. The proposed amendment would also take the suit out of the purview of Order XXXVII of the Code. Laying emphasis on the correspondence between the parties which predated the suit, the learned counsel for the

defendant submitted that the plaintiff was fully aware of the fact that the questioned invoice was issued by the plaintiff. Inviting the attention of the Court to paragraph 3(y) of the plaint, wherein the plaintiff did make a reference to the alleged proforma invoice, it was urged that the plaintiff's claim that the defendant raised the defence for the first time in the pleadings filed before this Court is patently untenable.

7. It would be contextually relevant to note that the plaintiff subsequently, restricted the proposed amendment to clauses (I), (II), and (III) of the Schedule to the application and submitted that the plaintiff does not press for incorporation of additional prayer (aa) seeking a declaration in respect of questioned invoice. The application is, thus, restricted to the amendment proposed in clauses (I), (II), and (III) of the Schedule.

8. In view of the aforesaid development, the principal challenges to the proposed amendment on account of it being barred by the provisions of Order II Rule 2 of the Code and, if allowed, the claim would fall outside the ambit of Order XXXVII of the Code do not hold the ground. The question that comes to the fore is whether the proposed amendment is necessary for the determination of real question in controversy between the parties? For an answer, the

nature of the suit assumes significance.

9. The averments in the plaint indicate that the suit is primarily for the recovery of the price of the goods sold and delivered. The defendant had set up a defence that the transaction between the parties was not the one relied upon by the plaintiff but it was in respect of the questioned invoice dated 11th August 2017. Evidently, the primary issue which would warrant adjudication is whether the plaintiff had sold and delivered the goods as claimed and the price thereof remained outstanding.

10. The submission on behalf of the defendant that the claim of the plaintiff that it became aware of the defence based on the questioned invoice only when the defendant filed the pleadings is not sustainable, may have some substance. The averments in paragraph 3(y) of the plaint give an impression that the plaintiff had an inkling of the possible defence. Undoubtedly, it was adverted to on a tangent. The said averment betrays the knowledge of the possible defence based on the questioned invoice. However, the said fact by itself is not sufficient to jettison away the claim of the plaintiff. On the contrary, the said fact indicates that the parties were aware of the true nature of the dispute.

11. The learned counsel for the defendant urged that the proposed

amendment would completely change the nature of the suit. To bolster up this submission, the learned counsel for the defendant placed reliance on the judgment of the Supreme Court in the case of ***Bharat Karsondas Thakkar Vs. Kiran Construction Company and Others*** [1]. In the said case, the Supreme Court, on facts, found that the proposed amendment would completely change the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance of an agreement of sale entered into between assignee and the vendors of the assignees.

12. The aforesaid pronouncement simply does not govern the facts of the instant case. By the proposed amendment, the plaintiff proposes to incorporate the ground that the transaction between the parties is not represented by the questioned invoice. In any event, the nature of the suit would continue to be one for recovery of the unpaid price of the goods sold and delivered. What warrants adjudication is whether the real transaction between the parties was the one relied upon by the plaintiff or set up by the defendant. The proposed amendment, therefore, seems necessary for determination of real question in controversy between the parties.

1 (2008) 13 SCC 658

13. Moreover, the stage of the suit assumes significance. It is trite that the amendments are required to be liberally allowed at a pre-trial stage. A useful reference in this context can be made to a judgment of the Supreme Court in the case of ***Sampath Kumar Vs. Ayyakannu and Another***[2]***,*** wherein, it was, *inter-alia,* observed that pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of trial or after conclusion thereof. In the former case, generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended.

14. For the foregoing reasons, I am persuaded to allow this application. Hence, the following order :

O R D E R

(i) The application stands allowed.

(ii) The plaintiff is permitted to amend the plaint in accordance with the Schedule of amendment excluding clause IV whereby an additional prayer clause (aa) was sought to be added.

(iii) The amendment be carried out within a period of three weeks.

2 (2002) 7 SCC 559

(iv) The plaintiff shall serve the amended copy of the plaint on the defendant within a period of two weeks thereafter.

(v) The defendant may file an additional written statement within a period of two weeks of being served with the copy of amended plaint.

Interim application stands disposed of in the aforesaid terms.

[N.J. JAMADAR, J.]