*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%   **Reserved on : 25th October, 2021**
Decided on : 09th November, 2021

\+   **<u>CM(M) 427/2021</u>**

SPAN HEALTHCARE PRIVATE LIMITED ..... Petitioner
Through: Mr. Aaditya Vijay Kumar with Mr.Shivam Batra, Ms. Ayushi Kumar & Mr.Akhil Ranganathan, Advocates

versus

VISHAL SHARMA PROPRIETOR ..... Respondent
Through: Ms. Payal Chandra, Advocate

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

<u>JUDGMENT</u>

1. The present petition under Article 227 of the Constitution of India has been filed by the petitioner (hereinafter referred to as 'plaintiff') challenging the order dated 12th February, 2021 passed by the District Judge (Commercial Court), East District, Karkardooma Courts, Delhi (hereinafter referred to as 'Commercial Court') in CS(COMM) No.319/2019, whereby, unconditional leave to defend has been granted to the respondent (hereinafter referred to as 'defendant') in a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') filed by the plaintiff.

2. A revision petition was filed by the plaintiff against the impugned order. However, the said revision petition was dismissed by this Court vide order dated 16th April, 2021 while giving liberty to the plaintiff to avail

appropriate remedies in law. Accordingly, the present petition has been filed. Notice in the petition was issued on 14th July, 2021. Pursuant to the notice issued by this Court, reply has been filed on behalf of the defendant.

3. The suit from which the present petition arises was filed in August, 2019 under Order XXXVII of the CPC claiming principal sum of Rs.82,86,379 along with interest @ 14% per annum, *inter alia* pleading that:

(i) The plaintiff is an exclusive distributor of 'Haemonetics' for the territory of India for supply of medical items.

(ii) The defendant is the proprietor of firm M/s Mega Care International and engaged in the business of supplying medical equipments.

(iii) In 2009, the defendant approached the plaintiff for supply of 'Haemonetics'. A Memorandum of Understanding (hereinafter referred to as 'MoU') was signed between the parties in 2009-2010 in terms of which, the defendant was granted distributorship for 'Haemonetics' for a period of 27 months.

(iv) The terms of the said MoU expired in 2012, but the parties continued with their business dealings with each other.

(v) The defendant would raise purchase orders on the plaintiff and the plaintiff would supply the said items along with the delivery note to be countersigned by the defendant and an invoice giving details of the items supplied.

(vi) Disputes arose between the parties in October, 2016 as the defendant started defaulting in payments due to the plaintiff.

(vii) The plaintiff claims that the defendant in various emails has acknowledged the money due and payable to the plaintiff.

4. Summons in the said suit were served on the defendant who entered appearance and filed the application for leave to defend. In the said leave to defend application, it has been pleaded that (i) in respect of supplies made by the defendant, the defendant was entitled to payment of commission/minimum guarantee margin; (ii) the plaintiff failed to pay the minimum guarantee amount/commission to the defendant and a sum of Rs.1,08,14,241/- is due to the defendant from the plaintiff in this regard; (iii) the factum of payment of commission has been acknowledged by the plaintiff in various emails exchanged between the parties; and (iv) the suit filed by the plaintiff does not fall within the ambit of a summary suit under Order XXXVII of the CPC as the same is not based on any written contract for a liquidated amount.

5. The leave to defend application was allowed by the Commercial Court vide the impugned order and the defendant was granted unconditional leave to defend. The Commercial Court, in the impugned order has held/observed as under:

(i) The emails exchanged between the parties demonstrate that even after the expiry of the initial MoU dated 2nd May, 2007, the parties continued their business relations under an oral agreement.

(ii) The reference to emails dated 26th July, 2017 and 31st March, 2012 show that there was an arrangement between the parties for payment of commission to the defendant by the plaintiff in respect of sales directly made by the plaintiff to end customers.

(iii) The rate at which the said commission was payable and time of payment of the said commission are triable issues.

(iv) Whether the defendant is entitled to file a counter claim in respect of the commissions due along with the written statement is also a triable issue.

(v) The admission made by the defendant in the emails is vague, not unequivocal and is not relatable to the invoices which form the basis of the suit. The reliance was placed on the judgment of this Court in ***G.E. Capital Services India Vs. K. M. Veerappa Reddy and Ors.*** 2015 (224) DLT 1 to hold that the suit was only in respect of balance amount due and not on the value of invoices relied upon in the suit.

6. Counsel for the plaintiff has drawn the attention of the court to the following emails exchanged between the parties so as to contend that there was a clear acknowledgment of the pending dues to the plaintiff made on behalf of the defendant:

(i) Email dated 4th November, 2016 from the defendant to the plaintiff, the relevant portion being set out below:

> *"We have received an email that we have been blocked from receiving any further goods.*
>
> *Pankaj & others are already aware that we have some orders to execute but do not have any stocks. We have also committed to Pankaj that we would be making a payment of atleast Rs.25 lacs this month but would be trying for 50 lacs.*

We are already taking a hit on paying the interest to you on our outstanding so just do not understand the logic behind blocking us without any prior intimation.

Not supplying the goods to the customer is going to adversely effect all of us."

(ii) Email dated 18th December, 2016 from the plaintiff to the defendant, the relevant portion being set out below:

"Here I am compelled to write this mail keeping in view the current pending AR of INR 1,52,14,459/-(1,47,08,459 towards Kits & 5,06,000 towards machine). This pending AR has really put us in deep trouble towards our further AR commitments to be made to Haemonetics."

(iii) Email dated 13th January, 2017 from the defendant to the plaintiff, the relevant portion being set out below:

"After going through in details regarding the default in payments from customers & the financial health of my company, I have reached to a conclusion that it is not possible for me to clear the outstanding by 28th February.

However, please find below the payment plan that is feasible for me:

Payments in January: Rs.52,00,000/- (Rs. 12,00,000/-) already paid.

Payments in February: Rs.40,00,000/-

Payments in March: balance to cleared as per the reconciliation statement."

7. Counsel for the plaintiff has contended that (i) if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend, even if triable issues or substantial defence is raised, shall not be granted unless the admitted amount is deposited by the

defendant in Court. Reliance in this regard has been placed on the judgment of the Supreme Court in ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd.***, (2017) 1 SCC 568; (ii) the admissions made by the defendant were unconditional and the Commercial Court has wrongly held that the admission was vague; (iii) no suit has been filed on behalf of the defendant in respect of the alleged commission due and therefore, the said defence is a sham defence; (iv) the suit is based on the invoices raised by the plaintiff on the defendant and is therefore, fully covered within the scope of a summary suit under Order XXXVII of the CPC; (v) the judgment of this Court in ***G.E. Capital Services India*** supra is no longer good law in view of the judgment of the Supreme Court in ***IDBI Trusteeship Services Ltd.*** supra. The judgment of the Bombay High Court in the case of ***Shree Sai Rent-A-Car Pvt. Ltd. Vs. M/s Sea Bird Tourist Centre,*** 2018 SCC OnLine Bom 4823, relied upon by the defendant was also delivered prior to the judgment of the Supreme Court in ***IDBI Trusteeship Services Ltd.*** supra and therefore, has no relevance; and (vi) the defendant himself had filed an application for modification of paragraphs 15 and 16 of the impugned order and the same is pending consideration before the Commercial Court.

8. *Per contra*, counsel for the defendant has questioned the maintainability of the present petition under Article 227 of the Constitution of India. It is contended that (i) the petition though disguised under Article 227 of the Constitution of India, is in the nature of an appeal filed against the impugned order; (ii) the plaintiff has failed to show any jurisdictional error in the impugned order so as to warrant interference by this Court in exercise of jurisdiction under Article 227 of the Constitution of India. Reliance is placed on the judgment of the Division Bench of this Court in

Black Diamond Trackparts Pvt. Ltd. & Ors. Vs. Black Diamond Motors Pvt. Ltd. 2021 SCC OnLine Del 3946 to question the maintainability of the present petition in the context of an order passed in a commercial suit.

9. Further, reliance is placed by the counsel for the defendant on the following emails exchanged between the parties to contend that the defendant was entitled to payment of commission from the plaintiff and the said payment of commission was not an afterthought:

(i) Email dated 18th February, 2008 from the plaintiff to the defendant attaching therewith the draft of an MoU to be entered between the parties, which envisaged payment of minimum guarantee from the plaintiff to the defendant. The relevant clause is extracted below:

> *"Minimum Guarantee:*
>
> *SPAN further assures MEGACARE of a minimum guarantee of 15% off the Net Sales price (Price Net of all applicable taxes) at all accounts (Combined) that MEGACARE supplies other than those listed in Annexure VII and such accounts that are added to this annexure in due course.*
>
> *However, this Minimum Guarantee is payable only if MEGACARE meets the purchase commitments as listed and defined in Annexure II. The Purchase Commitments defined in Annexure II excludes sales made to accounts separately listed in Annexure V during the periods of review: Year 1, Year 2 and Year 3."*

(ii) Email dated 10th October, 2011 from the plaintiff to the defendant, the relevant portion being set out below:

> *"As discussed, please go through the attached reconciliation details for your kind reference & action.*

If you require any further information/clarification, please feel free to contact me."

The reconciliation details referred to in the said email provided for a commission @ 15% from the plaintiff to the defendant.

(iii) Email dated 15th October, 2011 from the defendant to the plaintiff, in reply to the above email dated 10th October, 2011, the relevant portion being set out below:

> *"Please find the claim account sheet. There were too many anomalies in the sheet that you had sent which we have corrected.*
>
> *Also, kindly put the figures of the commission due to us on the accounts (in North India where the machines were placed/sold after 1st June 1997) where sales were made directly by Span."*

10. Reliance has also been placed by the defendant on the following emails exchanged between the parties:

(i) Email dated 13th April, 2017 from the plaintiff to the defendant, the relevant portion being set out below:

> *"Clearly, the settlement of the old credits (which you did not ask for) and the debits/interest (which we did not ask) for is one component and the one that we should address right away since it seems to be one of the reasons you are holding payments up (the other, likely –not having the money). My request is that we work to settle this first and then work to whittle down the amount due to us over time – I say this because I have little choice but to wait for your payment (of course, interest is accruing, but that is NOT the business SPAN is in).*

Therefore, I request you to make a trip to Bangalore with all the data you have available to close out this issue right away. We will clear our decks to ensure that in one working day, all the outstanding amounts are squared off and then only what is due from one party to the other remains: If I owe you money, I will pay you or provide you the kits you require and conversely, if after the settlement, you end up owing us an amount, well then, you find a way to pay us that PLUS the amounts due today. However, let us make this a priority rather than letting it linger unnecessarily until it becomes a big problem."

(ii) Email dated 19th December, 2016 from the defendant to the plaintiff, in response to the email dated 18th December, 2016 sent by the plaintiff to the defendant, as referred to above, the relevant portion being set out below:

"Further, if you would cross-check with the commission due to us, then the net outstanding would only be a lower side.

In the end, I can only request you not to stop the supplies but obviously that is your prerogative. Irrespective of your decision, I stand committed to pay you the outstanding amount at the earliest and latest by end of this current financial year."

(iii) Email dated 5th January, 2017 from the plaintiff to the defendant, the relevant portion being set out below:

"3. Span will send reconciliation to Megacare before the end of this week."

(iv) Email dated 13th January, 2017 from the plaintiff to the defendant, the relevant portion being set out below:

"Will certainly send you the reconciliation along with interest component but its not going to give any impact on your pending AR – rather will make some more additions.

> *So, please try to understand our really bad situation & help us to come out of this."*

(v) Email dated 25th February, 2017 from the plaintiff to the defendant, the relevant portion being set out below:

> *"Extremely sorry for delay in sending your reconciliation statement – the reason already told you & assure that the same will be sent within coming week!"*

(vi) Email dated 22nd June, 2017 from the defendant to the plaintiff, the relevant portion being set out below:

> *"In case of supplies being made directly by Span to any account in the north India territory (subject to excluded accounts)/or Delhi NCR region, as the case may be, Megacare shall be given 10% commission to be settled on annually basis."*

The aforesaid emails have been relied upon by the defendant to contend that (i) there were issues with regard to the payment of commission that was being discussed between the parties; (ii) there is no clear admission from the defendant to the plaintiff with regard to a specific amount being payable; (iii) the emails referred to above talk about a reconciliation statement to be prepared; (iv) in response to the email dated 4th November, 2016 relied by the plaintiff, the defendant had agreed to release money to the plaintiff only because the plaintiff was holding on to the supply of the goods to be made by the plaintiff to the defendant and there was no admission of liability in the said email; (v) even in respect of the email dated 13th January, 2017 relied upon by the plaintiff, no amounts were acknowledged to be due by the defendant to the plaintiff and the amounts would be determined subject to reconciliation and therefore, the contention of the plaintiff that payment of commission was an afterthought is completely wrong.

11. Counsel for the defendant also relies upon the judgment of the Bombay High Court in ***Shree Sai Rent-A-Car Pvt. Ltd.*** supra to contend that a claim for adjustment implies that there is no admission on behalf of the defendant. Reliance has also been placed on the judgment of this Court in ***G.E. Capital Services India*** supra to contend that suits filed under Order XXXVII of the CPC cannot be filed for claiming of balances as due on the basis of a statement of account. It is further submitted that the judgment in ***G.E. Capital Services India*** supra has not been overruled and continues to be good law. Reference is made to paragraph 21 of the plaint to contend that the amount claimed in the suit is based on the statement of account and the statement of account has been filed by the plaintiff along with the suit (attached at page 105 of the electronic file). Therefore, there is no infirmity in the finding of the Commercial Court that the suit is not maintainable under Order XXXVII of the CPC.

12. In rejoinder, counsel for the plaintiff contends that (i) the email dated 13th April, 2017 is not an admission on behalf of the plaintiff; (ii) the emails relied upon by the plaintiff demonstrate a clear admission of the amounts due from the defendant and no adjustments have been claimed by the defendant in his emails; (iii) only in respect of amounts payable in March, 2017, the same is subject to reconciliation; and (iv) judgment of this Court in ***G.E. Capital Services India*** supra is not applicable as in the said case the plaint was not based on invoices, whereas, the present suit is accompanied by all the invoices raised by the plaintiff on the defendant.

13. I have considered the rival contentions.

14. First, I will deal with the contention of the respondent with regard to the maintainability of the present petition under Article 227 of the Constitution of India. A Division Bench of this Court in ***Black Diamond*** supra has held that scope of interference by Courts in respect of orders passed in commercial suits is limited. The statute itself in Section 8 has barred the remedy of revision in respect of commercial suits, which was available in respect of ordinary suits. Therefore, the intent of the Commercial Courts Act, 2015 is that the commercial suits are decided in an expeditious manner and there is minimum interference with the orders passed in commercial suits, except where the statute itself provides a right of appeal. Undoubtedly, there cannot be any bar to petition being filed under Article 227 of the Constitution of India. However, the said remedy has to be exercised very sparingly. The Court in exercise of its jurisdiction under Article 227 of the Constitution of India is not sitting as a Court of appeal. The scope of interference is limited only to cases where the orders passed are perverse or without jurisdiction.

15. In the present case, the counsel for the plaintiff has strenuously drawn attention of the Court to various emails exchanged between the parties and has sought to read the said emails in a manner that demonstrates an admission of liability on behalf of the defendant. The Commercial Court has considered the various mails exchanged between the parties and come to the conclusion that there was no clear admission by the defendant of a specific amount that was due from the defendant to the plaintiff. In that view of the matter, in exercise of its jurisdiction under Article 227 of the

Constitution of India, this Court cannot re-appreciate the evidence in the form of the emails exchanged between the parties, to arrive at a different conclusion. Once again, it is emphasised that this Court is not sitting in appeal over the orders of the Commercial Courts. Even if a different view is possible, Article 227 of the Constitution of India cannot be invoked to interfere with the impugned order. In this regard reference may be made to ***Surya Dev Rai Vs. Ram Chander Rai and Ors.*** (2003) 6 SCC 675. The issues raised in the present petition are clearly beyond the scope of interference by this court in exercise of its jurisdiction under Article 227.

16. Be that as it may, I have examined the matter on merits. A perusal of the emails exchanged between the parties leads to the conclusion that a plausible defence has been raised by the defendant. In none of the emails exchanged between the parties, is there a clear and specific admission on the part of the defendant to a specific amount due. The emails dated 18th December, 2016 and 13th January, 2017 relied upon by the counsel for the plaintiff, only demonstrate that the defendant had agreed to pay certain amounts to the plaintiff as the plaintiff was blocking the supply of the goods to the defendant. But in the aforesaid emails, there is no clear-cut admission on behalf of the defendant to pay a specified amount. Further, the email of 18th December, 2016 was duly replied to by the defendant on 19th December, 2016 and a set-off with regard to the commission payable to the defendant was claimed. Various emails referred to by the counsel for the defendant also demonstrate that there was some reconciliation to be carried out between the parties before the final amount payable could be determined. Reference in this regard may be made to the email dated 13th April, 2017 from the plaintiff to the defendant where the plaintiff clearly acknowledges

that settlement/adjustment of old credits and debits needs to be done so as to determine the amount due from the defendant to the plaintiff.

17. From the above, the position that emerges is that there was an issue with regard to payment of commission that was raised by the defendant and that the same was subject matter of discussion between the parties. It is also clear that in none of these emails, a clear and categorical amount has been acknowledged by the defendant as being payable to the plaintiff. There is no merit in the contention of the counsel for the plaintiff that issue of the commission was raised only as an afterthought. The emails above were exchanged much before filing of the present suit and the defendant was claiming adjustment in respect of commission due to it from the plaintiff. The Bombay High Court in ***Shree Sai Rent-A-Car Pvt. Ltd.*** supra, taking into account the judgment of the Supreme Court in ***IDBI Trusteeship Services Ltd.*** supra has held that correctness or otherwise of adjustment as claimed by the defendant is a matter of trial. It was further observed that where the defendant has claimed adjustment of the amounts due and the basis is plausible, the correctness of the said adjustment as claimed by the defendant can only be established in the trial and the defendant in such a case, cannot be asked to deposit the amount in Court.

18. The counsel for the plaintiff has relied upon paragraph 17.6 of the judgment in ***IDBI Trusteeship Services Ltd.*** (supra), which is set out below:

> *"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."*

19. However, the said paragraph cannot be read in isolation and has to be read along with paragraphs 17.1 and 17.2 of the aforesaid judgment which are set out below:

> ***"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. In my view, the Commercial Court has rightly held that the defendant has raised triable issues indicating that he has a fair or reasonable defence and is therefore, entitled to unconditional leave to defend.

21. A reasonable doubt has also been created by the defendant with regard to maintainability of the present suit as a suit within the parameters of Order XXXVII of the CPC. This Court in ***G.E. Capital Services India*** supra, relying upon other judgments passed by this Court has laid down the principles to decide whether the suit is covered within the ambit of Order XXXVII of the CPC or not. Paragraph 11 of the aforesaid judgment is set out below:

> *"(i) Suits which are to be filed under Order XXXVII CPC, were as per the legislative intent, only those where the amount claimed in the suit is the same liquidated amount which arises as emerging/flowing directly from the written instrument which is the subject matter of the Order XXXVII suit, and, a civil court cannot under Order XXXVII CPC be called upon to look at various documents and various statements of accounts, spread*

over periods running into years, so as to determine how the amount due in the suit claimed is arrived at, and which amount is admittedly different from the amount contained in the written document(s).”

It was also observed therein that only when the liability is admitted in a written document containing the liquidated demand as payable to the plaintiff, suits can be filed under Order XXXVII of the CPC. Therefore, if the suit is based on acknowledgement of liability, that acknowledgement has to be that of specific liquidated amount.

22. Even though the present suit is based on unpaid invoices of the plaintiff due from the defendant, the ultimate amount claimed in the suit is based on a Statement of Account referred to in paragraph 21 of the plaint (attached at page 105 of the electronic file). Paragraph 21 of the plaint is set out below:

> *“21. Since no payments were made by the Defendant to the Plaintiff, the Plaintiff revived its claims for the entire outstanding amount. It is stated that after June, 2017, the Plaintiff has not made any further deliveries to the Defendant. As on June, 2017,* ***after adjusting all the payments due and payable to the Plaintiff, the Plaintiff is still entitled to recover a sum of Rs.82,86,379/- (Rupees Eighty Two Lacs Eighty Six Thousand Three Hundred and Seventy Nine Only).*** *”*

23. It is clear from the above that the amount claimed in the plaint is based on the Statement of Account filed with the plaint. It is neither based on an amount mentioned in any written instrument, nor on an acknowledgment of a liability of a specific liquidated amount by the defendant to the plaintiff.

24. In view of the above, no grounds for interference by this Court with the impugned order passed by the Commercial Court are made out in exercise of its jurisdiction under Article 227 of the Constitution of India. Dismissed.

25. Needless to state, that the observations made in herein are only in the context of leave to defend application filed by the defendant. The Commercial Court shall proceed with the adjudication of the suit uninfluenced by any observations made herein.

AMIT BANSAL, J.

NOVEMBER 09, 2021
dk/ak/sakshi