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

% **Date of decision: 8th December, 2021.**

\+ **CM(M) 512/2021 & CM No. 24501/2021 (for stay)**

GLOBAL FASHION UK LIMITED ..... Petitioners

Through: Mr. Harshvardhan Pandey, Advocate.

Versus

GLOBAL FABRIC GROUP & ORS. ..... Respondents

Through: Mr. Digvijay Rai, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

1. The present petition under Article 227 of the Constitution of India impugns the order dated 28th November, 2020 passed by the Additional District Judge (Commercial Court)-02 South East District, Saket Delhi in CS DJ no. 815/2018, whereby the application filed on behalf of the respondent no. 2 (hereinafter **defendant no. 2**) under Order XXXVII Rule 3(5) of the Code of Civil Procedure, (CPC), 1908, has been allowed and the defendant no. 2 has been granted unconditional leave to defend.

2. The plaint from which the present petition arises contains the following pleadings:

2.1 The petitioner company (hereinafter **plaintiff**) is based out of Hong Kong and is in the business of exporting different kinds of fabrics.

2.2 That the plaintiff supplied goods to respondent no. 1 (hereinafter **defendant no. 1 firm**), of which defendant no. 2 and 3 were partners;

2.3 Two invoices dated 31st August, 2017 and 10th December, 2017 in the amounts of USD 7,171.88/- and USD 73,544.07/- respectively, were issued by the plaintiff on the defendants in respect of the goods supplied by the plaintiff to the defendants.

2.4 Both the aforesaid invoices were signed/acknowledged by both defendants no. 2 and 3 in their capacity as partners of defendant no. 1 firm;

2.5 A letter dated 30th January, 2018 was sent by defendant no. 2 and 3 to their bankers for remitting the amounts due under the invoices to the plaintiff and the said letter was signed by both defendants no. 2 and 3. Thereafter, declarations were also filed under the Foreign Exchange Management Act, (FEMA), 1999, signed by both defendants no. 2 and defendant no. 3;

2.6 On the same date, viz. 30th January, 2018, when the defendants no. 2 and 3 had written to their bankers, a separate letter was issued by the defendant no. 2 to their banker to stop payments to the plaintiff;

2.7 A legal notice was issued by the plaintiff to the defendants demanding payment of arrears along with interest. Various email reminders were also sent by the plaintiff to the defendants in this regard, however, no reply was received from the defendants;

3. The present suit under Order XXXVII of the CPC was filed by the plaintiff against the defendants on 25th May, 2018 for recovery of USD 87,092.37/-, USD 80,715.95/- being the amount due as per the invoices and USD 6,376.42/- being the interest till the date of filing of the suit.

4. Defendant no. 1 firm and defendant no. 3 admitted the case of the

plaintiff.

5. On 18th July, 2018, an application under Order XXXVII Rule 3 (5) of the CPC was filed by defendant no. 2 seeking leave to defend. The said application was contested by the plaintiff by filing reply.

6. The Trial Court, vide the impugned order dated 28th November, 2020, granted unconditional leave to defendant no. 2 on the ground that the plea of collusion taken by defendant no. 2 if proven, may lead to a good defence.

7. Aggrieved by the impugned order, the plaintiff has filed the present petition.

8. The counsel for the plaintiff has made the following submissions:

(i) Admittedly, goods have been received by the defendants from the plaintiff.

(ii) There is a clear admission of debt by the defendant no. 2.

(iii) There is no material in support of the collusion theory set up by defendant no. 2.

(iv) Even if the collusion theory is to be believed, embezzlement out of the account of another partnership firm, M/s Eshnav Industries has nothing to do with the plaintiff company. Even if the funds were siphoned off, remedy of the defendant no. 2 would be to initiate legal proceedings against defendant no. 3 or the plaintiff company's director, Mr Vipin Dua, and that cannot be a ground for not releasing the payments to the plaintiff. Even if the collusion theory is to be believed

(v) Leave to defend should not have been granted in the present case as the defendant no. 2 has failed to show any substantive defence. The defence of the defendant no. 2 is completely sham and in the nature of moonshine.

(vi) Therefore, there is a patent error in the impugned order passed by the

Trial Court in which it has been noted that defendant no. 2 has a 'good' and 'plausible' defence.

(vii) New facts have been pleaded in the reply to the present petition which have not been taken by the defendant no. 2 in his leave to defend application.

9. The counsel appearing on behalf of defendant no. 2 submits:

(i) That defendant no. 2 had raised substantive pleas of collusion between Mr. Vipin Dua and defendant no. 3;

(ii) Funds from the account of M/s. Eshnav Industries, which has the same office as the defendant no. 1 firm, were siphoned off by the defendant no. 3 in collusion with Mr. Vipin Dua; and,

(iii) In respect of the suit amount, the bank account of the defendant no. 1 firm has already been directed to be frozen vide order dated 27th February, 2019 and therefore, the suit amount has been secured.

10. I have heard the counsels for the parties and perused the record.

11. In the present case, there is a clear admission of liability in respect of the suit amount by all the defendants, including defendants no.2. Admittedly, the goods were duly supplied by the plaintiff to the defendants. The defendants never questioned the invoices raised by the plaintiff and in fact wrote to their bankers to remit the invoice amount to the plaintiff.

12. Even if there was any collusion between Mr. Vipin Dua and defendant no. 3 to siphon off funds from M/s. Eshnav Industries, as claimed in the leave to defend application filed by defendant no. 2, the remedy

available to defendant no. 2/Ms. Eshnav Industries would be to initiate separate legal proceedings against Mr. Vipin Dua or defendant no.3 and this cannot be a ground for not releasing the funds to the plaintiff.

13. The Supreme Court in ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd.***, (2017) 1 SCC 568 has laid down the principles governing the grant of leave to defend under Order XXXVII of the CPC, which are as follows:

> *"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.*
>
> *17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.*
>
> *17.4.* ***If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing***

security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

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."

14. Applying the aforesaid principles in the facts and circumstances of the present case, in my view, the present case would fall under paragraph 17.4 above, as the defence raised by defendant no.2 appears to be plausible but improbable. The impugned order suffers from a manifest error on the face of the record and therefore, this is not a case where unconditional leave to defend should have been granted by the Commercial Court to the defendant no. 2.

15. Taking into account the facts and circumstances of the case and the order dated 27th February, 2019 passed by the Commercial Court in terms of which the bank account of defendant no. 1 has been frozen, it is deemed appropriate that the amount claimed in the suit of Rs.57,51,150.36/- is transferred from the aforesaid account of defendant no. 1 to the Commercial Court.

16. Accordingly, a direction is issued to defendant no. 4 to defreeze the account no. 35874629445 in SBI, Town Hall Branch, Delhi in the name of Global Fabric

Group (defendant no. 1) and to transfer a sum of Rs.57,51,150.36/- from the said account to the court of District Judge (Commercial Court)-02 South-East District, Saket, Delhi within two weeks from today. The said amount shall be kept in a fixed deposit by the Commercial Court till the final decision in the suit.

17. The counsel for the plaintiff requests that the plaintiff be allowed to withdraw the aforesaid amount subject to furnishing of security in the form of bank guarantee. This request cannot be considered in these proceedings as it is being made first time before this Court.

18. Plaintiff is given liberty to file an application in this regard before the Commercial Court which would be considered by Commercial Court in accordance with law.

19. The trial Court is requested to expeditiously decide the present suit.

AMIT BANSAL, J

DECEMBER 8, 2021
Sakshi R.