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



SUMMONS FOR JUDGMENT NO. 45 OF 2021
IN
COMM SUMMARY SUIT NO. 314 OF 2020
WITH
INTERIM APPLICATION NO. 1623 OF 2021

Naresh Manekchand Agarwal ...Applicant
**In the matter between**
Naresh Manekchand Agarwal ...Plaintiff
**Versus**
Rahul Vipanchander Aggarwal ...Defendant

Mr. Girish Kedia, for the Plaintiff.
Mr. Chirag Shah, a/w Mr. Akash Jain, i/b Mansukhlal Hiralal & Co., for the Defendant.

CORAM: N. J. JAMADAR, J.
DATED : 22nd AUGUST, 2022

ORDER:-

**1.** This commercial division summary suit is instituted for recovery of a sum of Rs.1,61,24,973/-, comprising of an amount of Rs.1,32,21,492/-, being the unpaid price of the goods sold and delivered, and interest thereon at the rate of 18% p.a.

**2.** The material averments in the plaint runs as under:

**(a)**The plaintiff is the sole proprietor of M/s. Goyal Traders. The plaintiff deals in the business of trading in steel materials.

The defendant is the proprietor of M/s. Vidhi Enterprises. The defendant is engaged in the manufacturing business.

(b) Pursuant to the orders placed by the defendant, over a period of time, the plaintiff claimed to have sold and supplied steel materials to the defendant by raising invoices during the period from 31st October, 2017 to 15th May, 2019. An aggregate amount of Rs.1,32,21,492/- became due and payable towards the price of the goods sold, supplied and delivered. The defendant, according to the plaintiff, accepted the delivery of the goods without any demur.

(c) The plaintiff avers the price of the goods, sold and delivered under each of the invoices, was to be paid within 60 to 70 days of the delivery of the goods. In the event of delay, it was agreed that, the defendant would pay interest on the unpaid price of the goods for the delayed period at the rate of 18% p.a. On account of delay, on the part of the defendant, the plaintiff claimed to have issued seven debit notes claiming an amount of Rs.29,03,481/- towards the interest component. The defendant, in turn, duly accepted and acknowledged the debit notes and even paid TDS thereon. The said amount was also reflected in the books of account of the defendant for which the defendant availed GST benefit as well. In addition, on 14th November, 2019, the defendant has issued an extract of ledger of the plaintiff maintained by the defendant confirming the balance of Rs.1,68,24,973/-. However, the defendant had paid a sum of Rs.7,00,000/- only, against the aforesaid outstanding amount. Hence, the plaintiff was constrained to address a legal notice on 15th October, 2020 calling upon the defendant to pay the outstanding amount along with further interest. In reply, the defendant did not contest the liability except making a bald assertion that there was no stipulation for payment of interest in the event of delay. Hence, this suit for recovery of unpaid price of the goods sold and delivered along with pre-suit and further interest.

**3.** The defendant appeared in response to the service of the writ of summons. Thereupon, the plaintiff took out a Summons for Judgment.

**4.** In the affidavit-in-reply seeking leave to defend the suit, the defendant has assailed the tenability of the instant suit under Order XXXVII of the Code of Civil Procedure, 1908 ("the Code"), on the ground that the claim is not based on a written contract. Though the plaintiff's claim is based on invoices yet there is no stipulation for payment of interest in the said invoices. The defendant contends that there have been business transactions between the plaintiff and the defendant since the year 2006. Transactions running into Crores of rupees were smoothly completed between the parties. In the year 2019, on account of stiff market condition, the defendant faced financial crunch. There was undue delay in receipt of payment from the defendant's customers and, resultantly, there was delay in payment by the defendant to the plaintiff. Taking undue advantage of the situation in which the defendant found himself, the defendant contends, the plaintiff fraudulently compelled him to sign statement of the plaintiff's ledger account, in defendant's books of account and coerced him to add interest. Since the contract does not contain a stipulation for payment of interest for the delayed period, on this count alone the defendant is entitled to an unconditional leave to defend the suit.

**5.** An affidavit-in-rejoinder is filed on behalf of the plaintiff controverting the contentions in the affidavit-in-reply.

**6.** I have heard Mr. Kedia, the learned Counsel for the plaintiff and Mr. Shah, the learned Counsel for the defendant, at some length. With the assistance of the learned Counsels for the parties, I have perused the averments in the plaint, documents annexed thereto, affidavit in support of Summons for Judgment and affidavit-in-reply seeking leave to defend the suit and rejoinder thereto as well.

**7.** Mr. Kedia would urge that the claim of the plaintiff that he had sold and delivered the goods, pursuant to the order placed by the defendant, has gone totally unimpeached. In the affidavit-in-reply, the defendant has made no endeavour to demonstrate that there was no sale and delivery of the goods, as claimed by the plaintiff. In any event, in the face of documents of unimpeachable character, the defendant could not have contested the sale and delivery of the goods. In this background, according to Mr. Kedia, the endeavour of the defendant to seek an unconditional leave to defend the suit by raising the defence of absence of stipulation for payment of interest on the price of the goods for the delayed period, is nothing but a sham or moonshine defence. In the face of clear and explicit confirmation of the balance in the ledger of the plaintiff, including the interest component, in the books of account maintained by the defendant, such defence cannot be said to be either fair or *bona fide*. Mr. Kedia would further urge that the contention of the defendant that he was compelled to make entries in the ledger of the plaintiff and acknowledge the liability to pay interest is unworthy of credence. Thus, the defendant does not deserve leave to defend the suit and, consequently, the suit deserves to be decreed.

**8.** In opposition to this, Mr. Shah, the learned Counsel for the defendant, laid emphasis on the conduct of the parties. A strenuous effort was made by Mr. Shah to draw home the point that there had been longstanding business relations between the plaintiff and the defendant, and, yet, when the defendant found himself in financial constraints, the plaintiff spread canard regarding the financial position of the defendant and thereby put paid to the prospects of the defendant tiding over the crisis.

**9.** Mr. Shah submitted with tenacity that the worth of the defence sought to be raised by the defendant is required to be appreciated through the aforesaid prism. From this standpoint, in the absence of a clear stipulation for payment of interest in the invoices raised by the plaintiff, the act of forcing the defendant to acknowledge the liability to pay interest by making entries in the ledger of the plaintiff surely raises a triable issue, submitted Mr. Shah.

**10.** Mr. Kedia, the learned Counsel for the plaintiff, joined the issue by canvassing a submission that the shallowness of the defence of absence of stipulation for payment of interest is betrayed by the fact that the defendant had not only acknowledged the liability to pay interest by confirming the balance in the books of account but also deducted tax at source (TDS). Both these entries, individually and cumulatively, sustain an action under Order XXXVII of the Code. Therefore, the defendant is not entitled to leave to defend the suit.

**11.** I have given anxious consideration to the rival submissions canvassed across the bar. The legal position as regards the leave to defend in summary suit instituted under Order XXXVII of the Code is fairly crystallized. If the defendant discloses, *prima facie*, fair and reasonable defence, ordinarily, the defendant is entitled to an unconditional leave. In contrast to this, if the defence raised by the defendant appears frivolous, false, or sham the leave to defend shall be refused, and the plaintiff is entitled to judgment. The controversy, however, arises in those matters where there is a doubt as to whether the defendant has raised a triable issue, and the nature of the conditions to be imposed, if the Court comes to the conclusion to grant conditional leave to defend.

**12.** On the aforesaid touchstone, reverting to the facts of the case, it is pertinent to note that the defendant has not made an endeavour to contest the claim of sale and delivery of the goods, even remotely. Nor there is any challenge to the quantity, quality and description of the goods which the plaintiff's claim to have sold and supplied to the defendant. Invoices (Exhibit-B1 to B5) coupled with the e-way bills render the claim of the plaintiff of sale and delivery of the goods beyond the pale of controversy. There does not seem to be much controversy over the fact that an amount of Rs.1,32,21,492/- became due and payable towards the price of the goods sold and delivered by the plaintiff.

**13.** The controversy between the parties revolves around the tenability of the suit on the basis of invoices and the alleged confirmation of the balance in the books of account including the liability to pay interest. To start with, under the invoices, the parties agreed, the price was to be paid after 60 days. It is however, imperative to note that the invoices do not contain a stipulation for payment of interest on the unpaid price beyond the said term of 60 days.

**14.** For this purpose, the plaintiff seeks to bank upon the debit notes (Exhibit-C1 to C7), extract of the ledger of plaintiff maintained by the defendant under his signature (Exhibit-E), and copy of TDS Certificate (Exhibit-D). In the ledger account of the plaintiff maintained by the defendant in the books of account of the defendant (Exhibit-E), it appears that on account of delay in payment of the price of the goods, interest was applied pursuant to the credit notes. This claim of the plaintiff, is further fortified by the fact that the TDS reconciliation, analysis and correction enabling system in Form 26-AS records that the defendant had deducted tax towards the interest which is payable to the plaintiff.

**15.** It would be contextually relevant to note that the defendant did not controvert either the maintaining of the ledger of the plaintiff nor the tax deduction at source. Instead, the defendant alleges subtle coercion at the hands of the plaintiff to give credit for the interest component in the ledger account of the plaintiff maintained by the defendant. Primarily, this submission on behalf of the defendant, does not appeal to human credulity. Two factors assume significance. One, the parties had specifically provided for the term of credit i.e. 60 days of the invoice. With the stipulation of term of credit, the liability to pay interest, in the event of delay, becomes a matter of an implied term of the contract. Two, the liability to pay interest was, in fact, clearly acknowledged by making entries in the ledger of the plaintiff.

**16.** Mr. Kedia, the learned Counsel for the plaintiff, was justified in placing reliance on a judgment of a learned Single Judge of this Court in the case of ***Sun and Sand Hotel Limited vs. M/s. V. V. Kamat, HUF***[1]***,*** wherein after adverting to the the previous pronouncements, the learned Single Judge held as under:

> "**33**. The judgments squarely apply to the present case. The authorities have uniformly held that an unconditional acknowledgment implies a promise to pay because that is the natural inference, if nothing is said to the contrary. In the present case there is no express agreement by the defendant to pay any amount to the plaintiff. The unconditional confirmation/acknowledgment of the Closing balance constitutes an implied promise by the defendant to pay the same. The suit is maintainable as a summary suit."

**17.** The case at hand, in my view, stands on a better footing. As indicated above, there is no denial of the factum of sale and delivery of the goods and the liability to pay the price therefor, in accordance with the invoices raised by the plaintiff. In the reply to the pre-suit notice, the only contention raised on behalf of the defendant was that there was no agreement to pay interest at the rate of 18% p.a. or at any other rate.

**18.** Undoubtedly, the invoices do not contain the stipulation for payment of interest, if the price remained outstanding beyond the term of credit. However, that is not the be all and end all of the matter. Even if it is assumed that there was no

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**1** 2003(3) Mh.L.J.

agreement to pay interest and the credit entries towards interest component in the ledger account of the plaintiff were not made with the free consent of the defendant, it cannot be said that the plaintiff is not at all entitled to claim and charge interest for the delayed payment, beyond the term of credit.

**19.** The case at hand, would be covered by the entitlement of the plaintiff to recover interest on the basis of the statutory right. Section 61 of the Sale of Goods Act, 1930 ("the Act, 1930") provides for payment of interest by way of damages and special damages. Sub-section (2) of Section 61 reads as under:

> "**Section 61 (1) .....**
>
> **(2)** In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price–
>
> (a) to the seller in a suit by him for the amount of the price– from the date of the tender of the goods or from the date on which the price was payable;
>
> (b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller– from the date on which the payment was made."

**20.** At best, the defendant can contest the rate at which interest shall become payable if it were to be held that the case would be covered by sub-section (2) of Section 61 of the Act, 1930. Should the interest be charged at the rate of 18% p.a., as claimed by the plaintiff, or at a lower threshold be then a matter which would warrant adjudication. However, that would not entitle the defendant to an unconditional leave to defend the suit.

**21.** In the totality of the situation, in my view, the instant case would be covered by paragraph 17.6 of the judgment of the Supreme Court in the case of ***IDBI Trsteeship Services Limited vs. Hubtown Limited***[2] as there is a clear admission of the liability to the extent of unpaid price of the goods, in the least, by sheer non-traverse. Hence, I am inclined to grant leave to the defendant on the condition of the deposit of sum of Rs.1,50,00,000/- to cover the principal amount and some portion of interest component.

**22.** Hence, the following order:

**: O R D E R :**

**(i)** The defendant is granted leave to defend the suit on the condition of deposit of sum of Rs.1,50,00.000/- within a period of eight weeks from the date of this order.

**(ii)** If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendant shall file his

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**2** (2017) 1 Supreme Court Cases 568.

written statement within a period of four weeks from the date of deposit;

**(iii)** If this conditional order of deposit is not complied with, within the stipulated period as mentioned earlier, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

**(iv)** Summons for Judgment accordingly stands disposed.

**(iv)** In view of the disposal of the Summons for Judgment, on the condition of deposit of the sum of Rs.1,50,00,000/-, which covers the substantial part of the claim of the plaintiff, in my view, no separate order is required to be passed in Interim Application No.1623 of 2021, for attachment before judgment, and, accordingly, IA/1623/2021 stands disposed.

[**N. J. JAMADAR, J.**]