

Sayali Upasani

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

COMMERCIAL SUMMARY SUIT NO. 1 OF 2021

JTB Jupiter Express Services Pvt. Ltd. ...Plaintiff

Versus

Om International Courier Cargo Service & ... Defendants
Anr.

Mr. Darshil Thakkar i/b Argud Partners, for the Plaintiff
None for the Defendants.

CORAM: N. J. JAMADAR, J.

DATED : 4th August, 2022

ORDER:-

1. This Commercial Division Summary Suit is instituted for recovery of a sum of Rs.3,01,33,794/- along with further interest at the rate of 21% per annum.

2. The plaintiff is a company incorporated under the Companies Act, 1956. The plaintiff is, *inter alia*, engaged in the business of International Courier Consolidation. The plaintiff acts as a middleman between the retail courier service providers, who are engaged in door to door delivery of parcels, and airlines. The defendant No.1 is a retail cargo courier service provider. The defendant No.2 to 4 are engaged in the day to day running of the business of defendant No.1.

3. The defendants approached the plaintiff and requested the plaintiff to provide credit facility and courier baggage consolidation services. An undertaking letter dated 24th May, 2010, came to be executed in favour of the plaintiff assuring therein that the amounts payable to the plaintiff under the invoice raised by the plaintiff would be paid within four weeks from the date of the invoice.

4. Over a period of time the defendants availed the services from the plaintiff, against which several invoices were raised. Since September, 2016, the defendants failed to make regular payments. For the period between September, 2016 to July, 2018, an aggregates sum of Rs.1,81,65,028/-, against 26 invoices, remained outstanding. As the defendant failed to pay the outstanding amount despite repeated requests and reminders, a legal notice dated on 8th February, 2019, was addressed calling upon the defendants to clear the outstanding amount. Thereupon, the defendants assured to pay a sum of Rs.1,25,000/- every fortnight. The defendants thus paid an amount of Rs.8,75,000/- from March, 2019 to September, 2019. On 2nd March, 2020, the defendant No.1 has acknowledged the liability to pay the sum of Rs.1,72,90,028/-.

5. As the defendants again committed default in payment, notice was addressed on 18th May, 2020, calling upon the defendants to pay the entire due amount. The said notice was followed by another legal notice dated on 31st July, 2020. Vide e-mail communication dated 3rd August, 2020, the defendant No.2 made a dishonest attempt to avoid the liability by raising false and frivolous contentions. Hence the suit.

6. An affidavit of service is filed Mr. Rajkumar J. Tiwari, the bailiff attached to the office of Sheriff of Bombay, that the writ of summons has been served on defendant Nos.1 to 4 on 2nd March, 2021. Postal acknowledgments evidencing the service of writ of summons are annexed to the affidavit.

7. None appeared for the defendants.

8. Thus, by an order dated 21st July, 2022, the suit was directed to be listed for *ex parte* decree.

9. The plaintiff has tendered an affidavit of evidence, affidavit of documents and compilation of documents.

10. I have heard Mr.Thakkar, the learned Counsel for the plaintiff. With the assistance of the learned Counsel, I have perused the averments in the plaint, documents annexed with it, affidavit of evidence of plaintiff's first witness Mr. Prashant

Shetty and the original documents tendered for the perusal of the Court.

11. As the defendants have not entered appearance despite the service of the writ of summons, under Order XXXVII Rule 2 (3), the allegations in the plaint are deemed to be admitted and the plaintiff becomes entitled to a decree. Nonetheless, I have considered the justifiability of the claim of the plaintiff.

12. The plaintiff asserts that it had acted as courier consolidator and rendered services to the defendant No.1, who is a retail cargo courier service provider. The business relationship, according to plaintiff, commenced with the execution of an undertaking on 24th May, 2010 (Exhibit P-1/2) which, according to Mr. Prashant Shetty, PW-1, is signed by defendant No. 2 Sunil B.Dhutia. The plaintiff claims that over a period of time, the services were rendered to, and paid for by, defendants. However, the amount covered by the invoices raised from 15th September, 2016 to 7th July, 2018 remained outstanding. This claim of the plaintiff is supported by invoices (Exhibit P-1/4 to P-1/29). It appears that the invoices were raised in regular course of business incorporating the terms of the contract between the parties. The invoices, *inter alia*, provide that interest at 21% per

annum will be charged on bills not settled within the stipulated period.

13. The claim of the plaintiff that as the amount remained outstanding, a notice was issued on 8th February, 2019 is supported by the office copy of notice (Exhibit P-1/31). The further claim of the plaintiff that eventually the defendants paid a sum of Rs.7,50,000/- and thereafter acknowledged the liability to the tune of Rs.1,72,90,028/-, as of 2nd March, 2020, is supported by the confirmation of accounts for the period of 1st April, 2019 to 2nd March, 2020. Mr. Prashant Shetty (PW-1) has put oath behind the assertion that the said confirmation of accounts dated 2nd March, 2020 (Exhibit P-1/32) is signed by Sunil B. Dhutia, Defendant No.2.

14. The material on record thus indicates that the claim of the plaintiff that for the services rendered by plaintiff to the defendant No.1, an amount of Rs.1,72,90,028/- remained due and the defendant Nos.1 and 2 had acknowledged the liability is sustainable. As the claim and the evidence in support thereof have gone totally unimpeached, I am persuaded to hold that the rendering of services, raising of invoices and incurring of the liability for the services rendered by the plaintiff and also the

acknowledgment of the said liability to the tune of Rs.1,72,90,028/- have been proved.

15. The question of liability of defendant Nos.2 to 4, however, warrants consideration. In the plaint, the plaintiff has asserted that the defendant Nos.2 to 4 are the persons engaged in day to day running of the business of defendant No. 1. The plaintiff, however, claimed that it was unaware of the exact nature and constitution of Om International Courier cargo services, defendant No. 1 firm. The plaintiff had sought the leave of the Court to amend the plaint upon determination of the exact nature and constitution of defendant No. 1.

16. In the affidavit of evidence also Mr. Prashant Shetty (PW-1) simply affirms that the defendant Nos. 2 to 4 are persons engaged in the day to day running of the business of defendant No.1. Neither the juridical status of the defendant No.1 i.e. whether a proprietorship concern, partnership firm or a company is disclosed. Nor the plaintiff positively asserts that the defendant Nos.2 to 4 are the partners of the defendant No. 1 firm or the directors of defendant No. 1 company. A bald assertion that the defendant Nos. 2 to 4 are engaged in day to day running of the business of defendant No.1 is of little significance.

17. It would be contextually relevant to note that the initial undertaking dated 24th May, 2010 (Exhibit-P-1/2) was executed by defendant No. 2, Sunil B. Dhutia. Likewise, the confirmation of accounts dated 2nd March, 2020 (Exhibit-P-1/32), which constitutes the basis of the summary suit, according to Mr.Prashant Shetty (PW 1), has also been executed by defendant No.2 Sunil Dhutia. These facts are required to be considered in conjunction with the reply dated 3rd August, 2020 (Exhibit-P-1/35) addressed by defendant No. 2 Sunil Dhutia. In the said reply the defendant No. 2 categorically asserts that Sunil is the sole proprietor of the defendant No. 1 and the notice has been wrongly addressed to defendant No. 3 Bela Dhutia and defendant No.4 Dharmendra Dhutia. Thus, it can be legitimately inferred that the defendant No.1 is the proprietary firm of defendant No.2 Sunil. Resultantly, it would be justifiable to pass the decree against the defendant Nos. 1 and 2 only.

18. Hence, the following order:

ORDER

- (I) The suit stands decreed as against defendant Nos. 1 and 2.
- (ii) The defendant Nos. 1 and 2 do pay an amount of Rs.3,01,33,794/- along with further interest at the rate of 9% per annum on the principal sum of

Rs.1,72,90,028/- from the date of the suit till payment and/or realization.

- (iii) The defendant Nos. 1 and 2 do pay the costs of the suit.
- (iv) The suit stands dismissed against defendant Nos. 3 and 4.
- (v) The plaintiff is entitled to refund of Court fees, if any, in accordance with rules.
- (vi) Decree be drawn and sealed expeditiously.

[N. J. JAMADAR, J.]