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

SUMMONSES FOR JUDGMENT NO.64 OF 2019
IN
COMMERCIAL SUMMARY SUITS 1042 OF 2019

M/s. Copper Star General Trading LLC ...Applicant
In the matter between
M/s.Copper Star General Trading LLC ...Plaintiff
vs.
1] JSK Industries Private Limited
2] State Bank of India ...Defendants

Mr. Sheelang Shah a/w Mr. Manthan Unadkat i/b. Unadkat & Co. for the Applicant - Plaintiff.
Mr. Ashish Kamat, a/w Mr. Harsh Moorjani and Mr. Ganesh Muthry, i/b K.V. Aiyan & Associates, for Defendant no.1.
Mr. Anup Khaitan, a/w Mr. Nilesh Trivedi, for Defendant no.2.

CORAM : N.J. JAMADAR, J.
RESERVED ON : 25th JULY, 2022
PRONOUNCED ON : 2nd AUGUST, 2022

ORDER :

1. This Commercial Division Summary Suit is instituted for recovery of a sum of USD 213,722.31 along with interest, being the price of the goods i.e. primary Aluminum Sow, sold and delivered by the plaintiff to defendant No. 1, on the faith of the letter of credit issued by defendant No. 2.

2. The material averments in the plaint can be summarized as under:-

a] The plaintiff is a company incorporated under the laws of UAE. It is engaged in the business, inter alia, of distribution, trade, export and supply of various goods and materials. Defendant No. 1 is a company incorporated under the Indian Companies Act, 1956 and is engaged in the business, inter alia, of manufacturing aluminum conductors, aluminum wire rods, alloys and coils. Defendant No. 2 is a bank.

b] The defendant No. 1 had placed an order for supply of 400 MT of primary Aluminum Sow- 99.75% at the provisional rate of 2,315 USD/MT. Post negotiations, the plaintiff agreed to supply to defendant No. 1 240.470 MT of primary Aluminum Sow (the goods) at the rate of 2238 USD/MT amounting to USD 538,171.86. The plaintiff raised a Commercial Invoice on defendant No. 1 dated 24th May, 2018. The defendant No. 1 opened a Letter of Credit (LC) bearing No. 06070181M0000260 dated 24th May, 2018, issued by defendant No. 2 bank for an amount of USD 926,000.00 maturing on 28th December, 2018.

c] Under Bill of Lading dated 1st July, 2018, 500 Ingots of the goods weighing 240.470 MT were shipped by the plaintiff from Jabel Ali Port on 1st July, 2018. The consignment arrived at Nhava Sheva Port on or about 5th July, 2018. Proclaim Insurance Surveyors and Loss Assessors Private Limited (the surveyor) reported a short shipment of the goods to the tune of 146.50 MT. The said short shipment was duly acknowledged by the plaintiff. Post discussion, it was mutually agreed between the plaintiff and defendant No. 1 that the defendant No. 1 would pay to the plaintiff a sum of Rs. USD 213,722.31. However, vide Swift Message dated 18th September, 2018 the defendant No. 2 informed the plaintiff's bank that consignment passed through Iranian Ports/ Customs and, since the Bar Code revealed that the consignment was of Iranian manufacturer, defendant No. 2 was unable to handle the transaction in view of clause 47A(16) of LC and sanctions imposed by the United States of America, vide Executive Order dated 6th August, 2018 issued by the President of USA.

d] The plaintiff addressed a notice to the defendant No. 1 on 20th December, 2018 and called upon the defendant No. 1 to either pay USD 213,722.31 or return the goods to the plaintiff. Upon communication by the plaintiff, the defendant No. 2, gave no objection to defendant No. 1 to make payment through any other AD-1 bank. Thereupon, the plaintiff again called the defendant No. 1 vide legal notice dated 8th February, 2019 to pay the unpaid price of the goods i.e. USD 213,722.31 along with interest at the rate stipulated in the invoice or return the goods. In the reply dated 28th February, 2019 the defendant No. 1 raised false, frivolous and baseless contention to avoid its liability. However, defendant No.1 has explicitly admitted indebtedness to the extent USD 213,722.31. Since the defendant No. 1 has acknowledged and accepted the delivery of the goods and even utilized the goods, the defendants are enjoined to pay the price of the goods. Hence, the suit.

3. The defendant Nos. 1 and 2 appeared in response to the service of the writ of summons. Thereupon, the plaintiff has taken out the Summons for Judgment. The defendant No. 1 has filed an affidavit in reply and sought an unconditional leave to defend the suit.

4. At the outset, the tenability of the suit under the provisions of Order 37 of the Code was put in contest. The suit allegedly suffers from the vice of suppression of material facts. In fact, the plaintiff is guilty of fraud in as much as the plaintiff had in breach of the terms of the contact supplied the goods originating from a source different than the one mentioned in the Bill of Lading and Certificate of Origin of the goods. Moreover, the goods delivered by the plaintiff, were significantly short in quantity. The short supply of the goods was a whopping 62% of the agreed quantity. The defendant No. 1 had neither placed an order for goods originating from Iran nor the

Letter of Credit was opened for goods of Iranian origin. The defendant No. 2 bank was thus justified in refusing to encash the Letter of Credit as the supply of the goods originating from Iran was in clear breach of terms of the contract between the parties as well as the terms and conditions subject to which the Letter of Credit was issued. For the said short supply and supply of goods originating from a source different than the one represented by the plaintiff, the defendant has a valid counter claim of USD 194,834.31.

5. The defendant No. 1 further contends that since the plaintiff failed to take back the delivery of the goods, supplied in breach of the contract, the defendant No. 1 was constrained to consume the said goods, after waiting for over six months, with a view to mitigate damages. The defendant No. 1 has a claim for damages to the tune of USD 405,139.17. The defendant No. 1 is ready and willing to return the equivalent quantity if the claim for damages of USD 405,139.17 is satisfied. Thus, the defendant No. 1 has a very strong and substantive defence to the plaintiff's claim. Therefore, the defendant No. 1 deserves an unconditional leave to defend the suit.

6. The defendant No. 2 has also filed an affidavit in reply seeking unconditional leave to defend the suit. The defendant No. 2 contends

that the plaintiff had deliberately shipped the goods sourced from Iran and defendant No. 2 was fully justified in not honoring the Letter of Credit as the fraud was unearthed.

7. An affidavit in rejoinder is filed on behalf of the plaintiff controverting the allegations of deliberate short supply and fraudulent supply of the goods originating from Iran.

8. In the wake of aforesaid pleading, I have heard Mr. Sheelang Shah, learned counsel for the applicant/ plaintiff and Mr. Ashish Kamat, learned counsel for defendant No.1 and Mr. Anup Khaitan, learned counsel for defendant No.2. With the assistance of the learned counsels, I have also perused the material on record.

9. Mr. Shah, learned counsel for the plaintiff would urge that the claim of the plaintiff is, in a sense, incontrovertible. The contract for sale is admitted. The sale and delivery of 93.970 MT of goods is indisputable. The defendant No. 1 admits in no unequivocal terms that the said quantity of the goods was consumed by defendant No. 1. The price at which the goods were to be paid for is also indisputable. Moreover, in the reply to the legal notice dated 28th February, 2019 and in the affidavit in reply there are categorical

admissions that the plaintiff is entitled to claim USD 213,722.31 being the price of the goods sold and delivered by the plaintiff to defendant No. 1. The fact that the defendant No. 1 has laid a claim of USD 194,834.31 towards damages, after set off, of the suit claim of USD 213,722.31, in itself, constitutes an implied admission of the liability. Thus, the defendant No. 1 is not entitled to leave to defend the suit and the plaintiff is entitled to a decree, submitted Mr. Shah.

10. As against this, Mr. Kamat, learned counsel for defendant No. 1 assailed the very tenability of the suit on the ground that the submissions now sought to be canvassed do not constitute the basis of the summary suit. On the contrary, the summary suit, as is evident from the averments in paragraph 14 of the plaint, is based on the Letter of Credit opened by defendant No. 1 with defendant No. 2 bank. Therefore, the plaintiff cannot permitted to rest his claim on the ground of implied admission. It was forcefully submitted by Mr. Kamat that the claim of the plaintiff is rooted in an egregious illegality. Not only the plaintiff is guilty of short supply of the goods but the plaintiff is also guilty of fraud in as much as the goods originating from Iran were shipped in contravention of the express representation and stipulation in the Bill of Lading. Inviting the attention of the Court to Surveyor's Report and the stipulations

in the Letter of Credit (LC), Mr. Kamat would urge that in such a situation, when a party resorts to an illegality, the loss should be allowed to rest where it falls.

11. Mr. Kamat joined the issue of implied admission by canvassing a submission that defendant No. 1 has claimed damages not only for the short supply of the goods but also for the supply of goods originating from Iran in breach of the terms of the contract between the parties. In the circumstances, an assertion in the reply to the legal notice and affidavit in reply that the defendant No. 1's claim far exceeds the suit claim cannot be construed as an admission of liability so as to support a decree under Order 37 of the Code.

12. Mr. Anup Khaitan, learned counsel for defendant No. 2 submitted that the defendant No. 2 bank based on the report of the Surveyor and the documents on the record was wholly justified in refusing to act on the Letter of Credit as the supply of the goods originating from Iran was in clear breach of the terms and conditions of Letter of Credit. Therefore, Mr. Khaitan would urge that the impleadment of defendant No. 2 in the instant suit is wholly unwarranted.

13. I have carefully considered the pleadings and documents on

record and given anxious consideration to the aforesaid submissions canvassed across the bar.

14. First and foremost, the challenge to the tenability of the suit under Order 37 needs to be considered. From the perusal of the averments in the plaint, prima facie one gets an impression that the summary suit was instituted on the basis of Letter of Credit opened by defendant No. 1 with defendant No. 2. At the same breath, in paragraph 14 of the plaint, in addition to the reference to the Letter of Credit, it is asserted that defendant No. 1 admitted the liability to the extent of USD 213,722.31 and thus the suit falls within the ambit of Order 37 of the Code.

15. As indicated above, an earnest endevour was made on behalf of the plaintiff, to rest the claim on the basis of the alleged admission of the liability. Before considering the contentions in the reply to the legal notice dated 20th August, 2019 and the affidavit in reply, which allegedly constitute implied admissions of liability and furnish a sustainable ground for a summary suit, it may be apposite to note few facts which emerge from the documents on record.

16. The Commercial Invoice raised by the plaintiff dated 12th May,

2018 indicates that 240.470 MT of goods were agreed to be supplied at a unit price of 2238 USD/MT. The country of origin was shown UAE. The consignment was to be dispatched from Jebel Ali, UAE. It was to be unloaded at Nhava Sheva, India. The Packing List indicates that the consignment was to be transported in 10 containers and the net weight of the goods was 240,470 kgs. They were to be dispatched from Jebel Ali, UAE to Nhava Sheva, India. The Certificate of Origin dated 2nd July, 2018 indicates that the goods originated from UAE. The Combined Transport Bill of Lading also indicates that the place of loading was Jebel Ali, UAE. The net weight of the goods shipped on board was 240,470 kgs.

17. In this backdrop, it would be contextually relevant to note that the Surveyor's report dated 31st July, 2018 and the addendum thereto, indicated that there was short supply of the goods to the tune of 146.500 MT. The surveyor noted that four containers were embossed with letter "IRICA" which appeared to be acronym for 'Islamic Republic of Iran Custom Authority'/Administration. It was further noted that the shipper's representative who was present during survey spoke to the shipper's office at Dubai and it was acknowledged that it was a case of short shipment and they would make good all losses/damages to the consignee. In this context, after

being apprised, the defendant No. 2 bank declined to further process the Letter of Credit as in view of the UN Resolution/EU/US Sanctions and Executive order dated 6th August, 2018 by the President of USA, they were unable to handle the said transaction.

18. The situation which thus obtains is that firstly there was a short shipment to the tune of 146.500 MT. The short shipment far exceeded the quantity of goods actually delivered. Secondly, there was material to indicate that the consignment originated from Iran. This is required to be appreciated in the light of entries in the mercantile documents, which showed that the goods originated from UAE and the plaintiff had certified that the goods originated from UAE.

19. Mr. Shah, the learned counsel for the plaintiff would urge that, notwithstanding the short supply, since the defendant No. 1 had accepted the delivery of the goods and even consumed the goods, the defendant No. 1 is liable to pay for the price for the goods. Since there is a categorical admission both in the reply to the legal notice and the affidavit in reply, a decree must follow. Attention of the Court was invited to the following averments in the reply to the legal notice.

> 3.12 .... Our clients vehemently deny that our clients have made profits out of sale and/or consumption of the said goods without making payment of USD 2,13,722.31 to your clients. As out clients have already in their reply dated 24th December, 2018 made their claim for damages of USD 4,05,139.17 and thus as on date, out clients is a net creditor of your clients to the tune of USD 1,94,834.31.

20. Mr. Shah further invited the attention of the Court to the following contentions in the affidavit in reply.

> I say that this defendant has a valid counter claim of USD 194834.31 against the plaintiff after setting off the suit claim of the plaintiff for USD 213722.31 and this defendant has a lien on the material/goods in its possession and unless this defendant's claim is settled the question of return of the material does not arise as alleged or at all.
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> ....
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> This defendant received the suit goods on 02-08-2018 and waited for the plaintiff to settle its claim and take back the material, but since the plaintiff failed to take back the material after paying this defendant's claim for damages for USD 405139.17, this defendant was in the circumstance compelled to consume the suit goods in its plant after waiting for over 6 months with a view to mitigate the claim for further damages. However, this defendant is ready and willing to return the material equivalent quantity after getting this defendant's claim for damages for USD 405139.17.

21. Mr. Shah banking upon the aforesaid contentions, strenuously urged where set off is claimed, the liability cannot be disputed. A strong reliance was placed on a judgment of this Court in the case of **Sun N Sand Hotel Limited vs. M/s. V.V. Kamat, HUF**[1]. In the said case, this Court considered the question as to whether a suit based

1 2003 Vol. 105 (1) Bom.L.R. 625

on balance confirmation letter is maintainable as a “summary suit”. After adverting to the previous pronouncements, a learned single Judge of this Court held that,

> “.... .... 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 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.”

22. The aforesaid submissions are required to be appreciated in the light of the peculiar facts of the case at hand. To begin with, indisputably the short shipment was far in excess of the goods which were, in fact, delivered. In accordance with the provisions contained in section 37 of the Sale of Goods Act, 1930, where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate. Under sub section (3) of section 37 of the Act, 1930, where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

23. Ordinarily, in the matter of short supply, the proportion of short supply to the quantity agreed to be supplied assumes significance. Undoubtedly, the buyer has a right to reject the goods if there is a short supply. However, the said right cannot be construed absolute and *de hors* the quantity of short supply. Where the deficiency or excess in quantity, is minimal or insignificant in proportion to the quantity agreed to be sold, the buyer cannot be considered to have an unfettered right to reject the goods. The principle *'de minis non curat lex'* may come into play. In such a case, the Court will not allow the buyer to take advantage of trivial difference in the quantity, if the delivery is substantially of the agreed quantity. However, where the difference is substantial the buyer would be justified in resorting to section 37(1) of the Sale of Goods Act, 1930. It cannot be urged that, in no case short supply is of consequence. In a given case, timely supply of specified quantity of goods may be of critical mercantile significance. In the case at hand, as indicated above, the short supply was in the range of 60% of the named quantity.

24. On the aspect of supply of the goods of a different description i.e. originating from a different source, Mr. Shah attempted to salvage the position by canvassing a submission that apart from

surveyor's report, there is no other material to show that the goods originated from Iran. At this juncture, prima facie, there does not seem any justifiable reason to question the veracity of the assessment of the surveyor. In any event, it would be a matter for trial. However, two circumstances assume critical importance. First, there is no categorical assertion either in the plaint or in the affidavit in rejoinder that the goods in question were manufactured by an entity based at UAE. On the contrary, in the affidavit in rejoinder, the plaintiff has asserted in clear and explicit terms that the plaintiff has initiated appropriate proceedings against the root supplier of goods in branch 221 of Iran General Court. Mr. Kamat was justified in canvassing a submission that if the plaintiff has initiated action against the supplier in Iran, the plaintiff cannot be heard to urge that the goods did not originate from Iran and were procured at UAE.

25. The submission on behalf of the plaintiff that since the delivery of the goods in part and utilization thereof is incontestible, the defendant No. 1 must pay for them, may carry some susbtance. However, the contentions in the reply to the legal notice and affidavit in reply (extracted above), which according to the plaintiff constitute implied admission, cannot be considered *de hors,* the

aforesaid aspects of substantial short supply and mis-discreption, in the sense of supply of the goods originating from an entity which allegedly faced trade restrictions. The later aspect cannot be considered to be wholly immaterial or inconsequential in mercantile transactions. The contentions extracted above, therefore, cannot be construed as an implied admission of liability in the strict sense of the term. From this stand point, the defences raised by the defendant No. 1 cannot be said to be sham or moonshine. On the contrary, both the defences of short supply and the supply of the goods of a different origin, for which the defendant No. 1 allegedly has a claim in damages, appear to be strong and substantial defences.

26. For the foregoing reasons, I am persuaded to hold that the defendants deserve an unconditional leave to defend the suit.

Hence, the following order.

ORDER

1] The Summons for Judgment stands dismissed.

2] The defendant Nos. 1 and 2 are granted unconditional leave to defend the suit.

3] The defendant Nos. 1 and 2 shall file the written statement within a period of six weeks from today.

(N.J.JAMADAR, J.)