

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13604 OF 2022

Yash Metals Impex Private Limited
Through its Director
Yashpal Bhawanilal Picholiya

.. Petitioner
(Orig. Defendant)

Versus

Kothari Metals Limited

.. Respondent
(Orig. Plaintiff)

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- Mr. Hrushi Narvekar i/by E.A. Sasi for Petitioner.
 - Ms. Tanjul Sharma i/by Dhruve Liladhar & Co. for Respondent.
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 30, 2023.

P.C.:

1. Heard Mr. Narvekar, learned Advocate for the Petitioner and Ms. Sharma, learned Advocate for Respondent for some time.

2. Perused the impugned order dated 15.09.2022 passed by the learned Trial Court in Summons for Judgment No.153 of 2017 in Summary Suit No.464 of 2017. Petitioner is original Defendant and Respondent is original Plaintiff before the learned Trial Court. The Plaintiff has taken out the Summons for Judgment against the Defendant for recovery of the principal amount of Rs.30,00,000/- and interest thereon. The Defendant has contested the Summons for Judgment.

3. Briefly stated the facts are as hereunder:-

3.1. The Plaintiff company is an importer and dealer of non-ferrous metals. Plaintiff supplied 6 MT Primary Nickel amounting to Rs.87,53,405/- to the defendant in the month of June, 2014. Plaintiff issued invoice dated 10.06.2014 for the aforesaid amount. Plaintiff contends that defendant accepted the said goods and assured payment against the same.

3.2. Plaintiff contends that for this transaction, defendant issued in nine (09) cheques, details of which are provided in para No. 3 of the plaint. Plaintiff contends that out of the 09 cheques, 06 cheques, all dated 06.08.2014 were honoured, however three (03) cheques, of Rs.10 lakhs each, all dated 19.08.2014 were dishonoured. Plaintiff therefore called upon defendant to make payment of the said amount of Rs.30 lakhs.

3.3. Plaintiff also approached the Bombay Non Ferrous Metals Association Ltd. ("the Association" for short) and sought resolution of the dispute by way of mechanism of arbitration provided under the Bye-laws of the Association. In the said arbitration hearings, defendant agreed to pay Rs.25 lacks to the plaintiff, however later on he resiled from his promise. Therefore, legal notice for recovery of amount was issued on 06.02.2017. The notice was replied on 06.03.2017 thereby denying the liability. Hence Summary Suit was filed and Summons for

Judgment was taken out and was made absolute in the Summary Suit proceedings.

4. Mr. Narvekar, learned Advocate appearing for the Petitioner would argue that Summons for Judgment was contested by the Defendant on the ground that there was a subsequent transaction in the month of December 2014 between the same parties, whereby Defendant supplied 'Mercury' to the Plaintiff vide invoice dated 27.12.2014 and was to receive a payment of Rs.30,08,487/- for the same, which according to him remained due and outstanding from the Plaintiff. He would submit that Defendant therefore raised a set off as defence in the Summons for Judgment, *inter alia*, submitting that Defendant therefore stopped payment of the remaining three cheques (noted hereinabove all dated 19.08.2014) in view of this subsequent transaction. He would further submit that in support of the subsequent transaction, Defendant has a strong case and would rely upon the account balance confirmation which was received from the Plaintiff itself. He is further aggrieved with the finding in the impugned order that the defence of set off taken by Defendant is not maintainable and submits that the same is incorrect and contrary to law. He submitted that the subsequent transaction pertaining to trading of Mercury was for the first time transacted with the Plaintiff in the second week of August, however he has not been able to show any material or

document to me in that respect. He would however contend that by virtue of the provisions of Order XIII Rule 6 of the Code of Civil Procedure, 1908, defence of set off is squarely maintainable and it would be up to the Trial Court to consider the issue and adjudicate the same on merits.

5. Be that as it may, at this stage, it would not be necessary for me to go into the merits of the two transactions between the parties for considering any set off.

6. Mr. Narvekar has not shown any documentary evidence, *inter alia*, pertaining to the second transaction of 'Mercury' having being traded between the parties, which would enable the Defendant to stop payment of the earlier three cheques (all dated 19.08.2014), which according to Ms. Sharma in fact pertain to the transaction of 'Nickel' in the month of June / August 2014.

7. Mr. Narvekar has further submitted that Defendant has filed a substantive Long Cause Suit No.83 of 2018 in the City Civil Court, Mumbai in respect of the outstanding amount raised vide invoice dated 27.12.2014 for the amount of Rs.30,08,486/- against the Plaintiff, which is the subsequent transaction for Mercury between the parties.

8. Both the learned Advocates are *ad idem* that if the decision in the Summary Suit is adjudicated, the same would govern the issue

and cause of action in the Long Cause Suit which is filed in the City Civil Court, Mumbai, but however is listed before a different Court.

9. Both the learned Advocates have made a joint request that the Long Cause Suit be transferred to be heard by the Court hearing the present Suit No.464 of 2017 in the City Civil Court, so as to enable the parties to prosecute the same effectively.

10. In view of the above observations and findings, after hearing the parties the following order is passed:-

- (I) The impugned order is sustained;
- (ii) The learned Principal Judge of City Civil Court, Mumbai is directed to transfer Long Cause Suit No.83 of 2018 to the Court of the learned Judge hearing Summary Suit No. 464 of 2017;
- (iii) Both the aforesaid Suits shall be heard by the same Court;
- (iv) Suit No.464 of 2017 shall be heard first and decided;
- (v) The learned Trial Court is requested to dispose of Summary Suit No.464 of 2017 within a period of four (4) months from today;
- (vi) The amount of Rs.25,00,000/- (Rs. Twenty Five Lacs

only) deposited in this Court shall be transferred to the Trial Court in the account of the Summary Suit;

(vii) The learned Trial Court shall not be influenced by any observations and findings in the impugned order, the present order and more specifically with the finding that the defence of set off is not maintainable as stated in the impugned order at the time of deciding Summary Suit No.464 of 2017 and the same shall be decided strictly on its own merits and in accordance with law;

(viii) All contentions of both parties are expressly kept open.

11. This order is not passed on any merits of the matter.

12. With the above directions, Writ Petition is disposed.

[MILIND N. JADHAV, J.]

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