IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.2 OF 2023
IN
COMMERCIAL SUMMARY SUIT NO.45 OF 2021

Bengal Mills Stores Supply Company (Bombay))…Plaintiff

Vs.

Oriental Manufactures)…Defendant

Mr. Mitesh V. Bhutekar with Ms. Gargi Warunjikar and Mr. Aniket Nangare, Advocates for the Plaintiff.

Mr. Manmohan Rao, Advocate for the Defendant.

CORAM : ABHAY AHUJA, J.

DATE : 11 DECEMBER, 2023.

P.C. :

1. The suit is filed by the Plaintiff as a Summary Suit praying for a decree of sum of Rs.1,35,68,557.44 with interest at the rate of 24% p.a. from the date of filing of the suit till actual realization.

2. The Defendant has entered appearance within the stipulated period, whereafter the Summons for Judgment has been taken out by the Plaintiff. An Interim Application had been taken out under Order VII Rule

11 of the Code of Civil Procedure, 1908 (CPC) by the Defendant which has been rejected by order dated 6th November, 2023 and that is how the Summons for Judgment has been listed for hearing today. Reply and Rejoinder have been filed.

3. It is the case of the Plaintiff that the Defendant had placed various purchase orders with the Plaintiff and the Plaintiff in pursuance of the said purchase orders used to supply/dispatch the materials to the Defendant as per the said purchase orders in regular course of business. After placing the purchase orders with the Plaintiff, if there were any amendments to the same, the Defendant would send letters of intent and/or emails with the specifications of the materials/requirement and the Plaintiff would accordingly dispatch material. Thereafter, the Plaintiff would raise tax invoices in respect of the materials dispatched to the Defendant. According to the Plaintiff materials were supplied to the Defendant through ANIR Transport Company at the addresses given by the Defendant. Accordingly, from 10th November, 2016 to 22nd November, 2016 there were 8 purchase orders/ letters of intent placed by the Defendant with the Plaintiff. According to the Plaintiff in pursuance of the purchase orders and the letters of intent, the Plaintiff supplied material of

Rs.81,90,385/- to the Defendant and the Plaintiff from time to time has raised tax invoices from 23rd November, 2016 to 15th December, 2016 which are annexed to the Plaint as Exhibits. It is submitted that the said amount tallies with the ledger account of the Defendant maintained in the books of accounts of the Plaintiff.

4. The Plaintiff submits that the Defendant had at no point of time raised dispute about the quality and quantity of the goods supplied to the Defendant and that the Defendant had received the goods as supplied by the Plaintiff and accepted the same. That despite this, Defendant has willfully neglected to pay the said amount to the Plaintiff.

5. Mr. Bhutekar, learned counsel for the Plaintiff would submit that the Plaintiff sent various reminders to the Defendant and also addressed a letter dated 28th December, 2016 alongwith the copy of the ledger accounts of the Defendant in the books of the Plaintiff. The Plaintiff had issued a debit note against the Defendant vide letter dated 31st January, 2017 and also reminded the Defendant that if the Defendant failed to pay, then interest at the rate of 24% would be charged. It is submitted that no reply was received from the Plaintiff. Therefore, letter dated 2nd

February, 2017 was addressed by the Plaintiff to the Defendant and Defendant was also informed that the debit note of 31st January, 2017 was confirmed by one Mr. Tej from the office of the Defendant. It is submitted that the Plaintiff had also provided summary of the accounts alongwith the said letter. Thereafter, it is submitted that the Plaintiff addressed letters dated 15th August, 2017 and 6th May, 2017, however no any reply had been received. It is submitted that the Plaintiff once again issued a debit note dated 19th June, 2017 for Rs.9,92,796/- and also addressed letter dated 19th June, 2017 requesting the Defendant to make payment. Thereafter, letters dated 4th July, 2017 and 4th August, 2017 were also addressed to the Defendant.

6. It is submitted that the Defendant replied to the letter dated 4th August, 2017 vide reply dated 15th September, 2017 and for the first time a dispute with respect to the material and the test certificate was raised. The Plaintiff replied by letter dated 18th September, 2017 to the aforesaid communication of the Defendant.

7. However, since no payment was forthcoming, the Plaintiff sent a legal notice dated 11th September, 2017 to the Defendant and the

Directors of the Defendant company demanding the outstanding payment. The Defendant replied to the said legal notice on 7th October, 2017 and disputed the claim of the Plaintiff. Thereafter, the Plaintiff also replied by letter dated 4th November, 2017 to which the Defendant replied by letter dated 30th November, 2017. The Plaintiff submits that the replies by the Defendant were only to avoid the lawful payments due to the Plaintiff but no dispute as to the quality of the material supplied was ever raised.

8. It is submitted on behalf of the Plaintiff that there have been several e-mail correspondence between the parties but no dispute has been raised about the quality of the goods.

9. Accordingly, since the amount of Rs.79,13,749.60 in addition to interest of Rs.56,54,807.84 at the rate of 24% on the principal amount from 31st March, 2017 to 18th November, 2019 was due, this summary suit for a sum totalling to Rs.1,35,68,557.44 with interest @ 24% per annum in accordance with the particulars of the claim at Ex. S has come to be filed. Mr. Bhutekar, has clarified that the Plaintiff had earlier filed Summary Suit bearing No. 1330 of 2018 before this Court for recovery of

outstanding dues from the Defendant, however due to formal defects, Plaintiff had withdrawn the said suit with liberty to file fresh Summary Suit against the Defendant. That pursuant to the said liberty vide order dated 19th November, 2019, this Summary Suit has been filed.

10. Mr.Bhutekar would submit that in the reply filed on behalf of the Defendant, the Defendant has admitted to an amount of Rs.78,99,295/- as against the disputed claim of Rs.79,13,749.60. Learned counsel would submit that this admitted amount is as per the balance of the ledger in the books of account of the Defendant. Learned Counsel would submit that the amount of mismatch pertains to an amount credit whereof has already been given by the Plaintiff to the Defendant in respect of credit note dated 1st February, 2017 and therefore, the claim of the Plaintiff of Rs.79,13,749.60 is correct. Learned counsel submits that in any event the Defendant has admitted the amount of Rs.78,99,295/- and therefore, to that extent this Court can allow the Summons for Judgment.

11. On the other hand, Mr. Rao, learned counsel for the Defendant would submit that this Court should grant unconditional leave to the Defendant in as much as the Defendant has raised a number of triable

issues in the matter.

12. Learned counsel would submit that there is difference of Rs.2,91,090 leading to mismatch in Ledger account of Plaintiff and Defendant which is on account of a) excess Credit Note worth Rs.276635.35/- for MODVAT / Excise excess charged which was not considered by Plaintiff and b) mismatch of amount of Rs. 14,455/- pertaining to the Bill No.6-7/000087 dated 5.12.2016

13. That apart from the mismatch which has been taken up in the reply, Mr. Rao, learned counsel would submit that the primary reason for the non-payment to the Plaintiff is the dispute raised by ZEECO India (the end purchaser/customer of the material supplied by the Plaintiff) with respect to the failure to furnish appropriate test certificate in due time because of which the Defendant has not yet received over Rs.49,00,000/- and the Defendant has had to suffer a loss to the tune of Rs.49,00,000/-. Mr. Bhutekar, learned counsel for the Plaintiff disputes the same submitting that this issue has been raised for the first time but submits that, in any event, this is a non-issue as it had already been agreed that the endorsement of all partners would be on xerox of the material test

certificate and therefore, the question of raising this issue at this stage is only to delay the payment to the Plaintiff.

14. Mr. Mohan Rao has also raised an issue with respect to the Power of Attorney dated 30th July, 2018 to Mr.Virendra Joshi, which according to him has been granted in an individual capacity by Mr. Zubin Joshi, who is a partner of the Plaintiff and not by the company itself. Mr. Bhutekar submits that Plaintiff is a partnership firm and therefore, the Power of Attorney can be granted by one of the partners and there is nothing wrong as the partners would have knowledge of the business of the firm.

15. Mr. Mohan Rao further submits that although there is no mention of interest in the purchase orders and interest has been charged at the rate of 24%. Mr. Bhutekar would submit that the tax invoices contain the interest of 24% which was never disputed by the Defendant. Moreover, by communication dated 31st January 2017, the Plaintiff has communicated to the Defendant that interest would be charged at the rate of 24% , however, no dispute had been raised with respect to the same and now dispute is being raised only to create triable issue where there is none and to delay the payment to the Plaintiff.

16. Mr.Mohan Rao also raises the issue of jurisdiction of this Court submitting that the jurisdiction of Baroda Court was agreed in purchase orders and therefore, this Court would not have the jurisdiction. Mr. Bhutekar submits that in the tax invoices, the jurisdiction of Mumbai has been mentioned and therefore, this Court has jurisdiction to try the suit. Mr. Bhutekar, would submit that in any event this Court has rejected an application filed by the Defendant under Order 7 Rule 11 of the Code of Civil Procedure, 1908, on the issue of jurisdiction, holding that this Court has jurisdiction to entertain, try and dispose of the Suit and therefore this objection is not tenable.

17. I have heard the learned counsel and also considered the rival contentions.

18. In the case of ***B. L. Kashyap and Sons Ltd. vs. M/s. JMS Steels and Power Corporation and Anr.***[1] the Hon'ble Supreme Court has laid down that grant of leave to defend is the rule and refusal is an exception. The Defendant is ordinarily entitled to leave to defend unless there is any

1 (2022) 3 SCC 294

strong reason to deny it. Even if there is a reasonable doubt about the probability of the defence, sterner or higher conditions could be imposed while granting leave but denying the leave would be ordinarily countenanced only in such cases where there is no triable issue or the Court finds the defence to be frivolous or vexatious.

19. In the facts of the case it is observed that the Defendant has admitted in its books of account to an outstanding amount of Rs.78,99,295/- as per its ledger, whereas the Plaintiff has claimed an amount of Rs.79,13,749.60. The amount of mismatch of Rs.2,91,090/-, which the Plaintiff submits is an amount in respect whereof credit has already been given by the Plaintiff to the Defendant under Credit note dated 1st February, 2017 whereas the Defendant has submitted that this mismatch pertains to excess credit note for MODVAT / Excise excess and mismatch of a bill. This in my view leads to a triable issue which can only be adjudicated at a trial upon evidence being led by the parties.

20. There are other disputed issues with respect to the receipt of material testing certificate by Defendant's customers, interest, which in my view raise triable issues which would need adjudication by filing of a

written statement.

21. The Defendant has submitted that due to the failure to furnish appropriate test certificate on the part of the Plaintiff, the end purchaser Zeeco India has not released payment of Rs.49,00,000/- to the Defendant, whereas it has been pointed out on behalf of the Plaintiff that it had already been agreed that the endorsement of all the parties would be on xerox of the material test certificate. This contention also raises a triable issue in my view to be adjudicated at a trial.

22. Further the Plaintiff has claimed an interest of 24% based on its communication dated 31st January, 2017 on the basis that no dispute had been raised with respect to the same, whereas the Defendant has disputed the same. This also raises a triable issue.

23. Since there are triable issues raised by the Defendant as noted above, the issue of jurisdiction raised by the Defendant could also be taken up by the Defendant in its written statement.

24. In view of above discussion, I am inclined to grant conditional leave to the Defendant. Accordingly the following order is passed :-

ORDER

(i) Leave to defend the present suit is granted to the Defendant subject to depositing a sum of Rs.78,99,295/- within a period of eight weeks from the date of uploading 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 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 aforesaid period, 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 stands disposed of in the aforesaid terms.

(ABHAY AHUJA, J.)