

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10250 OF 2024

Sukanraj Kasturchandji Jain

.. Petitioner

Versus

Shivaji Kishan Jadhav

.. Respondent

.....

- Mr. Yashpal Jain for Petitioner
- Mr. M.D. Mali for Respondent

.....

CORAM : MILIND N. JADHAV, J.

DATE : AUGUST 2, 2024

P. C.:

1. Heard Mr. Jain, learned Advocate for Petitioner - Plaintiff and Mr. Mali, learned Advocate for Respondent - Defendant.

2. Present Writ Petition impugns judgment & order dated 03.05.2024 passed by learned Trial Court in Application for Summary Judgment No. 6 of 2021 in Commercial Suit No. 131 of 2019.

3. Service of Petition on the Defendant has been effected on 23.07.2024 and affidavit of service dated 31.07.2024 has been tendered across the bar which is taken on record.

4. Briefly stated Plaintiff filed Application under O. XIII of the CPC seeking judgment on the Plaintiff's case directing Defendant to pay the sum of Rs. 17,08,096/- along with future interest. The claim of Plaintiff is for an amount of Rs. 11,10,539/- plus accrued interest

thereon based upon the invoice dated 23.03.2015 appended at page No. 68 of the Petition. Admittedly it is established that there is a trading relationship between the parties since 2013. Plaintiff used to supply goods (gold ornaments) to Defendant and raise invoice at the time of delivery. Payment indicated in the invoice was due and payable within seven days from the date of delivery. Relationship between the parties has continued even after the present dispute. Present dispute pertains to one such invoice dated 23.03.2015 issued by Plaintiff under which Plaintiff supplied gold ornaments to Defendant. According to Plaintiff, after the said invoice was issued, Defendant in the following year paid an amount of Rs. 40,000/-, thereafter in the following year paid another amount of Rs. 40,000/- and in the third following year paid an amount of Rs. 20,000/- to Plaintiff towards part payment of the aforesaid invoice amount. The ledger account maintained by Petitioner in respect of Defendant in his books of account is also placed on record by Petitioner. It is seen that the aforesaid payment of Rs. 1,00,000/- was paid by Defendant by NEFT in the Bank account of Plaintiff and therefore there cannot be any denial of the same. Neither the Defendant has denied making payment of Rs. 1,00,000/- to Plaintiff. However, it is seen that last the payment of Rs. 10,000/- paid by Defendant to Plaintiff was pursuant to the legal notice issued by Plaintiff to Defendant on 07.07.2017. The

last payment of Rs. 10,000/- was made on 11.07.2017. Defendant through his Advocate replied to the legal notice on 02.08.2017. Notice dated 07.07.2017 which is appended at page No. 73 of the Petition is an incomplete copy. Be that as it may, cognizance has been taken of the said notice by both parties in their respective pleadings. Suit plaint is appended at page Nos. 32-38 of the Petition. Reading of the Suit plaint depicts the aforesaid facts, *inter alia*, leading to the claims for the outstanding amount. In addition thereto, Plaintiff has also filed Criminal Complaint dated 15.11.2017 and Criminal Case No. 156/2017 for cheating against Defendant which is pending. Commercial Suit is filed for recovery of the outstanding amount on the basis of the aforesaid invoice.

5. In the written statement appended at page Nos. 41-45 of the Petition, Defendant takes an innocuous stand by stating that he is not aware whether the Plaintiff is the proprietor of the firm which has supplied the gold ornaments to him or that the said firm was carrying on business on the address mentioned in the invoice. This stand of the Defendant cannot be accepted since there is a continuing relationship between the parties from 2013 till date and the said stand of the Defendant is stated to be rejected. The other defence taken by the Defendant and argued vehemently by Mr. Mali is that disputed invoice is raised in the name of "Laxmi Ganesh Jewellers" but at the bottom

left side of the invoice, the rubber stamp affixed is in the name of "Sri Laxmi Ganesh Jewellers". However, this stand cannot be countenanced in view of the reply dated 02.08.2017 given by Defendant wherein it is admitted by Advocate for Defendant that the name of Defendant is "M/s. Laxmi Ganesh Jewellers". Other than that, the address is the same. In that view of the matter, this defence taken by Defendant also cannot be *prima facie* countenanced. The other defences of the Defendant are standard defences of mere denials of the said invoice as also the ledger entries relied upon by Plaintiff. However in the written statement, Defendant has nowhere disowned the fact that he paid the amount of Rs.1,00,000/- by NEFT to the Plaintiff in the following three years of which the ledger accounts have been maintained by the Plaintiff in his books of accounts and to which specific reference has also been made in the Suit plaint. It is seen that mere denial of Plaintiff's case by the Defendant cannot aid and assist the Defendant. However one of the issues which comes to the fore is that immediately on issuance of the legal notice by Plaintiff to Defendant, Defendant in his reply to the said notice categorically denied having received the subject property stated in the invoice. Hence here is the case of the Plaintiff coming to the Court seeking recovery of an amount on the basis of documentary evidence produced by him and the Defendant denying the said documentary evidence. It

can be understandable if this is a one off transaction between the parties, but considering that there is trading relation between the parties since 2013 onwards for the said transactions and the Defendant's case in his written statement as also in the affidavit in reply to the Summons for Judgment not being thoroughly convincing, learned Trial Court ought to have considered the substantive provisions of O. XIII and more specifically Rule 6(b) read with Rule 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, in the facts and circumstances of the present case by giving a *prima facie* findings that Plaintiff would have to discharge his burden and thereafter the Defendant in rebuttal. I am not inclined to accept the defence of the Defendant as convincing enough at this *prima facie* stage to persuade this Court to accept the judgment passed by the learned Trial Court which is impugned in the present Petition. Mr. Jain would draw my attention to Order XIII, Rule 6(b) and Rule 7 which are delineated herein under:-

"Order XIII-A

SUMMARY JUDGMENT

1.

(2)

(3)

2. *Stage for application for summary judgment - An applicant may apply for summary judgment at any time after summons has been served on the Defendant:*

....."

"6. Orders that may be made by Court - (1) On an application made under this Order, the Court may make such orders that it may deem fit in its discretion including the following :

- (a) judgment on the claim;
- (b) conditional order in accordance with rule 7 mentioned hereunder:
(emphasis supplied)
- (c) dismissing the application;
- (d) dismissing part of the claim and a judgment on part of the claim that is not dismissed;
- (e) striking out the pleadings (whether in whole or in part); or
- (f) further directions to proceed for case management under Order XV-A"

"7. Conditional order:-(1) Where it appears to the Court that it is possible that a claim or defence may succeed but it is improbable that it will do so, the Court may make a conditional order as set forth in rule 6(1)(b) above.

(2) Where the Court makes a conditional order, it may: -

(a) make it subject to all or any of the following conditions:-

- (i) require a party to deposit a sum of money in the Court;
(emphasis supplied)
 - (ii) require a party to take a specified step in relation to the claim or defence, as the case may be;
 - (iii) require a party, as the case may be, to give such security or provide such surety for restitution of costs as the Court deems fit and proper;
 - (iv) impose such other conditions, including providing security for restitution of losses that any party is likely to suffer during the pendency of the suit, as the Court may deem fit in its discretion; and
- (b) specify the consequences of the failure to comply with the conditional order, including passing a judgment against the party that have not complied with the conditional order."

5.1. Reading of the aforesaid rules clearly envisage that in the Application made under this order i.e. O. XXI-A, the Court may make

such order that it may deem fit in its discretion including a conditional order in accordance with rule 7 mentioned in the said rule. Under rule 7, it is stated that where it appears to the Court that it is possible that a claim or defence may succeed but it is improbable that it will do so, the Court may make a conditional order requiring a party to deposit a sum of money in the Court and further specify the consequences of failure to comply with such conditional order.

5.2. This is a fit case in my opinion where the Court ought to have applied the aforesaid statutory provisions in view of the stand adopted by the Defendant . Rather I am of the clear opinion that the learned Trial Court ought to have directed the Defendant to deposit at least part of the amount of claim to have a balance of convenience. Court, rather has not applied its mind to the aforesaid provisions i.e Rules at all considering the *prima facie* facts in the present case. This is my *prima facie* opinion.

6. At this juncture, Mr. Mali, learned Advocate enters appearance for Respondent - Defendant. I have permitted him to address me fully. He would justify the written statement and affidavit in reply to the Summons for Judgment filed by Defendant and would submit that substantive rather substantial triable issues have been raised by Defendant. He would draw my attention to the cause title of the Suit plaint as also the invoice which is referred to and alluded to herein

above to contend that the defences raised by Defendant that he has received the subject property stated in the invoice but some other entity has received it as the names is different on the invoice. I have already given my *prima facie* opinion and my imprimatur on the same after hearing Mr. Jain and maintain the same.

7. After I expressed my mind to Mr. Mali that I would like to interfere with the impugned judgment, Mr. Mali in his usual fairness informs the Court that in view of the fact that the learned Trial Court has opined that there are certain triable issues raised by the Defendant, he would submit that this Court to be lenient in passing any order for deposit. He would submit that Defendant would be ready and willing to deposit 50% of the amount of invoice of Rs. 11,10,539/- within a period of two weeks positively from today without seeking any further extension of time. It is a very fair statement by Mr. Mali and is accepted. It shall be so deposited by the Defendant. Learned Trial Court shall not give any extension of time to the Defendant for deposit of the aforesaid payment. If there is any default in compliance of this order, the impugned judgment dated 03.05.2024 shall stand conditionally set aside and Summons for Judgment No. 6 of 2021 shall stand allowed and granted. However if the aforesaid deposit is made by the Defendant as directed in the Trial Court within a period of two weeks from today i.e. the date when the

order is dictated in open Court today, then the Suit shall proceed further in accordance with law.

8. All contentions of the Plaintiff as also the Defendant are expressly kept open without this Court giving its imprimatur on any of merits of the matter.

9. Considering that Commercial Suit No. 131 of 2019 is almost five years old, learned Trial Court is directed to decide the same as expeditiously as possible and in any event within a period of six months from today strictly in accordance with law and after allowing both the parties to lead their respective evidence. Parties shall co-operate with the Trial Court and shall not seek unnecessary adjournment unless it is absolutely necessary in case of any urgency or emergency.

10. Both the parties are directed by this Court to approach the Trial Court along with server copy of this order on 06.08.2024 at 10:30 a.m.. Both the parties shall exchange their draft issues and submit the same to the Trial Court on that date upon which the Trial Court shall thereafter fix the schedule for proceeding with the Suit as per its convenience and discretion.

11. Impugned order is sustained but varied as per the directions contained hereinabove regarding 50% deposit to be made by the Defendant.

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

[MILIND N. JADHAV, J.]

Amberkar

RAVINDRA
MOHAN
AMBERKAR
Digitally signed
by RAVINDRA
MOHAN
AMBERKAR
Date:
2024.08.05
17:52:41
+0530