

(2013) 07 DEL CK 0577

Delhi High Court

Case No: I.A. 5269 of 2012 in CS (OS) 2576 of 2011

Bijender Chauhan @ Bijender
Kumar

APPELLANT

Vs

M/s. Financial Eyes (India) Ltd.

RESPONDENT

Date of Decision: July 23, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 1, Order 37 Rule 2, Order 37 Rule 3(4), Order 37 Rule 3(5)
- Sales of Goods Act, 1930 - Section 41, 42

Citation: (2013) 4 ILR Delhi 3234

Hon'ble Judges: Jayant Nath, J

Bench: Single Bench

Advocate: A.K. Trivedi and Mr. Avinash Trivedi, for the Appellant; Raman Kapur , Mr. Dhiraj Sachdeva and Mr. Ankur Gosain, for the Respondent

Final Decision: Dismissed

Judgement

Jayant Nath, J.

I.A. 5269/2012 in CS(OS) 2576/2011

1. This is an application under Order 37 Rule 3(5) of the CPC on behalf of the defendant for leave to defend and contest the suit. The accompanying Suit is filed by the plaintiff under Order 37 CPC for recovery of Rs. 30,97,959/-. The plaintiff in the plaint has contended that it is doing the business of trading and manufacturing of corrugated box, pouches and other packaging material of rice to its different customers. It is further stated that the plaintiff has business relations with the defendant since 4.11.2007. It is stated that statement of account is finalised till the financial year of 2009-10. Fresh transactions started from 2.4.2010 and the plaintiff had supplied goods to the defendant till 5.1.2011. The plaintiff submits that he had delivered the goods to the defendant between the period 2.4.2010 to 5.1.2011. In

paragraph 4 of the plaint the details of 20 invoices raised on the defendant have been provided. The total amount due as per the said 20 invoices is Rs. 52,12,726/-. The plaintiff admits that defendant had paid Rs. 23,30,804/- and is liable to pay the remaining amount of Rs. 28,81,922/-. Summons of judgment in the prescribed format under Order 37 CPC Rule 3(4) CPC were issued to the defendant. The defendant entered appearance and after receiving the summons of judgment has filed the present application for leave to defend. The defendant in the leave to defend application has firstly submitted that the plaint does not comply with the mandatory provisions of Order 37 Rule 2 of CPC and that the requirement of making an inscription immediately below the number of the Suit and title of the Suit that the Suit is under Order 37 of CPC has not been made in this case. Hence, it is submitted that present Suit cannot be treated as a Summary Suit.

2. It is secondly submitted by the defendant in his application that recently the plaintiff had supplied bad quality of poly-pouches and cartons and has thereby defrauded the defendant. The buyer of the defendant has pointed out to the defendant personally and through brokers that the quality of bags and cartons are not good and had asked for compensation towards the damages and losses and has raised certain initial claims. Hence, it is stated by the defendant that the supply of bad quality bags and cartons has not only caused loss to the defendant but also a huge loss to its reputation as a reliable exporter of India.

3. It is further contended that there is an initial claim of damages and loss incurred by the defendant of US\$ 39,154 (approximately Rs. 18 lacs) and that balance will be finalised by the defendants buyer. However, it is stated that the plaintiff has failed to pay the said initial claim of approximately Rs. 18 lacs of the defendant.

4. Learned senior counsel appearing for the defendant submits that in view of the fact that the plaintiff had supplied poor quality goods and the fact that the defendant has suffered huge damages no amount whatsoever is due or payable to the plaintiff and in fact on the contrary it is the plaintiff who owes money to the defendant. Learned senior counsel also relies upon letters dated 2.12.2010 and 24.4.2011 received from one U.R. Trading company who have pointed out about problem of opening of poly pouches and torn-up Master cartons in the rice shipments. It is also pointed out that in letter dated 24.4.2011 it is specifically pointed out that the packaging material is very weak and bad. Learned senior counsel for the defendant also relies upon communication dated 15.12.2010 and 28.04.2011 allegedly written by the defendant to the plaintiff pointing out the damages suffered by the defendant on account of poor quality of products supplied.

5. Learned senior counsel for the defendant thirdly submits that the present Suit does not lie under Order 37 CPC as it is based on accounts. He submits that along with the list of documents the plaintiff has filed a statement of account which is Annexure P-24. He submits that this account is not signed by the defendant and it is based on this account that the plaintiff is claiming Rs. 28,81,922/-. He submits that

no suit under Order 37 CPC lies based on the statement of accounts. He relies upon a Judgment of this Court in CS(OS) 2109/2002 titled as M/S. Associates India Financial Services (P) Ltd. versus M/s. Atwal and Associates and Ors. dated 9th August, 2012 where it was held that Suits claiming amounts which are only balance due based on accounts cannot be treated as falling under Order 37 CPC because the amount claimed is not a liquidated amount. Hence, he submits that the present Suit under Order 37 CPC would not lie. He also relies upon an Order of a learned Single Judge of this Court dated 23rd January, 2012 in RFA 202/2011 titled as M/s. K.& K Health Care Pvt. Ltd. versus M/s. Pehachan Advertising.

6. The learned senior counsel for the defendant fourthly contends that if it is argued that the present suit is based on invoices, he submits that, then also a suit under Order XXXVII CPC cannot be filed based on invoices. He relies upon the aforementioned judgment of this High Court in the case of M/S. Associates India Financial Services Pvt. Ltd. (supra).

7. In view of the above grounds he submits that there are enough reasons that unconditional leave to defend should be granted to the defendant.

8. On the other hand, learned counsel for the plaintiffs submits that as far as compliance of Order 37 Rule 2 CPC is concerned the title of the Suit itself very categorically states that it is a suit under Order 37 Rule 2 CPC.

9. He further submits that there is no denial by the defendant in the present application regarding delivery of goods and regarding the fact that the defendant has paid only a sum of Rs. 23,30,804/- leaving a balance liability of Rs. 28,81,922/-. He further submits that the contention of the defendant about the bad quality of goods supplied is absolutely false and only a bogus submission to wriggle out the liability. He points out that the reliance of the defendant on the two communications dated 15.12.2010 and 28.04.2011 is misconceived. These communications were never received by the plaintiff and no proof of despatch has been placed on record. He also points out that the first communication is allegedly dated 15.12.2010. He further submits that goods for about 8 lacs were supplied by the plaintiffs to the defendant after alleged letter dated 15.12.2010. These goods were duly received by the defendant without any protest or demeanour. He submits that the said act of the defendants completely falsifies its case and unequivocally demonstrates that these communications dated 15.12.2010 and 28.04.2011 are fabricated documents.

10. Learned counsel further relies upon judgment of this Court in Lohmann Rausher GMBH versus Medisphere Marketing Pvt. Ltd., 117 (2004) DLT 95 where it was held that invoices/bills/written contracts are within the contemplation of Order 37 Rule 2 CPC. The said judgment also states that u/s 41 of "The Sale of Goods Act, 1930" the defendant had a right to inspect the goods on delivery and report defects within a reasonable time of delivery. If goods are not rejected within a reasonable time, the judgment states that the mandate of Section 42 would apply and the defendants

would be deemed to have accepted the goods. He submits that in this case the defendant has accepted the goods and at no stage rejected the same. He submits that the defence of the defendant regarding quality of goods is purely fabricated and after-thought and is contrary to law. Defendant is deemed to have accepted the goods in terms of the Sales of the Goods Act.

11. I will now look into the merits of the rival contentions. In the context of grant of leave to defend, the principles of law applicable are well known. The basic judgment in this regard, namely, [Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation](#), may be looked into for the said purpose. In para 8, the Hon'ble Supreme Court has held as follows:

In [Kiranmoyee Dassi and another Vs. Dr. J. Chatterjee](#), Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253):

(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, there was such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence.

In the light of the above, I may now consider the submissions of the defendant.

12. As far as the first contention of the defendant regarding non compliance of Order 37 Rule 2 of CPC is concerned, i.e. it is contended that below the number of the Suit in the title of the Suit it is to be mentioned that the Suit is under Order 37 CPC. The contention further is that this provision has not been complied with by the plaintiff. The contention is absolutely devoid of merits. Perusal of the plaint filed in the present case shows that in the heading, after the details of the parties, the following is clearly stated:-

Suit under Order 37 Rule 2 of CPC for recovery of Rs. 30,97,959/- alongwith interest @ 18% on behalf of plaintiff."

Hence, there is no merit in the said contention of the defendant. The plaintiff has complied with Order XXXVII CPC.

13. Regarding the second contention of the defendant that the goods supplied by the plaintiff were defective, the said submission is also completely devoid of merits. The submissions made by the defendant in this regard are utterly vague. It is not in dispute that the goods dispatched by 20 bills as elaborated in paragraph 4 of the plaint have been duly received by the defendant. The period when the goods have been received is from 2.4.2010 to 5.1.2011. Defendants had ample time to physically inspect the goods. They utilised the goods for packaging of their rice and had also dispatched the packages containing rice to their customers abroad. It is difficult to believe that the defendant who is in the said trade since long time and have dealt with the plaintiffs since long, could not on an inspection of the goods and on usage of the goods detect defects in the quality of the goods supplied by the plaintiff. The contention is wholly meritless.

14. There is also merit in the submission of the learned counsel for the plaintiff that the two communications placed on record by the defendant are manipulated documents. No proof of despatch of these documents is filed. Further after letter dated 15.12.2010 was allegedly written by the defendant to the plaintiff the defendants have received material worth about Rs. 8 lac from the plaintiff. There was no protest or endeavour to ensure at that time that goods of the right quality were supplied to the defendant. There is not a whisper about this. In the two communications dated 15.12.2010 and 28.4.2011 the defendant does not point out the nature of defect in the goods. The communications clearly cannot be believed.

15. Notice may also be taken of the fact that out of the 20 invoices raised, the defendant has paid a sum of Rs. 23,30,804/-. It would naturally follow that the defendant was receiving the goods and has been making payment in part clearly indicating that they have found no defect in the goods. A perusal of the two letters dated 15.12.2010 and 28.04.2011 shows that they do not stipulate a rejection of the goods. They indicate that the defendant has utilized the goods and later one their customers had complained about the quality of the packing.

16. In the above context, reference may be had to the judgment of this High Court in the case of [M/s KLG Systel Ltd. Vs. M/s Fujitsu ICIM Ltd.](#), where this Court held as follows:

12. The disputes between the parties cannot be decided do hors the sundry provisions of the Sale of Goods Act. Part-payment to a substantial extent has been made by the Defendant/Applicant. When a buyer such as the Defendant/Applicant asserts that the merchandise/goods were defective, it is not open to it to withhold payment once the delivery is accepted; since they are deemed to have been accepted by operation of law.

It was further held in para 13:

On a careful reading of the Act, it appears that the intendment is generally that the price of the goods must be paid and if there is a subsequent defect (in contradistinction to a defect detected within a reasonable time of the delivery) the remedy that is envisaged is for the Buyer to sue for damages. This is obviously impregnated with sound commonsense and business ethics. In the present case, raising questions pertaining to the suitability of the supply after one year is not reasonable. A friable issue does not arise because what was supplied by the Plaintiff was what was ordered by the Defendant, if it did not suit the latter"s requirements the Plaintiff cannot be made responsible and liable. Significantly, it has not been shown that any legal action has been filed even by FEDO for recovery of damages from the Defendant. Some prima facie evidence of such an action should have been filed by the Defendant to justify the grant of leave to defend.

This case of M/s. KLG Systel Ltd. (supra) pertained to supply of certain software. The defendant had accepted the software; later on the defendant said that there is a failure in the software package and a third party connected with the defendant had complained about the same. This Court rejected the said contention and declined to grant leave to defend. The Court relied on Sec. 41 and 42 of the Sales of Goods Act. It was also pointed out in that case that the third party has taken no legal action against the defendant.

This Court in the case of Lohmann Rausher GMBH (supra) while interpreting Sections 41 & 42 of the Sale of Goods Act held as follows in para 21: -

21. As per the mandate of Section 41 of the Sale of Goods Act, the defendant not having inspected the goods in question prior to delivery, had a right to inspect the case on delivery and report defects within a reasonable time of delivery. If not rejected within reasonable time, mandate of Section 42 stipulates that the defendant would be deemed to have accepted the goods.

17. One may have a look at sections 41 and 42 of the Sales Good Act, 1930 which read as follows:-

41. Buyer's right of examining the goods.-(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

42. Acceptance.- The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

18. There is nothing on record to show that the defendant rejected the goods within a reasonable time. The goods were admittedly received by the defendant between April, 2010 and January, 2011. The defendant has utilized the goods namely packing material for packing rice etc. and exporting it abroad. The action of the defendant is clearly contrary to the provisions of Section 42 of the Sales of Goods Act. By utilizing the goods, the defendant has done an act in relation to them which is inconsistent with the ownership of the seller. The defendant continued to retain the goods without intimating the seller that he has rejected the same and can have them picked up. The defence of the defendant about the quality of goods supplied by the plaintiff being defective is a completely sham defence and absolutely without any merit.

19. The third contention of the defendant that the present suit is based on a Statement of Account and hence would not lie is a vague contention and is also without merits. A perusal of the plaint would show that the present case is not based on a statement of accounts but is based on the 20 invoices which have been raised on the defendant pursuant to which the goods have been supplied to the defendant. The plaint in paragraph 4 relies on the said invoices. The Plaint further states that out of the total figure of Rs. 52,12,726/- worth of invoices raised on the plaintiff the defendant had paid Rs. 23,30,804. Hence, the suit is based on the balance on these invoices. Merely because a mention is made to a Statement of Account in the plaint would not make the present suit to be based on Statement of Accounts. A specific query was made to learned senior counsel appearing for the defendant about the figures mentioned in the plaint. Learned senior counsel fairly stated that in the application for leave to defend the receipt of the goods, the value of the goods and payments having been made by the defendant is not disputed. He submitted that the defence of the defendant is regarding quality of goods.

20. The judgments cited by the learned counsel for the plaintiff to argue that a suit based on statement of account does not lie under Order 37 CPC would not apply to the facts of the case. In both cases namely Associate India Financial Services (supra) and M/s. K & K Health Care Pvt. Ltd. the Court came to the conclusion that the case is based on the statement of accounts. Hence, the said judgments have no application to the present facts as I have held that the present suit is based on invoices.

21. In the context of the above contention of the learned senior counsel for the defendant, reference may also be had to the judgment of this Court in [Dura-Line India Pvt. Ltd. Vs. BPL Broadband Network Pvt. Ltd.](#), where in para 8 the Court held as follows:

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The said submission is misconceived. The suit is based on a written contract comprising the offer, its acceptance by issuance of purchase orders and raising of invoices in execution thereof. These constitute the written contract. The amounts claimed are those due in the suit under the above written contract. Additionally, reliance has been placed on the acknowledgement and confirmation of balance issued by the defendant. The mere averment in the plaintiff that the plaintiff also maintains a running account, reflecting the price of the goods supplied and the payments made therefore, does not change the nature of the suit as in one being based on a running account. The mere maintenance of a running account does not disentitle the plaintiff from filing the suit under Order XXXVII, CPC, based on a written contract and acknowledgement in writing.

22. In view of the above judgment clearly even otherwise the contention of the learned senior counsel for the defendant on this account is without any merit.

23. The fourth contention of the learned senior counsel for the defendant that Order 37 CPC would not apply to a suit even on the basis of invoices is stated to be rejected. A perusal of the invoices placed on record would demonstrate that they contain full details regarding the quantity and rate of the goods. These invoices tantamount to a binding contract between the parties. None of the facts and figures stated in the bills are in fact even disputed. It would follow that present Suit would lie based on the invoice which is a binding contract. A perusal may also be had to the reasoning in paragraph 15 of the judgment in the case of Lohmann Rausher GMBH (supra), which reads as follows:-

15. It is apparent that a suit which seeks to recover a debt or a liquidated demand in money payable by the defendant arising out of a written contract is maintainable under Order XXXVII Rule 1 as a summary suit. It is no longer res-integra that invoices/bills are "written contracts" within the contemplation of Order XXXVII Rule 2. Reference could conveniently be made to decisions of this Court reported as [M/s. Punjab Pen House Vs. M/s. Samrat Bicycle Ltd.](#), ; [Corporate Voice \(P\) Ltd. Vs. Uniroll](#)

[Leather India Ltd., ; Beacon Electronics Vs. M/s. Sylvania and Laxman Ltd., ; and M/s KLG Systel Ltd. Vs. M/s Fujitsu ICIM Ltd., .](#)

24. The above judgment of M/s. KLG Systel Ltd. (supra) also holds that an Order XXXVII Suit lies based on an invoice. In para 11, the Court held as follows:

11. The Defendant/Applicant has also challenged the maintainability of the suit under Order XXXVII of the C.P.C., stating that "there is no debt or liquidated demand in money payable to defendant-Company (sic. read Plaintiff) and/or based on a written contract". It is no longer res integra that Invoices/Bills are "written contracts" within the contemplation of this Order. Reference is directed to Messrs. Punjab Pen House vs. Samrat Bicycle Ltd.; Corporate Voice (Pvt.) Ltd. vs. Uniroll Leather India Ltd; and [Beacon Electronics Vs. M/s. Sylvania and Laxman Ltd., .](#) There is, thus, no hesitancy in holding that the present suit is a suit which should be tried under the summary procedure of Order XXXVII of the C.P.C.

In view of the above, it is obvious that the defence raised by the defendants is a sham defence. The defence of the defendant that the quality of the goods supplied by the plaintiff is defective cannot be accepted in view of Sections 41 & 42 of the Sales of Good Act. The other legal issues raised by the defendant have been held by me to be without merit. Granting leave to defend would merely enable the defendant to prolong a litigation by raising frivolous and untenable pleas. There are no plausible grounds stated by the defendants which may be deemed sufficient to entitle the defendant to defend the preset suit. The present application is accordingly dismissed.

CS(OS) 2576/2011.

In view of the fact that the above application for leave to defend of the applicant/defendant has been dismissed, the Suit is decreed for a sum of Rs. 30,97,959/- in favour of the plaintiff and against the defendant.

The plaintiff shall be entitled to pendente lite interest @ 10% per annum from the date of filing of the Suit till recovery. The plaintiff shall also be entitled to costs.