

(2017) 11 DEL CK 0071

In the Delhi High Court

Case No : Civil Suit (COMM) No. 33 Of 2016

NSK India Sales Company Private Limited

APPELLANT

Vs

Proactive Universal Trading Company Private Limited

RESPONDENT

Date of Decision : 30-11-2017

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151, Order 13A Rule 2, Order 38 Rule 5
Commercial Courts, Commercial Division And Commercial Appellate Division Of High
Courts Act, 2015 — Section 16(1)

Citation : (2017) 11 DEL CK 0071

Hon'ble Judges : S.P.Garg, J

Bench : Single Bench

Advocate : Ajit Warriar, Aditya Naiyyar, Anish Gupta, Atul Kumar

Judgement

S.P.Garg, J

IA No. 14363/2016 (u/O 13A Rule 2 CPC)

1. The instant IA preferred by the plaintiff under Order 13A Rule 2 of the Code of Civil Procedure, 1908 (as amended by Section 16(1) of the

Commercial Courts Act, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015) for summary judgment is contested

by the defendant.

2. I have heard the learned counsel for the parties and have examined the file. The plaintiff has filed the instant suit for recovery of Rs. 7,41,37,369/-

along with pendente lite and future interest against the defendant; it was filed on 15.01.2016. It is being contested by the defendant; written statement

has been filed. The plaintiff has filed the replication. When the matter was ripe for framing of issues, the instant application was moved on behalf of

the plaintiff for summary judgment. It is averred that the defendant has

acknowledged and admitted its liability to pay the plaintiff the principal amount of Rs. 4,50,31,303/- as claimed by the plaintiff in the suit. Outstanding amount payable by the defendant in July, 2013 was Rs. 4.5 crore after adjustment of a payment of Rs. 50 lacs made by it on 04.07.2013. By an e-mail dated 25.09.2013 Vikash Batra, the promoter and one of the directors of the defendant clearly and unambiguously acknowledged defendant's liability to pay the plaintiff an amount of Rs. 4,50,31,303/-. In view of it, the defendant has not real prospect of successfully defending the claims raised by the plaintiff to that extent.

3. In response to the IA, it was urged that the application was not maintainable. Numbers of issues are involved in the present case which require oral evidence and the suit cannot be decided without it. Oral evidence is required to prove that e-mail relied on in the application was part of series of communication and negotiation for settlement, which is without prejudice to the rights and that settlement proposal ultimately could not work. Due to the wrongful acts of the plaintiff, the defendant suffered loss in business and a civil suit CS(OS) 3796/2014 for claiming damages from the plaintiff has since been filed.

4. On perusal of the pleadings of the parties and the documents on record, this Court is of the considered view that there are no compelling reasons to allow the claim in a summary judgment. In the written statement, the defendant has controverted the plaintiff's assertions in the plaint and specifically urged that the suit was bad for non-joinder of necessary party. Defendant's agreement was with NSK Japan Ltd. and subsequently the plaintiff, who was its subsidiary, was used as a vehicle for making supply to the defendant. It was further averred that it was not a case of running account and most of the claims under invoices had become barred by limitation. It was further stated that there was inordinate delay in the supply of material and complete goods under the purchase orders placed by the defendant. The plaintiff committed breach of trust and made defaults ruining the business of the defendant. Timely delivery of products by NSK / NISCO to the defendant for onward delivery to the customers was the sine-qua-non of the terms agreed between the parties. The defendant could not do business for almost two years due to some ad interim injunction obtained by the previous agent TAPL against the plaintiff. The plaintiff wrote several e-mails to

the defendant requesting it not to deal with customers till the case was resolved. It led to huge losses to the defendant. The promises made by NSK were never met. Supplies were not made in a timely manner and in malafide manner, the plaintiff took away the allocated customers / business. It was further pleaded that the defendant never agreed to make payment within 90 days or 24% interest. In e-mails dated 08.11.2011 and 26.03.2012 and 30.05.2013 the plaintiff clearly accepted the mess in their delivery system. Despite agreement between the parties wherein certain stocks were to be taken back by the plaintiff, it was never lifted. On 28.06.2013, the plaintiff visited the defendant for stock inspection and further discussions. It was agreed that the defendant would make a substantial payment to keep the negotiations alive. The plaintiff did not disclose true facts and tried to mislead the defendant; defendant never accepted any liability.

5. This Court by an order dated 09.02.2017 directed the defendant to file an affidavit on certain aspects mentioned therein; it was so filed.

6. Learned counsel for the plaintiff urged that the receipt of goods vide invoices value whereof was Rs. 4,50,31,303/- were not disputed. Defence was that supplies made by the plaintiff to the defendant were of much lesser quantity than ordered and not of the specification ordered. It was incumbent

upon the defendant to establish that the goods supplied were lesser in quantity or did not confirm to the technical specification. Affidavit filed by the

defendant is conspicuously silent on both these aspects. These goods were further sold by the defendant to the other customers and he received INR

29 millions from third party. There was a profit of 23% to the defendant out of resale of such goods. These are disputed by the defendant.

7. Since triable issues have been raised by the defendant in the written statement and there is no clear and ambiguous admission, claim of 4.5 crores

cannot be allowed by way of summary judgment. I have examined e-mail dated 25.09.2013 sent by Vikash Batra. The subject reads "Re: PUG :

Answer to pending issues on 8th August meeting". In this e-mail Vikas Batra accepted conditions No.1, 2 and 3 as mentioned in e-mail sent to him

on 23.09.2013. As per condition No.1, old payment of 45 millions INR was to be paid. Condition No.2 pertained to new delivery system and there

were other conditions at Sl.No.3. If e-mail dated 25.09.2013 is read in its entirety, it cannot be inferred that there was unconditional acceptance of the

liability of 4.5 crores by the defendant. In the said e-mail certain comments / clarifications were made. One was regarding supply and the other crucial one was about stock return. It discloses that 6M (already identified) was to be taken back. The balance 9M needed to be identified. It was further informed that the team for next couple of months will have to focuss on meeting the customers on supply issues etc. and smoothen the relationships; the defendant had received final notices from several of them. It was specifically mentioned that acceptance of conditions in the e-mail were just to ensure that the defendant was able to serve customers, meet their requirements and continue with the business. â??Trust you would be in a position to agreeâ?. Revised spreadsheet reflecting the above concerns was attached. Hence, it cannot be inferred at this stage that there was clear acceptance of the liability in the e-mail. Nothing has emerged on record if after e-mail dated 25.09.2013, there was any response by the plaintiff to address defendantâ??s concerns. It is unclear if the plaintiff has accepted stock return upto 15M INR to help reduce actual payment amount as proposed in e-mail dated 23.09.2013.

8. It is relevant to note that similar pleas were taken by the plaintiffs in the IA No.655/2016 under Order XXXVIII Rule 5 read with Section 151 CPC.

The said IA is still pending for disposal.

9. Considering the facts and circumstances of the case, I find no merit in the present application and it is dismissed.

10. Observation in the order shall have no impact on merits of the case.

CS(COMM) 33/2016 & I.A. No. 655/2016 (u/O 38 R 5 CPC)

List before the Roster Bench on 7th December, 2017 for further directions.