

Money Suit – 29/2022(CC)

**Present :: Nezaz Alam
Judge Commercial Court at Rajarhat
North 24 Parganas**

**CNR : WBNP19-000101-2022
J.O. code :: WB01398**

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04.07.2022

No caveat is filed as per note of the office.

The plaintiff filed a put up petition praying for moving injunction an application under Order XXXVIII Rule 5 read with Order XXXIX Rule 1 & 2 CPC on the ground of urgency. Leave is also sought to move the injunction application without exploring the mandate of section 12(A) of Commercial Court Act on the ground of urgency. Leave is granted.

Heard. Considered and allowed.

The application under Order XXXVIII Rule 5 read with Order XXXIX Rule 1 & 2 CPC is taken up for hearing.

Issue notice upon the respondents calling upon them to show cause within 15 days from the date of receipt of the notice as to why the temporary injunction as prayed for shall not be granted against them.

Perused the plaint, injunction application and the annexures filed on behalf of the petitioner.

Considered the submissions advanced by the Ld. Counsel for the petitioner.

Plaintiff filed the suit for Recovery of Money.

Plaintiff is a company engaged in the business of wholesale of industrial machinery, equipment, construction materials, hardware, plumbing and treating equipment and/or its supplies etc and having its registered office at L-7-1, Level-7, Block-L No.2, Jalan, Solaris, Solaris Mont Kiara, Kuala Lumpur – 504 408, Malaysia.

On the other hand, the respondent is a company incorporated under the provisions of the Companies Act, 1956 being supplier of “FERRO SILICON”.

Brief fact of the case is that in or about March, 2021, the plaintiff/petitioner approached the respondent for supply of "FERRO SILICON". The respondent agreed to supply the said goods to the petitioner by issuing a No.ASPL/FEB/071/20-21 accordingly, a Purchase order dated quotation being 22nd February, 2021 being Purchase and Order No.WTE/21/03021R1 dated 2nd March, 2021 was issued by the petitioner in favour of the respondent for supply of 1000 MT of Ferro Silicon @ USD 1,015 per Metric Tonne totaling USD 1,015,000.

It is alleged after issuance of the Purchase Order, the petitioner remitted USD 50,000 to the respondent on 10th March, 2021. The respondent has duly issued a Proforma Invoice on 2nd March, 2021.

Further alleged despite the payments, the respondent failed and neglected to supply the said goods as per Proforma Invoice. By an email dated 27th April, 2021, the respondent informed the petitioner that

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the first lot of 500 metric tonne was ready for dispatch and would be loaded into the container on running sampling basis and the date of stuffing would be finalized after receipt of balance payment.

Another Proforma Invoice was issued by the respondent on 27th April, 2021 bearing no.ASPLO04/21-22 dated 27th April, 2021 was issued by the respondent for supply of 500 metric tonne of the said goods at an aggregate consideration of USD 507,500.

It is contended that in connection with Proforma Invoices being No.ASPL 004/20-21 dated 27th April, 2021, the petitioner has duly remitted another USD 50,000 on 30th April, 2021 to the respondent as advance for effecting supply of 1000 Metric Tonne of the said goods and the said advance was duly received by the respondent from the petitioner.

Further contend in spite of the payment of the total advance for supply of 1000 metric tonne of the said goods as per the specification in the Purchase Order No.WTE/21/03021R1 dated 2nd March, 2021, the respondent failed and neglected to supply the said goods in spite of the repeated reminders. Various emails were exchanged by and between the parties whereby the respondent had assured the petitioner to supply the said good as per the Purchase Order. However, the petitioner failed and neglected to supply the same till date.

It is submitted vide letter dated 24th June, 2021 the respondent assured and had undertaken to make partial supply within 10 days. In reply thereto, vide letter dated 24th June, 2021 the petitioner requested the respondent to immediately supply the entire quantity of 1000 metric tonne of the said goods. In spite of the receipt of the email dated 24th June, 2021, the respondent failed and neglected to supply the same. The petitioner through its Learned Advocates and Solicitors sent a notice on 1st September, 2021 and demanded a sum of USD 100,000 with interest @ 15 % per annum from the respondent.

Further in reply thereto, the respondent admitted and acknowledged its default in supplying the said goods as per the Purchase Order and also accepted the receipt of 100,000 USD from the petitioner till 30th April, 2021. The petitioner agreed, acknowledged and had undertaken to refund a sum of USD 100,000 within 90 days after receiving the said letter. However, the respondent has not paid any amount till date after the assurance given by the Advocate for the respondent.

The defendant further by emails dated 21st October, 2021 and 11th November, 2021 admitted and acknowledged its debt and assured to make payment of 30% of the outstanding dues within 10-15 days and balance amount within 90 days to the plaintiff. However, no payment has been received by the plaintiff till date.

The petitioner is legally entitled to recover the said amount from the respondent and the respondent is also obliged to pay the said amount of USD 100,000 as stated hereinabove along with interest @ 15% per annum to the petitioner.

Petitioner came to know that the respondent is trying to sell off its assets and properties as well as removing the money from the bank accounts only with an intention to defraud the petitioner. Upon enquiry, your petitioner has gathered information regarding the details the bank accounts of the respondent, details whereof are mentioned in Schedule – A of the plaint.

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It is contended that Court may further be pleased to pass an order of injunction restraining the respondent, its men, agents, servants and/or assigns from dealing with the bank accounts as mentioned in the schedule without keeping aside a sum of Rs.95,57,565.47/-.

There is urgency in the matter as the petitioner has come to know, that the respondent is selling, alienating, encumbering and/or creating third party interest over and in respect of movable and immovable properties and/or removing and/or withdrawing money from bank accounts, hence, protective relief is prayed for.

Findings of the Court

Deducing the factual matrix, it transpires that the plaintiff/petitioner is a foreign company registered in Malaysia and the company placed purchase order for supply of "FERRO SILICON" pursuant to the purchase order No. WTE/21/03021R1 dated 2nd February, 2021 in favour of the respondent for supply of 1000 MT of Ferro Silicon @ USD 1,015 per Metric Tonne totaling USD 1,015,000.

The respondent was supposed to deliver the goods of 500 metric tonne in two different installments after receiving the payment. Although full payment was received by the petitioner but the goods were not dispatched inspite of promise. Follow up E-mail correspondence happened , petitioner promised goods would be immediately dispatched. Finally, the goods were not dispatched and ultimately, the petitioner undertook to refund the money along with commercial interest. The petitioner issued demand notice dated September 1, 2021 for refund of the money but the respondent inspite of acknowledging the debt has not paid a single farthing till date. Instead the respondent is trying to escape the liability or depriving the petitioner with intention to defraud by removing the money from his bank account and sell off the assets and properties, hence, preventive relief is prayed for.

From the conspectus of the above facts it is apparent that the respondent has received substantial amount from the petitioner with promise to supply 1000 MT of "Ferro Silicon" but failed to remain to commitment in delivery the goods to foreign buyer nor refunded the money received thereby the petitioner has made out a good arguable case in his favour with requires adjudication at the time of trial. The balance of convenience and inconvenience is inclined in favour of the petitioner as the respondent has taken the money and not delivered the goods. Further the petitioner has been suffering irreparable loss and injury following huge debts owed to the petitioner and at the same time from the factual backdrop of the fact as unfolded speaks of unfair business dealing, the dignity of the nation also gets effected before the business community as a whole.

Therefore, the plaintiff/petitioner has successfully qualified the requirement or touchstone of three principles in the grant of temporary injunction viz.

- a. Prima facie case,
- b. Balance of convenience and inconvenience,
- c. Irreparable loss and injury.

At this preliminary stage the court is restricted to the plaint & injunction application, sworn statement of the plaintiff/petitioner with annexed documents, together with the averment made therein.

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Thus, the law on the issue emerges to the effect that an ad-interim injunction shall be granted by the Court after considering all the pros and cons and preferably after issuing short notice but in exceptional cases, equitable and discretionary injunction can be exercised where by protective order needed to be passed as in the instant case, at least to protect the right of the plaintiffs for time being for the hereinabove reasons.

Hence, it is,

ORDERED

“The defendant/respondent, its men and agents are hereby restrained from dealing with the bank account as mentioned in the schedule ‘A’ of the injunction application without keeping aside a sum of Rs.74,61,990/- till 20.07.2022.”

Plaintiff/petitioner is directed to comply the provisions U/O 39 rule 3(a) and (b) of the code of Civil Procedure at once and furnish to the defendant/respondent:

1. a copy of the injunction application;
2. a copy of the affidavit filed in support of the temporary injunction application;
3. a copy of the plaint;
4. copies of documents on which the plaintiff/petitioner relies and
5. an affidavit stating that the copies stated above have been so delivered or sent.

Requisites to be filed immediately.

To date for S/R and appearance, hearing of temporary injunction application, W.O, if any, in the meantime and also for filing the W.S by the defendant/respondent.

Sd/- Neyaz Alam
Judge
Commercial Court at Rajarhat
North 24 Parganas