

OCD-16

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE

[COMMERCIAL DIVISION]

IA NO:GA-COM/1/2024
IN CS-COM/712/2024

SKIPPER LIMITED
VS
PRABHA INFRASTRUCTURE PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE KRISHNA RAO

Date : August 30, 2024.

Appearance :

Mr. Sabyasachi Choudhury, Adv.
Mr. Shounak Mukhopadhyay, Adv.
Mr. Sayantan Bose, Adv.
Ms. Ankita Choudhury, Adv.
...For the plaintiff

Mr. Dwaipayan Basu Mullick, Adv.
Mr. Rites Goel, Adv.
Mr. Ritoban Sarkar, Adv.
Ms. Tanvi Luhariwala, Adv.
...For the defendant

The Court: Mr. Sabyasachi Choudhury, learned Counsel, is appearing for the plaintiff and Mr. Dwaipayan Basu Mullick, learned Counsel, is appearing for the defendant.

Counsel for the plaintiff has filed the present application being GA-COM/1/2024 praying for judgment upon admission as well as interim order and ad interim order.

Counsel for the plaintiff has argued the matter with regard to grant of ad interim order.

Counsel for the plaintiff says that initially the plaintiff has filed the suit being CS/195/2022 along with an application for ad interim injunction but this Court has refused to grant the ad interim injunction. Subsequently, the suit was dismissed as withdrawn as the plaintiff has not initiated the pre-mediation process and accordingly, after the mediation process has been invoked and after getting the federal report in the mediation, the plaintiff has filed the present suit.

Now, the plaintiff has prayed for ad interim order for furnishing security of Rs.71,68,870/-.

Counsel for the plaintiff submits that the defendant has issued purchase order to the plaintiff and according to the plaintiff, it has supplied the materials. After supplying the materials, the plaintiff has paid certain amount and an amount of Rs.40,07,102/- is due and payable by the defendant.

As the defendant has not paid the said amount, the plaintiff has made a request to the defendant for payment of the said amount. Subsequent to the request of the plaintiff, the defendant has issued e-mail dated 8th September, 2021 wherein the defendant has agreed to pay of Rs.10-12 Lakh.

Counsel for the plaintiff submits that in spite of the admission by the defendant, the defendant has not paid the said amount.

Counsel for the plaintiff submits that in the said email dated 8th September, 2021 it was also admitted that after reconciliation of all materials supplied by the plaintiff, the defendant is ready to reverse back all the balance material and the balance payment.

Counsel for the plaintiff has submitted that in the said suit, the defendant has filed the written statement wherein the defendant has admitted that the defendant would proceed to make payment provided reconciliation of the goods is adjusted by the plaintiff.

Counsel for the plaintiff submits that only the defendant has taken the ground that there is a delay of supply of the goods of 77 days but even after the 77 days the defendant have accepted the said goods and as such the plaintiff cannot take the said plea of delay of 77 days.

Counsel for the plaintiff further submits that though the defendant are taken the said plea that due to the 77 days the defendant has suffered damage but no counter-claim was raised in the said written statement.

Counsel for the plaintiff submits that the defendant had admitted the liability to pay the principal amount of Rs.40,07,102/- and the defendant has already received the materials from the plaintiff and also admitted on the several means and as such it is necessary to pass an order of ad interim injunction for securing the amount as claimed by the plaintiff.

The plaintiff has relied upon the judgment in the case of ***Rahul S. Shah Versus Jitendra Kumar Gandhi and Others, reported in (2021) 6 Supreme Court Cases 418***, wherein the Hon'ble Supreme Court held that in a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases

during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

Counsel for the plaintiff relying upon the said judgment submitted that as per the document available on record the defendant has admitted the amount which is due and payable to the plaintiff, and at this stage ad interim order if not passed securing the amount, the plaintiff will suffer irreparable loss and injury and the decree, if any, will be passed in future would be only the paper decree.

The plaintiff has also relied upon the order passed by this Court in the case of ***Skipper Limited Vs. Prabir Kumar Sasmal*** dated March 11, 2024 wherein by relying upon the judgment passed by the Hon'ble Supreme Court in the case of Rahul S. Shah (Supra) has restrained the defendant from operating the account maintained by the defendant by keeping aside the amount claimed by the plaintiff.

Per contra, learned Counsel for the defendant submitted that the plaintiff has suppressed the material facts before this Court as on the same similar fact the plaintiff has filed an earlier suit and in the said suit also the plaintiff has filed an application for injunction on the similar ground and this Court by an order dated 23rd September, 2022 has rejected the prayer for ad interim injunction.

The defendant has relied upon the order passed by this Court in the earlier suit dated 23rd September, 2022.

Counsel for the defendant submits that the cause of action arose in the month of January, 2021 and March, 2021, but the plaintiff has filed the previous suit on 1st August, 2022 and this Court has rejected the prayer for ad interim injunction on 23rd September, 2022.

Subsequently, on 20th December, 2023, the plaintiff has withdrawn the suit and has initiated pre-mediation process under Section 12A of the Commercial Courts Act on 3rd January, 2024.

Counsel for the defendant further pointed out that on 2nd April, 2024 the mediation process has failed and on 26th June, 2024 the plaintiff has filed the present suit. Subsequently, on 19th August, 2024, the plaintiff has filed the instant application for grant of ad interim injunction.

Counsel for the defendant submits that from the act of the plaintiff itself shows that there is no urgency in the matter to pass in the ad interim order as prayed for by the plaintiff.

Counsel for the defendant has also raised objection on the ground of forum selection clause and submitted that in the purchase order it is categorically mentioned that the parties have agreed that the order is subject to Varanasi Court jurisdiction only but the plaintiff has filed the present suit before this Court though no cause of action arose before this Court and the plaintiff has agreed with regard to forum selection clause by accepting the purchase order.

Counsel for the defendant has relied upon the judgment in the case of ***Himani Alloys Ltd. Vs. Tata Steel Ltd. reported in (2011) 15 Supreme***

Court Cases 273 and submitted that admission should be categorical. Unless and until it is categorical admission it cannot be said that the defendant has made an admission. He has pointed out the e-mail which the plaintiff has relied upon and submitted the defendant has not categorically admitted with regard to the quantum of the amount, only the defendant has given the mail that he will pay the amount but the quantum is not being mentioned in the said mail but in the present suit, the plaintiff has claimed quantum of amount which does not reflect in the e-mail which the plaintiff relied as an admission on behalf of the defendant.

Heard the learned Counsel for the respective parties.

Perused the application and the judgment relied upon by the parties.

The plaintiff has narrated the facts with regard to the previous suit filed by the plaintiff in which this Court rejected the prayer for ad interim injunction. Subsequently, the plaintiff has withdrawn the suit for initiation of pre-mediation process and as such the submissions made by the Counsel for the defendant that the plaintiff has suppressed the material facts cannot stand.

Now, the question with regard to the forum selection clause, as per the submissions made by the Counsel for the defendant, as per the purchase order, the plaintiff has agreed with regard to the jurisdiction of Varanasi Court and as such this Court has not having the jurisdiction.

Admittedly, in the purchase order, the jurisdiction is mentioned with regard to the Varanasi Court but there are subsequent documents which shows that though the defendant has issued the purchase order to the plaintiff

at the address of Kolkata and the plaintiff has to supply the materials at Rajasthan. There is no such document or materials placed on record to say that any cause of action arose at Varanasi except the clause mentioned in the purchase order. From the document which the plaintiff has relied upon it is found that cause of action arose within the jurisdiction of this Court at Kolkata as all the communication has been made by the defendant to the plaintiff are at Kolkata address and the plaintiff has supplied the materials from Kolkata to Rajasthan as per the purchase orders.

The part payment has also been paid by the defendant to the plaintiff at Kolkata and as such this Court finds that by mere mentioning the forum selection clause it cannot be said that the plaintiff cannot file the suit before this Court though the cause of action also arose before this Court and as such the objection raised by the defendant with regard to forum selection clause also does not stand.

Now, the question whether the plaintiff is entitled to get the ad interim injunction as prayed for. The plaintiff has prayed for an ad interim injunction directing the defendant to furnish the security of Rs.71,68,870/-. The plaintiff has relied upon the documents, that is, the emails wherein the defendant has admitted that due to some personal difficulties the amount could not be paid or due to delay in supply of the goods but the delay for supply of goods was only for the 77 days but even after the delay of 77 days, the defendant has accepted the material from the plaintiff and utilized the said material.

At this stage, the plaintiff cannot say that the plaintiff has supplied the goods after the delay of 77 days. Even in the earlier suit when the defendant has filed the written statement, the similar stand was taken by the defendant but has not filed any counter-claim claiming the damages for the delay of supplying of the materials from the plaintiff. It is not denied with regard to the issuance of the purchase order or supply of the material by the plaintiff.

The defendant has raised an objection that the none of the emails of the plaintiff has mentioned about the quantum which the plaintiff has claimed but in the emails it is found that the defendant has stated that Rs.10-12 Lakh will be made tomorrow and further will be decided after re-conciliation.

It is not denied with regard to the amount payable by the defendant to the plaintiff. Now the question, whether at this stage the court can pass an order for ad interim injunction for securing the amount as claimed by the plaintiff. It is found that initially the plaintiff has filed the suit but this Court was not satisfied and this Court has rejected the said prayer on the ground that the plaintiff has only made one paragraph in the injunction application which was mentioned in paragraph 54 as appearing in order dated 23rd September, 2022 and this Court has rejected the said prayer relying upon the judgment of **QVC Exports Private Limited and Others and Sunil Kakrania & Ors.** and held that the care of plaintiff is not covered under the Order XXXVIII Rule 5 of the Code of Civil Procedure.

Now, the plaintiff has relied upon the judgment of Rahul S. Shah (Supra) wherein the Hon'ble Supreme Court in Paragraph- 42.7 held as follows:

“In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.”

Counsel for the defendant submits that this Judgment was also available at the initial stage when this Court has rejected the prayer of the plaintiff. It is true that this judgment of Rahul S. Shah was available but neither the plaintiff nor the defendant has brought to the notice of this Court with regard to the judgment of Rahul S. Shah (Supra).

Now, the plaintiff in paragraph-64 of the present application has categorically stated that the defendant refused to response any of the plaintiff's communication after the month of September, 2021. The plaintiff has also initiated the mediation process to settle the issue but the defendant has not come forward to settle the issue. The defendant has not denied with regard to the issuance of purchase order and for supply of the materials. The defendant has also not denied with regard to the quantum, only the defendant has taken the plea with regard to the delay of supply of the material of 77 days but it is found that on earlier occasion also the defendant has taken the said plea but no counter-claim was raised.

Considering the case of Rahul S. Shah and the pleadings of the present application, this Court finds that the plaintiff has made out a prima

facie case and balance of conveyance and inconveyance in favour of the plaintiff.

Though on the earlier occasion this Court has rejected the prayer for ad interim injunction in terms of order 38 Rule 5 of the CPC but now in terms of the judgment of Rahul S. Shah this Court by invoking the provision of 151 of the CPC pass an ad interim of injunction directing the defendant to secure the amount of Rs.40,07,102/- by keeping the said amount in the separate account till 4th October, 2024.

The defendant is directed to file affidavit in opposition within three weeks, reply thereto, if any, be filed within a week thereafter.

List the matter on 4th October, 2024.

(KRISHNA RAO, J.)

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