# THE HIGH COURT OF SINDH, KARACHI

Suit No. 1256 of 2019
[Eaton Phoenixtec MMPL Co., Ltd. versus Messrs. New Rabia Enterprises]

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| Plaintiff | : | Eaton Phoenixtec MMPL Co., Ltd. through Ms. Alizeh Bashir, Advocate. |
| Defendant | : | Messrs. New Rabia Enterprises through Syed Daanish Ghazi, Advocate. |
| Date of hearing | : | 28-03-2022 |
| Date of decision | : | 22-11-2022 |

## O R D E R

**Adnan Iqbal Chaudhry J. -** The suit is for recovery of price of goods. By CMA No. 2530/2020 under Order XII Rule 6 CPC, the Plaintiff prays for a decree on admission *"to the extent of Prayer (a) of the plaint or such other amount as this Hon'ble Court considers is admitted by the Defendant in the suit."* The prayer in clause (a) is for USD 330,805.30 together with interest @ 17% per annum from the date it became due till realization.

2. It is not disputed that under 6 proforma invoices agreed upon in March and April of 2016 as listed in para 2.3 of the plaint, the Plaintiff in Taiwan made shipment on or about 12-10-2016 to the Defendant at Karachi of solar invertors together with ancillary equipment at an agreed price of USD 610,805.30 for 9228 invertors. The Defendant took delivery of the goods in November of 2016, and from October 2016 to July 2017 the Defendant paid only USD 280,000 to the Plaintiff, leaving a balance of USD 330,805.30.

3. Heard the learned counsel and perused the record.

4. Per the Plaintiff, the Defendant made different excuses for not being able to pay the balance price, and eventually when the Plaintiff hired the services of a debt collection agency to pursue the recovery, the Defendant took the stance by legal notices dated 12-02-2018 and 24-04-2018 that some

of the invertors were defective. Per the Plaintiff, such ground taken by the Defendant after a long period of taking delivery, was frivolous.

5. The case set-up by the Defendant is that apart from the 6 proforma invoices subject matter of the suit, he had also made purchases under 7 previous proforma invoices since January 2016, being 17,338 invertors in all, out of which 824 invertors priced at USD 201,400 turned out to be defective, and hence he is entitled to adjust his loss from the balance payable to the Plaintiff. The Defendant has also filed Suit No. 949/2018 against the Plaintiff for damages for breach of contract, and for damages for harassment against the debt collection agencies engaged by the Plaintiff.

6. It is settled law that a decree under Order XII Ruler 6 CPC is by way of a discretion, and the Court may not exercise such discretion if a specific and material objection has been taken to the very maintainability of the suit.[1] Therefore, I first consider the objections taken to the maintainability of the suit, viz. (a) that the suit is filed by an unauthorized person; and (b) that the suit is time-barred. In my view, both objections are without force. The resolution passed by the Board of Directors of the Plaintiff to institute the suit is on the record along with the Power of Attorney in favour of the person who filed the suit. The proforma invoices, which constituted the contract between the parties, did not fix a period of credit, instead contemplated payment partly by letters of credit and partly by telegraphic transfer. It appears that subsequently the parties dispensed with the letters of credit due to their prior relationship, which fact is acknowledged by the Defendant in para 7 of the written statement. Thus, there being no fixed period of credit, limitation for the suit is governed by Article 52 of the Limitation Act, 1908 which provides a period of 3 years to institute the suit from the date of delivery of the goods. Per para 2.7 of the plaint, the Defendant took delivery of the goods in November, 2016; whereas, per para 6 of the written statement, the delivery commenced in October 2016. Either ways, the suit presented on 07-08-2019 was within the period of three years from the date of delivery.

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[1] *Macdonald Layton & Company Pakistan Ltd. v. Uzin Export-Import Foreign Trade Co.* (1996 SCMR 696).

7. Adverting now to the admission in the written statement. In para 16, the Defendant acknowledges: "*However, the Defendant (NRE) till date is willing to pay any amount payable after extinction of the USD $ 201,400.00 and adjustment of any expenses or loss suffered by the Plaintiff in accordance with exchange rate applicable at the time of payment was due.*" In para 17 he states: "*In this regard, the Defendant (NRE) had offered to extinct the amounts payable against the aforementioned infirmed units and pay USD $ 103,200 to the Plaintiff.*" Then in para 21 of the written statement the Defendant admits that after deducting the cost incurred on the defective invertors, "*the balance payable to Plaintiff = $ 100,665.30/-*". However, in para 22 of the written statement he contends that he is "*exercising a lien*" over such amount on account of loss to reputation, special damages and legal costs caused to him by the Plaintiff aggregating to USD 1,910,000.

8. *Ex facie*, there is an admission of fact by the Defendant in para 21 of the written statement that he is liable, in the very least, to pay a sum of USD 100,665.30 to the Plaintiff. The question is whether para 22 of the written statement qualifies such an admission.

9. In para 22 of the written statement when the Defendant states that he is '*exercising a lien*' on the balance payable, he is essentially taking the defense that he is entitled to set-off the amount payable to the Plaintiff against a claim for damages made against the Plaintiff in Suit No. 949/2018. But then, a set-off against a claim for damages is not a 'legal set-off' for 'any ascertained sum of money' and thus not envisaged under Order VIII Rule 6 CPC. It is at best a plea for an 'equitable set-off'. While an equitable set-off was recognized by the Supreme Court in *Niamat Ali v. Dewan Jairam Dass* (PLD 1983 SC 5), it was also held that the test was to see whether the claim for the debt and the claim for the equitable set-off are so connected that it would be inequitable to consider the latter separate from the former.

10. In the instant case, the debt owed by the Defendant is for the price of goods delivered to him, whereas the equitable set-off sought by him is for "*loss to reputation*", "*special damages*" and "*legal costs*" yet to be proved. Needless to state that the claim for loss to reputation is separate and distinct from damages for breach of contract. More significantly, the special

damages claimed do not appear to be for loss of invertors found defective. Para 21 of the written statement manifests that the purchase price of the defective invertors, customs duty paid, demurrage, warehousing, clearing and storage, cost of inspection, after sales service, upgrade and repairs incurred thereon, have already been deducted by the Defendant before arriving at the admitted sum of USD 100,665.30/. Therefore, in the facts of the case, the nexus between the respective claims of the parties is not such that it would be inequitable to deal with them separately.

11. In *Khalil (Pvt.) Ltd. v. M.V. WALES II* (2012 CLD 276), a somewhat similar defense was taken to Order XII Rule 6 CPC viz. that where the admission in the written statement was coupled with a counter-claim, it was not an admission of liability to pay. However, this Court observed that since Order XII Rule 6 CPC was concerned only with 'admissions of fact', if the admission of fact was unambiguous, categorical and unconditional, a decree can be passed despite a counter-claim. It was held that the words "without waiting for the determination of any other question between the parties" appearing in Order XII Rule 6 CPC are broad enough to cover a counter-claim. In *Qatar Airways v. Genyis International (Pvt.) Ltd.* (2002 CLC 449) as well, it was held that the mere pendency of a suit for damages by the defendant against the plaintiff is not a ground for rejecting an application under Order XII Rule 6 CPC.

12. From the discourse above, the juridical position that emerges is that where the admission is unambiguous, categorical and unconditional, then the mere presence of a plea of set-off would not suffice to defeat an application under Order XII Rule 6 CPC lest the words "without waiting for the determination of any other question between the parties" appearing therein become meaningless. However, in the final analysis, a decree under Order XII Rule 6 CPC remains a discretion of the Court, and it may well be that given the facts of a particular set-off before it, the Court is not inclined to exercise such discretion.

13. Having concluded that the admission made in this case by the Defendant is unambiguous, categorical and unconditional, and that the equitable set-off sought by the Defendant is no impediment, the application

under Order XII Rule 6 CPC is allowed by awarding the Plaintiff, against the Defendant, a partial decree of USD 100,665.30/- or Pak Rupees equivalent thereof as on the date of payment[2], plus interest on USD 100,665.30 @ 10% per annum from the date of suit until realization or Pak Rupees equivalent thereof as on the date of payment. The suit remains pending for the remaining prayer(s).

**JUDGE**

Karachi
Dated: 22-11-2022

[2] That a decree in foreign currency can be awarded in such manner had been settled in *Terni SPA v. PECO (Pakistan Engineering Company) Ltd.* (1992 SCMR 2238).