

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

G.A. (COM) No. 4 of 2024

In

C.S. (COM) No. 135 of 2024

(Old No. CS 188 of 2018)

Otmar Forster

Versus

Anil Saraogi

Mr. V.V.V. Sastry

Mr. Rahul Poddar

... For the plaintiff.

Ms. Labanyashree Sinha

Ms. Somali Bhattacharyya

Ms. Megha Das

.... For the defendant.

Hearing Concluded On : 16.07.2025

Judgment On : 25.07.2025

Krishna Rao, J.:

1. The plaintiff has filed the present application being G.A. (Com) No. 4 of 2024 in C.S. (Com) No. 135 of 2024 under Order XIII A of the Code of Civil Procedure, 1908, praying for summary judgment for an amount of USD 182,176 equivalent to Rs. 1,25,07,712.30 with interest and cost.
2. Brief facts of the plaintiff's case are that the plaintiff is a citizen and permanent resident of Koln, Germany. The defendant is a manufacturer and seller of garments and is engaged in the business of exporting garments under the name and style of "N.M. Exports" as a sole proprietor. In view of the plaintiff's experience and exposure in the European fashion and textile industry, the plaintiff and the defendant entered into an agreement on 21st July, 2005.
3. As per the agreement, the plaintiff entitled to receive commission of at least 3% of the FOB price after shipment from India on all orders carried out by the plaintiff and paid by the customers. The said agreement was initially for a period of one year but the same was extended from year to year, with an option to the parties to seek annulment with prior notice of two months.
4. The plaintiff received an amount of USD 54,207 from the defendant as commission out of total commission of USD 121,283 and thus the plaintiff is entitled to a sum of USD 67,076 in terms of agreement dated 21st July, 2005.

5. Mr. V.V.V. Sastry, Learned Advocate representing the plaintiff submits that instead of paying the amount, the defendant has filed a preemptive suit against the plaintiff before the Learned 1st Civil Judge, Junior Division at Sealdah praying for declaration that the plaintiff is not entitled to claim and recover any amount of commission at the rate of 3%. He submits that on receipt of summons of the said suit, the plaintiff has filed a demurrer application but the same was dismissed on 8th February, 2017. Being aggrieved with the order dated 8th February, 2017, the plaintiff has filed a Civil Revisional application before the Coordinate Bench of this Court being C.O. No. 1627 of 2017 and the Hon'ble Court by an order dated 17th May, 2017, held that the first and third reliefs of the suit can ever be granted and the third relief claimed in the suit is for injunction which is contrary to Section 41 of the Specific Relief Act, 1963.
6. Mr. Sastry submits that as the Coordinate Bench of this Court held that the defendant cannot claim first and third relief of the suit filed before the Sealdah Court, thus, the defendant is now precluded and estopped from raising the self-same defence in the present proceeding. In support of his submissions, he has relied upon the judgment in the case of ***Bhanu Kumar Jain Vs. Archana Kumar and Another*** reported in ***(2005) 1 SCC 787***.
7. Mr. Sastry submits that the cause of action raised by the defendant that the plaintiff is not entitled to get 3% commission is already rejected by the Coordinate Bench of this Court and thus the defendant cannot

raise the same issue in the present suit. Mr. Sastry submits that if the suit filed by the defendant and the written statement filed in the present suit is compared, it would find that the same defence is taken by the defendant in the present suit by filing written statement.

8. Mr. Sastry submits that the existence of agreement is not in dispute and the defendant admitted that as per agreement, the plaintiff is entitled to get 3% commission, thus there is no triable issue to decide the suit filed by the plaintiff.
9. Mr. Sastry submits that if this Court finds that the defence raised by the defendant is assumed to be correct, this Court may pass an order allowing the defendant to contest the suit by furnishing security. In support of his submissions, he has relied upon the judgments in the case of ***B.L. Kashyap and Sons Limited Vs. JMS Steels and Power Corporation and Another*** reported in ***(2022) 3 SCC 294*** and in the case of ***A2 Interiors Products Pvt. Ltd. Through its Authorized Representative Jatin Pasricha Vs. Rahul Bhandari and Ors.*** reported in ***2022 SCC OnLine Del 2862***.
10. Ms. Labanyashree Sinha, Learned Advocate representing the defendant submits that it is the specific case of the defendant that by an e-mail dated 14th December, 2015, the plaintiff had acted in breach of the Agreement dated 21st July, 2005 and failed to perform the same to the satisfaction of the defendant. She submits that though the written

agreement provides commission of 3%, the same was mutually modified by the parties and reduced to 1.25%.

- 11.** Ms. Sinha submits that all the invoices raised by the plaintiff carried commission at the rate of 1.25% and all the invoices have been paid to the plaintiff and the plaintiff received all the payments in the year 2015 itself without any objection. She submits that a meeting was held between the parties in Cologne, Germany sometimes in the month of February, 2015 and the agreement was determined and discontinued by mutual consent.
- 12.** Ms. Sinha submits that there is no iota of document or pleading to show that the defendant by his conduct admitted or acknowledged any payment as claimed by the plaintiff. She submits that it is the specific case of the defendant that all the payments of the plaintiff, have been made to the plaintiff and no dues are pending.
- 13.** Ms. Sinha submits that the claim of the plaintiff in the instant application has no foundation. The e-mails dated 13th November, 2015 and 23rd December, 2015 relied by the plaintiff itself shows that the plaintiff did not claim any amount as being due and payable to the plaintiff. She submits that from the side of the plaintiff, there was no demand for payment of any sum as the plaintiff himself was not aware of whether at all any payments were due to him or not. She submits that there is no pleading to show that how the plaintiff arrived at a sum of USD 67,076.

14. Ms. Sinha submits that the defendant has filed the suit before the Sealdah Court. The Coordinate Bench of this Court in a revisional application by an order dated 17th May, 2017, recorded that the dispute between the petitioner and the opposite party as to whether the petitioner is entitled to any commission on account of sale of goods of the opposite party's manufacture in Europe. The Hon'ble Court also held that the trial Court has found a modicum of cause of action evident from the plaint, the impugned order is not interfered with. She submits that the Hon'ble Court has not dismissed the suit and the defendant has raised the same objection in the present proceeding initiated by the plaintiff against the defendant, thus question of *res-judicata* and issue of estoppel does not arise.

15. Ms. Sinha further submits that the arguments made by the plaintiff in the present application are not pleaded either in the plaint or in the present application.

16. The agreement between the parties dated 21st July, 2005, reads as follows:

"The 2 parties of this signed contract:

*N.M. Exports (located at 2, Dilarjung Road,
Cossipore Kolkata – 700 002 India) represented by
Mr. Anil Saraogi*

And

*Mr. Otmar Foster, resident at Mohnweg 28, 50858
Koln, Germany*

have considered the following:

That the two parties have agreed Mr. Forster to act as a trade agent for N.M. Exports for a certain time period (specially from July 1, 2005 to July 1, 2006) and agree to the following terms:

Point 1:

- 1) N.M. Exports declares to have employed Mr. Forster to act as a trade agent on their behalf in regard to the sales of their goods starting July 1, 2005 by the terms below mentioned. Thereby, Mr. Forster has agreed to accept and enter upon this occupation.*
- 2) This contract is limited to the time period of one year from July 1, 2005 to July 1, 2006. The contract will be extended for the period of one (1) year every year, unless one of the parties informs the second party that an extension of this contract is not in their interest. The annulment of the contract has to be declared at the latest two months of the conclusion of the running contract.*

Point 2:

Mr. Forster will receive a commission of at least 3% of the FOB-price after shipment from India of all the orders carried out by N.M. Exports and paid by the customer.

Point 3.)

Mr. Forster is obliged to inform N.M. Exports of taking up any new German or international clients. Mr. Forster must have a written approval from N.M. Exports before starting or taking any new business or a new client. N.M. Exports reserve the right to disallow any customer if they decide so.

Point 4:

For the period of 12 months after conclusion of this contract Mr. Forster has the full rights to the commission mentioned in Point 2 in regard to any orders he has carried out.

Point 5:

- 18.** The plaintiff in any of the paragraph of the plaint or in the present application has not mentioned how the plaintiff has made the calculation as appearing in paragraph 22 of the plaint. The plaintiff had sent an e-mail to the defendant on 13th November, 2015, called upon the defendant to furnish details and particulars of orders that the defendant has executed against which payments have been received by the defendant from various customers to access the exact quantum of

commission which is due and payable by the defendant to the plaintiff. In reply to the said e-mail, the defendant has sent a reply by an e-mail dated 14th December, 2015 wherein the defendant has informed the plaintiff that the plaintiff did not comply with his obligations as contained in the contract for long time. There was a dinner meeting between the plaintiff and the defendant in February, 2016 at Cologne, Germany where it was agreed that the defendant would discontinue to pay to the plaintiff, the said commission for Vogeles Contracts at the rate of 1.25% from the next year, 2016 and the plaintiff has agreed and accepted the same. In the said reply, it was also informed to the plaintiff that no claim of the plaintiff would be entertained by the defendant from now and the agreement/ understanding by and between the parties having been terminated/ determined.

19. The plaintiff by an e-mail dated 23rd December, 2015, sent a reply to the reply of the defendant stating that the agency agreement is still in existence and the plaintiff is entitled to claim information with respect to the sales.
20. The defendant has disclosed several invoices wherein it reveals that the plaintiff has received commission from the defendant at the rate of 1.25 % without any objection.
21. Order XIII A, Rule 3 of the Code of Civil Procedure, 1908, as amended under the Commercial Courts Act, 2015 reads as follows:

**“ORDER XIII A
SUMMARY JUDGMENT**

3. Grounds for summary judgment.- *The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that-*

(a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and

(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.”

22. In the present case, the plaintiff has claimed commission at the rate of 3% as per agreement dated 21st July, 2005. The defendant has taken specific defence that the plaintiff has violated the terms and conditions of the agreement and has accepted commission at the rate of 1.25% without any objection and subsequently in the month of February, 2016, the agreement is terminated/ determined. As regard to the payment of commission at the rate of 1.25%, the defendant has disclosed invoices and the same is not denied by the plaintiff. As regard to the agreement, the plaintiff has denied with regard to the termination. The defendant has raised triable issue and there is no admission on the part of the defendant to the claim made by the plaintiff.

23. As regard to the issue raised by the plaintiff that due to the order passed by the Coordinate Bench of this Court in Civil Revisional Application being C.O. No. 1627 of 2017 (Otmara Forster Vs. Anil Saraogi) dated 17th May, 2017, the plaintiff is estopped from raising self-same defence, the order dated 17th May, 2017, reads as follows:

“The suit appears to be tenuous and more for professional benefit than for earning any relief to the plaintiff therein.

There is a dispute between the petitioner herein and the opposite party as to whether the petitioner is entitled to any commission on account of the sale of the goods of the opposite party’s manufacture in Europe. Upon a notice of demand being received by the opposite party, the defensive suit was filed in the trial court. On the petitioner’s application for rejection of the plaint, the trial court has found that the suit was maintainable.

On a reading of the plaint, it does not appear that the first or the third reliefs can ever be granted.

As far as the first relief is concerned, a declaration pertaining to a money claim cannot be issued. The third relief claimed in the suit is for an injunction which is contrary to Section 41 of the Specific Relief Act, 1963. If any authority is required on such proposition, a reference may be made to AIR 1983 SC 1272.

Since the trial court has found a modicum of cause of action evident from the plaint, the order impugned is not interfered with. It is, however, clarified that the pendency of the suit will not stand in the way of the petitioner herein instituting his independent claim before an appropriate forum in accordance with law.

CO 1672 of 2017 is disposed of without any order as to costs.

Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.”

- 24.** In the suit filed by the defendant being Title Suit No. 260 of 2015, the defendant has prayed for the following reliefs:

“a) Declaration that the defendant is not entitled to make any claim against the plaintiff in respect of any commission in the facts and circumstances

stated above, the commission entitled to by the defendant being paid by the plaintiff upto date.

b) Alternatively, the entitlement of the defendant as to the commission in the facts and circumstances of the case be determined.

c) Perpetual injunction restraining the Defendant his men, servants, agents associates and assigns from in any way making any claim against the plaintiff in respect of any commission in the facts and circumstances stated above, the commission entitled to by the defendant being paid by the plaintiff upto date;

d) Costs;

e) Further and/or other reliefs.”

25. The Hon’ble Court by an order dated 17th May, 2017 held that the first and third reliefs can ever be granted as the said reliefs are contrary to Section 41 of the Specific Relief Act, 1963. But the Court also held that the trial Court has found a modicum of cause of action evident from the plaint and the order impugned was not interfered with. The Court has not decided the suit and the Court has not interfered with the order of the learned trial Court. Leaving aside first and third prayers of the suit pending before the Sealdah Court, the defendant has prayed for another relief in prayer (b) wherein the defendant has prayed for determination of entitlement of the commission of the plaintiff.

26. This Court finds that there is no estoppel against the defendant and there is no res judicata for raising the issue in the present suit by filing written statement.

27. In the facts and circumstances mentioned above, this Court finds that the defendant has raised triable issue which can be decided only after the evidence of the parties and no summary judgment can be passed as prayed for by the plaintiff.

28. G.A. (Com) No. 4 of 2024 is dismissed.

(Krishna Rao, J.)