

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 1087 of 2004

Reserved on : 4th August 2009

Decision on : 11th August 2009

DINESH BHAKTA SHRESTHA Plaintiff
Through Dr. Amitabha Sen with
Mr. Lalit Kr. Singh and
Ms. Aditi Pandey, Advocates

versus

MMTC LTD. & ANR. Defendants
Through Mr. Sanat Kumar and
Mr. Sanjay Sharma, Advocates.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

- | | | |
|----|---|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
11.08.2009

S. Muralidhar, J.

1. This is a suit for recovery of Rs.58,60,288/- together with past, pendente lite, future interest at 18 % per annum, and damages and costs.

2. The plaintiff, a Nepali national, is the sole proprietor of Mini Mini Enterprises (MME) a concern registered with the Department of Commerce of the Government of Nepal and having a registered office in Kathmandu in Nepal. MME claims to specialise in fertilizer trade and related services.

3. In the year 1997, the Defendant No.1 MMTC, a Government of India undertaking which deals in agriculture inputs including fertilizers, was negotiating a contract to supply and deliver 20,000 MT of urea fertilizer at US\$ 247 per MT to Agriculture Inputs Corporation (AIC) an undertaking of the Government of Nepal. It is stated that the Government of Nepal was in urgent need of supply of urea at that point in time.

4. Even prior to MMTC entering into an agreement with AIC, MME was in contact with MMTC and was coordinating the visit by MMTC officials to Kathmandu for concluding the contract with AIC. On 19th June 1997, the MMTC wrote to MME informing it that a two-member MMTC delegation would be visiting Kathmandu between 25th and 26th 1997 for the finalization of the contract.

5. On 27th June 1997 an agreement was entered into between AIC and MMTC for supply of 20,000 MT of urea by MMTC. The consignment was to be delivered into three lots of 4000 MT, 6000 MT and 10,000 MT respectively. The agreement named the four warehouses of the AIC where the consignment was to be delivered. As regards the delivery period, the first lot of 4000 MT was to be delivered within twenty days from the date of the agreement, the second lot of 6000 MT within forty-five days and the third lot of 10,000 MT within sixty days.

6. By a letter dated 14th July 1997 addressed to MME, the MMTC informed it that “we are pleased to appoint you as our Agents for
CS(OS) No.1087/2004

facilitating MMTC's business with HMG Nepal. To start with, we are appointing you as our Agent for handling business concluded with M/s AIC, Nepal on 27/6/1997 for export of 20,000 MT of bagged Urea. Kindly note that the agency commission payable shall be 4% of value of business concluded with M/s AIC, Nepal. Detailed terms and conditions shall be sent to you in due course."

7. By a letter dated 6th August 1997 MME informed the MMTC that AIC had opened a letter of credit (LC) for the contract. On the next day it informed MMTC that Nepal Bank Ltd., Kathmandu had transmitted the LC to American Express, New Delhi. The delivery period was rescheduled effective from the date of opening LC, i.e., 6th August 1997.

8. It transpired that up to 4th September 1997 MMTC was able to deliver only 1400 MT out of 4000 MT of the first lot in the Nepalgunj and Bhairahawa offices of the AIC in Nepal. According to the plaintiff time being the essence of the contract it was incumbent on the MMTC to have adhered to the delivery schedule set out in the agreement with AIC. Ultimately of the 20,000 MT of urea agreed to be supplied to AIC, MMTC supplied 14686.603 MT during 1997.

9. On 23rd December 1997 AIC made a provisional payment of US\$ 66,790 to MMTC. A meeting was held between MMTC and AIC at Kathmandu on 30th January 1998. Inter alia AIC agreed to release US\$ 114,629.66 withheld by it on account of shortage of urea in earlier contracts subject to the insurance company giving a letter specifying that

AIC’s claims are under process and shall be settled within a particular date and MMTC undertaking to pay the differential amount out of the 100% value of shortages in case the insurance company settled the claim for a lesser value.

10. MME kept writing to MMTC regarding the payment of agency commission. According to the plaintiff several letters and reminders were sent between February 1998 and September 2000, requesting for release of the balance payments due to MME. Reliance is placed upon a letter dated 28th September 2000 sent by fax by MMTC to the plaintiff where the MMTC acknowledged that it owed the plaintiff the balance of the commission. The said letter sent by fax reads as under:

“To: Shri Sunil Shrestha Designation: Organisation: Mili Mili Enterprise Fax No. : 009771-417446	From : Shrikant Pathrabe Designation : Dy. Manager Date : 28/9/2000 Page No. : 1 of 1 Pages
---	--

If the transmission is not clear, please notify us immediately.

Sub: Regarding agency commission against AIC Nepal contract

With reference to your msgs and meetings on the above subject, the matter was examined and the competent authority felt that the agency commission to M/s Mili Mili cannot be released immediately till AIC, Nepal remits the amount of US\$2,99,821.79 which it had recovered arbitrarily from MMTC’s bills out of the export payment for supply of 14686.603 MT of urea during 1997. Till date we have received only an amount of US\$34,614.72 from AIC, which was remitted after much pursuation (*sic persuasion*) by MMTC by MMTC. AIC has been holding this amount for more than six months after recovery from the insurance company.

Since protecting the business interests of MMTC is one of the conditions of the agreement with M/s. Mili Mili, it is felt that M/s. Mil Mili should take up suitably with AIC for remittance of the balance amount before we can consider the remittance of

balance agency commission to M/s Mili Mili.

Yours faithfully,
(Shrikant Pathrabe)”

11. According to the plaintiff, MME wrote on 9th August 2001 to the MMTC demanding the payment of balance commission. Thereafter when MME was unsuccessful in getting MMTC to pay the balance commission, the proprietor of MME visited MMTC’s office on 9th May 2002. Immediately thereafter on 10th May 2002 MME wrote a letter to the MMTC referring to the meeting held on 9th May 2002 and pointing out that “till date we have not received our balance commission in an amount of U.S.\$ 78,313.63 even though we were assured at one time (vide MMTC’s letter dt. 28/9/2000) to release our balance amount after recovery of insurance claim amount from the under writers.” This was followed by a reminder dated 28th October 2003 which reiterated that MMTC owed it the balance agency commission of U.S. \$78313.63 “despite your verbal and written assurance to remit the balance after recovery of Insurance Claim (See MMTC’s letter of 28th September 2000) **which claim has been settled for long nearly two years already.**” (emphasis supplied)

12. When no payment was forthcoming the present suit was filed on 3rd September 2004.

13. In the written statement filed by the MMTC, a preliminary objection was taken as to the suit being barred by limitation. It was

pointed out that even if it was assumed that the MMTC's letter dated 28th September 2000 constituted an acknowledgment of debt, the suit filed on 3rd September 2004 was beyond the limitation period of three years. The other preliminary objection was that the suit was bad for mis-joinder of parties since the defendant No.2 being the Managing Director of the Defendant No.1 was not a necessary party. On merits, it was contended that due to serious lapses on the part of the plaintiff in not getting the LC period extended, MMTC suffered huge losses. It was further alleged that due to the inaction of MME, the plaintiff also failed to get the release of payments from the AIC. The stand was that since the plaintiff had failed to perform his part of the contract, he could not ask for any further commission.

14. On 5th September 2005, the following issues were framed:-

- “1. Whether the defendants agreed to pay to the plaintiff 4% commission on the total value of 20,000 metric tonnes of urea? OPP
2. Whether the defendants failed to perform their part of the agreement, if so, to what effect? OPP
3. Whether the plaintiff is entitled to recover amounts from the defendants, if so, how much? OPP
4. Whether the plaintiff is entitled to interest, if so, on what amount, at what rate and for what period? OPP
5. Whether the suit of the plaintiff is barred by time? OPD
6. Whether the suit is bad for mis-joinder of parties? OPP
7. Whether the plaintiff has committed breaches of the agreement, if so, to what effect? OPD
8. Relief.”

15. The submissions of Dr. Amitabha Sen, the learned counsel for the plaintiff and Mr. Sanat Kumar, the learned counsel for the defendants have been heard.

16. One of the preliminary objections concerned the question of the limitation. Therefore, this Court heard arguments on it first. In any event in terms of Order XIV Rule 2(2) CPC, it was thought appropriate to hear submissions on the aspect of limitation as a preliminary issue.

17. *Issue 5: Whether the suit is barred by time?*

The submission on behalf of the plaintiff is two-fold. It is first submitted that the limitation did not begin to run only with effect from 28th September 2000 when the MMTC wrote to the plaintiff acknowledging that it owed the plaintiff agency commission. It is contended that at the meeting held on 9th May 2002, MMTC acknowledged that the money was owing to the plaintiff. The contents of the said meeting were ‘memorialized’ in the letter dated 10th May 2002 written by MME to MMTC. There was no reply to this letter denying that such a meeting took place. Further, in the cross-examination of the witness for the defendant, the fact of the aforementioned meeting having been held on 9th May 2002 and the letter dated 10th May 2002 having received by the MMTC were not denied. Consequently it must be taken as if the MMTC has accepted that at the meeting held on 9th May 2002 it again acknowledged that it owed the plaintiff money in the form of the balance agency commission and therefore limitation would begin to run only

from that date.

18. Secondly it is contended that one of the points raised in the plaint is that the defendant No.1 perpetrated a fraud on the plaintiff by concealing from the plaintiff that it had already received the full payment owing to it from the AIC. This was the reason given by the MMTC for denying the agency commission to the plaintiff. According to the plaintiff this fraud was discovered on 25th October 2003. The suit was filed within one year of the discovery of the fraud and therefore was within time.

19. Counsel for the defendant on the other hand points out that after 28th September 2000, there is no letter written by the MMTC to the plaintiff in regard to the agency commission. The letter dated 10th May 2002 does not indicate that at the meeting held on 9th May 2002, there was any acknowledgment by the MMTC that the balance agency commission was owed to the plaintiff. Even in the subsequent lawyer's notice issued by the plaintiff to the defendant on 28th October 2003, no reference is made to any such acknowledgment by the MMTC of its dues at the meeting held on 9th May 2002. More importantly, that letter also does not mention the plaintiff having discovered any fraud as alleged in the plaint on 25th October 2003. It is further pointed out that the actual date of discovery of the fraud is mentioned only in para 35 of the plaint which sets out the various dates on which cause of action of filing the suit arose. It is submitted that although according to the plaintiff it realized only on 25th October 2003 that the MMTC had already received

the balance payment from AIC, in the letter dated 9th August 2001, the

plaintiff acknowledged that the MMTC had already received the amount claimed of payment from the underwriters. Therefore, there was no evidence to show that the fraud was discovered only on 25th October 2003. It is accordingly submitted that the suit is barred by limitation even on the second limb of argument.

20. The facts are really not in dispute. It is only the interpretation of the various documents that appear to be disputed. For instance MMTC does not dispute the letter dated 28th September 2000 which has been extracted hereinbefore. It can be construed to be an acknowledgment by the MMTC that it owes agency commission to the plaintiff. If the limitation for the plaintiff to claim the amount of agency commission is to run from that date, then clearly the suit is barred by limitation as it was filed on 3rd September 2004 more than three years after the date of that letter.

21. To overcome this difficulty, the plaintiff claims that at a meeting held on 9th May 2002 with MMTC the fact that it owed the plaintiff the balance agency commission was acknowledged by the MMTC and that this was thereafter memorialized by MME in the letter dated 10th May 2002 addressed to MMTC neither of which has been denied by the defendant of its witness.

22. A perusal of the letter dated 10th May 2002 shows that it refers to the meeting on 9th May 2002 regarding the release of commission to the plaintiff. However, a careful perusal of that letter shows that it

does not indicate that at the meeting held on 9th May 2002, the MMTC in fact acknowledged that it owed any sum to the plaintiff. The learned counsel for the plaintiff was unable to point to this Court any sentence in the said letter which records that at the meeting held on 9th May 2002 there was any such acknowledgment by the MMTC.

23. Mr. Ashwani Kumar Verma, the Senior Manager of the MMTC was examined as DW1. He was not specifically asked any question by the learned counsel for the plaintiff as regards the meeting held on 9th May 2002. In his cross-examination on 14th December 2007, he was asked about the letter dated 10th May 2002 (Ex.P-5) and he answered: “I have not replied to the plaintiff in response to Ex.P-5 but as regards the Ex.P-6 and P-21 I cannot say whether any replies to the same were sent by the MMTC to the plaintiff”. The learned counsel for the plaintiff wants this Court to infer from the above reply that the MMTC not only admitted the receipt of the letter dated 10th May 2002 but also that the said letter correctly memorialized what transpired at the meeting on 9th May 2002. According to him it should further be taken to have been admitted by the MMTC that at the meeting on 9th May 2002 MMTC acknowledged that it owed the plaintiff balance agency commission. This Court is unable to draw any such inference. At the highest, the above reply by the witness can only be understood as acknowledging the receipt of the letter dated 10th May 2002 and nothing more. In any event, the letter dated 10th May 2002 nowhere states that at the meeting held on 9th May 2002 the MMTC acknowledged that it owed balance agency commission to the

plaintiff. It is one thing to say that the plaintiff stated in the said letter that some balance amount was owing to MME by MMTC. It is another to say that the MMTC acknowledged that it owed such amount to MME. There can be no such deemed acknowledgment in the manner suggested by the learned counsel for the plaintiff only because the MMTC did not reply to the letter dated 10th May 2002. A question could have easily been put to the witness as to what transpired in the meeting on 9th May 2002. However, no such question was asked.

24. A reference may be made to Section 18 of the Limitation Act in order to appreciate what kind of an acknowledgment is required in law for the purposes of determining when the limitation begins to run. The acknowledgment envisaged in Section 18 has to be in writing signed by the party against whom such right is claimed. Where the writing is undated, oral evidence may be given of the time when it was signed. The earliest acknowledgment, if any, by the MMTC in terms of Section 18 is dated 28th September 2000. After that date there is no acknowledgment in terms of Section 18 Limitation Act.

25. Therefore, this Court is therefore unable to accept the submission of the learned counsel for the plaintiff that the limitation period of three years should begin to run from 9th May 2002.

26. The second limb of submission as regards limitation is that the suit is based on the discovery of the fraud by the MMTC and that this

fraud was discovered on 25th October 2003. The precise averment in the plaint in this regard is contained in paras 24, 25, 26 and 35 which read as under:

“24. The Plaintiff was growing more and more impatient and tried whatever means and resources were available with him to get the balance commission released to him. During this extremely tiring and arduous efforts to collect the remaining balance, the Plaintiff came to know that the Defendant Company had already received from AIC the total amount due to the Defendants.

25. Shocked at the fraud perpetrated on him by a Government of India undertaking, the Plaintiff was at a complete loss. He had no idea how to recover loss. He had no idea how to recover from the Government and where to go. The Plaintiff expected that the Defendant Company, being a Government of India undertaking, would act in good faith and not deprive one of its agents off his legitimately earned commission in a fraudulent manner.

26. Exasperated, the Plaintiff sent a legal notice to the Defendant Company on October 28, 2003. The Plaintiff, in its legal notice, once again, stated the balance owing to him and demanded payment in full forthwith. The Defendants chose to ignore that notice also and continued its silence.

35. The cause of action first arose on May 9, 2002 when the Plaintiff met the Defendants and memorialized the minutes of the meeting in his letter dated May 10, 2002. The Plaintiff stated the accounts in his letter to the Defendants regarding the balance commission. It again arose on October 25, 2003 when the plaintiff discovered, contrary to Defendants’ assertions, that the Defendants had already received their balance in full from AIC. This

fact of payment in full by AIC was fraudulently concealed by the Defendants from the Plaintiff who now realized that the Defendants never had the intention to perform what they were promising to the Plaintiff repeatedly. The cause of action further arose on October 28, 2003 when the Plaintiff issued a legal notice to the Defendants and demanded payment of the balance commission. The cause of action still continues. Hence, the suit has been filed within the prescribed limitation period.”

27. In addition to the above, after the arguments had concluded the plaintiff filed a further application purporting to place on record a two-page brief on this aspect. The two-page brief is a reiteration that the fraud was discovered on 25th October 2003 and therefore in terms of Section 17 of the Limitation Act, the period of limitation would begin to run from that date. It is contended that since there is no specific denial by the defendant of these averments it should be taken to be admitted that a fraud was discovered on the aforementioned date. Reliance is placed on the judgments of the Supreme Court in *Pallav Sheth v. Custodian & Others AIR 2001 SC 2763*; *Ramesh B. Desai v. Bipin Vadilal Mehta AIR 2006 SC 3672*; *Popat and Kotecha Property v. State Bank of India JT 2005 (12) SC 302*; *Steel Authority of India Ltd. v. Rameshwar Dass 60 (1995) DLT 271 (DB)* and *Anil Sudan v. Bimla (2008) 9 AD Delhi 424*.

28. A perusal of the para 35 of the plaint, shows that it is the only place where the plaintiff has stated that the alleged fraud was discovered on

CS(OS) No.1087/2004 **Page 13 of 18**

25th October 2003. The discovery of the fraud purportedly was in the following manner. It was “contrary to the Defendants’ assertions, that the Defendants had already received their balance in full from AIC. This fact of payment in full by AIC was fraudulently concealed by the Defendants.....”. This sentence in the above paragraphs of the above plaint are repeated.

29. In the evidence filed by way of examination-in-chief, the plaintiff has reproduced paras 24, 25 and 35 of the plaint verbatim. In other words, the evidence of the plaintiff does not give further particulars of how and in what manner the plaintiff discovered on 25th October 2003 the alleged fraud committed by the MMTC.

30. However, what is significant is that in para 28 of the plaint it is stated:

“28. More than five years have passed since the supply of fertilizer under the above said Agreement was initiated, completed and payment received therefrom by the Defendants. Yet, the payment of the Plaintiff’s legitimate and rightfully earned commission is still pending.”

31. It would appear from the above paragraph that according to the plaintiff the payments were received by MMTC in 1999 itself. The above paragraph for some reason is not found in the affidavit filed by way of evidence by way of examination-in-chief of the plaintiff.

32. A question was asked of DW1 about the payments received by the MMTC and the reply of the witness is as under:

“I am not aware of the MMTC having recovered the insurance amount from underwriter. It is correct that MMTC filed an insurance claim in respect to the shortage of the amount relating to the present contract. I do not know the details of this insurance claim as it was filed long back. I do not know whether I have filed any documentary proof to show my contention in para-11 of my affidavit that plaintiff has failed to perform its part of obligation. Volunteered, it is evident from the fact that the agreed amount was not supplied by the plaintiff and no further extension of time could be given to the plaintiff by the AIC.

Q: Was the insurance claim related to the cyclonic weather claimed by the defendant?

A: The details of insurance claim is not known to me.”

33. There is merit in the contention of the learned counsel for the defendant that the letter dated 9th August 2001 written by the plaintiff to the MMTC in fact suggests that the plaintiff was already aware by that date the MMTC had received full payment. The said letter reads as under:

“9th August 2001
M/s MMTC Limited
Core-1, “Scope Complex”
7 Institutional Area
New Delhi-110 003
INDIA

Kind Attn: Mr. P. K. Maheshwary - C.G.M.

**Subject : Release of Commission -
AIC/Nepal contract dated 27-06-1997**

Dear Sir,

This has reference to our meeting of 8th August 2001 at your office regarding subject matter. As informed to you via our e-mail dated 29th June 2001, AIC had already forwarded all required original documents pertaining to insurance claim of Urea **and since MMTC have already received agreed claim amount from the underwriters**, we now request you to kindly release our balance commission of U.S.\$ 78,313.63 of subject contract at the earliest enabling us to close our file.

Should you need any further clarifications in this regard, please do let us know.

Thanking you,

Yours faithfully

For Mili Mili Enterprises
(Sunil Shrestha)”

34. An attempt was made by the learned counsel for the plaintiff to suggest that the above letter only acknowledges MMTC having received the amount from the underwriters and not from AIC. This really does not help the plaintiff. If in fact the plaintiff knew that MMTC had already received the payments and therefore the balance agency commission was due to the plaintiff, it cannot be said that the plaintiff was unaware of the MMTC having received the payment for the consignment. The whole case of the discovery of the fraud as set out in para 35 of the plaint is about the concealment by the MMTC from the plaintiff that the payment had been received by it in full. The case that this alleged fraud was discovered only on 25th October 2003 is belied by the Plaintiff's letter dated 9th August 2001 to the MMTC.

35. Further the notice dated 28th October 2003 (Ex. P-6) also acknowledges that the insurance claim of the AIC “has been settled for

long nearly two years ago”. This assertion by the plaintiff is consistent with what it stated in its letter dated 9th August 2001. A conjoint reading shows that some time in 2001 itself the plaintiff was aware of MMTC having received the full payment. Clearly therefore the so called fraud was discovered by the plaintiff, on his own showing, in 2001 itself. Therefore, the resort to Section 17 of the Limitation Act by the plaintiff to somehow extend the period of limitation to 25th October 2003 the alleged date of the discovery of the fraud is misconceived. If the plaintiff knew that the so called fraud occurred on 9th August 2001 itself (actually a date prior thereto) then even on that basis the limitation began to run from that date and the suit is, therefore, barred by time.

36. In view of the above factual position, the decisions cited by the plaintiff are of no assistance to him. Those decisions no doubt set out the settled position in law that the limitation would begin to run only from the date of the discovery of a fraud in terms of Section 17 of the Limitation Act. But on the facts of the instant case, the date of the discovery of the fraud, even according to the plaintiff, was some time prior to 9th August 2001.

37. Therefore on both counts, this Court finds that the suit is barred by limitation.

38. In view of the above discussion, preliminary issue No.5 is decided in the affirmative in favour of the defendant and against the plaintiff. It is

held that the suit is barred by time.

39. In view of the finding on issue No.5, this suit fails. Consequently, a decision on the other issues is not called for. The suit is dismissed with costs. The records be consigned.

S. MURALIDHAR, J.

AUGUST 11, 2009
ak