

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 01.11.2010
Judgment Pronounced on: 09.11.2010

+ **CS(OS) No. 855/2002 and IA No.2394/2009**

M/S. SINEXIMCO PTE LTD. Plaintiff

- versus -

M/S. DINESH INTERNATIONAL PVT. LTD. Defendant

Advocates who appeared in this case:

For the Plaintiff : Mr A.K. Singla, Sr. Adv.
with Mr. J.K. Sharma, Adv.
For the Defendant : None.

**CORAM:-
HON'BLE MR JUSTICE V.K. JAIN**

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

V.K. JAIN, J

1. This is a suit for recovery of ₹84,15,000/-. It has been alleged in the complaint that the plaintiff is a company incorporated in Singapore and Sh. D.D. Gupta, who is its Managing Director and Principal Officer, is competent to institute this suit and sign and verify the pleadings on

behalf of the plaintiff company. It has been further alleged that vide Sales Contract No. 3371 dated 29th April 1997, the defendant company agreed to purchase Australian Tyson Chick Peas from the plaintiff company on the terms and conditions detailed in the contract. Pursuant thereto the plaintiff company shipped 2000 MT of commodities valued at US\$1,85,729.25, vide invoice dated 27th June 1997. As per the terms of the sale contract, the plaintiff drew Bill of Exchange for the invoiced amount. The Bill of Exchange envisaged payment by the defendant to Standard Chartered Bank, Singapore or any banker or trust nominated by it, within 90 days of sight. Bank of Punjab Ltd. Connaught Circus Branch, accordingly presented the Bill of Exchange for acceptance and payment by the defendant. The Bill was accepted by the defendant on 29th July 1997. The defendant paid a total sum of US\$ 150,820 from time to time. The last payment of US\$ 10970 was paid by the defendant company on 4th February 1999. It has been further alleged that as per the terms of Bill of Exchange, the unpaid amount was payable by the defendant on or before 5th May 1999. Since the balance payment was not paid, the Bank of Punjab, vide its letter dated 21st April 1999

returned the Bill of Exchange which was returned to the plaintiff by its banker Standard Chartered Bank, Singapore vide its letter dated 10th May 1999. The defendant company failed to make payment of the balance amount despite notice of demand. The plaintiff has accordingly claimed the principal amount of US\$ 84790.25 along with interest amounting to US\$ 84790 for the period 29th October 1997 to 4th May 1997 at the rate of 18% per annum and bank charges amounting to US\$ 305. The plaintiff has also claimed pendente lite and future interest at the rate of 24% per annum.

2. The defendant filed the written statement contesting the suit and took preliminary objection that the suit was barred by limitation since it pertains to the transaction of the year 1997. On merits, it was alleged that the defendant company imported Australian Tyson Chick Peas from the plaintiff company on a number of occasions in the year 1997 and the total quantity imported by it was about 9487.650 MT. The quantity was, however, found short by 209.534 MT. Moreover, the quality of the commodity was not as per specifications. The disputes which arose between the parties in this regard were

amicably resolved and no payment according to the defendant is due from it to the plaintiff. As regards consignment subject matter of the present suit, it is alleged in the written statement that the invoice of the plaintiff company stipulated delivery against acceptance though all other consignments were on the basis of documents against collection. This, according to the defendant, was done as the plaintiff had accepted the fact that the loss had occurred to the defendant due to bad quality and short quantity. Consequently, it agreed to make this concession. It has been further alleged that on arrival of the goods at the ports, the commodity was found to be only 472 MT as against the agreed quantity of 525 MT and on the matter being taken up by the defendant company with the plaintiff company, a letter was being sent to it by the plaintiff company agreeing to waive the interest and to receive part payments against the bill pertaining to that consignment.

3. The following issues were framed on the pleadings of the parties:-

1. Whether the claim of the plaintiff is barred by the time? OPD

2. Whether the disputes between the parties stand settled as alleged by the defendants? OPD

3. Whether the plaintiff is entitled to recover the suit amount? OPP

4. Whether the plaintiff is entitled to interest? If so, at what rate, for which period and on what amount? OPP.

5. Relief?

ISSUE NO. 2

4. The onus of proving this issue was on the defendant. No evidence has been produced by the defendant to prove that the disputes between the parties were settled and no amount remained due from the defendant company to the plaintiff company. The issue is, therefore, decided against the defendant and in favour of the plaintiff.

ISSUE No. 3

5. The plaintiff examined one witness Mr D.D. Gupta as PW-1. No witness was examined in the defence and the evidence of the defendant was closed vide order dated August 28, 2008. In his affidavit Mr D.D. Gupta stated that the defendant purchased commodity from the plaintiff as stated in the invoice Ex. P-1, valued at US\$ 185729.25. The

invoice was accompanied by Bill of Exchange Ex.P-2. The invoice as well as the Bill of Exchange were sent by the plaintiff for collection through its banker Standard Chartered Bank, Singapore. The Bill of Exchange, for payment on behalf of the defendant, was handled by Bank of Punjab Limited. The endorsement made on behalf of the defendant company, accepting to pay by due date, appears at Mark 'B' on the Bill of Exchange Ex. P-2.

6. According to PW-1 the banker of the defendant company returned the Bill of Exchange unpaid, to the value of US\$ 84729.25. The letter of the banker in this regard is Ex. P-3 whereas Return Memo of plaintiff's bank dated 10th May 1999 is Ex. P-4. During cross-examination, PW-1 Mr D.D. Gupta denied the suggestion of the defendant that the commodity supplied by the plaintiff company to the defendant company was not of agreed quality.

7. Though the defendant filed the affidavit of one Mr Daya Kishan Goel by way of evidence, that cannot be read in evidence since Mr Daya Kishan Goel was not produced for cross-examination.

8. The un-rebutted testimony of PW-1 thus proves that a sum of US\$ 84909.25 remained payable by the

defendant company to the plaintiff company. Even otherwise it is an admitted case in the pleadings that the defendant had agreed to purchase 525 MT of Australian Tyson Chick Peas from the plaintiff company. There is no dispute with respect to rate of the goods imported by the defendant company from the plaintiff company. Though the case of the defendant in the written statement is that instead of 525 MT, the quantity of the commodity, found on arrival of the goods at the port, was only 472 MT, no evidence has been led by the defendant to prove that the quantity of the goods, when delivered to it was only 472 MT. Thus, it has failed to discharge the onus placed upon it in this regard.

9. The defendant has also alleged in the written statement as that the Chick Peas received by it were not of agreed quality. No evidence has, however, been led to prove this averment and thus, this allegation also does not stand substantiated. This is not the case of the defendant that it had made any payment over and above the payments acknowledged in the plaint. Therefore, the plaintiff company is entitled to an amount equivalent to US\$

84909.25 from the defendant company. The issue is decided accordingly.

ISSUE No. 4

10. The plaintiff has claimed interest at the rate of 18% per annum. Admittedly, there is no agreement between the parties for payment of interest. No custom or usage of trade for payment of interest has been pleaded by the plaintiff company.

11. Section 80 of Negotiable Instruments Act however is relevant in this regard and reads as under:-

Interest when no rate specified.-When no rate of interest is specified in the instrument, interest on the amount due thereon shall, [notwithstanding any agreement relating to interest between any parties to the instrument], be calculated at the rate of [eighteen per centum] per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

Explanation- When the party charged is the endorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour.

12. In **Nath Sah vs. Lal Durga Sah**, *AIR 1936 Allahabad, 160*, a Division Bench of Allahabad High Court held that where no rate of interest is specified in a written instrument, then, notwithstanding any contract to the contrary, the interest is to be calculated at the rate of 6% per annum and the date from which such interest should be calculated should be the date on which the Principal amount ought to have been paid. In that case the suit was based on a promissory note which contained no mention of any liability to pay interest and the defendant had denied his liability to pay any interest.

In **Ghasi Patra vs. Brahma Thati**: *AIR 1962, Orissa 35*, the pronote payable on demand did not provide for payment of interest. It was contended before the High Court that under Section 80 of Negotiable Instruments Act , interest could have been allowed only from the date of demand and not for any earlier period and since no demand was proved in the case, no interest should have been allowed from the date of the execution of the pronote till the date of the suit. It was held that the plaintiff was entitled to interest under Section 80 of Negotiable Instruments Act from the date of execution of the pronote. In taking this

view, the High Court followed the decision of Bombay High Court in *Ganpat Tukaram v. Sopana Tukaram*, AIR 1928 Bombay 35, where it was held that where a promissory note is payable on demand, but is silent as to interest, the interest can be awarded under Section 80 of Negotiable Instruments Act at 6% per annum from the date of the promissory note. A Division Bench of Patna High Court in **Bishun Chand v. Audh Bihari Lal**, AIR 1917 Pat 533 also took the view that if the handnote is payable on demand but does not provide for the payment of interest, it carries interest at the rate of 6% per annum from the date of execution of the hand note until the realisation of the debt.

In **P. Mohan vs. Basavaraju** AIR 2003, *Karnataka*, 213, the suit was based on cheques which when presented were dishonoured. There was an agreement between the parties not to pay interest. It was held by Karnataka High Court that in view of the provisions of Section 80 of Negotiable Instruments Act, the defendant/appellant would be entitled to pay interest and that agreement between the parties not to pay interest would be valid only until the cheques were dishonoured.

13. In the case before this Court, there is no agreement between the parties that no interest will be paid by the defendant to the plaintiff. I find no justification for restricting the scope of Section 80 of Negotiable Instruments Act to only those cases, where the instrument provides for payment of interest, but the rate of interest is not specified and thereby allows unjust enrichment to a person who has defaulted in honouring his contractual obligation with respect to repayment of Principal sum. In my view, the provisions of Section 80 of Negotiable Instruments Act would equally apply to those cases where no term regarding payment of interest is contained in the instrument. Since the aforesaid provision, as amended, carries interest at the rate of 18% per annum, consequently, the plaintiff is entitled to interest at the rate of 18% per annum under Section 80 of Negotiable Instruments Act and the interest would be payable from the date on which the principal amount ought to have been paid by the defendant to the plaintiff.

14. **Issue No.1**

The case of the plaintiff, as set out in the plaint, is that the sale contract between the parties envisaged

payment made by the defendant within 90 days from sight.

In para 3 of the plaint, the plaintiff claimed as under:

“As per terms of sale contract, the plaintiff drew Bill of Exchange of invoiced value, envisaging payment by defendant 90 days from sight to the order of Standard Chartered Bank, Singapore or any banker or Trust Company nominated by them.”

15. In para 12 of the plaint, the plaintiff has pleaded as under:

“The cause of action for suit claim accrued to plaintiff.....on payment under Bill of Exchange becoming due for payment on 29.10.1997.”

16. Ex.P-2 is the Bill of Exchange drawn by the plaintiff upon the defendant on 23rd July, 1997 and accepted by the defendant on 29th July, 1997. A perusal of the endorsement made by the defendant at mark ‘B’ on this document would show that the defendant accepted to pay by due date. The Bill of Exchange expressly stipulated payment in 90 days from sight. Thus, there can be no doubt that the agreement between the parties envisaged payment by the defendant within 90 days from sight. Since the defendant accepted the Bill of Exchange on 29th July,

1997 and the acceptance was for payment on due date, the amount under the Bill of Exchange became payable by the defendant to the plaintiff on 27th October, 1997.

17. Ex.P-5 is the legal notice sent by the plaintiff to the defendant. Para 2 of the notice, to the extent it is relevant, reads as under:

“Amount under Bill of Exchange payable D/A 90 days from sight was due for payment on 29th October, 1997.”

A perusal of the plaint would show that the plaintiff has claimed interest on the unpaid principal amount, at the rate of 18% per annum, from 29th October, 1997. In view of the pleading of the plaintiff and the legal notice sent by it to the defendant, it is not open to the plaintiff to say that the amount under the Bill of Exchange did not become due on 29th October, 1997.

18. Article 34 of Limitation Act provides that the period of limitation on a Bill of Exchange payable at a fixed time after sight or after demand is three years from the date when the fixed time expired. Since the time fixed for payment, by the defendant, to the plaintiff, expired on 29th October, 1997, the period of limitation prescribed under Article 34 of Limitation Act expired on 27th October, 2000.

It has come in the evidence of the plaintiff and is otherwise an admitted case that the defendant made part payments to the plaintiff from time to time. The last part payment was made on 04th February, 1999. Section 19 of Limitation Act provides that where payment on account of debt or of interest is made before the expiration of the prescribed period, by the person liable to pay the debt or by his agent duly authorized in his behalf, a fresh period of limitation can be computed from the time when the payment was made. Since the last payment was made by defendant No.1 on 04th February, 1999, the period of limitation needs to be computed afresh from that date and computed accordingly which expired on 04th February, 2002. This suit, however, has been filed on 22nd April, 2002 and, therefore, is patently barred by limitation.

19. It has been alleged in the plaint that as per the terms of Bill of Exchange, the unpaid amounts was payable by the defendant by or before 05th May, 1999. I, however, fail to appreciate how the unpaid amount under the Bill of Exchange came to be payable on or before 05th May, 1999. A bare perusal of the Bill of Exchange is sufficient to show that the payment under this instrument became due on 29th

October, 1997. Part payments made by the defendant from time to time did not have the effect of altering the date on which the amount payable under the Bill of Exchange became due to the plaintiff. Irrespective of part payments made by the defendant from time to time and accepted by the plaintiff, the due date under the Bill of Exchange dated 23rd July, 1997 remained 27th October, 1997 when 90 days expired from the date the Bill of Exchange was accepted by the plaintiff. This is not the case of the plaintiff, anywhere in the plaint, that the parties had entered a subsequent agreement to alter the due date under the Bill of Exchange Ex.P-2 from 27th October, 1997 to 05th May, 1999 or any other date. The fact that in the legal notice sent by it to the defendant, the plaintiff expressly claimed that the amount under the Bill of Exchange, was payable on 90 days from the sight and was due for payment on 29th October, 1997, leaves no scope for any such plea by the plaintiff. The claim of interest by the plaintiff with effect from 29th October, 1997 is yet another indicator that the payment under the Bill of Exchange, even according to the plaintiff, became due on 29th October, 1997. Since payment under the Bill of Exchange had become due on 27th October, 1997 or at best

on 29th October, 1997, the Court, while computing afresh period of limitation in view of the provisions of Section 19 of Limitation Act, cannot add 90 days to the date from which the period of limitation is to be made afresh. The amount under the Bill of Exchange was already due when the part payments were made by the defendant to the plaintiff from time to time. The last payment having been made on 04th February, 1997, the fresh period of limitation computed under Section 19 of Limitation Act expired on 04th February, 2002.

20. During the course of arguments, the contention of the learned counsel for the plaintiff was that the present suit would be governed by Article 39 of Limitation Act since it is based on a dishonoured foreign bill. Article 39 of Limitation Act provides that in a suit based on a dishonoured foreign bill, where protest has been made and notice given, the period of limitation would be three years from the date when the notice is given. There are two pre-requisites before this Article can be invoked. A protest should be made and notice should be given when a foreign bill is dishonoured. If either of these two pre-requisite conditions is missing, Article 39 would not apply.

Section 100 of Negotiable Instruments Act provides

that:

"When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest."

21. Thus, the protest must contain (a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon; (b) the name of the person for whom and against whom the instrument has been protested; (c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public; the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found; (d) when the note or bill has been dishonored, the place and time of dishonor, and, when better security has been refused, the place and time of refusal; (e) the subscription of the notary public making the protest; (f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of

the person whom, and the manner in which, such acceptance or payment was offered and effected.

22. In the present case, no protest is alleged to have been made by the plaintiff when the Bill of Exchange was dishonoured. Hence, the first pre-requisite condition for applicability of Article 39 of Limitation Act does not stand fulfilled.

23. Section 93 of Negotiable Instruments Act provides that when a promissory note, Bill of Exchange or cheque is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note, or the drawee or acceptor of the dishonoured bill of exchange or cheque.

24. The object of a notice of dishonour which is to be given to the endorser is to indicate to the party notified that

the contract arising on the instrument has been broken by the principal debtor and the former being a surety will now be liable for the payment. Thus, the object is not to demand payment, but to warn the party of liability and in case of drawer to enable him to protect him as against drawee or acceptor who has dishonoured the instrument. The notice under Section 93 is to be given by the holder or by or on behalf of endorser, who, at the time of giving the notice, is himself liable on the Bill of Exchange.

This Section has no applicability to the facts of the present case and in any case no notice, as envisaged in this Section has been given. Therefore, the second pre-requisite condition for invoking Article 39 of Limitation Act also does not exist in this case. Hence, there is no merit in the contention that Article 39 of Limitation Act would govern the present suit.

25. After the judgment was reserved, the learned counsel for the plaintiff has filed a copy of the decision of Madras High Court in **Amirajan Saheb vs. Sayed Khadar**, *AIR 1978 Madras 385*. In the case before Madras High Court, a promissory note was executed on 06th April, 1966

and it represented part of consideration detained by the defendant in respect of a land purchased by him from the plaintiff. On the same date, there was an agreement between the parties which provided that if any litigation started within five years of the transaction, the expenses towards the same had to be met out of the amount of that pronote and the plaintiff would be entitled only to balance, if any, after meeting the litigation expenses. It was further stipulated in the agreement that if no litigation commenced, disputing the title of the property within five years, the plaintiff would be entitled to entire promissory note amount. This agreement was executed since the parties contemplated that there would be litigation regarding the title of the property, as Wakf Board was rightly to claim the same to be its property. The defendant made a payment of Rs 50/- after execution of the document. Later, the plaintiff filed a suit on the promissory note, claiming the entire amount, less the same of Rs 50 received by him. The suit was dismissed by the lower Appellate Court as premature finding that the Wakf Board had in fact filed a suit, claiming title to the property sold by the plaintiff to the defendant. The lower Court was of the view that because of the

agreement between the parties, the time for payment of amount under the promissory note had been postponed and, therefore, even though as an ordinary promissory note, it would get time barred within a few days after the date on which the suit was filed, it would not be so time barred, inasmuch as time for payment got postponed by a collateral agreement. Upholding the order of the lower Court, it was held that right to sue had not accrued when the suit was filed and, therefore, the suit was premature. In the case before this Court, there is no agreement between the parties, postponing the due date under the Bill of Exchange accepted by the defendant on 29th July, 1997. No such agreement has either been pleaded or proved. Part payment by the defendant from time to time did not amount to an agreement between the parties to postpone the due date of payment under the Bill of Exchange. As noted earlier, the plaintiff itself has claimed, in the legal notice sent by it to the defendant, that the amount under the Bill of Exchange due on 29th October, 1997 and it has also claimed interest from that date. This was nowhere the case of the plaintiff in the notice that the due date for payment under the Bill of Exchange was postponed to a later date by a subsequent

agreement between the parties. No such case has been made out even in the plaint. Therefore, reliance on this judgment is wholly misplaced. The issue is decided against the plaintiff and in favour of the defendant.

26. **Issues No.3 and 5**

In view of my finding on the issues, the suit is liable to be dismissed being barred by limitation.

ORDER

The suit is hereby dismissed. The parties to bear their own costs.

Decree sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

NOVEMBER 09, 2010
BG