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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on: March 23, 2011
Judgment pronounced on: April 20, 2011

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C.S. (OS) No. 39/1999

% Regency Export Pvt. Ltd. ... Plaintiff
Through: Mr. Sandeep Khurana, Advocate.

versus

Vanasthali Textiles Industries Ltd. ... Defendant
Through: Mr. A. K. Mishra, Advocate.

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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

SUNIL GAUR, J.

1. Plaintiff's suit for recovery of Rs. 16,82,601/- is based upon advance funding of Rs.17,00,000/- (Rupees Seventeen Lacs only) made by the plaintiff to the defendant in January, 1996 in relation to supply of 40,360 pieces of *beach towels*, which was to be delivered in four distinct lots during April to June 1996. As per the plaintiff, the overseas buyers could not translate their quotation into an Order by 15th March, 1996 and therefore, the offer made by the plaintiff to the defendant for supplying of the aforesaid towels was withdrawn and this was communicated to the defendant vide final Notice of Demand of 19th December, 1988 but the defendant refused to pay back the aforesaid advance money to the plaintiff on the specious plea of keeping its production potentials idle for the

plaintiff and so being entitled to retain the aforesaid advance money and so, this suit.

2. The defendant- Company contested this suit for recovery of principal suit amount of Rs.16,82,601/-, while asserting in the written statement that upon negotiating the price and the delivery schedules, plaintiff-Company had paid 20% of the total value of the Work Order in question and thereby putting the defendant- Company under obligation to book the production space for them. As per defendant, the normal practice in textile trade / industry is that if work Order is placed with scheduled time bound delivery, then advance non-refundable money is paid for covering the expenditure (fixed cost) of the manufacturing company during the *interregnum* period, during which the minute specifications were awaited and the manufacturing company remained under duty not to accept any other Order which can affect the execution of the earlier Order for which advance has been taken and this arrangement is known as "*Booking of Production Space*".

3. Defendant claims that it was well within the knowledge of the plaintiff company that the advance money i.e. 20% of the Work Order, being given by them to the defendant-Company was non-refundable money, as the time period for the delivery of the consignments in question was very tight and the necessary peripheral specifications being awaited by that time and the pressure was being put by the plaintiff-Company on the defendant-Company to start with the execution part of the work Order by booking the production space besides taking all other steps which are required to be taken for ensuring the time bound delivery of the consignment in question. Thus, according to the defendant, vide fax message of 19th December,

1995, plaintiff- Company was informed regarding booking of the production space by the defendant-Company for them and thereafter only non-refundable advance money was given by the plaintiff-Company to the defendant-Company. It is vehemently denied by the defendant that quotation was sought by the plaintiff–Company in October, 1995 to get reconfirmation/ negotiation and reduction of price before placing the Order and the Agreement between the parties stood concluded on 26th December, 1995.

4. As per the Defendant – Company, it books the production space on the basis of confirmed Order and in this case also, it was so done and any cancellation of the Order at the last stage and that too, after booking the production space, creates problems, as it becomes nearly impossible to substitute any Order in place of the cancelled Order in a short period of time and so, the entire production planning gets affected, which causes heavy loss. According to the Defendant – Company, when advance is received against an Order, it amounts to acceptance of an Order and the details of the Order are generally finalized in due course of time and in the instant case, Plaintiff – Company was repeatedly asked to finalise the design/color of the product in question. It is Defendant's case that cancellation of the Order in question by the Plaintiff vide fax message of 25th March, 1996 was responded to on 9th April, 1996, thereby informing the Plaintiff that since the production facility was blocked for execution of the Plaintiff's Order and because further valuable orders for beach towels, which is a seasonal item, were refused and on 3rd March, 1997, Defendant had informed the Plaintiff that on tabulating they had found that their losses were much higher than the amount advanced by the Plaintiff and so, the

suit amount cannot be returned.

5. On the aforesaid pleadings, the Issues claimed are as under:-

- (i) *Whether the plaint is liable to be rejected under Order VII Rule 11 CPC? (OPD)*
- (ii) *Whether the suit is within limitation? (OPP)*
- (iii) *Whether the suit is bad for non-joinder of necessary parties? (OPD)*
- (iv) *Whether this Court has no jurisdiction to try the present suit? (OPD)*
- (v) *To what amount the Plaintiff is entitled as principal interest? (OPP)*
- (vi) *Relief.*

6. The evidence led is of PW-1 - Shri Rajesh Kaura, Director of the Plaintiff – Company and that of DW-1 – Mr. Abhinay Rathi, authorized representative of the Defendant – Company. When this matter was finally heard, learned counsel for the parties had advanced their respective submissions and had meticulously referred to the evidence on record. Upon scrutiny of evidence on record, in the light of the submissions made, the findings returned on the Issues framed are herein as after.

Issue No.: (i) & (iii)

7. These two Issues were rightly not pressed by Defendant's counsel at the hearing in this matter, as there is no tangible basis to assert that the plaint suffers on account of non-joinder of necessary parties or lacks cause of action.

Issue No.: (ii) & (iv)

8. Since Defendant's head office is located within the jurisdiction of this Court and the advance money was paid by the Plaintiff to the Defendant in Delhi, therefore, this Court certainly possesses territorial jurisdiction to

entertain this suit. The cause of action to seek refund of the advance money arose on 25th March 1996, when the Agreement (Ex.P1) in question was cancelled by the Plaintiff and this suit has been filed on 2nd January, 1999 and is thus, clearly within limitation. Both these Issues are accordingly answered.

Issue No.(v):

9. The entitlement of the Plaintiff to recover the advance money upon cancellation of the Work Order, is refuted by the Defendant's counsel by asserting that when *Work Order* with scheduled time bound delivery is cancelled, then advance money is not refundable as per normal practice in Textile Trade/Industry. Defendant's counsel asserts that since production space was blocked by the Defendant for the Plaintiff, for the Order in question, so its cancellation entailed losses which were beyond the advance money. According to the Plaintiff's counsel, no evidence has been led by the Defendant to show that the Defendant had suffered any loss on account of being idle for the period in question and no details of the fresh Orders refused during the period in question is forthcoming and because there was no concluded contract between the parties, therefore, Defendant is not entitled to retain the advance money. Whereas, according to Defendant's counsel, Communication (Ex.PW-1/2) was a concluded contract and the follow-up Communications – (Ex.P3, Ex.P4, Ex.PW-1/3, Ex.PW-1/6) as well as the Fax - Ex.P6 (Ex. PW-1/7) cancelling the Order clearly indicates that the default is on the part of the Plaintiff and so the Defendant is well within its right to forfeit the advance money.

10. The basic Communication of 26th December 1995 - Ex.P1 (Ex.PW-1/2) is an admitted document. What is to be seen is whether it constitutes

the concluded contract or not. A bare perusal of this Communication clearly reveals that the offer made by the Defendant to the Plaintiff is definite and is time bound. On this very document, there is clear cut affirmation of the acceptance of this offer by the Plaintiff. I do not find any substance in Plaintiff's plea of this Communication of 26th December 1995 - Ex.P1 (Ex.PW-1/2) being not a concluded contract as there is a specific and definite offer by the Defendant which stands unequivocally accepted by the Plaintiff. Not only this, the subsequent admitted Communications (Ex.P2, Ex.P3 and Ex.P4) leave no manner of doubt that upon acceptance of minimum advance, Defendant had undertaken to supply the *Beach Towels* in time bound four distinctive lots, as disclosed in the Communication of 4th January, 1996 (Ex.PW-1/3). Undisputedly, Defendant had received advance money of Rs.15 lakhs in pursuance to the Agreement (Ex.P1) and in addition thereto, a sum of Rs.2 lakhs, which according to the Plaintiff, was to satisfy the Defendant's need for funds. This is seriously disputed by the Defendant's counsel and it is pointed out that there is unchallenged evidence of Mr.Abhinay Rathi (DW-1) to the following effect:-

“The amount of Rs.2 lakhs was paid to the Defendant - Company for booking the production space and not for satisfying its needs for funds.”

11. Cancellation of the Agreement (Ex.P1) by the Plaintiff vide Communication of 25th March 1996 (Ex.P6) was on account of foreign buyers of Plaintiff not being able to finalise the design for the product in question and refund of the advance money was sought by the Plaintiff vide this document. Vide admitted Communication (Ex.P9), Defendant took the stand that advance money was to block the valuable production space for

the Work Order placed by the Plaintiff and since the Defendant had refused other Orders at higher price, due to commitment to the Plaintiff and because the production facilities was probably going to remain idle/unutilized causing loss of production, loss of business and it was expressed by the Defendant to the Plaintiff to this Communication that the loss to the Defendant on account of this Order falling through, was far more than Rs.17 lakhs and so question of returning the advance money did not arise. Pertinently, what was said in this Communication (Ex.P9), deserves attention. Its relevant portion reads as under:-

“I am in deep fix now on what to do with this production space to minimize our losses it would certainly call for sum erratic and drastic steps from our end to minimize the losses and I can assure you that your advance will not be sufficient to fulfill the opportunity cost as well as fixed cost on the looms being idle/or mis-utilized as now we are trying to fill it at ridiculous prices.”

12. It is beyond dispute that the Agreement (Ex.P1) does not contain any forfeiture clause. That is to say, in the event of either side defaulting, this Agreement (Ex.P1) is silent about the fate of the advance money. In such a situation, it is upon the Defendant to substantiate its plea of sustaining heavy losses on account of cancellation of the Agreement (Ex.P1). It is so said because except the self serving assertion of the Defendant, there is no evidence on record to substantiate its plea of there being any trade practice in the Textile Industry of advance money being non-refundable. Rather, it has come in the evidence of Mr.Abhinay Rathi (DW-1) that the turnover of the Defendant - Company for the year ending in March 1996 was more than Rs.18 crores. The statement of production (Ex.D4) for the period from January, to September 1996, also does not

indicate any marked decline in the production by the Defendant - Company or production space of Defendant being idle, during the period in question. No instances are forthcoming to show that during the subsistence of the Agreement in question, any other Order was received by the Defendant - Company which was refused because of Plaintiff's booking the production space. In the Communications (Ex.P3 and P5), Defendant has nowhere disclosed about its refusing fresh orders because of Plaintiff's Order and the delay occasioned on account of non furnishing of the designs, etc.

13. It is quite evident from the evidence on record that except for booking the production space, for want of design, etc., the production of the *Beach Towels* by the Defendant could not be commenced. Since Defendant has failed to establish the actual loss suffered or the decline in its production, therefore, the Defendant cannot legitimately forfeit the advance money by baldly asserting that its losses outweigh the advance money of Rs.15 lakhs. However, it stands established from the evidence on record that Rs.2 lakhs was paid by the Plaintiff to the Defendant for booking the production space and what the Plaintiff had to say in the evidence, in this regard is as under:-

“Que: Is it true that in case of an Order is placed by any party the manufacturer will have to block its production space?”

Ans.: It is true that the manufacturer has to schedule and offer capacities available for all enquiries that they quote for as happened in the present suit.”

14. In the light of the evidence on record, it can be safely concluded that the Defendant was well within its right to retain a sum of Rs.2 lakhs received from the Plaintiff for booking the production space but was not

entitled to forfeit the advance money of Rs.15 lakhs, because instead of establishing sufferance of any loss on account of cancellation of the Agreement in question, what the Defendant witness Mr.Abhinay Rathi (DW-1) had said in his evidence is as under:-

“It is correct that profit of the Defendant - Company kept enhancing in the year 1995-96 and 1996-97.”

15. Aforesaid clinching admission assume importance in view of the fact that Defendant had undertaken to refund the advance money after adjusting the losses suffered by the Defendant - Company on account of the cancellation of the Agreement in question. As already concluded above, Defendant - Company has failed to establish that any loss was suffered by it on account of cancellation of Agreement in question. In this view of the matter, Plaintiff succeeds in its claim to seek refund of the advance money of Rs.15 lakhs and the Defendant is held to be justified in retaining Rs.2 lakhs towards booking of the production space. Consequently, it is held that the Plaintiff is entitled to recover the principal suit amount, minus Rs.2 lakhs, i.e., Rs.14,82,601/-, with reasonable rate of interest @ 9% per annum from the date of institution of this suit till realization. This Issue is accordingly answered.

Issue No.: (vi)

16. Consequential to the findings returned on the aforesaid Issues, this suit stands decreed with costs for a sum of Rs.14,82,601/- with interest @ 9% per annum from the date of institution of this suit, till realization. Decree sheet be drawn forthwith.

17. This suit is accordingly disposed of.

Sunil Gaur, J.

April 20, 2011
rs/pkb