

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA 496/2010**

% **18th November, 2011**

AJANTA OFFSET & PACKAGINGS LTD Appellant
Through : Mr. Sudhir K. Makkar, Advocate.

versus

KINTETSU WORLD EXPRESS Respondent
Through : Mr. Joydeep Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this appeal filed under Section 96 of the Code of Civil Procedure ('CPC') is to the impugned judgment of the trial Court dated 11th March, 2010 by which the trial Court dismissed the leave to defend application filed by the appellant/defendant and thereby decreed the suit of the respondent/plaintiff for recovery.

2. The brief facts of the case are that the respondent is a cargo/freight forwarding agent. The parties entered into a Memorandum of Understanding

(MOU) dated 24th December, 2006 setting out the terms and conditions with respect to their contractual relations. The appellant/defendant is a manufacturer/exporter of printed materials from India to various global destinations and the respondent/plaintiff offered its freight forwarding services to the appellant/defendant for the exports of the printed materials. The subject suit came to be filed as the respondent/plaintiff claimed that the various freight charges and other charges payable with respect to the services rendered to the appellant/defendant by the respondent/plaintiff were not paid. The suit was filed for recovery of the amount of ₹16,88,739.50/-/-. This amount is the principal amount payable with respect to the services. The suit was filed under Order XXXVII CPC. The appellant/defendant after entering appearance was served upon the summons of judgment, and accordingly, it filed the application for leave to defend which has been dismissed by the impugned judgment.

3. There were two fold contentions which were raised on behalf of the appellant in the leave to defend application. First contention was that with respect to five invoices which are stated in paragraphs 3(iii) of the appeal, the appellant was caused losses because the material had to be shipped by costly air freight because of delays which were caused by the respondent/plaintiff in shipment of the goods by ocean freight. The appellant/defendant therefore claimed to have suffered a loss of ₹28,54,889.92/- and which was claimed to be due and payable by the respondent/plaintiff. The second contention is that, with respect to invoices bearing Nos. 118 to 122, there was a counter claim to be filed of ₹2,27,935/-. It was also additionally argued that losses had occurred because the

respondent/plaintiff had deliberately withheld the consignment on account of certain payment disputes pertaining to earlier services rendered and therefore, losses were caused by having sent the goods by air freight instead of ocean freight because the shipments were withheld by the respondent/plaintiff. The respondent/plaintiff in reply contended that the contract in question being the MOU dated 24th December, 2006 specifically contained the consequences in case of delayed delivery and for which clause 8 provided that the maximum amount which could be claimed for delay was 3% of the total amount which was payable to the respondent/plaintiff. It was argued that the appellant/defendant had falsely claimed that the respondent/plaintiff wrongly detained the consignment. It was argued that payments were due and therefore, the respondent/plaintiff was forced to seek such claim from the appellant/defendant.

4. The trial Court by reference to the Clause between the parties which entitled a deduction of 3%, deducted the amount calculated in terms thereof of ₹14,643.48/- from the suit amount and decreed the suit with respect to the balance amount. The relevant paragraphs of the impugned judgment are paras 8 to 10 which read as under:-

“8. Perusal of the case file shows that the transactions and business dealings were being carried out between the parties on the basis of the Memorandum of Understanding dated 24.12.2006 and the execution of Memorandum of Understanding dated 24.12.2006 has not been denied by any of the parties. Furthermore, the application shows that the defendant has claimed the rebate of a sum of ₹14,643.48 p. only against the claim of the plaintiff by deducting an amount of 3% from the total

amount payable by the defendant and the same comes to an amount of ₹14,643.48 p. only. The defendant has claimed a loss of ₹2,27,935/- in respect of the subsequent transactions pertaining to invoices bearing No. 118 to 122, and in the considered opinion of this Court the same are not the subject matter of the present suit and therefore, the claim of the defendant for the shipment of the said consignment pertaining to the invoices No.118 to 122 cannot be clubbed by the defendant, as a defence to the present claim of the plaintiff. No other issue has been raised by the defendant in the present application.

9. During the course of arguments, the Id. Counsel for the plaintiff has accepted the proposal of the Court for decretal of his suit for the remaining amount, after deducting the amount of ₹14643.48 p. from the original claim of the plaintiff.

10. Since the defendant has raised no triable issue and in the considered opinion of this Court the damages suffered by the defendant in the subsequent transactions between the parties cannot be taken as defence to the present claim of the plaintiff. I am of the considered opinion that the present application is devoid of any merit and therefore, the same is hereby dismissed and accordingly the suit of the plaintiff is hereby decreed for a sum of ₹16,74,096.02 p. Since the transaction between the parties is a commercial transaction, pendente lite interest @ 10% p.a. is also awarded in favour of the plaintiff on the aforesaid amount, till the date of the decree. It is ordered accordingly.”

5. In order to appreciate the important issue at hand it is important to reproduce the agreed clause 8 in the MOU dated 24th December, 2006 entered into between the parties and the same reads as under:-

“8.0 In the event of more than 5% of the number of containers per month, not adhering to the above cycle time, Ajanta would be at liberty to make deductions amounting to 3% of the total amount payable to KWE for all such late deliveries exceeding 31 days.

8.1 In the event of more than 5% of the number of containers per month, being delivered ahead of the above cycle time, KWE would be at liberty to claim incentives amounting to 3% of the total amount payable to KWE for such advance deliveries before 26 days.”

6. A reading of the aforesaid clause shows that the parties envisaged the consequences of late delivery as being a maximum of reduction of 3% in the total amount which would be payable by the appellant/defendant to the respondent/plaintiff.

7. It is conceded by learned counsel for the appellant, and rightly so in view of the legal position, that once there is a claim for liquidated damages under Section 74 of the Contract Act, 1872, there is no scope of claiming unliquidated damages under Section 73 of the Contract Act. Learned counsel for the appellant, however, argued that in the present case, the losses which are claimed are independent of the losses which are contemplated by Clause 8 of the contract between the parties as the respondent/plaintiff had wrongly detained the containers.

8. In my opinion, once the parties with open eyes agreed upon a Clause in the contract for the consequences of late deliveries as the liquidated damages being 3% of the total amount payable to the respondent/plaintiff,

then in such circumstances it is not permissible for the appellant/defendant to claim that with respect to the self-same late deliveries, additional amount towards losses can be claimed for late deliveries. The issue with respect to late deliveries, whatever be their nature is at least *prima facie* squarely covered by this Clause 8.0.

9. At this stage, I may refer to a judgment of the learned Single Judge of this Court in the case ***Punjab and Sind Bank v. S.K. Tulshan 1991(1) ILR (Delhi) 293*** in which it has been held that the procedure under Order XXXVII is exhaustive and it is not permissible for a defendant to raise a counter claim as an action in defence in a leave to defend application. Two other judgments of two other learned Single Judges of this Court to the same effect are the judgments in the cases of ***Union of India and Others v. Raj Kumar Sawhney 1995(3)AD(Delhi)881*** and ***Deutsche Ranco GMBH Vs. Mohan Murti 1993(52)DLT288***. Such right, if the same is valid, will necessarily have to be exercised by means of proceedings other than setting out the same as a defence in the leave to defend application.

10. Therefore, looking at the issue from any angle of the disentitlement to claim an amount beyond the issue of liquidated damages or non-maintainability of the counter claim for alleged losses in a suit which is filed under Order XXXVII CPC, no fault can be found with the impugned judgment.

11. In view of the above, there is no merit in the appeal and the same is dismissed accordingly leaving the parties to bear their own costs.

12. At this stage, learned counsel for the appellant, on instructions, states that he would not like to press the appeal on merits in view of the judgments of this Court that the losses or damages as a counter-claim cannot be claimed as a defence in a leave to defend application, but, a substantive suit can be filed for the same. Learned counsel for the appellant therefore seeks liberty to withdraw this appeal so as to file substantive proceedings against the respondent/plaintiff in accordance with law. It is also submitted that the appellant will, if so required, move an application under Section 14 of the Limitations Act, 1963 in the suit which is filed, for exclusion of limitation on account of the *bona fide* mistake in having pursued the counter claim as a defence in the leave to defend application instead of filing the substantive suit.

13. Accordingly, in view of the statement of learned counsel for the appellant, the appeal is dismissed as withdrawn, with liberty to the appellant to file a substantive suit in accordance with law. Nothing contained in this order will therefore be a reflection on the merits of the counter-claim or the merits of the suit which is proposed to be filed on the counter-claim and the substantive suit/proceedings will be disposed of by the concerned Court in accordance with law.

VALMIKI J. MEHTA, J.

NOVEMBER 18, 2011

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