

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

+ **RFA 549/2004**

% **29th May 2012**

M/S MECHTECH PROCESS ENGINEERS PVT. LTD.

..... Appellant

Through: Mr. H.C.Dhall, Advocate.

VERSUS

M/S. ABHISHEK FILTERTECHNIK CHEM-PLANT PVT. LTD.

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the trial court dated 22.7.2004 dismissing the suit for recovery of moneys filed by the appellant/plaintiff against the respondent/defendant.

2. The facts of the case are that the appellant/plaintiff vide its order dated 2.3.2001 (Ex.PW1/2) sought to purchase machines being Puric Vertical Pressure Leaf Filters (2 nos.) from the respondent/defendant. The total price of one machine

was fixed at ₹ 5,80,000/- and therefore, the cost of the two filters was ₹11,60,000/-.

The respondent/defendant accepted the offer of the appellant/plaintiff vide its letter dated 3.3.2001, Ex.PW1/3. Under this contract, the appellant/plaintiff paid a sum of ₹2,31,443/- representing 20% of the advance to the respondent/defendant. It transpired that subsequently the appellant/plaintiff changed the specifications of the machines and accordingly issued a fresh offer letter dated 18.8.2001 (Ex.PW1/6) to the respondent/defendant. The respondent/defendant did not agree to the offer of the appellant/plaintiff even though it is the letter dated 18.8.2001 (Ex.PW1/7) stating that unless 50% of the price is paid, the contract cannot be confirmed. The appellant/plaintiff thereafter entered into negotiations for purchase of the machines from another supplier M/s Sharplex Agro Process Ltd. and total price of each machine was said to be ₹ 7,25,000/- each. The appellant/plaintiff therefore filed the subject suit stating that it had suffered a loss of ₹2,90,000/- being the amount paid over and above the price which was agreed by the respondent/defendant, and which amount was thus claimed on account of breach of contract by the respondent/defendant. The appellant/plaintiff also claimed in the suit the amount of 20% advance paid of ₹ 2,31,443/-. Before filing the suit, the appellant/plaintiff is said to have served a legal notice dated 4.9.2001 claiming the amount of ₹5,86,303/- alongwith interest at 24% per annum.

3. The defendant contested the suit on various grounds including that the contract was never finalized between the parties and therefore there does not arise any issue of breach of contract and consequent alleged entitlement of the appellant/plaintiff to claim the higher price allegedly paid to M/s Sharplex Agro Process Ltd. It was also contended by the respondent/defendant that the advance price has already been utilized towards manufacture of the machine which was substantially made, and in fact on account of failure of the appellant/plaintiff to agree to the fresh terms, the machines had to be stored for which rental charges were incurred. It was further prayed that the suit of the appellant/plaintiff be dismissed as the machines manufactured were for the specifications of the appellant/plaintiff and otherwise of no use to others.

4. After pleadings were complete trial Court framed the following issues.

“Issue

1. Whether the plaintiff is entitled to a decree for a sum of Rs.5,80,303/- with 24% interest pendente lite & future?OPP
2. Whether the suit is premature?OPD
3. Whether there is no cause of action and suit is liable to be dismissed?OPD
4. Whether this court has no territorial jurisdiction?OPD
5. Relief.”

5. The main issues decided by the trial Court, and which have been argued before me, are issue nos. 1 and 2. While dealing with these issues, the trial Court held that no concluded contract came into existence inasmuch as respondent/defendant did not accept the offer dated 18.8.2001 (Ex.PW1/6) because in its reply dated 18.8.2001 (Ex.PW1/7) it asked for a term of payment of 50% advance which was not agreed to and therefore, since there was no concluded contract there cannot be any breach and hence the appellant/plaintiff was not entitled to the higher costs of the machines paid to the new seller.

So far as the claim of the advance price is concerned, the trial Court has held that the respondent/defendant has in fact spent monies towards the manufacture of the machine, and the appellant/plaintiff acted illegally in prematurely terminating the contract. Trial Court has held that machine was manufactured to a substantial extent, and in fact, the respondent/defendant was forced to incur rental charges/demurrage charges for the machines.

6. The relevant observations of the trial Court qua both the above aspects are contained in paras 13 to 21 of the impugned judgment and which read as under:-

“13. Both these issues are decided together as they are interlinked. It is not in dispute that plaintiff placed a purchase order with the defendant dated 2.3.2001, copy of which is

Ex.PW1/2. Ld. Counsel for the plaintiff has submitted that the time was the essence of the contract. He has drawn my attention to clause-(6) and (8) of the purchase order which are reproduced as under:-

- “6. Delivery: 5-6 weeks from the date of this purchase order. Please confirm your exact delivery schedule in your order acceptance for our reference.
- 8. Payment: Our D.D.Towards 20% against this purchase order shall be released by us to you immediately on receipt or your order acceptance against this order. The balance payment shall be released against delivery at your works duly inspected by us.”

14. It is also an admitted fact that defendant accepted the offer vide letter dated 3.3.2001 copy of which is Ex.PW1/3. It is also an admitted fact that a sum of Rs. 2,31,443/- representing 20% advance was paid to the defendant vide bank draft on 5.3.2001. It is submitted by Ld. Counsel for the plaintiff that as per this contract the defendant was to supply two filters approximately by 16th of April 2001 but the same were not supplied even upto Sept. 2001 with the result plaintiff was forced to purchase these filters from M/s Sharplex Agro Process Ltd. at a sum of Rs. 7,25,000/- each and suffered a loss of Rs.2,90,000/-.

15. On the other hand it is submitted by Ld. Counsel for the defendant that there was no fault on the part of the defendant in supplying the parts. The part was not supplied in time as the contract was revised as new specifications were given by the defendant on 31.3.2001 vide Ex. DW1/6. The increase in price was not unilateral or arbitrary as alleged in the plaint, rather it was on account of change of design. PW-1 admitted in his cross-examination that certain changes were made in the price. Certain minor specification changes were made. The price was revised in August 2001.

16. It is significant to note that earlier contract between the parties Ex.PW1/2 dated 2.3.2001 has no significance because

subsequently the design was modified and in a way from the plaintiff's point of view it was substituted by their letter Ex.PW1/6. The relevant portion of the letter Ex.PW1/6 which is written to the defendant by the plaintiff are reproduced as under:-

“1) Accept price of Rs.6,50,000/- *each Pressure Leaf Filter* against Rs.5,80,000/- each ordered vide our above said purchase order.

2) *One Pressure Leaf Filter* as per our order shall be supplied by you to us by 15th Sept. 2001 positively after due to inspection and certification by M/s Mectech Process Engineers Pvt. Ltd. New Delhi and M/s Ruchi Infrastructure Ltd. Indore.

3) Second Pressure Leaf Filter shall be delivered by you to us by 30th Sept. 2001 positively after due to inspection and certification by M/sMechtech Process Engineers Pvt. New Delhi and M/s Ruchi Infrastructure Indore.

4) Payments against each filter shall be made against delivery after adjusting the advance already paid on prorated basis against each filter supply.

17. It is an admitted fact that ultimately the prices were revised and the defendant vide letter dated 18.8.2001 Ex.PW1/7 accepted the price at Rs.6,50,000/- per Pressure Leaf Filter. But has not accepted the payment terms. Defendant also stated in this letter that “Your nominal advance of 20% against our required 50% as per our offer was not adequate for the said tailor made ordered equipments.” Again said: “Acceptable payment terms payment against each filter to be made in advance on a prorated basis. “This letter was replied by the plaintiff, vide their letter dated 20.8.2001. Copy of which is Ex.PW1/8 stating that the payment of each filters shall be made against delivery after adjusting the advance on prorated basis. Defendant again wrote a letter Ex.PW1/9, referring to the letter dated 20.8.2001 of the plaintiff please note that there is no

possible way for us to proceed further production without receiving the advance payment as mentioned. This letter is replied by the plaintiff vide their letter Ex.PW1/10 dated 3.9.2001. Para-2 and 3 of this letter is reproduced as under:-

“We have no intention to stop your payment by any means as we have to supply the said Puric Filters to M/s Ruchi Infrasture Ltd, Kakinada and the payment has to be received from them by us. You have principally agreed on the phone to supply the filters as per our letter dated 18.8.2001 come into further correspondence of any type with lame excuse for non-supply of the filters. It will be in your interest as well as in our interest to get the filters installed in the company immediately without any further delay.

We hope that you will supply the filter as there has already been huge delay, from your side causing huge losses to our company if, we do not receive your confirmation by 7th Sept. 2001 about delivery date as mentioned in our letter dated 18.8.2001, we shall be constrained to cancel the order and initiate legal action at your cost and risk for claiming refund of our part payment sent to you and also for other direct and indirect losses.”

18. This letter was re-faxed by the defendant to the plaintiff. It is mentioned on the letter “that YOU ARE A WORTHLESS COMPANY. IF REQUIRED WE WILL PROVETT BEFORE ANY LEGAL AUTHORITY.”

19. So in a way the contract was never concluded as suggested by letter Ex.PW1/6 because the payment terms were not acceptable to the defendant and in fact it is evident from the letter Ex.PW1/11 that the plaintiff was not in a position to make the payment even at the time of delivery because in this letter plaintiff is itself saying that they have no intention to stop the payment as they have to supply the filter to M/s Ruchi Infrastructure Ltd. and the payment is to

be received from them and it is only for the first time this thing is brought to the notice of the defendant that these goods are to be supplied to the other party.

20. Now as per the letter Ex.PW1/6 written by the plaintiff one leaf filter was to be supplied by 15.9.2001 and 2nd by 30.9.2001 meaning thereby that plaintiff could not have revoked the contract before 15.9.2001 and 30.9.2001 but plaintiff had already made up his mind to purchase these filters from M/s Sharplex Agro Process Ltd. In fact PW-2 M/s Sharplex Agro Pvt. Ltd. firm stated in its cross-examination that its company talked with the plaintiff for the first time in August 2001 and they were to receive entire payment after the dispatch of filter and he can not say if the amount was given in advance in August 2001 as he has to verify from the record. He further stated that orders were placed in Sept. and obviously advance will be made in Sept. and not in August. Hence, it is proved from the statement of this witness that plaintiff was already negotiating with M/s Sharp Agro Process Ltd. for supply even prior to the revocation of contract with the defendant. They placed the order on them on 4.9.2001 vide Ex.PW1/11 i.e. much prior to the date of supplying the filter as stipulated in Ex.PW1/6. i.e. 5.9.2001 and 30.9.2001. The legal notice was replied by the defendant vide Ex.PW1/12 stating therein that the photographs of the work completed by them have been sent to them. Photographs are also placed on record . Obviously defendants spent huge amount in manufacturing these filters which were tailor made strictly according to the specification of the plaintiff and were of no use to the defendant. Even it is proved from the statement of DW-1 that they had hired the godown on lease to store these filters on account of paucity of space. The lease agreement for hiring the godown is Ex.PW1/15 and the receipt is Ex.DW1/16. Photographs are Ex.DW1/13. Only a bare suggestion was put that the photographs did not pertain to the filter in question which is denied by DW-1.

21. Hence, it is proved that vide letter Ex.PW1/6 new terms and conditions were suggested which were not agreeable to the defendant as he wanted 50% in advance and even as per the plaintiff the first filter was to be supplied by 15.9.2001 and before that date the order has been placed to M/s Sharplex Agro Process Ltd. on 4.9.2001. Defendant has not committed any breach of the contract. The defendant already spent a huge amount for preparing the filters and the plaintiff is not entitled to the refund of the advance amount. The defendant is not at all responsible for the breach of the contract. Time cease to be essence when the specification were revised. Hence, the plaintiff is not entitled for the amount claimed. The suit was premature.” (emphasis added)

7. In my opinion, no fault can be found with the aforesaid findings and conclusions of the trial Court inasmuch as, once there is no contract which is entered into there does not arise any issue of breach of contract. The original contract which was entered into vide Ex.PW1/2 was given a go-bye as shown from the letter dated 3.3.2001, Ex.PW1/3. Therefore, I agree with the findings and conclusions of the trial Court that there does not arise any issue of the appellant/plaintiff being entitled to higher price paid to another seller on account of alleged breach of contract of the respondent/defendant.

So far as the issue of the respondent/defendant having manufactured the machine and the same having been stored in a godown for which charges were incurred I may note that the trial Court has relied upon the photographs

(Ex.DW1/13) showing the machines as having been substantially manufactured. The trial Court also notes that the machines/filters which were tailor-made for specifications of the appellant/plaintiff were not of any use to the defendant, and to anyone else, I may add. Trial Court has also referred to the fact that the statement of DW1 shows that lease agreement Ex.DW1/15 was entered into for storing of the machine and for which payment was made vide receipt Ex.DW1/16.

8. A civil case is decided on balance of probabilities. The facts of the present case show that the trial Court has arrived at correct findings and conclusions. An Appellate Court is not entitled to interfere with the findings and the conclusions of the trial Court unless such findings/conclusions are illegal or perverse. Merely because two views are possible, this Court will not interfere. I do not find any illegality or perversity which calls for interference in this appeal. The appeal is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

MAY 29, 2012
ib

VALMIKI J. MEHTA, J.