

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

+ **RFA No.68/2004**

% **16th February, 2012**

M/S HARYANA TOURISM CORPORATION LIMITED Appellant
Through: Mr. Balbir Singh Mor, Adv.

versus

M/S P.K. HIMAT SINGKA & CO. Respondent
Through: Mr. J.P.Gupta, Adv.

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

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 21.10.2003 decreeing the suit of the respondent/plaintiff for Rs.2,77,861/- along with interest at 9% per annum, on account of the alleged breach of contract by the appellant/defendant in not purchasing the spare parts of the 90 HP outboard motors.

2. The subject suit was filed by the respondent/plaintiff setting up a

case that there was a contract between the parties whereby the appellant/defendant agreed to purchase spare parts of 90 HP outboard motors. It is pleaded that the respondent/plaintiff made an offer vide letter dated 14.10.1989 and the appellant/defendant accepted the same vide letter dated 18.10.1989. It was further pleaded by the respondent/plaintiff that by its letter dated 21.10.1989 a demand was made for payment of 25% advance as per the terms of the offer. It was further pleaded in the plaint that it subsequently transpired by reference to the acceptance letter of the appellant/defendant dated 18.10.1989 that certain parts as ordered were lesser and therefore a letter dated 23.10.1989 was written that an order for the balance spare parts be placed upon the respondent/plaintiff. Para 7 of the plaint refers to the fact that the respondent/plaintiff sent its letter dated 13.11.1989 again requesting the appellant/defendant for sanctioning the 25% advance as per the order so that the delivery could be made. There is a reference to other correspondence for seeking confirmation with respect to all the spare parts. The respondent/plaintiff thereafter pleaded that vide its letter dated 4.1.1990 the appellant/defendant was informed that the spare parts have been received and 25% advance payment be made. Plaint further speaks of issuing of reminders to the appellant/defendant. Reference in the plaint is then made to an alleged

meeting dated 11.5.1990 with the Managing Director of the appellant/defendant/Tourism Corporation where it was allegedly decided that all the spare parts will be purchased and a written confirmation will be sent, however, no confirmation was received. The plaint therefore states that ultimately a legal notice was sent and the suit was filed inasmuch as the spare parts which were imported for the appellant/defendant were such which could not be sold in the market. The value of the goods in October, 1989 was stated to be ₹2,08,861/-, and interest was claimed thereon @ 24% per annum as being ₹1,38,000/-. A total claim of ₹5,05,000/- was thus made which also included a claim of ₹1,00,000/- towards storage charges of the spare parts.

3. The appellant/defendant in the written statement denied that a contract had come into existence with respect to the spare parts. It was pleaded in para 6 of the reply on merits in the written statement that at no point of time confirmation of the order for the supply of the spare parts was sent to the respondent/plaintiff and that at no point of time the appellant/defendant agreed to take all the spare parts which the respondent/plaintiff wanted to sell. In effect it was pleaded that there was no contract for the supply of the spare parts. It was further denied that spare parts which were imported by the respondent/plaintiff could not be sold in the

market. The claim of the respondent/plaintiff was denied and it was prayed that the suit be dismissed.

4. After the pleadings were completed, the Trial Court framed the following issues:-

- “1. Whether the defendant proves that order for the purchase of spare parts was treated as cancelled by the duly authorized representative of the plaintiff in the meeting held on 11.5.1990, as averred in the W/S?
2. Whether this court has no territorial jurisdiction to try and entertain the suit?
3. Whether the plaintiff suffered damages on account of non-purchase of the spare parts by the defendant? If yes, to what extent?
4. Whether the plaintiff is entitled to interest? If yes, at what rate and on what amount?
5. To what relief, if any, plaintiff is entitled to?
6. What order and decree?”

5. Learned counsel for the appellant/defendant argued that though issue no. 1 is framed suggesting that a contract was already entered into and which was cancelled in the meeting on 11.5.1990, it is argued that a reading of the admitted correspondence on record shows that no contract was finally entered into as there was no consensus ad idem with respect to the total number of spare parts which were to be purchased. Further the contract cannot be said to be confirmed because no advance payment of 25%, as asked for by the respondent/plaintiff, was paid. It is argued that a reading of the plaint

itself shows that no concluded contract came into existence. It is argued that this Court should also in exercise of powers under Order 41 Rule 24 CPC go into the issue that in fact there was never a concluded contract entered into between the parties for the sale of the spare parts. It is finally argued on behalf of the appellant/defendant that even assuming there was a contract, the subject suit for recovery of the price of goods and other reliefs is not maintainable inasmuch as if there is a breach of contract, at best, the respondent/plaintiff could have sued for loss caused by the difference of the purchase price of the spare parts as compared to the price at which the spare parts were sold (or to be sold on around the date of the alleged breach) in the market, and since, the respondent/plaintiff failed to prove the efforts made by it to sell the spare parts in the market, there does not arise any question of giving a total price of the spare parts, and which claim clearly stares against Section 73 of the Contract Act, 1872.

6. Learned counsel for the respondent/plaintiff argued in reply that the only issue which was framed by the Trial Court was issue no.1 as to whether the contract was cancelled and there was no issue framed that no contract was ever entered into. It was also argued that the goods/spare parts were not capable of being sold in the market and therefore, the

respondent/plaintiff was entitled to receive the complete price of the goods along with the claim of interest and other ancillary claims. It is also argued in response to the argument urged on behalf of the appellant/defendant that there came into existence no concluded contract, that, in fact a contract was arrived at between the parties.

7. The first aspect which I have to consider is as to whether a contract for sale of spare parts being 90 HP outboard motors was ever entered into between the parties. This I am doing in exercise of my powers under Order 41 Rule 24 CPC. Besides, various other aspects which will be discussed below, it is necessary to refer to para 12 of the plaint and which reads as under:

“12. That after receiving the letter dated 7th March, 1990, the matter was discussed with the Managing Director of the Corporation at Delhi on 11th May, 1990 wherein it was agreed that the defendant will take the spare parts and a written confirmation will be sent to this effect and, as no confirmation was received, the plaintiff, vide its letter dated 16th May, 1990, requested the Corporation to confirm their decision but to no effect.” (emphasis added)

8. A reference to the aforesaid para of the plaint shows the admission of the respondent/plaintiff that the final order was still to be finally placed with respect to the spare parts, and which was only when a written confirmation would have been sent, and admittedly, it is not the case of the

respondent/plaintiff that a written confirmation was ever sent pursuant to the meeting held on 11.5.1990 between the representative of the respondent/plaintiff and the Managing Director of the appellant/defendant/Corporation. Thus it is clear that no final contract was arrived at. The fact that there is no concluded contract also becomes clear from reading of the earlier paras of the plaint in which there are admissions in so many terms that there was no agreement for the total number of spare parts because the order, which was placed upon the respondent/plaintiff dated 18.10.1989, did not contain all the spare parts which were to be ordered. This aspect is stated in paras 5 and 6 of the plaint, and which paras refer to the fact that the respondent/plaintiff had asked for a final order, which included the spare parts which were missing in the order dated 18.10.1989. There is also an issue with respect to who will pay the sales tax and this becomes clear from the letter dated 21.10.1989 sent by the respondent/plaintiff to the appellant/defendant, and in which letter, the respondent/plaintiff specifically raised the issue by stating as under:-

“What about Sales Tax? Whether you pay 4% or 10% Sales Tax?
Please send your advance draft by calculating the Sales Tax as payable to you.”

9. In law, a concluded contract comes into existence when there is a

consensus ad idem with respect to all the necessary/material terms of the contract. If there is no consensus ad idem, there is no concluded contract. The facts of the present case show that there is no consensus ad idem with respect to all the number of spare parts to be supplied, that whether 25% was or was not to be paid as an advance, who was to pay the sales tax and finally and more importantly the respondent/plaintiff itself states that there had to be confirmation of the contract pursuant to the meeting dated 11.5.1990, but admittedly there is no confirmation sent pursuant to the meeting dated 11.5.1990 by the appellant/defendant to the respondent/plaintiff.

10. The relevant correspondence in this regard which exist in the Trial Court record on the aspect of the fact that there cannot be said to be a concluded contract are as under:-

- i) Letter dated 18.10.1989 from the appellant/defendant to the respondent/plaintiff (Ex.P2/Ex.D3, which is with respect to the supply of spare parts).
- ii) Letter dated 21.10.1989 from the respondent/plaintiff to the appellant/defendant (Ex.D1, which pertains to the issue of sales tax being raised as to who will pay the sales tax and at what rate).
- iii) Letter dated 23.10.1989 of the respondent/plaintiff to the

appellant/defendant (Ex.P3/Ex.D5, pertaining to the issue raised with respect to order of the spare parts not being complete).

iv) Letter dated 13.11.1989 from the respondent/plaintiff to the appellant/defendant (Ex.D6, issue of not having released the 25% advance amount).

v) Letter dated 16.11.1989 from the appellant/defendant to the respondent/plaintiff (Ex.D4, which talks of confirmation yet to be sent for the spare parts order).

11. Since I am exercising power as a Court of First Appeal under Section 96 CPC, I am entitled to reappraise not only the facts and evidence, but also the law as applied. Order 41 Rule 24 CPC permits this Court to take an independent view on the basis of the facts and evidence which have come on record. Any doubt as to the powers existing in this Court is removed by reference to Order 41 Rule 33 CPC which provides that in order to do complete justice, the Appellate Court can exercise all such powers for modifying the impugned judgment and decree. In view of the aforesaid admitted position appearing on the file, and I say admitted because the correspondence between the parties is admitted, I hold that there was never any concluded contract between the parties, and this issue though not framed

by the Trial Court, I am taking as an issue to be decided and am deciding the same on the basis of the pleadings and evidence which has emerged on record including the admitted position from the case set up by the respondent/plaintiff in the plaint itself.

12. Now let me assume that there was a concluded contract between the parties. The issue then to be decided is that if there is a breach of contract by the appellant/defendant, what would be the amount to which the respondent/plaintiff would be entitled to on account of the breach. It is quite clear that as per Section 73 of the Contract Act, 1872 once there is a breach of contract, the aggrieved party can only claim loss which is caused to him on account of breach of contract by the guilty party. Once there is a contract to sell the goods, the difference of price between the price at which the goods were to be sold to the buyer and the price at which the goods are actually sold in the market in and around the date of the breach, is taken as loss to the aggrieved party under Section 73 of the Contract Act, 1872. Section 73 of the Contract Act, 1872 also lay down that the aggrieved party must also take the necessary steps to minimize the losses. In the facts of the present case though it was very vehemently sought to be argued by counsel for the respondent/plaintiff that the goods were such which could not be sold in the

market, I am of the opinion that after all these goods are only spare parts fixed on outboard motors used on boats, and boats are found in almost hundreds and hundreds of the lakes in the country, and therefore, the argument that the goods being spare parts of 90 HP outboard motors cannot be sold in the market is an argument which I reject. In any case, if there was any doubt with respect to lack of action of the respondent/plaintiff in invoking the necessary steps to sell the goods in the market, it becomes clear from the following cross examination of the witness of the respondent/plaintiff:

“Letter Ex.D/11 was sent by me. This in fact is confirmatory copy of the telegram. We had not sell the goods to any other customers.

(Volunteered) : This was a sort of threat.

Otherwise in fact these goods are not saleable in the market to any other customer.

We have some customers like Indian Army, Indian Navy, Coast Guards, BSF, Central Water Commission, many State Tourism Corporations, private boat builders. Various departments who purchase outboard motors from us but none of these customers purchase 115 HP outboard motors from us. We generally supply 10, 15, 25, 30 and 40 HP outboard motors. HP outboard motors are generally used for pushing the boats and that is why these are called outboard motors. (Volunteered) : There is another type of such motors called in board motors.

Q. Can you show from the record any tender or advertisement or any document showing you had invited any quotation that you had offered these spare parts for sale to the public at large till date?

A. There was no customer and as such there is no question of advertising these goods for sale and spending money on these advertisements unnecessarily. I have not produced relevant documents for import of these goods including invoice.”(underlining added)

13. A reference to the aforesaid cross-examination of the witness of the respondent/plaintiff shows that there does exist a market for the spare parts in question not only among the State Tourism Corporations but also various private boat builders. When a specific question was put to the witness of the respondent/plaintiff as to show the record with respect to the tender or advertisement or other document to show as to what steps have been taken to sell the spare parts, finding no answer, a vague reply is given that since no efforts were made to sell the spare parts in the market as no customer existed in the market and therefore it was 'unnecessary' to make efforts. In my opinion, this vague answer clinches the issue that no sincere efforts as per legal obligation upon the respondent/plaintiff in terms of Section 73 of the Contract Act, 1872 were at all made by the respondent/plaintiff for selling the spare parts in the market. Therefore, even assuming there is a contract, since the respondent/plaintiff has failed to prove what loss is caused to him, and the suit claim is not for the loss (difference in price) but only for the total price of the spare parts, the claim as laid out is non-maintainable and liable to be dismissed.

14. In view of the above, the appeal is accepted. The impugned judgment and decree dated 21.10.2003 is set aside. Suit of the

respondent/plaintiff will stand dismissed. Decree sheet be prepared. Trial Court record be sent back.

15. The appellant/defendant had deposited 50% decretal amount in this Court. The respondent/plaintiff had withdrawn this amount by furnishing of a bank guarantee. Since the appeal has been accepted, the amount which had been released to the respondent/plaintiff be realized for the appellant/defendant from the bank guarantee furnished by the respondent/plaintiff in this Court. Appeal is disposed of accordingly.

VALMIKI J. MEHTA, J

FEBRUARY 16, 2012
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