

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ (1) CS(OS) 2340/2001 and IA No.1537/2004

HANDICRAFT AND HANDLOOM EXPORT
CORPORATION OF INDIA LTD. Plaintiff
Through: Mr. Vivek Singh and Ms. Madhu
Sharan, Advocates.

versus

UNISILK LTD. RM AND ORS. Defendants
Through: Mr. R.K. Joshi, Advocate for D-7.

+ (2) CS(OS) 480/2008 and IA No.3621/2010

M/S. OVERSEAS TRADING CORPORATION Plaintiff
Through: Mr. Vibhor Garg, Advocate

versus

HANDLOOMS AND HANDICRAFTS EXPORT
CORPORATION OF INDIA LTD. Defendant
Through: Mr. Vivek Singh and Ms. Madhu
Sharan, Advocates.

% Date of Decision : July 09, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

1. Since commonality of facts and law are involved in the aforesaid suits, both the suits are being decided by this common judgment.

2. The essential facts as set out in CS(OS) No.2340/2001 are not in dispute and are as delineated below.

3. On 08.10.1998, the Director General of Foreign Trade, decided vide Government Notification No.47 (RE-98)/97-02 to allow the import of mulberry raw silk without import licence by six agencies which included the Handicraft and Handloom Export Corporation of India Limited (hereinafter referred to as "HHEC"). In view of the permission granted by the Government of India for import of raw mulberry silk without import licence, the HHEC was approached by the defendant No.8, M/s. Overseas Trading Corporation (hereinafter referred to as "Overseas Trading") for the purchase of raw mulberry silk.

4. The defendant No.1, Unisilk Limited RM is a company based in Hong Kong and deals with the export of mulberry raw silk. The plaintiff placed an order of import of 1,240 bales of mulberry raw silk on Unisilk Limited RM (hereinafter referred to as "Unisilk") and out of 1,240 bales of raw mulberry silk, import of 311 bales of mulberry raw silk of Korean origin was contracted with defendant No.1 vide contract No.US/6047/98 and US/6055/98 dated 27.10.1998, which are the subject matter of dispute in this suit. HHEC imported the said goods from Unisilk on Cost Insurance Freight (C.I.F.) basis. The value of the goods in terms of US Dollars was 1,74,899.57.

5. The subject matter of the aforesaid contract was insured with the defendant No.2, M/s. China Merchants Insurance Company Limited, Hongkong (hereinafter referred to as the "Insurance Company"). The sum insured for the aforesaid goods in US Dollars was 1,92,390 vide three policy numbers viz. MCG-3033-012851, MCG-3033-012852 and MCG-3033-012853. On 18.03.1999, the aforesaid three insurance policies were further extended upto 15.04.1999. The defendant No.3 is a claim settling agent of the defendant No.2/Insurance Company. The defendant No.4 is the

survey agent of the defendant No.3. The defendant No.5 is a company engaged in the shipping business and the aforesaid goods were brought to India by its ship Ever Delux in container No.UGMU-8660253/20'. The defendant No.6 is an Indian agent of the defendant No.5. The defendant No.7 is a corporation of Government of India and carries on the business of providing/procuring the container to exporters and importers for export and import of goods and also provides the warehouse facility for exported and imported goods. The defendant No.8 is engaged in trading of silk products and its import and export, and had placed the order of purchase of 1240 bales of imported mulberry silk of Korean origin on the plaintiff.

6. It is the case of HHEC that HHEC was acting as canalizing agency and the Insurance Company was to provide the details of quality and quantity of raw silk to be imported by HHEC. A contract was entered into between the HHEC and Overseas Trading, that is, the plaintiff and the defendant No.8 for the supply of imported raw mulberry silk to Overseas Trading. HHEC had back to back buy agreement with Overseas Trading as raw mulberry silk was imported on the basis of the order placed by the said Overseas Trading.

7. On 22.10.1998, the sale contract was forwarded by the defendant no.1 – Unisilk to HHEC whereby Unisilk had agreed to sell mulberry silk of Korean origin to HHEC and this was given shape in the form of contract Nos.US/6041/98 and US/6042/98. Subsequently, one more sale contract was forwarded on 27.10.1998 by Unisilk to HHEC by which the Unisilk agreed to sell mulberry raw silk of Korean origin and the terms of contract were contained in contract Nos.US/6047/98, US/6055/98, US/6056/98 and US/6057/98.

8. It is further the case of HHEC that on 27.10.1998, the defendant No.8, Overseas Trading placed orders for the supply of imported mulberry silk on HHEC. The import orders amongst other indents contained indent No.US/6047/98 dated 27.10.1998 for 260 bales of 30 kgs. each and indent No.US/6055/98 dated 27.10.1998 for 51 bales of 30 kgs. each, contained in sale contract forwarded by Unisilk to HHEC.

9. The plaintiff-HHEC by fax message dated 30.10.1998 sent its acceptance of the contract for import of mulberry silk to Unisilk and the contract, *inter alia*, contained indent No.US/6047/98 dated 27.10.1998 for 260 bales of 30 kg. each and indent No.US/6055/98

dated 27.10.1998 for 51 bales of 30 kg. each of mulberry silk. Thereafter, the defendant No.1, Unisilk by fax message bearing reference No.11/90914/98 dated 5th November, 1998 informed HHEC that mulberry silk forming part of indent No.US/6047/98 and indent No.US/6055/98, both dated 27.10.1998, had been shipped to India on 30th October, 1998.

10. By another fax message dated 12.11.1998, the defendant No.1, Unisilk informed the plaintiff-HHEC the document dispatch details for the 311 bales of mulberry raw silk shipped to India by the ship EVER DELUX. On the following day, i.e., on 13.11.1998, the HHEC received through their banker-State Bank of India documents containing Bill of Lading dated 29.10.1998 issued by Speeder Container Lines S.A. (the defendant No.5) and invoices of Unisilk dated 29.10.1998 (six in number), the details of which are as under:-

Sl. No.	Bill of Lading	Quantity (Bales)	Invoice No.
1.	HK/New-14992	51	UL/6137/98
2.	HK/New-14987	52	UL/6136/98-A
3.	HK/New-14988	52	UL/6136/98-B
4.	HK/New-14989	52	UL/6136/98-C

5.	HK/New-14990	52	UL/6136/98-D
6.	HK/New-14991	52	UL/6136/98-E

11. The plaintiff asserts that on 29.11.1998, the raw mulberry silk imported by it reached at I.C.D. Tughlakabad, New Delhi in container No.UGMU-8660253/20'. The Custom examined 10 per cent contents of the container on 15.03.1999 after cutting the seal, and again on 18.03.1999, on request, the goods were examined 100 per cent by the Custom, and on such examination only 235 bales were found as against the invoice quantity of 311 bales of mulberry raw silk. The sum and substance of the report are reproduced in the plaint as under:-

Bill of Entry	Quantity Found	Deficiency as against quantity indicated (Bale)
206437/10-Feb-99	As per invoice	Nil
206438/10-Feb-99	38 bales as against 52 of invoice quantity	14
206440/10-Feb-99	26 bales as against 52 of invoice quantity	26

206441/10-Feb-99	28 bales as against 52 of invoice quantity	24
206446/10-Feb-99	As per invoice	Nil
206447/10-Feb-99	40 bales as against 52 of invoice quantity	12

12. It is further the case of the plaintiff-HHEC that the container was thereafter examined by M/s. B. Ghose and Company Limited, I.C.D. Tughlakabad, New Delhi on 19.03.1999 and it was reported by them in their worksheet No.4508 that the subject container had arrived at I.C.D. Tughlakabad, New Delhi with its seal intact and only 235 bales had been found.

13. The plaintiff-HHEC thereupon requested for Destuffing Survey of the container UGMU 8660253/20' and on the instruction of the shipping line, the defendant No.6, M/s. Greenways Shipping Agency, acting as their official surveyors, Master Marine Services Private Limited carried out a detailed survey on 19.03.1999 in the presence of the Custom House Agent of Consignee. In its Destuffing Report dated 21.03.1999, it stated that the total quantity received was 235

bales and net shortage was of 76 bales. It confirmed line seal intact with no evidence of tampering. The plaintiff-HHEC vide fax message on 23.03.1999 informed the Insurance Company (the defendant No.2) about shortage of 76 bales of mulberry raw silk and the defendant No.4—M/s. Tata Tea Limited (CEEMIS SURVEY AGENT) was also informed.

14. It is further the case of the plaintiff-HHEC that the defendant No.7—M/s. Container Corporation of India Limited on 24.03.1999 issued a certificate that the container had been received with the original seal intact and as per its tally only 235 bales were found and it will not accept the liability for short landing.

15. The defendant No.8-Overseas Trading, the purchaser of the imported raw mulberry silk from HHEC also contacted M/s. Tata Tea Limited (CEEMIS SURVEY AGENT) vide their letter dated 01.04.1999 that 76 bales were missing from the container and registered a claim with them and along with their claim, copies of three insurance cover policies, copies of six invoices and six bills of lading, also forwarded the following documents:-

41

- (a) Certificate of the Customs Department as recorded on the back of Bill of Entry.
- (b) Inspection Report of the Shipping Company Surveyor.
- (c) Inspection Report of the Container Corporation.
- (d) Details of claim of U.S. \$ 47,490.44 on account of loss of 76 bales of mulberry silk.

16. The Tata Marine Agencies, agent of Tata Tea Limited vide their fax No.INS:GEN:471/99 dated 7th April, 1999 replied to the Overseas Trading (the defendant No.8) that they were not nominated as the claim settling agent of the defendant No.2/Insurance Company in the insurance policies in question and that the defendant No.3 was the claim settling agent and requested the defendant No.8-Overseas Trading to submit the claim documents direct to the defendant No.3-CEEMIS.

17. On 22.04.1999, the defendant No.1-Unisilk informed the HHEC vide letter bearing reference No.11/100341/99 that it had loaded the entire quantity of 311 bales. Left with no option, the HHEC by registered letter on 26.05.1999 lodged the claim of US \$ 47,717.44 with the Insurance Company [the defendant No.2], M/s.

Tata Tea Limited [CEEMIS SURVEY AGENT (the defendant No.4)] and Speeder Container Line S.A. [the defendant No.5 through whom the goods were dispatched] with regard to the shortage of 76 bales of mulberry raw silk, out of 311 bales shipped vide Bill of Lading No.HK/NEW/14987 to HK/NEW/14992 dated 29.10.1998, shipped in container No.UGMU 8660253/20', insured vide policy Nos.MCG-3033-012851, MCG-3033-012852 and MCG-3033-012853.

18. Consequent to the lodging of the claim by the plaintiff-HHEC, the defendant No.3/CEEMIS, the claim settling agent of the defendant No.2/Insurance Company, vide its letter dated 11.06.1999 in reply to the letter of HHEC dated 26.05.1999 stated that they were the claim settling agent of M/s. China Merchant Insurance Company Limited (the defendant No.2), but they repudiated the claim on the ground that the original seal of the container was intact at the time of the delivery of the container and, therefore, the loss had not occurred due to the operation of the external fortuity during the insured transit and it was due to short shipment. In the meantime, the Custom informed the HHEC vide letter dated 05.07.1999 that on the basis of the order dated 19.06.1999 of Deputy Commissioner of Custom, the custom

43

duty on 76 bales worth ₹ 6,56,052 (Rupees Six Lacs Fifty Six Thousand and Fifty Two Only) was being refunded as a shortage of 76 bales had been found.

19. On 05.07.1999, the HHEC informed the defendant No.3-the claim settling agent of the defendant No.2-Insurance Company vide its fax bearing reference No.HHEC/SILK/OTC that a certificate had been issued by M/s. Modern Century Forwarding Limited that Unisilk had loaded complete material as per invoice and, therefore, the chances of short loading did not arise. On 06.03.2000, the defendant No.2-Insurance Company by its letter addressed to Overseas Trading Corporation further repudiated the claim of HHEC and closed the file on the frivolous ground that the defendant No.4, the survey agent of the defendant No.3 had not been requested for the survey by the defendant No.8-Overseas Trading.

20. The plaintiff-HHEC by its fax message dated 27.07.2000 informed the defendant No.2-Insurance Company that at no point of time, the Insurance Company had suggested second survey by its agent and, therefore, it could not be treated as material breach. The defendant No.2-Insurance Company, by fax message dated

10.08.2000 again repudiated the claim of the plaintiff-HHEC and also refused to accept the container listing and claimed that cargo interest had not taken any positive action in this respect. The plaintiff-HHEC rebutted the contention of the Insurance Company vide fax message dated 01.09.2000, stating that the surveyor M/s. Tata Marine Agencies (the agent of defendant No.4) was contacted about the shortage of 76 bales of mulberry silk and on information of Tata Marine Agency, the defendant No.3 was contacted. The failure to conduct survey on the part of the surveyor therefore could not be held against the plaintiff-HHEC, inasmuch as the request was made as early as in March, 1999 itself.

21. By its fax bearing reference No.GF-2486 C dated 11.09.2000 Unisilk requested the defendant No.2—Insurance Company to settle the claims of the plaintiff-HHEC and copy of the said communication was forwarded by Unisilk to HHEC, but to no avail. Ultimately, on 20.01.2001, the plaintiff-HHEC served notice on defendant No.2/Insurance Company for settlement of claim by 15th February, 2001 stating that failure to do so would result in filing of a recovery suit. The plaintiff-HHEC vide their fax message bearing reference

No.HHEC/SILK/OTC dated 08.05.2001 also informed Unisilk that 311 bales of mulberry raw silk had been imported on Cost Insurance Freight basis and requested Unisilk to provide the documentary evidence in support of shipment of 311 bales, for which the payment had been made.

22. The plaintiff-HHEC alleges that in the aforesaid circumstances, 76 bales of mulberry silk valued at approximately US \$ 47,717.44 were lost either due to short shipment or due to pilferage during transit or due to loss at the warehouse of the defendant No.7, and thereby the plaintiff-HHEC had suffered loss. Payment had been made by the plaintiff-HHEC to Unisilk for 311 bales of mulberry silk and it was the duty of Unisilk to compensate the plaintiff-HHEC for the aforesaid shortage of 76 bales of mulberry raw silk. The aforesaid goods were insured with the defendant No.2—Insurance Company and the said insurance covered **“all risk upto Varanasi U.P. India including warehouse to warehouse”**, and thus the Insurance Company was liable to reimburse the HHEC for the loss caused to it under the policies issued by it in favour of the HHEC. The HHEC further alleges that the defendant No.4, which is the claim setting agent of

the defendant No.3 and the defendant No.3, which is the claim settling agent of the defendant No.2–Insurance Company, were under a contractual obligation to carry out survey for any loss claimed and the contract itself speaks about the role of the defendant No.4. The defendant No.4 was well informed by the HHEC to conduct the survey but it ignored the request of HHEC. Thus, all the defendants have performed their duty negligently and thereby caused loss to the HHEC and are, therefore, jointly and severally liable to pay a sum of U.S. \$ 47,717.44 (equivalent to approximately ₹ 22,89,960/-) to the HHEC with interest @ 18% per annum on the aforesaid amount from 18.03.1999 when the shortage of 76 bales of mulberry silk was discovered by the Custom Department. The defendants having failed to pay the aforementioned amount to the plaintiff-HHEC, the present suit was instituted by the plaintiff on 26/09/2001 seeking recovery of Rs.33,20,442/- (Rupees thirty three lakhs twenty thousand four hundred and forty two only) in favour of the plaintiff and against the defendants No.1 to 7 alongwith future interest at the rate of 18% per annum from 18.9.2001 till the realization of the entire decretal amount.

23. The plaintiff served the defendants with summons of the filing of the suit through publication in international newspapers apart from ordinary mode of service. The defendants No.1 to 3, 5 and 6 did not appear despite service upon them by publication and were proceeded *ex-parte* in default of appearance on 08.02.2006.

24. The defendants No.4, 7 and 8 filed their respective written statements. The plaintiff filed replications to the written statements of the defendant No.4 and the defendant No.7. On 7.9.2006, the following issues were framed for adjudication:-

- “1. *Whether the plaintiff is entitled to the suit amount?*
OPP
2. *Whether the plaintiff is entitled to interest as claimed? OPP*
3. *Whether the defendants are jointly and severally liable to pay the amount claimed by them? OPD*
4. *Relief.”*

25. On 22.08.2008, an application filed by the defendant No.4 for deletion of its name from the array of parties was dismissed being IA No.12327/2006 and at the behest of the defendant no.4, the following additional issues were framed for consideration:-

- “1. Whether defendant no.4 is a proper and necessary party to the suit and the suit is bad for misjoinder of parties? OPP*
- 2. Whether there is any cause of action against the defendant no.4 and in favour of the plaintiff? OPD*
- 3. Whether the insurance policy is properly stamped and if not its effect? OPP”*

26. By a subsequent order dated 11.08.2009, however, a review application filed by the defendant no.4 (being IA No.12739/2008) seeking recall of the order dated 22.08.2008 was allowed by this Court on the ground that there was no privity of contract between it and the plaintiff, whose claim is premised upon the alleged negligence or wrongful performance of the agreement by defendants Nos. 1 to 3. It was held that the fourth defendant was neither a necessary nor proper party and in the circumstances, the review application deserved to be allowed. Consequently, the defendant no.4 was deleted from the array of parties.

27. In the course of trial, the plaintiff-HHEC examined two witnesses, namely, PW-1, Mr. Nirmal Sinha, General Manager of the HHEC and PW-2, Mr. V.K. Anand, Ex-Marketing Manager of the

CS

HHEC, who tendered in evidence their respective affidavits by way of evidence as Exhibit PW-1/A and Exhibit PW-2/A.

28. In the course of his testimony recorded on 30th October, 2009, Mr. Nirmal Sinha tendered in evidence his affidavit Exhibit PW-1/A and the documents enclosed therewith exhibited as Exhibit PW-1/1 to Exhibit PW-1/28. The witness was cross-examined by Sh. R.K. Joshi, the learned counsel for the defendant No.7 on 30th October, 2009 and subsequently on 6th November, 2009.

29. The statement of PW-2, Mr. V.K. Anand was recorded on 3.5.2010, who tendered his affidavit in evidence Exhibit PW-2/A relying upon the documents already exhibited as Exhibit PW-1/1 to Exhibit PW-1/28. PW-2, Mr. V.K. Anand was also cross-examined at length by the learned counsel for the defendant No.7.

30. The defendants did not choose to adduce any evidence in rebuttal except the defendant No.7-Container Corporation of India Limited. The defendant No.7 adduced the evidence of Shri Radhey Shyam, Sr. Manager (Commercial) of the defendant No.7, who appeared in the witness box as D-7W1. and tendered his affidavit of

50
evidence as Exhibit D-7W1/A relying upon the document Exhibit D-7/1 (already exhibited as Exhibit PW1/D1).

31. On scrutinizing the oral and documentary evidence on record and after hearing the counsel for the plaintiff, the defendant no.7 and the defendant No.8, the Court is of the opinion that the following documents and the facts emerging therefrom stand established on the record from the testimonies of the plaintiff's witnesses, namely, PW1-Mr.Nirmal Singh and PW2-Mr. V.K. Anand:-

1. Plaintiff-HHEC vide Govt. Notification No. 47 (RE-98/97-02 dated 8.10.1998 was allowed to import mulberry raw silk without import licence (**Exhibit PW1/2**).
2. Defendant No.8-Overseas Trading, a partnership firm placed the order of purchase of imported mulberry silk of Korean origin by an agreement dated 27.10.1998 entered into between the plaintiff and defendant no.8 (**Exhibit PW1/5**)
3. Plaintiff placed order of 1240 bales of mulberry raw silk on defendant no.1-Unisilk and contract of import of 311

57

bales of mulberry raw silk was contracted with defendant no.1-Unisilk vide Ref. no. US/6047/98 (for 260 bales) & US/6055/98 (for 51 bales) dated 27.10.1998, which is the subject matter of the dispute. The said goods were imported on Cost Insurance Freight (CIF) basis. (**Exhibit PW1/6**).

4. Defendant No.2- Messrs China Merchants Insurance Company Limited was the Insurance Company at Hong Kong with whom the subject matter of aforesaid contract of 311 bales was insured for US \$ 1,92,390. Insurance policy nos. MCG-3033-012852 for 156 bales, MCG-3033-012851 for 104 bales and No. MCG-3033-012853 for 51 bales dated 27.10.1998 were issued by the Defendant No.2 (**Exhibit PW1/4**).
5. Plaintiff-HHEC vide fax message dated 30.10.1998 sent its acceptance for the contract of import of mulberry silk to defendant No.1 (**Exhibit PW1/7**).

- 52
6. Defendant No.1 informed the plaintiff vide fax message dated 5.11.1998 that the goods have been shipped to India on 30.10.1998 (**Exhibit PW1/8 & PW1/9**).
 7. Plaintiff on 13.11.1998 received the copy of original documents viz. invoices, packing/weight list, bill of lading etc. from the defendant No.1 (**Exhibit PW1/10**).
 8. The insurance policy cover was extended to 15.04.1999 by defendant No.2 (**Exhibit PW1/11**).
 9. The aforesaid goods shipped from Hong Kong reached I.C.D., Tughlakabad, New Delhi, warehouse of defendant No.7 in Container no. UGMU-8660253/20' on 29.11.1998.
 10. The Custom examined 10% contents of the container on 15.03.1999 after cutting the seal and again on 18.03.1999 on request 100% goods were examined by Custom and only 235 bales were found against the invoice quantity of 311 bales. Thus there was shortage of 76 bales. (Bill of entries showing shortfall of 76 bales are **Exhibit PW1/12**).

11. The container was further examined by M/s B. Ghose & Co. on 19.03.1999 and as per its report the container arrived at ICD, Tughlakabad, N. Delhi with seal intact and only 235 bales were found. (**Exhibit PW1/13**).

12. Plaintiff requested for Destuffing Survey of the container. Defendant No.6 through its Surveyor Master Marine Services Pvt. Ltd. carried survey in presence of Custom Authorities and gave its Destuffing Report dated 21.3.1999 stating that there was shortage of 76 bales and confirmed that line seal was found intact. (**Exhibit PW1/14**).

13. Plaintiff vide fax dated 23.3.1999 informed the defendant no.2 (copy to defendant Nos. 1, 4 & 8) that only 235 bales were delivered against 311 bales (**Exhibit PW1/15**).

14. Defendant No.7 issued a certificate dated 24.3.1999 to the effect that the container was received with seal intact and it will not accept any liability for short landing of goods (**Exhibit PW1/16**).

15. Defendant No.8 vide their letter dated 1.4.1999 raised the claim with defendant No.4, the survey agent of defendant No.3, providing all the documents (**Exhibit PW1/17**).

16. Defendant No.4 vide letter dated 7.4.1999 informed defendant No.8 that they are not the settling agent of the defendant No.3 (**Exhibit PW1/18**).

17. Defendant No.1 vide fax dated 22.4.1999 confirmed that they had loaded the entire quantity of 311 bales (**Exhibit PW1/19**).

18. Plaintiff lodged the claim with defendant No.2 vide letter dated 26.5.1999 (**Exhibit PW1/20**).

19. Defendant No.3 vide letter dated 11.06.1999 repudiated the insurance claim raised by the plaintiff (**Exhibit PW1/21**).

20. Custom department vide order dated 19.06.99 refunded the custom duty of Rs.6,56,052/- on account of short shipment of 76 bales of mulberry silk. (**Exhibit PW1/22**).

21.Plaintiff vide letter dated 05/07/1999 confronted the defendant No.3 with their stance that they do not have any liability and provided them the certificate showing 311 bales were dispatched (**Exhibit PW1/23**).

22.Defendant No.2 vide their letter dated 6.03.2000 refused to entertain the insurance claim and closed their file (**Exhibit PW1/24**).

23.Plaintiff vide their letter dated 27.7.2000 again asked the defendant No.2 to settle the claim (**Exhibit PW1/25**).

24.Defendant No.2 vide fax dated 10.8.2000 again repudiated the claim of plaintiff (**Exhibit PW1/26**).

25.Plaintiff vide fax dated 1.9.2000 rebutted the contention of defendant No.2 (**Exhibit PW1/27**).

26.Defendant No.1 vide its fax dated 11.09.2000 requested the defendant no.2-Insurance Company to settle the claim of the plaintiff (**Exhibit PW1/28**).

27.Plaintiff served notice dated 20.1.2001 on the defendant no.2 with a copy marked to defendant No.1 that a suit for

recovery will be instituted if the claims are not settled by
15.02.2001.

28. Present Suit for recovery was filed on 26.09.2001.

32. Both the plaintiff's witnesses, PW1 and PW2, as already stated were subjected to cross-examination by the learned counsel for the defendant No.7, which shall be adverted to at the relevant time. The defendant No.7, as already stated, in the course of its evidence examined Mr. Radhey Shyam, Senior Manager (Commercial), who tendered his affidavit in evidence Exhibit D-7W1/A. The said witness in his affidavit stated that M/s. Greenways Shipping Agency had approached the Mumbai office of defendant No.7 for carriage of container No. UGMU 8660253-20 from Mumbai to ICD, Tughlakabad, Delhi. The defendant No.7 had issued an **Inland Way Bill** No.692995 dated 24.11.1998, which was exhibited as Exhibit D7/1. The goods were transported from Mumbai to Delhi on the basis of the said Inland Way Bill, which carried the endorsement "**said to contain**", meaning thereby that the particulars mentioned in the said Inland Way Bill were put on the basis of the information supplied by M/s Greenways Shipping Agency. The defendant No.7,

he stated, neither weighed the container nor any inspection of the goods in the container was carried out by defendant No.7 at Mumbai. The container was having the **one time original seal**. The container was handed over with the said original seal at Mumbai by M/s Greenways Shipping Agency. The container was not customs cleared at Mumbai as the customs clearance formalities were to be completed at Delhi.

33. D-7W1, Mr. Radhey Shyam further stated in his affidavit in evidence that the goods were examined by the customs after cutting the one time original seal on 15.3.99 and again examined on 18.3.99 when 235 bales were found in the container. Neither the defendant No.7 nor its representative had witnessed the stuffing of 311 bales in the container. The container had the original seal intact at the time of the cutting of the seal on 15.03.1999 and as such the defendant no.7 was not responsible for the alleged loss, if any, of the goods. There was no question of tampering with the goods at the time of handing over of goods for customs examination as the container was having the original seal intact and no loss had taken place at ICD, Tughlakabad.

34. In the course of his cross-examination, D-7W1, Mr. Radhey Shyam stuck to his stance that the present case was not a case of pilferage but was a case of short landing. On a query put to him by the counsel for the plaintiff, he stated that the seal of the container had been cut in the presence of representatives of the defendant No.7, Customs, Importers and Security Staff. Thereafter, the goods were examined by the Customs Authorities and thereafter they issued Customs Out of Charge and on the basis of Customs Out of Charge and delivery order issued by the shipping company, the defendant No.7 had issued the gate-pass for the physical removal of the goods.

35. Mr. R.K. Joshi, the learned counsel for the defendant No.7 placed strong reliance on the original **Inland Way bill** and in particular to the following terms and conditions contained therein:-

“1. This Inland Way Bill is prima facie evidence of the receipt by CONCOR from the Consignor in apparent good order and condition, except as otherwise noted, of the total number of containers, packages or other units specified on the face thereof.

JP

2. The Inland Way Bill is given by CONCOR for the containers to be carried by it and must be given up at destination by the consignee at the time of taking delivery.

3. This Inland Way Bill is issued subject to the conditions and liabilities as specified in the Railways Act, 1989.

4. The Consignor must accept responsibility for all particulars furnished in respect of Cargo tendered by him for stuffing in container and carriage by CONCOR. The Consignor is deemed to have indemnified CONCOR against any damage or loss suffered by it by reason of incorrect or incomplete particulars furnished by him in regard to the Cargo.

5. Notice of loss or damage must be given to CONCOR and destination zonal railway (in case of transit involving rail haul) at the time of delivery.”

36. Learned counsel submitted that the aforesaid Inland Way Bill had been issued subject to the conditions and liabilities as specified in the Railways Act, 1989 as evidenced by Clause 3 of the said bill reproduced hereinabove. The plaintiff in the instant case did not give any notice whatsoever as required by Section 106 of the Railways Act, 1989 within six months of the entrustment of the goods to the defendant No.7 and, thus, the present suit against the defendant No.7 was not maintainable. He emphasized that D-7W1, Mr. Radhey Shyam in his affidavit had stated on oath that no notice under Section 106 of the Railways Act had been given by the plaintiff and the witnesses had not been cross-examined at all on this crucial aspect. Not even a suggestion was put to him that such notice was given by the plaintiff to the defendant No.7 and, thus, it stood established on record that the plaintiff had not complied with the mandatory provisions of Section 106 of the Railways Act, 1989 before institution of the present suit.

37. Mr. Joshi also laid great emphasis on the affidavit in evidence of D-7W1 on two other aspects of the matter. He emphasized that the witness in paragraph 5 of his said affidavit had categorically stated

60

that the original Inland Way Bill carried the endorsement “**said to contain**” and further stated that the meaning of the words “**said to contain**” is that the particulars mentioned in the said Inland Way Bill were on the basis of the information supplied by M/s. Greenways Shipping Agency. The defendant No.7 had neither weighed the container nor taken inspection of the goods in the container at Mumbai. The container was having the “**one time original seal**” and was handed over with the said original seal at Mumbai by M/s. Greenways Shipping Agency. The said original seal was intact at the time of the cutting of the seal by the Customs on 15.03.1999.

38. Mr. Joshi emphasized that D-7W1, Mr. Radhey Shyam was not at all cross-examined by the plaintiff either with regard to the endorsement “**said to contain**” on the Inland Way Bill or with regard to the original seal being intact at the time of the cutting of the seal by the Customs at Delhi. He also placed reliance on the cross-examination of PW1, Mr. Nirmal Sinha, who admitted that the Bill of Lading was issued by the defendant no.5 with the remarks “Shippers Load and Count”. Learned counsel also referred to the statement of PW-2, Mr. V.K. Anand, who in the course of cross-examination

admitted that the container could not have been opened without cutting the original seal. He submitted that D-7W1 had categorically stated that the seal of the container had been cut in the presence of the representatives of the defendant No.7, Customs, Importers and Security Staff and there was nothing to suggest that the statement of the witness was false. Learned counsel also referred to the Joint Survey Report (**Exhibit PW1/14**) to submit that the categorical finding of the surveyor was that it was a case of short shipment and not tampering. Thus, the defendant No.7 was not at all liable.

39. Reference was made by Mr. Joshi to the decision of the Madras High Court in *Nippon Yeesen Kaisha Ltd. V. Union of India and Another AIR 1987 MADRAS 12* where, in a suit of damages for short delivery of goods, the carrier of goods was held not liable for shortage in view of the endorsement **“said to weigh”** found in the Bill of Lading. The said endorsement, it was held, could only mean that there was no admission or acceptance of the weight by the carriers, as declared by the shippers or consignors. Such an endorsement could not be taken note of as conclusive proof of weight of the goods shipped. If there is a complaint of short delivery, weight

62

wise, the burden rests squarely on the plaintiff to place acceptable and convincing evidence of the actual weight of the goods shipped. The Madras High Court referring to its earlier judgment in *M/s. T.S. Company Ltd. Bombay Vs. Food Corporation of India AIR 1983 Madras 105* held that the plaintiffs had not discharged their burden of proof in view of the endorsement “**said to weigh**” in the bill of lading which had been interpreted in the case of *T.S. Company (Supra)* as follows:-

“.....In other words, it would mean that the particulars of weight entered in the bills of lading were in accordance with the figures given by the shipper, but so far as the matter is concerned, he did not give any assurance that those particulars had been checked and found to be correct. Once such a conclusion is reached, then it follows that it is for the respondent to prove that the rice bags that were loaded at Bangkok were of the same weight as had been entered in the bills of lading. Only after such proof is adduced, the owner of the vessel can be called upon to account for the shortage. Since such proof has not been adduced by the respondent in this case, we have to hold that the appellants cannot be called upon to account for the shortage in the weight contents of the bags.”

40. In so far as the defendant No.7 is concerned, on the basis of the testimony of D-7W1 and the original Inland Way Bill (Exhibit D-

67

7W1/A), this court has no hesitation in arriving at the conclusion that it is not possible to fasten the liability on the defendant No.7 as carriers in view of the endorsement "**said to contain**" found in the bill of lading in the instant case. As held in the case of *Nippon Yeesen Kaisha (Supra)*, the aforesaid words indubitably mean that there was no admission or acceptance of the weight by the carriers, as declared by the shippers or consignors. The plaintiff's complaint of short delivery weight-wise is, therefore, not relatable to the defendant No.7, in that, the burden rests squarely on the plaintiff to prove by adducing evidence, the actual weight of the goods shipped. The plaintiff indisputably has not discharged the burden of proof placed upon it in this regard. The defendant No.7, therefore, cannot be mulcted with the liability of short delivery more so when there is evidence on record to suggest that the one time original seal was found intact by the Customs at the time of inspection of the goods. The fact that no notice under Section 106 of the Railways Act was given to the defendant No.7 by the plaintiff, despite the fact that Clauses 3 and 5 of the "**Inland Way Bill**" made it mandatory that such a notice be issued and given to CONCOR and the destination

zonal railway at the time of delivery as notice of loss or damage, further fortifies the case of the defendant No.7 that no liability can be fastened upon it at this belated stage.

41. As noticed above, the defendants No.1, 2, 3, 5 and 6 did not contest the case and the defendant No.4 was deleted from the array of parties by the order of this Court dated 11.08.2009. The evidence adduced by the plaintiff and the defendant No.7, however, clearly points to the fact that there was short delivery of 76 bales to the defendant No.8 which was due to short-shipment. The plaintiff has failed to establish that the cause of the short delivery was either due to pilferage during transit or due to loss at the warehouse of the defendant No.7. Thus, the shortage of 76 bales is directly attributable to the defendant No.1-Unisilk, which had received payment of 311 bales of mulberry raw silk of Korean origin but had delivered only 235 bales of raw silk, resulting in a shortfall of 76 bales. The plaintiff is, therefore, entitled to receive a sum of US \$ 47717.44 as claim amount for the shortage of said 76 bales. The defendant no.1 is the consignor of the indented material, the defendant No.2 is the Insurance Company based at Hong Kong with which the subject

28

matter was insured. The defendant No.3 is the claim settling agent of the defendant No.2. The defendant No.5 are the shippers through whom the consignment was brought to India and the defendant No.6 is an Indian agent of the defendant No.5, which carried out the inspection of the container on the instructions of the defendant No.5 and issued survey report. Thus, all the defendants must be held jointly and severally liable to reimburse the plaintiff for the loss occasioned to it due to short shipment of 76 bales of mulberry raw silk.

42. In view of the aforesaid, issue No.1, 2 and 3 are decided in favour of the plaintiff and against the defendants. Resultantly, a decree in the sum of Rs.33,22,422/- (Rupees thirty three lakhs twenty two thousand four hundred and twenty two only) is passed in favour of the plaintiff and against the defendant Nos. 1, 2, 3, 5 and 6 alongwith *pendente lite* and future interest at the rate of 18% per annum from the date of the institution of the suit, that is, 26.09.2001 till the realization of the entire decretal amount.

CS(OS) No. 480/2008

43. By way of this cross-suit filed by Overseas Trading [defendant No.8 in CS(OS) No.2340/2001], against HHEC [the plaintiff in CS(OS) No.2340/2001], recovery of a sum of Rs.77,34,519/- (Rupees Seventy seven lakhs thirty four thousand five hundred and nineteen only) with *pendente lite* and future interest thereon at the rate of 18% per annum from the date of the institution of the suit till the recovery of the decretal amount is sought for in favour of the plaintiff and against the defendant for short delivery of 76 bales of mulberry raw silk on the basis of a contract entered into between the parties on 27.10.1998.

44. The facts being identical to the fact in CS(OS) No. 2340/2001 do not bear repetition.

45. Suffice it to say that the suit which was instituted on 12th February, 2008 by Overseas Trading was contested by the defendant-HHEC by filing a written statement denying its liability to pay the suit amount and submitting that the defendant had made payment to M/s Unisilk Limited for the import of 311 bales of mulberry raw silk, though only 235 bales were received by it and there was a shortfall of

76 bales in the consignment. It was submitted that the defendant had accounted for the purchase during 1998-99 and had made full payment to the foreign supplier, that is, M/s. Unisilk Limited including the value of 76 bales short received during the year 1998-99 itself, and subsequently during 1999-2000, the defendant had filed an insurance claim of Rs.20.38 lakhs, which was rejected by the insurance company. It was also submitted that the payment terms were D.P. at sight and hence payment had to be made to the foreign supplier even before clearance of shipment as per the terms of the contract and accordingly the defendant had made the payment of 311 bales to the foreign supplier. It was specifically stated that as per the agreement between the parties, it was clearly mentioned that the defendant had no liability towards any claim in respect of quality and quantity of the consignment imported. The defendant had filed a suit for recovery against M/s Unisilk Limited only at the request of the plaintiff towards the loss suffered on account of costs of 76 bales. The present suit was, therefore, liable to be rejected.

46. The defendant in the written statement filed by it also submitted that the suit was barred by limitation as the same had been

filed with delay of almost nine years and, thus, was liable to be rejected.

47. On 17.2.2009, on the pleadings of the parties, the following issues were framed for consideration:-

“1. Whether the plaintiff is entitled to recover any monies/damages for short supply of goods from the defendant and if so in what amount? OPP

2. If the above issue is decided in favour of the plaintiff whether the plaintiff is entitled to any interest, if so at what rate and for what period? OPP

3. Whether the claim of the plaintiff in suit is barred by time? OPD

4. Whether the proceedings in the present suit are to be stayed under Section 10 of the CPC? OPD

5. Whether the suit is bad for non-rejoinder of the M/s Unisilk Ltd., M/s China Merchants Insurance Company Ltd. and M/s Ceemis, Claim Settling Agent and M/s TATA Tea Ltd. and if so to what effect? OPD

6. Relief.”

48. On 28.09.2010, the court recorded the submission of the parties that since the controversy revolved around interpretation of documents only, there was no need for oral evidence and the suit was accordingly listed for final disposal.

49. At the time of hearing, Mr. Vibhor Garg, the learned counsel for the plaintiff submitted that in view of the order passed by this Court on 17.02.2009, he does not press for a finding being rendered by this Court on Issue No.4 relating to Section 10 of the Code of Civil Procedure and he confines his arguments to the remaining issues.

50. Mr. Garg, the learned counsel for the plaintiff submitted that there were two separate and distinct transactions/contracts; first, between the foreign exporters and the canalizing agency/defendant and the second between the canalizing agency/defendant and the domestic consumer/plaintiff. He emphasized that the defendant/canalizing agency had entered into back to back agreements with the foreign supplier Messrs Unisilk Limited and the plaintiff. Both the said transactions were separate and distinct with no *inter se* nexus; there was no casual connection between the import of mulberry silk by the defendant and the purchase of imported goods in India by the plaintiff. The defendant had purchased goods in its own name as a wholesale importer. The property in the goods were transferred to the defendant and in turn the defendant sold the goods to the plaintiff. The defendant was not acting as agent of the plaintiff

as claimed. There existed no privity of contract between the plaintiff and the foreign exporter, in that, the transaction under which the goods were placed on board the ship did not create any real rights and obligations between the foreign sellers and the plaintiff.

51. Learned counsel for the plaintiff contended that the aforesaid facts were evident from the defendant's own admissions set out in the plaint in CS(OS) No. 2340/2001, which must be construed as admissions within the meaning of Section 17 of the Indian Evidence Act, 1872. He placed reliance, *inter alia*, on the following admissions made by the defendant:-

- (i) Specific and direct admission of liability by the defendant – HHEC vide confirmation letter dated 27.11.2002 admitting credit balance in favour of the plaintiff.
- (ii) Statement made in paragraph 5 of the written statement filed by the defendant – HHEC in the present suit admitting credit balance of Rs.18.45 lakhs (Principal amount) under Schedule of current liabilities in favour of the plaintiff.

- (iii) Admissions made by the defendant – HHEC in CS(OS) No. 2340/2001 in so far as the present suit is concerned and in particular those made in paragraphs 2, 11, 12, 14, 15 and 25 of the plaint in the said suit.

52. In order to rebut the aforesaid contentions of the learned counsel for the plaintiff, the defendant-HHEC contended that the defendant was only acting as a canalizing agency and the foreign supplier-M/s Unisilk was chosen by the plaintiff itself. The subject matter of the contract was insured with M/s China Merchants, a Hong Kong based Company. CEEMIS Claim Settling Agent of England was survey agent of M/s. China Merchants. The payment terms were DP at sight and hence payment had to be made to the foreign supplier even before clearance of shipment as per the terms of contract and accordingly the defendant made the total payment of 311 bales to the foreign supplier; only 235 bales were received and there was a shortfall of 76 bales in the consignment. The defendant had accounted for the purchase during 1998-99 and had made full payment to the foreign supplier-M/s. Unisilk Limited including the value of 76 bales short received during the year 1998-99 itself;

22

subsequently during 1999-2000, the defendant had filed an insurance claim of Rs.20.38 lakhs, which was rejected by the insurance company. Thereafter the plaintiff had requested the defendant to institute a recovery suit and provided all the papers relating to the communication with the foreign exporter, insurance company etc. as evidenced from letter dated 5.10.99 of the plaintiff to the defendant, which categorically states, "We undertake to reimburse to HHEC of India Limited expenses it may have to incur." The defendant accordingly filed a suit for recovery bearing CS(OS) No. 2340/2001 against M/s Unisilk Limited for the loss caused to the plaintiff on account of short delivery of 76 bales of mulberry raw silk. The plaintiff had been arrayed as defendant No.8 in the said suit. Thus the present suit was an abuse of the process of law.

53. Learned counsel on behalf of the defendant, also contended that the instant suit filed by the plaintiff was liable to be rejected in terms of clause 3 of the Annexure A containing the terms and conditions of the agreement dated 27.10.98 entered into between the plaintiff and the defendant. For the sake of facility and ready reference, the said clause is reproduced as under:-

“3. The particulars of quality as indicated on the import invoice, buyer shall furnish certificate at the time of taking delivery that silk imported is to the satisfaction of the buyers with regard to quality and quantity. It is hereby expressly agreed and understood that HHEC will neither be liable nor entertain any claim in respect of the quality and quantity of the consignment imported.”

54. Learned counsel contended that it is crystal clear from the aforesaid clause that the defendant-HHEC can in no eventuality be held liable for any claim in respect of quality and quantity of the consignment imported. He emphasized that HHEC was merely acting as an agent between the plaintiff and the foreign supplier. He also relied upon clause 11 and clause 13 of the Annexure A of the agreement dated 27.10.1998, which read as under:-

“11. The buyer agrees and undertakes to keep the HHEC indemnified and harmless against all claims, costs, expenses and risks”.

“13. The buyer agrees and assures that the HHEC will not be liable or responsible in any manner for any act of fraud, deceit, misrepresentation, etc. interalia as regards the quality of the silk as also in the event the consignment is discovered to be other than that for which the order was placed and the buyer undertakes to keep HHEC indemnified and harmless against all claims, offences, penalties, levies etc.”

55. It was further contended that the present suit had been filed by the plaintiff only on the basis that the defendant-HHEC had shown the amount of Rs.18,44,950/- as credit balance standing in the books of accounts of the defendant to be paid to the plaintiff. It was submitted that the accounting entries reflected in the account of the defendant during 1999-2000 were "insurance claim receivable", under Schedule Current Assets amounting to Rs.20.38 lakhs and credit of Rs.18.45 lakhs under Schedule Current Liabilities. It was clarified that the said accounting entries had been made for control purposes as explained in the written statement filed by the defendant and to establish that the defendant had incurred loss on account of short receipt of 76 bales. At the time of submission in the civil suit against the foreign supplier, that is, M/s Unisilk Limited, the plaintiff in fact owed a sum of Rs.1.33 lakhs to the defendant apart from the cost of filing the civil suit against the foreign supplier on behalf of the plaintiff.

56. Apart from the above, the learned counsel for the defendant contended that the suit of the plaintiff was barred by limitation. The agreement was entered into between the parties in 1998 and the

consignment had been found short in 1999. Thus, the present suit filed in 2008 by the plaintiff, nine years after the accrual of the cause of action was clearly barred by limitation and liable to be rejected on this ground alone. It is settled law that mere writing of letters/reminders would be of no avail to the plaintiff in enhancing the period of limitation.

57. It was further contended that the suit was bad for misjoinder of parties, in that, plaintiff had not arrayed as parties M/s Unisilk Limited (the foreign supplier), the China Merchants (the insurance company), CEEMIS-Claim Settling Agency and M/s TATA Tea Limited etc. as necessary parties for the adjudication of the present case. Whether the foreign supplier was responsible for the shortage of 76 bales or pilferage had occurred during shipment or at the Container Corporation of India where the goods were kept after the shipment reached India, it was contended, could not be determined in the absence of the aforesaid parties.

58. Finally, learned counsel for the defendant contended that the plaintiff by filing the present suit had abused the process of law, inasmuch as the defendant had, at the request of the plaintiff, filed the

suit for recovery against the foreign supplier on account of loss caused by shortage of 76 bales to the plaintiff. < It had been the categorical stand of the defendant that after the defendant succeeds in the said suit and the amount is recovered from the foreign supplier, the claims of the plaintiff will be satisfied after deducting the legal expenses. > It is for this reason that the plaintiff had all along supported the defendant in CS(OS) No. 2340/2001 and had not even filed written statement in that suit and/or cross-examined the witness of the defendant in that suit. The present suit was, therefore, liable to be dismissed.

59. Having carefully considered the respective contentions of the parties, the Court is of the opinion that in the present case, the foreign supplier, that is, M/s Unisilk Limited was chosen by the plaintiff itself. All the terms and conditions of the agreement entered into with the foreign supplier by the defendant were finalized by the plaintiff. The defendant-HHEC was only the canalizing agency whose services had been sought by the plaintiff on account of the Government of India Notification No. 47 (Re-98)/97-02 issued on 8.10.98 to allow the import of mulberry silk without import licence for which the

defendant had been permitted by the Government as a designated agency. The plaintiff was dealing directly with the foreign supplier and the defendant-HHEC was only acting as an agency as the plaintiff could not import mulberry silk directly. At the very outset it had been clarified by the defendant that it would not be responsible for any loss caused to the plaintiff on account of the quality or quantity of the import consignment. This is amply borne out by Clause 3 of the agreement between the parties dated 27.10.98, which requires the buyer to furnish a certificate at the time of taking delivery that the silk imported is to the satisfaction of the buyer with regard to the quality and quantity; and further provides that the HHEC will neither be liable nor entertain any claim in respect of the quality and quantity of the consignment imported. Clause 11 of the agreement further provides that the buyer agrees and undertakes to keep the HHEC indemnified and harmless against all claims, costs, expenses and risks. Clause 13 clinches the issue by providing that the buyer agrees and assures that the HHEC will not be liable or responsible in any manner for any act of fraud, deceit, misrepresentation, etc. *inter alia* as regards the quality of the silk as also in the event the consignment

is discovered to be other than that for which the order was placed and the buyer undertakes to keep HHEC indemnified and harmless against all claims, offences, penalties, levies etc.

60. It is also not in dispute that the earlier suit CS(OS) No.2340/2001 was filed by the defendant-HHEC at the behest of the plaintiff. (This is also borne out by the letter dated October 5, 1999 of the plaintiff to the defendant, which categorically states: "We undertake to reimburse to HHEC of India Limited expenses it may have to incur." The Court is, therefore, of the view that the present suit belatedly filed by the defendant against the plaintiff apart from being an afterthought is an abuse of the process of law, more so, as the plaintiff had been arrayed as defendant No.8 in the earlier suit, and as is evident from the record of the said suit, the plaintiff had been supporting the defendant, *vis-à-vis* its claim against the foreign supplier and the insurance company.

61. As regards the issue of limitation raised by the defendant and the admissions and acknowledgments pressed into service by the plaintiff, including the balance confirmation dated 27.11.2002 in the books of accounts of the defendant, in view of the specific contract

agreement between the parties that the defendant would not be responsible for either the quality or quantity of the consignment in any eventuality, it is not possible to hold that the plaintiff is entitled to recover the suit amount, which constitutes short-fall in the consignment from the defendant. The Court is, however, of the opinion that the defendant having acted as the canalizing agency for the plaintiff to enable the plaintiff to import mulberry silk into India, on the plaintiff's recovering the amount due from the foreign supplier on account of the shortfall of the delivery in the consignment, the plaintiff shall be entitled to receive the same from the defendant. { To be noted at this juncture that the defendant has never disputed the fact that the amount when recovered from the foreign supplier-M/s Unisilk Limited and/or the insurance company, the claims of the plaintiff will be satisfied by the defendant. }

62. In view of the fact that a decree has been passed in favour of the defendant-HHEC and against the foreign supplier in CS(OS) No.2340/2001, { the present suit is disposed of with a direction to the defendant-HHEC to pay the decretal amount recovered as a result of the decree passed in CS(OS) No. 2340/2001 to the plaintiff in the }

80

present suit within 30 days of the receipt thereof. In case the said amount is not paid within a period of 30 days of the receipt thereof, the defendant shall be liable to pay the same to the plaintiff with interest at the rate of 18% per annum till the date of realization.

63. CS(OS) No.2340/2001 and the present suit being CS(OS) No.480/2008 stand disposed of accordingly.

Reva Khetrapal
REVA KHETRAPAL
JUDGE

July 09, 2012
km/sk

— *frsh* IA-22932/12 on behalf
of defendant u/s-152 r/w
O-20, R-3 CPC for amendment
of the Judgment dt-09/07/12.

86

3

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CS(OS) 480/2008

M/S OVERSEAS TRADING CORPORATION Plaintiff
Through: Mr. Vibhor Garg, Advocate.

versus

HANDLOOMS & HANDICRAFTS
EXPORT CORPORATION OF INDIA LTD. Defendant
Through: Mr. Madhu Saran and Mr. Vivek Singh,
Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

ORDER
15.03.2013

%

I.A. 22932/2012 in CS(OS) 480/2008

Present application has been filed by the defendant under Section 152 read with Order 20 Rule 3 CPC for amendment of the judgment and decree dated 09th July, 2012 passed in CS(OS) 480/2008.

Learned counsel for defendant seeks modification of the aforesaid judgment on the ground that legal expenses have to be deducted before making any payment to the plaintiff. In this connection, he relies upon para 58 of the aforesaid judgment.

On the other hand, learned counsel for plaintiff states that plaintiff has already filed an appeal against the aforesaid judgment and the present application should not be allowed as the legal expenses have not even been

quantified.

The relevant paras of the judgment dated 09th July, 2012 are reproduced hereinbelow:-

“58. Finally, learned counsel for the defendant contended that the plaintiff by filing the present suit had abused the process of law, inasmuch as the defendant had, at the request of the plaintiff, filed the suit for recovery against the foreign supplier on account of loss caused by shortage of 76 bales to the plaintiff. It had been the categorical stand of the defendant that after the defendant succeeds in the said suit and the amount is recovered from the foreign supplier, the claims of the plaintiff will be satisfied after deducting the legal expenses. It is for this reason that the plaintiff had all along supported the defendant in CS(OS) No.2340/2001 and had not even filed written statement in that suit and/or cross-examined the witness of the defendant in that suit. The present suit was, therefore, liable to be dismissed.

xxx

xxx

xxx

60. It is also not in dispute that the earlier suit CS(OS) No.2340/2001 was filed by the defendant-HHEC at the behest of the plaintiff. This is also borne out by the letter dated October 5, 1999 of the plaintiff to the defendant, which categorically states: “We undertake to reimburse to HHEC of India Limited expenses it may have to incur.” The Court is, therefore, of the view that the present suit belatedly filed by the defendant against the plaintiff apart from being an afterthought is an abuse of the process of law, more so, as the plaintiff had been arrayed as defendant No.8 in the earlier suit, and as is evident from the record of the said suit, the plaintiff had been supporting the defendant, vis-à-vis its claim against the foreign supplier and the insurance company.

61. As regards the issue of limitation raised by the defendant and the admissions and acknowledgments pressed into service by the plaintiff, including the balance confirmation dated

27.11.2002 in the books of accounts of the defendant, in view of the specific contract agreement between the parties that the defendant would not be responsible for either the quality or quantity of the consignment in any eventuality, it is not possible to hold that the plaintiff is entitled to recover the suit amount, which constitutes short-fall in the consignment from the defendant. The Court is, however, of the opinion that the defendant having acted as the canalizing agency for the plaintiff to enable the plaintiff to import mulberry silk into India, on the plaintiff's recovering the amount due from the foreign supplier on account of the shortfall of the delivery in the consignment, the plaintiff shall be entitled to receive the same from the defendant. To be noted at this juncture that the defendant has never disputed the fact that the amount when recovered from the foreign supplier-M/s Unisilk Limited and/or the insurance company, the claims of the plaintiff will be satisfied by the defendant.

62. In view of the fact that a decree has been passed in favour of the defendant-HHEC and against the foreign supplier in CS(OS) No.2340/2001, the present suit is disposed of with a direction to the defendant-HHEC to pay the decretal amount recovered as a result of the decree passed in CS(OS) No. 2340/2001 to the plaintiff in the present suit within 30 days of the receipt thereof. In case the said amount is not paid within a period of 30 days of the receipt thereof, the defendant shall be liable to pay the same to the plaintiff with interest at the rate of 18% per annum till the date of realization.

(emphasis supplied)

Keeping in view the aforesaid paras, this Court is of the view that the intent of this Court was to direct the defendant HHEC to pay to the plaintiff the decretal amount recovered as a result of the decree passed in CS(OS) 2340/2001 after deducting the legal expenses.

Consequently, para 62 of the judgment dated 09th July, 2012 is amended and shall now read as under:-

"62. In view of the fact that a decree has been passed in favour of the defendant HHEC and against the foreign supplier in CS(OS) No.2340/2001, the present suit is disposed of with a direction to the defendant HHEC to pay the decretal amount recovered as a result of the decree passed in CS(OS) no.2340/2001 to the plaintiff in the present suit after deducting legal expenses within 30 days of the receipt thereof. In case the said amount is not paid within a period of 30 days of the receipt thereof, the defendant shall be liable to pay the same to the plaintiff with interest at the rate of 18% per annum till the date of realization."

With the aforesaid observations, present application stands allowed.


MANMOHAN, J

MARCH 15, 2013

js