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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision : 1st March, 2012

+ RFA(OS) No.5/2007

STATE TRADING CORPORATION OF INDIA Appellant
Represented by: Mr.D.Roy Chaudhary, Sr.Advocate
instructed by Ms.Sumati Anand,
Advocate.

versus

SHREE DIGVIJAY CEMENT CO. LTD. Respondent
Represented by: Ms.Aishwarya Bhati, Advocate
Mr.Karmendra Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J. (Oral)

1. We shall be referring to the parties as per their nomenclature in the plaint.
2. Shree Digvijay Cement Company Ltd. was engaged in the business of manufacture and sale of cement.
3. During the relevant period of time i.e. the year 1976-1977, cement could be exported from India only through a canalizing agency appointed by the Government of India under the Export Control Order. State Trading Corporation of India was one such canalizing agency appointed.
4. The cement to be exported was required to be packed in six ply kraft paper bags, which had to be marked with the label: 'STC of India Ltd.'.
5. Kraft paper required for packaging had to be imported and for which an import licence was to be obtained, with an

obligation to convert the kraft papers into bags for packaging cement.

6. Shree Digvijay Cement Company Ltd. had desired to export cement, and State Trading Corporation of India, as the canalizing agency, had an export order(s).

7. It was thus a win-win situation. One party had orders for export and the other had the means to supply the goods to be exported.

8. As regards the export obligations pertaining to cement, various contracts were entered into between the parties, which have been exhibited as 'Ex.D1/19', 'Ex.D1/20', 'Ex.D1/21', 'Ex.D1/22', 'Ex.D1/23', 'Ex.D1/24' and 'Ex.D1/25'.

9. Vide a clause, which is *pari materia*, and in some contracts has been assigned serial No.12 and in some serial No.13, under the caption: 'Force Majeure', it stands expressly stipulated that the contract is subject to force majeure i.e. if during the continuation of the contract, a force majeure situation came into being, neither party would be liable to the other for any loss caused.

10. Pertaining to the six ply kraft paper bags in which the cement had to be packed, the kraft paper, as noted hereinabove was to be imported and thus, to facilitate the import, State Trading Corporation of India issued a Letter of Authority dated September 21, 1976, 'Ex.D5', which reads as under:-

"General Products.

No.STC/GP/SKP/76-66

September 21,1976.

M/s Shree Digvijay Cement Company Ltd.
Bombay.

Sub: Import of sack kraft paper for Jan/March, 77
Cement export requirements.

Kind Attention: Mr.M.L.Rathi

Dear Sirs,

Please refer to your letter No.DA/133/549 dated 17.9.76 requesting for issue of LA in your favour for importing 1000 tonnes of sack kraft paper in order to cover your Jan/March, 77 export requirements of cement. We confirm having since applied to JCCI&E for issue of necessary licence and will send you the same as soon as received. As usual you will be required to pay service margin of 0.25% on the value of the license.

2. Regarding your import proposal for 1,000 tonnes of Scandinavian origin @ US\$ 452 C.I.F. net. From Elof Hansson, we hereby convey our approval to this import. Please ensure that the shipments are made positively between October/December, 76. In case the shipments during this period are not arranged for any reason, our this approval may be treated as cancelled and our fresh approval will be required for shipments beyond December.

3. As you are aware, for the present OPI and Wardens are the only two converters on our approved list. Hence this import is being allowed on the condition that the paper bags will be got manufactured from either of these two converters. However, in case, any further converts are approved by us subsequently, these can also be included in this list later.

4. As per Import Trade Control Regulations the paper imported against the LA prepared to be issued to you will be used for manufacture of bags for export of cement only and no portion thereof will, in any case, be diverted for any other use whatsoever. You will be required to give an undertaking to this effect on stamped paper (as per form attached) for being lodged with the office of the JCCI&E to enable clearance of the goods from the Customs on arrival. The details of arrangements concluded with the respective paper

converters for manufacture of bags should also be advised to us as soon as finalised and we should be kept fully posted of any further correspondence with them on the subject. Of course this will also include the details of conversion charges payable to the converts. Please note that if any paper imported against the LA in question is not utilised for the above mentioned purpose due to any reason whatsoever including but not restricted to stoppage of exports of cement D & C will undertake to dispose of such remaining stock of kraft paper in the manner as may be directed and specified by the STC. In such a case, any unutilised portion of the import licence/LA shall be surrendered to STC for being surrendered back to the office of JCCI&E.

5. Please acknowledge receipt and confirm the above.

Thanking you

Yours faithfully,
For S.T.C. of India Limited.

Sd/-
(N.C.Dembla)
Dy.Marketing Manager

(emphasis supplied)"

11. Being relevant for the purposes of our decision in appeal, we highlight that the underlined portions highlight the terms under which State Trading Corporation gave the authority to Shree Digvijay Cement Company Ltd. under the Letter of Authority 'Ex.D/5' to import the kraft paper.

12. With reference to the force majeure clause pertaining to the contract(s) regarding supply of cement by Shree Digvijay Cement Company Ltd. to the State Trading Corporation of India, it would be apparent that the same would not and cannot apply to the kraft paper imported and converted into bags, for the reason, the second underlined portion in paragraph 4 of 'Ex.D/5' contemplates a situation of the imported paper not

being utilized for the purpose for which it was imported, including any other reason whatsoever, rendering the purpose of the import not being fulfilled. The clause envisages, that in said situation, Shree Digvijay Cement Company Ltd. would dispose of the un-remaining stock of kraft paper in a manner directed by State Trading Corporation of India.

13. Proceeding further and highlighting that under 'Ex.D/5', Shree Digvijay Cement Company Ltd. imported 992.855 MT kraft paper, which was converted, through approved converters, nominated by State Trading Corporation of India into 26,84,200 bags and a substantial number of bags were utilized i.e. cement was filled in the bags and the same were delivered to State Trading Corporation of India, 6,61,714 bags, having value ₹31,86,087/-, remained unutilized when in July 1997 the Government of India imposed ban on the export of cement.

14. The issue cropped up: as to in what manner the kraft paper bags, which had to be utilized for packaging cement for export and had remained unutilized when the ban was imposed, would be utilized.

15. State Trading Corporation informed Government of India that unutilized stock of kraft paper bags, intended for packaging cement to be exported, was lying unutilized. Permission was sought from the Government to exempt the kraft paper from import levies.

16. Vide Ex.PW-1/1, dated 21/22.03.1978, the Government of India responded as under:-

"G.Ramanathan
Deputy Secretary

Government of India
Deptt.of Industrial Development
New Delhi.

DO No.12-8/77-Cem.

Dear Shri Bhupendra Singh,

Please refer to your DO letter No.STC/Cement/SKP/78 dated the 20th February 1978, to Shri S.M.Chakravarty, Director, regarding utilisation of imported sack kraft paper for internal distribution of cement.

I am to draw your attention, in this connection, to the minutes of the meeting held on 7-11-1977 in the room of Shri P.K.Kaul, Additional Secretary, Ministry of Commerce, wherein it was decided that question of kraft paper being exempted from import levies might not be possible, that STC being a commercial organisation had to conduct a large number of transactions during the course of the year and that they should be prepared to suffer losses in some of them and profits in others.

In view of the above, it is now for the STC to settle the claims of paper converters/producers in this regard and treat the expenses incurred on import of paper as a business loss.

Yours sincerely,

Sd/-
(G.RAMANATHAN)

Shri Bhupendra Singh
Chief Marketing Manager
State Trading Corporation of India
Chandralok, 36, Janpath
New Delhi-110001.

Copy for information and necessary action to:

1. Overseas Packaging Industries Private Limited, 49, Bajaj Bhawan, Nariman Point, Bombay-400021.
2. Shree Digvijay Cement Company Limited, 97, Sunder Nagar, New Delhi-110003.

Sd/-
(G.RAMANATHAN)
Deputy Secretary to the Govt. of India."

(emphasis supplied)

17. State Trading Corporation responded vide its letter dated October 26, 1978, Ex.P-4 as under:-

"No.12-8/77-Cem.
Government of India
Ministry of Industry
Department of Industrial Development

NEW DELHI, the 26th October, 1978

- | | |
|---|---|
| 1. Shree Digvijay Cement Co.Ltd., Bombay | 4. Associated Cement Companies, Bombay. |
| 2. India Cements Ltd., Madras | 5. Tamilnadu Cement Corporation, Alangulam. |
| 3. Dalmia Cements Ltd., 4, Scindia House, New Delhi | 6. Saurashtra Cements, Bombay. |

Sub: Use of paper bags made out of imported sack kraft paper, originally intended for packing cement for exports, in the internal market for packing cement.

Sir,

The State Trading Corporation of India has represented to this Ministry that consequent on the ban imposed by the Government on the exports of cement outside the country, some of the cement manufacturing units which were exporting cement through them earlier have at present certain stocks of paper bags made out of imported sack kraft paper

originally intended for packing cement for export and that these bags are lying with them unutilised. The Corporation approached this Ministry for permission to the manufacturing units to use the bags for packing cement in the internal market. The question of permitting such manufacturing units to utilise the stocks of papers bags made out of imported kraft paper and presently available with them for packing cement for use in the internal market has been considered in this Ministry. It has now been decided that such of the cement manufacturing units, which were exporting cement through the State Trading Corporation of India earlier and which have at present stocks of paper bags made out of imported sack kraft pape originally intended for packing cement for exports and imported into the country on the basis of licenses obtained through State Trading Corporation, may use such bags for packing cement in the internal market subject to the following conditions:-

- i) There will be no increase in the packing charges i.e. packing charges for cement packed in paper bags will also be the same as announced by the Government for packing cement in new jute bags and serviceable second hand jute bags from quarter to quarter;
- ii) The number of paper bags used will be counted against the limits allowed for use of serviceable second hand jute bags from time to time; and
- iii) This permissions will not constitute as an approval of the Government for use of imported sack kraft paper under any other rules/regulations and it will be the responsibility of the State Trading Corporation or the producer concerned to obtain such clearance.

Yours faithfully,

Sd/-

(G.Ramanathan)

Deputy Secretary to the Government of India

Copy for information and guidance to:-

1. Shri Mahesh Prasad, Joint Secretary, Ministry of Commerce, Civil Supplies & Co-operation, Deptt. of Commerce, New Delhi.

2. Shri B.C.Malhotra, Group Executive, State Trading Corporation of India, Chandralok, 36, Janpath, New Delhi.

3. Joint Cement Controller, New Delhi.

Sd/-

(G.Ramanathan)

Deputy Secretary to the Government of India"

18. Thereafter, Shree Digvijay Cement Company Ltd. was able to dispose of the bags and realize ₹12,91,926.28. Resultant, being the loss, was ₹18,94,161/-, which Shree Digvijay Cement Company Ltd. sought to enforce against State Trading Corporation of India .

19. Suit, registered as CS(OS) No.561/1980 has been decreed by the learned Single Judge, vide impugned judgment and decree dated March 17, 2006.

20. Noting that there was an arbitration clause in the contract but both parties had submitted to the jurisdiction of the Civil Court, the learned Single Judge has decided the ten issues which were settled, as per the pleadings of the parties, vide order dated March 25, 1982, which issues read as under:-

"1. Was kraft papers imported by the plaintiff for and on behalf of the defendant and as its agent? If so of what amount and weight?

2. Were the kraft paper bags prepared by the plaintiff for and on behalf of defendant and as its agent? If so of what quantity and value?

3. What was the effect of the ban imposed by the Government on the export of cement?

4. Were any bags which were prepared by the plaintiff for complying with the export orders of the defendant left over? If so of what quantity and value?

5. Did the plaintiff prepare kraft paper bags in anticipation of the orders to be placed by the defendant for the export of cement and under the instructions of the defendant? If so how many and of what value?

6. Did plaintiff suffer any loss in the disposal of what the kraft paper bags? If so how much and to what effect?

7. Is defendant liable for the loss so incurred by the plaintiff?

8. Is plaintiff entitled to interest and if so at what rate?

9. Is plaintiff otherwise entitled to claim damages from the defendant? If so how much?

10. Relief.”

21. To a reader of the issues it would be apparent that the basic issues which would determine the fate of the claim are issues No.1 and 2.

22. For if, pertaining to the kraft paper, status of Shree Digvijay Cement Company Ltd. was not that of an agent, the loss had to be borne by the company. But, if the status of the company vis-a-vis State Trading Corporation was that of an agent, being the principal State Trading Corporation would be obliged to make good the loss.

23. Eschewing reference to the evidence pertaining to the loss suffered for the reason learned counsel for the appellant concedes that a loss as claimed was suffered, we note the reasoning of the learned Single Judge and simultaneously reflect thereon.

24. After noting Chapter-10 of the Indian Contract Act 1872 and highlighting Sections 182, 185, 186, 187, 188 and 222 thereof, the learned Single Judge has opined, and correctly, that the relationship of principal and agent need not be express, it may be implied as well.

25. With reference to the intention of the parties i.e. whether they intended to enter into a relationship of principal and agent, the learned Single Judge, in paragraph 33 of the impugned decision, has noted a decision of the Supreme Court reported as 2005 (6) SCC 188 Chairman, Life Insurance Corporation & Ors. vs. Rajeev Kumar Bhaskar. The learned Single Judge has culled out the ratio of law from the aforesaid decision as under:-

“The said consent need not necessarily be to the relationship of principal and agent itself. The principal and agent would be held liable to have consented if they have agreed to a state of facts on which the law imposes the consequences which result from agency, even if they do not recognize it themselves and even if they have professed to disclaim it. It was held that agency is consensual and not contractual. For creating a contract of agency in view of Section 185 of the said Act even passing of consideration is not necessary.”

26. With respect to the principle of law culled out by the learned Single Judge, learned Senior Counsel for the appellant concedes that the legal position culled out is correct, but

counsel hastens to add that the learned Single Judge has incorrectly applied the admitted facts to hold that in view of the legal principle culled out by the learned Single Judge, the relationship of principal and agent emerges.

27. The facts on which the learned Single Judge has culled out that there was a relationship of principal and agent have been penned by the learned Single Judge in paragraph 37 to 39 of the impugned judgment. They are six in number and we serialize the same as under:-

- (1) State Trading Corporation had arranged for the licence on service margin.
- (2) The paper to be imported against licence was to be utilized only for manufacturing the paper bags for packaging cement to be exported by State Trading Corporation.
- (3) Specified labels, in the name of State Trading Corporation, had to be printed on the paper bags.
- (4) The conversion of the imported kraft paper into bags was through converters, appointed and approved by State Trading Corporation of India.
- (5) In case of unutilized stock remaining with Shree Digvijay Cement Company Ltd., the same had to be disposed of in a manner directed or specified by State Trading Corporation of India.
- (6) Shree Digvijay Cement Company Ltd. did not have a right to sell or dispose of any unutilized paper.

28. We have put to learned senior counsel for the appellant, whether any of the six facts noted herein above by the learned Single Judge are an incorrect reproduction of the facts.

Learned senior counsel answers by accepting that the same have been correctly culled out by the learned Single Judge.

29. With respect to the first fact noted by the learned Single Judge i.e. State Trading Corporation having arranged for the licence on service margin, to facilitate import of the kraft paper, we note that the learned Single Judge has added the caveat: that said fact by itself would not be sufficient to fasten the relationship of principal and agent.

30. Thus, as an Appellate Court, we note that the learned Single Judge has properly applied himself to the first admitted fact.

31. With respect to the next five admitted facts, the learned Single Judge has noted that the price paid for the import of kraft paper was borne by Shree Digvijay Cement Company Ltd. but has also noted that once the import was made, utilization of the imported goods i.e. the kraft paper, was as per the directions of State Trading Corporation. The learned Single Judge has further noted the fact that State Trading Corporation did not have to pay any separate price for the bags, and the price thereof was a component of the price of the cement, would not make a difference as regards the relationship of principal and agent vis-a-vis the import and utilization of the kraft paper.

32. In other words, with respect to the next five admitted facts, the learned Single Judge has further noted the ancillary facts having a bearing on said five i.e. the learned Single Judge has properly applied himself to all relevant facts which had to

be put in the basket while arriving at a conclusion vis-a-vis the relationship of the parties relatable to the kraft paper.

33. Thereafter, in paragraph 41 and 42 of the impugned decision, the learned Single Judge has noted the letters Ex.PW-1/1 and the letter Ex.P-4 and there-from has opined, in our opinion correctly, that State Trading Corporation sought to mitigate the loss and this shows that it understood the position: that as a principal, the loss would be its. The learned Single Judge has noted that only after the Government refused, did State Trading Corporation change its stand.

34. We concur with the view taken by the learned Single that in view of the six admitted facts, which we have pithily culled out herein above, as are to be found in para 37 to 39 of the impugned decision, the parties stood in a relationship of a principal and an agent with respect to the import and utilization of the kraft paper.

35. Pertaining to the argument of learned counsel for the State Trading Corporation that the agreement does not state that the relationship of the parties is that of a principal and an agent, has to be answered by keeping in mind, that as regards the obligation of Shree Digvijay Cement Company Ltd. to supply cement, the relationship has to be found with reference to the agreements Ex.D-1/18 to Ex.D-1/25, which agreements have nothing to do with the import and utilization of the kraft paper. We hasten to add that the only reference to the kraft paper bags in the said agreements is the obligation to package the cement in the kraft paper bags.

36. The relationship between the parties, with respect to the import and utilization of the kraft paper is to be found in the terms of the letter of authority, dated September 29, 1976, Ex.D-5.

37. For the six features noted by the learned Single Judge we concur that the relationship which emerges is that of a principal and an agent.

38. The two decisions pressed into aid before us, being 1977 (3) SCC 147 The Bhopal Sugar Industries Ltd. vs. Sales Tax Officer, Bhopal and AIR 1968 SC 784 M/s.Sri Tirumala Venkateswara Timber and Bamboo Firm vs. Commercial Tax Officer, Rajahmundry have been noted by the learned Single Judge in para 53 of the impugned decision and have been correctly applied and understood and distinguished.

39. With respect to the decision in Bhopal Sugar Industries' case (supra), the issue was dealt with on the fact of the said company purchasing high speed diesel oil, petrol and lubricants which were sold from a petrol pump installed by the company at its factory premises wherefrom business of manufacture of sugar was carried out. Some petroleum products were consumed by the company for its own purpose and the issue of levy of sales tax thereon cropped up. The agreement between Caltex India Ltd. and the company under which petroleum products were supplied to the company was interpreted, on the terms of the said document between the parties, as a principal to principal relationship and thus it was held that when the company has consumed certain petroleum products it would not be a case of sale on behalf of the Caltex India Ltd.

40. The second decision in Sri Tirumala's case (supra) also turned on the terms of the agreement under which business was transacted.

41. We have already dwelled, herein above, on the issue of the application of a force majeure condition, and thus do not re-deal with the same for the reason we have already held that the agreement pertaining to sale of cement had a force majeure clause and the letter of authority under which the kraft paper was imported has totally different terms.

42. We dismiss the appeal with costs.

43. The bank guarantee furnished by the appellant in terms of the interim order dated 19th January 2007 is directed to be encashed by the Registrar General of this Court and the amount realized is directed to be paid over to Shree Digvijay Company Ltd. towards satisfaction of the decree.

44. We make it clear that if the amount covered by the bank guarantee falls short of the amount payable to Shree Digvijay Company Ltd., the remainder could be recovered through execution.

PRADEEP NANDRAJOG, J.

PRATIBHA RANI, J.

MARCH 01, 2012
KA/dk