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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on : May 24, 2012
Judgment Pronounced on: May 31, 2012

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RFA(OS) 16/2010

DINESH BHAKTA SHRESHTHA Appellant
Represented by: Dr.Amitabh Sen, Ms.Aditi Pandey,
and Ms.Malyashree Sridharan,
Advocates.

versus

MMTC LTD. & ANR. Respondents
Represented by:Mr.Sanat Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. Suit filed by the appellant has been dismissed, being held to be barred by limitation.
2. The suit was based on the plea that respondent No.1, MMTC, a Government of India Undertaking, was to supply 20,000 MT urea to the Government of Nepal; delivery to be made to Agriculture Inputs Corporation (AIC), an Undertaking of the Government of Nepal at a price of US\$247 per MT as per agreement dated June 27, 1997, Ex.P-14 for which the appellant was to be paid agency commission @4% of the business conducted. The consignment was to be delivered in three lots of 4,000 MT, 6,000 MT and 10,000 MT.

3. It was alleged that respondent No.1 breached the date(s) on which urea had to be delivered. Albeit belatedly, only 14686.603 MT urea was supplied and for which respondent No.1 paid provisional agency commission in sum of US\$66,790 on December 23, 1997. It was pleaded that in spite of repeated reminders sent balance payment due in sum of US\$78,313.63 was not paid to him, and converted into Indian rupees, decree prayed for was in sum of ₹58,60,288/- together with past, pendente lite and future interest.

4. For the purposes of limitation, relevant would it be to note that the appellant relied upon a facsimile message dated September 28, 2000, Ex.P-20, which reads as under:-

To: Shri Sunil Shrestha Designation: Organization: Mili Mili Enterprise Fax No. : 009771-417446	From : Shrikant Pathrabe Designation: Dy.Manager Date : 28/9/2000 Page No. : 1 of 1 Pages
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If the transmission is not clear, please notify us immediately.

Sub: Regarding agency commission against AIC Nepal contract

With reference to your msgs and meetings on the above subject, the matter was examined and the competent authority felt that the agency commission to M/s. Mili Mili cannot be released immediately till AIC, Nepal remits the amount of US\$2,99,821.79 which it had recovered arbitrarily from MMTC's bills out of the export payment for supply of 14686.603 MT of urea during 1997. Till date we have received only an amount of US\$34,614.72 from AIC, which was remitted after

much pursuation (*sic persuasion*) by MMTC by MMTC. AIC has been holding this amount for more than six months after recovery from the insurance company.

Since protecting the business interests of MMTC is one of the conditions of the agreement with M/s.Mili Mili, it is felt that M/s.Mili Mili should take up suitably with AIC for remittance of the balance amount before we can consider the remittance of balance agency commission to M/s. Mili Mili.

Yours faithfully,
(Shrikant Pathrabe)”

5. It is the case of the appellant that on May 09, 2002, he met the officials of MMTC demanding balance payment and on May 10, 2002 wrote the letter Ex.P-5 making a memorial of what transpired at the meeting, which letter reads as under:-

“10th May 2002

M/s.MMTC Limited,
Core 1, “Scope Complex”
7, Institutional Area,
Lodi Road, New Delhi-110003
INDIA

Attn: Mr.Ashwani Verma – Sr. Manager

Sub: Release of commission against supply of 20,000 MT Urea fertilizer to AIC/Nepal.

Dear Sirs,

Please refer to our meeting at your office on 9th May, 2002 regarding subject contract signed between M/s. Agriculture Inputs Corp. (AIC). Nepal and your esteem organization M/s. MMTC Ltd., New Delhi dt. 27th June, 1997 for the supply and delivery of 20,000 MT Urea fertilizer under government to government negotiation basis. As already explained to you during our

meeting, it will be worth mentioning here that we had played a very vital role in initiating and materializing this business for which MMTC had appointed us as their agent vide their letter ref.No.MMTC/Men.Trade/Urea/97 dt. July 14, 1997.

We would like to bring it to your kind notice that this purchase by AIC (directly under negotiation) was made at much higher price than the prevailing market price so as to meet AIC's emergency requirement and as such main emphasis was given to early/timely delivery which was specified in the a.m. contract too. However, although contract stipulated delivery time i.e. October 4, 1997. AIC had made decision not to accept any cargo after such date due the fact that International Urea price had crashed and also due to obvious reason of being obliged by the contract terms. This decision of AIC was restricted to only 14,686.6.0 MT for which MMTC received all payments except for some payments withheld by AIC on account of shortages of Urea, DAP, Spare Bags etc. supplied under previous contracts between AIC and MMTC in which we were not involved in any way. These facts were agreed and accepted by the MMTC delegation who visited AIC, Nepal during end January 1998 and also signed an MOU with AIC on 30th January 1998 to the effect.

As per a.m. agency appointment letter MMTC had agreed to pay us 4% agency commission on the value of business concluded as against our request and verbal assurance by the visiting MMTC delegation of 6% - 8%. Although our understanding was to be paid on pro-rata basis, after much deliberation we were paid partial provisional commission of US\$66,790.00 only on 23.12.1997. Since then, despite of our repeated reminder follow-ups and personal visits requesting to release our payments, till date we have not received our balance commission of US\$78,313.63 even though we were assured at one time (vide MMTC's letter dt. 28/9/2000) to release our

balance amount after recovery of insurance claim amount from the under writers.

Since MMTC has already accepted the claim settlement amount and received same almost six months ago, we request you once again to kindly release our balance commission without further delay as we have already suffered a lot having to finance unseen expenses towards this business for such a long period. Should you need any further clarifications in this regard, we will be very much obliged to do so even by personally visiting Delhi if you so desire. None the less, we are taking liberty of enclosing herewith some copies of our correspondences and related documents for your information and perusal.

Thanking you in advance for your cooperation and assuring you of our very best of services at all times.

Yours faithfully,

Encl. As stated.

(Sunil Shrestha)

Cc:
Mr.P.K.Maheswary – CGM
(Fertilizer Division)
MMTC Ltd.”

6. The suit was filed on September 3, 2004.
7. Two submissions were urged before the learned Single Judge. Firstly that the letter dated May 10, 2002, Ex.P-5 addressed to MMTC, being not refuted with reference to its contents was a deemed acknowledgment of the debt and thus by virtue of Section 18 of the Limitation Act 1963, the limitation would be extended; and secondly appellant discovered the fraud i.e. the dishonest intention of MMTC not to pay the money on October 25, 2003 and for which appellant relied upon the legal notice sent by him on October 28, 2003, Ex.P-6,

and thus with reference to Section 17 of the Limitation Act 1963, pleaded that limitation would commence when the fraud was detected. The suit being filed on September 3, 2004, was thus pleaded to be within limitation.

8. Both pleas have been negated by the learned Single Judge holding that no reply being sent to Ex.P-5 could not be treated as a deemed acknowledgment of the debt. It appears that the appellant had also pitched his case with reference to Ex.P-20 written by MMTC on September 28, 2000, and for which the learned Single Judge held that reckoned with effect from said date, the suit which was filed in the year 2004 would be barred by limitation. With respect to the issue of fraud, the learned Single Judge has held that the appellant could not demonstrate as to how he discovered a fraud on October 25, 2003.

9. Same pleas which were urged before the learned Single Judge have been urged in the appeal.

10. With respect to the first plea, which appellant predicates with reference to Ex.P-5 and Ex.P-20 and Section 18 of the Limitation Act, suffice would it be to state that whereas Ex.P-20 may extend the limitation, but the same would be only up to September 28, 2003, and we would highlight that the cause of action to sue would accrue when agency commission became due and payable to the appellant in the year 1997 when 14686.603 MT urea was supplied. If it is the case of the appellant that he was entitled to full commission with respect to 20,000 MT urea which had to be supplied, even then cause of action to sue would accrue in the year 1997 inasmuch as the supplies had to be effected till September 4, 1997 and by said date only 14686.603 MT urea was supplied, and qua the

remainder the breach was committed. As regards appellant resting his case on Ex.P-5, suffice would it be to state that merely because MMTC did not respond to the contents thereof, would not mean that MMTC acknowledged the debts on May 10, 2002 or on the date it received the letter.

11. On the subject of fraud, suffice would it be to state that the so-called fraud alleged by the appellant is that MMTC had never intended to pay any money to him and this he did not know when he entered into the contract and even when the contract was breached. He claims that it was only when he sent the legal notice Ex.P-6 on October 28, 2003 and received no response, did the dishonest intention of MMTC surface.

12. The plea has no legal legs to stand inasmuch as it cannot be said that MMTC had no intention to pay any money when it entered into the contract, evidenced by the fact that MMTC did pay commission in sum of US\$66,790 to the appellant and qua the remainder, it may be highlighted that MMTC did not pay the commission since the Government of Nepal did not pay the full money to MMTC for the urea supplied. In fact Ex.P-20 would reveal that MMTC had written to the appellant to ensure AIC Nepal to release the balance amount which was arbitrarily deducted and thereupon assured appellant that he would be paid the commission. Thus, we agree with the view taken by the learned Single Judge that there is no foundation to build a case of fraud.

13. Since learned counsel for the appellant had cited, we deal with the decisions referred to and relied upon during arguments in the appeal.

14. The first decision, reported as AIR 2001 SC 2763 Pallav Seth v. Custodian & Ors. which was relied upon with

reference to Section 17 of the Limitation Act was dealing with an issue of contempt proceedings initiated. Facts were noted which brought out a fraud being perpetuated and knowledge thereof gained on a particular date.

15. Suffice would it be to state that Section 17 of the Limitation Act 1963, makes a departure from the previous enactment i.e. the Limitation Act 1908 and prescribes that period of limitation shall not begin to run until fraud is discovered or could with reasonable diligence be discovered and in the case of a concealed document till the means of it being produced or compelling its production were available.

16. Decision reported as AIR 1954 SC 724 Mahadeo Prasad v. State of West Bengal refers to the offence of cheating punishable under Section 420 IPC and lays down the well-known proposition that in relation to contractual matters, the intention to cheat has to be determined when the contract was entered into and not when a subsequent breach takes place and the person accused does not make the payment, howsoever wrong the person may be.

17. Learned counsel cited the decisions reported as 1995 (2) SCC 528 Gian Chand v. Gopala & Ors., 2006 (2) SCC 428 R.K.Parvatharaj Gupta v. K.C.Jayadeva Reddy, and AIR 2000 SC 3621 Shakuntala v. Narayan Gundoji Chavan & Ors. to urge that with reference to a contractual obligation, limitation commences when the breach of the obligation is committed. We only highlight that all three cases dealt with the subject of specific performance of a contract and drew the distinction between a cause of action and a cause of action accruing. Instant suit is not seeking specific performance of a contract. The suit seeks a specific money decree due under the contract

and needless to state limitation would commence when the money allegedly became due i.e. in the year 1997.

18. We concur with the view taken by the learned Single Judge and thus dismiss the appeal but leave the parties to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 31, 2012
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