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

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DECIDED ON: 18.03.2013

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RFA (OS) 31/2011

USHA

..... Appellant

Through: Mr. Gajender Giri with
Mr. R.L. Kadamb, Advocates.

versus

PUNJAB & SIND BANK & ORS

..... Respondents

Through: Mr. Shivaji M. Jadhav with
Mr. Rahul Jain and Ms. Smitakshi Talukdar,
Advocates for Resp-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The appellant is aggrieved by a judgment and order of the learned Single Judge dated 13.12.2010 whereby her suit for recovery of ₹ 65,84,252/- was dismissed on the ground of limitation.
2. The appellant - hereafter referred to as plaintiff - was a commission agent carrying on business under the name and style of M/s Universal Exports and in the course of that activity, he used to introduce exporters to buyers and received commission from the sellers. The plaintiff alleged that the second defendant, a manufacturer of cotton yarn, was introduced by her to one M/s Export India. The latter caused the revolving letter of credit

no.44/95 of ₹ 2 Crores to be opened in favour of the second defendant, the supplier. The terms of the LC indicated that it could revolve three times. The plaintiff further alleges that on account of this transaction or introduction, her concern was to receive 5% of the FOB value of the LC. The plaintiff relied upon Memorandum of Understanding (MOU) said to have been entered into between her and the second defendant – the supplier, on 22.07.1995, assuring payment of 5% commission of the FOB value after realisation of the sale proceeds. Certain other terms were also alleged. In the suit ultimately filed by the plaintiff, it was alleged that despite demands made upon the second defendant for payment of commission, an amount of ₹27,31,494/- which was due to her was not paid and only the sum of ₹13,65,757/- was paid upon her invoking the bank guarantee on 28.11.1995. The plaintiff consequently claimed a sum of ₹ 34,34,252/- as principal towards balance commission payable along with interest @ 18% from 1.1.1996 to 30.11.1998.

3. The Bank - Punjab & Sindh Bank, the first defendant in the suit, contended that its liability ceased on 30.11.1995, i.e., the last date of the bank guarantee. By then, the realized invoices and export proceeds shown to it were to the tune of ₹ 5,46,29,903/-. It paid 2.5% of that value in terms of the bank guarantee, i.e., ₹ 13,65,748/-. The bank also averred that the second defendant had informed it that the plaintiff had complied and performed only part of the contract and was entitled to the commission of only 2.5% of the FOB value.

4. The supplier, i.e., the second defendant, completely denied the existence of the agreement and objected to the suit claiming it to be time barred. It also alleged that the order was not completed to the extent of ₹ 6

Crores before 30.11.1995 and, therefore, the offer to pay 5% commission of the FOB value under the bank guarantee became null and void. The second defendant further stated that the orders executed resulted in realisation against six invoices to the extent of ₹ 5,46,29,903/- and that since the condition precedent for the plaintiff to be entitled to the balance 2.5% of the commission had not been fulfilled, there was no question of entitlement for those amounts. It also stated that the terms of the contract between the second defendant and the plaintiff were outlined in the guarantee which itself had a finite life which ended on 30.11.1995. The second defendant denied liability in respect of further claim of the plaintiff for commission for the supplies made in excess of ₹ 6 Crores. It was stated that extension of the letters of credit resulting in its revolving a further three times of the original value did not, in any manner, entitle the plaintiff to the commission claimed in the suit.

5. This Court, before which the suit was originally filed, had framed eight issues. The impugned judgment dwelt on all the issues. The learned Single Judge was of the opinion that the plaintiff could establish entitlement to the extent of 5% of the total bank guarantee value, i.e., ₹ 6 Crores and thus was entitled to legitimately claim ₹ 30 Lakhs. However, the learned Single Judge was also of the opinion that the suit was time barred as it was filed on 30.11.2008. According to the learned Single Judge, the earliest point of time when the cause of action arose was on 28.11.1995 at the stage when plaintiff invoked the bank guarantee.

6. Counsel for the plaintiff urged that the impugned judgment, insofar as it proceeded to hold the suit as time barred, is not sustainable. It was urged that when the invocation of the bank guarantee took place on 28.11.1995,

the plaintiff was not aware about the real nature of the bank's intention; it received the amount of ₹ 13,65,757/- through cover of letter dated 8.12.1995. It was on that day that the plaintiff knew that the bank was refusing to honour its commitment and that the cause of action to file a suit in respect of the balance amount crystallized later.

7. Learned counsel for the appellant also argued that the learned Single Judge fell into error in holding that the plaintiff had not proved its entitlement to commission in respect of orders beyond ₹ 6 Crores. It was submitted that the terms of the bank guarantee clearly indicated that the parties, i.e., the seller and the plaintiff, had an agreement whereby 5% of the FOB value of the exports made by the second defendant was to be the commission payable. Counsel emphasized the fact that the materials on record clearly reveals that the supplies made were in excess of ₹ 9.5 Crores. In these circumstances, the learned Single Judge should not have confined the findings of the plaintiff's entitlement to only ₹ 30 Lakhs and should have written the findings for a higher amount.

8. Counsel for the second defendant argued that the plaintiff could not prove the existence of the agreement for payment of 5% commission. It was also argued that the commission was conditional upon the entire supplies being completed on or before the last date of the expiry of the bank guarantee, i.e., on 30.11.1995. In this case, since the plaintiff could establish export realisation only to the extent of ₹ 5,46,29,903/-, it became entitled to half of the commission payable, i.e. ₹ 13,65,757/-. The bank released those amounts. Therefore, there was no question of any further amount being paid. Counsel highlighted the fact that the commission itself was premised upon the entire orders being executed and the export proceeds

being realised on or before 30.11.1995. In other words, if any part of the proceeds were received later or the export effected during the later period, there was no question of the plaintiff being entitled to any such amount.

9. Learned counsel argued that the findings of the learned Single Judge to the extent that the suit was time barred, should not be disturbed having regard to the facts of the case.

10. Both parties were *ad idem* as to the fact that the commission payable was conditional upon the amounts being received by the second defendant and the entire orders having been executed before 30.11.1995. The plaintiff was unable to establish that as on date the entire order in fact had been executed being fully aware of the terms of agreement outlined in the bank guarantee itself. The plaintiff should have taken care to file the suit within the prescribed period. In the present case, the suit was filed a day late, i.e., on 30.1.1998. Therefore, the Single Judge's findings in this regard cannot be faulted.

11. Learned Single Judge was of the opinion that since the plaintiff could establish its entitlement only in respect of ₹ 5,46,29,903/- for which the bank was bound to honour its terms of the guarantee, as on that date, having regard to the documents presented, the claim as against that defendant was indefeasible. However, as far as the second defendant was concerned, the learned Single Judge held that the said defendant/supplier was liable in the following terms: -

“21. Coming to the liability of defendant No.2, it is not in dispute that it was required to pay 5% of the transactional value up to Rs 6 crores to the plaintiff as commission. It is also an admitted case that defendant No.2 has sold goods worth more than Rs 6 crores to Exportos India. This is also not the

case of defendant No.2 that supplies up to Rs 6 crores have not been completed. Therefore, defendant No.2 cannot escape from its liability to pay commission at the rate of 5%, on Rs 6 crores, to the plaintiff, which comes to Rs 30 lacs. Since defendant No.1 has already paid a sum of Rs 13,65,747/- to the plaintiff, defendant No.2 is liable to pay the balance amount of Rs.16,34,253/- to the plaintiff. This, of course, is subject to the claim having not become barred by limitation.”

As regards this issue, this Court is of the opinion that the terms of the guarantee support the findings. The relevant extract of the bank guarantee reads as follows: -

“Under the terms of contract the commission is payable to commission Agent @ 5% on F.O.B. value of the L/C amount realization by Canara Bank, New Delhi. And the amount of commission is payable by the seller on the commission agent as under:

- a) 50% of the total commission is payable to commission Agent after realization of L/C amount from Canara Bank, New Delhi.*
- b) Balance 50% of Commission amount is payable to after completing the order and submitting the proof of following documents (Xerox copy) and acknowledgement issued by M/s Hanil Era Textiles Ltd.*
- 1) Bank Realization Certificate issued by Canara Bank, New Delhi.*

We Punjab & Sind Bank, (hereinafter referred to as the ‘Bank’) are the request of M/s Hanil Era Textiles Ltd. (seller) do hereby undertake to pay the Commission Agent an amount not exceeding @ 5% on F.O.B. actual realization value against L/C No.44/95 against loss caused to or suffered by the commission agent by reason of non-payment by the said seller.

2. We, Punjab & Sind Bank do hereby undertake to pay the amount due and payable under this guarantee without any demur, merely on a demand from the commission agent stating that the amount claimed is due by way of loss of damage caused to the commission agent by reason of the seller's failure to pay the above mentioned. Any such demand made on the Bank shall be conclusive as regards the amount due any payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding "5% on F.O.B. value."

12. The Single Judge was of the opinion that the plaintiff could not prove the terms of the oral contract alleged to have been formalized on 22.07.1995, yet he proceeded to rely upon the bank guarantee underlying the fact that the plaintiff was entitled to commission at 5% on F.O.B. value of the L.C. amount. The further reasoning was that the L.C. amount at the point of time when the bank guarantee was issued on 21.09.1995 was to a limit of ₹ 6 Crores after three revolutions. This Court is in agreement with the Single Judge on this score. The arguments of the supplier/second defendant that the obligation to pay commission ended on 30.11.1995 defies logic and is unpersuasive. The occasion for payment of commission was the assistance rendered by the plaintiff in securing the export order. If one understands the basic nature of the transaction, i.e., the role played by the plaintiff as a booking agent or one who facilitated the contract between the seller and the buyer, the question of limiting the liability of the seller, who is primarily responsible for paying 5% of the F.O.B. value, fails. This is for the reason that having introduced the two parties, the agent, i.e., the plaintiff, lost control over the contract or the method of its execution. The bank guarantee in effect and in fact amounted to securing the amounts and

assuring the agent, i.e., the plaintiff, that its dues would be paid. If the bank guarantee, on the other hand, is the primary consideration as is being argued by the seller (for the contract with the plaintiff), consequences urged on its behalf would appear to be logical. However, neither the terms of the guarantee nor the pleadings in this regard support the submissions of the second defendant that its liability stood extinguished as on 30.11.1995. The liability to pay 5% of the F.O.B. value, having regard to the recoveries made by it, stood delineated in the bank guarantee which was only a mechanism of payment at different stages. If one sees the understanding of the parties in this light, it is also apparent that even if for any reason, no supplies were effected on or by 30.11.1995, the plaintiff's entitlement for payment of commission would yet be subsisting. In the present case, the earliest point in time when the plaintiff became aware of the right to claim amounts from the defendant was on 8.12.1995 when finally the bank refused to honour its commitment. That was the point of time when the plaintiff knew that the second defendant could be sued for the balance amount which in this case was the difference of what was paid on 8.12.1995 and the sum of ₹ 30 Lakhs. For these reasons, the Court is of the opinion that there is no infirmity in the findings of the learned Single Judge viz-a-viz the liability of the second defendant.

13. As far as the question of limitation goes, this Court is of the opinion that nature of the contract being was where the plaintiff claimed commission and the earliest point in time when it became aware that the second defendant would be liable for any amount at all was on 8.12.1995. Had the bank honoured its commitment and paid the entire amount, there was no question of plaintiff suing the defendant. However, the bank partly

complied with the demand and paid ₹ 13,65,757/-. Even the second defendant concedes that as on 28.11.1995, the export proceeds realised by it were to the tune of ₹ 5,46,29,903/-. In fact, no reason is given why only ₹ 13,65,757/- was paid. 5% of ₹ 5,46,29,903/- works out to ₹ 27,31,494/-. Having regard to these facts, the plaintiff became aware as to the amount it could legitimately seek and claim from the second defendant only after 8.12.1995. The Court is of the opinion that the findings of the learned Single Judge about the suit being time barred as against the second defendant cannot be sustained. It is accordingly set aside.

14. As a result of the above discussion, the appeal is allowed to the extent that a decree in the sum of ₹ 16,34,253/- shall be drawn against the second defendant with interest @ 12% per annum as held by the learned Single Judge from 1.1.1996 till the date of realisation. The second defendant shall also bear the cost, in respect of the entire proceedings, i.e., the suit and this appeal.

15. The appeal is allowed to the above extent.

**S. RAVINDRA BHAT
(JUDGE)**

**SUDERSHAN KUMAR MISRA
(JUDGE)**

MARCH 18, 2013
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