

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

Date of decision: 11th April, 2013.

+ **CS(OS) 2213/2010**

M/S. FORTUNEX LIMITED **..... Plaintiff**

Through: Mr. Sudhanshu Batra, Sr. Adv. with
Mr. Lokesh Bhola and Mr. Vishnu
Anand, Advocates.

Versus

M/S. KOUTONS RETAIL INDIA LTD. **..... Defendant**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

% **11.04.2013**

1. The plaintiff seeks a decree for recovery of Rs.1,45,15,753/- along with *pendente lite* and future interest at 18% per annum pleading:

(i) that the defendant, being one of the leading retailers and well reputed fashion wear brand in India in May-August, 2008 placed orders on the plaintiff for purchase of 49,152 number of men's corduroy trousers and for 31,440 number of men's shirts for a total consideration of United States Dollar (USD) 265,189.52 and USD 161,789.70 respectively;

(ii) the plaintiff agreed to supply the said garments through its

suppliers M/s. Sterling Apparels Ltd. and M/s. Sirina Garments & Textiles Ltd. being the entities established under the Laws of Bangladesh and having their manufacturing units in Bangladesh;

(iii) that the defendant agreed to make the payment by way of Letters of Credit (LCs) in favour of the suppliers and to enable the defendant to open the LCs, proforma invoices were raised by the aforesaid suppliers of the plaintiff on the defendant and in response where to LCs were opened by the plaintiff in favour of the said suppliers;

(iv) that the said suppliers accordingly consigned 49,152 men's corduroy trousers and 31,440 number of men's shirts to the defendant through sea route and raised invoices on the defendant;

(v) that the aforesaid goods reached at Nhava Sheva Port, Mumbai and were transported to the Bonded Warehouse at Inland Customs Depot (ICD) at Tughlakabad, Delhi in December, 2008/January, 2009;

(vi) the defendant was notified of the arrival of the said goods and the suppliers aforesaid of the plaintiff sent the export documents to the defendant for payment;

(vii) however, the defendant made payment for only one of the invoices and failed and neglected the payment of other three invoices and refused to accept the documents and returned the documents to the suppliers of the plaintiff;

(viii) that after a series of discussions, the defendant requested the plaintiff to make payment of all the goods to the respective suppliers and agreed to pay for the goods to the plaintiff if the invoices for the said goods are claimed by the plaintiff from the defendant and payment terms are changed to DP i.e. Documents against Payments terms;

(ix) that the plaintiff thereafter sent export documents to the defendant through plaintiff's Bank along with the invoices to the banker of the defendant for collection of the invoice amount on DP basis;

(x) the defendant again failed and neglected to pay the outstanding dues and has further failed to take the delivery of the consignment which is still lying at ICD, Delhi;

(xi) the defendant has thus failed to pay the amount of USD 257,388.20 to the plaintiff after inducing the plaintiff to change the

payment terms from LC to DP and on the basis of which inducement the plaintiff also paid the shipper in respect of the goods supplied to the defendant and stepped into the shoes of the said suppliers;

(xii) that the defendant is also liable to pay interest @ 18% per annum;

(xiii) hence, this suit for recovery of principal amount of USD 257,388.20 together with interest till the date of institution of the suit thereon @ 18% per annum i.e. total USD 308,845.81 which translates to Rs.1,45,15,753/-.

2. The counsel for the defendant appeared before this Court even before the summons of the suit were issued on 25th February, 2011 and sought time to file written statement. However, written statement was not filed and on 20th May, 2011 cost of Rs.2,000/- payable to the Delhi High Court Legal Service Committee was imposed on the defendant. The order dated 3rd August, 2011 records that though the counsel for the defendant claimed having filed the written statement but the same was not on record. Further cost of Rs.5,000/- payable to the counsel for the plaintiff was imposed on the defendant. The order dated 30th September, 2011 records that though the written statement had been filed but the cost of Rs.5,000/- was promised

to be paid in the course of the day and the counsels for the parties informed that the parties are contemplating settlement. Cost of Rs.5,000/- was not paid and vide order dated 9th December, 2011 further one week's time was given to the defendant to pay costs. Counsels again informed that compromise was being negotiated. However, none appeared for the defendant on 10th April, 2012 and the order dated 29th May, 2012 records that neither had anybody appeared for the defendant nor had the costs imposed of Rs.2,000/- and Rs.5,000/- for permitting the written statement to be placed on record been paid. Accordingly, vide order dated 1st June, 2012, the defendant was ordered to be proceeded against *ex-parte* and the plaintiff permitted to lead *ex-parte* evidence. None appeared for the defendant thereafter and the plaintiff has filed affidavit by way of examination-in-chief of its Finance Head, Mr. Pankaj Kumar and which was tendered into evidence on 6th February, 2013 and exhibit marks put on the documents proved. The senior counsel for the plaintiff has been heard.

3. Though the defendant is *ex-parte* and has not even paid the costs subject to payment of which the written statement was permitted to be taken on record but I have still perused the written statement of the defendant. The defendant therein has pleaded that, (i) the suppliers of the plaintiff

raised invoices even prior to the bills of lading and the said suppliers were in fact spurious and defrauded the defendant Company by increasing the per unit price of men's corduroy trousers from 4 USD to 5.51 USD and by increasing men's shirts price from 4 USD to 5.19 USD, 4.95 USD and 5.08 USD for different quantities; (ii) that the goods were not shipped within the stipulated time period, thus not making the same available for the season for which they are ordered and were after the season, of no value; (iii) there were also discrepancies in the invoices raised by the suppliers of the plaintiff; (iv) that the defendant was not notified of the arrival of the containers; (v) that the payment of the invoices thus remained due, due to the negligence and non-compliance by the plaintiff Company with the terms of the LCs and for which the defendant is not at fault; (vi) that the plaintiff subsequently of its own changed the payment terms from LC to DP; (vii) that the defendant's banker did not receive any document from the plaintiff or the plaintiff's banker.

It would thus be evident that the defendant in the written statement filed also did not deny the transaction.

4. The senior counsel for the plaintiff has taken me through the affidavit by way of examination-in-chief in *ex-parte* evidence and the documents

proved and which are on the same lines as the contents of the plaint hereinabove enumerated. For this reason, need is not felt to discuss the documents Ex. PW-1 to PW-14 proved to prove the claim in suit.

5. The defendant, though not denying the transaction but raising certain technical defences, has chosen not to contest the claim and there is no reason to doubt the un-rebutted testimony of the plaintiff and on the basis whereof the defendant is found to be owing the principal amount of USD 257,388.20 to the plaintiff.

6. The plaintiff has claimed interest @ 18% per annum. Though undoubtedly the transaction was a commercial one, but interest is always in the discretion of the Court and considering that the plaintiff, inspite of the defendant having not accepted the goods, did not take any steps to mitigate its damages, it is not deemed expedient to grant interest @ 18% per annum as claimed and interest on the principal amount of USD 257,388.20 from 9th September, 2009 (neither plaint nor the evidence is very clear as to from which date the plaintiff has claimed interest and this is the last date given of sending export documents) @ 9% per annum is deemed apposite.

7. The suit is thus decreed for recovery of principal amount of Rs.1,20,97,245/- being equivalent of USD 257,388.20 (at the rate of Rs.47

/USD at which the plaintiff has computed USD 308,845.81 to be Rs.1,45,15,753/-) together with interest @ 9% per annum thereon from 9th September, 2009 is passed in favour of the plaintiff and against the defendant. The plaintiff shall also be entitled to costs of suit as per schedule.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

APRIL 11, 2013

bs..