

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

+ **RFA No. 530/2006**

% **12th November, 2018**

R.P. GARG

..... Appellant

Through: Mr. R.M. Sinha and Mr. P.M. Sinha
Advocates (Mobile No. 9811478026).

versus

A.V. IMPEX

..... Respondent

Through: Mr. Rajesh Manchanda and Mr. Rajat
Manchanda, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the trial court dated 22.07.2006 by which the trial court has decreed the suit of the respondent/plaintiff by passing a money decree for a sum of Rs. 9,15,055/- along with interest

at 8% per annum on account of goods (non-basmati rice) sold by respondent/plaintiff to the appellant/defendant.

2. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that the parties had entered into an Agreement on 10.11.1995/Ex.PW1/3 whereby the respondent/plaintiff was to supply to the appellant/defendant non-basmati brand 'rado' rice of 100 Metric Tonnes (M.T.) @ US\$ 0.30 per kg rice was to be shipped to Kiev in Ukraine. The respondent/plaintiff further pleaded that payment was to be made within 90 days from the date of the bill of lading. Respondent/Plaintiff is said to have sent the first shipment of 40 M.T. vide Bill of Lading dated 25.11.1995/Ex.PW1/4. Both the parties thereafter vide letter dated 15.12.1995/Ex.PW1/5 agreed to enhance the rate from US\$ 0.30 to US\$ 0.37 per kg for the balance supply of 60 M.T. It is pleaded in the plaint, that on 26.12.1995 another contract Ex.PW1/6 for 20 M.T. of rice was entered into between the parties at the enhanced rate of US\$ 0.37 per kg. Therefore, at this stage, in total a further supply of 80 M.T. of rice was to be made by the respondent/plaintiff to the appellant/defendant at US\$ 0.37 per kg. On 29.12.1995 the respondent/plaintiff sent another

shipment of 40 M.T. of rice vide Bill of Lading dated 29.12.1995/ Ex.PW1/7. The last shipment of 40 M.T. of rice was sent by the respondent/plaintiff to appellant/defendant vide Bill of Lading dated 08.01.1996/Ex.PW1/8. The total value of 120 M.T. of non-basmati brand 'rado' rice was US\$ 41,600/-. The appellant/defendant paid US\$ 16,530/- to the respondent/plaintiff on different dates and the balance payment of US\$ 25,070/- remained. The respondent/plaintiff is said to have written various letters to the appellant/defendant which had no effect and ultimately the respondent/plaintiff sent a Legal Notice dated 11.03.1997, which also did not yield the desired result, and therefore the subject suit was filed claiming the balance amount of US\$ 25,070 and interest at 30% of US\$ 9,930, thus totaling to US\$ 35,000/-, and which converted into Indian Rupee came to Rs.12,77,500/- being the suit amount.

3. The appellant/defendant contested the suit by filing written statement. It was pleaded that the respondent/plaintiff was guilty of concealment of facts because on 10.11.1995, not one but two contracts were entered into. The first contract was entered into in the morning which was proved as Ex.DW1/1, and as per this contract the

appellant/defendant was to only provide a godown and office space at Kiev in Ukraine to the respondent/plaintiff, and out of the sales of rice stock made by the respondent/plaintiff, the appellant/defendant was to receive 25% of price as profit. The appellant/defendant was also to provide accommodation and other facilities to the representatives of the respondent/plaintiff to be paid by the respondent/plaintiff. It was pleaded that the subsequent agreement entered into in the evening of the same date being Ex.PW1/3, being for sale of rice by the respondent/plaintiff to appellant/defendant was only to facilitate and effectuate the first agreement. It was pleaded in the written statement that the appellant/defendant therefore was never a purchaser of the goods as no goods were sold by the respondent/plaintiff to the appellant/defendant. Further, it was pleaded in the written statement that whatever amount was received from sale of the goods after being credited to the account of the appellant/defendant, was thereafter credited to the account of the respondent/plaintiff in India. Along with the written statement counter claim was filed for recovery of a sum of Rs.1,80,000/- being the 25% profit margin to be paid by the

respondent/plaintiff to the appellant/defendant. Interest was also claimed at 24% per annum.

4. After the pleadings were complete the trial court framed the following issues:-

“Issues:-

- (i) Whether plaintiff is a registered partnership firm and suit has been filed by a registered partner of the said firm? If not, to what effect?
- (ii) Whether the plaintiff had supplied rice to the value of US\$ 41,600 to the defendant? If so, to what effect?
- (iii) Whether a sum of US\$ 25,070/- are still payable by the defendant to the plaintiff towards balance price of the said rice? If so, to what effect?
- (iv) Whether the plaintiff is entitled to interest? If so, at what rate and for what period?
- (v) Whether the defendant was entitled to commission/service charges @ 25% of the total profits earned by the plaintiff from the sale of non-basmati rice at Ukrai? If so, to what effect?
- (vi) To what amount, if any, is the plaintiff entitled as commission/service charges?
- (vii) Whether the defendant is entitled to any interest? If so, at what rate and for what period?
- (viii) Relief.

6. Vide order dated 01.06.2006, issue no.6 was amended and re-framed as under:

To what amount, if any, is the defendant entitled as commission/service charges?”

5. Issue nos. 2, 3 and 4 are the relevant issues and these issues have been decided by the trial court in favor of the respondent/plaintiff and against the appellant/defendant by holding

that once the first agreement is found to be void, the same is not a legal agreement which would have bound the parties, and what will therefore bind the parties is not the first agreement Ex.DW1/1 but the second agreement of the same date Ex.PW1/3. Trial court also notes that there is nothing in the second agreement Ex.PW1/3 which shows that the same is in any manner for effectuating the first agreement Ex.DW1/1. Trial court has reasoned that it was because the first agreement was found to be illegal that the second agreement was entered into for the sale of rice by the respondent/plaintiff to the appellant/defendant, and it is this second agreement which will bind the parties. The trial court has also held that the fact that payments of UD\$ 16,500 were received in the account of the appellant/defendant and this entire amount was transferred to the respondent/plaintiff without deducting the 25% profit margin as was claimed by the appellant/defendant. Hence, this showed that the relationship between the parties was of a buyer (appellant/defendant) and seller (respondent/plaintiff). The trial court has also observed that it is an admitted fact that Sh. Virendar Singh was the representative of the appellant/defendant at Kiev in Ukraine where consignment of the rice

was received, and infact it was so admitted by the witness of the appellant DW2/Sh. Birender Singh.

6. Learned counsel for the appellant/defendant has very passionately argued that the second agreement Ex.PW1/3 was only to effectuate the first agreement and that the respondent/plaintiff has never proved that the appellant/defendant was given the bills of lading or that the appellant/defendant ever received the goods from the respondent/plaintiff. It was argued that the subsequent amendments to the contract for enhancing the price and for thereafter selling the total quantity of rice of 120 M.T., was really only in furtherance of the second agreement Ex.PW1/3, and once PW1/3 was only to effectuate the first agreement Ex.DW1/1, therefore the relationship between the parties was not of the appellant/defendant as the buyer and the respondent/plaintiff as the seller. It was also argued by the learned counsel for the appellant/defendant that the respondent's/plaintiff's partners and their witnesses have admitted that the first agreement Ex.DW1/1 was found to be illegal agreement not by the appellant/defendant but by the respondent/plaintiff and its consultants and therefore it is only for that reason that the second agreement

Ex.PW1/3 was entered into, and therefore, the respondent/plaintiff cannot claim that the second agreement prevails and not the first agreement Ex.DW1/1.

7. In my opinion, the arguments urged on behalf of the appellant/defendant do not have any merit and are liable to be rejected. This appeal is also therefore liable to be and is accordingly dismissed for the reasons given hereinafter.

8. In my opinion, once the bills of lading have been proved as Ex.PW1/4, Ex.PW1/7 and Ex.PW1/8, it has to be held that the goods in question under these bills of lading have been received by the appellant/defendant inasmuch as on the two bills of lading i.e. Ex.PW1/7 and Ex.PW1/8, the consignee is none other than the appellant/defendant and in the bill of lading Ex.PW1/4 the consignee is written as Sh. Virendar Singh through the appellant/defendant, and it is not denied that Sh. Virendar Singh was admittedly the representative of the appellant/defendant. The customs authority and port authorities at Kiev in Ukraine would only have handed over the contents and subject matter of the bills of lading to the consignee which was the appellant/defendant, and if the appellant/defendant

wanted to successfully contend otherwise that it was not the appellant/defendant but the respondent/plaintiff itself who had received the goods through its representatives, it was for the appellant/defendant to prove so, but except making self-serving averments, no credible evidence has been led to disbelieve the natural course of events, that it is only the consignee who would have received the goods under the bills of lading, with the consignee being none other than the appellant/defendant. This Court, therefore, rejects the argument urged on behalf of the appellant/defendant that the appellant/defendant did not receive the original bills of lading Ex.PW1/4, Ex.PW1/7 and Ex.PW1/8 and that the appellant/defendant never received the goods under the three bills of lading.

9. In my opinion, the trial court has rightly arrived at a finding that if the contractual relationship between the parties was of the appellant/defendant not being a buyer, but only of receiving the goods for and on behalf of the respondent/plaintiff at Kiev in Ukraine, then for the payment already received by the appellant/defendant of US\$ 16,530 in its bank account in Ukraine, this entire amount of US\$ 16,530 would not have been remitted by the appellant/defendant from

its account at Kiev in Ukraine to the bank account of the respondent/plaintiff in India inasmuch as, the appellant/defendant would, in case the case of the appellant/defendant was correct that it was not the buyer, have in fact first deducted 25% profit margin out of the amount of sale of rice of the value of US\$ 16,530. The trial court has therefore rightly held that on this ground it has to be held that the relationship between the parties was of the appellant/defendant as the buyer and the respondent/plaintiff as the seller.

10. In my opinion, there is another ground for holding that the appellant/defendant was a buyer of goods and the respondent/plaintiff was the seller inasmuch as in paras 8 and 9 of the plaint, the respondent/plaintiff has referred to sending by it to the appellant/defendant of its Letters dated 13.12.1996 and 07.02.1997 and the Legal Notice dated 11.03.1997 for making the payment of the due amount. Besides the fact that the respondent/plaintiff has proved its letters and legal notice along with postal receipts as Ex.PW1/10 to Ex.PW1/27 (being the letters, legal notice and the postal receipts along with AD cards), it is seen that the appellant/defendant while replying to paras 8 and 9 of the plaint in paras 8 and 9 of the written statement

has not denied receiving the Letters dated 13.12.1996 and 07.02.1997 and the Legal Notice dated 11.03.1997 sent by the respondent/plaintiff, and all that the appellant/defendant has stated in paras 8 and 9 of the written statement is that the letters and the legal notice are blatantly false to the knowledge of the appellant/defendant. Therefore, once the appellant/defendant had received the Letters dated 13.12.1996 and 07.02.1997 written by the respondent/plaintiff asking for payment of the balance price, as also that appellant/defendant had received the Legal Notice dated 11.03.1997, and the appellant/defendant remained silent and did not send any replies by putting up a defence which has been put up for the first time only in the written statement-cum-counter claim, there is no reason why an adverse inference should not be drawn against the appellant/defendant with respect to the contents of the Letters dated 13.12.1996 and 07.02.1997 written by the respondent/plaintiff to the appellant/defendant, as also the contents of the Legal Notice dated 11.03.1997 sent by the respondent/plaintiff to the appellant/defendant.

11. In view of the aforesaid discussion, I do not find any merit in the appeal and the same is hereby dismissed. Whatever

amount has been deposited by the appellant/defendant in this Court be released to the respondent/plaintiff by the Registry of this Court within two weeks in appropriate satisfaction of the impugned judgment and decree.

NOVEMBER 12, 2018

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VALMIKI J. MEHTA, J

