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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.02.2014

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM

and

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

Appeal Suit (MD)No.158 of 2013 &

MP(MD)No.2 of 2013

Sterlite Industries (India) Ltd.,
SIPCOT Industrial Complex
Madurai Bypass Road,
Tuticorin- 628 002.

.. Appellant/Defendant

(Now known as Sesa Goa Limited by
virtue of order in CP 164 to 167 of 2012
dated 25.07.2013 of the Hon'ble High
Court (Principal Bench)

Vs.

Emirates Trading Agency LLC
having its office at
PO box 5239, Dubai, UAE,
rep.by its Authorised
Signatory S.Sirajudeen

.. Respondent/Plaintiff

Appeal Suit filed under section 96 of CPC against the Judgment and decree dated 06.06.2013 passed in Original Suit No.73 of 2009 by the Principal District Court, Thoothukudi.

For Appellant : Mr.S.Parthasarathy
Senior Counsel for
M/s.Sathish Parasaram
For Respondent : Mr.Shivakumar

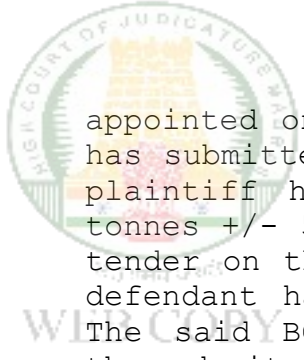
JUDGMENT

Judgment of the Court was delivered by A.SELVAM, J.

This Appeal Suit has been directed against the Judgment and decree dated 6th June 2013 passed in Original Suit No.73 of 2009 by the Principal District Court, Thoothukudi.

2. The respondent herein as plaintiff has instituted Original Suit No.73 of 2009 on the file of the trial Court praying to pass a decree for a sum of Rs.11,90,55,970/- together with interest, wherein the present appellant has been shown as sole defendant.

3. In the plaint it is averred that the plaintiff is an International Company. The plaintiff has participated in various international and global tenders. The plaintiff has entered into arrangements with various manufacturers including the defendant. The defendant has supported the plaintiff in respect of several contracts. As per local custom and practise, it is compulsory to have a local agent for tenders floated by BCIC. Under the said circumstances, the plaintiff has

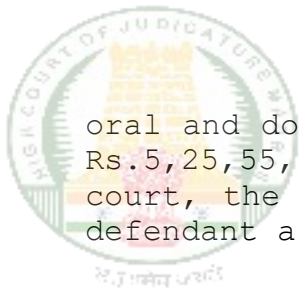


appointed one M/s.R.K.Enterprises, Dhaka as its agent and the said agent has submitted papers on behalf of plaintiff and also signed contract. The plaintiff has participated in tender for supplying of 50,000 metric tonnes +/- 5% phosphoric Acid. The plaintiff has participated in the said tender on the basis of complete back up support of the defendant and the defendant has confirmed the said tender by its letter dated 20.08.2007. The said BCIC has accepted the offer of the plaintiff and defendant through its agent viz., R.K.Enterprises by its letter dated 24.10.1997. Both the plaintiff and defendant have entered into an agreement dated 26.10.2007 with regard to supply of phosphoric Acid. The plaintiff has given bank guarantee to the tune of 11,42,510/- U.S.dollars. On 10.11.2007, the said BCIC has issued three separate contracts for delivery of shipment, wherein the defendant has been shown as manufacturer and plaintiff has been shown as principal. After agreement, the defendant has given various undertakings. Despite of agreement, as well as undertakings given by the defendant, has failed to supply phosphoric acid. The plaintiff has issued fax messages on various dates. On 20.01.2008 both the plaintiff and defendant have decided to meet together in the office of the defendant, wherein the defendant has promised to resolve the issue. But the defendant has failed to fulfil its promise. Under the said circumstances, on 28.01.2008 the plaintiff has issued another letter on 31.01.2008. The defendant has sent a letter stating that it has been forced to suspend daily production of phosphoric acid due to non-availability of raw materials. On 13.04.2008 the said BCIC has invoked the bank guarantee and received payments. The plaintiff has debited the same on 21.04.2008. The present suit has been instituted only in respect of U.S.dollars 11,42,510/- deposited as bank guarantee. Under the said circumstances, the present Suit has been instituted for the relief sought for in the plaint.

4. In the written statement filed on the side of the defendant it is averred that the present suit has been instituted without any basis. The cause of action does not disclose the real facts. It is denied that as per local custom and practise an agent has to be appointed in respect of tenders floated by BCIC. It is also equally false to aver that the plaintiff has approached the defendant with regard to supply of phosphoric acid. The tender copy referred to in the plaint has not been given to the defendant by the plaintiff. The defendant has never participated in the tender averred in the plaint. It is false to aver that BCIC has accepted offer of the plaintiff and defendant through its agent R.K.Enterprises. It is false to aver that on 26.10.2007 an agreement has come into existence between the plaintiff and defendant. The averments made in the plaint to the effect that despite of agreements and undertakings given by the defendant, it has failed to supply phosphoric acid as agreed are false and there is no merit in the Suit and the same deserves to be dismissed.

5. In the replication statement filed on the side of the plaintiff, except few aspects, remaining aspects in the written statement are denied. Likewise, in the additional written statement filed on the side of the defendant, the main averments made in the written statement are reiterated.

6. On the basis of the divergent pleadings raised on either side, the trial Court has framed necessary issues and after analysing both the



oral and documentary evidence has decreed the Suit in part to the tune of Rs.5,25,55,460/-. Against the Judgment and decree passed by the trial court, the present Appeal Suit has been preferred at the instance of the defendant as appellant.

7. The sum and substance of the case of the plaintiff is that on 26.10.2007, an agreement has come into existence between the plaintiff and defendant with regard to supply of phosphoric acid to BCIC and in pursuance of the same, as per trade custom, the plaintiff has given a bank guarantee by way of depositing U.S. Dollars mentioned in the plaint. But, despite of repeated meetings and undertakings given by the defendant, has failed to supply phosphoric acid and the said BCIC has invoked bank guarantee and therefore, the present Suit has been instituted for the relief sought for in the plaint.

8. The consistent stand taken on the side of the defendant is that there is no concluded contract between the plaintiff and defendant and much less the agreement dated 26.10.2007 is not at all a concluded agreement and the defendant has not given any undertaking so as to supply phosphoric acid as mentioned in the plaint and therefore, the defendant is not liable to pay the amount claimed in the plaint.

9. The trial Court after considering the rival pleadings raised on either side has framed a vital issue to the effect as to whether on 26.10.2007 a concluded contract has come into existence in between the plaintiff and defendant?

10. After relying upon the relevant as well as vital documents filed on the side of the plaintiff, the trial Court has given a specific finding to the effect that on 26.10.2007 a concluded contract has come into existence in between the plaintiff and defendant with regard to supply of phosphoric acid and therefore, the only point that comes up for consideration in the present Appeal Suit is as to whether on 26.10.2007 a concluded contract has come into existence in between the plaintiff and defendant.

11. The learned Senior counsel appearing for the appellant/defendant has sparingly contended that the trial Court has framed an issue to the effect as to whether on 26.10.2007 a concluded contract has come into existence in between the plaintiff and defendant and on the side of the plaintiff, certain documents have been filed. Only on the basis of certain documents filed on the side of the plaintiff, the trial Court has given a specific finding to the effect that on 26.10.2007 a concluded contract has come into existence in between the plaintiff and defendant. The specific stand taken on the side of the defendant is that the defendant has never agreed to supply phosphoric acid as averred in the plaint and never entered into a concluded contract with the plaintiff with regard to supply of phosphoric acid and since no concluded contract has come into existence in between the plaintiff and defendant, the defendant cannot be mulcted with liability. But the trial Court without considering the definite stand taken on the side of the defendant has erroneously decreed the suit in part and therefore, the Judgment and decree passed by the trial Court are liable to be interfered with.

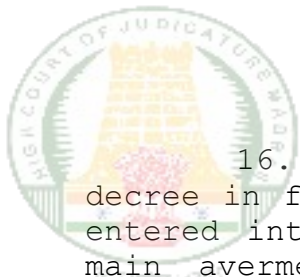


12. In order to dissipate the contentions put forth on the side of the appellant/defendant, the learned counsel appearing for the respondent/plaintiff has contended that for the purpose of establishing the various arrangements made by the plaintiff and defendant with regard to supply of phosphoric acid to BCIC, so many vital documents have been filed on the side of the plaintiff and in pursuance of various arrangements and meetings held in between the plaintiff and defendant, a concluded contract has come into existence on 26.10.2007, whereby the defendant has expressly accepted to supply phosphoric acid as averred in the plaint and despite of exertion taken by the plaintiff, the defendant has not supplied phosphoric acid and ultimately expressed its inability by way of saying that daily production has been stopped due to non-availability of raw materials and the present suit has been instituted for getting the amount which has been deposited as bank guarantee in the form of U.S.dollars and the trial Court after considering the available evidence on record has given a specific finding to the effect that there is a concluded contract in between the plaintiff and defendant and ultimately decreed the Suit in part and therefore, the Judgment and decree passed by the trial Court are not liable to be interfered with.

13. The entire case of the plaintiff is based upon the documents which have been marked as Exs.A2 to A10. As narrated earlier, the present Suit has been instituted only on the basis of the alleged agreement dated 26.10.2007. The consistent stand taken on the side of the plaintiff is that with regard to supply of phosphoric acid a concluded contract has come into existence in between the plaintiff and defendant on 26.10.2007. The alleged agreement dated 26.10.2007 has been marked as Ex.A8. Prior to Ex.A8, various communications have become emerged in between the plaintiff and defendant and the same have been marked as Exs.A2 to A7. Even a cursory look of Ex.A8 would clearly go to show that a concluded contract has come into existence in between the plaintiff and defendant with regard to supply of phosphoric acid. The bank guarantee given by the plaintiff has been marked as Ex.A37.

14. From the conjoint reading of the documents referred to earlier, the Court can very well come to a conclusion that prior to agreement various communications have become emerged in between the plaintiff and defendant and ultimately Ex.A8, concluded contract has come into existence in between them and consequently, the plaintiff has deposited the amount mentioned in the plaint as bank guarantee in the form of U.S.Dollars and thereafter, the defendant has expressed its inability in supplying phosphoric acid due to non-availability of raw materials. The main stand taken on the side of the appellant/defendant is that since there is no concluded contract in between the plaintiff and defendant at any point of time much less on 26.10.2007, the present suit is not legally maintainable. In view of the discussion made earlier, it is needless to say that the main contention put forth on the side of the appellant/defendant is nothing but baseless.

15. In the written statement filed on the side of the defendant question of jurisdiction of the trial Court has also been raised. The trial Court has given a specific finding to the effect that it has jurisdiction to entertain the present Suit. Further, the said point has not been raised in the present Appeal.



16. The present Suit has been instituted praying to pass a money decree in favour of the plaintiff on the basis of the concluded contract entered into in between the plaintiff and defendant on 26.10.2007. The main averments made in the plaint are that after entering into a concluded contract dated 26.10.2007, the defendant has repudiated the same and therefore, the plaintiff is entitled to get the relief sought for in the plaint.

17. The learned counsel appearing for the respondent/plaintiff has accited the following decisions:

(a) In 1994 Supp (2) SCC 531 - Fertiliser Corporation of India Vs. Jagdish Prasad Kesharwani, the Hon'ble Apex Court has held that in case of breach of a concluded contract by one party, other party is entitled to maintain a suit so as to refund of security.

(b) In (2011) 10 Supreme Court Cases 300 (Phulchand Exports Limited Vs. O.O.O.Patriot), the Hon'ble Apex Court has held that "in case of breach of contract, as per Sections 70, 65, 23, 73 and 74 of the Indian Contract Act, 1872 , one of the parties entitled to get damages.

(c) In (2011)10 Supreme Court Cases 573 (MSK Projects India (JV) Limited Vs. State of Rajasthan and another) also, the same view has been reiterated.

18. It has already been befittingly discussed and decided that as per Ex.A8, a concluded contract has become emerged in between the plaintiff and defendant with regard to supply of phosphoric acid to BCIC and in pursuance of the same, the plaintiff has deposited the amount mentioned in the plaint as bank guarantee in the form of U.S.dollers. Further on the side of the plaintiff, various documents have been filed to the effect that the defendant has failed to supply phosphoric acid and ultimately expressed its inability to supply the same due to non-availability of raw materials. Further the said BCIC has invoked the bank guarantee given by the plaintiff. Since a concluded contract has come into existence with regard to supply of phosphoric acid by the defendant and since a total failure has occurred on the part of the defendant, the defendant is legally liable to pay the amount deposited by the plaintiff in the form of bank guarantee.

19. The trial Court after considering the overwhelming evidence adduced on the side of the plaintiff and also after calculating the U.S.dollers at the rate of relevant time, has rightly decreed the suit in part. In view of the foregoing enunciation of both the factual and legal aspects, this court has not found any acceptable force in the contention put forth on the side of the appellant/defendant and therefore, the present Appeal has to fail.



20. In fine, this Appeal Suit deserves dismissal and accordingly is dismissed with costs. The Judgment and decree passed in Original Suit No.73 of 2009 by the Principal District Court, Thoothukudi are confirmed. Connected Miscellaneous Petition is also dismissed.

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Sd/-
Assistant Registrar (AS)

/True copy/

Sub Assistant Registrar

To

The Principal District Judge, Thoothukudi

+1CC TO M/S.SATHISH PARASURAM, ADVOCATE, SR.7374

+2CCs TO MR.K.BHASKARAN, ADVOCATE, SR.6949

Mj

SR : 05.03.2014 : 6p/5c

Judgment in
Appeal Suit (MD)No.158 of 2013
and MP (MD)No.2 of 2013
04.02.2014