

\$~R-105

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

% *Date of Decision : September 18, 2015*

+ **RFA(OS) 138/2012**

ITI LTD. Appellant

Represented by: Mr.D.Verma, Advocate

versus

BHARAT PHOTO CIRCUITS LTD. Respondent

Represented by: Mr.Niki Kantawala, Advocate with
Mr.Abhinav Sharma, Advocate for
R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Appellant prayed for a decree to be passed against respondent No.1 in sum of ₹23,52,491.69 of which the principal sum due was ₹18,97,170.73 and the balance pre-suit interest, on the pleading that for goods to be supplied by respondent No.1, it had received 90% advance and that all goods as per specifications were not supplied. A decree in sum of ₹9,92,000/- was prayed for against respondent No.3 on the plea that at the asking of respondent No.1 respondent No.3 had issued two bank guarantees in sum of ₹3,00,000/- and ₹5,00,000/- which were payable on demand to secure 90% advance paid by the appellant to respondent No.1 for the contracted goods. ₹8,00,000/- was the principal sum claimed against respondent No.3 and the remainder was the interest. Impleaded as defendant NO.2 in the suit was the Managing Director of respondent No.1 and since

learned counsel for the appellant concedes that said respondent was neither a guarantor nor gave any indemnity in favour of the appellant concerning the debt of respondent No.1, the question of any decree being passed against said respondent does not arise.

2. The suit has been dismissed.

3. We would have expected the pleadings in the plaint to plead that 'X' quantity of printed circuit boards, the contracted goods, had to be supplied. Followed by a pleading as to the agreed rate : 'R'. Followed further by the pleading that for the 'X' quantity of goods at the agreed rate 'R' the total amount payable was 'X x R'. 90% thereof, say 'A' was paid. Goods supplied as per contract were 'X - Y' for which the price payable would be $(X - Y) \times 'R'$. Therefore the amount refundable is $A - (X - Y) \times 'R'$. Unfortunately the pleading does not bring out as above.

4. But since the case pleaded is that the appellant paid 90% of the contracted price for the goods to be supplied by the respondent No.1 and that the respondent No.1 did not supply, as per specifications, the contracted goods, we have called upon learned counsel for the appellant to show us from the evidence that the appellant has made good its case.

5. The learned counsel for the appellant has not been unable to do so. As per learned counsel for the appellant some goods supplied were defective and in spite of assurance the defective pieces were neither repaired nor replaced, and the only document to support said case is Ex.PW-1/7.

6. A word about Ex.PW-1/7.

7. In the suit file we do not find any document exhibited as Ex.PW-1/7. Evidence by way of examination in chief of the witness of the appellant has referred to a letter dated June 08, 1990 written by the first respondent to the

appellant as Ex.PW-1/7. It is unfortunate that when exhibit marks were put on the document before the learned Local Commissioner when evidence was being recorded, nobody realized that the letter in question was not in the file and this explains the non-existence of the document Ex.PW-1/7.

8. Notwithstanding that, we have looked into the letter which has been filed as Annexure A-8 in the appeal. It reads as under:-

“No.Mktg/031/3420

08 June 90

*M/s Indian Telephone Industries Ltd.,
ESS Project,
Mankapur – 271302
Gonda (U.P.)*

Kind Attn. Shri P.K.Gupta, Manager Purchase.

*Sub: Re-inspection of PCB's supplied against your
P.O.No.MPRS/87/C/I-DC/5057/DL dtd 19.4.88.*

Dear Sir,

1. As per discussions with you and Director, Mankapur on 5.6.90 I have instructed out technical team which is doing segregation/re-inspection work at Mankapur that in order to expedite the process they should initially concentrate on segregating the various lots for pieces which do not require any rework. When this is completed for all the material, then later they can take up the balance pieces in one lot which require rework/repair. As this is likely to be a time consuming process they can reoffer them subsequently after doing the needful.

2. I have given your letter Nos.ESS:M:F: Bills dated 5.6.90 and MP RS/87-C/I/SO57/DL dated 5.6.90 to our Bank. They have informed that they will extend the guarantee as required as soon as they receive the original letter No.ESS:M:F: Bills dated 5.6.90 which is addressed to them from ITI. I will be

grateful if you will kindly check with your finance Department and ensure that this letter has been dispatched.

Thanking you,

Sincerely yours,

*Sd/-
(AJAI KUMAR)
MANAGING DIRECTOR”*

9. Though learned counsel for the appellant did not point out, but we find that the letter in question has been proved as Ex.PW-1/13. Therefore we discuss the contents of the letter.

10. Now, the letter only brings out that the respondent acknowledged that there was an issue concerning the goods supplied by it and had instructed its technical team which was doing segregation/re-inspection work at Mankapur to expedite the process and should first concentrate on identifying pieces which do not require any rework. After the work is completed such pieces which were found to be defective could be taken back for rework/repair. Unfortunately for the appellant the letter does not quantify the number of the goods. Ex.PW-1/7 is too tenuous an evidence to decree the suit. Unless there is evidence of the number of defective pieces which were supplied and remained un-rectified, the question of passing any decree does not arise.

11. As per the plaint, and as noted above the excess amount received by the first respondent was ₹18,97,170.73.

12. The appellant examined three witnesses. PW-1, the Assistant Manager Law of the appellant simply reiterated the averments in the plaint

and proved documents Ex.PW-1/1 to Ex.PW-1/15, out of which learned counsel for the appellant simply relies upon Ex.PW-1/6. The letter throws no light on the issue. It is a letter by which respondent No.1 agreed to extend the bank guarantee.

13. PW-2 was the Manager of the appellant at Manakpur and quality control incharge. He has proved no document but has deposed that 338995 printed circuit boards were defective and their value was ₹29,14,538.65. PW-3 another Manager of the appellant deposed on lines similar to the deposition of PW-2.

14. Regarding testimony of PW-1 we need to note that he was the Assistant Manager, Law and as was expected, during cross-examination had to admit that he had no personal knowledge of the case and was relying upon information given to him by the purchase department. When questioned whether any document filed by the plaintiff showed a rejection of the defective goods he admitted that none were filed. To specific query whether any document showed that the appellant wrote to the defendant that a particular number of printed circuit boards were finally rejected, he answered that there was no such letter filed. In his testimony PW-1 has proved two letters Ex.PW-1/14 dated May 30, 1989 and Ex.PW-1/15 dated June 03, 1989. Though learned counsel for the appellant makes no submissions pertaining to said letters, on a perusal thereof we find that if the two were properly proved the appellant could have established the number of printed circuit boards which were finally rejected. But unfortunately for the appellant, and for which finding we may refer to the testimony of PW-1 recorded on October 11, 2004, that these documents were assigned an exhibit mark limited for the purpose of identification of the document(s) and

not for the proof of its contents or for the proof of the document because the witness through whom the two documents were sought to be proved had no clue to the authorship of the two documents.

15. As noted above the testimony of PW-2 and PW-3 brings nothing worthy of being noted.

16. As against that we find that in his testimony Ajay Kumar DW-2, with reference to clause (iv) of the purchase order DW-1/1 has brought out that it was the duty of the appellant to retire the documents within a period of seven to ten days and that there was a delay of upto three and half months. He has proved Ex.DW-2/1 to Ex.DW-2/30. These are the pre-inspection report of inspections carried out by the quality control staff of the appellant at the site of the defendant. He has highlighted the acceptance of the goods by the quality control staff of the appellant at the pre-shipment stage. The witness has proved the bills raised by the respondent No.1 upon the appellant as Ex.DW-2/32 to Ex.DW-2/151. His testimony brings out that if not stored properly the goods could deteriorate. This aspect of the matter has been considered by the learned Single Judge in paragraph 30 of the impugned order, which reads as under:-

“30. In the light of the stand of the defendant and the admissions of PW-2 it appears that the defence set up by the defendant that the plaintiff was taking an undue time for retiring the documents which had resulted in the deterioration of the goods supplied by the defendant to the plaintiff (which normally have a shelf-life of 1-2 months) and where the goods were being taken up for inspection even six months later, the said goods i.e. the PCBs also being sensitive in nature and requiring a controlled atmosphere in which they are to be stored; the deterioration in these circumstances due to natural condition of the goods

cannot be over-looked.”

17. There is yet another aspect of the matter. In the written statement filed by the respondent No.1 it was pleaded that appellant claimed MOD VAT on the goods and in respect of which plea DW-2 has deposed to said fact. Rule 57-G (3) and (4) of the Central Excise Rules, 1944 lay down the procedure to be observed by the manufacture of the goods and record to be maintained. DW-2 has categorically deposed that the appellant never reversed the entry for the alleged defective goods in the corresponding record to be maintained by the appellant concerning the goods. We note that testimony of DW-2 on said point has not even been challenged. On this issue we find that the Manager, Law of the appellant who appeared as PW-1 was cross-examined and he gave evasive answers to specific query put to him regarding reversal of corresponding entries in the record of the appellant regarding excise duty paid on the goods.

18. We therefore find no case in favour of the appellant and against respondent No.1.

19. Concerning the two bank guarantees issued by respondent No.3, we need to look at the terms of the bank guarantees for the reason if they were unconditional and payable on demand and were alive, the appellant may possibly argue that as regards the bank it was liable to pay the amount covered by the guarantees to the appellant, leaving it open for defendant No.1 to sue for recovery. Though, such a plea may be irrelevant today because of the evidence which has been led at the trial and the findings which need to be returned in relation thereto.

20. The four communications which are relevant would be Ex.PW-1/6,

PW-1/8, Ex.PW-1/11 and PW-1/13. The four documents bring out that the bank was aware that settlement talks concerning the disputes were on between the parties and that Ex.PW-1/11 brings out that the appellant requested the bank to treat the claim under the bank guarantees as cancelled with a request that the bank guarantees be renewed. Vide Ex.PW-1/11 dated June 05, 1990 while withdrawing the claim under the guarantees the bank was requested to extend the bank guarantees, which admittedly were never extended by the bank because respondent No.1 never requested the bank to do so. There is no proof that within the original period of the bank guarantees, the two were again invoked.

21. The appeal is accordingly dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 18, 2015

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