

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.11.2016

PRONOUNCED ON 01.12.2016

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.631 of 1999

Rakesh Kumar Agarwal
Proprietor, M/s. Jaipur Fashion House
No.6, Kondy Chetty Street
Chennai - 600 001. ... Plaintiff

vs.

1. M/s. Jose Handicrafts
Partnership Firm,
No.17, Swamy Naicken Street
Chindadripet, Chennai -600 002
2. Mr.Ravikumar
Partner
M/s. Jose Handicrafts
No.17, Swamy Naicken Street
Chindadripet, Chennai -600 002 ... Defendants

Civil Suit filed under Order IV Rule 1 of Original
Side Rules 1956 read with Order VII Rule 1 CPC praying for
the following judgment and decree against the defendants.

i) directing the defendants to pay a sum of
Rs.14,93,884/- (Rupees Fourteen lakhs ninety three thousand
eight eighty four only) to the plaintiff towards their
liability as on 15.02.1999.

ii) directing the defendants to pay future interest
for Rs.10,48,511/- to the plaintiff from 15.02.1999 onwards

till the date of realisation of the above said amount at the rate of 24% per annum.

Iii) directing the defendants to pay the cost of the suit.

For Plaintiff : Mr.P.T.Perumal

For defendants : Mr.P.R.Dinesh Kumar

J U D G M E N T

The suit is filed for recovery of sum of Rs.14,93,884/- together with interest at the rate of 24% p.a for Rs.10,48,511/- from the date of plaint till the date of realisation.

2.The brief facts of the case of the plaintiff are as follows:

The plaintiff is running business of textile fabrics in the name and style of "Jaipur Fashion House". The first defendant is a partnership firm engaged in the business of processing and exporting designed textile cloth. The second defendant is the partner of first defendant firm. The plaintiff used to supply various textile fabrics to the defendants on credit basis. Every time, when the materials

were taken delivery, the second defendant used to sign in the invoice on behalf of the first respondent, as a token of acceptance of the materials, after due verification.

2.1. In the course of business transaction, the plaintiff supplied materials to the defendants, vide P.O.No.5/JOES/96 dated 25.11.1996, for which the defendants also paid advance amount of Rs.10,00,000.00. The second defendant also signed in the invoice, as a token of delivery and acceptance of the materials.

2.2. While so, the defendants approached the plaintiff for financial help of Rs.75,000/- as he required money for the business purpose. The plaintiff, in good faith, gave a sum of Rs.75,000/- by way of cheque bearing No.580872 to the defendants. As on 11.4.1997, the debit balance of the defendants, was Rs.10,48,511/-.

2.3. Inspite of repeated requests made by the plaintiff, the defendants have not chosen to show any interest in clearing their debit balance. Therefore, the plaintiff issued a legal notice on 16.12.1998 for which a reply was sent by the defendants stating that a sum of Rs.2,9793.73 alone is due to the plaintiff. Since the defendants have not adhered to the obligations undertaken under the contract entered into between them, the

plaintiff has filed the present suit.

3. The case of the defendants, in nutshell, is as follows:

It is admitted that the plaintiff and the defendants were engaged in the textile trade activities and based on the terms and conditions stipulated in the Purchase Order, the plaintiff supplied goods. As per the Purchase Order dated 25.11.1996, several varieties of items for 21,200 mts, which included grey fabric and checks and stripes fabric, with agreed price ranging from Rs.88 to Rs.99 per meter were entrusted to the plaintiff. The period stipulated in the contract for supply of grey fabrics was 30.12.1996 and 50% of checks and stripes was 15.01.1997 and balance by 15.02.1997.

3.1. It is the case of the defendants that it is not possible for them to export manufactured garments to its buyers abroad, to whom they have agreed to supply garments, after the expiry of the agreed delivery time as the buyer will reject the goods if the agreed delivery time expires. The plaintiff failed to perform the contract by supplying fabrics within the time prescribed in the Purchase Order. However, as the defendants had paid the advance amount, except no other option, they had exported the goods to

their buyers abroad with delay. But one of the buyers, namely, Shelter Island Apparel, Inc, made a Debit Note to the value of USD 28,000, stating that the goods are in poor quality, weaving defects and low density and shrinkage.

3.2. According to the defendants, the quality of supply of goods was informed to the plaintiff. But, as the plaintiff pleaded that the goods are meant only for export and it cannot be sold in local market, the defendants had no other option except to export the goods. Therefore, the defendants sent Debit Notes to the plaintiff vide debit note Nos.146 and 147 for Rs.9,98,760/- and Rs.46,177.27 respectively on 05.08.1997 as the non-supply of goods in time and in good quality caused much financial loss to the defendants.

3.3. It is also the case of the defendants that the suit is coercive and bereft of genuine claim as the plaintiff has approached this Court with delay. According to the defendants, certain documents filed by the plaintiff are different from originals. Hence, the defendants prayed for dismissal of the suit.

4. On the above pleadings, originally, this Court, on

03.02.2014, has framed the following issues:

1. Whether the debit balance of the s to the tune of Rs.10,48,511.00 in the ledger book of the plaintiff as on 11.04.1997 is correct?

2. Whether the s are liable to the plaintiff for the above said amount of Rs.10,48,511/- with 24% per annum for the unpaid balance in the trade of supplying fabrics for export?

3. Whether the defendants are correct in adjusting the Debit Note value of Rs.10,45,537.27 in the accounts of the plaintiff?

4. Whether the relief of recovery of a sum of Rs.14,93,884/- as on the date of filing the suit along with further interest of 24% be granted to the plaintiff with costs?

5. To what other reliefs the plaintiff is entitled?

5. On the side of the plaintiff, P.W.1 was examined and Exs.P1 to P7 were marked. On the side of the defendants, D.W.1 was examined and Exs.D1 to D8 were marked. The details of the documents are hereunder:

Exhibits produced on the side of the plaintiff:

S. No .	Exhib its	Date	Description of documents
1.	P-1	25.11.1996	Purchase order
2.	P-2 (series) 5 Nos.	11.4.1997	Invoice No.12/97-98
3.	P-3 (series)	-	Computer sheet of statement of accounts
4.	P-4	16-12-1998	Suit notice
5.	P-5	19-12-1998	Acknowledgment receipt of suit notice
6.	P-6 series	08.01.1999	Reply notice by defendant's counsel enclosing a SBI chque 5521601 for Rs.2973.73
7.	P7 Series	13.01.1999	Copy of the denial telegram sent by the plaintiff counsel

Exhibits produced on the side of the defendants:

S. No .	Exhib its	Date	Description of documents
1.	D-1		Order details issued by plaintiff
2.	D-2		Order details issued by plaintiff
3.	D-3		Delivery notes
4.	D-4		Letter of credit
5.	D-5		Invoice issued by the defendants
6.	D-6		Debit note
7.	D-7		Letter from State Bank of India

<i>S. No</i>	<i>Exhib its</i>	<i>Date</i>	<i>Description of documents</i>
8.	D-8		Debit note

Witnesses examined on the side of the plaintiff:

P.W.1. - Rakeshkumar Agarwal

Witnesses examined on the side of the defendants

D.W.1 - S.R.Kumar

6. Heard, Mr.P.T.Perumal, learned counsel appearing for the plaintiff and Mr. P.R.Dineshkumar, learned counsel appearing for the defendants and perused the records.

7. Learned counsel for the plaintiff submitted that the plaintiff is the supplier of textile fabrics. The first defendant is the Firm and the second defendant is a partner functioning on behalf of the first defendant. The defendants placed an order to the plaintiff for supply of textile fabric worth Rs.19.73 lakhs for the purpose of export, for which the defendants also paid the advance amount of Rs.10,00,000/- in three installments. It is a trade practice that 50% payment of advance is must for accepting the order.

8. The learned counsel for the plaintiff further submitted that though the defendants placed Purchase Order on 25.11.1996, it was signed by both sides on 30.11.1996. As per the Purchase Order, the supply was to commence on 30.12.1996 and end on 15.02.1997. Since there was a delay of 35 days in making the major portion of advance payment, the plaintiff could not supply the entire consignments within the time stipulated in the Purchase Order. The second defendant accepted the entire consignments by personally checking the qualities and verifying the quantities and also affixing his seal of acceptance of the delivery.

9. It is the submission of the learned counsel for the plaintiff that as per the terms and conditions stipulated in the Purchase Order, if there is any defect in supply, the defendants ought to have informed the defect by written complaint within seven days from the date of acceptance of the consignments. Since the defendants have accepted delivery and have not chosen to communicate about any alleged defects within the stipulated time, it indicates that there was no defect or whatsoever in the fabrics. However, the defendants have not chosen to pay the balance

amount.

10. It is contended by the plaintiff's counsel that the defendants have sent a reply to the legal notice by giving false statement of accounts, and refunding a sum of Rs.2973.73 by way of cheque. This attitude of the defendants would clearly prove that they played an unfair game in order to escape the contractual liability of Rs.10.48 lakhs against the supply and interest for that amount at the rate of 24% as per invoice terms.

11. It is also the submission of the learned counsel that the delay cannot be attributed on the part of the plaintiff as the defendants have not paid the major portion of advance amount within the stipulated period, as agreed in the contract. Further, the second defendant himself has personally verified and taken delivery of the goods without any protest. That apart, the second defendant has not even informed about the alleged defect within seven days as per the contract. This would clearly show that the contention of the defendants is nothing but beyond imagination. Furthermore, the contract also clearly stipulates that the plaintiff was not responsible for any damages or loss occurred in transit. Having accepted the delivery without any protest, now the defendants cannot put

forth false contentions that the plaintiff supplied defective goods with delay.

12. It is further submitted that that though the defendants stated that the consignments were sent to the US buyer on 17.7.1997, no document, has been produced to prove the same except D6. Though the defendants have produced Ex.D6, Debit Note dated 17.07.1997, it is only an after thought as the said Debit Note was not informed to the plaintiff at any point of time before the filing of the suit. It appears that the last supply of goods by the plaintiff to the defendants was on 11.04.1997 and goods have also been taken delivery by the defendants latest by 20.04.1997. If really, goods were found defective, the concerned US buyer ought to have informed about the same to the defendants immediately, but the same has not been done. It is well known that no prudent man would wait to send a letter till July. But it is the case of the defendants that he received letter from the US buyer on 17.07.1997 about the defective goods, therefore, Ex.D6 cannot be given much importance. Whereas, the Purchase Order Ex.P1 clearly shows that whenever, any defect is found, the purchaser has a right to return the goods. The defendants have neither informed the alleged defects in the goods, nor returned

the goods. The above conduct of the defendants clearly shows that they are making false claim to defeat the legally payable amount. Ex.D6 also silent about the goods supplied by the plaintiff and, hence, the defendants cannot take advantage of the same. Since there is no dispute with regard to the purchase of fabrics and also the accounts, the plaintiff is, certainly, entitled for decree as prayed for.

13. Countering the arguments of the plaintiff's counsel, the learned counsel for the defendants submitted that terms and conditions set out in Ex.P1 is the foundation for the entire case. Even though, there is no dispute with regard to the consignment of contract, it is the contention of the learned counsel that the plaintiff has not supplied the goods within the time stipulated in the contract. A specific agreement, Ex.P1, was made only to accommodate the goods, as per the terms and conditions set out therein. The defendants have paid Rs.10,00,000/- as advance for the work, which was to be completed on 15.02.1997. Though the plaintiff has to complete the supply of first part of goods on 30.12.1996, the same were supplied only on 23.01.1997. Since there was a delay in supplying the goods by the plaintiff, the defendants were

not in a position to deliver the goods to the US buyer in time. Further, it was found that there were weaving defects in the goods and the same is marked under Ex.D6, letter dated 17.7.1997. P.W.1, in his cross examination, has admitted that the conditions stipulated in Ex.P1 would bind the parties. The time is the essence of the contract as per Section 55 of the Indian Contract Act 1872.

14. It is submitted by the learned counsel for the defendants that since defective goods supplied by the plaintiff were delivered to the US buyer, they have sent Debit note dated 17.7.1997. It is also the submission of the learned counsel for the defendants that because of the inordinate delay, that too, with defective quality in supply of goods, the defendants faced huge financial crisis. Therefore, the plaintiff having committed breach of contract, cannot escape from the clutches of law.

15. It is further submitted by the learned counsel for the defendants that the defendants have already sent a Debit Note under Ex.D8 to the plaintiff for a sum of Rs.9.98,716 and Rs.46,777.27 respectively for quality defects and delay in delivery, even prior to the legal notice. Thereafter, the defendants have sent a cheque for a sum of Rs.2973.73, after deducting the debit advice

amount of Rs.10,45,537.27. Since the defendants have already settled the amount, they are not liable to pay any further amount. Hence, the learned counsel for the defendants prayed for dismissal of the suit.

Issue Nos. 1 to 5

16. Admittedly, the suit has been filed by the plaintiff for recovery of amount on the basis of supply of fabrics to the defendants. From the evidence of both sides, it can be easily inferred that there is no dispute with regard to the supply of fabrics by the plaintiff to the defendants. The entire dispute arose with regard to Ex.P1, Purchase Order dated 25.11.1996. On a careful perusal of Ex.P1, it is seen that Purchase Order was placed by the defendants to the plaintiff for supply of various fabrics. Though the Purchase Order was dated 25.11.1996, contract was signed only on 30.11.1996. There is no dispute with regard to the aforementioned Purchase Order and the delivery of goods.

17. The only contention of the defendants is that the plaintiff has not supplied the goods, as per the terms and conditions set out in Ex.P1, Purchase Order. On a careful perusal of Ex.P1, it is clear that the defendants had ordered about 21,200 meters of several varieties of

fabric items with agreed price ranging from Rs.88 to 99 per meter. It is also set out in the Purchase Order that the first item was to be delivered by 30.12.1996 and 50% of the second item by 15.01.1997 and the balance 50% by 15.02.1997. This fact is also not disputed by both sides.

18. It is the contention of the plaintiff that it was agreed to supply goods, as per the terms set out in Ex.P1. Since there was a delay of 35 days in making advance payment of major portion of the amount, the plaintiff could not deliver the goods in time. On a careful perusal of Ex.P2 series, Invoices, it is clear that all the consignments were supplied to the defendants from 23.01.1996 to 11.04.1997.

19. It is to be noted that though the plaintiff failed to supply the goods within the time stipulated in the contract, delivery of consignments were taken by the defendants, without any protest, whatsoever. It is an admitted fact that at no point of time, the defendants have chosen to send protest letter to the plaintiff with regard to the alleged delay in delivery. It is also admitted that the defendants have paid a sum of Rs.1,75,000/- on 26.11.1996 and another sum of Rs. 1,75,000/- on 26.12.1996 and lastly a sum of Rs. 6,50,000/- on 01.01.1997 by way of

cheques as advance. It is to be noted that huge sum of of Rs.6,50,000/- was paid only on 01.1.1997, i.e. after the agreed date of delivery of first batch of goods. In this regard, it is the contention of the plaintiff that as per the trade practice, the delivery of consignment would take place only after making payment of 50% of advance amount. Only due to the delay caused by the defendants, in paying the major portion of the advance amount, the delivery was delayed.

20. It is further to be noted that the conduct of the defendants in receiving the delivery, without any protest, whatsoever, would fortify the plaintiff's case that the delay in delivery of consignment was only due to the delay in making the major portion of advance. P.W.1, in his cross examination, has also asserted that the delay in delivery was due to the delay in payment of advance. The conduct of the defendants in receiving the goods without any protest would clearly indicate that he has waived the terms specified in Ex.P1 as to the delivery of goods. In this regard, it is useful to refer Section 55 of the Indian contract Act, 1872, which reads as follows:

"55. Effect of failure to perform at

fixed time, in contract in which time is essential.- When a party to the contract promises to do a certain thing at or before a specified time, or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.- If it was not the intention of the parties that time should be the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promiser for any loss occasioned by him by such failure.

Effect of acceptance of performance at time other than that agreed upon.-

If, in case of a contract voidable on account of the promiser's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than the agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so. "

From the above, it is very clear that the promisee accepts performance of such promise at that time other than the agreed, later he cannot claim compensation for any loss occasioned by the non-performance of the promise, unless he has given a notice at the time of acceptance.

21. As already discussed above, in this case, the defendants have not shown any protest as to the delay in delivery of goods. If really, it was the intention of the defendants to abide by the contract, as set out in Ex.P1, the moment, the delivery was delayed, the defendants could have very well repudiated the contract by making protest. The conduct of the defendants in accepting the

delivery without any demur, clearly established the factum of waiver of time limit by the defendants as set out in Ex.P1 contract. Furthermore, the conduct of the defendants clearly shows that time stipulated in Ex.P1 for delivery is not the essence of the contract. If it is the intention of the parties that time is the essence of the contract, the defendants ought to have taken some steps at the initial stage itself to repudiate the contract.

22. It is well settled that non-performance of the contract makes the contract voidable at the option of the promisee. Admittedly, in this case, the defendants, have not taken any steps to repudiate the contract. Therefore, the conduct of the defendants in accepting the delivery without any demur makes it clear that time is not the essence of contract. On the other hand, it gives rise an inference that time was extended further, by mutual consent of the parties. Particularly, in the sale of goods, if the delivery was not effected in time, as per the Purchase Order, the contract is always voidable. If the purchaser failed to repudiate the contract in time, it can be easily inferred that the purchaser kept the contract alive and thereby proved that the time was not the essence of the contract.

23. In this case, it is the contention of the defendants that due to the delay in delivery and also the defects in goods, their exporter in America, namely, Shelter Islan Apparel Inc sent a Debit Note for USD 28,000/- and the xerox copy of the same was marked as Ex.D6. A perusal of Debit Note Ex.D6, shows that the goods were found in inferior quality and had shrinkage. The Debit Note also clearly shows that previous consignment which was sent to Mexico also had similar defects and no Debit Note was made as it was their first shipment.

24. It is to be noted that P.W.1, in his evidence, has categorically admitted that such export was made through air only to America and not to Mexico etc., Therefore, it creates a doubt that the Debit Note relied upon by the defendants is with regard to the subject matter of the suit or not. Further, the Debit Note Ex. D6 is dated 17.07.1997, whereas Ex.P6, reply notice was sent by the defendants on 08.01.1999 to the plaintiff. On a careful perusal of Ex.P6 reply notice, it appears that the alleged Debit Note Ex.D6 does not find place. If really the Debit Note was received by the defendants on 17.07.1997 for USD 28,000/- it ought to have found place in Ex.P6. That apart, immediately after the receipt of Ex.P6, the plaintiff sent telegrams by

denying the contentions mentioned in Ex.P6, which is evident from the certified copy of the telegrams Ex.P7 series. Further, other particulars also found missing in Ex.P6 reply notice.

25. It is the contention of the defendants that they issued Debit Notes for USD 28,000/- under Ex.D8 to the plaintiff on 05.8.1997 itself. It is to be noted that the so called Debit Notes allegedly sent to the plaintiff have not at all been established by the defendants. Though it is the contention of the defendants that they have sent these Debit Notes to the plaintiff and also sent a cheque for Rs.2973.73, there is no piece of paper available to infer that the Debit Notes have been sent to the plaintiff as early as on 05.8.1997. But it is the contention of the defendants that the said Debit Notes were served on the servant of the plaintiff. If that is to be true, nothing prevented the defendants from filing postal acknowledgment card. All these facts would clearly show that the contention of the plaintiff that Ex.D6 has been fabricated at a later stage only to non suit the plaintiff has to be accepted.

26. D.W.1, in his evidence, has also admitted that his brother is living in America. It is to be noted that

P.W.1 put the suggestion to the effect that Ex.D6 was created for the purpose of the case. The above suggestion coupled with the fact that the mention about Ex.D6 found missing in the reply notice and further the fact that no proof, whatsoever filed to show that Ex.D8 series, Debit Notes were sent to the plaintiff, would fortify the contention of the plaintiff that Ex.D6 is created only for the purpose of the case.

27. It is the main contention of the defendants that they could not pay the amount due to the poor quality of fabrics and Debit Notes issued by the American company. It is to be noted that the delivery was effected in March itself. Admittedly, last delivery was effected on 11.4.1997. D.W.1 in his cross examination also admitted that he used to send the consignments by way of air to the American buyer and the American buyer will clear the goods one week thereafter. That being the case, goods must have been received by the American buyer in the middle of April 1997 itself and they could have very well verified about the quality of the goods on the same month, whereas Ex.B6, alleged Debit Notes were issued only in the month of July 1997. This fact would also clearly shows that the alleged Debit Notes are set up only for the purpose of the

case. No buyer, would check the goods after three months from the date receipt of delivery. Therefore, the contention of the defendants that he could not pay the amounts due to inferior quality of the goods cannot be accepted.

28. It is further to be noted that, as already discussed above, Ex.D6, the alleged Debit Note, was never mentioned anywhere in the reply notice, whereas it is only pleaded in the year 2006, when the written statement was filed. Therefore, the contention of the defendants that due to Ex. D6 he could not pay the amount also cannot be countenanced. Furthermore, even as per Ex.P1 contract, the defendants have right to return the goods, if any defects were found in the goods. Since the defendants have not chosen to return the goods, it should be easily construed that the goods are not defective.

29. Though the defendants have relied upon Ex.D7, the letter said to have been issued by Assistant General Manager, State Bank of India to show that the bills were paid, the author of the letter has not been examined. Therefore, mere production of letter cannot be given much importance. As far as receipt of the goods is concerned, there is no dispute by the defendants. Though it is

stated by D.W.1, in his evidence, that the delivery was effected on piecemeal basis in 20 instalments, to establish the same, no documents, whatsoever were filed. Further as per the evidence of P.W.1, the advance amount should have been paid in the month of November but the same was paid only in the month of December and January, which is also not disputed by the defendants. Ex.P3 Statement of accounts for a sum of Rs.10,48,511/- is also not denied by the defendants. Ex.P1 clearly shows that if any defect is found with regard to the supply of goods, the same should be informed within 7 days.

30. Having regard to the facts that the defendants having accepted the goods without any demur and also receiving a sum of Rs.75,000/- from the advance amount paid by the defendants from the plaintiff, now they cannot take a stand that the goods were defective and the Debit Notes were issued.

31. As already discussed as the Debit Note itself found to be fabricated one and also Ex.P3 statement of accounts is also not disputed either in the written statement or in the evidence of P.W.1, this Court is of the view that the defendants are liable to pay the amount as per the Purchase Order. Accordingly, issues are

answered in favour of the plaintiff. Therefore, the plaintiff is, certainly, entitled to recovery of the suit amount with subsequent interest at the rate of 6% p.a. from the date of the plaint till the date of realisation.

In the result, the suit filed by the plaintiff for recovery of a sum of Rs.14,93,884/- is decreed with subsequent interest at the rate of 6% p.a. on Rs.10,48,511/- from the date of plaint till the date of realisation with costs.

sd/.N.S.K.J

01.12.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/23.02.2017

COURT OFFICER

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