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

Date of Decision- 29.07.2019

+ RFA 333/2019

NATIONAL TEXTILE CORPORATION Appellant
Through: Mr.Ajit Puduserry with Mr.Ajeet
Singh Verma, Advs.

versus

GENEX INDUSTRIES LTD & ANR. Respondents
Through: None.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

RFA 333/2019 & C.M. No.17215/2019 (for stay)

1. The present appeal assails the judgment and decree dated 31.08.2017 passed by the learned Additional District Judge in Civil Suit No.1706/2000 wherein the learned Trial Court has dismissed the suit instituted by the appellant/plaintiff seeking recovery of a sum of Rs.13,80,725/- along with interest from the respondent.
2. At the outset, it may be noted that the aforesaid suit filed by the Appellant was initially decreed in its favour as the respondents had been proceeded ex parte. However, on an application under Order 9 Rule 13 CPC moved by the respondents, the judgment was set aside and the suit now stands dismissed under the impugned order.
3. The brief facts, as emerge from the record are that the appellant entered into an agreement with the respondents for combining of 1 FCL

of Merino Wool imported from Australia and a work order in this regard was issued to the respondent dated 02.03.2006. As per the appellant, the said wool which was being imported from Australia had been certified by the Australian authority to have a thickness of 21.5 microns. As per the terms of the work order, the respondent was to take delivery of the wool directly from the customs authorities and was to hand over the resultant wool after combing the same with a condition, that thickness of the combed wool should be within +/- 0.5 microns from the original wool.

4. The respondents carried out the requisite combing of the wool, whereafter delivery of the material was taken by the appellant. It was claimed by the appellant that the samples of the wool collected from the respondents were sent to an independent Government laboratory at Ludhiana from where it was found that the thickness of the combed wool was ranging between 22.4 to 22.8 microns and was much more than what had been agreed between the parties.

5. It was further claimed that after receiving the said report, the appellant sent a request to the respondent to replace the material, which it failed to do. The appellant further claimed that on account of the inferior quality of wool supplied by the respondents it was not able to fulfil an order received from the ordinance clothing factory and had to consequently suffer a loss of Rs.8,19,979/-. The appellant, therefore, issued a legal notice to the respondents, which was replied to by them denying that there was any defect in the material produced by them. In these circumstances, the subject suit was instituted by the appellant.

6. The respondents/defendants in their written statement denied that there was any breach of contract on their part or that there was any defect in the combed wool supplied by them. It was also denied that the appellant had suffered any loss on account of the alleged defective material supplied by the respondents. The appellant then filed a replication reiterating its claims.

7. Based on the pleadings of the parties, the learned Trial Court framed the following issues:-

“Issue no.1: Whether the present suit has been signed, instituted and verified by competent person? OPP.

Issue no. 2: Whether suit is bad for misjoinder of necessary parties? OPD.

Issue no. 3: Whether the plaintiff is estopped by its own act and conduct for filing the present suit? OPD.

Issue no. 4: Whether this court has no jurisdiction to try and entertain the present suit? OPD.

Issue no. 5: Whether plaintiff is entitled to recover an amount of Rs. 13,80,725/- along with interest as claimed in the suit? OPP.

Issue no. 6: Relief.”

8. In support of its claim, the appellant/plaintiff examined two witnesses Shri.S.C.Sogani, its then Manager (Finance and Accounts) as PW-1 and Sh. V.K.R Machiraju, Quality Assurance officer, Textile Committee, Ludhiana Punjab as PW-2. The learned Trial Court after considering the evidence led by the parties and the submissions made by their respective counsel has dismissed the appellant’s suit under the

impugned judgment by holding as under:-

“21) Issue no. 5: Whether plaintiff is entitled to recover an amount of Rs. 13,80,725/- along with interest as claimed in the suit? OPP.

The onus of proving this issue was upon the plaintiff. As per the case of plaintiff a contract Ex. PWI/3 was given to the defendant for the combing of the wool which plaintiff has purchased from Australia. It is further contended on behalf of plaintiff that as per the terms of the contract defendant was required to maintain a particular diameter of the wool in Microns to preserve the quality of combed material. This stipulation was the essence of the contract. It is contended that the Australian authority had already given a certificate that material contains 21.5 micron quality of wool. Accordingly, as per the work order Ex. PWI/3 the defendant was expected to maintain the said micron level and there shall not be a variation of more or less than 0.5 micron. It is further contended that after the delivery of the combed material plaintiff has sent the same for testing to an independent lab. The samples were tested and it was found that there has been variation of more than 0.5 micron in the diameter of the combed material. Therefore, plaintiff sent a letter dated 25.05.2000 alongwith test reports to the defendant. It is further contended that despite reminders defendant did not replace the material. Plaintiff has claimed that workers of the plaintiff had to sit idle during this time and plaintiff was not able to fulfill the prestigious business order received by it as defendant has not adhered to prescribed standard of quality. There has been loss of goodwill and reputation also. Hence, after adding the payment which was made to the defendants and assessing damages as per the abovementioned criterias, plaintiff has claimed a sum of Rs. 13,80,725/-.

22) *In order to prove the said averments, plaintiff has examined its the then Manager (Finance and Accounts) as PW-1. PW-1 has reiterated the above mentioned contents on oath in examination in chief. It is also stated on behalf of plaintiff that samples of combed material were collected in presence of the representatives of defendants. However, plaintiff has not placed on record any document signed by such representatives showing that the samples were collected from the combed material in presence of the defendant's representatives. In the plaint it has been averred that after taking out the samples signatures of the representatives of both the parties were taken on paper with the respect to taking out the sample. But despite this averment no such paper has been produced in the court nor any such paper is annexed with the lab report. Neither any receipt has been placed on record nor such representatives was examined by the plaintiff to show that samples were taken in presence of representatives of the defendant. Defendants have contended that infact plaintiff has taken the delivery of entire material and has made the payment at the time of delivery itself. Defendant has denied the fact that the samples were taken out for testing by the plaintiff s representatives at the time of delivery. Hence, it was incumbent on all the plaintiffs to prove the said fact. As already discussed above, plaintiff has not adduced any evidence in support of this averment and hence failed to prove that the samples of the combed material were taken in presence and with consent of the defendants.*

23) *Further, PW-1 in his cross examination has deposed that after taking the samples plaintiff has sent the same at the lab for examination. There is no evidence on record to ascertain that the samples which were collected at the time of delivery and the samples which were sent for examination were the same. As per the cross-examination of PW-1 neither he has collected the samples himself nor he has deposited the same in the lab*

for testing. The person who has deposited the samples with the lab has not been examined by the plaintiff. The lab report does not accompany any letter signed by the representatives of both the parties showing that samples were taken as averred by the plaintiff. Hence, from the testimony of PWs and the documents on record it cannot be ascertained that the samples were taken from the same combed material which were lifted by the defendants for the purpose of combing and the same samples were sent to the lab for testing.

24) The photocopies of lab test report has been placed on record by the plaintiff as Ex. PW2/2. In order to prove the said reports, plaintiff has examined PW-2. PW-2 has stated that the original lab reports have been destroyed vide head office order Ex. PW2/1. Admittedly, PW-2 has neither participated in the testing of the samples nor he has prepared the report. As per the testimony of PW-2 the report Ex. PW2/2 has been issued under the signatures of Sh. Balram Kumar and Sh. A.K Dhawan. Said Sh. Balram has stated to be retired but it has been stated that Sh. A.K Dhawan was still working in lab and posted at Mumbai. PW-2 has not identified the signatures of Sh. Balram Kumar or Sh. A.K Dhawan on Ex. PW2/2. Neither he has deposed that he has seen them in ordinary course of nature signing or writing. It is not that PW-2 has tested the samples. Original of PW-2 was not available and plaintiff has not made any effort to examine the person who have carried out the test and who has prepared the test report Ex. PW2/2. Perusal of Ex. PW2/2 shows that it bears the signatures of Sh. A.K Dhawan also. As per the testimony of PW-2 Sh. A.K Dhawan was posted at Mumbai which shows that he was available for examination. Despite that plaintiff did not take any steps for examination of Sh. A.K Dhawan so as to prove the copies of lab reports.

25) Besides this, there are other contradictions in the case of plaintiff PW-1 in his cross-examination has admitted that as per Ex.PW1/8, the wool which was imported was of different micron quality. It is clear from job order Ex. PW1/3 that quantity of the material with its micron level was not mentioned in Ex. PW1/3. The legal notice sent by the plaintiff and the test report simply mentions the diameter of combed material in microns. It nowhere mentions the previous diameter of the said material. As the material which was delivered for combing itself had different diameter, hence, from the test report it cannot be ascertained whether there was variation of more or less than 0.5 microns in the diameter after combing by the defendants. Further, as per the terms of the Job Work Contract Ex. PW1/3 the only stipulation is that if the diameter of the combed material varies more or less than 0.5 microns then the independent lab report should be binding on both the parties. It nowhere states that in case of change in diameter the plaintiff will be entitled for compensation. Thus, even if it is taken that plaintiff has successfully proved that the defendant has changed the diameter while combing and thus breached the terms of contract, then also the said fact alone will not entitle the plaintiff for damages. In order to claim damages plaintiff has to prove that it has suffered loss due to change in the agreed diameter and due to non fulfillment of a condition in the contract. The work order which plaintiff has received as averred has not been placed on record. PW-1 in his cross-examination has admitted that plaintiff has nowhere given the details of the workers who had to sit idle due to the fact that inferior quality of material was supplied by the defendants. No other evidence has been placed on record on behalf of plaintiff in support of the amount claimed by the plaintiff.

26) Written submissions has been filed by the plaintiff wherein it has been stated that DW-1 was not duly

authorized to depose in the court. Firstly as discussed above, even if the testimony of DW-1 is not considered than also plaintiff has to discharge the onus by leading evidence itself which plaintiff has failed to discharge. Further, any person who is aware about the facts of the case can depose in the court and an authority letter for the said person for deposing is not required. Hence, the said argument is not tenable.

27) In view of the above discussions, it is clear that plaintiff has failed to prove that the combed material which was delivered by the defendant was of inferior quality or there was a variation of more or less than 0.5 microns. Onus of proving the said fact was upon the plaintiff and as plaintiff has not proved the same, present issue is decided against the plaintiff and in favour of defendants.”

9. Learned counsel for the appellant has not been able to dispute the position as recorded in the impugned judgment that absolutely no evidence was led by the appellant in support of its claim for damages on account of the loss suffered by it as a consequence of the inferior quality of material claimed to have been supplied by the respondents. In fact, the appellant has not been able to demonstrate either before the learned Trial Court or before this Court that the samples which were alleged to have been found of inferior quality were actually those which have been taken from the same material, which after being lifted by the respondents from the custom house and had been combed by them. Since the appellant did not lead evidence in support of any of its contentions, the learned Trial Court was fully justified in dismissing the appellant's suit for claim of damage.

10. I also find that the primary ground urged by the appellant in the present appeal is that the learned Trial Court had failed to appreciate the effect of the judgment dated 13.06.2012, wherein the same stand taken by the respondent stood rejected by the learned Civil Judge (Junior Division) Ludhiana. It is urged that during the pendency of the subject suit filed by the appellant, the respondents had instituted a suit before the learned Civil Judge (Junior Division) Ludhiana seeking an order restraining the appellant from invoking the bank guarantee of Rs.2 lakhs against the respondents, which suit stands dismissed.

11. A perusal of the aforesaid judgment dated 13.06.2012 on which heavy reliance is sought to be placed by the appellant in support of its claim that the respondent has been held to be guilty of having committed breach of the contract shows that the said decision was based on the earlier ex-parte decree passed in the present suit itself, which ex-parte decree as noted hereinabove already stands set aside and, in fact, after trial the very suit had been dismissed under the impugned judgement. In these circumstances, no reliance can be placed on the decision dated 13.06.2012 as the same was based on an ex-parte decree in favour of the appellant, which decree stands set aside. At this stage, learned counsel for the appellant submits that on an appeal preferred by the respondent, even the very suit, which was dismissed by the City Civil Court, Ludhiana as withdrawn and, therefore, the primary ground taken by the appellant in its appeal also no longer survives.

12. The appeal being meritless is dismissed along with the pending application.

C.M. No.22491/2019 (for delay of 460 days in re-filing the appeal)

13. The present application seeking condonation of delay of 460 days delay in re-filing the appeal.

14. Learned counsel for the appellant submits that though the appeal was filed within the period of limitation, there has been a delay on the part of the appellant in re-filing the same, as the appellant was not able to obtain certified copies of the some of the records of the learned Trial Court, due to a communication gap between him and the appellant's counsel appearing before the learned Trial Court. He, therefore, prays that the delay in re-filing be condoned.

15. As the appeal is found to be meritless and is being dismissed, no orders on the present application are warranted.

16. The application is disposed of as infructuous.



REKHA PALLI, J

JULY 29, 2019

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