IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL SUIT NO. 4 OF 1997

MMTC Limited
Under Indian Companies Act, 1956 and
having its registered office at Core 1,
Scope Complex, Lodhi Road, New Delhi,
and an office at Mittal Tower, A & B Wings
First and Second Floors, Nariman Point,
Mumbai 400 021. .. Plaintiff
Vs.
Samarth Auto Care Private Limited
a Company incorporated under the
Companies Act, 1956, and having its
registered office at 304, Nav Ratan Building,
3rd floor, Carnac Bunder, P.D'Mello Road,
Mumbai 400 009. .. Defendant

Mr.P.N. Ganwani with Mr.B.G. Saraf for plaintiff.

None for defendant.

CORAM : N.J. JAMADAR, J.
DATE : 31ST JANUARY 2020

ORAL JUDGMENT :

1. This commercial division suit is for recovery of an amount of Rs.1,02,73,627/- alongwith a further interest at the rate of 24.5% p.a. on the sum of Rs.87,50,154/- from the date of the suit till realization.

2. The material averments in the plaint can be stated in brief as under :-

(a) The plaintiff is a company registered under the provisions of the Companies Act, 1956. The plaintiff deals in the business of multi merchandise trading. The defendant is also a company registered under the provisions of the Companies Act, 1956. The defendant carries on the business of distribution of tyre sealant.

(b) In or about September 1994, the defendant approached the plaintiff to import on the defendant's behalf 'tyre sealant' which was then being sold in the United States of America under the trade mark "Tyretite" for its distribution in India and also for export to the neighbouring countries through the plaintiff. The terms and conditions of the contract were incorporated in a Memorandum of Understanding executed on 28-09-1994 ("MOU").

(c) The plaintiff opened the first letter of credit bearing No.301/90/94 dated 5-10-1994 for an amount of US$ 93,827 through Indian Overseas Bank and in favour of 'Tyretite International, U.S.A.' for 800 cans of Tyretite and 50 Injection

Kits. At the defendant's request, the plaintiff had opened the second letter of credit bearing No.301/101/94 dt. 15-11-1994 for an amount of US$ 92,227/- through Indian Overseas Bank in favour of 'Tyretite International, U.S.A.' for 800 cans of Tyretite and 50 Injection Kits. The defendant furnished the bank guarantees in the amount equivalent to 10% of the value of the material to be imported plus customs duty.

(d) The Tyretite International dispatched 50 Injection Kits, as a part of first consignment by air. The other part of the consignment, namely, 800 cans of Tyretite arrived by sea. The defendant purchased 50 Injection Kits from the plaintiff in or around December 1994, on high air basis. The defendant requested the plaintiff to store 50 Injection Kits, part of second consignment in the plaintiff's godown. The plaintiff called upon the defendant to lift the material by communication, dated 1-03-1995 and 9-03-1995. The defendant, by their letter dated 24-03-1995, requested the plaintiff to keep the second consignment in Customs Bond for some time. Latter on, by letter dated 11-04-1995, the defendant proposed to lift the entire lot in five installments and gave a schedule for taking delivery under which the last quantity of 200 drums was to be lifted by May 1995. The defendant also requested the plaintiff to keep the second consignment in CWC Bond so as to save on customs duty.

(e) In the meanwhile, the defendant made certain payments towards part of the price of the goods. Eventually, the defendant failed to lift 175 drums out of the first consignment and the full second consignment. Hence, the plaintiff called upon the defendant to take delivery of the said goods and pay for them by letter dated 30-11-1995. Further correspondence was exchanged between the parties. Ultimately, the defendant failed to clear the consignments and pay the price of the goods. The plaintiff was, thus, constrained to encash the bank guarantees furnished by the defendant aggregating to Rs.10,50,000/-. A sum of Rs.87,50,154/- became due and payable by the defendant to the plaintiff on account of the import of the aforesaid goods at the instance of the defendant. Hence, the suit for recovery of the said amount along with further interest @ 24.5% per annum.

(f) The defendant resisted the claim by filing the written statement. Though the factum of import of the tyre sealant at the instance of the defendant by the plaintiff is not disputed, yet, it is contended that when the defendant took delivery of 675 Drums and 50 Injection Kits (part of the first consignment), the product failed to produce the desired results as it had already lost the sealant property. The defendant contends that the delay on the part of the clearing agent of the plaintiff to clear the consignment in time, resulted in the product losing its property and thus it failed. The defendant asserts that the plaintiff had supplied defective goods resulting in heavy losses and, thus, the defendant was justified in refusing to accept the delivery of the balance part of the first and the second consignment. Thus, the substance of the defence raised by the defendant is that of delayed clearance of the goods, post import, resulting in the product losing its sealant value and the consequent loss of business and reputation in the market.

3. In the light of the rival pleadings, this Court on 19th June 2014 framed the following issues :

“1. Do the plaintiffs prove that they imported first consignment of 50 injunction kit and 800 drums of tyretite on or about 23rd February 1995?

2. Do plaintiffs prove that they opened a Letter of Credit for USD 93827 in favour of M/s. Tyretite International, USA for import of the aforesaid first consignment?

3. Do defendants prove that they opened a Bank Guarantees in favour of plaintiffs towards the 10% value of the material to be imported plus custom duty and the consignment is not as per MOU dated 28th September 1994?

4. Do defendants prove that they have lifted the first consignment comprising of 50 injunctions and 800 drums of Tyretite by making 100% payment to the plaintiffs and failed to lift 175 drums out of 800 drums of the first consignment?

5. Do plaintiffs prove that they opened a Letter of Credit for USD 92227 in favour of M/s. Tyretite International USA for import of second consignment of 50 injunctions Kit and 800 cans of Tyretite?

6. Do plaintiffs prove that 50 injunctions kits of second consignment were cleared by them by making payment of Customs duty amount to Rs.29,874/- and moved the consignment in their go down due to failure of the defendants to lift the same?

7. Do plaintiffs prove that the defendants had make request to keep 800 cans of Tyretite in Customs Bond for some time to save on customs duty?

8. Do plaintiffs prove that by their letter dated 11th April 1995 the defendants had proposed to lift the entire lot in five installments and gave schedule but did not lift the material?

9. Do plaintiffs prove thta their Bankers Indian Overseas Bank remitted the sums given in the two letter of credits to M/s. Tyretite International, USA as the costs of the two consignments of the materials so imported?

10. Do defendants prove that they have made the payment of Rs.52,75,000/- towards the purchase of first consignment?

11. Do defendants prove that on 25th September 1995 an amount of Rs.40,44,770/- due and payable by them to M/s. Vilas Transport Company, a sister concern of the defendants was adjusted against the dues of the defendants and issued delivery order for 475 cans of Tyretite?

12. Do plaintiffs prove that on 30th November 1995 the defendants had not cleared 175 cans of the first consignment and full materials of the second consignment?

13. Do defendants prove that they have lifted both the consignments imported by the plaintiffs on behalf of them by making full payment thereof?

14. Do plaintiffs prove that the defendants are liable to pay Rs.1,02,73,627/- along with interest @24.5% p.a., on the sum of Rs.87,50,104/- from the date of the suit till payment and /or realization?

15. What decree?

16. What order?"

4. In order to substantiate the averments in the plaint, the plaintiff filed affidavits in lieu of examination in chief of Ms. Sunita Parkar (PW-1), Additional General Manager, and Mr.Suresh S. Taishete (PW-2), Assistant General Manager (Law). By order dated 19-12-2014, this Court had permitted the plaintiff to lead the secondary evidence of the documents and admitted and marked documents in evidence. A Court Commissioner was appointed to record further evidence of the witnesses, whose affidavits in lieu of examination in chief were also accepted by the said order.

5. As the advocate for the defendant declined to cross-examine the plaintiff's witnesses, the Court Commissioner placed the matter before the Court with report to that effect. By an order dated 17-01-2017, this Court noted that the notice issued to the defendant No.1-Company was returned unserved with the remark "Company not found at given address" and even the status of the defendant company was shown as "Defunct" on the website of the Registrar of Companies. Thus, this Court was constrained to close the cross-examination of the plaintiff's witnesses by the defendant. This Court has also closed the defendant's evidence and directed that the matter be listed for arguments.

6. I have heard Shri P.N. Ganwani, the learned counsel for the plaintiff on 8th January 2020. The matter was adjourned for arguments on behalf of the defendant. None appeared for the defendant on two consecutive dates. Hence, the matter is taken up for passing orders.

7. From the pleadings of the parties, the following uncontroverted facts emerge :

> There is no dispute over the fact that the plaintiff, at the instance of the defendant, had imported two consignments of tyre sealant namely "Tyretite" from U.S.A. It is indisputable that the plaintiff had opened two letters of credit. The bank had debited the accounts of the plaintiff with the amounts of the said letters of credit. The import of the goods in India is incontestable. There is no controversy over the fact that the defendant had not taken delivery of 975 Drums of Tyretite. The controversy between the parties revolves around the alleged failure of the plaintiff to clear the goods from the Customs, in time, and the resultant loss of the sealant property of the said product.

8. The claim of the plaintiff that the plaintiff had imported the goods at the instance of the defendant in pursuance of the terms of the contract finds support in the MOU dated 28-09-1994, Exh.'A' to the plaint. The claim of the plaintiff that it had opened the letters of credit and the concerned bank had remitted the amount to M/s. Tyretite International, the consignments were duly imported and the defendant committed default in taking delivery of 975 drums and 50 Injection Kits, despite communications emanating from the plaintiff and the corresponding assurances to lift the consignments from Customs and pay for them, find necessary support in the documents evidencing the correspondence (Exhibits 'B', 'C', 'D' and 'E', respectively). To add to this, the evidence of the plaintiff's witnesses has gone wholly unimpeached.

9. In the backdrop of the defence of the defendant that there was delay on the part of the plaintiff to clear the consignments from the Custom and the said delay contributed to the product losing its sealant property and thus the defendant was justified in refusing to take delivery of 975 Drums, it was incumbent upon the defendant to establish the said defence by eliciting material and admissions in the cross-examination of the plaintiff's witnesses or by leading evidence in support thereof. Implicit in the said defence are admissions that there was a contract to import the product "Tyretite", the plaintiff had purchased the said product at the instance of the defendant, latter had agreed to pay for the price of the said product, under the terms of the conditions incorporated in the MOU at Exh.'A', the product was duly imported by the plaintiff and the defendant did not take the delivery thereof. Thus, the factum of import and sale can hardly be put in contest.

10. It is imperative to note that the defence of defect in the goods is rested in the product losing its sealant property on account of delay in clearance from Customs. It is not the case of the defendant that the product was inherently defective. What the defendant has sought to contend is that on account of delay in clearance and the passage of time, the product lost its chemical property.

11. In contrast to the aforesaid defence, the plaintiff has placed material on record to demonstrate that the immediately after import of the goods, the plaintiff addressed communications to the defendant calling upon the defendant to take the delivery of the goods. There are documents which indicate that the defendant had sought time to take delivery of the goods on account of financial constraints.

12. The situation which thus emerges is that there is no material to support the defence of defect having been crept in, in the goods, on account of delay attributable to the plaintiff. Even otherwise, in the face of the documents on record, the said defence appears a creature of an after-thought, and not borne out by the contemporaneous exchange of correspondence between the parties.

13. In the aforesaid backdrop, the issues are required to be answered in favour of the plaintiff and against the defendant.

14. Resultantly, the plaintiff is entitled to a decree in the sum of Rs.1,02,73,627/- as per the Particulars of Claim annexed at Exh.'LL' to the plaint. So far as further interest, on the principal amount of Rs.87,50,154/-, from totality of the facts and circumstances of the case and the nature of the transaction between the parties, award of interest @ 12% per annum would be in the fitness of things.

15. Hence, the following order :

O R D E R

(i) The suit stands decreed.

(ii) The defendant do pay a sum of Rs.1,02,73,627/- along with further interest @12% per annum on the principal amount of

Rs.87,50,154/- from the date of the suit till realization.

(iii) The plaintiff is also entitled to refund of Court fees, if any, in accordance with the Rules.

(iv) The decree be drawn up and sealed expeditiously.

(v) The Commercial Suit stands disposed of in above terms.

[N.J. JAMADAR, J.]