

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: January 16, 2020

+ CS(OS) 2712/2011
M/S LUAN AIRWAYS PVT LTD

..... Plaintiff

Through: Mr. Venancio D'costa and
Ms. Astha, Advs.

versus

PCI LIMITED & ANR

..... Defendants

Through: Mr. Arun Khatri, Advocate with
Mr. Nadeen Mew, Advocate

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This suit has been filed by the plaintiff for recovery of ₹1,13,18,621/- along with *pendente lite* interest at the rate of 18% per annum.

2. The facts as noted from the plaint are, plaintiff is a Company duly registered and incorporated under the Indian Companies Act, 1956, having its registered office Gauhati, Assam. Defendant No.1 is also a Company registered and incorporated under the Indian Companies Act, 1956, ('defendant Company', for short) having its registered office in New Delhi. The defendant No.2, Vivek Saxena, is the Group President

(Marketing) of the defendant Company and has been made a party as he had given a written representation dated March 10, 2011 ('Proposal', for short) to the plaintiff Company on behalf of the defendant Company. However, I may note here that defendant No.2, Vivek Saxena was deleted from array of parties by this Court vide order dated May 7, 2013 while allowing I.A. 1505/2012.

3. It is the case of the plaintiff Company that Shri. Vivek Saxena had represented that the defendant Company has conglomerated with Diamond Aircraft Industries of Austria (M/s Diamond Aircraft', for short), which is dedicated in supplying the General Aviation Market with the safe, economical and amazing aircrafts. It is also the case of the plaintiff Company that as per clause 7 of Annexure-II of the Proposal, Shri. Vivek Saxena had categorically stated that the Aircraft offered to the plaintiff Company is accepted by Director General Civil Aviation ('DGCA', for short) for operation in India. It is the case of the plaintiff Company that it, considering the Proposal given by Shri. Vivek Saxena and with the intention to venture into Aviation business, entered into a Purchase Agreement dated March 10, 2011 ('Contract', for short) as well as placed a Purchase Order dated March 10, 2011 ('Purchase Order', for short) with two amendments therein, with the defendant Company for purchase of one DA42 NG Aircraft ('Aircraft', for short) for a total price of ₹3,41,43,656/-. As per the terms and conditions of the Purchase Order, the plaintiff Company was required to pay 30% of the total price amount in advance within 10 days of signing of

the Contract and balance 70% was to be paid at the time of delivery of the Aircraft against final invoice. That as per the condition No. 2 of Annexure-II to the Proposal, all the payments were to be made in favour of the defendant Company.

4. It is the case of the plaintiff Company that it paid 30% of the total price amount i.e. ₹1,02,43,096/- on March 14, 2011 as per the terms and conditions of the Purchase Order, which was duly acknowledged by the defendants on March 16, 2011. It is averred that it came to the utter shock of the plaintiff Company when it was revealed during the preparedness meetings held on July 07, 2011 in the office of DGCA for the issue of Non-Scheduled Operations Permit ('NSOP', for short) to import Aircraft, that the said Aircraft with Austro-Engine, is not certified by DGCA. The aforesaid observation of DGCA was contrary to the Proposal given by the Shri Vivek Saxena, on behalf of the defendant Company, relating to Aircraft certification / registration in India, wherein it had been specifically mentioned that the Aircraft offered to the plaintiff Company is duly accepted by DGCA for operation in India. It is the case of the plaintiff Company that it accordingly cancelled the order since the defendant Company had misrepresented the plaintiff Company and demanded the refund of the advance payment made to the defendant Company as per the terms of the Contract. The plaintiff Company in this regard wrote an e-mail dated July 17, 2011 to Shri Vivek Saxena, citing the reasons for canceling the project and demanded the refund of the advance payment. It is averred that despite cancellation of the Contract, the defendant Company

on one pretext or the other avoided to refund the advance payment, as such the plaintiff Company again vide e-mail dated July 21, 2011 requested for refund of the advance amount. It is the case of the plaintiff Company that the defendant Company kept on assuring the plaintiff Company that they would get the approval from DGCA, however it was not feasible to wait, since the validity of NOC issued by Ministry of Civil Aviation ('Ministry', for short), was expiring on August 26, 2011 by which time, the aircraft should have been ready for operation and no further extension was to be granted to the plaintiff Company by the Ministry. It is averred that in spite of various reminders / requests to refund the advance amount, the defendant Company have repetitively avoided paying the legitimate dues to the plaintiff Company. That in all the communications made by the plaintiff Company to the defendant Company and Sh. Vivek Saxena, it had been made clear that the Contract stands cancelled due to the aforesaid misrepresentation as well as due to the fact that the last and final extension given by Ministry expires on August 26, 2011. This aspect can be seen from the e-mails dated August 19, 2011, August 24, 2011 and September 19, 2011 wherein the plaintiff Company had persistently been requesting the defendant Company to refund its genuine dues.

5. Without prejudice, it is also stated that as per Clause 10 of Annexure-II to the Proposal given on behalf of the defendant Company, in case the order is cancelled after having made the advance payment, only 15% of the advance payment would be retained. However, in the present case the defendant Company,

through its representative Shri. Vivek Saxena, had induced the plaintiff Company by giving false representation to part with their money, as such, the plaintiff Company is entitled to the refund of the entire amount with interest. A reference is made in the plaint to a legal notice dated September 26, 2011 issued to the defendant Company to pay the amount of ₹1,02,05,860/- along with interest @18 per annum within 15 days of the receipt of the notice. It is the case of the plaintiff Company that despite the same, the defendant Company, in a fraudulent manner, failed and neglected to refund the monies lawfully payable to the plaintiff Company. It is under these circumstances, that the present suit has been filed.

6. Written statement has been filed by the defendant Company stating that the suit is not maintainable as it has not been signed, verified and instituted by a duly authorized person, in accordance with law. That apart, it is stated that the suit is not maintainable as no cause of action has arisen in favour of the plaintiff Company and against the defendant Company. It is stated that the contract, alleged to have been terminated vide letter dated August 19, 2011, had already been performed by defendant Company well before its alleged termination and thus, the said termination has no force in the eyes of law. The termination letter dated August 19, 2011 is contrary to the essence of the Contract and is nothing but a mere nullity. It is stated that vide letter dated July 07, 2011, the plaintiff Company was intimated that the Aircraft was ready for delivery. An Aircraft Statement of Conformity by M/s Diamond Aircraft and a

letter from M/s Diamond Aircraft addressed to the CEO of the plaintiff Company dated July 06, 2011 stating the formal delivery date of the Aircraft were, also attached with the said letter of defendant Company. It is alleged that subsequently, in order to avoid taking delivery and making payment thereof, the plaintiff Company vide letter dated August 19, 2011 allegedly terminated the Contract on false and incorrect pleas unsustainable both in law and on facts. It is also stated that the plaintiff Company is guilty of suppression and concealment of facts inasmuch as the plaintiff Company had failed to put on record the reply of the defendant Company dated October 21, 2011 issued in response to plaintiff Company's legal notice dated September 26, 2011 to the defendant Company. In the said reply, it was reiterated that the Aircraft offered to plaintiff Company was approved for operation in India. The defendant Company along with the reply had also enclosed therewith two letters dated November 17, 2009 and October 11, 2011 issued by DGCA, which made it abundantly clear that the Austro-Engine, which came fitted in the Aircraft and which is the alleged dispute of the plaintiff Company, was in fact approved by the DGCA. The defendant Company has also stated that the plaintiff Company intended to purchase an Aircraft, the defendant Company therefore, made the Proposal to it for selling the Aircraft on the terms and conditions as mentioned therein. The plaintiff Company examined the Proposal made to it and after verifying all relevant and necessary details and satisfying itself on all counts, agreed to purchase the Aircraft from defendant Company. It is conceded that the parties herein

entered into the Contract, pursuant to which it was agreed that defendant Company would deliver the Aircraft to the plaintiff Company. It was agreed that delivery of Aircraft would be taken by the plaintiff Company on its own as per Clause 5 of the Terms and Conditions annexed to the Purchase Order. The plaintiff Company in terms of Contract executed between the parties made the advance payment. Defendant Company after receiving the advance payment started to perform its part of the obligations by taking steps to make the Aircraft ready for plaintiff Company. It is the case of the defendant Company that as part of the Purchase Order (Clause 2 of Annexure-I), defendant Company was supposed to impart training to pilots of plaintiff Company on the contracted plane. The pilots of plaintiff Company were sent to Austria by the defendant Company for training on the Aircraft to enable them fly the said Aircraft. The defendant Company, as per Contract, also made the Aircraft ready for delivery and informed the plaintiff Company about the same by way of email dated July 07, 2011.

7. It is the case of the defendant Company that the plaintiff Company was aware that the Aircraft was ready for delivery and had therefore convened a preparedness meeting in the office of DGCA on July 07, 2011. The plaintiff Company after the preparedness meeting in the office of DGCA informed the defendant on July 07, 2010 that the Aircraft proposed to be imported was not approved by DGCA. The defendant Company on the same day i.e. on July 07, 2011 in reply to the plaintiff Company's apprehension about the engine in the aircraft not

being approved by the DGCA, sent an email to the plaintiff Company with a link of the DGCA website, as well as an attachment containing details of Type Design Acceptance granted by DGCA to clarify the plaintiff Company's misunderstanding. The plaintiff Company thereafter never reverted back on this issue.

8. After the Contract was performed by the defendant Company, as the Aircraft was made ready for delivery to plaintiff Company, the plaintiff Company tried to wriggle out of its commitments alleging that the Aircraft proposed to be imported has got an engine (Austro-Engine), which was not approved by the DGCA. However, the fact of the matter is that plaintiff Company was always aware that the plane was fitted with an Austro-Engine, and the same was duly approved by the DGCA. It is the case of the defendant Company that the reason for misunderstanding that arose in the instant case was that the engineer from plaintiff Company had made some incorrect statements about the engine of the Aircraft during the preparedness meeting held at DGCA's office on July 07, 2011. The said engineer was unaware about the particulars of engine, was not trained for the engine fitted in the Aircraft nor was permitted by DGCA to repair the said Aircraft. It was because of this incorrect statement made by the plaintiff Company's engineer that DGCA opined that though the plane was certified but Austro-Engine was not permitted for operation. However the defendant Company, apart from clarifying this issue with the plaintiff Company, had even offered to accompany the plaintiff

Company to DGCA's office to clarify any kind of misunderstanding regarding operation of Aircraft in question, vide emails dated August 19, 2011 and August 23, 2011. It is contended by defendant Company that the plaintiff Company in the present case had got NOC from Ministry to operate Non-Scheduled Air Transport Services only up to August 26, 2011, vide letter March 08, 2011. In the said letter, it was stated that it was the last extension given to plaintiff Company and thereafter, no further extension would be granted. The plaintiff Company on realizing that no further extension would be given to it, decided to call off its project in view of the decision of the concerned Ministry. The Contract was in fact terminated not due to the alleged type of certification of the Aircraft by DGCA but due to the fact that NOC given to plaintiff Company by the Ministry was expiring on August 26, 2011 and thereafter, the plaintiff Company would not be able to fly the said Aircraft. The termination of the Contract by the plaintiff Company was thus mala fide, issued due to the plaintiff Company's own limitations and not due to the reasons as allegedly mentioned by the plaintiff Company in its termination letter dated August 19, 2011. The plaintiff Company has very fairly conceded in its e-mail dated August 24, 2011 that irrespective of the reason for termination, the plaintiff Company's right to terminate the Contract was not subject to any conditions.

9. It is stated by the defendant Company that the plaintiff Company has heavily relied upon the Supplement to Purchase Order and the Contract wherein, it was agreed that in case the

order is cancelled after having made the advance payment, 15% of the advance payment would be retained by PCI Ltd i.e. defendant Company. According to the defendant Company, the said Clause could have been only invoked by the plaintiff Company to claim refund during the subsistence of the Contract. However, in the case in hand, the contract had already been performed and therefore, no question of any refund survives as the Aircraft was ready for delivery. It is the case of defendant Company that vide letter dated July 07, 2011, the defendant Company had informed the plaintiff Company about the Aircraft being ready for delivery. Despite such information, the plaintiff Company vide letter dated August 19, 2011 sought to terminate the Contract and asked for refund of money. The stand thus adopted by the plaintiff Company of terminating the Contract by reading a single Clause is, in derogation of the entire contract and is misconceived. In this regard, it is stated that the Contract has to be read in its entirety and not on the basis of the individual clauses / covenants.

10. A replication to the written statement of the defendant Company has been filed by the plaintiff Company.

11. The following issues have been framed by the Court:-

- (i) Whether the defendant had represented to the plaintiff that the aircraft offered by the defendant to the plaintiff for sale was accepted by the DGCA for operation in India? OPP
- (ii) Whether the aforesaid representation was false and the said aircraft was not certified by the DGCA? OPP
- (iii) Whether for the aforesaid reason the plaintiff is entitled to

refund of 30% of the advance sale consideration in the sum of ₹1,02,43,096/- paid to the defendant? OPP

(iv) Whether the defendant is entitled to forfeit the advance sale consideration in excess of 15%? OPD

(v) Whether the defendant is entitled to forfeit any amount paid by the plaintiff? OPD

(vi) If the plaintiff is found entitled to any monies whether the plaintiff is entitled to any interest thereon and if so for what period and at what rate? OPP

(vii) Relief

12. The plaintiff Company has filed the evidence by way of affidavit of Shri Nakul Chhawchhari, Ex.PW1/A.

13. Similarly, the evidence by way of affidavit was filed on behalf of defendant Company by Shri Vivek Saxena, Ex.DW1/A. Both of them appeared in the witness box.

14. The plaintiff witness PW1 Nakul has tendered his evidence by way of affidavit Ex.PW1/A and relied upon Ex.P-1 to Ex.P-3 and D-10, which documents are already admitted during the admission / denial of the same. That apart, he has also relied upon Ex.PW1/1 to Ex.PW1/19 his support of his case / contention. He was cross examined by the defendant's counsel.

15. Similarly, Mr. Vivek Saxena has filed his examination in chief, which is Ex.DW1/A. That apart, he has relied upon documents mentioned in his affidavit as Ex.DW1/1 and Ex.DW1/2.

SUBMISSIONS:-

16. At the outset, it may be stated here that the learned

counsel for the plaintiff Company submitted that he shall be confining the suit with regard to entitlement of the plaintiff Company for 85% of the advance paid by the plaintiff Company to the defendant Company by deducting 15% of the same in terms of the Contract. In other words, he is not pressing the claim of the plaintiff for refund of the entire amount of advance paid to the defendants i.e., 30% of the total contractual value. In this regard, it is his submission that in terms of a communication dated March 10, 2011 Ex.P-1 and Ex.PW1/15, an amount of 30% of ₹3,41,43,656/- which is ₹1,02,06,860/- was paid to the defendants as advance, which aspect is proved through Ex.PW1/2. According to him, as per Ex.P-1 and Ex.PW1/15, it is clear that in case the order is cancelled after having made the advance payment, 15% of the advance payment would be retained by the defendant Company. It is contended that the acceptance/delivery of the Aircraft was not given / taken nor the balance 70% of the contractual amount was paid to the defendants, which shows that Contract was yet to be completed / fulfilled and the plaintiff Company having terminated the Contract, has sought the refund of the money vide letters dated August 19, 2011 Ex.PW1/6 and Ex.PW1/7. The same has not been refunded back. He also stated, the plea on behalf of the defendants that the Contract was terminated for the reasons attributable to the plaintiff Company, inasmuch as the NOC issued by the DGCA was expiring on August 26, 2011 without scope for further extension and that being the reason, the plea that the Aircraft was not approved by the DGCA was only a ploy is

totally misconceived and untenable. That apart, he stated that since the delivery of the Aircraft has not taken place nor the 70% of the balance payment has been made to the defendant Company, and the Contract having not been fulfilled, the plaintiff was within its right to cancel the same and seek the refund of at least 85% of the amount of advance, as paid to the defendant Company by allowing the defendant Company to retain 15% of the said amount in accordance with the Contract. He stated that the claim made by the plaintiff Company in this case is justified and the plaintiff Company is entitled to the refund of the same with *pendente lite* interest @ 18% per annum.

17. On the other hand, the learned counsel for the defendants has reiterated the contents of the written statement as reproduced above. In substance, it is his plea that the Aircraft was ready for delivery and this fact was informed to the plaintiff Company vide e-mail dated July 07, 2011. Despite the same, the plaintiff Company did not come forward to take the delivery of the same. According to him, the contract having been fulfilled, the plaintiff is liable to pay 70% of the balance amount to the defendant Company. In substance, it is his submission, the plea that the Aircraft was not approved by the DGCA is only a ploy for the plaintiff Company to wriggle out of the Contract as the plaintiff Company did not like to fly the Aircraft as the validity of NOC issued by the Ministry was expiring on August 26, 2011. He also stated that the stand adopted by the plaintiff Company seeking refund of 85% of the total advance paid by the plaintiff to the defendant Company is totally misconceived, on a reading of a

single Clause, in derogation of the entire contract.

FINDINGS:-

18. Having heard the learned counsel for the parties and in view of the statement made by the learned counsel for the plaintiff that he shall be maintaining the suit only with regard to claim of the plaintiff Company for refund of 85% of the advance paid being ₹1,02,05,860/- by retaining 15% by the defendant Company, this Court is of the view that the issues, which need to be determined are issue Nos. (iv), (v) and (vi).

19. Insofar as issue Nos. (i), (ii) and (iii) are concerned, in view of the statement of the learned counsel for the plaintiff Company, those would not arise for consideration.

ISSUE Nos.(iv) & (v):-

20. These issues are being taken up together. Ex.P-1 and Ex.PW1/15 clearly stipulate; (i) 30% of the advance of the total amount of the price will be paid with the order within 10 days of signing of the agreement, balance 70% will be paid prior to delivery of Aircraft against final invoice of the payment shall be in favour of defendant Company; (ii) in case, the order is cancelled after having been made the advance payment, 15% of the advance payment would be retained by the defendant Company.

21. It is a conceded position that the advance payment of 30% of the contractual value was made by the plaintiff Company to the defendant Company. It is also a conceded position that even though e-mail dated July 07, 2011 stated that the Aircraft is ready for delivery, the Aircraft's delivery/acceptance was not

taken by the plaintiff Company nor was balance amount paid. In fact, it is the case of the defendant Company that the plea of the plaintiff Company that the Aircraft was not approved to fly in Indian skies by the DGCA is only a ploy for the plaintiff Company to wriggle out of the contract as the final extension of the NOC from the Ministry was expiring on August 26, 2011. This Court is of the view, in light of the clear stipulation in the Contract and on the facts that the delivery/acceptance has not been taken by the plaintiff Company nor 70% of the balance amount has been paid to the defendant Company, the reasons for which the plaintiff Company terminated the Contract would be irrelevant / inconsequential, as in any case on the termination of the Contract, the consequence, is that the defendant Company could only retain 15% of the advance payment, so received from the plaintiff Company and is bound to return the balance 85%. This is clear from the reading of the Clause, which has already been noted above. There is no ambiguity in the said Clause nor anything contrary has been pointed out by the learned counsel for the defendant Company. That apart, it is important to note that 70% of the balance amount has not been paid, nor any counter-claim has been filed by the defendant Company, for the said amount. So, it necessarily follows, till such time the delivery is taken and the balance amount of 70% of the amount is paid to the defendant Company the contract cannot be said to have been executed *in toto*. Therefore, the plaintiff Company is within its right to terminate the Contract and in fact terminated the Contract vide letter date August 19, 2011. In fact, the defendant Company

concedes to this fact in its pleadings as well. So, the plaintiff Company shall be entitled to the refund of 85% of the advance amount. Accordingly, issue Nos. (iv) and (v) are decided in favour of the plaintiff Company and against the defendant Company by holding that the defendant Company is not entitled to forfeit the advance sale consideration in excess of 15%. In other words, it can only forfeit 15% of the amount of advance sale consideration and nothing more.

ISSUE No.(vii)

22. In view of my conclusion to issue nos. (iv) and (v), the plaintiff Company is entitled to a refund of 85% of the advance sale consideration, which is in excess of 15% of the amount and the same is ₹86,74,981/- from the defendant.

ISSUE No.(vi)

23. Insofar as issue No.(vi) is concerned, because of non-refund of the amount by the defendant Company, despite clear contractual obligation, the plaintiff Company shall be entitled to a *pendente lite* interest @12% per annum. It shall also be entitled to future interest @12% per annum till the date of its realization on the amount so determined in issue No. (vii). The suit is decreed. Decree sheet be drawn up. No costs.

V. KAMESWAR RAO, J

JANUARY 16, 2020/ak