
(2003) 01 AP CK 0136

In the Andhra Pradesh High Court

Case No : C.C.C. Appeal No. 47 of 1989

Alco Chem Ltd.

APPELLANT

Vs

Hyderabad Chemical and Pharmaceutical Works Ltd.

RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 72
Sales of Goods Act, 1930 — Section 64A
Tariff Act, 1934 — Section 10

Citation : (2003) 3 BC 508

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : A.G. Seetha Ram, for the Appellant; None, for the Respondent

Judgement

V.V.S. Rao, J.—M/s. Hyderabad Chemical and Pharmaceutical Works Limited, a company registered at Hyderabad (hereafter called "the plaintiff") filed a suit against M/s. Alco Chemicals Limited having registered office at Seohare, Bijnore District, Uttar Pradesh (hereinafter called "the defendant") being O.S. No. 491 of 1985 on the file of the Court of I Additional Special Judge, S.P.E. and A.C.B. Cases-cum-Additional Judge, City Civil Court, Hyderabad. In the suit they prayed for a decree for an amount of Rs. 82,929.56 ps. from the defendant. The amount claimed includes interest component of Rs. 22,175.21 ps. on the principal of amount of Rs. 60,754.35 ps. The principal amount was allegedly export duty collected by the defendant from the plaintiff. The Trial Court by judgment and decree dated 5.12.1988 decreed the suit for an amount of Rs. 82,929.56 ps. with interest at 18% per annum from the date of the suit i.e. 9.6.1980 till the date of decree, and 6% per annum from the date of decree till realisation, with costs. Aggrieved by the same, the defendant has filed this regular appeal.

2. The factual matrix is in an arrow compass. The plaintiff purchased rectified spirit from the defendant company during the period 1973-74 under five invoices. The defendant collected an amount of Rs. 60,754.35 ps. towards export

duty besides sale price of rectified spirit and cost of other items. The said levy of export duty was challenged by the defendant before the High Court of Allahabad by filing a writ petition which quashed the levy of export duty as illegal. The defendant claimed and got refund of more than Rs. 20,00,000/- in May, 1978 from the Government of Uttar Pradesh. After coming to know about the same, the plaintiff addressed letters 19.9.1978 and 18.4.1979 asking for refund of amount collected from them. The defendant did not pay the amount and, therefore, the suit for recovery of Rs. 60,754.35 ps.

3. The defendant resisted the suit inter alia disputing the jurisdiction of the City Civil Court, Hyderabad to try the suit and also on the ground of limitation. It denied the claim of the plaintiff on the ground that it is the defendant who got refund of the export duty by fighting expensive litigation, that the plaintiff did not claim any such refund from the High Court of Allahabad and, therefore, the plaintiff is not entitled to have unfair advantage. The defendant also pleaded that there was no agreement or understanding between the plaintiff and the defendant for refund of export duty if the amount is ultimately refunded by the Government of Uttar Pradesh to the defendant.

4. The Trial Court framed the following issues having regard to the pleadings.

1. Whether the plaintiff is entitled to the suit claim ?
2. Whether the defendant company was merged into Upper Ganges Sugar Mills Limited as pleaded by defendant, if so, the plaintiff is entitled to sue now existing company ?
3. Whether the Suit filed by property person ?
4. Whether the suit is within time ?
5. Whether this Court has jurisdiction to try the suit ?
6. Whether the collection of levy of export duty is the subject-matter of disputed between Alco Chemicals Limited and Government of Uttar Pradesh?
7. To what relief?

The plaintiff examined its Managing Director as P.W.1 and marked Exs. A.1 to A.8. The defendant examined their Officer and General Power of Attorney Holder as D.W. 1, but did not mark any documents. Exs. A.1 to A.5 are invoices from the defendant to the plaintiff for purchase of rectified spirit during the period 1973-74. Exs. A.6 and A.7 are the two letters addressed by the defendant claiming refund of export duty and Ex. A.8 is postal acknowledgement of Ex. A.7. On consideration of the evidence on record, the Trial Court on issues 1, 3 to 6 held in favour of the plaintiff. Issue No. 2 was not pressed by the defendant before the Trial Court.

5. In this appeal Sri Sitaram made the following submissions. The collection of the export duty by the supplier was as per the existing law and that there was no

agreement between the parties that the duty should be refunded to the purchaser in case the supplier gets it back by whatever subsequent change regarding the collection. The Court below erred in not ordering notice to M/s. Upper Ganges Sugar Mills Limited for amendment of cause title after the merger of the defendant company with the said Company and its decision was based on the evidence of an officer of the non-existing M/s. Alco Chemicals Limited. The purchaser took into account sale price with consultation of State Government concerned and by this refund asked for in the suit the respondent enriches twice. The Court below erred on point of limitation, and it did not take into consideration the amount spent by the appellant in its fight against the State Government of Uttar Pradesh. The rate of interest claimed is exorbitant, and based on no evidence and that Section 64-A of the Sale of Goods Act, 1930 (for short, "the Act") has no application to the facts of this case. The reasoning of the Court below that the plaintiff's responsibility in paying back to its customers arises only when the customers claim is incorrect and not sound in law. The Court below erred in observing that the defendant is enriching itself unlawfully by not paying the duty to the plaintiff and it should have seen that the levy was correct and lawful at the time of transaction.

6. The learned Counsel though made elaborate submissions as noticed hereinabove, however, emphasised only two points. He submits that Section 64-A of the Act has no application to the facts of the case. Secondly, he would contend that the plaintiff has already passed on the burden of export duty to the customers and, therefore, he cannot be allowed to recover the amount from the defendant which would amount to unlawful enrichment. These contentions are refuted strongly by the learned Counsel for the other side.

7. The short point that falls for consideration is whether the defendant can retain the amount of export duty paid by the plaintiff which was later refunded by the Government of Uttar Pradesh to the defendant?

8. Admitted facts may be indicated briefly. There is no dispute that the defendant supplied rectified spirit under Exs. A.1 to A.5 and collected export duty separately. Export duty which was shown separately in the invoices Exs. A.1 to A.5 did not form part of the sale price of rectified spirit. There was dispute between the Government of Uttar Pradesh and the defendant as to competence of the Government of Uttar Pradesh with regard to legality of the levy of export duty by Government of Uttar Pradesh. The same was allowed by the Allahabad High Court by reason of which the defendant claimed refund of the amount of export duty including the amount paid by the plaintiff under Exs. A.1 to A.5. There is also no dispute that the defendant received Exs. A.6 and A.7 letters sent by the plaintiff company in which the plaintiff informed the defendant that former paid export duty to Government of Uttar Pradesh through the latter which was refunded by them. Under Exs. A.6 and A.7 the plaintiff requested the defendant to refund the amount of Rs. 60,754/- paid by them towards export duty by the Government of Uttar Pradesh which was repaid by the Government of Uttar

Pradesh to the defendant. These facts are not denied.

9. The Managing Director of the plaintiff's company in his evidence deposed that there is no agreement between the plaintiff and the defendant enabling the seller to retain the export duty which was refunded to them. He also deposed that the rectified spirit supplied by the seller was given to various hospitals and Government organisations and that there was understanding between the parties to refund any export duty if it is later held to be illegal. The defendant promised them that it would return the amount. Regarding the price it is in his evidence that price of the product sold by the plaintiff company will be fixed by the Government itself. He, however, denied the suggestion that the plaintiff made profits by selling products manufactured by using either purchased by the defendant company. He also denied the suggestion that price fixed by the Government includes export duty.

10. The Officer of the defendant company who was examined as D. W.1 has admitted that he has no personal knowledge prior to its merger with M/s. Upper Ganges Sugar Mills Limited and, therefore, his evidence is not of much use. Therefore, the submission of the learned Counsel for the appellant that the plaintiff has already collected export duty from the customers is not supported by any evidence. On the contrary, P.W. 1 denied such suggestion and nothing was elicited from high cross-examination to the effect that plaintiff had already been paid by Government Organisations and Hospitals. This aspect of the matter assumes importance when we consider the question of applicability of Section 64-A of the Act.

11. In the absence of any agreement between seller and buyer regarding refund of export duty or other taxes paid by the buyer to the seller, whether the buyer is entitled to ask for refund of the amount? Whether the same amounts to unlawful enrichment of the seller? Whether the defendant can plead that any refund of the export duty or taxes to the buyer would amount to unlawful enrichment by the buyer?

12. u/s 2(10) of the Act price means the money consideration for sale of goods. u/s 31 of the Act it is the duty of the seller to deliver goods to the buyer and he has to accept and pay for them in accordance with the terms of the contract of sale. Chapter-VI of the Act deals with suits for breach of the contract. u/s 55 of the Act where under a contract of sale the property in the goods has passed on to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods. Therefore, the right of the seller is only to sue for the "price of the goods". If the contract stipulates that if the price of the goods includes the revenues payable to the State like sales tax, excise duty and customs duty, etc., it is always open to the buyer to recover the price of the goods from the seller. In such an event, even if the buyer gets some benefit by reason of a Court judgment in the absence of any agreement or covenant contrary, the buyer cannot claim refund of price of goods. The following statement of law from

Halsbury's Laws of England, (Halsbury's Laws of England, Fourth Edn. Vol. 41, pg. 615, para 677) may beneficially be referred to.

Effect of revenue duties on price--Whoever may be liable and on whatever event for the payment of customs or excise duty or value added tax, the amount of the duty is usually passed on to the buyer as part of the price. It is the responsibility of the seller to quote an inclusive price if he wishes and if he fails to do so he cannot later recover the duty payable as an addition to the contract price. However, where a new or increased customs or excise duty or value added tax is imposed after the making of the contract, but before delivery of the goods in the case of customs or excise only, or supply of the goods in the case of value added tax, the duty or increase of duty, if paid by the seller may, unless otherwise agreed, be added to the price; and conversely where a duty is repealed or reduced, if the seller has had the benefit of the alteration, the duty or reduction may be deducted from the price. As regards customs or excise duty, but not value added tax, in addition to the actual amount of the duty to be added or deducted there may also be added or deducted a sum representing the expenses incurred or saved, as the case may be, as a result of the additional or repealed duty. The amount of such expenses, if not agreed upon by the parties, is settled in default of agreement by the revenue authorities.

As a question of fact, whether Exs. A.1 to A.5 include price of the rectified spirit supplied which also takes in its fold the export duty paid? Exs. A.1 to A.5 are similar and we may notice Ex. A. 1 which is as under :

Telegram : ALCOCHEM ORIGINAL Telephone: 30 (Dhampur) ST.Reg. BJ 1010
(Central) ALCO CHEM LIMITED Invoice No. 231/7374 Dated 26.9.59 SEOHARA
(BIJNOR) Dated 14/15.11.73 Regd. Office

14 Radha Bazar Lane Calcutta 1

To

M/s. Hyderabad Chemical & Pharmaceutical Works Ltd. Azmabad Industrial Area
Hyderabad-20 We have sent to
you..... as
per your order.....
.....

Permit No

PARTICULARS	AMOUNT
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Rs. ps.

1. To cost of 24,961.2 + 25,021.2 = 49982.4 Lit

(a) Rectified/Denatured/Industrial Spirit @ 36 paise P. Lit. 17,993.66

(b) Containers TW 40847 WR E. 10,440.03

Duty 98255 ER 10,465.13 20,905.16

2. Sales Tax State Additional Tax

3. Central Sales Tax @ 3% On cost 539.80

on E. Duty 627.15 1,166.95

(Form "C" to be submitted by the buyer)

4. (a) Drums security

(b) Drums Hire

(c) Drums Cost 4,261.00

5. Freight 4,339.00 8,600.00

6. Forwarding and Other Expenses T.W. Clearing @ 200/- P.T.W. 400.00

7. Application Fee Excise Pass No. 486 and 488 14 11/73 x 15 11/73 1.50

Total 49,067.27

(Rupees forty-nine thousand sixty-seven and twenty-seven paise only)

R/RNo. 771592, Date 15.11.73

Station Secunderabad

Prepared by..... For ALC OCHEM LTD.

Checked by.....

13. As seen from the above the cost of rectified spirit is shown separately. Other items of payables are sale tax, additional tax, central sales tax, security for packaging, material, freight, application fee, forwarding expenses, etc. These items do not include any export duty. Therefore, export duty is shown separately. Indeed, the cost of rectified spirit is Rs. 0.36 ps. per litre whereas the export duty included separately is 0.42 ps. per litre. This shows that sales tax, central sales tax, security for packaging, material, etc form part of price of the rectified spirit but not the export duty. It was never the intention of the seller that export duty would also form part of the price. If the intention had been such there would have been a separate printed entry in the invoice, but export duty was included in handwriting presumably because there was dispute between manufacturers of rectified spirit and State of Uttar Pradesh to levy export duty on the rectified spirit. Therefore, it is not possible to uphold the submission that the price included export duty also. Therefore, seller could not have recovered export duty if by the lime goods were delivered to the buyer export duty had been declared illegal. In this case, the export duty was paid by the buyer which was remitted the seller to the Government of Uttar Pradesh and later by reason of the judgment of the Allahabad High Court it was refunded to the seller.

14. The Indian Tariff Act, 1934 (Act No. XXXII of 1934) dealt with customs duties of goods imported into or exported from British India. Section 10 of the said Act permitted addition to or deduction from a contract price of an increase or decrease in duty imposed after the making of the contract. It did not provide for an eventuality where there was increase or decrease in the excise duty. Therefore, Section 10 of the Indian Tariff Act was repealed and reenacted as Section 64-A of the Indian Sale of Goods Act, 1930 by Indian Sale of Goods (Amendment) Act, 1940 (Act No. 41 of 1940). Section 64-A of the Indian Sale of Goods Act, 1930 provided for addition to or deduction from taxes in a contract of sale. The Indian Sale of Goods Act was further amended by the Indian Sale of Goods (Amendment) Act, 1963 (Act No. 33 of 1963) by which Section 64-A of the Act was substituted. The said provision reads as under.

64.A. In contracts of sale, amount of increased or decreased Taxes to be added or deducted: (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in Sub-section (2) being imposed increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid, where tax was chargeable at that time :

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid, and to sue for and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased tax only or not tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or tax be sued for or in respect of such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes namely,

(a) any duty of customs or excise on goods,

(b) any tax on the sale or purchase of goods.

The above section is a special provision to meet two contingencies. In a contract of sale of goods, during the working or performance of the same, if customs or excise duty or tax on the sale or purchase of goods is imposed by any law for the time being in force, then, if such imposition takes place seller may add such increase to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of taxes. He shall be entitled to be paid such increase and he can sue for recovery of such tax. The section also provides for recovery by the seller of the amount of increase in duty from purchaser where

the increase takes effect subsequent to contract. The purchaser is also entitled to recover from seller the duty in case there is a similar decrease. Such right of the purchaser exists both before delivery is given or taken.

15. A Constitution Bench of the Supreme Court in *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, , made the following observations while interpreting Section 64-A of the Indian Sale of Goods" Act.

This section provides for the recovery by the seller of the amount of increase in duty from the purchaser where the increase takes effect subsequent to the contract and for the right of the purchaser to recover from the seller the duty in cases where there is a similar decrease and this right exists both before the delivery is given, taken and rice received or paid as the case may be *A.R.R.M.N. Narayanan Chettiar Vs. Kadir Sahib and Others*, . Counsel for the appellants attempted to counter this submission by relying upon a judgment of the Privy Council in *Prabhudas v. Ganidada* . In that case the Government duty had not been reduced but the buyer claimed that it had constructively been decreased because the tariff valuation had been reduced and so constructively it must be reckoned that there was a decreased in the duty on the goods sold. This contention was negatived by the Privy Council and it was held that a change of duty means a change in the rate of duty, and not a change of tariff value.

In *Central Hindustan Italian Trading Co. (Pvt.) Ltd. v. Pitty Brothers (Pvt.)Ltd.* AIR 1963 Bom 222, the Bombay High Court held that the words "deduct" and "deduction" in Sub-section (b) of Section 64-A of the Act do not relate to physical act of deduction at the time of payment of the price and that the phrase "so much from the contract price" has no relation to the physical act of payment of price, but in the context it refers the right of the purchaser to take off the duty in the process of calculation of arriving at the contract price. The provisions of Section 64-A of the Act are applicable, it was held, only when the incidence of imposition, increase, remission or abolition of duty is connected with and related to the goods of a particular contract for sale of goods between a seller and a buyer. In view of the provisions of Section 64-A of the Sale of Goods Act whether or not the plaintiff passed on the burden to the consumer, the defendant in law is bound to refund the export duly collected from the plaintiff as otherwise he would be violating Section 64-A of the Act. I may hasten to add that even as a question of fact, the defendant-appellant on whom the burden lies has failed to prove before the Trial Court that the plaintiff has passed on the export duty which was collected from them as a separate item in the invoice to the consumers. In either view of the matter it is settled law by reason of decision of nine-Judge Constitution Bench in *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , that no seller who paid excise duty or customs duty under law which was declared as illegal and unconstitutional is entitled to collect the levy both from the Slate as well as the purchaser. In such a situation, the seller is not entitled to retain the tax collected from the purchaser and is bound to return the same. In private law if the purchaser distributed his share of

burden to others that is of no consequence.

16. The learned Counsel for the appellant, however, submits that if the suit claim is allowed, it would amount to unlawful enrichment of plaintiff as he has passed on the lax burden to his customers. As a finding of fact, I have held that the case of the plaintiff that the price of the goods supplied by it to the hospitals and Government Institutions was fixed by me Government itself and that it has not passed on the burden to the consumer stands unrebutted. As per Section 72 of the Indian Contract Act, 1872, the amount of export duty collected separately by the defendant from the plaintiff was under a mistake of law and, therefore, the defendant is bound to refund the same. In a claim for refund of amount which is unlawful enrichment it is no defence that the plaintiff has passed on the burden to others and has not incurred any loss. We should not forget that the contract of sale is between seller and purchaser and not between purchaser and consumer. Therefore, the submission is without any basis.

17. Lastly, it is contended that the Trial Court failed to exercise sound discretion while awarding interest on the amount claimed. It may be mentioned that the Trial Court awarded interest at the rate of 18% per annum from the date of filing the suit till the date of decree, and 6% per annum from the date of decree till the date of realisation. Exs. A.1 to A.5 invoices do not provide for any rate of interest payable by the purchaser in the event there is a delay in paying the sale price within a specified period. Therefore, there is no basis for awarding interest at the rate of 18%. In a situation where the contract of sale is silent, as to rate of interest payable by the purchaser, the Court can award interest by way of damages and special damages u/s 61 of the Act which reads as under:

61. Interest by way of damages and special damages--(1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price--

(a) to the seller in a suit by him for the amount of the price--from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller--from the date on which the payment was made.

Section 34 of the Code of Civil Procedure, 1908 (CPC) also empowers the Civil Court to award interest on the principal sum adjudged from the date of suit till the date of decree not exceeding 6% on the suit amount as the Court may deem reasonable. In *Central Bank of India Vs. Ravindra and Others*, , a Constitution Bench of the Supreme Court considered the scope of Section 34 of the CPC.

Regarding the power of the Court to award interest pendente lite and post-decree is also considered and in paragraph 55(8) (of SCC) it was laid down.

Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34, CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.

Insofar as awarding of interest at 6% per annum for post decree period is concerned, no exception can be taken. However, having regard to the decision of the Supreme Court in Central Bank of India v. Ravindra (supra) and Section 34 of CPC award of interest at 18% pendente lite is not justified for the Court's discretion to award interest is subject to condition that award of interest pendente lite shall not exceed 6%. Therefore, in my considered opinion, insofar as interest is concerned, the plaintiff would be entitled for interest only at 6% per annum from the date of suit till the date of decree and also at 6% interest from the date of decree till the date of realisation.

18. Yet another aspect of the matter is whether the plaintiff is entitled to claim interest at 18% per annum on the amount of export duty of Rs. 60,754.35 ps. from 1.6.1978 to 8.6.1980 ? As already noticed Exs. A.1 to A.5 invoices do not require the plaintiff to pay interest even if there is delayed payment. There was no agreement between the parties. In such a situation, award of interest at 18% on the amount of export duty till the date of filing of the suit would not be justified. In cases arising u/s 61 of the Act. Patna High Court in Bibhuti Bhusan Bose Vs. National Coal Trading Co., , Rajasthan High Court in M.K.M. Moosa Bhai Amin, Kota Vs. Rajasthan Textile Mills, Bhawanimandi, Madras High Court in A.K. Srinivasa Naidu Vs. S. Jayarama Reddiar Firm, , and Delhi High Court in Rudnap Export Import v. Eastern Associates Co. AIR 1984 Delhi. 20, have held that in the absence of contract to the contrary, interest can be claimed at 6% per annum provided a demand has been made. The plaintiff while addressing letters Exs. A.6 and A.7 did not demand any interest. Indeed, no interest was claimed in Exs. A.6 and A.7. Therefore, in my considered opinion, the plaintiff is not entitled to claim any interest.

19. In the result, the defendant's appeal is partly allowed. The decree passed by the Trial Court is modified to the effect that the defendant do pay the plaintiff a sum of Rs. 60,754.35 ps. with interest @ 6% per annum from the date of suit till realization. The parties shall bear their own costs.