

(2000) 02 DEL CK 0020

In the Delhi High Court

Case No : I.AS. No. 11771 and 11772/96 and S.No. 2261/96

Dimple Overseas Ltd.

APPELLANT

Vs

Minerals and Metals Trading Corpn. Ltd.

RESPONDENT

Date of Decision : 07-02-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8

Citation : (2000) 5 AD 525 : (2001) 1 CivCC 157 : (2000) 53 DRJ 645 : (2000) 4 RCR(Civil) 40

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. Rajiv Nayar, Mr. Sandeep Sethi and Mr. Satinder Singh, for the Appellant; Mr. Sanjiv Puri and Mr. Ajay K. Dutta, for the Respondent

Judgement

J.B. Goel, J.—plaintiff has filed this suit for recovery of Rs. 1,37,22,137/- under summary procedure of Order xxxvII of the CPC (for short "the CPC").

2. The case of the plaintiff is that on June 7, 1995, the plaintiff had entered into a contract with the defendant for sale of 14250 MT of Di-Ammonium Phosphate (DAP) Ex-JNPT (Jawaharlal Nehru Port Trust), Bombay @ US\$ 240 per MT as per contract No. MMTC/FA/DAP/2/95-96. The goods had already been imported and were lying at the said port. plaintiff had written letter dated 7.6.1995 to M/s. Vilas Transport Company (hereinafter called the "Clearing Agent") apparently holding the goods, informing them about the sale of the goods, informing them about the sale of the goods to the defendant and requiring the said Clearing Agent to deliver the entire consignment to the defendant. Vide another letter dated 7.6.1995, plaintiff also confirmed to the Asstt. Collector of Customs, JNPT, Bombay about their having sold the said consignment to the defendant. The said Clearing Agent in turn vide their letter dated June 7, 1995 confirmed to the defendant that they were holding the said consignment and will deliver the same as per their (defendant's) instructions. The defendant vide their letter dated June 8, 1995 agreed to buy the goods and by means of fax message on 9.6.1995

gave instructions to the said Clearing Agent to dispatch the goods to four prescribed destinations and also confirmed to the Asstt. Collector of Customs, JNPT, Bombay about their having purchased the goods from the plaintiff. An authorisation certificate to stock and sell the said goods in favor of the defendant was also issued by the plaintiff. The Clearing Agent in Compliance of defendant's directions dispatched the goods to various specified destinations accordingly. The sale made and delivery thus were completed. the total price of the goods amounted to Rs. 11,14,93,250/- against which three part payments were made by means of cheques of Rs.8,59,37,760/- on June 20,1995, Rs. 1.00 Crore on 27.6.1995 and Rs.50.00 lakhs on July 3, 1995. The balance amount of Rs.1,05,55,490/- remained due and unpaid in spite of several letters of demand and also two lawyer's notices. plaintiff has claimed the balance amount with interest @ 24% per annum.

3. The defendant on summons for judgment being served filed two applications, one (I.A. 11771/96) for leave to defend and the other (I.A. 11772/96) under Section 8 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act, 1996") Pointing out that there is arbitration agreement between the parties and there are disputes between the parties which are liable to be referred for arbitration. For leave, the following grounds are alleged:-

1. That the payment was to be made on actual quantity determination to be certified by an independent surveyor (SGS) and also by defendant's officials and such certificates have not been issued/furnished;

2. Against agreed quantity of 14250 MT, only 13941.500 MT was supplied of the value of Rs.10,50,00,604/- besides Rs.34,92,500/- paid by the plaintiff to the port authorities and handling agents. Thus the defendant is liable to pay to the plaintiff only Rs.10,85,89,104/- whereas they have paid Rs.10,97,37,760/-, thereby an excess amount of Rs.11,48,656/- has been paid to the plaintiff which is recoverable by them;

3. That the parties had entered into agreement dated 19.6.1995 which is governed by General Conditions of Sale and in its Clause (H) there is an arbitration agreement and the disputes arising between the parties are liable to be referred for arbitration.

plaintiff has denied and disputed the case set up by the defendant.

4. Learned counsel for the defendant has contended that as there is a dispute between the parties and the contract contains an arbitration clause "H", as such disputes arise between the parties which could be resolved in arbitration and the suit is not maintainable, and the disputes are liable to be referred for arbitration u/s 8 of the Arbitration Act, 1996.

5. Whereas learned counsel for the plaintiff has contended that the goods were sold and delivered by the plaintiff to the defendant through the Clearing Agent and the sale and delivery were accepted and effected on 9.6.1995; payment was

payable on "Cash on Delivery" (COD) basis; the plaintiff had complied all the terms and conditions of the agreement. Defendant had accepted the delivery through Clearing Agent on 7th or 9th June 1995 and had made part payments. The defendant is liable to make payment of the balance amount and in the circumstances no valid ground for leave to defend has been made out, and that there is no dispute nor any was raised before this application of leave was filed; the application is not bona fide. It is also contended that there is no arbitration agreement between the parties and in any case, there is no dispute which could be referred for arbitration.

6. The question that arises is whether and when the sale and the delivery of the goods had taken place.

7. Most of the correspondence which exchanged between the parties have been placed on record. The undisputed facts are that the plaintiff had already imported 14250 MT of DAP and the said goods were lying at JNPT Port perhaps since May 1995. Parties had entered into negotiations and the plaintiff as seller had agreed to sell and the defendant as buyer had agreed to buy the said 14250 MT of DAP lying at JNPT Port @ US\$ 240 per MT on port delivery and "Cash on Delivery" (COD) basis. The agreement to sell is thus for sale of specific ascertained goods in deliverable state. "Delivery", "deliverable state" and "specific goods" are defined in clauses (2), (3) and (14) of Section 2 of the Sale of Goods Act, 1930 (for short "the Act") as under :-

(2) "Delivery" means voluntary transfer of possession from one person to another :

(3) Goods are said to be in a "deliverable state" when they are in such state the buyer would under the contract be bound to take delivery of them:

(14) "Specific goods" means goods identified and agreed upon at the time a contract of sale is made.

8. Sections 19, 33 and 36(3) of the Act provide for the rules when and how the property in such a case is transferred from the seller to the buyer, which read as under :-

19. Property passes when intended to pass. - (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

"33. Delivery. - Delivery of goods sold may be made by doing anything which the

parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf."

"36. Rules as to delivery.-

(1) x x x x x x x x x

(2) x x x x x x x x x

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

x x x x x x x x x

9. The weight of the cargo agreed to be sold was 14250 MT and the goods were lying at JNPT Port. The Clearing Agent were holding the goods on behalf of the plaintiff. The plaintiff vide their letter dated 7.6.1995 addressed to the aforesaid Clearing Agent wrote as under :-

"We hereby confirm having sold 14,250 Metric tons of Di-Ammonium Phosphate Ex.JNPT Port to M/s. M.M.T.C. Limited, Core 1, Scope Complex, 7, Lodhi Road, New Delhi.

You are hereby requested to deliver the entire consignment to them directly,"

Vide another letter dated 7.6.1995, plaintiff also informed/confirmed to the Asstt. Collector of Customs, JNPT, Bombay having so sold 14250 MT of DAP ex JNPT port to the defendant. The said Clearing Agent vide their letter dated 7.6.1995 in turn wrote to the defendant as under :-

"We hereby confirm that we are clearing 14250 MT of Di-Ammonium Phosphate (DAP) of Jordanian origin arrived per vessel. m.v. A1 Shams imported by M/s. Dimple Overseas Limited, New Delhi.

We further confirm that we are holding the above cargo with us in JNPT cylos and will deliver as per the instructions to be received from you or from your Bombay office from time to time.

We have also bagged 3,300 MT in 50 kg Bags which is lying at the port ready for despatch. Please give us dispatch instructions accordingly."

10. The defendant vide their letter dated 8.6.1995 addressed to the plaintiff wrote as under :-

"Please refer to your Offer No.2/95/DAP and subsequent letter dated 7th June, 1995 on the above mentioned subject. Consequent upon negotiations, we hereby agree to buy 14,250 MT of DAP in bulk at US\$240 PMT (U.S. Dollars Two hundred and forty only) as offered by you.

This is, however, subject to approval by the Management of this Company."

And vide letter dated 9.6.1995 addressed to the Asstt. Collector of Customs, JNPT, Bombay confirmed having purchased the said consignment as under:-

"We hereby confirm having purchased 14,250 MT of Di-Ammonium Phosphate from M/s DIMPLE OVERSEAS LIMITED 10/60 Industrial Area, Kirti Nagar, New Delhi - 110 01 Ex-JNPT Port.

We further confirm that the said consignment will be cleared by us and the goods imported/purchased are for use as manure by farmers only."

plaintiff vide their certificate dated June 9, 1995 also authorised the defendant "for stock and sale of the said DAP".

11. The defendant vide their fax No.3401994 dated 9.6.1995 wrote to the said Clearing Agent as under:-

"We hereby give below dispatch instructions for imported DAP to be moved to various destinations in packed conditions (.) Quantities already packed in Dimple Overseas brand may be further modified by including marketed by MMTC(.) The remaining quantities in bulk should be packed in MMTC marked bags for which you have got the ready bags available with you.

The rates for bags will be as per the agreement entered by you with M/s. Dimple Overseas i.e. the cost of bags will be at Rs.10.20 per bag (.) We will be using the existing bags only for such purpose (.) any additional requirement be procured from normal suppliers of MMTC with proper printing of our logo."

x x x x x x x x x x x

12. In this fax it was also instructed that 2000 MT each be dispatched to four destinations, namely, valsad, Baroda, Surat and Ahmedabad.

13. The said Clearing Agent in compliance of the instructions of the defendant wrote to the defendant as under:-

"With reference to above, we are clearing the consignment under our existing contracted Agreement with you and will be abiding by all the terms and conditions contained therein.

We will be clearing this consignment also within the clauses of existing contracted agreement which we have with your goodselves.

The payment of Rs.5,00,000/- which we have received from M/s Dimple Overseas Limited will be adjusted in our final bill to you for this consignment.

We further confirm that deliveries have been effected, as per your dispatch instructions dated 9.6.1995 to following places under the relevant G.R. Nos.

1. Rasayani - MAIDC GR No.) As per
2. Nasik - C.W.C. A/c MMTC GR No.) sheets

3. Poona - C.W.C. A/c MMTC GR No.) enclosed"

The defendant's Delhi office in their fax dated 19.6.1995 wrote to their Bombay office as under:-

"KINDLY REFER TO OUR TELEPHONIC DISCUSSIONS REGARDING PACKING & DISPATCH OF IMPORTED DAP LYING IN JNPT PORT (.) QUANTITIES DISCHARGED ARE ALREADY INCURRING DEMURRAGE WHICH HAS BEEN BORNE BY THE PARTY (.) AS PER OUR UNDERSTANDING IT WILL BE OUR endeavor TO dispatch THE UNLOADED CARGO AT THE EARLIEST EITHER BY ROAD OR RAIL (.)

WHILE YOU WILL BE MOVING THE MATERIAL TO MAIDC DESIGNATED DESTINATIONS FOR OUR DIRECT SALES TO THEM, IT IS ALSO NECESSARY TO MOVE MAXIMUM STOCKS BY ROAD TO THE NEARBY CENTRES LIKE PUNE, NASIK AND ALSAD (.) THESE STOCKS MAY BE SENT ON STOCK TRANSFER BASIS TO CWC/SWC GODOWNS (.) KINDLY INSTRUCT OUR HANDLING GENT AT BOMBAY TO dispatch MAXIMUM QUANTITY BY ROAD TO THESE DESTINATIONS (.) REGARDING AVAILABILITY AND ALLOTMENT OF RAKES WE ARE FOLLOWING UP WITH THE RAILWAYBOARD AND WE ARE QUITE HOPEFULL THAT SOME RAKES WILL BE AVAILABLE ON PRIORITY (.) TILL WE RECEIVE ALLOTMENT OF RAKES OUR ROAD MOVEMENTS SHOULD CONTINUE UNABATED (.) ROAD MOVEMENTS TO OTHER GODOWNS MAY ALSO BE EXPLORED FOR WHICH MMTC WILL BEAR MAXIMUM TRANSPORTATION COST OF RS. 300 PMT AND THE BALANCE AMOUNT WILL BE BORNE BY THE SUPPLIER (.) HOWEVER SUCH MOVEMENTS SHOULD BE CLEARED BY YOU BEFORE THEY ARE TAKEN UP BY OUR HANDLING AGENT (.)

14. A sum of Rs.8,59,437,760/- was paid by the defendant to the plaintiff by means of a cheque dated 20.6.1995, another sum of Rs.1.00 crore by means of another cheque dated 27.6.1995 and another sum of Rs.50.00 lakhs was paid by means of cheque dated 3.7.1995. In this way, in all Rs.10,09,37,760/- have been paid leaving a balance of Rs.1,05,55,490/-.

15. The disputes sought to be raised by the defendant is that against agreed quantity of 14250 MT only 13941.500 MT was supplied by the plaintiff.

16. The goods were agreed to be sold ex. JNPT, against port delivery on furnishing by the plaintiff of the following documents:-

1. Commercial invoice;
2. Weight certificate issued by independent surveyor which is SGS;
3. Certificate of quality issued by independent surveyor which is SGS;
4. Quantity determined - as per actual quantity received at the port duly certified by independent surveyor/MMTC's representative at the port/based on actual dispatch from the port;

17. As already noticed, the Clearing Agent was holding the goods on behalf of the plaintiff and thereafter on being instructed, they were holding the goods on

behalf of the defendant as their Agent. It is clear from the letter dated 15.6.1995 of the Clearing Agent to the defendant that the said Agent was the constituted agent of defendant also for clearing goods. The Agent had confirmed to the defendant about quantity of 14250 MT held by them. The plaintiff vide their letter dated 20.6.1995 had also submitted the following original documents to the defendant:-

1. B/L Nos. 1 to 5 all dated 25.4.1995;
2. Weight certificate of Eurabia Shipping & Intl. Transport Co. certifying that 14,250 MT were loaded.
3. Quality certificate from SGS in respect of the consignment.
4. Quality certificate from SGS in respect of the consignment.
5. Certificate of Origin issued by Singapore Indian Chamber of Commerce & Industry.

The copy of the surveyor's report in respect of the quantity and Clearing Agent's confirmation that they were holding the aforesaid cargo had been sent earlier also. No dispute was raised by the defendant about the relevant documents or the quantity of the goods either when the Clearing Agent had confirmed the delivery from the plaintiff or before the defendant started sending the goods to various destinations or after receipt of the documents from the plaintiff vide letter dated 20.6.1995. As already noticed, according to Section 2(2) of the Act "delivery" means voluntary transfer of possession from one person to another. Any dealing physically passing the goods sold from the hands of the seller into those of the buyer constitutes "actual delivery". Delivery of goods may also be made by doing anything which the parties agree shall be treated as delivery "which in effect amounts to delivery of possession to the seller or his Agent". u/s 33 of the Act, delivery of the goods is complete-

- (1) by doing anything which the parties agree shall be treated as delivery; or
- (2) by doing anything which has the effect of putting the goods
 - (i) in the possession of the buyer; or
 - (ii) in the possession of any person authorised to hold them on his behalf.

18. The plaintiff, as noticed above, vide their letter dated 7.6.1995 had conveyed and confirmed to the defendant as well as to the Asstt. Collector of Customs and the Clearing Agent of having sold 14250 MT of goods lying at JNPT, Bombay to the defendant and defendant vide their letter dated 8.6.1995 accepted the sale "subject to confirmation by the management" and then by letter dated 9.6.1995 addressed to the Asstt. Collector of Customs confirmed having purchased the goods from the plaintiff and in fax message dated 9.6.1995 having given instructions to their Clearing Agent to des-patch the aforesaid goods to various stations and the Clearing Agents in compliance of those instructions having

dispatched the same. The plaintiff had thereby divested itself of the possession and property in the goods in favor of the defendant and the property of the goods vested in the defendant through their Agent at the most on 9.6.1995. The sale and transfer of the property in the goods from plaintiff to the defendant thus was complete on 9.6.1995. This delivery was accepted by the defendant without any reservation and had dealt with the goods as owner after taking such delivery on 9.6.1995. The defendant is liable to make payment of the price of the goods weighing 14250 MT. If there was any short delivery thereafter, that will be a dispute between the defendant and their Clearing Agent for which the plaintiff cannot be held responsible and liable. It may also be mentioned that the defendant had not raised any objection about the documents furnished by the plaintiff. This also confirms that the sale was completed in accordance with the agreement between the parties. Also according to clause 11 of the agreement between the parties "the goods at the port should be free from all encumbrances, demurrage/wharf rent will be to the seller's account". In clause 13, it was also agreed that "all other port charges and handling charges will have to be borne by MMTC Limited". This obviously means that the seller was liable to bear the port charges up to the date of sale and delivery and thereafter it was the liability of the defendant to bear the same. The defendant has admitted having paid such charges after such delivery. This also proves that sale and delivery were complete. The defendant thus is liable to pay for the quantity of 14250 MT @ US\$ 240 per MT amounting to Rs. 11,14,93,250/- out of which Rs. 10,09,37,760/- only have been paid to the plaintiff. Thus after adjusting the payments made by the defendant, a balance amount of Rs.1,05,55,490/- remains due from the defendant which was not paid in spite of plaintiff's letters of demand and also their lawyer's notices. Reply was not sent to any such notices. This also shows that there was no dispute between the parties. The plaintiff in their lawyer's notice dated August 17,1995, made demand of interest @ 24% per annum. Defendant is also liable to pay interest u/s 61(2) of the Sale of Goods Act and also under the Interest Act, 1978. Defendant have not disputed the rate of interest. plaintiff is thus also entitled to interest @ 24% per annum as claimed.

19. Defendant have taken the objection that there is a dispute between the parties regarding less quantity delivered and this dispute is referable to arbitration. But it is denied by the plaintiff that there was any arbitration agreement between the parties. Reliance on behalf of the defendant has been made on a contract dated 19.6.1995. But according to the plaintiff, the sale and delivery was made and completed on 9.6.1995 itself. Any term incorporated in the agreement dated 19.6.1995 would not be relevant; in any case there is no dispute to be referred. As already held, the goods weighing 14250 MT were sold and delivery completed on 9.6.1995 and the defendant is liable to make payment of the amount on delivery of the goods as agreed. There is thus no bona fide dispute nor any dispute was raised before these applications were filed. Mere non-payment of the liability would not amount to a dispute. This ground has no

merit.

20. In view of the above discussion, no bona fide triable issue arises in the case. Both the applications are dismissed.

21. In the result, the suit of the plaintiff is decreed and

(1) a decree for recovery of Rs.1,37,22,137/-;

(2) interest @ 18% per annum on the principal amount of Rs. 1,05,55,490/-

(i) from the date of institution of the suit till decree and

(ii) from the date of decree till realisation; and

(iii) Costs of the suit

is passed in favor of the plaintiff and against the defendant.

I.A. Nos.11771/96 and 11772/96 dismissed and Suit No.2261/96 decreed and are disposed of.