

(2005) 07 DEL CK 0051
In the Delhi High Court
Case No : CS (OS) 781 of 1995

Essel International

APPELLANT

Vs

Nav Auro Investment (P) Ltd. and Others

RESPONDENT

Date of Decision : 28-07-2005

Acts Referred:

Partnership Act, 1932 — Section 69

Citation : (2005) 07 DEL CK 0051

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Sandeep Sethi and Pratibha M. Singh, for the Appellant; Viraj R. Datar, for the Respondent

Judgement

Swatanter Kumar, J.—M/s. S.L. International, a partnership concern duly registered under the provisions of the Indian Partnership Act has filed the present suit through one of its registered partners Sh. Ashok Kumar Goel for recovery of Rs. 59,38,123/- (Rs. 50 lacs as principal, Rs. 9,27,123/- on account of interest up to 31st January, 1995 and notice charges of Rs. 11,000/-). The plaintiff has further prayed for grant of future interest at the rate of 24 per cent p.a. till realisation. Summons in the suit were issued to the defendants who thereupon not only filed the written statement jointly but also raised the claim of set off/counter claim praying for passing of a decree to the extent of Rs. 70,07,023.25/- along with interest at the rate of 18 per cent p.a. from the date of institution of the suit till realisation of the said amount. Thus by this judgment, I would deal with the suit of the plaintiff and the counter claim preferred by the defendants.

2. According to the plaintiff, in the last week of April, 1994, the Chief Executive of the plaintiff firm namely Sh. P.C. Lahiri was approached by defendant No. 3 that their company defendant No. 1 needed temporary credit facility to the extent of Rs. One crore and that they shall return that amount within a period of about 8 months or earlier along with the interest at the rate of 24 per cent p.a.

On these terms, the plaintiff agreed to advance the amount of Rs. One crore with interest returnable within 8 months. In pursuance of the request of the defendants and the agreed terms and conditions, the plaintiff extended the loan facility of Rs. one crore by issuing a cheque No. 007898 dated 6th May, 1994 in favor of defendant No. 2 which was encased in their account. Defendant No. 2 is stated to be a division of defendant No. 1.

3. It is specifically pleaded in the plaint that vide cheque No. 908359 dated 18th May, 1994 drawn on Punjab National Bank, Jorbagh, New Delhi, the defendants returned the amount of Rs.50 lacs and consequently the said amount was credited in the account of the plaintiff on 19th May, 1994 leaving a balance of Rs. 50 lacs. The balance amount of Rs. 50 lacs was not paid by the defendants to the plaintiff even within 8 months and thus the payment has not been made to the plaintiff despite various visits of Shri P.C. Lahiri, Chief Executive of the plaintiff to the office of the defendants as well as discussion on telephone. Resultantly, the plaintiff has filed the present suit for recovery of the principal amount as well as the interest from 6.5.1994 till institution of the suit and charges for legal notice of Rs. 11,000/-, thus making a total of Rs. 59,38,123/-.

4. It is the case of the plaintiff that defendant No. 2 is a division of defendant No. 1 and defendant No. 3 is a Managing Director of defendant No. 1 who had extended his personal assurance and guarantee that the amount would be refunded to the plaintiff. As such, all the defendants are jointly and severally liable for repayment of the advanced loan.

5. The suit was contested by the defendants who had taken preliminary objections alleging in their written statement that the suit was false, fabricated and true facts had been suppressed by the plaintiff. It is the pleaded case of the defendants that the suit is barred u/s 69 of the Indian Partnership Act, 1932 as plaintiff is not a registered partnership firm, the plaint does not disclose any cause of action and the suit is also bad for mis-joinder of parties. On merits, the defendants vehemently denied that they had taken any loan much less a loan of Rs. One crore from the plaintiff as alleged. The defendants never agreed to pay any interest much less an interest at the rate of 24 per cent p.a. as claimed by the plaintiff as they had not even taken any loan from the plaintiff. The receipt of the sum of Rs. One crore was admitted but according to the defendants this was received by defendant No. 2 as earnest money and performance guarantee amount for the purchase of one cargo of sugar approximately 12,000 tonnes + 5% of Colombian white sugar. Defendant No. 2 is an importer of sugar into India and has imported large number of sugar in the year 1994 contracted from sources out of India and has resold different cargoes to different companies who had approached the said defendant. One Mr. Sashank Bhagat resident of 9, Jungpura, New Delhi approached the answering defendant for the purchase of one cargo of sugar at a contracted rate of Rs. 13,750/- per tonne. The total sum payable by the plaintiff to the defendants was Rs. 1.65 crores as earnest money performance guarantee deposit of Rs. 1.65 crores approximately 10% of the

value of the cargo to be imported. The amount of Rs. One crore was received by defendant No. 2 towards the earnest money and performance guarantee and an additional sum of Rs. 65 lacs was to be paid within ten days. According to the defendants, instead of paying the balance of Rs. 65 lacs, the plaintiff again approached the answering defendant to return a sum of Rs. 50 lacs due to some pressing urgency on the assurance that the total amount shall be paid back within ten days. The answering defendant had, thus, returned the sum of Rs. 50 lacs on 18.05.1994 on this assurance. Despite various letters and the defendants' personal contacting the plaintiff, the plaintiff failed to pay the balance amount resulting in the defendants' selling the imported sugar in the open market and they suffered tremendous loss. They claim a set off of Rs. 50 lacs and have filed a counter claim of Rs. 70 lacs on account of damages suffered by the defendants because of breach on the part of the plaintiff. The counter claim of the defendants has been repudiated by the plaintiff. In this manner, the defendants pray for dismissal of the suit of the plaintiff while the plaintiff prays for passing of a decree for money in its favor and rejection of the counter claim raised by the defendants.

6. On the pleadings of the parties, the court vide its order dated 14.07.1998 framed the following issues:-

"1(a) Whether the suit is barred by Section 69 of the Indian Partnership Act?

1(b) Whether the plaint has been signed and verified by one of the registered partners of the plaintiff firm? If not so, its effect?

2(a) What were the terms and conditions on which Rs. 1 crore were given to the defendants?

2(b) Was this amount advanced to the defendant by way of loan?

2(c) Whether the said Rs. 1 crore was received by the defendants by way of earnest money and performance guarantee amount for purchase of one cargo of sugar approximately 12,000 tonnes @ Rs. 13,750/- per tonne as alleged in para 8 of the written statement?

3. Whether defendants are entitled to a set off of Rs. 59,38,123.25/- as alleged in para 1 of the counter claim and para 11 of the written statement?

4. Whether the defendants are entitled to a sum of Rs. 70 lakhs from the plaintiff by way of counter claim as alleged in paras 1 to 8 of the counter claim.

5. Whether the plaintiff is entitled to interest? If so, at what rate and to what amount?

6. To what amount the plaintiff is entitled from the defendants?

7. To what amount the defendants are entitled by way of counter claim from the plaintiff?

8. Whether the defendants called upon the plaintiff to purchase the alleged sugar

from the defendants and whether the plaintiff committed any default in purchasing the said Columbian sugar? If so, to what effect?

9. Whether the present suit is maintainable against the defendant No. 3?

10. Whether the defendants are not liable to repay Rs. 50 lakhs to the plaintiff out of the total amount of Rs. 1 crore, which was admittedly advanced by the plaintiff to the defendant vide para 8 of the claim."

7. The plaintiff examined only one witness Sh. P.C. Lahiri, PW1 and PW2, Mr. S.C. Garg, who was working as a Deputy General Manager of the plaintiff company, was examined in rebuttal. However, the defendants before closing their evidence on 07.02.2004 examined two witnesses in support of their claim. Affidavit by way of evidence of DW1, Mr. Sameer Thukral was filed which was tendered for cross-examination. Mr. Charu Chandra Mehta was also examined as DW1 and his examination-in-chief was recorded on 1.3.2002 on which date he was partly cross-examined and his cross-examination was deferred. On the next dates, the said witness failed to appear for further cross-examination. As such, vide order of the court dated 30.10.2002, his evidence was closed.

Issue Nos. 1(a), 1(b) and 9.

8. At the very outset, learned counsel appearing for the defendants stated that he does not press for decision on issue Nos. 1(a) and 1(b) as there is sufficient evidence on record to establish that the plaintiff is a duly registered partnership concern and the plaint has been signed and verified by a duly authorised person. In view of the statement made on behalf of the defendants, it is not necessary for this court to examine these issues on merit or otherwise. The issues are, Therefore, answered in favour of the plaintiff and against the defendants.

9. Learned counsel appearing for the plaintiff stated that he does not seriously press issue No. 9 to the effect that the suit is maintainable against defendant No. 3. Even otherwise, there is no evidence on record except a bald averment made in paragraph 12 of the plaint that defendant No. 3 had extended his personal assurance for repayment of the said amount. However in the evidence of the plaintiff, this is nowhere stated that defendant No. 3 had agreed to stand as a surety or a guarantee for repayment of the said loan. There is no evidence led by the plaintiff oral or documentary in support of this issue. Consequently, this issue is answered against the plaintiff and in favor of defendant No. 3 by holding that the plaintiff is not entitled to any relief against defendant No. 3.

Issue No. 2(a), 2(b), 5 and 8

10. All these issues can be subjected to a common discussion because of the nature of evidence led by the parties on these issues and the fact that one way or the other, the finding on any of these issues is inter-dependent upon the finding on the other. I have already noticed that the evidence led by the parties is very limited. Hardly any evidence particularly documentary has been led by the parties in order to discharge the onus placed upon them under the respective

issues. PW-1 who was working as General Manager stated that the General Power of Attorney Ex.PW1/2 had been executed by the firm and signed by all the partners in his favor. He has stated that defendant No. 3 had approached him for a loan of Rs. One crore in the end of April, 1994 or is the beginning of May, 1994. After talking to the partners of the firm, it was agreed to give the loan to the defendants with interest at the rate of 24 per cent. The loan was given by cheque dated 6.5.1994 drawn on Punjab National Bank, Lawrence Road, New Delhi. The cheque was issued in favor of defendant No. 2 and the same was encashed. The amount of Rs. 50 lacs was returned on 18th May, 1994 by way of a cheque drawn in favor of the plaintiff. No interest was paid. The balance amount with interest had not been repaid. The legal notice Ex. PW1/3 was issued to the defendants, postal receipts of which were Ex.PW1/4 to PW1/6, claiming the amount of Rs. 59, 38,000/-.

11. Above is the case pleaded by the plaintiff in the plaint and to support it the General Power of Attorney of the plaintiff Sh. P.C. Lahiri was examined as PW-1 and Sh. S.C. Garg, PW-2 was examined in rebuttal. PW-1 stated on oath the facts in regard to grant of loan. He specifically stated that the amount was agreed to be returned within eight months. The loan interest was to be 24 per cent. These according to the plaintiff were the terms of giving loan to the defendants. In his cross-examination PW-1 clearly admitted that the plaintiff firm is primarily in the business of export of Indian handicrafts and agro commodities. This is stated to be trading activity of the plaintiff and it is not involved in manufacturing process. There is no reference in the statement of PW-1 as to what was the relationship between the partners of the plaintiff firm and the defendants. There is also no Explanation rendered by this witness as to why a loan, which was allegedly taken in view of the financial crisis of the defendants at an interest @ 24 per cent p.a. at least for a period of 8 months, was returned after few days that too without interest. The conduct of the parties in this transaction is defied by the commercial practice or the principles of commercial transactions. Why the payment was accepted by the plaintiff without interest, was interest agreed to be waived of on the complete transaction or not, are the questions, which remain unanswered, unexplained in the evidence produced by the plaintiff. There is also no Explanation on record tendered either by PW-1 or PW-2 who is stated to be the Deputy General Manager of the plaintiff company. Why no documents were executed for advancing a loan the plaintiff has chosen not to produce its regular books of accounts and income tax returns except an entry at point "B" to "B1" of Ex.DW1/E which reads as under:-

"Bank voucher cheque issued as advance payment to on account agent sugar."

12. This entry is sought to be explained by PW-2 in his cross-examination where he says that Asia Sugar and Chemical Company has never been constituted as an agent of the plaintiff. He also states that there was no document executed qua the loan as per his testimony dated 19.02.2004 qua Asia Sugar and Chemical Company. Why this entry was not relied upon by PW-1 as a loan document, if the

statement of PW-2 is of no consequence. This witness also attempted to explain that in the last 19 years, the plaintiff firm have been giving loan without documents. The word "agt" in Ex.DW1/E at point "F" again according to this witness was not an abbreviation for the word "against".

13. As already noticed, there is no documentary evidence produced by the plaintiff in support of its claim except DW1/E which again was exhibited during the cross-examination of PW-2 and is the instance of the defendants. Non production of its regular books of accounts and income tax records, is another aspect of the suit which the plaintiff should have explained. No Explanation whatsoever has been rendered on behalf of the plaintiff for non-production of this documentary evidence which the plaintiff is required to maintain in its normal course of business and even under the provisions of the Income Tax Act. The court would be called upon to draw adverse inference against the plaintiff for withholding the material evidence which is ought to be in possession and power of the plaintiff in its normal course of business. The story put forward by the plaintiff suffers from serious infirmities, doubts and contradictions. The statements of PW-2 and PW1 to a greater extent, are not reconcilable .PW-1 does not even refer to DW1/E while PW-2 also do not exhibit the same statement in examination in chief but relies thereupon in his cross-examination that too without producing the regular books of accounts of the plaintiff. The version of the plaintiff suffer from the element of improbability as well. The defendant company which is stated to have taken loan of Rs. One crore because it was in financial crisis at the rate of 24 per cent p.a., would normally not return the loan within few days and the plaintiff would give up interest upon such a large sum. The plaintiff has not been able to establish by any plausible evidence the terms and conditions of loan of one crore to the defendants. In fact there is no documentary or even unimpeachable oral evidence to establish the transaction of loan. Once the terms of the contract are not proved, the plaintiff cannot claim any interest, moreover, when the plaintiff has even failed to prove that it had advanced any loan out of which a sum of Rs. 50 lacs was returned on account of loan to the plaintiff. The contents of Ex.DW1/E support the case of the plaintiff. The entry uses the expression "Adv. Pymnt. To On A/C AGT SUGAR". This is the statement of account of plaintiff. If it was a loan transaction where would be occasion for the plaintiff to make an entry of one crore as an advance payment relatable to sugar. This in fact completely demolishes the case of the plaintiff in relation to a loan transaction. Notice served by the plaintiff Ex.PW1/3 also tenders no Explanation as to why the sum of Rs. 50 lacs was accepted by the plaintiff without interest from the defendant being a loan despite the fact that there is stated to be an agreement for payment of interest at the rate of 24 per cent p.a. Ex.PW1/3 as appears to have been typed on 21.2.1995 and was then dated as 11th March, 1995. The inevitable conclusion of the above discussion would that plaintiff has failed to discharge the onus placed on it under issues No. 2(a), 2(b), 5 and 8.

Discussion on defendants' case

14. Onus of these issues was placed upon the defendants. The defendants had denied the version of the plaintiff in relation to grant of a loan of Rs. One crore and had set up a claim of set off, counter claim on the basis of a transaction of purchase of sugar by the plaintiff. While vehemently denying the receipt of temporary credit facilities, it is the case of the defendants that plaintiff had approached them through Mr. Shashank Bhagat for purchase of one cargo of sugar approximately 12,000 + 5% to less, ex-warehouse at a price contracted at the rate of Rs. 13,750/- Rs. 1.65 crores was to be paid as earnest money performance guarantee being approximately 10 per cent of the value of the cargo to be imported. One crore was stated to have been paid.

The balance of Rs. 65 lacs was not paid but the plaintiff approached the defendants for return of Rs. 50 lacs due to some pressing urgency on the assurance that the total balance amount would be payable back within 10 days. Thereafter, resultantly a sum of Rs. 50 lacs was paid on 18.05.1994. To establish this story the defendants examined Mr. Charu Chandra Mehta, DW1 and Mr. Samir Thukral was also examined as DW1. Evidence of Mr. Samir Thukral was led by filing affidavit by way of evidence in examination-in-chief. However, he failed to appear before the Joint Registrar as well as before the court for cross-examination. As such, his evidence cannot be led in support of the case of the defendants. Thus, affidavit filed by Mr. Samir Thukral will not be considered for the purposes of deciding the fate of the afore-referred issues, the onus of which was on the defendants. According to Mr. Charu Chandra Mehra, DW-1, he was working as a senior executive in the defendant company. The defendant company is involved in import and export activities and it deals basically with sugar, wheat, rice and edible oils etc. He has given the detail of the functioning of the defendant company. According to this witness, the defendant company gets 60 days for purchase of the sugar and the company March rich after 60 days charges interest at the rate of 6.5 per annum. He claims to be working in the defendant company since 1993. The company is stated to have imported three vessels in the year 1994-95. The first vessel was percales in which the 14,000 metric tonnes of sugar was imported. The second one was Green Had in Haldia and Kakinada in which 12,000 m. tonnes of sugar was imported. In this vessel, 12,000 tonnes of Columbian white refined sugar was imported. The cargo was contracted with the foreign buyer in mid May, 1994. The plaintiff had approached for purchase of the sugar and had given one crore for buying this cargo of sugar at the price of Rs. 13,750/- per metric tonnes. 10% of advance money was to be given but the plaintiff had given Rs. one crore. The contract for purchase of sugar was settled between the parties sometimes around 3rd or 4th May, 1994 where after the cheque for one crore was given. Rs. 50 lacs were returned to the plaintiff because of regent need. The deficiency of this entire amount was to be made up by the plaintiff within seven-ten days which was not done and when the cargo arrived on 29th July, 1994, the plaintiff refused to take the delivery as contracted for the reason that market price of sugar had fallen down and the

plaintiff wanted to back out of the contract. Compelled by these circumstances, the defendants were forced to sell the sugar in the open market at the rate of Rs. 12 per kg instead of the price agreed at 13.75 per kg. The total price which the defendant got in the open market of the sugar aforesaid was Rs. 14.07 crores which was agreed to be purchased by the plaintiff at Rs. 16.50 crores and the defendant has suffered Rs. 1.20 crores as loss, thus claiming the set off as well as counter claim on account of damages against the plaintiff.

15. During his cross-examination nothing material could be brought. General questions in regard to nature, type of sugar were asked. Nothing specific was put to this witness in his lengthy cross-examination.

16. The defendants on 27th March, 1997 had filed list of documents including certain documents relating to sugar transaction during the period referred to in the plaint and DW1 in his statement. Mark "X1" is the resolution of the Board of Directors of the defendant company of its meeting dated 18th April, 1996 empowering Mr. Samir Thukral to sign, verify the pleadings and file the present suit. Surprisingly, even this document was not proved by the defendant by bringing the original minutes book in court particularly when this document was denied by the plaintiff. Mark "X2" to "X5" are the copies of the letters dated 6th May, 1994, 18th May, 1994 and 20th June, 1994 and 1st August, 1994. These letters have been written to the plaintiff by the defendants and reference to discussion between the parties in relation to return of Rs. 50 lacs which was given back by the defendant to the plaintiff out of the one crore earnest money purchase of sugar etc. has been referred into these letters which are also of no help to the defendant inasmuch as they were not proved in accordance with law. During the course of admission/denial on 22nd July, 1997, the plaintiff had denied the documents as well as receipt of the said documents. The defendants were required to prove these documents but no notice was served by the defendants upon the plaintiff to produce the original of these documents and no steps were taken to establish that these letters were ever received by the plaintiff. As such, the Joint Registrar rightly marked these documents and declined to exhibit the same. Therefore, even these documents cannot be read in evidence. Ex.DW1/2 a document which was denied by the defendant is a voucher written by the defendants themselves and does not have any acknowledgment and or signatures of the plaintiff or its representatives. This is a self-serving piece of evidence and to support the same the defendant also failed to produce its regular books of accounts, balance sheet or any other income tax record to show the correctness of the averments made in the written statement. Surprisingly, the defendant filed on record general ledger exhibited DW1/KK but in the said general ledger the transaction with the plaintiff is no way reflected. No documents have been produced by the defendants to show that any contract existed between the parties for purchase and supply of the sugar. The witness DW1 has failed to state the exact terms and conditions of the contract which was entered into between the parties. To a great extent, the statement of DW-1 is even beyond pleadings as in the written statement filed by the defendants, there

is no reference to the previous business of the defendants, the manner in which the transaction was entered into, the details of the vessel and any other documents through which the sugar was allegedly imported into India and that too at the instance of the plaintiff. According to the defendants, if plaintiff was to purchase the entire vessel of the imported sugar runs into more than 16 cores of the value, the parties normally would and should execute proper documents spelling out the clear transactions and right obligation of the parties emerging there from. The claim of set off and counter claim are not supported by any documentary or agent evidence which could persuade the court to sustain any of the pleas raised by the defendants on this score. A pertinent feature of the defendants' case which suffers from basic improbability is also that according to the defendants the transaction ad completed between the parties in the beginning of May on the basis of which the defendant had already transacted for import of large quantity of sugar. According to the averments made in Mark X/3, it is stated that the money was being returned to the plaintiff company at the instance of Mr. Shashank Bhagat who had introduced the plaintiff to the defendants. Mr. Shashank Bhagat was never produced before the court to substantiate the version of the defendants. The conduct of the defendant is again no in consonance with the business conduct of a company which is stated to have suffered loss of more than one crore. Why the company would wait for such a long time to raise its claim particularly when the cargo had been received in the year 1994 itself and the company claimed to have suffered loss of 1.20 crores. The company only thought of raising this claim at the time of filing the present written statement in the year 1997 and did not even respond to the notice Ex.PW1/3.

17. The above discussion on these issues clearly show that defendant has also failed to prove the issues onus of which was placed upon the defendant. They have failed to prove that there was a complete concluded contract between the parties wherein the plaintiff had required to purchase sugar of 12,000 tonnes at the rate of Rs. 13,750 per tonne as alleged in the written statement. It has also not been able to prove its claim of set off and counter claim as no evidence has been led to prove, the actual receipt of the sugar, sale of sugar and the loss suffered by the defendants. Except DW-1, no other witness or purchaser has been examined. The defendants have also failed to produce books of accounts reflecting the above transaction.

18. The complete analysis of the documents and oral evidence led by the parties in this suit clearly show that both the plaintiff and the defendants have miserably failed to lead any cogent and proper evidence in support of their respective claims. Further more, both the parties have withheld material relevant documentary evidence which is always expected to be in their power and possession. Furthermore, brother parties have failed to serve appropriate notice as contemplated under the provisions of order XI of the CPC.

19. For the reasons afore-recorded, the suit of the plaintiff as well as claim of the

defendants for set off and counter claim are dismissed while leaving the parties to bear their own costs.