

(2019) 02 CAL CK 0043
In the Calcutta High Court

Case No : Appeal From Decree (Apd) No. 252 Of 2015 With Civil Suits (Cs) No. 274B OF 1996

Essem Chemical Industries

APPELLANT

Vs

Standardshoe Sole & Mould (India) Ltd.

RESPONDENT

Date of Decision : 13-02-2019

Acts Referred:

Sale Of Goods Act, 1930 — Section 61

Citation : (2019) 02 CAL CK 0043

Hon'ble Judges : Biswanath Somadder, J; Arindam Mukherjee, J

Bench : Division Bench

Advocate : Malay Ghosh, V.N. Mishra, T. Laha, Shaunak Mitra, S.K. Kapur, Dhruba Ghosh, Rupak Ghosh, Srenik Singhvi, Soumajit Ghosh, Arindam Halder, Amrita Halder, Sananda Ganguli, Shubradip Roy

Final Decision : Allowed

Judgement

Arindam Mukherjee, J

1) The suit wherefrom the decree under appeal emanates is for recovery of price for goods sold and delivered by the plaintiff being the respondent in the appeal and the defendant being the appellant.

2) The plaintiff says that during the period from January, 1991 to December, 1995 the plaintiff had sold and delivered to the defendant diverse quantities of chemicals of different qualities. The plaintiff also admits to have received goods, sold and delivered by the defendant to the plaintiff. The plaintiff has given its version of the agreement said to have been entered into by and between itself and the defendant for the sale of goods. The plaintiff has, however, failed to produce its primary evidence, being the books of accounts to establish its claim in the suit. The plaintiff proceeds on the basis the defendant's admission in its balance-sheet as on 31st March, 1995 wherein the defendant has admitted and acknowledged to owe a sum of Rs. 1,26,30,953/- to the plaintiff. The plaintiff though refers to balance confirmation said to have been made by of the partners

of the defendant firm on 31st October, 1991 for a sum of Rs. 41,32,250.59/- and 21st September for a sum of Rs. 1,50,23,373/- but appears to have abandoned such case in view of the defendant's admission in the balance-sheet. The plaintiff says that the balance-sheet has been signed by Sital Ghosh one of the partners of the defendant firm, and duly certified by the auditor of the defendant firm. The plaintiff then says that between 1st April, 1995 and 31st December, 1995 the following transactions took place.

- i) Plaintiff sold and delivered further materials, aggregating to Rs. 33,64,518/-.
- ii) The defendant against such supply has made payment of Rs. 35,51,211/-.
- iii) Plaintiff issued several credit notes in favour of the defendant aggregating to Rs. 2,54,914.37.
- iv) Defendant supplied materials aggregating to Rs. 7,57,120/-.
- v) The defendant by a demand draft dated 10th September, 1995 had paid a further sum of Rs. 2,99,550/-.

3) The plaintiff further states that after giving credit to all payments received from the defendant, the credit notes issued by it and the value of the goods sold and delivered by the defendant, a principle sum of Rs. 81,31,441/- remained due and payable from the defendant. The plaintiff is entitled to interest at the agreed bank rate on the said principle sum up to 31/08/1996 which comes to Rs. 67,74,772/-. Thus, the plaintiff's claim in the suit is for Rs. 1,49,36,213/-. The plaintiff has claimed a decree for the said sum of Rs. 1,49,36,213/- by treating the principle and interest as the principle sum and further interest.

4) On the basis of the statements made in the plaint and arithmetical calculations made in respect of the transactions post 31st March, 1995, it appears that a sum of Rs. 1,86,693/- (35,51,211/- -33,64,518/-), a sum of Rs. 254,914.37/-, a sum of Rs. 7,57,120/- and a sum of Rs. 2,99,550/- aggregating to Rs. 14,98,277.37/- has to be deducted from Rs. 1,26,30,953/- (admitted by defendant in its balance-sheet) which brings us to a figure of Rs.1,11,32,675.63/. This does not take us to a sum of Rs. 1,12,299,625/- as shown by the plaintiff in its statement appearing at Page-21 of the Paper Book Volume-I (part of the plaint). This arithmetical discrepancy has to be set right as the plaintiff has not given any further particulars in the plaint apart from those mentioned hereinabove before its claim can be considered.

5) The plaintiff though has claimed interest at the banking rate but has not specified such rate in the plaint. The agreement pleaded by the plaintiff in the plaint also does not appears to be a written agreement. It is, therefore, necessary for the plaintiff to prove such agreement before it can invite the Court to believe the same. The chart appearing at page 21 of the paper book (Vol-I) also does not improve the situation. On the contrary, it complicates the plaintiff's claim as the figures shown therein does not tally with the facts and figures pleaded in the body of the plaint probably due to the arithmetical error as

pointed above. The plaintiff as appears from the said chart had given adjustment of debit notes raised by the defendant for a sum of Rs. 31,38,185/, but has not provided any details of the debit notes, that is, when were they raised, what were their individual value, when such adjustment was made and were these the entire value of the debit notes raised by the defendant. The debit for interest shown in the said chart aggregating to Rs. 67,74,772 also does not give any details.

6) The defendant in its written statement has given its version of an agreement said to have been entered into between themselves and the plaintiff. This agreement is also not in writing. Unless, the said agreement is proved before us, we are not inclined to accept the same. The defendant further alleges that it had acted as a distributor and marketing agent of the plaintiff. In course of business transactions, the defendant raised several debit notes on the plaintiff on diverse dates on account of short supply, excess billing, defective materials, discount allowed to the customers, commission paid to technicians, repairing charges of CCI godown etc. which the plaintiff failed to give adjustment to. The aggregate of the debit notes between 1991 to 1996 as alleged by the defendant is Rs. 1,12,60,454.12/-. The defendant further alleges that the plaintiff has failed to issue sales tax declaration form on account whereof the defendant became entitled to a sum of Rs. 3,43,886.53 from the plaintiff. The plaintiff has never paid or adjusted the said sum. The plaintiff while supplying the goods through their own men had procured orders which were supplied by the defendant but no sales tax amounts has been paid by the purchasers and, as such, the plaintiff is liable to compensate for such amount aggregating to Rs. 3,42,683/-. The defendant has also alleged that the plaintiff has failed to pay and/or give adjustments for a sum of Rs. 2,18,569.05 for the price of the goods sold and delivered by the defendant to the plaintiff. According to the defendant, the plaintiff sold, supplied and delivered goods to the customers out of the stock lying with defendant but no money in respect of the said sale was received by the defendant. On this head, the defendant claimed a sum of Rs. 20,20,983.76/-. After adding up all these claims the defendant has a claim of a sum of Rs. 1,41,86,479.46 from the plaintiff. It is, however, noticed that the defendant has not formally claimed any decree by way of counter claim as against the plaintiff despite having mentioned about the same. The defendant has proceeded to claim interest at the rate of 22 per cent per annum on the said sum. In absence of any decree being claimed separately by way of counter claim the defendant at best can ask for a set off.

7) It is, therefore, apparent that the defendant is attempting to set off a sum of Rs. 1,41,86,479.46/- with interest from the claim of the plaintiff. The defendant has also failed to produce its primary evidence that is books of accounts to support and prove its claim which the defendant intends to set off.

8) The defendant cannot resile out of the admission made in its balance-sheet as on 31st March, 1995. The said sum as shown in the balance sheet is a

cumulative figure after adjustment of all amounts receivable from the plaintiff till 31st March, 1995. The defendant at best, on proving the debit notes raised by it subsequent to 31st March, 1995 can claim set off of such sum. The debit note said to have been raised by the defendant prior to 31st March, 1995, therefore, cannot be taken into account in view of the admission in the balance sheet.

9) Even for the sake of argument if we accept that the defendant in its balance sheet as 31st March, 1995 had included separately the amount receivable from the plaintiff under sundry creditors which would reduce the admitted figure of Rs. 1,26,30,953/- the defendant owed to the plaintiff then also it was the obligation of defendant to produce their book of accounts to substantiate any such amount. The defendant has not produced its books of accounts. In such circumstances, the admitted figure of Rs.1,26,30,953/- has to be accepted as the settled position of accounts as on 31st March, 1995 after adjustment of all money which the defendant was to receive till 31st March, 1995. The defendant has not substantiated its claim for Rs. 20,20,983.76/-.

10) It is also apparent that the plaintiff has given credit for debit notes aggregating to 31,38,185/- from the admitted outstanding figure as on 31st March, 1995. This pre supposes that, these debit notes are for the period subsequent to 31st March, 1995 and not for the period prior thereto. In the event the debit notes were for a period prior to 31st March, 1995 then, it has to be held that the plaintiff of its own is not proceeding on the basis of the figure of 1,26,30,953/- admitted in its balance sheet.

11) On an analysis of the pleadings, evidence both written and oral adduced by the parties, we find that the defendant in its claim has included debit notes for the period between 1991 and 1996. The debit notes prior to 31st March, 1995 has to be excluded simply because of their admission in the balance-sheet as on 31st March, 1995 and their failure to show that the debit notes prior to 31st

March, 1995 has not been taken into account while arriving at the admitted figure of Rs. 1,26,30,953/- in the balance sheet. The debit notes for the period subsequent to 31st March, 1995 is very few in number and the plaintiff has given adjustment of Rs. 31,38,185/- which is much in excess of the aggregate value of the debit notes said to have been raised by defendant subsequent to 31st March, 1995.

12) The defendant has heavily relied upon the plaintiff's letter dated 20th February, 1996 (Exhibit-8) to impress upon the fact that the plaintiff has claimed only a sum of Rs. 3,32,949/- as on 31st December, 1995 and as such could not have claimed any sum in excess thereof. On a careful reading of the said letter, it will appear that the same has been written in response to the statement of account submitted by the defendant for the period of 01.04.1994 to 31.03.1995 and 1.04.1995 to 31.12.1995. The plaintiff while dealing with the statements had supplied its reconciliation statement for the period 01.04.1994 to 31.03.1995 and 01.04.1995 to 31.12.1995. So far as the period between 01.04.94 to

31.03.95 is concerned, after the balance sheet as on 31st March, 1995 the reconciliation is of no consequence. It will also clearly appear from paragraph 5 of the said letter that the plaintiff has referred the statement of account between 31.04.1995 to 31.12.1995 and thereafter has mentioned that "from the final balance of CCIL as on 31st December 1995 you will observed that Rs. 3,32,949/- is due from you after adjusting the amount of all credit notes and purchases/ purchase returned". This amount due has to be construed only for the period between 1st April, 1995 and 31st December, 1995 that too on account of debit and credit notes and does not include claims for any period prior thereto that is to say, it is not the figure payable by the defendant to the plaintiff on account of the transactions the parties had since 1991.

13) The letter dated 20th February, 1996 (Exhibit-8) refers to a MOU dated 27th November, 1995 in respect of defendant's obligation to pay bank charges. The said MOU has not been proved and, as such, the obligation of the defendant to pay bank charges cannot, therefore, be accepted. However, since the plaintiff has given adjustment of excess sum than the aggregate of the debit notes said to have been raised by the defendant for the period between 1.4.95 to 31.12.95, we do not give separate adjustments for the debit notes on account of bank charges aggregating to Rs. 3899/-.

14) It will appear from the letters dated 15th May, 1995 (Exhibit-6) and the letter dated 22nd September, 1995 that, the defendant had agreed to pay an advance of Rs. 20lakhs which was to be adjusted in four equal instalments at the rate of Rs. 5lakhs per month against supplies to be made during the period starting from October, 1995. Both these two letters have been written by the plaintiff and there is no denial to the same. In fact in the letter dated 22nd, September, 1995 it is stated that the said excess payment together with any further payment to Bombay upto 30.09.1995 will be considered as advance payment to be adjusted according to the spirit of the letter dated 15th May, 1995. It is an admitted position that after September, 1995 there has been no sale or cross-sale between the parties and, as such, the said payment of Rs. 20lakhs could not have been adjusted against supplies to be made on October, 1995 unless such fact is proved by the plaintiff who claims a decree inclusive of the said sum. The plaintiff has not been able to substantiate that said Rs. 20lakhs have been adjusted in terms of the latter dated 15th May, 1995 and 22nd September, 1995 though the same was its obligation. Plaintiff has not given adjustment of the said sum of Rs. 20lakhs in its schedule of claim appended to the plaint appearing at page 21 of the paper book (Vol. 1) In that view of the matter the defendant should get benefit of said sum of Rs. 20lakhs and we are inclined to give the same to the defendant particularly in view of the two letters discussed above. So far as the sales tax dues claimed by the defendant is concerned, there is no evidence laid down by the defendant to substantiate the plaintiff's liability to pay and/or compensate and/or reimburse the said sum. We, therefore, reject such claim of the defendant.

15) We have considered the three judgments cited by the plaintiff, that is, AIR 1951 SC 177, 2005 (7)SCC 667 and 2012 (8)SCC 148 and the distinguishing features pointed out by the defendant. We find that there can be no quarrel as to the ratio laid down in those decisions. It is correct that plaintiff can resort into an alternative case and make a prayer in the alternative for a decree for money even if the allegation of the money being paid in pursuance of a contract could not be established by evidence. However, the alternative claim has to be substantiated by evidence after its foundation has been laid down in the pleadings when the principle claim of the plaintiff does not succeed. In the instant case, we are of the view that the plaintiff is entitled to rely upon the balance-sheet to show the sum admitted by the defendant in their balance-sheet. So far the transactions subsequent to 31st March, 1995 the plaintiff has to establish its claim by evidence. We find that the plaintiff had itself stated certain facts and figures which the plaintiff admits in respect of transactions for the period subsequent to 31st March, 1995. In absence of the primary evidence that is books of accounts of the plaintiff being produced by the plaintiff, we are unable to accept any alternative case save and except to the extent made out as discussed hereinabove.

16) We have taken note of the issues settled in the suit as also the impugned judgment and decree wherein the learned Trial Judge has given his findings in respect of each one of them. We have also gone through the questions and answers relied upon by the parties in the course of hearing. The depositions of the witnesses of the parties do not persuade us to form an opinion different from what we have discussed above.

17) We have noticed that the plaintiff has admitted that the defendant has paid Rs. 186,693/- (Rs.35,51,211 -Rs.33,64,518), a sum of Rs. 2,99,550/- (by demand draft). The plaintiff has given adjustment of credit notes for a sum of Rs. 2,54,914.37/-. The defendant has sold delivered goods of Rs.757,120/-. Adding up all these figures takes us to Rs. 14,98,277.37 which is rounded up as 14,98,277/-. Deducting the said sum of Rs. 14,98,277 from Rs.126,30,953 (as admitted by the defendant in its balance sheet) a figure of Rs, 1,11,32,676 is arrived at. Deducting a sum of Rs. 31,38,185/- therefrom on account of debit notes raised by the defendant takes us to Rs. 79,94,491/-. After deducting Rs.20 lakhs therefrom on account of advance to Bombay remaining unadjusted, the figure arrived at is 59,94,491/-. This is the principle sum which the plaintiff is entitled to realize from the defendant. Plaintiff is not entitled to add the interest component to arrive at a principle sum in absence of any specific agreement to that effect particularly when the rate of interest claimed by the plaintiff is not an agreed amount. The plaintiff can at best claim interest under Section 61 of the Sale of Goods Act, 1930.

18) Considering the fact that the transactions between the parties being commercial in nature, the period during which the transaction went on as also the year of filing of this suit and taking an average of the rate of interest charged

by the nationalized banks during this period we are inclined to award an interest at the rate of nine per cent per annum on and from 1st January, 1996 till realization of the entire sum. We take 1st January, 1996 as the cut off date since it was expected that all dues between the parties were either to be paid off by 31st December, 1995 or squared off which has not been done admittedly. The plaintiff is entitled to interest at the rate of 9 per cent simple interest per annum on the principle sum of Rs. 59,94,491/- on and from 1st January, 1996 until realization. The plaintiff is entitled to a further sum of Rs. 50,000/- on account of court fees paid for the institution of the suit. We modify the decree to that extent.

The appeal is disposed of accordingly.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on a priority basis.