(2010) 03 DEL CK 0223

In the Delhi High Court

Case No : I.A. No. 10607 of 2003 in CS (OS) No. 152 of 1999

G. Runghen and Co. APPELLANT

Vs

S.N. Goenka and Co. Pvt. Ltd. and Another RESPONDENT

Date of Decision : 25-03-2010

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 21, 61, 64

Citation : (2010) 03 DEL CK 0223

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Akhil Anand, for the Appellant; P.R. Aggarwal and Manjula Gandhi, for the Respondent

Judgement

S. Ravindra Bhat, J.—In this summary suit, under Order XVII CPC (CPC) the plaintiff claims a decree for US$ 2,20,314.86 against the defendants, in Indian currency at the exchange rates prevailing at the date of the decree with pendente lite and future interest at the rate of 18% per annum till realisation of the decree from 01.01.1999. After service of notice, the defendant entered appearance; the plaintiff requested for issuance of summons the judgement, upon which the first defendant moved an application seeking leave to defend the proceedings.

2. Briefly the suit averments are that the plaintiff, during the period September 1996 and May 1997 supplied, to the first defendant, at the latter''s request, heavy melting scrap and scrap brass tubes through various shipments and issued several invoices for such supplies. It is contended that the material was sent to the first defendant from time to time during the concerned period; on behalf of the plaintiff the transaction was effected through Mauritius Commercial Bank Ltd. The second defendant was authorized to collect payment and the bills of exchange on behalf of the Mauritius Bank and on behalf of the plaintiff. It is contended that intimation about supply of material was given to the first defendant from time to time and that the latter used to get the original

documents released from their banker, the second defendant. On release of such original documents from the second defendant, the first defendant secured delivery of goods. It is argued that the plaintiff supplied to the first defendant material, and issued several invoices amounting to US $170, 217, 28/-. Details of the invoices raised by the plaintiff and the Mauritius bank reference have been indicated as follows:

-- S.
No. Date Mauritius Bank Invoice No. Amount (US $) reference No.
-- 1.
19-9-1996 OBC 96 NY 9772 001HMS/09/GNK/96 30,417.91
-- 2.
19-9-1996 OBC 96 NY 9811 004/SC/B/MLGY/09/GNK/96 9,633.70
-- 3.
12.11.1996 OBC 96 NY 11641 018/SBT/1/GNK/11/96 22,810.25
-- 4.
12.11.1996 OBC 96 NY 11642 (010/HMS/4/GNK/11/96 11,542.35 12.11.1996 008/HMS/4/GNK/11/96 11,455.62 12.11.1996 011/HMS/4/GNK/11/96 11,917.10
-- 5.
11.4.1997 OBC 97 NY 4316 1003/HMS/4/GNK/11/97 20,383.26
-- 6.
11.4.1997 OBC 97 NY 4314 1002/HMS/4/GNK/11/97 22,002.30
-- 7.
11.4.1997 OBC 97 NY 4311 1001/HMS/4/GNK/11/97 24,695.68
-- 8.
25.7.1997 OBC 97 NY 5990 1007/HMS/4/GNK/11/97 5,358.99
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3. The plaintiff says that the goods were shipped by sea, and the relative documents including Bills of Exchange, were sent to the first defendant, through the second defendant for acceptance. These Bills of Exchange were accepted for payment, according to their tenure on the concerned dates of payment. The details of such bills of exchange, mentioned in the suit are:

-- Sl.
Date of Bill of Amount (US $) Due Date No. Exchange
-- 1.
27-5-1997 5,358.99 22.8.1997
-- 2.
11.4.1997 24,695.68 14-7-1997
-- 3.
11.4.1997 22,002.30 14.7.1997
-- 4.
11.4.1997 20,383.38 14.7.1997
-- 5.

	12.11.1996	22,810.25	23.12.1997
6.	12.11.1996	34,915.07	9-02-1997
7.	19.9.1996	30,417.91	16.12.1996
8.	19.9.1996	9,633.70	31.10.1996

4. It is claimed that despite receiving the goods, the first defendant failed to make payments towards the above Bills of Exchange, for US $ 1,70,217.28; a reference is made to a registered legal notice, dated 27.04.1998 demanding payment for the said amount, to which the first defendant replied on 16.05.1998, making false pleas. The plaintiff says that the said letter was replied on 29th July, 1998. The plaintiff claims the said amount, in terms of the Bills of Exchange, as well as 18% interest, from the dates they fell due, till 31.12.1998, and future as well as pendente lite interest, on the same amounts. This, says the plaintiff, works out to Rs. 90,99004.12. The suit is verified by Mr. Gautam Khaitan, who claims to be the plaintiff''s power of attorney holder.

5. The first defendant, in the leave to defend application (IA 10607/2003) disputes the claim, contending, inter alia, that the suit has not been instituted by a competent person; the power of attorney holder''s affidavit, as well as his right to make the claim, is contested. It is also stated that the suit does not conform to the standards prescribed by the CPC for institution of a summary suit.

6. The defendant says that the plaintiff has not disclosed the agreement, on which the transactions were premised, even though the same is alluded to. It is submitted that the parties had been transacting with each other since 1995, and the plaintiff has been, for its own reasons not forthcoming on the issue, and has chosen to keep the written contract away from the Court. It is submitted that the agreement for supply of the scrap was specific as regards the quality, size, quantities, and other particulars, which were to be shipped, and that they are essential for a just adjudication of the dispute between the parties. According to the agreement, the shipped scrap was to be free from explosives and pitted rust or dust commission of 2% on the CIF value was to be paid to the defendant, and further, inspection by one SGC was to be done, before actual shipment.

7. It is submitted that in the absence of pre-shipment inspection, the plaintiff had to prove that the goods supplied were of the requisite and agreed quality, free from rust etc. It is submitted that the plaintiff has also not brought on record the originals of the Bills of Exchange, and only photocopies are placed on the judicial file, which does not satisfy the requirement of Order 37, CPC. It is pointed out that the plaintiff does not refer, or say when the Bills of Exchange were presented, and not honoured, or that notice of protest was recorded or issued. The defendant relies on Sections 61 and 64 of the Negotiable Instruments Act, 1882 ("the Act") in this regard, and submits that in the absence

of averments, or even any shred of documentary evidence, the Court cannot decree the suit, much less in a summary proceeding, as is claimed.

8. The defendant argues that the Bill of Ladings relied on in this case, are not proper documents, and say that the consignment "is said to contain" certain quantity of goods. Such vague contents do not lend credence to the assertion that any specific or particular quantity of goods were shipped, or placed on board as consignments. The plaintiff would therefore, have to prove that the goods agreed to be supplied were indeed shipped, and received by the defendant. The defendant also submits that the letter placed on record by him reveals that plaintiff was intimated about the shortcomings in the quantity and quality of the scrap supplied, and that they had rust, as well as dust, contrary to the agreement.

9. In support of the application for leave (to defend the suit) copies of some documents, including letters and faxes have been filed by the defendant. It is submitted that the issues raised in the application point to serious questions of fact, as well as law, that are triable, and that the defendant should be granted unconditional leave to defend the suit.

10. It is the common case of the parties that the plaintiff supplied quantities of scrap to the defendant; the latter does not dispute that such supplies had been made previously. The defendant''s case is that specific quantities of the product, were agreed upon, and that two crucial aspects were also agreed, i.e. pre-despatch inspection, and further that the goods were to be free from rust and dust.

11. The relevant provisions of the Act are as follows:

61. Presentment for acceptance.- A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured.

If the bill is directed to the drawee at a particular place, it must be presented at that place; and if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured.

1 [Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.]....

64. Presentment for payment.- Promissory notes,-bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder.

2 [Where authorized by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.]

Exception.- Where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

12. In this case, one of the questions raised by the defendant, for leave to defend the suit, is that the Bills of Exchange were not presented. The copies of each of Bills of Exchange have been placed on the record; they are payable "90 days Bill of lading date after sight". The bill of lading date, and due date, are recorded on the face of the document. The defendant''s acceptance of the document is shown at the reverse. The Bills are made out "to the order of The Mauritius Commercial Bank". The defendant is shown as drawee.

13. In Nilgiri Trading Co. and Others Vs. K. Simrathmull and Another, , the Madras High Court held:

The prima facie presumption is that if a person who endorses a bill of exchange to another, whether for value or for purposes of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appears in evidence, as the bona fide holder and proprietor of such bill and shall be entitled to recover, notwithstanding there may be on it one or more endorsements in full subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees whose names he may strike from the bill or not as he may think proper". The Madras High Court held that the mere absence of re-endorsement did not disentitle a previous endorsee who came in possession of the bill of exchange from being a holder of the bill of exchange and sue on it.

Section 21 of the Negotiable Instruments Act, 1881 defines the expression "at sight" and "after sight". In a bill of exchange the expression "at sight" means ''on demand'' while ''after sight'' means ''after acceptance'' or ''noting for non-acceptance'' or ''protest for non-acceptance''. The Bills of exchange here say "At 90 days Bill of lading date, of this First of Exchange.... Pay to the order of the Mauritius Commercial bank...." They are to be paid to the order of the Mauritius Commercial Bank.

14. The plaintiff has not filed the original Bills of Exchange. The dates when they were presented are also not known; in fact the photocopy of an incomplete document, i.e. a letter dated 15th April, 1998, by the second defendant bank, returning the bills as unrealized, has been placed. The photocopy does not appear to be a complete document; furthermore, its last page, facially seems to be missing. The letter - whatever can be seen from it, mentions that import bills due beyond six months are not realizable, for certain reasons. Two bills, for US $ 9633.70 and US $ 5738.99 were returned, with the comment that original documents were not furnished to the second defendant bank.

15. The plaintiff - as well as the defendant rely on several letters exchanged

between both of them. In several of these, the defendant refers to the quality of the goods exported by the plaintiff, and complains that they ought to have been inspected and tested, before dispatch; there is frequent reference to the quality of the product, and that they were not inspected, pre-shipment.

16. The correct position of law, vis-?-vis the right of a defendant to be permitted to contest a summary suit, has been spelt out in Santhosh Kumarm v. Bhai Singh AIR 1958 SC 32 Milkhiram (India) Private Ltd. and Others Vs. Chamanlal Bros., , and Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . The Court summarized the position in the latter decision (Mechelec Engineers) in the following terms:

(a) If the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiffs claim, the court may impose conditions at the ti me of granting leave to defend the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.

17. In the present case, the overall conspectus of facts, lead the Court to conclude that even though all the pleas of the defendants may not be feasible or sound, yet there are features, particularly relatable to the quality of the goods, and the condition of pre-shipment, as well as the issue of presentation of the Bills of Exchange, which are not entirely devoid of merit. The features of this case and the defences sought to be raised cannot, in these circumstances be called bogus, sham or moonshine, so as to entail rejection of the application for leave to defend. The case is also not of the last category, where the defendant ought to be called upon to provide security as a precondition to permission to contest the suit.

18. In view of the above conclusions, the defendant is entitled to unconditional leave to defend the suit; IA 10607/2003 is therefore allowed.

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19. The Court has, today, permitted the defendant to contest the suit, unconditionally. The defendant is, therefore, granted four weeks time to file his written statement. The plaintiff shall file the replication within eight weeks. Parties shall conduct admission or denial of documents, by filing affidavits, within ten weeks.

List the suit, before the Joint Registrar, for scrutiny on 5th July, 2010; list before the Court, on 2nd August, 2010, for framing issues.

