
(2013) 05 DEL CK 0337
In the Delhi High Court
Case No : CS (OS) No. 1341 of 1998

Indus Tours and Travels Pvt. Ltd. APPELLANT
Vs
Indus International Co. Ltd. RESPONDENT

Date of Decision : 30-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1, Order 7 Rule 11(a)

Citation : (2013) 5 AD 594

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Advocate : Lalita Kohli, Mr. Abhishek Swarup and Ms. Swarupama Chaturvedi,
for the Appellant;

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—This is a suit for recovery of USD 409,086 (US \$ Four Hundred and Nine Thousand Eighty Six only), equivalent to Rs. 1,61,71,170/-(Rupees One Crore Sixty One Lakh Seventy One Thousand and One Hundred Seventy Only). It is the case of the plaintiff that it is a company registered under the Indian Companies Act, 1956 and is engaged in the business of tour operators in India, Nepal and other Asian countries. The defendant is a company incorporated under the laws of Japan and is also engaged in the business of tourism, operating from Japan. The plaintiff submits that it had been rendering various services for conducting tours to the defendant company since the year 1985 and that both the plaintiff and the defendant have had a long standing relationship. It further contends that the defendant company used to route their tourist activities in India, Nepal and Bhutan through the plaintiff company. During these tours, the plaintiff submits that it used to incur expenses for hotel accommodation, transport, food, tour guides and various other arrangements, as requested by the defendant.

2. The plaintiff submits that the head office of the defendant at Osaka made composite payments for all the branches of the defendant in consideration for the

services rendered by the plaintiff. It further contends that the defendant used to receive payments from the tourist groups and thereafter it used to pay the plaintiff as per the invoices/bills raised by the plaintiff for each tourist/group. Due to the volume of work, varied types of requirements and fluctuating rates for different services at different times, the broad terms of understanding between the parties was reduced to writing in the form a written agreement which was contained in the formal agreement for the period from October 1, 1993 to September 30, 1995. It also contends that as per the agreement, all payments were made on submitting invoices and that this position also continued even after the formal termination of the agreement on September 30, 1995. These invoices were made in USD and payable in USD being calculated on the basis of the then prevailing rates. As per the arrangements between the parties, various rates were fixed over and above the actual expenses borne by the plaintiff as consideration for the services rendered or/and to be rendered by the plaintiff from time to time.

3. The plaintiff submits that according to the arrangement as stipulated under the agreement, once the tour group leaves from India, a final invoice was to be raised by the plaintiff and the defendant was to settle the payment within 30 days of receipt of the invoice. It contends that vide letter dated January 20, 1996, the plaintiff company informed the defendant by fax that sum of USD 2,84,118 was due from the defendant on September 30, 1995 and the defendant was asked to confirm the balance amount. And that it was stated in the said fax letter that in case no reply is received within 15 days of the issue of this letter, it would be presumed that the balance shown in the letter is correct. The plaintiff submits that no reply was received in writing and the outstanding balance amount was confirmed by the defendant over telephone.

4. It contends that the defendant company continued to avail the facilities and services rendered by the plaintiff at the request and instruction of the defendant company even after September 30, 1995. The defendant company kept on paying the invoiced amounts from time to time, though not strictly adhering to the period of 30 days within which it was to make the payment. And that despite the commitment and obligation of the defendant company to pay the outstanding bills/invoices within the prescribed time, the defendant started defaulting and delaying the payment during the financial year commencing from April 1, 1996. The plaintiff submits that as a result of this delay, it used to keep running account of the dues against the defendant. The plaintiff submits that huge amounts started accumulating towards the defendant.

5. Thereafter, it contends that the defendant company started raising frivolous objections of over billing and wrong preparation of invoices. The defendant allegedly refused to make remittances despite the plaintiff requesting them to retain 10% as disputed amount and remit the balance. It contends that in furtherance of this demand, various fax messages and oral requests, including face to face meetings in India and Japan were held between June and December

1997. And that despite repeated requests and persistent persuasion of the plaintiff, the defendant did not make the remittance and instead cancelled the tour bookings made with the plaintiff.

6. The plaintiff states that on account of these cancellations, it suffered huge losses and also loss of reputation. It submits that by that time, an outstanding amount of USD 3, 66, 438 (US \$ Three Lakh, Sixty Six Thousand and Four Hundred and Thirty Eight Only) along with interest at the rate of 24% per annum, became due for payment by the defendant to the plaintiff. Hence, the plaintiff had to serve a legal notice dated November 5, 1997. Since the defendant did not make any payments, the plaintiff has instituted the present suit.

7. The defendant filed written statement on February 7, 2000 in which it raised certain counter claims. In the preliminary submissions, the defendant contends that the plaintiff has been avoiding furnishing true accounts despite the order of this Court dated February 16, 1999 and because of which the defendant filed its Written Statement based on the assumptions of certain accounts of the plaintiff. The defendant submits that it was ready to settle the account when and if cost sheets were provided. The defendant also denies that there was any amount of outstanding dues to the plaintiff. It also submits that the plaintiff had actually raised inflated and false invoices and in fact the defendant had made excess payments to the plaintiff and hence the outstanding dues were actually due to the defendant by the plaintiff. Hence, the defendant made in its WS a counter claim of Rs. 11,54,000/- (Rupees Eleven Lakh Fifty Four Thousand Only), based on certain assumption as the accurate estimation could only be made by reference to cost sheets, balance sheets and original vouchers. Hence the defendant has prayed the decree of rendition of full accounts and its counterclaim. This Court, vide order dated 16.02.1999, directed the plaintiff to discover on oath the documents which have been in its power and possession relating to matters in question in this suit as discovery of documents was necessary for fair disposal of the suit and saving costs.

8. The plaintiff filed its replication denying the averment that it was holding the necessary documents. It was also denied that the plaintiff had received any excess amount and reaffirmed that in fact the plaintiff is entitled to payment as claimed in this suit. It was also denied that invoices were subject to checking costs sheets and balance sheets and was also pleaded that bills were raised according to the agreed terms. In response to this, an additional Written Statement was filed by the defendant pleading that cost sheets were the main basis of payments to the plaintiff and that the invoices were to reflect the net costs. Further, the contents of the WS and counter claim were reaffirmed

9. Vide an Order dated September 23, 2004, this Court framed the following issues:

i. Whether the plaint does not disclose any cause of action and is liable to be rejected under Order VII Rule 11(a) CPC. OPD

- ii. Whether the Plaint is signed and verified by the plaintiff. OPP
 - iii. Whether under the agreement between the parties, the invoices sent by the plaintiff to the defendant were subject to checking from cost sheets. OPP
 - iv. Whether under the agreement which expired on 30.09.1995, various rates were fixed over and above the actual expenses borne by the plaintiff as consideration for the services rendered and to be rendered from time to time. OPP
 - v. Whether the parties continued to work subsequent to 30.09.1995 on the same terms and conditions as contained in agreement for the period from 01.10.1993 to 30.09.1995 or with modification if any. OPP
 - vi. What was the undertaking/agreement between the parties for the payment by the defendant to the plaintiff for the services rendered by the plaintiff after 30.09.1995. OPD
 - vii. Whether the defendant accepted its liability of USD 2,84,118/- as on 30.09.1995 vide its letter dated 20.01.1996. OPP
 - viii. Whether the liability of the defendant from 01.10.1995 is to be determined on the same basis as it was up to 30.09.1995. OPD
 - ix. Whether the defendant was liable to pay to the plaintiff USD 3,66,438/- on 31.10.1997. OPP
 - x. Whether the defendant is liable to pay interest to the plaintiff and if so at what rate. OPD
 - xi. Whether the costs incurred by the plaintiff justify the amount claimed in the invoices raised on the defendant. OPD
 - xii. Whether the plaintiff is the agent of the defendant or not. OPD
 - xiii. Whether the plaintiff settled the accounts with the defendant. OPD
 - xiv. Whether costs sheet, or disclosures of costs are essential for verification of the accounts as per the contentions raised in paragraphs 13E, 13F and 13L of the defense of the plaintiffs. OPD
 - xv. Whether the defendant is entitled to rendition of accounts and in the relationship of principal and agent, verify the costs incurred by the agent. OPD
 - xvi. To what amount is the defendant entitled. OPD
 - xvii. Relief. OPD
10. Vide an Order dated September 23, 2004, this Court appointed Adv. Sunil Bagai as the Local Commissioner. On behalf of the plaintiff, Sh. Sunil Anand (Accounts Manager of the plaintiff company) was examined as PW1, Sh. H. S. Gill (Director of the plaintiff company) as PW2 and Sh. Naveen Kumar Jain (Partner

of Naveen Jain & Co., Chartered Accountant) as PW3. The defendant has cross-examined PW1-3. However, it is pertinent to note that the defendant stopped appearing before this Court after July 6, 2009 and no witness has been examined by the defendants. The defendant's right to lead oral evidence was closed vide Order dated April 13, 2010.

11. With respect to the first issue, I find that the plaintiff has disclosed a clause of action i.e. claim of the suit amount. Besides, the Defendant has not led any evidence to the contrary. Therefore, I find this issue in favour of the plaintiff. Regarding the second issue, the plaintiff herein is verified by Mr. H. S. Gill (PW2), the Managing Director (MD) of the plaintiff company. He has filed an affidavit stating that he is the MD of the plaintiff company and that he is duly authorized to sign, verify and institute the suit on behalf of the plaintiff company. Mr. H. S. Gill has stated in his cross-examination that he was appointed as the MD of the plaintiff company in the year 1996. There being nothing to the contrary, Mr. Gill being the MD could be held to be competent to sign and verify the Plaintiff as per Order XXIX Rule 1 of CPC. The Issue is decided accordingly.

12. In order to decide the third and fourteenth issue regarding whether the agreement between parties, the invoices sent by the plaintiff to the defendant were subject to checking from cost sheets, the Agreement must be examined. The relevant provision is Clause (I) of the Agreement for the period 01.10.1993 to 30.09.1995. This clause stipulates:

The final invoice will be raised by A, as soon as the group leaves from India. B will settle the invoice within 30 days of receipt of invoice from A. A will raise invoice in INR wherever rates are applicable. Otherwise, hotels where rates are in USD, Bill should be USD rates convertible in INR.

I see that there is no mention of cross-verification of the invoice with the cost-sheets in the Agreement between the parties. Hence, I find this issue in favour of the plaintiff.

13. With respect to the fourth issue regarding the rates, The Agreement in Article 2A stipulates the "mark-up" rates which are to be complied by the plaintiff with respect to booking made for the defendant. During Cross-Examination of Mr. Sunil Anand (PW1), Accounts Manager of the plaintiff company, he was asked to explain the meaning of "mark-up". He replied stating:

the bills received from Hotels, including room rent, meals, taxes etc. and on the final bills issued by Hotels, we add 10% on account of mark-up.

Thereafter, he was asked if the mark-up is the profit the plaintiff or defendant or both. He has replied stating:

under Art. 2A, 10% mark-up is profit for plaintiff.

Hence, this issue is also decided in favour of the plaintiff.

14. Issues 5, 6 and 8 concern the arrangement between the parties for the work

done subsequent to the expiry of the agreement and the determination of the parties liabilities thereon. The defendant has not led any evidence in support of this issue. However, PW1 stated in Cross-Examination that the contract has not terminated after 30.09.1995 and the parties continued as per the same terms and condition. PW2 has stated that the Agreement was continuing after its date of expiry with the mutual consent of the defendant and plaintiff. Since this evidence has not been assailed by the defendant, I find these issues also to be in favour of the plaintiff.

15. The seventh issue is regarding the defendant's acceptance of its liability of USD 2,84,118/- as on 30.09.1995 vide its letter dated 20.01.1996. The relevant letter is PW1/49X. Upon careful examination, it can be seen that there is no signature of the defendant. However, PW2 has also stated that the defendant only impliedly accepted this Balance Confirmation as they did not directly respond to the letter. However, it must be observed that the letter dated 20.01.1996 clearly states as follows:

In case no reply is received within 15 days from the date of issue of this letter, it will be presumed that the balance shown in this letter is correct.

I find that the silence of the defendant amounts to acceptance of its liability.

16. I am of the opinion that the remaining issues can be broadly categorized into two larger issues. Issues 9, 10, 11, 13 and 16 pertain to the main issue in the suit regarding whether the accounts were settled between the parties and what amount is to be paid by which party along with interest. Meanwhile, issues 12 and 15 are regarding the existence of an agency between the parties and the rendition of accounts by the agent to the principal. Regarding the first of the larger issues, as observed above, the parties have continued their business even after the expiry of the agreement. It has also been seen from the agreement, that there was no express stipulation for the plaintiff to provide the cost sheets for the purpose of verification as against the invoices claimed. However, at this juncture, I find that the outcome of the second of the larger issues; regarding the principal-agent relationship between the defendant and the plaintiff to be of considerable relevance. This is because, even though the Agreement between the parties does not stipulate the verification of invoices raised with the cost sheets, in the event the plaintiff carried on business with the defendant as its agent, there would arise a legal requirement to produce the cost incurred to the principal.

17. Therefore, I shall proceed to examine the issue regarding agency first. At the very outset, it is pertinent to note that though the defendant has contended this issue in its written statement and counter claim, it has not led any evidence in furtherance of this issue. However, I have observed conflicting answers from PW1 and PW2. PW1 during the cross-examination was asked who was the overseas agent? And PW1 has stated:

The Japanese Party was the principal and the Delhi Office was handling agent.

This statement was objected to by the counsel for the plaintiff. Meanwhile, PW2 during his examination has categorically denied the existence of any principal-agent relationship between the parties. Therefore, there seems to be uncertainty between the parties regarding the nature of relationship between them after the expiry of the Agreement. However, I am of the view that the manner in which the parties carried out their businesses is akin to a principal-agent relationship for the following reasons. Firstly, as submitted by the plaintiff, it was providing services to the defendant on the basis of oral agreements, but the broad understanding was reduced in writing in the Agreement for the period between 01.10.1993 to 30.09.1995. Secondly, it is also seen from the evidence that the plaintiff continued to provide services to the defendant even after the expiry of the agreement. Thirdly, the accounts manager of the plaintiff company (PW1) has identified the defendant company as the principal. Based on these reasons, I find that the plaintiff was the defendant's agent and therefore, is required to justify the costs incurred in carrying out his business under the agency.

18. Vide Order dated February 16, 1999, this Court had ordered for the discovery of the cost sheets from the plaintiff. 281 files containing the cost sheets are purportedly lying locked. However, to help in expedient disposal of the matter, the Accounts Manager of the Plaintiff Company (PW1), has appraised this Court with copies of the said 281 files which correspond to the Table of Costs as contained in PW1/17x. I have perused through these files on a random selection to tally them with the Table of Costs. My findings are as follows.

19. As noted above, it is seen from the Balance Confirmation slip dated September 30, 1996 that the defendant has acknowledged dues to be USD 2,84,118 (US\$ Two Lakh Eighty Four Thousand One Hundred and Eighteen only). Thereafter, from October 1, 1995 the table of invoices is produced in PW1/17x. The plaintiff has also produced a detailed tabulation of the various costs raised by it along with the margin mark-up amount. I find that the amounts raised are corresponding to the cost incurred by the plaintiff, which is supported by the bills and vouchers placed on record. However, the plaintiff has also placed on record the List of Bills which have been misplaced due to the closure of the plaintiff's company and shifting of files. The total amount for the missing bills/vouchers is Rs. 2,64,550 (Rupees Two Lakh Fifty Four Thousand Five Hundred and Fifty). Based on the aforesaid findings, I hereby decree the suit in favour of the plaintiff to the tune of Rs. 1,59,06,620/- (Rupees Once Crore Fifty Nine Lakh Six Thousand Six Hundred and Twenty Only), being the difference between the amount prayed for and the total sum for which bills/vouchers are missing, along with pendent lite and future interest at the rate of 12% per annum from the date of filing of the suit till realization. The counter-claim filed by the defendant is hereby dismissed. Decree be drawn accordingly.