(1990) 03 CAL CK 0055

In the Calcutta High Court

Case No : F.A. No. 336 of 1984 and Cross Objection No. COT 3910 of 1984

Lloyd Bitumen Products Pvt. Ltd. APPELLANT

Vs

Oil and Natural Gas Commission RESPONDENT

Date of Decision : 21-03-1990

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Limitation Act, 1963 — Article 55, 3

Citation : (1990) 2 CALLT 245

Hon'ble Judges : Mukul Gopal Mukherji, J;J.N. Hore, J

Bench : Division Bench

Advocate : Samarjit Gupta, B. Muksuddy, S.K. Mukherjee and T.K. Sen, for the Appellant;Sanjoy Bhattacherjee and Chandrima Bhattacharya, for the Respondent

Judgement

J.N. Hore, J.—This is an appeal by the plaintiff LLoyd Bitumen Products Private Limited against the judgment and decree of dismissal passed by the learned Judge, 3rd Bench, City Civil Court in Commercial Suit No. 428 of 1976.

2. Plaintiff instituted the said suit against the defendant Oil and Natural Gas Commission for recovery of central sales tax dues payable by the defendant to the extent of Rs. 23,163.21. The plaintiff''s case in short was that during the period between 1970 and 1971 the plaintiff, at the request of and pursuant to the orders in writing dated 23rd April, 1970 and 16th May, 1970 placed by the defendant at the plaintiffs place of business at premises No. 4A, Royd Street, P.S. Park Street, Calcutta sold and delivered to the defendant at Baroda and Ahmedabad from Calcutta diverse quantities of coal tar enamel and coal tar primer of agreed specification and at the agreed rates on terms and conditions that the defendant would submit to the plaintiff within a period of 30 days from the date of the receipt of the said goods or within a reasonable time the requisite Central Sales Tax Decleration Form duly filled in and signed in respect of and covering the said goods so sold and delivered, failing which the defendant would be liable to pay to the plaintiff further sums towards central sales tax at the rate

of 10% on the price of goods. The plaintiff duly submitted to the defendant eight bills covering the sale goods and the defendant accepted the said bills without raising any objection and paid the sum inclusive of central sales tax at 3 % as charged therein. The defendant failed and neglected and ultimately on or about 9th January 1976 refused in writing to submit to the plaintiff the requisite central sales tax declaration form in respect of and covering the said goods on a frivolous pretext notwithstanding demands by the plaintiff. By and under two separate assessment orders dated 12.12.74 and 12.12.75 and consequential two separate demand notices dated 31.12.74 and 23.12.75 received by the plaintiff from the appropriate Commercial Tax Officer, the plaintiff was assessed to Central Sales Tax for the sale of the said goods. The plaintiff is entitled to recover from the defendant the amount of Central Sales Tax at the rate of 10% on the price of the said goods which after giving credit for 3% central sales tax charges in the eight bills referred to above and paid by the defendant amounts to Rs. 22,165.76. The plaintiff claimed interest at the rate of 6% per annum on the said sum and the total claim was laid at Rs. 23,163-21 including interest.

3. The defendant-respondent contested the suit by filing a written statement in which several legal and technical objections were taken and the claim of the plaintiff was denied. The defence case was that there was no written or implied contract between the parties requiring the defendant to furnish declaration in ''C Form in lieu of 7% States Tax by and between the defendant and the plaintiff. The defendant by a letter dated 9.1.76 requested the plaintiff for a final reply in the matter of free supply of 48.118 M.T. of Coal Tar Enamel as per promise of the plaintiff vide Letter No. I.B.P.-037/ 3563 dated 19th October 1972 as the same was not till then fulfilled, and expressed willingness to consider thereafter about the submission of Declaration Form without prejudice. The plaintiff supplied defective materials and they agreed to replace such materials by a free supply of 48.118 M.T. of coal tar enamel and when the plaintiff was not keeping their promise the said letter dated 9.1.76 was written by the defendant and the said cannot save the limitation. Free supply of 48.118 M.T. of coal tar enamel by the plaintiff to the defendant as replacement to cover the shortage found in coating the material on the line pipe was a condition precedent for filing of Declaration Form ''C by the defendant and as the plaintiff failed to fulfil that condition, the question of furnishing ''C Form by the defendant did not arise. The defendant also denied its liability to pay any interest on the amount alleged to be due. The jurisdiction of the City Civil Court to try and entertain the suit was also challenged. The defendant also took the plea of limitation inasmuch as the claim in respect of the bills submitted by the plaintiff to the defendant for Sales Tax was far beyond the period of 3 years from the date of supply.

4. Upon consideration of the materials on record the learned Judge has found that there was an implicit agreement between the plaintiff and the defendant that the defendant would bear the burden of Central Sales Tax at 10% in case they failed to supply the Sales Tax Declaration Form and that the defendant failed to. submit the said Form in contravention of the agreement between the

parties. The learned Judge has also found in favour of the plaintiff that the Court had territorial jurisdiction to try the suit. The lower Court has also found in favour of the plaintiff that the plaintiff was entitled to recover a sum of Rs. 15,131.15 towards Central Sales Tax paid by the plaintiff. The learned Judge has, however, found in favour of the defendant that the suit was barred by limitation inasmuch as the claim was not preferred within 3 years from the date of supply of the goods or even from the date of payment of the last bill relating to the transactions. In the opinion of the learned Judge the fact that the defendant failed to furnish the Sales Tax Declaration Form as per agreement did not extend the period of limitation inasmuch as when the Sales Tax Declaration Form was not supplied to the plaintiff, the plaintiff should have taken steps to recover the amount which was payable on account of Sales Tax by reason of the agreement within the period of limitation. The suit was accordingly dismissed with costs on the ground of limitation though other issues were answered in favour of the plaintiff.

5. The defendant has also preferred cross-objection challenging the findings of the court below with regard to jurisdiction of the court to entertain and try the suit and the agreement between the parties with regard to submission of the Sales Tax Declaration Form by the defendant in lieu of 7% Central Sales Tax and that the defendant was liable to pay Sales Tax at the rate of 10% and that the plaintiff was entitled to recover the same less the amount already paid by the defendant and that the plaintiff was entitled to recover a sum of Rs. 15.131.15 towards the Central Sales Tax paid by the plaintiff.

6. Mr. Gupta, learned Counsel for the appellant has sought to assail the finding of the court below with regard to limitation and contended that time would run from the date of refusal by the defendant to submit Sales Tax Declaration Form i.e. 9.1.76 and the suit being filed on 22.9.76 was well within time. Mr. Bhattacherjee, learned Counsel for the respondent has, on the other hand, contended that time would run from the date of payment of the last bill i.e. 6.7.71 and as the suit was filed more than 3 years after that day it was hopelessly barbed by limitation. He has not, however, pressed the cross-objection preferred by the respondent, The only point for determination in this appeal, therefore, is whether the suit was barred by limitation.

7. In order to appreciate the argument advanced by Mr. Gupta, it is necessary to refer to certain facts. Admittedly, the defendant was to pay the sales taxes. The order dated 23.4.70 with annexures (Ext. 1) shows that the prices are inclusive of excise duty but other taxes applicable were to be paid by the defendant. Now, admittedly, taxes were paid at the rate of 3 % as per bills raised by the plaintiff in all the bills. There is, however, endorsement that Sales Tax Declaration Form was due. The general rate of tax on sales in the course of inter-State trade or commerce as prescribed u/s 8(2) of the Central Sales Tax Act, 1956 was ten percent at the material time. But a dealer selling goods to a registered dealer in the course of inter-State trade or commerce of the description referred to in

Section 8(3) is liable, u/s 8(i)(b) to pay tax at a concessional rate, of three percent at the material time, on that part of his turnover. In order to qualify himself for that rate of tax, he has to furnish to the prescribed authority within the prescribed time a declaration duly filled and signed by the registered dealer to whom the goods are sold: Such a declaration must contain the prescribed particulars in the prescribed form obtained from the prescribed authority. If the selling dealer fails to furnish the declaration in the prescribed form (C-Form) he is liable to pay tax at the general rate provided for in Section 8(2). Similarly, Section 5(2) (a)(ii) of Bengal Act VI of 1941 provides that the taxable turnover would be the amount which remains after deducting sales to a registered dealer of goods of the classes specified in the certificate of registration of such dealer as being intended for re-sale by him in West Bengal or for own use by him in the manufacture in West Bengal of goods for sale, and/or containers and/or other materials for the packing of the goods of the class or classes so specified. The proviso lays down that the deduction on account of sales referred to in sub clause (ii) shall be allowed to the dealer who sales the goods only when he could furnish in the prescribed manner a declaration containing prescribed particulars in the prescribed form obtainable from the prescribed authority duly filled up and signed by the registered dealer to whom the goods are sold. There is no dispute that the defendant is a registered dealer and the circumstances that the defendant paid central sales tax as the concessional rate of 3% instead of 10% and the plaintiff demanded submission of the Sales Tax Declaration Forms in the bills go to show that there was a tacit agreement for submission of the necessary Sales Tax Declaration Form. Unless the defot submitted the necessary ''C form it was liable to pay sales tax at the rate of 10%. The payment of sales tax at the concessional rate of 3% depended on submission of the necessary declaration form duly filled in and signed by the defendant which was a registered dealer.

8. Mr. Gupta has contended that in view of what has been stated above the plaintiff''s right to sue could not accrue unless there was failure or refusal by the defendant to submit the necessary declaration form and it was only after the refusal to submit the Sales Tax'' Declaration Form duly filled in on 9.1.76 by a letter (Ext. 6) that the plaintiff''s right to recover central sales tax from the defendant at the general rate of 10% minus the amount already paid at 3 % arose. The defendant could submit the declaration form even on the date of assessment and so unless there was previous refusal by the defendant the plaintiff could not file, a suit against the defendant before the date of assessment of the plaintiff''s turn over at the general rate of 10%. There is considerable substance in the contention of Mr. Gupta. For a suit, there must be a cause of action. In other words, there cannot be a suit unless there is a cause of action for the same. This cause of action, again, postulates or presupposes a right to suit, upon which it must be founded, and it arises upon a breach or threatened breach of some legal right which is the occasion for the particular suit. Limitation must be in respect of the suit. Under the statute or the law of limitation it is the suit which is barred. Where, therefore, there is no cause of action, on which the

suit can rest or upon which it can be brought, no question of limitation arises and time would not and cannot run, or, in other words, the law of limitation for its application postulates a suit i.e. a cause of action otherwise subsisting. So, the question is when the right of the plaintiff to recover the central sales tax at the general rate of 10% less the amount already paid at the concessional rate of 3% could arise in this case. Could the plaintiff''s right to sue arise on the date of delivery of the goods or on the date of the payment of the last bill as urged by Mr. Bhattacherjee, learned Advocate for the respondent and as held by the court below. In our opinion, the answer must be given in the negative. If the defendant submitted the necessary declaration form duly filled in and signed before the assessment of the turn over of the plaintiff as per contract between the parties, there would have been then no cause of action for the present suit. It was only for the failure of the defendant to submit the declaration form that the plaintiff could acquire a right to sue the defendant. Now, the defendant''s letter dated 9.1.76 addressed to the plaintiff (Ext. 6) shows that the plaintiff made a demand for submission of the necessary declaration form and in reply the defendant by this letter informed the plaintiff that it would submit the necessary declaration form if the plaintiff had supplied 48 M.T. of enamel etc. and primer free of cost inasmuch as the consignment of the said goods was defective. This is a new and extreneous condition which could not have relevance in the matter of submission of the declaration form which the defendant was bound to submit under the contract. Unless the declaration form was submitted, the defendant was not entitled to concessional rate of 3 %. After enjoying the concession in the rate of the central sales tax, the defendant did not submit the declaration form and imposed'' altogether a new and extraneous condition for submission of the declaration form. The letter (Ext. 6) amounts to refusal to submit the necessary declaration form on frivolous pretext. It was, therefore, only on such refusal on 9.1.76 to file the necessary declaration form that the right of the plaintiff to recover the central sales taxes at the general rate of 10% arose. The cause of action for this suit, therefore, arose on 9.1.76 and not before that. It was not really a simple suit for recovery of the balance price of goods sold and delivered but really a suit for compensation for breach of contract. It was for the breach of contract on behalf of the defendant to submit the necessary Sales Tax Declaration Form and the consequent inability on the part of the plaintiff to produce it or before assessment that the disputed turn over was assessed at the general rate of 10%. As a result the plaintiff had to pay the sales taxes, at the rate of 10%, thus sustaining damage. The residuary Article 55 in respect of suits on contract, and not Article 14, is applicable in the present case. As the suit was within 3 years from the date of the breach of the contract i.e. 9.1.76, it must be held that it was within time and not barred by limitation.

9. The cross-objection being not pressed, the appeal must succeed. Upon calculation it appears that the appellant is entitled to a sum of Rs. 21,970/- approximately and not Rs. 22,165.76 as per annexure ''A'' to the plaint.

10. The appeal is, therefore, allowed in part with proportionate costs and the

cross objection be dismissed. The judgment of the court below, on the issue of limitation and the decree of dismissal are hereby set aside,

The suit stands decreed in part for Rs. 21,970/- with proportionate costs. The decretal amount will bear simple interest at the rate of 6% from today till the date of realisation.

Mukul Gopal Mukherji, J.

11. I agree.

