
(1998) 01 DEL CK 0017

In the Delhi High Court

Case No : IA No. 10355/90 in suit No. 320/89

Manish Paper and Board Mills Ltd.

APPELLANT

Vs

Jainson Clothing Corporation

RESPONDENT

Date of Decision : 19-01-1998

Acts Referred:

Citation : (1998) 01 DEL CK 0017

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Sh. P.V. Kapoor and Ms. Ketki Goswamy, for the Appellant; Sh. G.L. Rawal and Sh. Kuljit Rawal, for the Respondent

Judgement

K.S. Gupta.J.

1. plaintiff has filed application under order 6 Rule 17 CPC alleging that it has filed suit for recovery of Rs. 11,84,008.34 Along with interest against the defendant. Case of the plaintiff interalia is that because of the negligence on the Part of M/s. Soyuzvneshtrans who was the handling agent of the defendant is USSR, the plaintiff has suffered the losses in question. To determine the real controversy between the parties, it is necessary that said M/s. Soyuzvneshtrans is imp leaded as defendant. It is further stated that the case of the defendant in the written statement is that it was acting as an agent and it did not enter into contract with Novo export, the Russian seller in its" independent capacity. Contract was between the plaintiff and said Novo export. This plea taken by the defendant is denied by the plaintiff. However,if it is held that the defendant was acting as agent of the plaintiff and not in its independent capacity and the contract was between the plaintiff and aforesaid Novo export, Novo export is bound to compensate the plaintiff for short delivery of the contractual goods in question. Cause title of the suit is sought to be amended by impleading M/ s.Soyuzvneshtrans as defendant No.2 and Novo export as defendant No.3. After existing para 22, following new paras are further sought to be incorporated.

3 22A. "The plaintiff states that the defendants No.2 was the handling agents of the defendants No.1 in USSR. Prior to loading the goods in question, the defendant No.1 and 2 in collusion and conspiracy with each other wetted in salt water lesser quantity of goods than contracted for so as to increase the weight of the goods to be equivalent to that of the contracted quantity. The plaintiff submits that the defendants No.1 and 2 in collusion and conspiracy with each other and deliberately loaded less quantity of contracted goods with a view to make a wrongful gain for themselves and cause of wrongful loss of defendants. The defendant No.1 and 2 are thus jointly and severally liable to pay to the plaintiff the sums claimed in the plaint.

22B. In the alternative and without prejudice to the above it is submitted that if it be held that defendant No.1 was the agent of the plaintiff and had entered into the contract with the defendant No.3 on behalf of the plaintiff, then the plaintiff states that the defendant No.3 with a view to causing a wrongful gain to himself and a wrongful loss to the plaintiff deliberately wet in salt water less quantity of goods than contracted for so as to increase the weight of the goods to be equivalent to that of the contracted quantity. The defendant No.3 in that is liable to pay to the plaintiff a sum of Rs. 11,84,008.34 Along with interest at the rate of 18% per annum from the date of payment to the date of realisation."

2. Consequential amendments are also sought in paras 23, 25 & 26 and the prayer clause of the plaint on the lines indicated in the application. Affidavit of S.K. Jain, director of the plaintiff company has been filed Along with the application.

3. In the reply it is stated that by seeking the proposed amendment, the plaintiff intends to change the entire character of the suit. It is denied that M/s. Soyuzvneshttrans and Novo export are necessary parties to the suit. It is stated that both of them are not subject to the jurisdiction of this Court and the allegations in regard to the alleged collusion are erroneous. Suit is barred by limitation against aforesaid M/s. Soyuzvneshttrans and Novo export.

4. I have heard the parties' counsel and have been taken through the record.

5. It is interalia alleged in the plaint that in the month of March 1987, defendant entered into a contract with Novo export at Moscow (USSR) for import of 5,000 MT (Plus/ minus 10%) of paper waste of cardboard waste A-1 and by the bill of lading No. 28 dated 30th June, 1987, 549.755 MT out of 5,000 MT of paper waste was loaded from the port of Ilyichevak on vessel " M.V. Nikita Mitchenko" destined for Bombay. While, the said goods were on high seas, the plaintiff entered into a contract with the defendant for purchase of 549.755 MT (plus/ minus 10%) of paper waste @ Rs.2,300/- MT. plaintiff issued a letter of authority dated 16.7.87 in favor of the defendant and Along with letter dated 27th July, 1987 plaintiff enclosed two bank drafts for Rs. 9,00,000/- & Rs. 3,64,436.50, totalling Rs. 12,64,436.50 which were duly encased by the defendant towards the price. Ship carrying the aforesaid consignment arrived at Bombay port on

20th July, 1987. On containers being opened for the purposes of customs examination and destuffing, the plaintiff noticed high percentage of moisture in the goods. Goods were, however, got cleared from the custom. By a letter dated 13th August, 1987, plaintiff apprised the defendant of the high moisture content in the goods. plaintiff got lifted samples by M/s SGS. India Private Limited. Bombay, who by certificate No. 5201/05/02454 dated 26th August, 1987 reported high moisture content of 32.4% therein. M/s. Ian Roy & Company, Indian agent of M/s. Ingosstrakh Ltd. (Soviet Insurance Company) simultaneously conducted a detailed inspection of the goods. In terms of the survey report dated 2nd September, 1987 it reported moisture content of 49.21%. It is further alleged that on 15th September, 1987. Rohit Sabharwal, representative of the defendant visited the factory of the plaintiff and he too confirmed the goods having high moisture content and fungal growth. Thus, out of 549.755 MT of cardboard waste A-1 (the contracted quantity), the defendant supplied only 327.36 MT and there was, thus, short supply of 239.74 MT. A sum of Rs. 8,79,409/- has been claimed @ Rs.3,680/- per MT landed cost because of the short supply of the goods by the defendant. It is stated that the plaintiff was compelled to incur an additional expenditure of Rs. 3,04,599.34 to restore the strength properties of the aforesaid goods by adding 20% wood pulp. This amount too has been claimed by the plaintiff from the defendant.

6. Law on amendment of pleadings is well settled by the Supreme Court. All amendments ought to be allowed which satisfy the two conditions: (a) not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendment can only be refused where the other party cannot be placed in the same position as if the pleadings had, been originally correct, but the amendment would cause him an injury which could not be compensated in cost. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment, must be refused; to allow it would be to cause the defendant an injury which could not be compensated in cost by depriving him of a good defense to the claim. (See *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others*,). By the proposed amendment plaintiff without touching the pleadings in paras 1 to 22 of the plaint wants to incorporate new grounds of claim that the defendant in collusion with M/s. Soyuzvneshtrans loaded less quantity of contracted goods and got it wetted in salt water to increase the weight thereof and both of them are thus jointly and severally liable to pay the suit amount to the plaintiff. In the alternative, if it is held that the defendant was the agent of the plaintiff and had entered into contract with M/s. Soyuzvneshtrans on plaintiff's behalf as pleaded in the written statement, then defendant No.3 is liable to pay the suit amount for its having got wetted in salt water less quantity of goods with a view to increase weight equivalent to that of the contracted quantity. In my view, amendment sought neither changes the character of the suit nor seeks to introduce a new case as

urged on behalf of the defendant.

7. Further, court cannot prejudge the merits of the proposed amendment except for the limited purpose of satisfying itself that it is not frivolous, vexatious, mala fide in character and is intended to override the court. Yet another objection, taken on behalf of the defendant that the amendment, if allowed, will none it the defendant qua the counterclaim too is without any merit. Decision in The Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others, , Jagan Nath (Deceased) through Lrs. Vs. Chander Bhan and Others, , & CMI Limited Vs. Arun Bhandari, 1997(3) AD (Del) 759, relied on behalf of the defendant are of little help in the matter. Since the amendment sought is necessary for the purpose of determining the real controversy between the parties, same deserves to be allowed.

8. M/s. Soyuzvneshttrans and Novo export are permitted to be imp leaded as defendant 2 & 3 plaintiff is allowed to amend the plaint on the lines indicated in the is subject to payment of Rs. 2,000/- as cost.