

(2001) 06 DEL CK 0010
In the Delhi High Court
Case No : FAO (OS) No. 128 of 2000

Minerals and Metals Trading Corporation Ltd.	APPELLANT
Vs	
Dimple Overseas Ltd.	RESPONDENT

Date of Decision : 01-06-2001

Acts Referred:

Sales of Goods Act, 1930 — Section 33

Citation : AIR 2001 Delhi 427

Hon'ble Judges : Sharda Aggarwal, J;Arun Kumar, J

Bench : Division Bench

Advocate : Mr. V.L. Makhija and Mr. Sanjeev Puri, for the Appellant; Mr. Rajiv Nayyar Mr. Sandeep Sethi and Mr. Sanjay Jain, for the Respondent

Judgement

Arun Kumar, J.—This appeal is directed against a judgment of the learned Single Judge of this court dated 7th February, 2000 on an application of the defendant for leave to defend a suit filed under the provisions of order xxxvII of the Code of Civil Procedure. By the impugned judgment the learned Single Judge dismissed the application of the defendant/appellant seeking leave to defend the suit. As a result of refusal to grant leave to defend the suit to the defendant the suit was decreed as prayed. Briefly the facts are that the plaintiff, respondent in this appeal, filed a suit for recovery of Rs. 1,37,22,137/- along with interest and cost of the suit from the port and paid demurrage for it. The plaintiff i.e. the vendor started claiming the price of the good as per the terms of the contract on this the defendant raised the dispute that it will pay the price based on quantity of goods as per their dispatch from the port in bags. The defendant made part payment but a balance of more than rupees one crore remained to be paid. The plaintiff refuted the stand of the defendant regarding the payment by stating that as per the terms of the contract the payment was on COD basis i.e. cash on delivery basis. Delivery of the cargo took place on 7/8 June, 1995 because of 9th June, 1995 defendant started issuing instructions about the disposal of the cargo. the plaintiff was entitled to payment of price of the entire quantity of goods latest on 9th June, 1995. The payment could not be linked with dispatch of the entire

quantity of goods nor the determination of the total quantity could be based on the dispatches. The defendant took its own time in arranging for the dispatch of goods. the payment of price of the goods, Therefore, could not be made dependent on this. Ultimately the plaintiff filed the present suit for recovery of Rs. 1,05,55,490/- was the balance price while the rest was element of interest.

2. The crucial question for determination in this case is as to when the delivery took place and property in goods passed from the seller to the buyer. The learned Single Judge held that the delivery of the goods took place at the most on 9th June, 1995 and in view of the terms of the contract the plaintiff became entitled to the price of the entire goods on that date. In the application for leave to defend the suit the only defense raised by the defendant besides raising a plea of existence of arbitration clause in the contract is about short delivery. According to the defendant it did not receive full 14,250 M.T. quantity. The quantity received by it was only 13,941.500 m.t. and it is liable to pay only for that much quantity. The point regarding arbitration clause was decided against the defendant. However during the course of hearing of the present appeal the learned counsel for the defendant/appellant did not address any arguments on this point and, Therefore, it is deemed to have been given up. Thus the only point for consideration in this appeal is as to when the delivery of goods took place and when did the liability to pay the price of goods arise. if delivery of 14,250 MT took place on or up to 9th June, 1995, the defendant would be liable to pay for this much quantity. There is no dispute about the price.

3. fortunately, the answer of the above questions is not difficult as it is to be found from the contract between the parties and the correspondence in relation thereto which has been placed on record. Neither party raised any dispute about the authenticity of the copies of the correspondence exchanged between the parties on this issue which have been placed on record. the case of the appellant is that against the agreed quantity of 14,250 MT it received delivery of only 13,941.500 MT and the defendant was, Therefore, liable to pay the plaintiff price of only the said quantity. There is no dispute about the price. The only dispute is about the quantity of goods supplied. In order to make good his submission the learned counsel of the appellant relied on a clause in the contract under the heading "Quantity Determination". It is written against the said clause "AS PER ACTUAL QUANTITY RECEIVED AT THE PORT DULY CERTIFIED BY INDEPENDENT SURVEYOR/MMTC'S REPRESENTATIVE AT THE PORT/BASED ON ACTUAL dispatch FROM THE PORT. QUANTITY SHOULD BE CERTIFIED BY MMTC'S OFFICIAL ALSO." On the basis of the above specification it is argued that certification from the MMTC Official it cannot be said that a quantity of 14,250 MT was finally determined. Further it was argued that the plaintiff had only offered the quantity of 14,250 MT. The offer did not mean that the quantity had been officially determined. On actual delivery it was found that the quantity was less and the defendant was, Therefore, liable to pay only for the quantity supplied to it.

4. On the other hand the learned counsel for the respondent argued that the

contract was for 14,250 MT. For this quantity sufficient proof had been offered to the defendant as per the terms of the contract. The defendant did not raise any dispute about quantity at the relevant time. It took delivery of the goods as offered by the plaintiff. The present dispute about quantity being short was an afterthought. It is explained that shortage, if at all, could have occurred while packing the goods in bags by the clearing agent as per instructions of the defendant. In such a bulky cargo some amount of shortage could occur due to loss in packing. The cargo is received in the shape of granules and is packed in bags running into thousands. The defendant must have proceeded on the basis of the quantity of material as per the bags while the contract was of the quantity of material as per the total cargo. In support of his submissions the learned counsel for the respondent/plaintiff drew our attention first to the agreement itself the relevant clauses whereof are as under

6. QUALITY: SPOT CARGO CF 14250 MT APPROX.

7. DELIVERY: AT BOMBAY JNPT

8. PAYMENT: ON `COD" BASIS

SELLER TO PRESENT FOLLOWING DOCUMENTS FOR PAYMENT

- COMMERCIAL INVOICE
- WEIGHT CERTIFICATE ISSUED BY INDEPENDENT
- SURVEYOR WHICH IS SGS
- CERTIFICATE OF QUALITY ISSUED BY
- INDEPENDENT SURVEYOR WHICH IS SGS.

5. The respondent complied with all the conditions contained in the contract. Clause 8 is regarding payment. invoice of the goods was submitted. Weight certificate issued by independent surveyor which is SGS was submitted. A certificate of quality issued by independent surveyor that is SGS was also submitted i.e., `cash on delivery" basis. Therefore, there could be no hurdle in the way of respondent being paid the price of the goods. About the reliance placed on behalf of the appellant on clause 9 which relates to quality determination it is submitted that proof of actual quantity received at the port as certified by the independent surveyor had been submitted. Above the requirement of a certificate from MMTC official our attention was invited to appellant's own letters dated 9th June to the Asstt. Collector of Customs showing that they accepted the quantity as 14,250 MT and that was sufficient compliance of the said requirements. The correspondence which followed in our view really clinches the issue. of 7th June, 1995 itself there are three letters on record. First is a letter by the respondent (Dimple Overseas) to the Assistant Collector of Customs, JNPT, Bombay confirming having sold 14,250 MT of DAP, ex JNPT to MMTC, i.e., the appellant. it was further intimated to the Customs that the consignment would be cleared by MMTC. Second letter of 7th June, 1985 is

by respondent/Dimple Overseas to M/s. Vilas Transport Company, the clearing agent. This also contains a confirmation from the side of the plaintiff regarding sale of 14,250 MT of DAP, ex JNPT to MMTC. The clearing agent who was so far the clearing agent of the plaintiff was requested to deliver the entire consignment directly to the buyer i.e. MMTC. This means deliver instructions were issued on 7th June, 1995 itself. The third letter of 7th June, 1995 is by Vilas Transport Company i.e. the clearing agent to the MMTC i.e. the defendant/appellant. The letter needs to be reproduced:

07.06.95

The General Manager

M/s. MMTC Ltd.

Core 1, Scope Complex,

7, Institutional Area, Lodi Road,

NEW DELHI.

Dear Sir,

We hereby confirm that we are clearing 14,250 MT of Di Ammonium Phosphate (DAP) of Jordanian origin arrived par vessel, m.v. A1. Shams imported by M/s. Dimple Overseas Limited, New Delhi.

We further confirm that we are holding the above cargo spot purchase with us in JNPT cloys and will deliver as per the instructions to be received from you or from your Bombay office from time to time.

We have also bagged 3,300 MT in 50 Kg Bags which is lying at the port ready for dispatch. Please give us dispatch instructions accordingly.

Thanking you

Yours faithfully,

VILAS TRANSPORT CO.

PARTNER

6. ON 8th June, 1995 appellant wrote to the respondent signifying acceptance of the offer to buy 14,250 MT of DAP in bulk. This shows that the entire quantity was lying in the shape of one consignment in bulk. The next letter is a letter dated 9th June, 1995 from appellant to the Assistant Collector of Customs. This letter has an important bearing and needs to be reproduced:

9th June 1995

The Asstt. Collector of Customs,

Customs House,

Jawaharlal Nehru Port Trust,

Nhava Eurabia

Bombay

Sub: Purchase of 14,250 MT of Di-Ammonium Phosphate

Ex-JNPT Port.

Dear Sir,

We hereby confirm having purchased 14,250 MT of Di-Ammonium Phosphate from M/s DIMPLE OVERSEAS LIMITED, 10/60, Industrial Area, Kirti Nagar, New Delhi-110 015 Ex-JNPT Port.

We further confirm that the said consignment will be cleared by us and the goods imported/purchased are for use as manure by farmers only.

Thanking you,

Yours faithfully,

for MMTC Limited

(S.K. PATRA)

(GENERAL MANAGER (FERT))

CC to M/s Dimple Overseas Ltd., 10/60, industrial Area, Kirti Nagar, New Delhi -110 015.

7. By this letter the defendant/appellant confirmed having purchased 14,250 Mt of DAP from the plaintiff ex JNPT. The defendant also confirmed that the said consignment would be cleared by it. This means that on 9th June, 1995 the defendant/appellant confirmed the purchase of the cargo and also confirmed to the Customs that it will be clearing the goods. It signifies acceptance of delivery of goods by MMTC. The question of clearing the goods by the appellant would arise only when the property in goods has passed. The relevant provision contained in the Sale of Goods Act in this behalf is section 33. The said provision is reproduced as under:

"33. Delivery - delivery of goods sold may be made by doing anything which the party is agreed shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf."

8. In this case the goods had come in the possession of the buyer and that is why the buyer confirmed that it would clear the goods. This fact is further established from a fax message sent on 9th June, 1995 by the defendant/appellant to Vilas Transport Company, Bombay i.e., the clearing agent. In the said fax message dispatch instructions were given by the defendant to the

clearing agent. The instructions are for transportation of specified quantities of the cargo packed in bags for this purpose. The clearing agent was further requested to contact the regional office of the MMTC at Bombay for further necessary instructions regarding dispatch and payment of transportation charges. this fax message from MMTC to the clearing agent in our view completely clinches the issues in favor of the plaintiff. Unless the property in goods had passed to the defendant/MMTC there could be no occasion for MMTC to issue dispatch instructions regarding goods to its clearing agent. M/s. Vilas Transport Company and Company were the clearing agents of the MMTC is established from MMTC's own inter-departmental fax message dated 19th June, 1995 where the said clearing agent has been described as "our handling agent". In this connection letter dated 15th June, 1995 is also relevant and important. This is a letter from Vilas Transport Company i.e. clearing agent to MMTC where MMTC has referred to "existing contract agreement with you". Further Vilas Transport Company informed MMTC in the said letter that "deliveries have been effected as per your dispatch instructions dated 9th June, 1995 to the following places.

9. The clearing agent had confirmed to the defendant about quantity of 14250 MT held by them. The plaintiff had vide its letter dated 20th June, 1995 submitted following original documents to the defendant:

1. B/L no. 1 to 5 all dated 25.4.1995.
2. weight certificate of Eurabia Shipping & Intl. Transport co. certifying that 14,250 Mt were loaded.
3. Quantity certificate from SGS in respect of the consignment.
4. Quality certificate from SGS in respect of the consignment.
5. Certificate of Origin issued by Singapore Indian Chamber of Commerce & Industry.
10. The copy of the surveyors's report in respect of the quantity and clearing agents's confirmation that it was holding the aforesaid cargo of 14250 MT are on record. These documents were not disputed.
11. Besides the correspondence referred to above it is important to note that as per the agreement between the parties the delivery of the goods was ex JNPT, Bombay. This means that the delivery was to be effected at the Bombay port as per the contract. The quantity of the goods naturally had to be determined at the time of delivery and not subsequently. For quantity determination reference was also invited to photo copies of the certificate of the independent surveyor M/s J.B. boda, Surveyors Private Limited, Bombay as proof of delivery of the contracted quantity. A copy of the certificate is on record. Thus the requirement as to quantity determination under clause 9 of the agreement was also satisfied. The only point about which the appellant raised a question is about there being no certification of quantity of MMTC officials. To this answer is contained in

MMTC's own letter dated 9th June, 1995 confirming purchase of 14,250 MT. To us it appears that the dispute about quantity is an afterthought to avoid payment. First time this dispute was raised by the appellant was in its letter dated 14th July, 1995 where it was stated that "MMTC would release final payment on the basis of actual quantity received at the port based on actual dispatch from the port duly certified by the MMTC officials. "This letter was immediately replied by the plaintiff on 17th July, 1995. In the reply plaintiff placed reliance on clause 8 of the contract regarding payment which is 'cash on delivery' basis. The plaintiff categorically stated that there was no agreement that final payment would be made only after the dispatches are completed and on the basis of report of MMTC officials. dispatches would depend on the sweet will of the appellant besides other factors. Payment could not be linked to this. This plea taken by the appellant, in our view, was totally false and was intended to avoid payment. The MMTC letter dated 9th June, 1995 addressed to the Assistant Collectors of Customs wherein MMTC confirms having purchased 14,250 MT of DAP leaves no scope for the MMTC to dispute the quantity as at the time of delivery ex JNPT, Bombay and, Therefore, in our view the MMTC i.e. the appellant is liable to pay the price of 14,250 MT. No other dispute was raised. In view of this clear position emerging from admitted documents on record, no case was made out for grant of leave to defend the suit. In our view the learned Single Judge rightly rejected the application of the appellant for leave to defend the suit.

13. Accordingly we endorse the finding of the learned Single Judge "that the plaintiff had divested itself of the possession and property in goods in favor of the defendant and the property in the goods vested in the defendant through their agent at the most on 9th June, 1995. The sale and transfer of the property in the goods from plaintiff to the defendant this was complete on 9th June, 1995. This delivery was accepted by the defendant without any reservation and defendant had dealt with the goods as owner after taking such delivery on 9th June, 1995. The defendant is liable to make payment of the price of the goods weighing 14,250 MT."

14. According to the plaintiff the principal outstanding amount was Rs. 1,05,55,490/-. on this amount the plaintiff claimed interest @ 24 % p.a. The suit was filed on 16 the September 1996. Interest was included in the amount claimed in the suit up to the date of institution of the suit and, Therefore, a sum of Rs. 1,37,22, 490/- was claimed as the said amount besides pendent lite future interests and costs. The learned Single Judge passed a decree in the sum of Rs. 1,37,22, 137/- along with interest @ 18% p.a. on the principal amount of Rs. 1,05,55,490/- from the date of institution of the suit till realisation. The transaction in suit was a commercial transaction. The learned counsel for the appellant argued that the rate of interest awarded by the court was too high. the transaction in suit was commercial transaction. As per the decree and judgment in the suit the delivery of the goods took place latest on 9th June, 1995. The condition regarding payment was 'cash on delivery'. Therefore the plaintiff

became entitled to the price of the goods on the said date. The plaintiff has been deprived of the amount for such a long time. The suit which was filed on 16th September, 1996 was decreed on 7th February, 2000. Thereafter the execution of the decree could not take place in view of the present appeal. The plaintiff/respondent has thus been deprived of the money due to it for nearly six years as of now. We would not like to interfere with the decision of the learned Single Judge regarding award of interest as well as about the rate of interest.

15. We find that the appeal has no merit and the same is dismissed with costs.

16. Before parting with this judgment we would like to note that the learned counsel for respondent had raised a preliminary objection regarding maintainability of the appeal on the ground that the appellant had failed to file certified copy of the judgment under appeal. The appellant has filed an affidavit stating that the certified copy of the judgment dated 7th February, 2000 was applied for on 17th february, 2000 but the same is not yet ready and, Therefore, it has not been made available to the appellant so far. The appellant has annexed with the affidavit photocopy of the receipt issued by the registry of this court for the application for certified copy. The receipt shoes that the next date on which the delivery of the certified copy is likely to be given is 7th June, 2001. Accordingly the preliminary objection is not tenable and is disposed of as such.