(2010) 03 DEL CK 0207

In the Delhi High Court

Case No : CS (OS) No. 1254 of 1999 and I.A. No. 12178 of 2009

M.M.T.C. Limited APPELLANT

Vs

Mukta Sons RESPONDENT

Date of Decision : 15-03-2010

Acts Referred:

Limitation Act, 1963 — Article 23

Citation : (2010) 174 ECR 204 : (2010) 257 ELT 408

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Sunil Ahuja, for the Appellant; None, for the Respondent

Judgement

Indermeet Kaur, J.—plaintiff M.M.T.C. Ltd. was nominated as an agent by the Ministry of Commerce, Central Government for import of gold of 0.995 fineness as per the Export Import Policy 1992-97 (hereinafter referred to as the EXIM Policy). Under the notifications dated 16.9.1992 No. 273/92-Cus dated 28.6.1993 No. l43/93-Cus there was no customs duty if gold jewellery is exported within 120 day from the date of the drawl of the gold. Further, the export oriented jewellery manufacturers who draw gold from the nominated agency were required to export the manufactured jewellery articles within 120 day from the date of the said drawl of the gold.

2. plaintiff delivered 3 kgs. of gold to the defendant on 3.6.1994 under contract No. L-963. This gold was duty free. Defendant was required to export the gold jewellery within 120 days i.e. by 27.10.1994. He failed to do so. He thus became liable to pay customs duty and penalty.

3. Vide notice dated 29.12.1994 the office of the Collector of Customs raised a demand on the plaintiff for his failure to export the gold jewellery within the stipulated time.

4. On 12.2.1999 the Collector of Customs invoked the bank guarantee which the plaintiff had furnished to them i.e. of an amount of Rs. 6.3 crores. Customs duty

claimed was Rs. 10,81,401/-; penalty was to the tune of Rs. 1,02,042/-; a sum of Rs. 15,917/- was claimed as sales tax. This amount of Rs. 11,99,360/- was held due and payable by the defendant. Interest @ 24% per annum has also been claimed on the principal sum. Total sum of Rs. 25,04,325/- as also pendent elite and future interest has been claimed.

5. Defendant M/s Mukta Sons has filed its written statement. It is not disputed that in terms and conditions of EXIM Policy and the customs notifications, the defendant was to export the manufactured gold i.e. the jewellery articles within 120 day from the receipt of this gold from the plaintiff who was the nominated agency of the government. Defendant has admitted that 3 kgs. of gold had been received by him from the plaintiff on 01.7.1994. He was required to export the gold jewellery made from this gold by 27.10.1994. Defendant had furnished a bank guarantee of Rs. 12 lacs which was the cost of the gold. Another bank guarantee of Rs. 2,70,000/- had also been furnished by him for the difference between the domestic and international prices of the gold. Defendant could not export the gold within the stipulated period i.e. by 27.10.1994 because of an epidemic of plague which had spread like a wild fire in India in September 1994. There was panic both at local and international levels. Flights were cancelled and other air and ships traffics also came to be suspended. For this reason, defendant could not honour his commitment and the circumstances being beyond his control he could not export the gold jewellery by 27.10.1994.

6. Defendant made a request to the Director General of Foreign Trade (hereinafter referred to as the DGFT) on 27.10.1994 for extension of time. Extension of time was granted on 16.1.1994 by which time the peak period i.e. Christmas period was already over. plaintiff invoked both the bank guarantees of the defendant in November, 1994 i.e. a total sum. of Rs. 14,70,000/-. Defendant is not liable to pay any amount.

7. Replication was filed reiterating the averments made in the plaint and denying the submissions and the defence as set up by the defendant.

8. On the 18.7.2005, on the pleadings of the parties, the following issues were framed:

1. Whether this Court has no jurisdiction to entertain and try the present suit? (OPD)

2. Whether the suit is time barred? (OPD)

3. Whether the suit, as framed, is not maintainable and does not disclose any cause of action in favour of the plaintiff and against the defendants? (OPD)

4. To what amount, if any, the plaintiff is entitled to recover as the principal amount? (OPD)

5. Whether the suit is bad for non-joinder of the Directorate General of Foreign Trade and Canara Bank? (OPP)

6. Whether the plaintiff is entitled to any interest? If so, at what rate on what amount and for what period? (OPD)

7. Relief.

9. plaintiff in support of his case has examined one witness i.e. the Senior Manager in the Office of MMTC. Defendant has also produced one witness in defendant namely K.M. Gupta, the proprietor of M/s Mukta Sons.

10. Arguments have been addressed by the plaintiff. None has appeared for the defendant. Record has been perused. Issue-wise finding is as follows:

ISSUE No. l

11. The onus to discharge this issue was on the defendant. He has neither produced any evidence nor addressed any arguments on this issue. In the plaint, it has been averred that since the parties to the suit reside and work for again at Delhi the cause of action has arisen in Delhi and this Court has the territorial jurisdiction to try and entertain the present suit. This averment stand established. Both the parties are admittedly residents of Delhi; defendant has its office at Green Park Extension, New Delhi.

12. Issue No. l is decided in favour of the plaintiff and against the defendant.

ISSUE N0.2:

13. The present suit is a suit for recovery of Rs. 25,04,325/-comprising of the customs duty of Rs. l0,81,401/- and the penalty amount of Rs. l,02,042/-. The custom duty and the penalty amount had been paid by the plaintiff to the Collector of Customs on 19.2.1999 when the customs department had invoked the bank guarantee furnished by the plaintiff. Under Article 23 of the Limitation Act 1963 for an amount paid by the plaintiff on behalf of the defendant limitation is a period of three years which has to be computed from the date when the said money is paid. Suit filed on 25.5.1999 is within time.

14. Issue No. 2 is decided in favour of the plaintiff and against the defendant.

ISSUE No. 3:

15. A preliminary objection has been taken by the defendant that the suit as framed is not maintainable as it does not disclose any cause of action against the defendant. This is negatived by the averments made in the plaint. Admittedly, 3 kgs. of gold had been supplied by the plaintiff to the defendant. In terms of the loan agreement dated 30.6.1994 Ex.PW-1/4, customs duty and penalty was levied upon the plaintiff as the gold imported by the plaintiff no longer was a duty free item as the stipulations of the EXIM Policy had not been adhered to by the defendant. Cause of action is prima facie evident.

16. Issue No. 3 is decided in favour of the plaintiff and against the defendant.

ISSUE No. 5:

17. The DGFT was the body to whom the defendant had made a request for extension of time from 27.10.1994 which was the date of the expiry of the 120 day period when the defendant had to export the gold jewellery. The DGFT is neither a necessary or a property party in the present suit proceedings. Onus to establish this issue was on the defendant who had failed to discharge it.

18. Issue No. 5 is decided in favour of the plaintiff and against the defendant.

ISSUE Nos. 4 & 6:

19. Admittedly 3 kgs. of gold had been supplied by the defendant to the plaintiff on 30.6.1994. Admittedly jewellery had to be manufactured from this gold and exported by the defendant within a period of 120 day. Admittedly, the gold jewellery could not be exported by the defendant. His reason for not adhering to this schedule was because of an epidemic of plague and the havoc which had created in commercial trade. Under the loan agreement dated 30.6.1994 Ex.PW-1/4 bank guarantee had to be furnished by the plaintiff which he had done in terms of two bank guarantees of Rs. 12 lacs and Rs. 2,70,000/-as a security for the price of the gold. These bank guarantees stood invoked by the plaintiff in November, 1994 as the defendant had failed to adhere to his commitment.

20. Present suit is not a suit for recovery of the price of gold. The said claim is based upon customs duty and the penalty which has been imposed by the Collector of Customs on the plaintiff as the gold imported by the plaintiff was no longer to be treated as duty free. Under the EXIM Policy plaintiff had supplied gold to the defendant who in turn could not abide by its conditions of exporting the gold jewellery within the period of four months from the date of the supply of the gold. Under Clause 4 of Ex. PW-1/4 defendant became liable for all penalties which included the customs duty. Collector of Customs had recovered this amount from the plaintiff on 19.2.1999 when his bank guarantee was invoked.

21. PW-1 has reiterated this on oath. The customs notification have been proved as Ex.PW-1/2 and Ex.PW-1/3. Loan application of the plaintiff dated 20.6.1994 is Ex.PW-1/4. The purchase order from M/s Ruby Jewellers dated 20.5.1994 Ex.PW-1/5 substantiates that the said gold would be converted into gold jewellery to be supplied to a foreign buyer. Demand notice Ex.PW-1/10 dated 27.8.1998 was sent by the plaintiff to the defendant. A second demand notice dated 12.2.2998 Ex.PW-1/14 was again sent. Defendant did not pay up the customs duty and penalty. The letter of the Canara Bank on whom the said bank guarantees were drawn is dated 18.2.1992 Ex.PW-1/8 informing the plaintiff that his bank guarantees had been invoked.

22. DW-1 has on oath, admitted the receipt of 3 kgs. gold; further he could not export it by 27.10.1994 which was the outer date of export. Ex.PW-1/4 is admitted; in terms thereof he was liable for all penalties in case of default. His bank guarantees totaling Rs. 14,70,000/- has been invoked by the plaintiff. He has deposed that he is not liable to pay the said amounts which are recoverable

from the plaintiff alone as his bank guarantees have been invoked.

23. In his cross-examination, DW-1 has admitted that he has read clauses 3, 4, and 5 of the application Ex.PW-1/4. Perusal of these clauses show that there is a clear stipulation that if the defendant fails to comply with any of the conditions as stipulated in the EXIM Policy he shall be subjected to the penalties as stipulated therein.

24. Sum total of the evidence put before this Court has amply established that the plaintiff was bound by all the clauses contained in Ex.PW-1/4. This is an admitted document. Defendant was a manufacturer of gold; after receipt of the gold his jewellery articles although ready could not be exported by 27.10.1994 because of an epidemic of plague.

25. In terms of Ex.PW-1/4 he became bound to pay all the subsequent liabilities incurred by the plaintiff which included the customs duty and the consequent penalty.

26. plaintiff is, however, not entitled to the sum of Rs. 15,917/-claimed on account of sales tax; there is no such provision in Ex.PW-1/4.

27. Interest has been claimed @ 24% per annum. In terms of Ex.PW-1/20 which is a letter of the Canara Bank to the plaintiff interest has been charged @ 2% above the claimed rate of interest which is 23% during the said period. Interest clause of 2.75% on the quantity in US dollars as per exchange rate is also stipulated in clause-3 of Ex.PW-1/4. plaintiff is thus entitled to the interest amount of Rs. 1,02,042/- i.e. a total sum of Rs. 24,88,408/-.

28. Issues No. 4 and 6 are decided accordingly.

ISSUE No. 7: RELIF:

29. Suit of the plaintiff is decreed for a sum of Rs. 24,88,408/-with pendent elite and future interest @ 12 % per annum from the date of the filing of the suit till realization. Cost also be awarded in favour of the plaintiff. Decree sheet be drawn. File be consigned to record room.