

(2009) 12 DEL CK 0360

In the Delhi High Court

Case No : IA No. 14651 of 2008 in CS (OS) No. 1803 of 2007

Mr. Subhash Kathhuria

APPELLANT

Vs

Softline Creations Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 37 Rule 2(1), Order 37 Rule 3(5)

Contract Act, 1872 — Section 74

Citation : (2009) 12 DEL CK 0360

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Ravi Gupta, Reema Kalra and Gaurav Gupta, for the Appellant; C.S. Prashar, for the Respondent

Final Decision : Allowed

Judgement

Manmohan Singh, J.—By this order, I shall dispose of the application being I.A. No. 14651/2008 under Order 37 Rule 3(5) of the Code of Civil Procedure, 1908) filed by the Defendants seeking leave to defend.

2. The brief factual matrix of the case is that the plaintiff is a proprietor of M/s Anita Intentional and is engaged in the business of manufacturing stainless steel bullets. The Defendants are engaged in the business of importing of heavy melting scrap for supply to industries. The Defendant's company imports scrap from Poland and sells the same to the buyers for use in manufacturing steel.

3. The plaintiff entered into an agreement with the Defendants on 27th August, 2004 wherein the Defendants agreed to sell and supply Heavy Melting Scrap I-II in the ratio of 80:20 of a total quantity of 15000 MT for a total value of Rs. 91 lacs. The plaintiff paid the entire abovesaid amount vide two cheques details of which are given as under:

----- Cheque No. Amount Dated

Drawn on	-----	375224	Rs.
31.00	Lacs	23.08.2004	Original Bank Of Commerce
-----	-----	375228	Rs. 60.00 Lacs
27.08.2004	Original	Bank	Of Commerce
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4. It was agreed in the agreement that in case of non shipment of the goods, the amount of Rs. 91 lac would be refunded by the Defendants to the plaintiff along with the quantified and liquidated damages of Rs. 45.5 lac. Clause 6 of the agreement reads as under:

...In case of non shipment, Rs. 91 lac to be refunded alongwith a consolidated damage of Rs. 45.50 lac.

5. The Defendants for this purpose simultaneously issued two post dated cheques favouring to plaintiff for non performance of the contract by them, the details of the said two cheques is as under:

-----	Cheque No.	Amount	Dated
Drawn on	-----	384394	Rs.
91.00	Lac	30.09.2004	Bank of India
-----	-----	384393	Rs. 45.50 Lacs
30.09.2004 -do-	-----	-----	-----

6. The plaintiff submits that the Defendants failed to perform the contract within the stipulated period they allegedly returned the amount of Rs. 91 lacs to the plaintiff on 1st October, 2004 but to make the payment of Rs. 45.5 lacs towards the liquidated damages, the defendants sought 3 months time from the plaintiff. The plaintiff granted the time sought by then by then defendantS subject to its payment along with interest @ 18% p.a.

7. The defendants however failed to pay the said amount of Rs. 45.5 lac and interest accrued thereupon.

8. It is submitted that the Defendant No. 2 is the Managing Director of defendant No. 1 who stood as guarantor in the agreement and had assured the plaintiff of the refund of the above said amount as also the interest accrued thereupon.

9. The plaintiff filed the present suit under Order 37 CPC claiming the following amounts from the Defendants:

i) Liquidated damages as per agreement Rs. 45,50,000/- ii) Interest accrued thereupon calculated @ 18% p.a. w.e.f. 30.10.2004 till the filing of the suit. Rs. 24,57,000/- ----- Total Rs. 70,07,0000/- -----

10. The plaintiff also sent a legal notice on 30th August, 2007 on the Defendants through his Advocate Sh. Sanjay Abbott to clear the admitted liability due to the plaintiff but to no avail.

11. The Defendants were served with summons for judgment on 20th October,

2008, and applied for leave to defend, inter-alia, on the following grounds:

a) That the Defendants placed orders with foreign party of Poland namely M/s Marie Impex for the purchase of the contracted scraps. The Defendants also made a payment of USD 45000 to the said foreign supplier for the purchase of contracted scraps. But the material was not supplied to it because of worldwide shortage of HMS (Contracted goods) and restrictions placed by the Government of India during the said period on import of scrap due to Bhusan Steel Bomb blast case.

b) That the penalty Clause was incorporated in the agreement to deter the seller from diverting the material to other buyers in case of rate escalation. In the present case, the Defendants did not receive the material from the supplier, hence there was no question of diverting the material to any other party. The Defendants informed the plaintiff as soon as they became aware that the goods cannot be supplied by the foreign supplier and returned the entire principal amount on 6th October, 2004 itself i.e. within a period of less than two months.

c) The Defendants submit that since the lapse on their part occurred due to the unforeseen circumstances beyond its control, non supply of agreed goods by them was neither willful nor intentional. In these circumstances, it is contended that the plaintiff is entitled to only reasonable compensation irrespective of the amount claimed in the agreement depending upon the facts and circumstances of the case. It is alleged that the amount of reasonable compensation can only be determined after granting leave to defend and leading evidence.

d) Clause 6 of the agreement stipulates two terms namely "consolidated damages" and "penalty" to describe the amount of Rs. 45.5 lac. It is stated that leave to defend has to be granted for ascertaining the said Clause in the agreement and to ascertain factual intention of the parties at the time of agreement.

12. The plaintiff in the reply to the application stated that the Defendants did not import any goods during the period August, 2004 to September, 2004 as the rate of the goods escalated to USD 215.00 per MT on 11th September, 2004 from USD 190.00 per MT on the date of agreement. It is stated that the cheque of Rs. 45.5 lacs was handed over by the Defendants to the plaintiff by way of performance guarantee which was to be encashed by the plaintiff in case of non performance of the contract by the Defendants.

13. Learned Counsel for the plaintiff referred to Section 74 of the Indian Contract Act which can be looked into to decide the controversy. It reads as under:

Section 74. Compensation for breach of contract where penalty stipulated for:- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to

receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

14. The submissions of the learned Counsel for the plaintiff is that the above said provision is directly applicable to the facts of the present case, therefore, no leave to defend is to be granted to the defendants as no trial is required in view of the specific Clause of the agreement. The suit is, therefore, liable to be decreed as no defence is available to the defendants.

15. In order to determine the application for leave to defend filed by the defendants, it is relevant to refer the provision of Rule 2 of Order 37 of the Code of Civil Procedure, 1908 which reads as under:

(2) Subject to the provisions of Sub-rule (1), the Order applies to the following classes of suits, namely:

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

16. The Defendants relied upon the case of Mechelec Engineers and Manufacturers v. Basic Equipment Corporation 1964 SCR 1060 wherein it was held that whenever a defence raises a really triable issue, leave must be given.

17. It is only in cases where the defence is patently dishonest or so unreasonable that it could not be reasonably expected to succeed, the court exercises its discretion to refuse the leave. The principles to be followed in the cases under Order 37 of CPC are laid down in the case of Smt. Kiranmonyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246, 253 elaborately in the form of following:

(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and

immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.

18. To support his contention that the measure of damages, in the case of breach of the stipulation by way of penalty is by Section 74 of the Indian Contract Act, 1872, by awarding reasonable compensation not exceeding the penalty stipulated for, the learned Counsel for the defendants referred the case of Fateh Chand Vs. Balkishan Das, , it was laid down by the Apex Court in para 8 and 10 that court is not bound to award compensation when no legal injury has resulted. The relevant portion of the judgment is reproduced hereunder:

The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The Section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

19. In another case decided by the Apex Court reported at Maula Bux Vs. Union of India (UOI), , it was clearly laid down that whereunder the terms of the contract, the party in breach has undertaken to pay a sum of money or to forfeit

a sum of money which he has already paid to the party complaining the breach of the contract, the undertaking is of the nature of the penalty. It was observed that where the party complains about the breach being committed, whether or not the actual damage or loss is proved to have been caused thereby, the party complaining is entitled to receive from the party who has broken the contract, a reasonable compensation. It is true that in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract.

20. It appears from the defence raised by the defendants that the defendants placed the orders with the foreign party for the purchase of contracted scrap. It is also stated in the application that the defendants have also made a payment of USD 45000 to the said foreign supplier, however, the material was not supplied to the defendants because of worldwide shortage and further restrictions was placed by the Government of India. The defendants have also stated the question of diverting the material to the other party under the said circumstances does not arise as the defendants did not receive the material from the supplier. In order to show the bona fide the defendants have also returned the principal amount within two months. The lapse, if any, occurred due to unforeseen circumstances which are beyond the control of the defendants. At the same time the defendants have not disputed the fact that the plaintiff, under these circumstances, is entitled to reasonable damages only which can be determined after granting leave to defend and leading the evidence and for that purpose the plaintiff has to prove the damages, if any, suffered by him. After having gone through the judgment referred by the defendants, *prima facie*, I agree with the submission of the defendants and I am of the considered view that the defence raised by the defendants is not moonshine and the present case is covered in Clause (a) and (b) of the principle laid down in the case of *Smt. Kiranmonyee Dassi and Anr. v. Dr. J. Chatterjee* (*supra*).

21. Thus, trial in the present case is required on the basis of defence raised by the defendants. Learned Counsel has argued that infact there is no breach on the part of the defendants as alleged in the application for leave to defend. Thus, the defendants are given the opportunity to contest the case as the defence raised by the defendants is not false, frivolous or moonshine. There are triable issues involved in the matter raised by the defendants.

22. Having regard to the circumstances of the case, I feel that to assess the compensation arising from the breach of contract by the defendants, the sum named by the parties in Clause 6 will be taken into consideration as the measure of reasonable compensation but the defendants must be given the opportunity to prove the reasons for the breach to arrive at an amount which will compensate the loss caused to the plaintiff.

23. I consider the defendants should be given the leave to defend as it raises a

triable issue pertaining to whether the defendants failed to supply the goods to the plaintiff under some unforeseen circumstances or they deliberately avoided the contract has to be looked into to determine the amount of compensation which can be reasonably awarded to the plaintiff in the facts and circumstances of the case. In the result, the application of the defendants is allowed.

24. The written statement be filed by the defendants within six weeks from today. Replication thereto be filed within four weeks thereafter. The documents relied shall also be filed by the parties. List the matter before the Joint Registrar on 12th April, 2010 for admission/denial of the documents.