(2017) 03 DEL CK 0037

In the Delhi High Court

Case No : CS(COMM) 1106 of 2016 M of S

M/s Fedders Lloyd Corporation Ltd — APPELLANT

Vs

KSS Petron Pvt. Ltd. — RESPONDENT

Date of Decision : 17-03-2017

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 37

Citation : (2017) 162 DRJ 481

Hon'ble Judges : Rajiv Sahai Endlaw, J.

Bench : Single Bench

Advocate : Mr. P.S. Bindra, Advocate, for the Plaintiff; Mr. K.K. Sharma, Sr. Advocate, with Mr. Vinod Wadhwa, Advocate, for the Defendant

Final Decision : Disposed Off

Judgement

Rajiv Sahai Endlaw, J.—The defendant, in this suit for recovery of Rs.1,82,20,511/-, seeks rejection of the plaint on the ground of claim therein being barred by time and this Court not having territorial jurisdiction to entertain the suit.

2. The plaintiff has instituted this suit pleading i) that the defendant awarded purchase orders dated 17th January, 2011, 11th January, 2012, 16th October, 2012, 21st February, 2013 and 20th June, 2013 to the plaintiff for supply of fabricated structural steel as per specifications contained in the purchase orders; ii) that as per the purchase orders, the supplies were for different periods and were to commence and end on different dates, the latest falling in 2013-14; iii) that the plaintiff made the supplies in accordance with the purchase orders and the defendant acknowledged the same by way of certificate dated 1st October, 2013; iv) that for the supplies made, the plaintiff raised invoices totalling Rs. 92,72,37,881/- and against which the defendant has paid Rs.91,38,40,448/- leaving the balance amount of Rs. 1,33,97,434/-; v) that the last payment was made by the defendant to the plaintiff on 19th July, 2013 being in the sum of Rs. 10,36,544/-; vi) that the defendant also issued C Forms for the supplies made;

vii) that for the remaining amount totalling Rs. 1,33,97,434/-, the plaintiff on various occasions requested the defendant to make the payments; however the requests fell on deaf ears as defendant failed to pay the outstanding amount; viii) that the plaintiff got served a legal notice dated 19th May, 2015 through its advocate calling upon the defendant to pay to the plaintiff Rs. 1,33,97,434/- with interest; ix) the said notice was served on the defendant on 25th May, 2015 but the defendant neither gave any reply nor made any payment; x) that the plaintiff is also entitled to interest at the rate of 12% per annum with effect from 19th July, 2013 and a sum of Rs. 48,23,077/- is due from the defendant to the plaintiff towards interest till the date of institution of the suit.

3. Paras no.10 and 11 of the plaint are as under:

"10. That the cause of action for filing the present suit arose from to (sic for two) time as stated in the foregoing paras. The cause of action arose when the Defendant made payments leaving the balance amount outstanding. The cause of action arose on 19.7.2013 when the last payment was made by the Defendant to the Plaintiff leaving the suit amount outstanding. Since the Defendant has failed to pay the outstanding amount, the cause of action is continuing one.

11. This Hon''ble Court has territorial jurisdiction to try and entertain the present suit for the reason that the cause of action for filing the suit arose in Delhi. The Purchase Orders were placed upon the Office of the Plaintiff at Delhi and payments were to be made and also made to the Plaintiff at Delhi through its bank account in SBI, Tolstoy Marg, Delhi. The balance payment due is also to be made at Delhi. Therefore, this Hon''ble Court has jurisdiction to entertain and try the present suit.

4. Summons of the suit were issued by the Joint Registrar.

5. The defendant, on being served has filed this application contending that as per paras no.5 and 10 of the plaint, last payment was made by the defendant to the plaintiff on 19th July, 2013 and the cause of action for the suit also accrued to the plaintiff against the defendant on 19th July, 2013 when the last payment was made by the defendant to the plaintiff and the suit instituted on 12th August, 2016 is barred by limitation. Qua territorial jurisdiction, it is contended that the purchase orders were issued by the defendant from its Gurgaon (Haryana) office; the material was to be supplied by the plaintiff to the defendant at Paradeep Refinery Project, Paradeep, Orissa; the supplies were to be made by the plaintiff from its godowns at Haridwar (U.P.), Sikandrabad and Jabalpur; the place of business of the defendant is Gurgaon (Haryana), the invoices were raised by the plaintiff from its registered office at Noida and thus this Court has no territorial jurisdiction to entertain the suit.

6. Being of the view that an application for rejection of the plaint is to be considered only on the basis of averments made in the plaint and documents filed therewith, the need to call for a reply to the application was not felt.

7. The counsels were heard on 14th December, 2016 and 15th December, 2016 and orders reserved.

8. As far as the ground for rejection of the plaint on the ground of this Court not having territorial jurisdiction to entertain this suit is concerned, as evident from para no.11 of the plaint reproduced herein above, the plaintiff has invoked the territorial jurisdiction of this Court pleading that the purchase orders were placed upon the office of the plaintiff at Delhi and payments were to be made and made to the plaintiff at Delhi through its bank account in State Bank of India, Tolstoy Marg, Delhi and the balance amount for recovery of which the suit is filed was also payable at Delhi. The said pleas have not been controverted by the defendant in the application for rejection of the plaint. It is also not the case of the defendant that though the plaintiff has pleaded so but the documents show otherwise. A perusal of a copy of at least one of the purchase orders placed by the defendant on the plaintiff shows the same to have been placed upon the plaintiff at Delhi. Though the plaintiff in the list of documents has referred to other purchase orders also but the plaintiff is found to have filed documents running into 675 pages without proper indexation and by clubbing all the purchase orders together and thus it is difficult to check the other purchase orders. Be that as it may, the said aspect cannot be subject matter of rejection of the plaint which has to be on the basis of averments made in the plaint only. As per averments made in the plaint, all the purchase orders balance amount where under is claimed in this suit having been placed upon the plaintiff at Delhi, this Court would have territorial jurisdiction to entertain the suit and the plaint cannot be rejected on the ground of this Court not having territorial jurisdiction.

9. However, as far as the ground of the suit claim being barred by time is concerned, the suit is found to have been filed first on 14th July, 2016 and re-filed on 12th August, 2016 and came up before the Joint Registrar on 17th August, 2016 when summons thereof were ordered to be issued.

10. The suit being for recovery of the balance amount due towards price of goods supplied by the plaintiff to the defendant as per purchase orders placed by the defendant upon the plaintiff, it was enquired from the counsel for the plaintiff whether not the limitation therefor would be governed by Articles 14 to 16 of the Schedule to the Limitation Act, 1963. Article 14 provides for limitation of three years commencing from the date of delivery of the goods for a suit for price of goods sold and delivered where no fixed period of credit is agreed upon. Article 15 also provides limitation of three years commencing from the date when the period of credit expires for a suit for price of goods sold and delivered to be paid for after the expiry of a fixed period of credit. Article 16 provides for a limitation of three years commencing from the date when the period of the proposed bill expires for a suit for price of goods sold and delivered to be paid for by a bill of exchange and no such bill having been given. Mention may also be made of Article 18 which provides limitation of three years commencing from the date when the work is done for a suit for price of work done by the plaintiff for the

defendant at the request of the defendant and where no time has been fixed for payment. The plaintiff however in the plaint has shied away from giving the dates of delivery of goods under the purchase orders claim to be placed by the defendant on the plaintiff and has computed the limitation not as per the date of delivery of goods or from the date of expiry of period of credit or from the date when the work was done but from the date of the last payment made. It was as such enquired from the counsel for the plaintiff as to how the date of the last payment made by the defendant to the plaintiff could be the commencing point for limitation of three years. Article 1 of the Schedule to the Limitation Act relating to a suit for accounts provides for limitation of three years commencing from the close of the year in which the last item admitted or proved is entered in the account but for a suit for balance due on a mutual, open and current account where there have been reciprocal demands between the parties. It was enquired from the counsel for the plaintiff that in the absence of a plea of a mutual, open and current account where there have been reciprocal demands between the parties, how could the period of limitation be computed from the date of last payment made by the defendant to the plaintiff.

11. The counsel for the plaintiff referred to Bharath Skins Corporation v. Taneja Skins Company Pvt. Ltd. 186 (2012) DLT 290. A Division Bench of this Court therein was concerned with a suit for recovery of balance amount due towards the price of goods supplied under 56 bills and for which a current, open and mutual account was maintained by the plaintiff in the name of the defendant and as and when goods were supplied, a bill was raised for the value of the goods supplied and correspondingly a debit entry was made in the account as and when payment was received by making a credit entry in the account. It was held that Article 14 of the Schedule to the Limitation Act does not apply to suits for recovery of money due on a running and current but non-mutual account between the buyer and seller and there being no Article in the Schedule to the Limitation Act dealing with suits for recovery of money due on running and current but non-mutual account, the residual Article 113 would apply and thereunder the period of limitation of three years for filing the suit would begin to run when the claim was denied in response to the legal notice or when the last payment was made.

12. Per contra, the senior counsel for the defendant relied on The Hindustan Forest Company v. Lal Chand 1960 (1) SCR 563 holding that where various quantities of goods are delivered by the seller to the buyer from time to time and various payments towards price of goods are made, the account containing the balance amount due would not qualify as a mutual account based on reciprocal demands within the meaning of Article 115 of the Limitation Act, 1908 equivalent to Article 1 aforesaid of the Limitation Act, 1963.

13. However the plaintiff neither pleads nor argues that the account for the recovery of the balance amount due where under the suit is filed is a mutual, open and current account where there have been reciprocal demands between

the parties. Thus the reliance on The Hindustan Forest Company supra misconceived.

14. The question for adjudication thus is whether the case of the plaintiff is covered by Bharath Skins Corporation supra and in which case it would be within time as the suit was first instituted within three years of the last payment or it would be governed by any of the Articles 14 to 16 aforesaid of the Schedule to the Limitation Act and in which case, the suit claim may be barred by time.

15. I may notice that the counsel for the plaintiff, after the judgment had been reserved, has also filed copies of judgments in F.C.C. Projects Pvt. Ltd. v. Ashish Bhardwaj (2007) 145 DLT 457 (DB), Rajesh Kumari v. Prem Chand Jain 1997 (42) DRJ 280, Sanjeev Chopra v. All Wear Clothing (India) Pvt. Ltd. 2012 SCC Online Del 640 & Technofab Engineering Ltd. v. Nuchem Weir India Ltd. 2006 SCC OnLine Del 1575 but reliance whereon is again found to be misconceived.

16. A perusal of the purchase order dated 17th January, 2011 placed by the defendant on the plaintiff and a copy whereof is at page 4 of the documents shows the same for "supply of Fabricated Structural Steel" as per specifications with the first delivery thereunder to be started after three weeks from date of e-mail confirmation from the defendant and the total duration for supply being seven months from the date of purchase order. Clauses 4 and 8 thereof are as under:

"4

Terms of Payment

1. 10% of the Total Order Amount shall be paid against unconditional acceptance of this PO and submission of ABG for an equivalent Amount in KSSIIPL prescribed format duly issued by nationalized bank and submission of signed & accepted sub-orders copy on prime rollers (Like SAIL, Jindal) as proof of ordering of steel against this purchase order. The validity of ABG shall be for a period till the full recovery is adjusted against supplies.

2. 80% of the total order value with taxes & duties shall be paid through irrevocable & revolving letter of credit with 30 days interest free usance period against submission of following documents to KSSIIPL banker.

i) Original Lorry Receipt (GR), as applicable.

ii) Original Cenvatable and commercial invoices in requisite sets.

iii) Original Packing List in requisite set.

iv) Original Inspection Release Note issued by TPIA.

v) Original Material test certificates duly endorsed by TPIA.

vi) Original Dispatch instructions issued by KSSIPL.

vii) Delivery Challan or Goods receipt note duly signed by KSSIIPL stores as a proof of receipt of all material.

3. 10% payment shall be released after successful completion of erection at site for material supplied by FLCL or 3 months from the date of last supply, whichever is earlier and on submission of performance bank guarantee of 10% of Total Order Value valid till 12 months from the date of last dispatch as per KSSIIPL prescribed format. LC confirmation charges, if required shall be to the supplier"s account.

8

Terms and Conditions

All other Terms and conditions shall be as per General terms & Conditions (Indigenous)."

As aforesaid, the plaintiff, while filing the documents has clubbed the documents in hundreds with no proper indexation and it is impossible to find the other purchase orders. It can only be presumed that the other purchase orders are on the same terms and conditions. The index also does not disclose the plaintiff to have filed any General Terms and Conditions (Indigenous) referred to in Clause 8 supra of the purchase order. A perusal of the copy of the invoice at page 88 of the plaintiff"s documents shows the invoices to be for a specific amount and not for "rounded up amounts". Again, the remaining invoices are presumed to be similar.

17. The document at serial no.4 of the list of documents of the plaintiff is described as "Statement of Account" and is filed at pages 655 to 667. A perusal thereof shows debit entries for specific invoice amounts and credit entries again for specific amounts and they do not appear to be payments on account but appear to be payments against specific invoices. Therefrom, it does not appear that the account maintained by the plaintiff in the name of the defendant was of the nature with which the Division Bench of this Court in Bharath Skins Corporation supra was concerned. A Single Judge of this Court in Wings Pharmaceuticals Ltd. v. Praveen Bhasin, observing that the relationship between the parties in that case was of buyer and seller, held the account to be not a mutual running account and Bharath Skins Corporation supra to be not applicable; the plaint was rejected on the ground of limitation.

18. Reference may also be made to (a) Sumeet Steel Traders v. Surendra Enterprises AIR 2005 AP 345 (DB) holding that merely because several supplies are made it does not mean that they are one transaction and Article 15 would govern; (b) S.T.K.M. Lakshmanan Chettiar v. Nalla Sevugam Servai AIR 1943 Mad 13 holding that in the absence of anything to show that the dealings were intended to be continuous, period of limitation cannot begin to run from the date of last supply; (c) Chittoor Visweswara Rao v. Akella Satyanarayna AIR 1957 AP 445 to the same effect; and, (d) Discover Prints India Pvt. Ltd. v. Ashu Chemicals

2012 SCC OnLine Del. 160.

19. Moreover, as per the terms of payment contained in the purchase order, the payments to be made by the defendant were to be 10% in advance, 80% through irrevocable revolving letter of credit on submission of documents including of dispatch of goods and 10% after successful completion of erection work at site.

20. The plaint is blissfully vague.

21. There is no averment about the receipt of advance if any, the receipt under the revolving letter of credit if any, or when the work of erection of the material supplied was completed. In my view the period of limitation in such a case would be three years from each of the said dates.

22. The plaint is thus not found to be as per the transaction between the parties and though is liable to be rejected on this ground only without liberty to the plaintiff to file afresh as suits cannot be permitted to be filed in such casual manner, not intended to get any relief but merely to remain pending in the Court and to develop the case as the suit proceeds, but reserving the right to impose exemplary costs on the plaintiff, it is deemed appropriate to offer an opportunity to the plaintiff to, if has any seriousness in the matter, render explanation.

23. List on 26th April, 2017.

