
(2001) 07 DEL CK 0070
In the Delhi High Court
Case No : FAO (OS) No. 259 of 2001

M/s Fujitsu ICIM Ltd.

APPELLANT

Vs

M/s KLG System Ltd.

RESPONDENT

Date of Decision : 16-07-2001

Acts Referred:

Citation : (2001) 94 DLT 164 : (2001) 60 DRJ 226

Hon'ble Judges : Sanjay Kishan Kaul, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. Arvind Kumar and Ms. Sujata Kurdukar, for the Appellant; Mr. Sanjiv Goel, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—M/s KLG System Ltd., respondent filed a suit for recovery of Rs. 12,86,060/16 against the appellant under the provisions of Order 37 of the Code of Civil Procedure, 1908. The suit arose out of a purchase order dated 2.8.1994 placed by the respondent on the appellant for supply of software including installation, commissioning and providing facility to personnel of their purchaser, FEDO. In terms of the purchase order the supply was alleged to have been made and out of the total contract amount of Rs. 26,83,012.80, after making part payments, a sum of Rs. 7,59,104/- is stated to have remained unpaid. A further claim of Rs. 76,000/- was made in the suit on account of the appellant allegedly not providing training to FEDO personnel as required in terms of the agreement between the parties and for which a bill dated 23.8.1995 was raised. Summons were taken out in prescribed form and the appellant applied for un-conditional leave to contest. the suit. Apart from various preliminary objections, on merit, it was pleaded that the respondent failed to fulfill the performance requirement under the purchase order dated 2.8.1994 which fact was alleged to have been admitted by the respondent. A categorical averment was made in sub para (j) that performance of the order was to be to the satisfaction of FACT. Thus in the absence of any satisfaction of the FACT, it was alleged that the respondent was not entitled to the balance amount under the

contract. The appellant further alleged that in fact FACT had expressed its dissatisfaction with the software package supplied by the respondent and had withheld payment and levied damages of Rs. 9,30,374/- apart from encashing a bank guarantee of Rs. 5.2 lacs of the appellants. This was stated to be to the knowledge of the respondent.

2. The application for leave to defend filed by the appellant was dismissed by the impugned order dated 23.4.2001 of the learned Single Judge and the suit was decreed with cost.

3. Learned counsel for the appellant forcefully contends before us that apart from any other plea, the reading of the purchase order dated 2.8.1994 shows that the respondent has failed to comply with the terms and conditions thereof and was thus not entitled to the suit amount. The payment terms in the said purchase order stipulate that 50% of the order value was to be paid immediately against delivery and the balance 50% after successful installation at FEDO. It is undisputed position that the initial 50% amount has been paid and part of the balance 50% amount has also been paid to the respondent. Learned counsel for the appellant states that even though the balance 50% was not payable, in view of the business relationship between the parties, part of the balance payment was made. Learned counsel for the appellant referred to para-3 of the said purchase order dated 2.8.1994 which provided that the supply of ISOGEN was liable to be made only after satisfactory demonstration and approval of the software by FEDO within 15 days from the date of the purchase order. It was further contended that admittedly this condition of the purchase order had not been complied with. The purchase order dated 2.8.1994 under the heading of "Price" states the value of Software as Rs. 15,31,020/- if ISOGEN is excluded. Learned counsel also referred to the copy of the bank guarantee and the encashment thereof placed on record.

4. Learned counsel for the appellant referred to letter dated 24.9.1996 addressed by the respondent to the appellant which refers to the outstanding problems enumerated by FEDO. This letter also requested the appellant to arrange to collect the balance amount from FEDO due to the respondent. Thus the learned counsel for the appellant contends that this letter clearly shows that the respondent was conscious of lack of satisfaction of FEDO as also the fact that the balance amount had to be collected from the FEDO and then paid to the respondent. Since not only was the balance amount not paid but the bank guarantee was also encashed, the amount was not payable to the respondent by the appellant. Learned counsel for the respondent also referred to the Fax of the respondent sent to FEDO at page 74 of the paper book which records that workarounds for some of the problems had been suggested by the respondent's Engineers but the respondent saw no reason for withholding of payment on this account by the FEDO. These letters have been referred to advance submissions of the learned counsel for the appellant that the essential terms and conditions of the purchase order had not been fulfilled and FEDO was not satisfied with the

performance as a result of which the appellant had been put to loss. All these facts and allegation, it is contended, at least given rise to triable issues and the appellant was entitled to a un-conditional leave to contest the suit. Learned counsel for the appellant further submits that the reference in the impugned judgment to Annexures B and C stated to be the correspondence exchanged between the appellant and FEDO was not correct in as much that the correspondence was between the respondent and FEDO and between the appellant and FEDO with copy marked to the respondent respectively.

5. Learned counsel for the respondent has opposed the plea of the appellant for un-conditional leave to contest the suit. It is the contention of the learned counsel for the respondent that the very fact of payment having been made out of the balance 50% of the amount would show that the respondent had performed its obligation as otherwise there would have been no occasion to make such payment. It was further contended that letter dated 24.9.96 was sought to be mis-interpreted by the learned counsel for the appellant. Respondent was only assisting FEDO for exchange of certain software work and there was no question of supplies not being made to the satisfaction of the FEDO.

6. Learned single Judge had extensively dealt with facts of the case and legal position on the question of grant of leave to defend. The Supreme Court has set down the circumstances and the condition for the grant of leave to defend under Order xxxvII CPC, 1908 in the judgment of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . For the reasons stated hereafter we are unable to agree with the conclusion of the learned single Judge rejecting the application of the appellant for leave to defend the suit. The question is, can the defense of the appellant be said to be sham, illusory or practically moonshine or is it a bonafide and reasonable defense?. The legal position is quite clear that if the appellant is able to raise triable issue indicating that he has bona fide or reasonable defense, although not a possibly good defense, the appellant is entitled to un-conditional leave to defend.

7. A bare perusal of the purchase order would show that approval of FEDO was made a part of the term of the purchase order in so far as supply of ISOGEN is concerned. Not only this subsequent communications between the parties and FEDO clearly establish that FEDO had raised certain issue about the performance of the supplies made by the respondent. This fact is recorded in respondent's own letter dated 24.9.96 addressed to the appellant. The plea sought to be advanced on behalf of the appellant that there was an arrangement inter se the parties for making payment by the appellant to the respondent after the payments were received from FEDO cannot be also outrightly rejected at this stage without evidence being recorded in view of the contents of the letter dated 24.9.96. The respondent has also addressed letters to FEDO to protest against retention of amount in the FAX on record at page 74 of the paper book. The appellant prima facie has shown that FEDO has failed to pay balance amount, FEDO/FACT had encased bank guarantee and thus the appellant has been put to

a loss as a consequence of the alleged non-performance of the obligations by the respondent.

8. Taking into consideration all these aspects, we are of the considered view that the appellant is entitled to un-conditional leave to defend the suit and the application of the appellant, is No. 3402/99 is thus liable to be allowed.

9. The result is that the appeal is allowed, the impugned judgment and the consequent decree is set aside and the appellant is granted un-conditional leave to contest the suit. Parties are left to bear their own costs.

10. Parties shall appear before the learned single Judge on 7th August, 2001 for further directions in the suit.