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(1992) 07 DEL CK 0026

In the Delhi High Court

Case No : Suit No. 2626 of 1986

M/s. Nandan Iron and Metal Industries — APPELLANT

Vs

M/s. Fenesty Inc. — RESPONDENT

Date of Decision : 16-07-1992

Acts Referred:

Citation : AIR 1992 Delhi 364

Hon'ble Judges : C.L. Choudhary, J

Bench : Single Bench

Advocate : Rajesh Benati, for the Appellant;

Judgement

1. M/s. Nandan Iron & Metal Industries, (hereinafter called the ''plaintiff'')has filed the suit for recovery of Rupees 1,83,410/- against the defendants on the allegations that plaintiff is a partnership firm registered under the Partnership Act and that the suit has been filed through an authorised person.

2. Defendant No. 1 M/s. Fenesty Inc. is a United States Corporation incorporated under the laws of U.S.A. and the defendant No. 2 is acting as its agents in India. Defendant No. 2 acting as agents for and on behalf of its US principals M/s, Fenesty Inc. issued indent dated 31st January, 1984 from its office in New Delhi to the plaintiff firm for supply of about 17.5 Metric Tonnes of Brass Dross, Copper minimum 60%, metallic recover 90% of U. S. origin @ US Cents 58 per pound C & F Bombay by sea. The said offer was accepted by the plaintiff and was conveyed to defendant No. 2 as agents for defendant No. 1. The offer was made at New Delhi, accepted at New Delhi and the contract was entered into at New Delhi.

3. In pursuance to the aforesaid contract, the plaintiff established an irrevocable letter of credit dated 7th February, 1984 with the State Bank of India, Moradabad in the sum of US $ 23,400/- being the established price of material to be shipped by the defendant No. 1 in pursuance of the aforesaid indent. One of the vital and material binding term of the contract was that the metallic recovery of 90% was

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guaranteed in the Brass Dross to be supplied by defendant No. 1. In pursuance of the contract, for supply of Brass Dross, the defendant No. 1 shipped a quantity of 15.815 M. T. of Brass Dross ex Los Angeles to Bombay per M/V President, Lincoln and raised their invoice dated 27th March, 1984 in the sum of US $ 21,032.15.

4. The shipping documents were negotiated by the defendant No. 1 under the aforesaid credit with the State Bank of India and full payment of the consignment was realised by defendant No. 1. The documents supplied to the plaintiff, inter alia, contained a certificate issued by the defendant No. 1 to the effect that the materials shipped hereunder to be Brass dross, copper minimum 69% metallic recovery 90%.

5. The aforesaid consignment was received in India and the plaintiff found to its great consternation that the consignment of Brass dross supplied by the defendant No. 1 contained mux, soil and ash with a lot of foreign materials like broken glass bottles, mild steel parts etc. and the metallic recovery was far much less than 90% recovery guaranteed by defendant No. 1 in their indent.

6. The plaintiff by their letter dated 13th July, 1984 brought to the notice of the defendants that the Brass dross shipped by defendant No. 1 was of extremely poor and inferior quality against the contract for supply of Brass dross of refined quality with a guaranteed metallic recovery of 90%, the consignment supplied by defendant No. 1 was absolutely trash and did not secure the contractual metallic recovery content. The consignment was got surveyed through a reputed firm of Surveyors, who certified that the metallic recover in dross in lump form was only 21.627% and in the powder form it was only 52.14%. It is alleged that according to the guaranteed metallic recovery content of 90%, the consignment of Brass dross of 15.819 M/T ought to have yielded metallic recovery of 14.23 MTs whereas the actual metallic recovery was only of 0.0369 M / T from dross of 7.9380 M/T from dross powder making a total recovery of 7.9649 M/T resulting in short metallic recovery of 6.2722 M/T. According to the plaintiff, the total cost of the consignment was Rs. 4,15,822.01, which gave per M/T cost of Rs. 20,066,38. The plaintiff was, Therefore, entitled to claim a sum of Rs. 1,82,310/- being the cost of 6.2722 M/T of metallic content short recovered by them because of metallic recovery much lower than that guaranteed in the contract. It is alleged that the defendants are liable to compensate the plaintiff for the inferior quality supplied by the defendants. The plaintiff claimed a sum of Rs. 1,83,410/- i.e. Rs. 1,82,310/- for short recovery of the metallic content and Rs. 1,100/- towards the cost of notice.

7. The defendants were served. Despite service none appeared on behalf of the defendants and they were proceeded ex parte by order dated 18th August, 1989 The plaintiffs were, however, given opportunity to lead ex parte evidence by way of affidavits, which they have done.

8. Affidavit of Shri Rajesh Nandan has been filed on behalf of the plaintiff. He is a

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partner in the plaintiff firm, which is registered with the Registrar of Firms of U.P. He has proved the copy of the Registration Certificate which is Exhibit D1. He has supported the allegations made in the plaint. M/s. Fenesty Inc., defendant No. 1 is a U. S. Corporation having its office at Suite 344.98, Cutter Mill Road, Great neck New York (U.S.A.) and Defendant No. 2 M/s Khaitan Fenesty Holdings Pvt. Ltd. is having its office at 606, Padma Tower, Rajendra Place, New Delhi, Exhibit P.2 is the offer dated 31st January, 1984 by Khaitan Fenesty Holdings Pvt. Ltd. (defendant MP/2) and is signed by V. K. Ashok on its behalf. The name of the sellers is M/s Fenesty Inc. Suite No. 344, 98 - Cutter Mill Road, Great Neck, New York. From this document it is clear that defendant No. 1 is having its business in India through defendant No. 2, who are agents of defendant No. 1. Defendant No. 1 is a foreigner but is carrying on its business in India through defendant No. 2. The suit filed in India against defendant No. 1 is maintainable and this Court has the jurisdiction to decide the suit against defendant No. 1.

9. However,, it is specifically stated in clause 10 of the General Provisions of the Contract that this contract is being signed by the Agent of the Principal and under no circumstances are the obligations of the Seller or the Principal enforceable upon the Agent.

10. Section 230 of the Contract Act reads as under:-

"Agent cannot personally enforce, nor be bound by, contracts on behalf of the principal - In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to the contrary - Such a contract shall be presumed to exist in the following cases:-

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) Where the agent does not disclose the name of his principal;

(3) Where the principal though discharged, cannot be sued.

11. In this case it is specifically provided under Cl. 10 of General Provisions that the contract is being signed by the Agent and under no circumstances are the obligations of the seller or the Principal enforceable upon the Agent. In view of this, I hold that defendant No. 2 is not liable for the obligations which are enforceable against the principal.

12. Exhibit P. 3 is the irrevocable Letter of Credit. Exhibit P. 4 is the invoice issued by Fenesty Inc. Exhibit P. 5 is the certificate issued by defendant No. 1, which reads as under :---

"We do hereby confirm that the material shipped hereunder to be Brass Dross Copper, minimum 69% Metallic Recovery 90%".

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13. Exhibit P. 6 is the copy of the notice dated 13th July, 1984 addressed to the defendants. Exhibit P. 7 is the report of survey of the material. The report determines the metal recovery and copper percentage from the dross in lumps and powder form.

14. From the ex parte evidence produced on behalf of the plaintiff, the plaintiff has been able to establish that the Brass dross supplied by the defendants in short metallic recovery of 6.2722 M/T, the costs of which amounts to Rs. 1.82,310/-. Accordingly, I pass an ex parte decree in favor of the plaintiff and against the defendant No. 1 for the recovery of Rs. 1,82,310 / - with costs.

15. Order accordingly.

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