
(2014) 04 SHI CK 0030
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 16 of 2006

M/s. Subhash and Company	Vs	APPELLANT
The Associated Cement Companies Ltd. and Others		RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Limitation Act, 1963 — Section 18

Citation : (2014) 04 SHI CK 0030

Hon'ble Judges : V.K. Sharma, J

Bench : Single Bench

Advocate : T.S. Chauhan, Advocate for the Appellant; K.D. Sood, Senior Advocate and Mr. Sanjeev Sood, Advocate for the Respondent

Judgement

V.K. Sharma, J.—The plaintiff has brought this suit against the defendants for recovery of Rs. 35,89,821/- (rupees thirty five lac, eighty nine thousand and eight hundred twenty one only) along with pendente lite and future interest @18% per annum.

2. The plaintiff is a sole proprietary concern. Defendant No. 1 is a public limited company, having its cement plant (defendant No. 2) at Barmana, District Bilaspur, H.P., of which defendant No.3 is the Manager, Finance.

3. It is averred that the defendants invited quotations for supply of "shale" to defendant No. 2. The quotation submitted by the plaintiff on 26.7.1999 was accepted by the defendants. Accordingly, supply order was issued on 20.8.1989 (in fact 20.8.1999), pursuant to which the plaintiff supplied "shale" to the defendants from time to time. The agreement was initially for two years w.e.f. 20.3.1999 (in fact 20.8.1999) and was later on renewed up till 30.5.2003, when according to the plaintiff the contract was unilaterally terminated by the defendants.

4. It is further averred that besides the plaintiff, the Himachal Pradesh Mineral and Industrial Development Corporation (HPMIDC) was also making supply of

"shale" to the defendants under a similar agreement.

5. As agreed, the supply was to be made at the following rate:-

6. As per condition No. 9 of the agreement, "the above rates will remain firm over a period of one year, after that any increase in diesel cost only shall be considered alone." According to the plaintiff, the price of diesel increased. The plaintiff requested for payment of the enhanced diesel price from time to time orally as well as in writing, by way of representations dated 13.4.2004 and 13.9.2004, meeting the concerned officials of the defendants in January and March, 2005 and lastly by serving a legal notice dated 3.4.2005, to which reply dated 6.5.2005 was sent by the defendants, but without any result. The suit amount has been quantified by the plaintiff in a tabular form as below:-

7. The suit is contested by the defendants on preliminary objections regarding mis-joinder of parties, limitation, maintainability and valuation. On merits, the contract is admitted, as also extension thereof. It is stated that the plaintiff supplied "shale" to defendant No. 1 from 2.9.2000 to 26.5.2003. During this period, the plaintiff never requested for revision of the rates due to hike in the price of diesel. It is further stated that the dispute, if any, was to be decided by the Senior Vice President of the company, whose decision was final and binding on the parties. The plaintiff for the first time sent a notice dated 3.4.2005 through counsel, Sh. R.D. Poswal, demanding increase in the rate because of the increase in the price of diesel from Rs. 10.14 to Rs. 19.14 per liter, to which reply dated 6.5.2005 was sent through counsel, Sh. R.K. Handa, Advocate, repudiating the claim of the plaintiff.

8. It is admitted that HPMIDC had also supplied "shale" to defendant No. 1, but under a different agreement. No enhancement in diesel price was paid to HPMIDC as well. It is further stated that the plaintiff is governed by the purchase order and cannot equate itself in similar treatment with other parties, who had separate supply orders. The plaintiff never asked for enhancement of rate commensurate with enhancement in diesel price either orally or in writing prior to the notice dated 3.4.2005. The claim of the plaintiff was rightly denied by the defendants in reply dated 6.5.2005. The plaintiff is not entitled to automatic increase in the diesel rate in terms of clause 9 of the supply order. In any case, the claim relating to the period prior to 18.4.2003, that is, three years earlier to the filing of the suit, is barred by time.

9. In replication, the stand taken by the defendants is refuted and instead the case set up in the plaint is reaffirmed.

10. On the pleadings on behalf of the parties, the following issues have been framed:-

1. Whether the plaintiff is entitled to the suit amount as claimed, if so to what extent? ...OPP.

2. Whether the suit is not within time? (Onus objected to).OPD.

3. Whether the suit is bad for mis-joinder of parties as alleged in preliminary objection No. 1? ...OPD.

4. In case Issue No. 1 is proved, to what rate of interest the plaintiff is entitled? ...OPP.

5. Relief.

11. The parties have led evidence. I have heard their learned counsel/senior counsel and perused the record.

Issue No. 2

12. For the sake of convenience, this issue is taken first for discussion and decision.

13. Admittedly, supply order Ext. P.1 was issued by defendants No. 1 and 2 in favour of the plaintiff on 20.8.1999. It is reproduced below in extension:-

Ref: GL/Shale/685 Date: August 20, 1999.

ACC "The Associated Cement Companies Limited. GAGAL CEMENT WORKS P.O. Barmana-174013 Distt. Bilaspur, (Himachal Pradesh) Phone: (STD Code 01978) 44069, 44031 Grams: "GAGALCEMT" Bilaspur (H.P.)

M/s. Subhash & Company, Village Begher, P.O. Bhater Nichli Tehsil Sadar, Dist. Bilaspur.

Telex: 0948100681 (Thro RABMN) Fax: 01978-44067 Email: accgagal@nde.vsnl.net.in

Dear Sirs,

Sub: Supply of Shale.

This has reference to your quotation dated 26.7.99. We are pleased to place this order for supply up to 500 tonnes per day of uncrushed shale to our Works. Exact quantity to be supplied shall be intimated to you by our Manager Production based on our requirement. Following are the terms and conditions:-

1) a) The basic rate per tonne of shale: Rs. 24.00

b) Transportation charges per tonne: Rs. 35.00

Total: Rs. 59.00

2) The royalty and sales tax if any paid by you will be reimbursed to you on your producing documentary evidence of payment to the Government Authorities.

3) You shall supply shale in tipping trucks only for mechanical unloading of shale at our Works.

4) You shall supply shale of this requisite size exactly as per the requirement which will be communicated to you from time to time by our Manager Production

and you will arrange supply strictly according to our instructions.

5) You will be responsible for and will indemnify us against all claims arising out of accidents and for compensation to our works or damage to our property if caused by your trucks.

6) Income tax will be deducted from your bills as per rules in force.

7) In case of unsatisfactory work, the company will have the right to terminate the contract and get the work done by other party. Any extra expenditure incurred on this account will be recovered from your pending bills.

8) Notwithstanding the above, you will abide by the directions that may be issued by the Company from time to time and in this respect the decision of the Sr. Vice President will be final and binding on you.

9) The above rates will remain firm over a period of one year, after that any increase in diesel cost only shall be considered alone.

10) This contract is valid for a period of two years w.e.f. 20.8.1999.

11) We are sending this letter in duplicate and would request you to please return the duplicate copy of this order duly signed in token of your acceptance of the work as per terms and conditions stipulated above.

Thanking you,

Yours faithfully, For THE ASSOCIATED CEMENT COS. LTD.,

-sd- (NAVEEN CHADHA) SR. VICE PRESIDENT (WORKS) GAGAL CEMENT WORKS.

I/We accept the above work order as per terms and conditions stipulated therein.

-sd- M/s. Subhash Thakur & Co. Village Begher, P.O. Nichli Bhater, Teh. Sadar, Distt. Bilaspur, (H.P.)

14. It is also admitted that supply of "shale" was made by the plaintiff between 2.9.2000 to 26.5.2003. The suit was filed on 18.4.2006.

15. According to the plaintiff, Article 1 of the Limitation Act, which is extracted below, would apply in the facts and circumstances of the present case:-

16. It is further submitted on behalf of the plaintiff that clause 9 of the supply order Ext. P.1 and its letters Ext. PW. 4/D and Ext. 4/E, received by defendant No. 1 on 13.4.2004 and 13.9.2004, respectively, would constitute acknowledgment in writing u/s 18 of the Limitation Act.

17. In support of its contentions, reliance is placed on behalf of the plaintiffs on (1) Food Corporation of India Vs. Assam State Cooperative Marketing and Consumer Federation Limited and Others, and (2) R.L. Kalathia and Co. Vs. State of Gujarat, .

18. Per contra, the defendants submit that the case falls under Article 14 of the

Limitation Act, which is as under:-

19. The defendants have relied upon the following case law:-

- (1) M/s. Mohan Meakin Ltd. Vs. M/s. Surjit Beverages Pvt. Ltd., .
- (2) Raghunath Shaw Vs. Kanai Lal Das and Others, .
- (3) Bibhuti Bhusan Bose Vs. National Coal Trading Co., .
- (4) Attadi Venketi Vs. Bharatam Ramulu and Sons, .

20. Firstly, while coming to the first contention raised on behalf of the plaintiff that clause 9 of the supply order Ext. P.1 and letters Ext. PW. 4/D and Ext. PW. 4/E amount to acknowledgment in writing within the meaning of Section 18 of the Limitation Act, it would be seen that whereas clause 9 of supply order Ext. P.1 is in the nature of mere stipulation to the effect that the agreed rate would remain firm over a period of one year and after that any increase in diesel cost alone shall be considered. On a plain reading of this clause, it is manifest that the same cannot be termed as an acknowledgment of liability in writing u/s 18 of the Limitation Act by any stretch of imagination. Similarly, letters Ext. PW. 4/D and Ext. PW. 4/E bearing stamps of receipt dated 13.4.2004 and 13.9.2004, respectively, which are mere letters of request submitted by the plaintiff to the Joint President of defendant No. 2 for payment of increased diesel cost for the relevant period, also do not bind the defendants with the aid of Section 18 of the Limitation Act, as there is no acknowledgment of liability therein on behalf of the defendants, much less an acknowledgment in writing.

21. It is apparent from the very nature of the transaction stipulated under supply order Ext. P.1 that the same is for supply of goods (shale) by the plaintiff to the defendants at the given rate including transportation charges. It being so, it cannot be said to be a transaction based on a mutual, open and current amount, where there have been reciprocal demands between the parties attracting Article 1 of the Limitation Act. To the contrary, since goods (shale) were supplied by the plaintiff to defendants No. 1 and 2 under supply order Ext. P.1, whereunder no fixed period of credit was agreed upon, the present suit would be a suit for recovery of the price of goods sold and delivered and as such Article 14 of the Limitation Act would apply. Though in both the cases, the prescribed period of limitation is three years, yet the starting period of limitation is different, as provided under each of the provision.

22. As already noticed, the suit was filed on 18.4.2006. It being so, the transactions for the last three years, that is, dating back to 17.4.2003, would fall within limitation. Thus, only the last two transactions mentioned in the table given under para 6 of this judgment, would be within limitation and rest of the claim set up by the plaintiff is barred by time.

23. The issue is decided accordingly.

Issues No. 1 and 4.

24. Both these issues being inter-connected, requiring common appreciation of evidence and law, are taken up together for discussion and decision.

25. As already observed, admittedly supply of "shale" was made by the plaintiff to defendants No. 1 and 2 under supply order Ext. P.1, cause 9 whereof provided for increase in diesel cost. Though the plaintiff requested for such increase vide letters Ext. PW. 4/D and Ext. PW. 4/E, received by the Joint President of defendant No. 2 on 13.4.2004 and 13.9.2004, respectively and thereafter vide notice dated 3.4.2005, which request/demand was repudiated by the Joint President vide reply dated 6.5.2005, Ext. PW. 4/H, yet the plaintiff did not take recourse to the legal remedy available to him till as late as 18.4.2006, by which time the substantial claim had already become time barred, leaving only a fraction thereof amounting to Rs. 58,781/- (rupees fifty eight thousand and seven hundred eighty one only) legally enforceable.

26. The increase in diesel prices has been proved by PW. 2, Sh. Sidharath Aggarwal and PW. 4 (wrongly mentioned as PW. 3), Sh. Ram Singh, coupled with the testimonies of PW. 4, Sh. Subhash Thakur, sole proprietor of the plaintiff concern and PW. 5, Sh. Arvind Kumar, Chartered Accountant. PW. 1, Sh. R.S. Singha has proved payment of enhanced rates for supply of "shale" made by HPMIDC (formerly HPGIC Ltd.) to defendant No. 1 on account of increase in price of diesel. The defendants have not led any evidence to the contrary.

27. The above discussion brings me to hold that the plaintiff is entitled to the suit amount partly only to the extent of Rs. 58,781/- (rupees fifty eight thousand and seven hundred eighty one only) along with interest @18% per annum, it being a commercial transaction.

28. Both the issues are decided accordingly.

Issue No. 3.

29. As supply order Ext. P.1 has been issued by Senior Vice President (Works) of defendant No. 2 on the letter head of defendants No. 1 and 3 and defendant No. 3, being the Manager Finance, of defendant No. 2, the suit cannot be said to be bad for mis-joinder of parties.

30. The issue is accordingly held against the defendants.

Relief.

31. In the result, the suit succeeds partly and is accordingly decreed in part and the plaintiff is held entitled to recover a sum of Rs. 58,781/- (rupees fifty eight thousand and seven hundred eighty one only) from the defendants along with pendente lite and future interest @18% per annum, jointly and severally with proportionate costs. Let decree be drawn accordingly.