
(2014) 02 DEL CK 0197

In the Delhi High Court

Case No : Regular First Appeal (OS) 124 of 2012

National Agro Chemicals Industries Ltd.

APPELLANT

Vs

National Research Development Corporation

RESPONDENT

Date of Decision : 10-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Limitation Act, 1963 — Section 17

Citation : (2014) 208 DLT 107

Hon'ble Judges : Pradeep Nandrajog, J; Jayant Nath, J

Bench : Division Bench

Advocate : Amit Sibal, Mr. Sumeet Bhatia and Mr. Prateek Chadda, for the Appellant; P.N. Bhardwaj and Mr. Ashutosh Bhardwaj, for the Respondent

Final Decision : Allowed

Judgement

Jayant Nath, J.—The present Regular First Appeal is filed u/s 96 of the CPC 1908 for setting aside the judgment and decree dated September 06, 2012 whereby the appellant was restrained from using technology/know how given by the respondent for manufacture of Pesticide Monocrotophos Technical unless the appellant paid the royalty. A preliminary decree was also passed wherein the respondent was held entitled to royalty in terms of the License Agreement and also entitled to rendition of accounts to determine the royalty. The respondent had filed the Suit seeking relief of injunction and rendition of accounts. In the Plaint it is stated that the respondent is a Government of India undertaking dealing with licensing of different know how and expertise, projects and processes developed by different Central Government laboratories. It is averred that the respondent having full rights in the invention/know-how for the manufacture of Monocrotophos technical including Monocrotophos 36 WSC developed by the Regional Research Laboratory, Hyderabad (hereinafter referred to as "RRLH") agreed to grant a license vide license agreement dated 27.01.1983 to the appellant for use of the said invention/process/know how to manufacture Monocrotophos technical including Monocrotophos 36 WSC for a

period of five years from 1.11.1982 or five years from the date of start of manufacture. The appellant had to pay a consideration of Rs. 5,00,000/- (Rupees Five lac only) for the license agreement plus royalties @ 2% on the net ex-factory sale price.

2. It is further averred that no royalties were paid by the appellant, despite starting of its plant. The respondent initiated enquiries and learnt that the appellant was manufacturing and selling the said products by using the licenses process without filing the royalty returns or making payment of royalty to the respondent. This information was given by an officer of the respondent who had been sent to visit the factory and business premises of the appellant. It is averred that despite repeated requisition neither entry to the factory was allowed nor cooperation was given by the appellant. It was, however, confirmed by the officer that the appellant was in production after 1989 and are manufacturing and selling Monocrotophos weighing approximately 200 tons to 600 tons in a year valuing approximately between Rs. 3,00,00,000/- (Rupees three crore only) to about Rs. 6,00,00,000/- (Rupees six crore only) yearly. Hence, the present Suit had been filed seeking decree of perpetual injunction and rendition of accounts from the appellant and thereafter for a final decree on account of royalties found due pursuant to rendition of accounts and interest.

3. The appellant filed its written statement before the learned Single Judge. The execution of agreement dated 27.1.1983 with the respondent is admitted. It is averred that another agreement dated 20.10.1983 was executed between the appellant and Council of Scientific and Industrial Research (hereinafter referred to as "CSIR"). Under this agreement RRLH was also to shoulder number of responsibilities. It is averred that in terms of Clause 3.1 of this agreement, after commissioning of the plant, guarantee runs were to be conducted jointly by the appellant/CSIR and RRLH. Further, as per Clause 3.3 of the said agreement, RRLH was to ensure capacity of the plant and consumption of raw materials as follows:-

4. Another agreement dated 2.5.1985 was entered into by the appellant with CSIR through RRLH whereby RRLH agreed to provide detailed design report.

5. The first trial production is stated to have commenced in October 1988 in consultation with RRLH. However the plant did not achieve the required quality of 68% w/w. It is further stated that on account of the delay in commencement of industrial production, the respondent had to take huge loans and incur heavy expenses. The appellant was constrained to take outside expert help for re-commissioning of the plant. It is further averred that after considerable time lapse the appellant with the help of outside expert was able to achieve the desired quality for production of Monocrotophos with the requisite efficiency in consumption of raw material. It is further averred that the respondent was not entitled to any royalties whatsoever inasmuch as they have failed to discharge their obligations. It is further urged that on account of the said conduct of these three entities including the respondent, the contract in question stood completely

abandoned and frustrated.

6. A preliminary objection is also taken that the Suit filed by the respondent in 1997 is barred by limitation as according to the Plaint itself commercial production has commenced in 1989. The period of limitation being three years, the Suit became barred in 1992 or 1993.

7. Issues were settled on 5.5.2000 which read as follows:-.

(1) Whether the plaint has been signed and verified by an authorized person on behalf of the plaintiff?

(2) Whether the suit is barred by limitation?

(3) Whether the suit is bad for non-joinder of the parties? If so to what effect?

(4) Whether the defendant was provided with a know-how as per the licence agreements dated 21.1.83, 20.10.83 and 2.5.1995? (The correct date being 2.5.1985 and not 2.5.1995)

(5) Whether the plaintiff has committed breach of these agreements and the agreement stood abandoned and frustrated as alleged? If so to what effect?

(6) Whether the plaintiff is entitled to rendition of accounts?

(7) To what relief, if any, is the plaintiff entitled?"

8. The respondent has led evidence of three witnesses being PW-1 Mr. Mukund Mehta, Law Officer, PW-2 Mr. Ashwini Kumar Kohli, Section Officer, and PW-3 Mr. V.V. Narain Reddy. Evidence of PW-3 was led in rebuttal. PW-1 has exhibited two documents. PW-2 has exhibited four documents. PW-3 has exhibited 31 documents. In the course of admission/denial of documents, 32 documents filed by the respondent have been exhibited as Exhibit P-1 to P-32.

9. The appellant has led the evidence of DW-1 Mr. G.P.S. Kairon, their Executive Director, DW-2 Mr. Vipin Kumar Dua, their Finance Manager and DW-3 Mr. Sharad Kumar Chauhan, Chemical Engineer, who is stated to have been engaged by the appellant to do quality check for manufacture. DW-1 has exhibited 19 documents. Two documents have been marked in Admission/denial as Ex. D1 and Ex. D2.

10. Learned counsel appearing for the appellant has strenuously made two submissions. Firstly, it is submitted that issue No. 2 has been wrongly decided by the impugned order inasmuch as material evidence placed on record including communication dated 19.05.1989 (Ex. DW-1/7) has been completely ignored. The letter dated 19.5.1989, Ex. DW-1/7 shows that the fact that the contract has been frustrated was well within the knowledge of the respondent in or around 1989 itself. The communication Ex. DW-1/7 points out that the technology given by the respondent was defective and that the Agreement stands completely frustrated. Reliance is also placed on evidence of its witnesses to argue that despite best efforts, the commercial production could not commence from the

technology given by the respondent. The appellant had to take help of outside experts before commercial production could commence at a much later date after incurring huge losses. It is urged that these facts were within the knowledge of the respondent. It is stated that the impugned order has completely ignored this evidence and has not dealt with the same and has erroneously concluded that the present suit is filed within the limitation period. The evidence placed on record shows that the suit is filed well beyond the period of three years and is barred by limitation.

11. It is also strenuously urged that the reliance of the impugned order on paragraph 12 of the preliminary objection to the Written Statement is misconceived and that the impugned order is misreading the contents of the said Written Statement. Paragraph 12 states that the respondent at best is entitled to royalty for the year upto 1993. The paragraph further states that the Suit is barred by nine years of limitation. Hence, the interpretation that royalty becomes payable from 31.3.1993 is an erroneous conclusion reached in the impugned order. The order also wrongly treats this as an admission.

12. The second submission of the learned counsel for the appellant relates to the finding on issues No. 4, 5 and 6 in the impugned order. It is urged that issues No. 4, 5 and 6 have also been wrongly decided inasmuch as voluminous evidence placed on record by the appellant would demonstrate that the technology that was given by the respondent was not in accordance with the agreed parameters and the license agreement was null and void and no amount was payable to the respondent. It is urged that the said evidence has not been taken into account or dealt with by the impugned order.

13. Learned counsel appearing for the respondent has reiterated that they got knowledge about the commercial production only after PW-2 had inspected the factory premises on 9-10/10/1995 and hence the impugned order rightly holds that the suit filed on 27.11.1997 is within limitation as the limitation period can begin only w.e.f. 19.10.1995.

14. First we will deal with issue No. 2, namely, as to whether the suit is barred by limitation. The impugned order holds that as per inspection report dated 9-10/10/1995 (Ex. PW-2/3), which is a detailed inspection report prepared by PW-2, the appellant has concealed documents of production and that in fact production has commenced by the appellant from the Financial Year ending 31.3.1992. Further, relying upon Section 17 of the Limitation Act, it was held that as the appellant was guilty of concealing the date of commencement of commercial production the period of limitation would only be taken w.e.f. 09.10.1995 when PW-2 carried out his inspection and the respondent gained knowledge that commercial production had commenced long back. The impugned order further holds relying upon paragraph 12 of the preliminary objection to the Written Statement that as per the appellant itself the royalty become due at best from 31.03.1993

15. In our view, the finding recorded by the learned Single Judge on this issue are erroneous. The impugned order has ignored the evidence led by the appellant pointing out the defect in the technology supplied by the respondent including communication dated 19.5.1989 (Ex. DW-1/7). This evidence/communication shows that respondent had full knowledge about the facts i.e. that the appellant had resiled from making payment of any royalty in 1989 itself.

16. Reference may be had to the evidence of DW-1. The relevant portion of the evidence of DW-1 proving Ex. DW-1/7 reads as follows:-

17. I say that, my company received a letter dated 12.05.1989 from NRDC (the respondent i.e. National Research Development Corporation.) The said letter is already exhibited as Exhibit D/2. NACIL(appellant) replied to the said letter vide letter dated 19.5.1989 which is being exhibited as Exhibit DW-1/7. In this letter it has been clearly mentioned that NRDC and RRLH had completely failed in enabling commercial production of the end product as was agreed and therefore there is no liability for any payment whatsoever.

17. There is no cross-examination of DW-1 on this communication. In light of the above communication and the absence of any cross-examination of the same in our view the appellant has proved dispatch of the abovesaid communication and receipt of the same by the respondent. The period of limitation has to necessarily commence w.e.f. receipt of the said letter dated 19.5.1989. The Suit is filed in 1997.

18. Apart from Ex. DW-1/7, one cannot help noticing other correspondence placed on record by the respondent. Mr. V.V. Narain Reddy PW-3 has exhibited 31 documents. Ex. PW-3/22 is a letter dated 3.11.1988 sent by the appellant to RRLH pointing out that the plant has been commissioned successfully in supervision of their engineers. However, complaint on the quality of production and rated capacity is made in the said communication. Reference may also be had to the communication Ex. PW-3/29 which is undated but has obviously been sent in 1989 by RRLH to the appellant. The said letter reads as follows:-

Kindly refer to our earlier letter of even No. dated 23rd January 1989 and subsequent telex of 14th March 1989 on the above subject. Your plant for production of Monocrotophos has been successfully commissioned by our Institute during September/October 1988. We propose to send our team for providing the guarantee runs within a month as per Article 3.3 of Agreement dated 2nd May 1985.

In case you are not availing our services for providing guarantee runs kindly intimate to us and thus absolve us of providing guarantee runs.

Kindly treat this as urgent and inform us.

19. These communications clearly show that the unit of the respondent RRLH who was responsible for ensuring that the plant reaches optimum capacity and whose technology was the subject matter of the present license agreement was

fully aware that the plant had become operational in 1988/1989. The only dispute was as to whether it had been successfully commissioned and had achieved promised parameters. In the light of this evidence some of which has been filed by the respondent themselves, there is no explanation as to why the respondent should have waited till 1995 to send PW-2 to carry out an inspection of the factory of the appellant. These documents clearly show that in 1989 the respondent was aware that there were certain problems in functioning of the plant and that the appellant was treating the agreement as over. In these facts and circumstances, the provisions of Section 17 of the Limitation Act would have no application whatsoever. There is no fraud made out in the facts of the case to attract Section 17 of the Limitation Act.

20. The suit is essentially for recovery of dues which the respondent claims has arisen out of the contract dated 27.01.1983 between the parties. Though the relief claimed is for rendition of accounts essentially it is for compensation for breach of contract by the appellant. Hence, Article 55 of the Limitation Act would be applicable which reads as follows:-

21. As early as in 1989, the appellant had repudiated the contract and have clearly indicated that the contract stands frustrated and nothing is payable on account of royalty to the respondent. They have refused to pay the royalty which is the subject matter of this Suit. The suit filed in 2007 is clearly barred by limitation.

22. There are two more aspects pertaining to the issue of limitation. The impugned order relies on the inspection report filed by PW-2 Shri A.K. Kohli Ex. PW-2/3 which is dated 9-10/10/1995. Based on this inspection report the impugned order concludes that the appellant is guilty of concealing the date of commencement of commercial production and, therefore, Section 17 of the Limitation Act comes into play. A perusal of DW-2/3 shows that PW-2 visited the factory of the appellant but received no information. He has thereafter visited the office of Registrar of Companies at Jalandhar and has prepared the report based on balance sheets made available by the Registrar of Companies. The report concludes based on the said balance sheets that commercial production has been commenced by the appellant since 31.3.1992. This conclusion does not show any fraud. Further limitation will not start to run from 1995 merely because the respondent chose to inspect the balance sheets of the appellant as available with the Registrar of Companies in 1995. The impugned order wrongly takes the limitation to commence from 1995. The balance sheets of a company are in public domain. It was always open to the respondent to have carried out inspection of these documents if it had any claims against the appellant.

23. Secondly, the impugned order has relied heavily on paragraph 12 of the preliminary submissions to the written statement, relevant portion of which reads as follows:-

12. Without prejudice to the above that the contract stand frustrated, the

present suit of the plaintiff is also barred by limitation. The trial production with the consultation of the RRLH was started in 1988. The same suffered a serious set back due to the insufficient assistance rendered by NRDC and its related agencies. The limited production that took place was by incurring huge losses. With the help of outside experts, production was brought to the requisite quality and efficiency levels at a huge expense of time, money and effort. This, the defendant was constrained to do as huge investments had been made and NRDC, RRLH & CSIR had completely left the defendant in the lurch. The plaintiff is, if any, at best, entitled to the royalty for the first years ended in 1993 itself. The present suit has been filed after nine years of commencement of commercial production and is, therefore, completely barred by limitation. The present suit is liable to be dismissed on this sole ground.

24. On the basis of the above, the impugned order concludes that as per the appellant the payment for royalty became due from the year ending 31.3.1989. A bare reading of the said portion of the written statement would show that the conclusion in the impugned order is erroneous. What the para actually states is that at best the plaintiff (respondent) would be entitled to royalty for the year ending 1993 itself. The further averment is that the suit filed in 1997 is barred by limitation. Hence, the contention is that royalty is at best payable till 1993 and not that the liability of royalty commenced from 1993. The impugned order has wrongly relied upon the said observations in the written statement.

25. Accordingly, the Suit is filed beyond the prescribed period of three years and is clearly barred by limitation. The decision in the impugned order on this issue is set aside. Issue No. 2 is answered accordingly.

26. We now come to Issues No. 4 to 6. The impugned order has clubbed the above issues to hold that the respondent is bound by the terms of the license agreement dated 27.1.1983 Ex. P-1 and that the appellant is entitled to pay royalty from the year ending 31.3.1989.

27. The impugned order reasons that if appellant was of the view that it did not use the technology of the respondent then nothing prevented the appellant from returning the technology documents back and permitting the respondent to inspect the factory of the appellant for checking whether the supplied know how by the respondent was being used by the appellant or not. The impugned order further holds that merely because the appellant had to take expert help and had improved the technology for its own benefit would not imply that the technology supplied by the respondent was not taken and that royalty fee as per the Agreement is not payable. Reliance is also placed on the balance sheet of the appellant for the sales period ending 31.3.1989 to show that as sales are being made royalty did become payable. Based on the said finding the impugned order directs that the appellant is liable to rendition of accounts. The impugned order further appoints a Local Commissioner to go into the rendition of accounts.

28. In our view the findings recorded by the impugned order on these issues

completely ignore the voluminous evidence led by the appellant of these issues.

29. The onus to prove issues No. 4 and 6 was on the plaintiff. Evidence led by the plaintiff on this count is quite sketchy. PW-1 Mr. Mukund Mehta merely proves the Certificate of Incorporation, the original minutes containing resolution empowering Mr. N.K. Sharma to sign and verify the plaint. Reliance is placed on the visit of an official of the company in 1995 and the said report of PW-2 Mr. A.K. Kohli. It is stated that the present Suit is filed based on the said report. Similarly, PW-2 Mr. Ashwini Kumar Kohli only states that pursuant to orders of his Chief Technical Coordinator he has visited the premises of the appellant and he has submitted Tour reports regarding his visit to the premises of the appellant on 9-10/10/1995 which is Exhibit PW2/3. The said Tour reports relies on the balance sheets of the appellant company which were made available by the Registrar of Companies and which shows production figures of Monocrotophos. The said witness deposed that he obtained necessary balance sheets from the Office of Registrar of Companies and worked out the royalty payable to the respondent for the year 1993-1998. PW-3 Dr. V.V. Narain Reddy who is working as a Deputy Director and Head Organic Division-II in Indian Institute of Chemical Technology, Hyderabad has merely tendered and marked the documents as Exhibit PW-3/1 to PW-3/31. He had appeared in rebuttal evidence.

30. Clearly, there is no attempt on the part of the respondent to try and lead evidence to show that the technology that was supplied to the appellant was successful or was as per agreed terms. There is no cogent evidence led by the respondent to show that technology as agreed upon was supplied and that with the help of said technology the appellant achieved requisite production parameters. The technology may have been used by other companies or elsewhere. There is no attempt to show who else used the said technology and as to whether the same was successful. In the absence of any such evidence, there is no option but to hold that the plaintiffs have failed to prove issues No. 4 and 6.

31. For issues No. 4 to 6 we may look at the evidence led by the appellant on these issues. DW-1 Mr. G.P.S. Kairon in his evidence by way of Affidavit in paragraph 18 states as follows:-

18. I say that my company started the defective commercial production in the year 1988. A perusal of the Balance sheet as on 31.3.1989 will show that NACIL were able to produce 21 tonnes for the period from 15.10.1988 to 31.3.1989 (approximately 6 months) of Monocrotophos Technical as against the projected installed capacity of 200 metric tonnes per annum. At no point of time have we ever been able to achieve the desired end product of Monocrotophos 68% w/w. In fact the plaintiff and its agencies have never given even the Guarantee runs for the product in question which itself shows that the plaintiff is not entitled to any Royalty whatsoever. In fact the plaintiff has completely abandoned the defendant company and just because the defendant was doing some business in order to safeguard its investment the plaintiff is unfairly claiming royalty. This is

the very reason why the plaintiff has hardly ever written to us claiming during the entire period from 1989 to 1995.

32. Reference may also be had to the cross-examination of DW-1 on 03.08.2006 which reads as follows:-

Ques: I put it to you that the desired product as per license agreement production was started by your company in the year 1988-89. Is it correct?

Ans: We started only defective production in 1988-89 which were not as per the norms.

Ques: I put it to you that you have sold commercially the desired product during the period 1988-89 and was also maintaining the stocks of the same. Is it correct?

Ans: It is incorrect. Volunteered: Because we bought MCP Technical from outside to blend it with our defective production in order to make it sellable.

Ques: Is it correct that you have shown in your accounts for the year 1988-89 the royalty payable by you as expenses? Ans: Yes, it is shown in our records.

Ques: Did you pay this royalty to anyone?

Ans: No, we have not paid this royalty to anyone. Volunteered:

Since the production was defective.

33. Similarly, reference may be had to further cross-examination of DW-1 held on September 06, 2006. Relevant portion of which reads as follows:-

Ques: I suggest to you that Guarantee runs, quality, installed capacity were achieved after full implementation of the project according to the process licensed by NRDC and NRDC is entitled to royalty.

Ans: It is incorrect.

Ques: I suggest to you that the plaintiff did not abandon the defendant company and the plaintiff is claiming the royalty fairly.

Ans: It is incorrect.

Ques: I put it to you that NRDC has been claiming the royalty even during the period from 1989-1995 and writing to you. Ans: I cannot tell off hand without seeing the records.

Ques; Is it correct that the project was successfully producing ISI standard products to its capacity except after coming out of some usual initial teething problems?

Ans: It is incorrect.

Ques: I suggest to you that the defendant had never complained except

mentioning a false excuse to obtain rescheduling of the payment of loans from financial institutions.

Ans: It is incorrect.

34. Clearly the above testimony of DW-1 regarding faulty technology having been supplied by the respondent has remained unshaken in cross-examination.

35. At this stage, it would be useful to also go through the communication dated 19.05.1989 sent by the appellant to the respondent being Ex. DW-1/7. The said communication reads as follows:-

We are shocked to read the contents of your letter in which you have asked for the needful that could be arranged from your side for our commercial production. It is really surprising that you do not know anything about the miseries which were faced by us in adopting your defective technology developed by RRLH. We had been in constant touch with the scientists of RRLH to rectify (sic) the defective technology and to suggest remedial measures but they maintained complete salience (sic) over the matter after they miserably failed in bringing the efficiency of the plant to produce MCP (T) 68% w/w, during their visit at our plant during 1988-89 where we were carrying out trial bests.

Even the modifications suggested by them did not work out (sic) and plant could not produce the desired output and purity of MCP(T).

Not only that the technology was defective but the composition of raw materials mentioned therein was also miscalculated and there was a lot of wastage during the process in consuming the raw material as compare to the quantity of output received by us. We incurred heavy financial losses on account of low yield per batch, low purity and high consumption of solvents/chemicals per batch. No concrete solution could be found by RRLH in spite of various meetings with its scientists.

Further thereafter the scientists of RRLH did not come forward to give any further guarantee tests. We were thus left with no alternative but to take advice of outside experts, who were successful in running other plants engaged in manufacturing of MCP(T). This had become necessary in absence of any response from the scientists of RRLH. Now with the help of other experts fundamental changes in technology, design and raw material have effected and we are hopeful to go into commercial production in a couple of months. This has involved great financial implications for us as we had to undergo heavy losses because of defective technology and designs provided by RRLH under the agreement.

In view of the above, please note that our agreement with you stand completely frustrated because of its breach on the part of RRLH and as such we shall in no way be liable to payment of any royalty to them under said agreement.

36. The contents of the above communication also shows that the appellant has

protested to the respondent about the technology received being not up to the mark. Receipt of this communication has not seriously been challenged by the respondent. This communication re-enforces the conclusion that the respondent has supplied faulty technology which is contrary to the agreed terms of the agreement dated 27.01.1983.

37. In view of the above evidence placed on record by the appellant, in our view the appellant has successfully proved that the appellant was not able to carry out commercial production based on technology supplied by the respondent. Accordingly, we hold that the appellant was not provided know how as per license agreement dated 27.1.1983, 20.10.1983 and 2.5.1988. Accordingly, the respondent is not entitled to any rendition of accounts or to any royalty. We answer issues No. 4 to 6 accordingly and set aside the impugned order on the said issues. The present Appeal is accordingly allowed and the decree passed by the learned Single Judge is set aside. No order as to costs.