(2012) 09 DEL CK 0091

In the Delhi High Court

Case No : CS (OS) No. 2687 of 1997

National Research Development Corporation — APPELLANT

Vs

National Agro-Chemicals Industries Ltd. — RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1
Evidence Act, 1872 — Section 106
Limitation Act, 1963 — Section 17

Citation : (2013) 1 ILR Delhi 88

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : P.N. Bhardwaj, Mr. Ashutosh Bhardwaj, for the Appellant; Surbhi Mehta, Ms. Ashwin Kumar, Ms. Chandrika Gupta, for the Respondent

Judgement

Valmiki J Mehta, J.—The subject suit has been filed by the plaintiff M/s. National Research Development Corporation (NRDC) seeking reliefs of rendition of accounts and injunction against the defendant from using the technology given under the licence agreement dated 27.01.1983 for manufacturing of Monocrotophos Technical including Monocrotophos 36 WSC without complying with the terms of the licence agreement. Vide licence agreement dated 27.01.1983, Ex. P-1, plaintiff gave to the defendant the knowhow for the manufacture of Monocrotophos Technical including Monocrotophos 36 WSC as right in the said invention was granted to the plaintiff. The detailed terms and conditions on which licence is granted are mentioned in Ex. P-1, and of which the clauses pertaining to consideration payable to the plaintiff are clauses 1 & 3. Plaintiff was to get a premium of Rs. 5 lakhs and thereafter royalty @ 2% of the net ex-factory sale price of the material manufactured. The case of the plaintiff is that the defendant kept on filing nil returns i.e. commercial production did not start for commencement of payment of royalty, however, when an officer of the plaintiff Sh. Ashwani Kumar Kohli, PW-2 visited the premises of the defendant in 1995, it transpired that the defendant was selling products manufactured by the technology supplied by the plaintiff at least w.e.f. financial year ending 31.3.1992. The visit of this officer to the premises of the defendant is dated 9-10.10.1995. The subject suit thereafter came to be filed on 25.11.1997.

2. In the written statement the defendant has contended that the technology supplied by the plaintiff was defective and, therefore, the defendant was not liable to make any payment to the plaintiff. The defendant claims that on account of the fault of the plaintiff in not giving the requisite technology the defendant had to enter into another agreement seeking outside expert''s help and only whereafter trial production commenced in around 1988. In para 12 of the preliminary objection in written statement it is pleaded that the plaintiff at best entitled to royalty for the year ended 31.3.1993. The grant of the licence Ex. P-1 in favour of the defendant by the plaintiff is not disputed. It is also pleaded in the written statement that the licence agreement stood frustrated by the acts of the plaintiff because the invention given by the plaintiff was of no use to the defendant. It was pleaded that in fact because of the inadequate/faulty technology defendant suffered losses.

3. On the pleadings of the parties, the following issues were framed in this case on 05.05.2000:

(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 21.1.183, 21.10.83 and 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?

Issue Nos. 4 and 5 were recasted/reframed vide order dated 23.04.2001 which read as under:

4. Whether the defendant was provided with the know-how as per the Licence Agreement dated 27.1.1983?

5. Whether the plaintiff is bound by the Agreements dated 20.10.1983 and 2.5.1995? If yes, whether the plaintiff has committed breach of any of these agreements?

Issue No. 1

4. Issue No. 1 is as to whether the plaint is signed and verified by an authorized

person. This issue need not detain me inasmuch the Supreme Court in the judgment reported as United Bank of India Vs. Naresh Kumar and others, holds that the suits filed by companies should not be dismissed on technical grounds once the same are contested to the hilt. It also holds that the suits by the companies when filed on behalf of a principal officer should be held to be validly instituted in terms of Order 29 Rule 1 Code of Civil Procedure, 1908 (CPC). In para 1 of the plaint plaintiff has stated that the signatory Sh. N.K. Sharma is the Managing Director of the plaintiff corporation. In the written statement in reply to this para it is not disputed that Sh. N.K. Sharma is the Managing Director of the plaintiff corporation. A Managing Director is surely a principal officer of a company. I may also states that the certified copy of the resolution authorizing Sh. N. K. Sharma to sign and verify the plaint was filed and proved as Ex. PW-1/1. The suit is therefore validly signed and filed, and issue No. 1 is thus decided in favour of the plaintiff and against the defendant.

Issue No. 3

5. This issue of alleged non-joinder of necessary parties is misconceived inasmuch as contractual relationship under the licence agreement was only between the plaintiff and the defendant. Plaintiff is only claiming rights in the suit on the basis of this agreement Ex. P-1 with the defendant. No other person is therefore a necessary party inasmuch the disputes which are the subject matter of the plaint are only between the plaintiff and the defendant. Merely, because the defendant may say that two other entities i.e. Council for the Scientific & Industrial Research and M/s. Indian Institute of Chemical Technology are necessary parties, they would not become so because the agreement Ex. P-1 is between the plaintiff and the defendant in the suit and the rights which are claimed in the suit arise only under this agreement in favour of the plaintiff and against the defendant. Issue No. 3 is therefore decided in favour of the plaintiff and against the defendant.

ISSUE NO. 2

6. Ordinarily limitation commences when the plaintiff was entitled to the royalty payments. In terms of Ex. P-1, clause 3(i) royalty became due every year on 1st April, 1st October and was payable on the 1st of May and 1st of November of that year. It is a common ground of both the parties before me that royalty becomes payable after commercial production begins. The defendant claims the suit to be barred by limitation as it has been filed in the year 1997 as the trial production is said to have commenced in the year 1988. Para 12 of the preliminary objections which contained the defence of the suit being barred by limitation reads as under:

12. Without prejudice to the above that the contracts 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.

7. Since limitation commences from the date of the commercial production, commencement of trial production cannot in any manner commence limitation with respect to the royalty. As per the defendant, the payment of royalty became due from the year ending 31.3.1993, and so stated in para 12 of the written statement. This admission will be used while deciding issue pertaining to entitlement of the plaintiff to claim royalty, however, the issue for the present is that for what period royalty can be claimed by the plaintiff and when did the cause of action commence for claiming of royalty.

8. Before proceeding ahead in the facts of the present case, Section 17 of the Limitation Act, 1963 would be relevant and I, therefore, reproduce the same as under:

17. Effect of fraud or mistake-(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act.-

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as a aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or applicant has been fraudulently concealed from him;

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the mean of production the concealed document or compelling its production: ....

9. As per Section 106 of the Evidence Act, 1872, the onus of proving a fact which is in the special knowledge of the person, is on that person. This is logical because what is established within knowledge of a person, cannot be in the knowledge of another person. The issue in this case is, when did commercial production begin. This fact surely would only be in the knowledge of the defendant. I have not been shown any document on behalf of the defendant of intimation being given to the plaintiff as to when the commercial production begins. On the contrary, counsel for the plaintiff has drawn my attention to the

nil returns qua commercial production filed by the defendant, and which are Ex. P2 to Ex.P12, and which show that at least till 1987 the defendant itself took up the stand that the commercial production did not begin.

10. The plaintiff has filed and proved on record through PW-2, Sh. A.K. Kohli, his inspection report dated 9-10/10/1995 as Ex.PW2/3. This is a detailed inspection report and which shows as to how the defendant company had changed its name without any intimation to the plaintiff. The report further shows that efforts were made to conceal documents of production, however, on some documents being given, it transpired from the balance sheet that in fact production of Monocrotophos Technical had at least commenced from the financial year ending 31.3.1992. The inspection by Sh. A.K. Kohli went on for two days, and which showed how the defendant had mala fidely and illegally concealed the date of commercial production from the plaintiff. I may, at this stage, on the issue of mala fides also state that the plaintiff was in fact forced to approach the Court earlier even for premium payable under the licence agreement as the defendant had failed to pay the total premium amount of Rs. 5,00,000/-. That suit was decreed in favour of the plaintiff, and whereafter the amount was paid. Once the defendant has failed to show any intimation given to the plaintiff of a specific date for commencement of commercial production, I hold that the defendant is guilty of concealing the date of commencement of commercial production and therefore the date of commencement of limitation, thus bringing into play Section 17 of the Limitation Act, 1963. Limitation would therefore only begin with effect from 9.10.1995 and therefore the suit filed on 27.11.1997 is within limitation. Issue no.2 is therefore decided in favour of the plaintiff and against the defendant.

ISSUE NOS. 4, 5 & 6

11. That takes me to the main issues in this case, and which are issue Nos. 4, 5 and 6. The agreement, Ex.P-1 between the parties is an admitted document. This document has also been filed by the defendant. In order to decide the present issue, a portion of the Clause 3 of the agreement is relevant and the same reads as under:-

...It will not be open to the Grantee to claim any exemption from or reduction in the payment of royalty accruing under this clause of the plea of having used its own know-how or having effected any improvement upon the said invention or on the plea that the articles to be manufactured under the said invention have been manufactured by using a different process and the Grantee shall be liable for the payment of the royalties for all the articles manufactured by it and covered by this agreement irrespective of any plea whether the same have been manufactured by the said invention or otherwise. ......

12. The reference to the above said clause makes it quite clear that the defendant could not claim exemption or reduction from payment of royalty on the ground of having used its knowhow or effected any improvement upon the

said invention or contend that the articles which have been manufactured have been done so by using a different process. Obviously, the plaintiff is required to put such clause for persons/entities such as the defendant which after receiving the technology, dishonestly and fraudulently use all excuses to avoid making payment of royalty. I may only add that surely the purchasing of technology under the license agreement was a considered act of the defendant, and the defendant would have obviously seen the requisite technology before taking license of the same under the agreement Ex.P-1. It therefore does not lie in the mouth of the defendant now to claim that no royalty payments are liable to be made to the plaintiff. If really the defendant was honest, and if it was correct that the defendant had not used the technology of the plaintiff, nothing prevented the defendant from addressing communication saying that all the technology documents are returned back to the plaintiff and the plaintiff can inspect factory of the defendant at any point of time for checking as to whether the supplied knowhow by the plaintiff was being used by the defendant or not. Obviously, the defendant did not do this. Mere fact that the defendant took expert help and may have improved the technology for its own benefit, however cannot mean that the technology supplied by the plaintiff was not taken, and the royalty fee and another charges under the agreement were not payable. Merely because the defendant takes up a case that the technology is not proper, cannot mean that the agreement stands frustrated. If I were to allow such a plea as raised by the defendant, the plaintiff will never get any royalty in almost all the cases. I therefore hold that the defendant is bound by the terms of the agreement, Ex.P-1 and it was liable to pay the necessary royalty in terms of this agreement to the plaintiff.

13. The issue is that what should be the date from when the royalty should be held to be payable to the plaintiff. Though the defendant in para 12 of the preliminary objections in the written statement has stated that the plaintiff is at best entitled to royalty for the year ending 31.3.1993, however, I am of the opinion that the defendant will be liable to pay royalty from the year ending 31.3.1989. The defendant itself has filed its balance sheet and therefore this balance sheet for the year ending 31.3.1989 can be read against the defendant. This document (colly) is exhibited as Ex.DW1/P1. As per this profit and loss account which forms part of this balance sheet, the sales for the period ending 31.3.1989 have been given as Rs. 53,65,181/-. Therefore, if there are sales, surely, royalty became payable to the plaintiff with effect from 1.4.1989. I hold 1.4.1989 as the date for commencement of payment of royalty, and it is from this date that the defendant will be liable to render accounts to the plaintiff as per the present judgment for payment of royalty to the plaintiff.

Issue nos. 4 to 6 are accordingly answered in favour of the plaintiff and against the defendant by holding that the plaintiff has not committed any breach of Ex.P-1, and it is in fact the defendant who is dishonestly refusing to make payments of royalty amount in terms of the license agreement dated 27.1.1983 (Ex.P-1) and this royalty will continue to be paid unless it is established before the Local Commissioner that commercial production of the defendant was stopped, and if stopped then with effect from which date. Plaintiff is entitled to rendition of accounts for royalty payments with effect from the financial year ending 31.3.1989 and the date of commencement of payment of the royalty will be taken as 1.4.1989.

RELIEF

14. Suit of the plaintiff is therefore decreed and the defendant is restrained from using technology/knowhow given by the plaintiff to the defendant for manufacture of Monocrotophos Technical, unless, the defendant pays the royalty in terms of the license agreement, Ex.P-1. Plaintiff is entitled to rendition of accounts from the defendant with effect from financial year ending 31.3.1989 and the first date of royalty being payable will be taken as 1.4.1989. The plaintiff will also be entitled to pendente lite and future interest at 9% per annum simple, in case of passing of the final decree in favour of the plaintiff and against the defendant with respect to royalty payments due. The plaintiff will also be entitled to costs. I may note that plaintiff has been forced into this litigation by fraudulent and dishonest acts of the defendant in not making payment of its lawful dues. In fact, the plaintiff was earlier forced to file a suit even for recovery of premium amount as already stated above. For imposing costs, I exercise my powers under Rule 14 of the Delhi High Court (Original Side) Rules 1967 so as to exempt the applicability of rules on the aspect of costs in the present case. I therefore impose actual costs which I quantify at Rs. 1,00,000/- in view of the ratio of the recent judgment of the Supreme Court in the case of Rameshwari Devi and Others Vs. Nirmala Devi and Others, which holds that it is high time that dishonesty in litigations should be visited by actual costs.

15. I appoint Sh. D.S. Paweriya (Retd. ADJ), Chamber No. 49, Tehsil Building, Tis Hazari Courts, Delhi-110054, Mob: 9999621110, as a Local Commissioner who will go into the rendition of accounts by the defendant to the plaintiff. Let the parties appear before the Local Commissioner on 19.10.2012 at 4.00 P.M. when the Local Commissioner will give the necessary directions for conducting of proceedings with respect to rendition of accounts. The fees of the Local Commissioner is fixed at Rs. 75,000/-. 50% will be paid at the commencement of the proceedings and balance 50% at the stage of arguments.

16. Decree sheet incorporating the aforesaid preliminary decree be drawn up by the Registry. List this suit for directions on 14th January, 2013.