(1998) 03 DEL CK 0105

In the Delhi High Court

Case No : I.As. 8866/97, 9360/97, 10078/97 and S.No. 1910/97

Sachdeva and Sons Industries Pvt. Ltd. APPELLANT

Vs

Syrian Arab Republic RESPONDENT

Date of Decision : 27-03-1998

Acts Referred:

Citation : (1998) 3 AD 481 : (1998) 72 DLT 755 : (1998) 46 DRJ 793

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Mr. Vikramjit Sen and Mr. P. Banerjee, for the Appellant; Mr. Jagdeep Kishore, for the Respondent

Judgement

S.N. Kapoor, J.—The plaintiff has filed a suit for restraining defendant No. 3 from making payment to defendant No. 4 against the bank guarantee bearing No. FHKA/230-KA77650z/LZR dated 22.4.97 and also for restraining defendant No. 2 from making payment to defendant No. 3 against bank guarantee No. AHB/EPG/1/97 dated 15.4.1997 and 18.4.1997 executed by defendant No. 2 in favor of defendant No. 3. In this connection I.A. 8866/97 under O. 39, R. 1 & 2 has been filed.

2. The plaintiff - a private limited company - responded to a call for quotation No. SR/69 dated 3.2.1997 vide its quotation dated 3.3.1997. M/s. Syrian Arab Republic (General Foreign Trade Organisation for Chemicals and Foodstuffs GEZA), Damascus, unequivocally confirmed the quotation of the plaintiff vide fax No. SR/127. It is stated that the quantity of 12,000 M. Tons +/- 5% at the seller''s option was essence of the agreement and could not be altered unilaterally. The value of the entire contract was settled at US $ 4,825,800 for the total quantity of 12,600 M. Tons. The said confirmation dated 10.3.1997 also specified a bank guarantee on the 10% of the contract value i.e. US $ 4,82,580 to be received by defendant No. 1 within ten days from the date of confirmation i.e. 10th March, 1997.

3. Defendant No.1 GEZA required the plaintiff to get a bank guarantee issued from a internationally recognised bank. Punjab National bank, defendant No. 2 approached defendant No.3, Union Bank of Switzerland, Jurich. Defendant No.3 required Punjab National Bank, defendant No.2 to execute a counter bank guarantee. Consequently defendant No.2 issued counter bank performance guarantee for the said amount of US #4,82,580 dated 15.4.1997 valid till 26.7.1997. Union Bank of Switzerland, defendant No.3 in turn as per requirement approached Commercial Bank of Syria, defendant No.4 and issued performance bank guarantee No. FHKA/230-KA77650Z/LZR dated 22.4.1997 for the said amount. Defendant No.3 as per requirement of defendant No. 1 was also required to open letter of credit in the name of plaintiff to be confirmed by defendant No.5 being representative agent of defendant No.4 in India. Defendant No.4, Commercial Bank of Syria opened letter of credit bearing No. 97/9242 dated 4.6.1997 in favor of Sachdeva & Sons E.O.U. for an amount of US # 4,825,800. Upon the receipt of said letter of credit the plaintiff found that the terms and conditions as listed in the said letter of credit were drastically different from the terms and conditions as per the contract entered upon by the parties dated 10.3.1997 This amounted to change the substance of the contract and the changes were unconscionable. As per contract dated 10.3.1997 the shipment period is mentioned for one month from receiving L/C dated 4.6.1997 on 6th June, 1997. There were other material changes also. The terms at site L/C and the subsequent instructions as incorporated in the letter of credit are self contradictory. It has specifically stated in the letter of credit that negotiation under any reserve is completely prohibited. The plaintiff approached the defendant No.1 i.e. General Foreign Trade Organisation for Chemicals and Foodstuffs, GEZA but there was no response. It is alleged that defendant No.1 fraudulently entered into the said contract as it wanted to resile from the performance of the same if the international price of the rice was reduced in the markets which at that time was an imminent possibility for the international rate of rice was $ 383 per M. Tons while present rate is only $ 305 and $ 315 per metric ton. The plaintiff has already contracted the performance in India to procure 12,600 M. Ton. On 11.6.1997 the plaintiff issued a letter to defendant No.1 through Fax to the effect that the said letter of credit was inconsistent with the contract entered into between the parties on 10th March, 1997 and the same be rectified by way of necessary amendments in accordance with the contract dated 20.3.1997. On 9.9.1997 fax message had been received from defendant No.1 to the effect that the contract was withdrawn since contracted rice had not been supplied within the period fixed for supply. The defendant No.1 has not answered to the said letters till date. The plaintiff is willing to adhere to the said contract dated 10.3.1997 and is willing to supply rice to the defendant No.1 as per specifications. Hence the suit for the permanent injunction and in connection with this suit I.A. 8866/97 has been filed seeking ad interim injunction against defendant No.2 and 3 as stated above.

4. The punjab National Bank, defendant No.2 has filed I.A. 9360/97 under O. 39,

R. 4. According to the case of defendant No. 2 the plaintiff had requested defendant No.2 for issuing bank guarantee in favor of GEZA, the concern wholly owned by Government of Syria. Since Punjab National Bank did not have direct dealings with any bank in Syria it requested Union Bank of Switzerland, defendant No. 3 to issue the said bank guarantee on behalf of defendant No.2 for which the Punjab National Bank issued a counter-guarantee for a sum of US $ 4,82,580.00. Union Bank of Switzerland, defendant No.3 in turn requested the commercial Bank of Syria, Branch No.3, Damascus, Syria, defendant No.4 to issue the said performance guarantee on behalf of itself in favor of GEZA and Union Bank of Switzerland i.e. UBS have issued a counter guarantee in favor of commercial bank of Syria. It is claimed that Geza, defendant No.1 made demand to encash the Bank Guarantee on Commercial Bank of Syria on 6.9.1997. Pursuant to the said demand the Commercial Bank of Syria called upon Union Bank of Switzerland to pay the said amount on 8.9.1997 and Union Bank of Switzerland sent a swift message on 8.9.1997 informing about the said demand stating therein that due to the plaintiff''s failure to fulfill its obligation under the contract, the beneficiaries under the guarantee i.e. GEZA have claimed full amount. Accordingly Punjab National Bank was asked to credit its Head Office Account maintained with Union Bank of Switzerland at Zurich with a sum of US$ 4,82,580.00 with the value date of 11.9.1997. On 11.9.1997 Union Bank of Switzerland claimed the bank guarantee amount and telex charges confirmed that it has paid the amount to Commercial Bank of Syria itself. Besides, the above amount Union Bank of Switzerland had also asked for certain bank commission charges amounting to Rs. US$ 18,003.52 which amount has been remitted by the Punjab National bank to Union Bank of Switzerland on 11.9.1997. Further a swift message was received by the applicant from UBS reiterating its request for payment forthwith vide Annexure D-2/4. On further telephonic enquiry it was confirmed by the said bank that it had paid US$ 4,82,500 to GEZA on 11.9.1997 itself. On this the punjab National Bank has been placed in an embarrassing position vis-a-vis Union Bank of Switzerland in as much as the Union Bank of Switzerland has conveyed to the Punjab National Bank that if it did not pay the aforesaid amount, it would debit the Head Office Account of Punjab National bank maintained with the Union Bank of Switzerland at Zurich and recover the said amount. According to the defendant No.2 Punjab National Bank the suit suffers from two defects firstly the plaintiff has not sought any injunction against Commercial Bank of Syria and secondly GEZA itself has not been sued but the suit has been filed against the Syrian Arab Republic which requires a prior permission from the Government of India to sue a foreign government, in the absence whereof the suit itself would not be maintainable. Hence the prayer that ad interim stay should be entertained.

5. I have heard the learned counsel for the parties and gone through the record.

6. Incidentally it may be mentioned that there is no suit against defendant No.1. Whether it is Govt. of Syria or a Government company of Syrian Government the name of defendant No.1 was ordered to be deleted in view of provisions of

Section 86 of the CPC for want of permission from the Central Government to file a suit against defendant No.1. The plaintiff neither obtained permission nor sought any permission so far for impleading defendant No.1.

7. In so far as the bank guarantee is concerned the Punjab National Bank has no concern whatsoever with the correspondence exchanged between the plaintiff and defendant No.1. It is not the case of plaintiff that defendant No.2, Punjab National Bank or defendant No.3, Union Bank of Switzerland or defendant No.4, Commercial Bank of Syria had committed any fraud on the plaintiff or any other person in connection with the present bank guarantee. If any fraud has been committed it has been committed by officials of defendant No.1 whose name has been ordered to be deleted.

8. It is very much apparent in view of the facts and submissions of parties that defendant No.1 in the present context is the most necessary party. The suit cannot proceed for want of permission to sue defendant No.1 u/s 86 of CPC.

"What shall be the consequence then?" is the question. In addition to the fact that ordinarily the bank guarantee should not be stayed, I start with the presumption that some official of defendant No 1 or defendant No.1 might have committed the mischief or fraud leading to such a situation if the case of the plaintiff is accepted. But could the innocent parties like defendant No.2, Punjab National Bank, defendant No.3, Union Bank of Switzerland and defendant no.4, Commercial Bank of Syria be made to suffer in any manner on account of fraud committed by any official of defendant No.1 who is not before this Court, for want of permission?

9. In Societe General Vs. National Small Industries Corporation Limited & Ors., 1997 (1) DL 281 the Division Bench of this Court in a similar situation made the following observations and refused to grant the injunction prayed for:

10. In such like matters, the plaintiff/respondent cannot succeed merely on the basis of prima facie case, it is further required to be established that he was likely to suffer irretrievable injustice. In this regard, it may also be mentioned that so far as the balance of convenience is concerned that is certainly in favor of Society General, the appellant for they had paid the money out of their funds, through a cheque on 10th July, 1995. So far as the PNB is concerned, they have not discharged their duties and the conduct of the NSIC in accepting the Bill of Exchange also appears to be negligent. Thus, it is virtually a matter of recovery of amount between M/s. Khalil Enterprises, NSIC and PNB, for all the three were negligent. The amount is virtually required to be recovered from SLMR, either by receiving goods in lieu of the amount received from the SLMR and M/s Dayal Express Line or by payment from either of them. In order to recover the amount from SLMR, the appellant, if so advised, may seek an order of attachment of the bank account of SLMR. But in absence of any allegation of fraud on the pat of the appellant or about their knowledge about the fraud, the appellant does not come into picture at all. Therefore there is no irretrievable loss in case this ILC

accompanied by Bill of Exchange is allowed to be encashed."

11. As such, no relief as prayed for by the plaintiff in the suit or in the application can be granted for failure of the plaintiff to properly sue a necessary party defendant No.1 after obtaining permission u/s 86 CPC, the plaint could be rejected under O. 7, R. 11 and before rejection of the plaint, the plaintiff instead of seeking permission u/s 86 CPC got defendant No.1 deleted from the array of the defendants. It may be mentioned that defendant No.1 is the ultimate beneficiary of the bank guarantee. All allegations of mischief and fraud have been made against defendant No.1. In such circumstances to continue ad interim injunction would be unjustly causing loss to Punjab National Bank, defendant No.2 or Union Bank of Switzerland, defendant No.3 who have already made the payment under the Bank Guarantee to Commercial Bank of Syria. Proceeding with such suit is going to be futile exercise. The present suit cannot be converted into a suit for recovery against defendant No.1 for want of permission from the Central Government u/s 86 of CPC. Consequently since the plaintiff on his own volition got the name of defendant No. 1 deleted for want of permission u/s 86 CPC, this Court cannot finally decide the suit at all in absence of defendant No.1. This Court in such a situation has no option but to dismiss the suit in its present form in absence of defendant No.1 but in order to do substantial justice in between the parties the plaintiff may be given liberty to file a fresh suit on the same cause of action after obtaining requisite permission u/s 86 CPC to file a suit against defendant No.1.

12. Accordingly I.A. 9360/97 is allowed and I.A. 8866/97 is dismissed.

13. Since the suit itself is not maintainable, another I.A. 10078/97 seeking injunction not to charge certain incidental expenses, has become infructuous, Suit No. 1910/97 and I.A. 10078/97 are also dismissed with liberty to the plaintiff to file a fresh suit after obtaining requisite permission against Defendant No.1 u/s 86 CPC subject to payment of cost of Rs. 5,000/- to Defendant No.2.

