
(1991) 12 SHI CK 0013

In the High Court Of Himachal Pradesh

Case No : Letters Patent Appeal No. 26 of 1991

Shree Digvijay Cement Co. Ltd.

APPELLANT

Vs

Chamera Hyde-Electric Project and Another

RESPONDENT

Date of Decision : 18-12-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, Order 7 Rule 11, 148, 151, 21

Citation : (1993) 1 ShimLC 41

Hon'ble Judges : V.K. Mehrotra, J; Lokeshwar Singh Panta, J

Bench : Division Bench

Advocate : O.P. Gaggar, for the Appellant; Neel Kamal Sood, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Mehrotra, J.—Shree Digvijay Cement Company Ltd, Digvijaya-gram, Gujarat (for short, "the Company") has assailed in this Letters patent appeal the judgment and order of a learned single Judge (Justice Ms. Kamlesh Sharma) in O. M P No. 93 of 1991 in civil suit No. 112 of 1990 Instituted by Chamera Hydro-Electric Project, Banikhet District Chamba. (briefly, "the Chamera Project") against it in this Court. The third Defendant in the suit is the Regional Commissioner for Cement Industry, Government of India, New Delhi.

2. The suit seeks recovery of a sum of Rs. 58.39,711,51, under Order VII Rule 1 read with Section 26 of the CPC along with interest from the date of the filing of the suit till the date of payment at the rate of 17-1/2% per annum from the Company. Summons of the suit was issued to the Company on November 20, 1990 for March 4, 1991. The Company appeared before the Court "in protest" and made an application purporting to be under Order VII Rule 11 read with Sections 21,148 and 151 of the Code of Civil Procedure. On the facts mentioned in this application, the Company prayed that the suit be dismissed as having been instituted before a Court which had no territorial jurisdiction to try it and that pending the disposal of the application time for filing the written statement may be suitably enlarged. The matter was heard by the learned single Judge,

after Plaintiff Chamera Project filed a reply to the application of the Defendant Company, at some length. By the order under challenge the learned Judge rejected the application and directed the Defendants to file their written statements: So far, no written statement has been filed by the Defendant-Company in view of an order passed by this Court on September 4, 1991 in this appeal saying that the Company shall not be required to file its written statement during the pendency of the present appeal.

3. According to the allegations contained in the plaint, Chamera Project approached Proforma Defendant No. 3, Regional Development Commissioner, Cement Industry, (North Region) Government of India for allocation of quota of cement to ensure observance of the time schedule for the construction activities of the gigantic and prestigious Chamera Project. By an authorisation dated December 31, 1985, a release order of 4,000 MT of cement was issued in favour of Chamera Project which was to be supplied by the Defendant-Company. Following it, an order was placed by the Chamera Project through its letter dated January 15, 1986 with the Defendant-Company for supply of 4,000 MT of Portland cement within the validity period. The Defendant Company forwarded a proforma invoice dated January 20, 1986 to the Chamera Project towards the value of 4,000 MT of cement of receipt whereof Plaintiff Chamera Project remitted 100% advance of Rs. 35,12,329.60 to the Defendant-Company. The amount was paid through a bank draft dated February 18, 1986 which was sent to the Defendant-Company through registered post on February 20, 1986. The Company did not supply even a single metric tonne of cement inspite of having received 100% advance payment for the supply as cost price.

4. The case of Plaintiff Chamera Project further is that the failure on the part of the Defendant-Company to supply cement within the stipulated period caused irreparable loss to the Project. The Plaintiff reserved the right to file a suit for compensation/damages on account of the loss so suffered. However, through letters dated March 28, March 29, and April 21, 1986 and thereafter through the personal visit of their representatives, Plaintiff Chamera Project requested the Defendant-Company to despatch the cement but without any response. The validity period was got extended by Plaintiff Chamera Project to June 30, 1986 and on May 20, 1986 a further request was made to the Defendant-Company to make the supply. This too did not bear any fruit. Plaintiff Chamera Project followed up the matter with both the Defendants and, in fact, through letter dated May 26, 1986 proforma Defendant No. 3 requested the Defendant-Company to expedite the supply of cement. The Plaintiff also made similar requests and, in the alternative, made a request for the refund of the advance amount along with interest. The then Regional Development Commissioner asked the General Manager of the Defendant-Company through letter of August 4, and October 1, 1987 to settle the accounts of the Plaintiff by refunding the amount of advance along with interest. Promises were made by the Defendant-Company from time to time to refund the amount of advance shortly, while admitting failure to supply the cement. After much persuasion and efforts on the part of the

Plaintiff, the Defendant-Company refunded a sum of Rs. 10 00.000 in two equal instalments of Rs. 5,00,000 each the first of which was received by Plaintiff Chamera Project on November 3, 1987 and the second in the month of February 1988. The Plaintiff kept on waiting, on account of promises made by the Defendant-Company, to make the refund soon and eventually served a legal notice dated March 3, 1989 asking for the refund of the balance amount along with interest within a period of one month from the receipt of notice. Ultimately, the suit had to be filed when no further refund was made.

5. What has been said in the application dated February 26, 1991 by the Defendant-Company is that it has its registered office at Digvijay-gram in the State of Gujarat, its manufacturing units are located at various places in the States of Gujarat, Maharashtra and West Bengal and Its administrative office is located at Bombay It does not have any office nor its activities spilt over in the State of Himachal Pradesh. The cement was ordered to be supplied by the third Defendant. It was levy cement under the Cement Control Order and there was no independent contract of supply between the Plaintiff and the Defendant-Company which never came to the State of Himachal Pradesh through its agents or servants for any contract being entered into between the parties. The goods were to be supplied to a consignee through the Indian Railways or any other carrier named and appointed by the Plaintiff. The responsibility of the Defendant-Company ended on its delivering the goods to the carrier who was the agent of the Plaintiff at the manufacturing plant of the Defendant-Company in the State of Gujarat. Payments were also stipulated to be made at the manufacturing place of the Defendant-Company. As such, on the Plaintiff's own submissions in the plaint, cause of action had not arisen within the territorial jurisdiction of the H.P. High Court wholly or in part. The Defendant-Company did not reside, carry on business or work for gain within the territorial jurisdiction of the High Court.

6. The learned single Judge has, in substance, held that part of the cause of action arose within the territorial jurisdiction of this Court, inasmuch as the supply order, which was made by Plaintiff Chamera Project on January 15, 1986 from its head office at Banikhet (Chamba District) in Himachal Pradesh on the basis of an authority letter/release order dated December 31, 1985 contained the terms and conditions of supply, amounted to an offer which was accepted by the Defendant-Company through the invoice/proforma bill sent by it to the Plaintiff which was received within the State of Himachal Pradesh at Banikhet in District Chamba. On receipt of the invoice/proforma bill the contract was complete. In coming to this conclusion the learned Judge placed reliance upon the decision of the Supreme Court in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, The learned Judge also held that the mere fact of printing of the words "subject to Jamnagar jurisdiction" in the invoice/proforma bill could not amount to agreement between the parties that only the courts at Jamnagar will be the venue for settlement of the disputes. It was also held by the learned Judge that subsequent to the original contract, Plaintiff Chamera Project made counter offer to the Defendant-Company to refund the amount of Rs. 35, 12, 329.60 advanced

to it with interest which was accepted by the Defendant-Company which conveyed its acceptance through its matter delivered to the Plaintiff at Banikhet and also part refund of Rs. 10.00.000 was made by it. By it, another contract came into being which was to be performed at Banikhet as refund was to be made there. The suit could, thus, be filed in Himachal High Court in its original jurisdiction.

7. We have heard Shri O.P. Gaggar for the Defendant-Company in support of this appeal and Shri Neel Kamal Sood on behalf of Plaintiff Chamera Project. Since the suit is at its threshold, we proceed to dispose of the appeal on its merits at the admission stage itself as was also prayed by the Learned Counsel for the parties.

8. The principal submission of Shri Gaggar was that inasmuch as supply of cement was to be made by the Defendant-Company in pursuance of a statutory order emanating from the third Defendant (Regional Commissioner of Cement Industry) in exercise of the powers under the Cement Control Order, there was no contract between Plaintiff Chamera Project and the Defendant-Company as there was no element of volition left to the parties in the matter. Unless there was an element of volition on the part of a party, no contract could come into existence. Reliance was placed by Shri Gaggar upon the majority judgment of the Supreme Court in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, The view taken in that case was that mere compliance with the despatch instructions issued by the Controller, which in law the assessee could not decline to carry out, did not amount to acceptance of an offer on its part because offer could not be made by the Controller or the Government. The manufacturer was left with no volition under the Control Order. We need not discuss this case in any detail for this majority view has expressly been disapproved by the Supreme Court in a seven Judge decision in *Vishnu Agencies (Pvt.) Ltd. Vs. Commercial Tax Officer and Others*, dealing with the question whether a sale made under compulsion of law was exigible to sales tax. The Supreme Court took notice of various earlier decisions, including the one in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, and held that the majority judgment in that case was not good law. The Supreme Court held that the true principle underlying the decision rendered by it was that a transaction with was effected in compliance with the obligatory terms of a statute may nevertheless be a sale in the eye of law. In effect what the Court held was that a contract could come into existence between the supplier mill and the allottees of its product under the mandate of law irrespective of the fact that the volition of the parties was largely curtailed.

9. In view of the clear pronouncement of the Supreme Court in *Vishnu Agencies* it must be held that the transaction between Plaintiff Chamera Project and the Defendant-Company could amount to a contract irrespective of the fact that supply was to be made by the Defendant Company in pursuance of the authorisation/release order issued by the third Defendant in favour of the Plaintiff.

10. The second aspect of the matter, stressed by Shri Gaggar, was that, in any case no part of the cause of action could be said to arise within the territorial jurisdiction of this Court even accepting that the facts stated in the plaint were true in their entirety. We find it difficult to accept the submission in the circumstances of the present case. The direction contained in the authorisation/release order was followed by a supply order dated January 15, 1986 by Plaintiff Chamera Project. This would clearly constitute an offer by the Plaintiff to buy 4,000 MT of cement from the Defendant-Company, albeit in pursuance of the authorisation/release order. proforma invoice bill for Rs. 35,12,329 60 sent by the Defendant-Company would, undoubtedly, constitute its acceptance of the offer in the eye of law. This acceptance was communicated to the buyer at Banikhet in Himachal Pradesh. We are in respectful agreement with the view expressed by the learned single Judge, supported as it is by the decision of the Supreme Court in A.B.C. Laminart Pvt. Ltd AIR 1986 SC 1239, that the making of a contract is a part of the cause of action and that ordinarily the acceptance of an offer and its intimation results in a contract so that the suit can be filed in a Court within whose jurisdiction the acceptance was communicated.

11. The requirement that the amount representing 100% advance payment of price of cement should be through a bank draft which should be sent to the Defendant-Company by post and made payable at the manufacturing place of the Defendant-Company, implicit in the transaction between the parties, has to be construed as an implied request by the Defendant-Company that the remittance should be made by post from Banikhet. The post office would, thus, be its agent for purposes of receiving the payment See Shri Jagadish Milts Ltd. by its successor Shri Ambica Mills Ltd. v. The Commissioner of Income Tax, Bombay North, Kutch ana Saurashtrd Akmedabad AIR 1959 SC 1960 . That would also show that part of the cause of action arose within Himachal Pradesh where payment came to be made to the Defendant-Company. The decision of the Patna High Court in Meghraj Sanchialal Vs. Malpani Rice and Oil Mills, cannot be read to lay a rule to the contrary and if, as canvassed by Shri Gaggar, it does so. We find ourselves unable to accept the view expressed therein.

12. We ere unable to persuade ourselves to the view that the printing of the words "subject to Jamnagar jurisdiction" in the invoice/proforma bill would exclude the jurisdiction of this Court, as has been rightly observed by the learned single Judge, there is nothing in the present case to show that the parties had agreed that only the courts at Jamnagar will be the venue for settlement of their dispute. There is nothing to suggest that Plaintiff Chamera Project had expressed its willingness to be bound by a term that the jurisdiction of this Court would stand ousted and that the venue for settlement of disputes between the parties would be confined only before the Courts at Jamnagar. The principles in this regard are hardly in doubt. The decision in Potel Bros v. Vadilal Kashidas Ltd. AIR 1959 Mad 227 , and C. Satyanarayana and Others Vs. Kanumarlapudi Lakshmi Narasimham, read with the observations of the Supreme Court in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, rule out acceptance of

the submission that has been made before us on behalf of the Defendant-Company.

13. The present suit is for the refund of money paid in advance to the Defendant-Company, along with interest thereon. The deposit is in the nature of a debt and the Defendant-Company is bound to return it. A suit for recovery of debt can be brought at the place where the creditor resides, *The Shimoga Oil Mills v. The Radhakrishana Oil Mills Kadiri and Ors.* AIR 1952 Mys 111.

14. If the nature of the amount of deposit or advance upon breach of contract is a debt, on account of the failure of the consideration, and the party receiving the money is required to refund it, the principle that the debtor must find his creditor would apply to the return of the advance on the equitable principle that when there was failure of consideration, there was an equity in favour of the Plaintiff which impliedly made the retention of the amount of deposit or advance, a debt due by the Defendant to the Plaintiff *G. Yenkaresha Bhat and Ors. v. Kamalapat Motilal and Ors.* AIR 1957 Mad 201. The application of this doctrine cannot be confined to the recovery of advance simpliciter, as was canvassed by Shri Gaggar. excluding therefrom the amount of interest payable on account of non-refund of the amount of advance. It may not be possible under this rule, to seek damages or recover any amount of compensation from the Defendant. The recovery of an amount by way of interest upon the principal amount of debt on account of non-payment thereof is not to be excluded from the jurisdiction of the Court within whose jurisdiction the Plaintiff is located and seeks recovery of the amount of debt on the aforesaid equity arising in his favour.

15. In the view that we have taken on the basic submissions made by Shri Gaggar, it is not necessary for us to express any opinion on the question whether any subsequent contract, arising between the parties on account of the failure of the Defendant-Company to supply cement and its assurance to refund the amount of advance received by it together with refund a part thereof in two instalments, would vest territorial jurisdiction in this Court to entertain the suit.

16. In sum, we find no merit in this appeal and dismiss it. The interim order shall stand discharged. The Defendant-Company would be free to seek further extension of time for filing written statement from the learned single Judge.

17. Parties are, however, left to bear their own costs of this appeal.