(2011) 05 DEL CK 0023

In the Delhi High Court

Case No : CS (OS) No. 37 of 1999

Space 2000 SPA — APPELLANT

Vs

Goetze (India) Ltd. — RESPONDENT

Date of Decision : 09-05-2011

Acts Referred:
Limitation Act, 1963 — Section 14

Citation : (2011) 05 DEL CK 0023

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : M. Hussain and Manav Ujla, for the Appellant; Davinder Singh Jasmeet Singh, Saurabh Tiwari, K.D. Sengupta and Aahuti Sharma, for the Respondent

Judgement

Sunil Gaur, J.—In the year 1995 Defendant had supplied three consignments of readymade leather garments to the Plaintiff against full payment and details of the aforesaid consignment finds mention in the plaint. Plaintiff is an Italian company who had received the aforesaid consignment against Invoices of 5th July, 1995, (Ex. P-2), 30th June, 1995, (Ex. P-3) 23rd August, 1995, (Ex. P-4) and the said three consignments received from the Defendant were inspected in the warehouse of the Plaintiff, where it was discovered that the aforesaid consignments were defective and this was conveyed by the Plaintiff to the Defendant vide Communication of 21st September, 1995, (Ex.P-5). Since the Plaintiff claims to have received no response from the Defendant to the aforesaid Communication and the subsequent reminders, therefore the Plaintiff had approached the Italian Court/Tribunal of Genova for appointment of a Surveyor to make a detailed Inspection/verification of the aforesaid consignment of garments and to assess the defects therein. Vide Order of 7th December, 1995, (Ex.P-6) of Italian Tribunal, Dr. G. Bulfari was appointed as a Surveyor, who had conducted a detailed investigation and had concluded that the consignments in question was not negotiable as it had inherent manufacturing defects, details of which find mention in the Survey Report of 4th May, 1996, (Ex.P-7). On the basis of the aforesaid Survey Report, Plaintiff herein had filed a petition for conservative arrest ante causam before the Tribunal of Florence and ultimately the aforesaid Tribunal vide Order of 20th July, 1998, (Ex.P-6) had declined to entertain the abovesaid petition on account of lack of territorial jurisdiction. Plaintiff claims to have suffered loss to the tune of US Dollars 1,45,027 equivalent to Rs. 60,91,134/- and this suit to recover the aforesaid amount is said to be within limitation, after excluding the period spent by Plaintiff in prosecuting the proceedings before the Italian Court/Tribunal.

2. Defendant has contested the aforesaid claim of the Plaintiff by filing a written statement, wherein number of preliminary objections have been taken including that of the plaint being barred by time and on merits, it is stated that before the despatch of the consignment in question, representative of the Plaintiff had carried out inspection and had certified this consignment to be fit for despatch and it is denied that the consignment supplied was substandard or defective. In the replication filed, Plaintiff reiterates the averments made in the plaint.

3. The issues claimed by the parties to the suit are as under:

i. Whether the suit filed is within limitation? OPP.

ii. Whether the plaint has been signed, verified and suit instituted by the duly authorised person on behalf of the Plaintiff? OPP.

iii. Whether the goods supplied by the Defendant to the Plaintiff were defective or damaged? OPP.

iv. If the above issue is proved in affirmative, whether the garments supplied by the Defendant were damaged in transportation or at the hand of the Plaintiff while preserving the same and no liability can be encompassed on the Defendant? OPD.

v. To what amount, if any, is the Plaintiff entitled to recover from the Defendant? OPP.

vi. Whether the Plaintiff is entitled to any interest. If so at what rate and on what amount and for what period? OPP.

vii. Relief.

4. The evidence led on behalf of the Plaintiff is of its Attorney Shri Rajiv Sharma P.W. 1 and the Defendant, though had filed the evidence of its Financial Controller Shri Rajan Luthra but he has not stepped into witness box and thus, the solitary evidence of the Defendant is of its General Manager Shri Khalid Iqbal Khan (D.W. 1).

5. When this matter came up for final hearing, Plaintiff''s counsel as well as learned senior counsel for the Defendant had ably assisted this Court to scan through the evidence on record and had made their respective submissions which have been considered and thereafter the findings returned on the

aforesaid issues are as under:

ISSUE No. (i)

6. Plaintiff seeks to invoke Section 14 of the Limitation Act to bring this suit within the period of limitation of 3 years from the date i.e. 4th May, 1996, when the Survey Report Ex.P-7 was purportedly made available to the Plaintiff. This suit has been instituted on 15th December, 1998, and according to Plaintiff''s counsel upon computing the period of limitation from 4th May, 1996, this suit is well within limitation. Alternatively, the time spent by the Plaintiff in prosecuting the legal remedies before the Italian Court/Tribunal i.e. from 5th May, 1998, till 20th July, 1998, is sought to be excluded.

7. According to learned senior counsel for the Defendant, the cause of action to file this suit arose prior to 21st September, 1995, when letter intimating the alleged defects was sent by the Plaintiff to the Defendant and since the suit has been filed after 30th August, 1998, therefore, the Report of the Surveyor, which is not proved, would not extend the period of limitation. So far as exclusion of time spent by Plaintiff in pursuing legal remedies before Italian Court/Tribunal is concerned, the stand of learned Senior Counsel for Defendant is that since the nature of proceedings before Italian Court/Tribunal and in the present suit is entirely different, therefore resort to Section 14 of Limitation Act cannot be made. In support of this submission, reliance has been placed upon decision of the Apex Court in Jai Prakash and Ors. v. Satnarain Singh and Ors., 1994 Supp. (1) SCC 153

8. On the question of limitation, what the Plaintiff has averred is that the suit is therefore, within the period of limitation even without the aid of Section 14 of the Limitation Act, 1963. It is evident from the aforesaid assertion that the Plaintiff proceeds to solely rely upon the Survey Report (Ex.P.7) to calculate the period of limitation and does not seek exclusion of time spent in pursuing the remedies before the Italian Court/Tribunal. After scrutiny of the evidence on record, I find that the period of limitation to institute this suit for recovery had commenced when Plaintiff had communicated to the Defendant vide letter of 21st September, 1995, (Ex.P-5) that the consignment in question is defective and the Survey Report of 4th May, 1996, (Ex. P-7), which is neither proved nor is per se admissible, does not and cannot extend the period of limitation for the reason, firstly it is not duly proved on record by its author and secondly because it was just a tool to collect the evidence, to substantiate Plaintiff''s stand and therefore in the opinion of this Court, the period of limitation has to be calculated from 21st September, 1995, when Communication (Ex.P-5) was made by the Plaintiff to the Defendant and this suit filed on 15th December, 1998, is clearly barred by time.

9. Though, the Plaintiff has not called upon this Court to determine the applicability of Section 14 of the Limitation Act to the facts of this instant case but even if such an attempt is made, it would be futile for the reason that the

proceedings before the Italian Court/Tribunal as is evident from the Order of 7th December, 1995, (Ex.P-6) were entirely in a different context of seeking conservative arrest ante causem against the Defendant, whereas the present proceedings is in respect of claim of money. The dictum of the Apex Court in Jai Prakash and Ors. (supra) is that exclusion of time u/s 14 of Limitation Act is available only where the earlier proceedings related to the same matter that is in issue in the suit, and not otherwise.

10. Seen from any angle, I find that the suit is clearly barred by time. Accordingly it is held that the suit filed by the Plaintiff is beyond the period of limitation. Thus this issue stands answered against the Plaintiff.

ISSUE No. (ii)

11. This suit has been instituted on the strength of Power of Attorney of 12th November, 1998, (Ex. P-1) by Shri Rajiv Sharma P.W. 1, who is said to be working with a legal firm-Singhania and company. The objection of the learned senior counsel for the Defendant is that the Plaintiff''s attorney Mr. Rajiv Sharma (P.W. 1) was having no personal knowledge of the transaction in question and therefore the institution of the suit by the Plaintiff through its Attorney is not valid one. A bare perusal of the aforesaid Power of Attorney (Ex.P-1) reveals that it is in the nature of a vakalatnama and does not satisfy the requirements of a valid Attorney, vesting authority upon its holder to institute this suit on the subject matter of the claims made in the plaint filed. Therefore, I unhesitatingly conclude that the Power of Attorney (Ex.P-1) is not a valid authorization in favour of Shri Rajiv Sharma P.W. 1, as this witness does not claim any knowledge about the facts of this case. It is thus held that the suit is not validly instituted. This issue is answered against the Plaintiff.

ISSUE Nos. (iii) and (iv)

12. The burden squarely lay on the Plaintiff to prove that the consignment of garments supplied by the Defendant were defective or damaged. To discharge this burden, Plaintiff heavily relies upon the Survey Report (Ex.P-7), which though exhibited by the Plaintiff''s witness in evidence, but the same is not duly proved on record as the author of this Report (Ex. P-7) has not stepped into the witness box to prove this Report (P-7). It is not the case of the Plaintiff that this Report (Ex. P-7) is per se admissible. Otherwise also, it cannot be per se admissible. Furthermore, Plaintiff''s witness P.W. 1 does not claim any personal knowledge about the contents of this Report (P-7) and therefore he has not been able to depose about the condition of the consignment in question. Except for the bald statement of Plaintiff''s witness P.W. 1 of the consignment in question being defective, there is no tangible evidence on record to substantiate the aforesaid stand of the Plaintiff.

13. During the course of hearing, Plaintiff''s counsel had relied upon few photographs (Annexure P-8) which is said to be of the consignment in question, to demonstrate that clearly the consignment in question was defective. These

photographs (Annexure P-8) cannot be looked into, because firstly, they are without negatives and thus inadmissible and secondly, because there is no reference of these photographs in the Plaintiff''s evidence. On the other hand, on behalf of the Defendant, strong reliance was placed upon Inspection Certificate of 28th April, 1995, (Ex. D.W. 1/1) issued by the Plaintiff to the Defendant certifying that the consignment in question is in order and the Plaintiff had allowed its shipment. Despite the cross examination of Defendant''s witness, the authenticity of the aforesaid Inspection/Clearance Certificate Ex. D.W. 1/1 remains intact.

14. Once the heavily relied upon Survey Report (Ex.P-7) is excluded from consideration as the same is inadmissible, there remains no worthwhile evidence to prove that the consignment in question was defective/damaged. Thus, it is held that the Plaintiff has failed to prove that the consignment in question was defective or damaged. Issue No. (iii) stands answered against the Plaintiff.

15. Since Issue No. (iii) is not answered in affirmative therefore the Defendant is relieved from the burden of proving Issue No. (iv). Accordingly, these two issues stand answered.

ISSUE Nos. (v) and (vi)

16. Consequent upon the findings returned on the aforesaid issues, these two issues are answered against the Plaintiff while holding that the Plaintiff is not entitled to recover any amount from the Defendant. These two issues stand answered accordingly.

ISSUE No. (vii)

17. Consequentially, it is held that the Plaintiff is not entitled to recover any amount whatsoever from the Defendant. As such, this suit is dismissed while leaving the parties to bear their own costs.

18. The suit is accordingly disposed of.