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(2009) 11 MAD CK 0159

Madras High Court

Case No: Second Appeal No. 607 of 1995 and C.M.P. No"s. 7023 of 1995 and 15666 of 1999.

Andhra Pradesh Electronics Development Corporation Ltd.	APPELLANT
Vs	
M.K. Mohan and Indian Bank	RESPONDENT

Date of Decision: Nov. 24, 2009

Acts Referred:

- Contract Act, 1872 - Section 23
- Imports and Exports (Control) Act, 1947 - Section 3

Citation: (2010) 1 LW 518

Hon'ble Judges: M. Tevapaul, J

Bench: Single Bench

Advocate: P. Lakshmi Ratan, for C.A. Sundaram, for the Appellant; L. Venkataraman, for Iyer and Dolia, for R2, for the Respondent

Final Decision: Allowed

Judgement

M. Tevapaul, J.
The second Defendant, Andhra Pradesh Electronics Development Corporation Ltd., who suffered a decree before both the Courts below has preferred the present second appeal. The suit is filed by the first Respondent who is the Plaintiff, for declaration that the contract entered into between the Plaintiff and the second Defendant was illegal and unenforceable in law and also for consequential injunction restraining the first Defendant, Indian Bank and the second Defendant Andhra Pradesh Electronics Development Corporation Ltd., from enforcing the bank guarantee issued by the first Defendant.

2. The first Respondent/Plaintiff was served with notice in the second appeal and his name was also printed in the cause list but there is no representation on the side of the

first Respondent/Plaintiff.

3. In the plaint, the Plaintiff would contend that the second Defendant placed purchase order with the Plaintiff for supplying 2500 Video Cassette Players (hereinafter referred to as "VC Ps) of VIP Funai Model of Japan. The import licence had to be obtained from the Chief Controller of Imports and Exports. The second Defendant assured the Plaintiff to help him to obtain the import licence from the authorities. Therefore, the contract was entered into between the Plaintiff and the second Defendant, subject to the aforesaid assurance. As the second Defendant insisted upon the supply of VC Ps as per the understanding between the parties, the Plaintiff procured 430 number of VC Ps from the open market and supplied to the second Defendant. The Plaintiff could not get the import licence for making the VC Ps. Therefore, the contract has become impossible of performance. The procurement of foreign commodities without proper import licence is illegal. The above contract has no legal force. On the request of the Plaintiff, the first Defendant Indian Bank issued an irrevocable bank guarantee in favour of the second Defendant. It is contended by the Plaintiff that the second Defendant cannot invoke the bank guarantee as the very contract entered into between the Plaintiff and the second Defendant was illegal. With the aforesaid pleadings, the Plaintiff sought for the reliefs stated supra.

4. The first Defendant Bank has contended in its written statement that the bank was served with a notice of the order of injunction granted by the trial Court from invoking the bank guarantee by the second Defendant. In any event, the first Defendant was given to understand that the Plaintiff was not able to perform his part of contract, on account of various restrictions in foreign exchange transactions. Therefore, the second Defendant is not entitled to invoke the bank guarantee issued by the first Defendant. With the aforesaid contentions, the first Defendant sought for discharge of the obligations under the bank guarantee.

5. The second Defendant M/s. Andhra Pradesh Electronics Development Corporation Ltd., would contend that as per the bank guarantee, the first Defendant had undertaken to pay the amount due without any demur merely on the demand made by the second Defendant, the moment the Plaintiff committed breach of contract. Admittedly, the Plaintiff did not supply the quantity in terms of the purchase order inspite of several extension of time granted by the second Defendant. The Plaintiff had committed breach of terms and conditions of the purchase order. Therefore, the second Defendant was entitled to invoke the bank guarantee. The Plaintiff supplied only 447 VC Ps. The second Defendant was making a demand on the Plaintiff to supply the balance VC Ps. But before ever an action could be taken, the Plaintiff has rushed to the Court and filed the present suit. In the advertisement calling for quotations issued by the second Defendant, only the competent parties, having licences were required to participate in the deal. The quotation of Sri Gayatri Marketing Agencies was accepted by the second Defendant. Modhi & Company was appointed as the authorised Agent of Sri. Gayatri Marketing Agencies. Neither Sri Gayatri Marketing Agencies nor Modhi & Company could furnish bank guarantee.

Thereafter, Sri Gayatri Marketing Agencies appointed M/s. Mac Overseas, Chennai, the Plaintiff herein, as their authorised agent. The subject bank guarantee was issued by the first Defendant guaranteeing the performance of the Plaintiff. The second Defendant is not concerned with the import licence to be obtained by the Plaintiff from the Chief Controller of Imports and Exports. The second Defendant vehemently denies that the contract between the Plaintiff and the second Defendant had become impossible of performance. The Plaintiff who had already supplied 447 numbers of VC Ps and received the value there of cannot now set up a plea that the contract itself is an illegal contract. With the aforesaid pleadings, the second Defendant prays for dismissal of the suit.

6. The trial Court as well as the First Appellate Court having adverted to the Import and Export Policy announced by the Ministry of Commerce, Government of India marked as Exhibit A. 15 and the Open General Licence issued by the Ministry of Commerce, Government of India marked as Exhibit A. 16, has returned a finding that the import of the electronic goods namely the VC Ps were completely banned from import. Therefore, an illegal contract to import banned electronic items was entered into between the Plaintiff and the second Defendant. The illegal contract cannot be sought to be performed as per Section 23 of the Indian Contract Act. In view of the above, the Courts below have held that the second Defendant aggrieved by the non performance of the illegal contract by the plain-tiff, cannot lawfully invoke the bank guarantee issued by the first Defendant.

7. The following substantial questions of law were formulated at the time of admission of the second appeal.

i) Whether in terms of the import policy of 1988-91, the import of video cassette players was banned or merely restricted?

ii)Whether, for the purpose of successful completion of a contract, a party necessarily requires a licence, an implied condition and convenient of the contract held out by such party is that they will be in the position to get such licence and thereby perform the contract.

iii)Whether the first Respondent as successor in interest to the original tender or was not equally bond by the tender notice include the condition that only persons with valid import licence ought to tender, and whether by so succeeding to the contract, the first Respondent did not hold out an assurance/promise to the Appellant that they were possessed of such import license ?

8. The learned Counsel for the Appellant/second Defendant would submit that none of the terms of the contract clinched by the Plaintiff and the second Defendant was against the law or against the public policy. Knowing full well that the Plaintiff had to obtain licence from the authority concerned for importing the electronic items proposed to be supplied to the second Defendant, the Plaintiff entered into a contract to supply VC Ps of Japan make to the second Defendant. Referring to the stand taken by the Plaintiff in the plaint,

the learned Counsel for the second Defendant would submit that the Plaintiff was aggrieved by the alleged non co-operation of the second Defendant in securing the licence for importing electronic goods from foreign country. Referring to Exhibits B.5, BIO and B.11, the letters written by the Plaintiff to the second Defendant, the learned Counsel for the second Defendant would submit that the second Defendant was made to believe that the Plaintiff, having taken steps to import the electronic goods from foreign country, was making supply to the second Defendant. He attacks the judgments of the Courts below on the ground that both the Courts have misconceived Exhibits A. 15 and A. 16. There is no prohibition imposed by the Government of India to import the electronic items. It is his further submission that the Courts below have confused totally with the "banned items" with that of the "restricted items" as adumbrated under part A and part B of the Appendix attached to Volume I of the Import and Export policy. Therefore, he would submit that the Courts below have erred in concluding that the contract clinched by the Plaintiff with the second Defendant was per-se illegal and therefore, the question of performance of such a contract by the Plaintiff would not arise.

9. The learned Counsel for the second Respondent/first Defendant would submit that there was an agreement between the Plaintiff and the second Defendant for supply of VPS of Japan make when there was a total ban for import of electronic items from foreign countries. The Courts below have rightly evaluated Exhibits A.15 and A.16 and arrived at a decision that the contract entered into between the Plaintiff and the second Defendant to supply the banned electronic items of foreign origin is per-se illegal and therefore, the question of non performance by the Plaintiff would not arise. There can also be no invocation of the bank guarantee given for such performance of the illegal contract. It is his further submission that the second Defendant has not come out with the details of the loss which he has incurred on account of the non performance by the Plaintiff. Inasmuch as the Plaintiff has chosen not to contest the second appeal preferred by the second Defendant, equity demands that the first Defendant should be discharged from the obligation of honouring the bank guarantee issued by it as otherwise the first Defendant would face an uphill task of recovering the amount from the Plaintiff who has not shown his face before this Court. It is further submitted that the second Defendant had chosen to enter into an agreement with the Plaintiff without actually verifying the licence, if any, obtained by the Plaintiff for importing electronic goods from foreign country. Therefore, the second Defendant cannot now complain that the Plaintiff failed to perform his part of contract inasmuch as it has become next to impossibility for the Plaintiff who was not armed with any licence to import the foreign electronic goods to supply electronic goods to the second Defendant. Therefore, he would submit that the second appeal deserves dismissal.

10. Exhibit A.1 is the purchase order placed by the second Defendant with the Plaintiff. There is no dispute to the fact that the Plaintiff was ultimately nominated by Sri Gayatri Marketing Agencies who was the successful bidder for supply of VC Ps of Japan make to the second Defendant who had placed orders with the Plaintiff for supply of 2500

numbers of VC Ps Funai brand of Japan make under Exhibit A.1. The terms and conditions for the supply of those electronic item is found in Exhibit A.2. The fourth condition found in Exhibit A.2 would stipulate that the Plaintiff should furnish performance guarantee from any of the scheduled bank for 10% of the order value covering all the terms and conditions of the purchase order, Exhibit A.1. All the seven terms and conditions found under Exhibit A.2 do not appear to be illegal per-se.

11. It is contended by the Plaintiff that the second Defendant promised the Plaintiff to secure the licence for importing VC Ps from foreign country. Firstly, it is found that the second Defendant has come out with a total denial of such a stand taken by the Plaintiff. Secondly, such a plea of the Plaintiff falls beyond the ambit and scope of terms and conditions found in Exhibits A.1 and A.2. Thirdly, the Plaintiff cannot travel beyond the scope of Exhibits A. 1 and A.2 and come out with a plea that there was an oral assurance given by the second Defendant to secure the required licence for importing VC Ps of Japan make. The Courts below have rightly rejected such a plea of the Plaintiff which does not have a leg to stand upon.

12. It is relevant to refer to Exhibits B.5, B.10 and B.11 the letters written by the Plaintiff to the second Defendant, in order to understand what actually was the understanding of the parties with respect to the terms of the contract. The Plaintiff shot off the letter Exhibit B.5 dated 29.05.1989 to the second Defendant informing the second Defendant that there had been some delay in clearing the VC Ps procured by him. For making supply after clearance of VC Ps he required some amendments of the terms and conditions.

13. In the correspondence made by the Plaintiff to the second Defendant under Exhibit B.10 dated 11.09.1989, the Plaintiff has come out with a case that VC Ps of Funai brand of Japan make had, in fact reached Chennai Port but the consignment could not be traced. In the mean time, the Plaintiff had given instruction to his partners to extend the bank guarantee. In yet another communication Exhibit B.11, dated 20.01.1990, the Plaintiff has categorically communicated to the second Defendant that he procured the VC Ps only from the persons having proper documents. The Plaintiff also assured the second Defendant that he would make arrangement for production of those relevant documents relating to the import of VC Ps to enable the second Defendant to get back the VC Ps seized by the Central Excise authorities.

14. The aforesaid documents namely Exhibits B.5, B.10 and B.11 would go to establish that the Plaintiff had intended to supply VC Ps of Japan make to the second Defendant only by procuring the same from the persons having proper documents or by importing the same from foreign country.

15. The trial Court has in fact misconceived the provisions found under Import and Export Policy announced by the Ministry of Commerce, Government of India marked as Exhibit A.15 and the Open General Licence Exhibit A.16. Both the Courts below having wrongly read the Import and Export policy and the Open General Licence marked as Exhibits A.

15 and A. 16 arrived at a decision that there was a total ban of import of electronic items from foreign country.

16. On a careful perusal of Exhibit A.15, it is found that the electronic items were scrupulously listed under Restricted items and not under Banned items. There are certain items which had been completely banned by the Ministry of Commerce, Government of India. Under the Import and Export Policy, the electronic items had not been listed under the banned items. The electronic items had been conspicuously listed under the restricted items. Normally import of restricted items would not be allowed but such import might be allowed by the Chief Controller of Import and Export wherever it was considered necessary as per the import and export policy marked as Exhibit A.15. That is the reason why the Plaintiff has come out with a plea of course to suit its convenience that the second Defendant assured him to procure the licence from the Chief Controller of Imports and Exports for importing the restricted items. Therefore, it is found that the VC Ps could very well be imported form the foreign country provided necessary licence was granted by the Chief Controller of Import and Export.

17. The courts below have totally misread the provisions found in the Open General Licence marked as Exhibit A.16. Under Exhibit A.16, it is found that the Ministry of Commerce, Government of India having exercised its powers conferred by Section 3 of the Imports and Exports (Control) Act 1947 issued Open General Licence to the public with respect to certain items for the purpose of importing the same from the foreign country.

18. True it is that the Government of India chose not to issue open general licence for electronic items. The open general licence given by the Ministry of Commerce, Government of India Exhibit A.16 has nothing to do with the ban imposed on certain items and the restriction imposed on certain other items by the Government of India under the Import and Export policy. The Courts below have misconstrued Exhibit A.16 as though it prohibits issuance of any licence for the Import of electronic items which was dealt under the provisions of the Import and export policy. By no stretch of imagination we can come to a decision based on Exhibits A.15 and A.16 that there was total ban for importing electronic items. Electronic items had been categorised under the restricted items which could be imported from foreign country by getting licence from the Chief Controller of imports and exports.

19. The Plaintiff participated in the tender having come to know that he was supposed to supply VC Ps of Japan make. The implication is that he had to procure from foreign country those electronic items armed with proper documents. The fact remains that the second Defendant is one of the public sector undertakings of the Government of Andhra Pradesh. It is quite unimaginable that the Government of Andhra Pradesh through this contract encouraged illegal import of the electronic items into the country.

20. Of course the second Defendant should have verified before ever the purchase orders were placed with the Plaintiff as to whether the Plaintiff was armed with proper documents for importing electronic goods from foreign country. It may be a lapse on the part of the second Defendant in not properly verifying the aforesaid facts and circumstances. But, such a lapse will not definitely invalidate the lawful contract entered into between the Plaintiff and the second Defendant.

21. An agreement is said to be lawful u/s 23 of the Indian Contract Act, 1872, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

22. Here is the case where the second Defendant being the public sector undertaking of the Government of Andhra Pradesh wanted to procure VC Ps of Japan make. The Plaintiff participated in the tender called for by the second Defendant. Purchase orders were placed with the Plaintiff by the second Defendant under Exhibit A.1. None of the terms and conditions found under Exhibit A.2 is found to be unlawful or opposed to public policy. The Plaintiff agreed to supply VC Ps of Japan make to second Defendant. The admitted position is that the Plaintiff in fact supplied 447 numbers of VC Ps of Japan make to the second Defendant in part performance of the contract. To ensure the performance as directed by the second Defendant, the Plaintiff had submitted bank guarantee obtained from the first Defendant. The correspondence Exhibits B.5, B.10 and B.11 would go to show that the Plaintiff having fully understood that he was obligated to supply VC Ps of foreign make on import clinched the business deal with the second Defendant. There is nothing illegal in placing the orders by the 2nd Defendant with the Plaintiff for supplying VC Ps of foreign make. There is also nothing unlawful in procuring armed with proper documents and supplying the VC Ps of foreign make by the Plaintiff to the second Defendant as demanded by the second Defendant.

23. It is also established before the Court that the VC Ps of foreign make could be procured from foreign countries with the permission of the Chief Controller of Imports and Exports and that there was no total ban for import of such electronic items from the foreign country at the relevant point of time. Therefore, I come to a firm decision that the agreement entered into between the Plaintiff and the second Defendant under Exhibits A.1 and A.2 are is lawful. When the agreement is found to be lawful, the first Defendant is obligated to honour it''s commitment by meeting the demand made by the second Defendant on invocation of the bank guarantee Exhibit A.14.

24. The submission made by the learned Counsel for the first Defendant that the first Defendant may not be in a position to collect any amount from the Plaintiff who failed to contest the second appeal preferred by the second Defendant does not appeal to the mind of this Court. The first Defendant is bound by the terms and conditions of the bank guarantee. When admittedly the Plaintiff failed to perform its part of the contract, the invocation of the bank guarantee by the second Defendant is found to be quite legal. Of

course the first Defendant could not honour its commitment as the Plaintiff had rushed to the Court and obtained an order of injunction. In view of the above, the substantial questions of law formulated by this Court are decided in favour of the Appellant/second Defendant.

25. In the result, the judgments of the Courts below are set aside and the suit filed by the first Respondent/ Plaintiff is dismissed in its entirety. As a consequence, the second appeal is allowed. There is no order as to costs. Consequently, connected miscellaneous petition is closed.