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(1996) 10 CAL CK 0017

Calcutta High Court

Case No: Suit No. 625 of 1984

Kerala S. E. D. C. Ltd.	APPELLANT
Vs	
State of Bihar and Another	RESPONDENT

Date of Decision: Oct. 8, 1996

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80, 80(1)
- Limitation Act, 1963 - Section 17(l)(a)

Citation: 100 CWN 1124

Hon'ble Judges: Nikhil Nath Bhattacharjee, J

Bench: Single Bench

Judgement

Nikhil Nath Bhattacharjee, J.
This is a suit for a decree for Rs. 2,19,606.00p. on (sic) of price of goods sold and delivered but not paid. Plaintiffs Case, in short, is that plaintiff is a Goveranment company engaged in manufacture and Sile of different products including Transistors/Radios under the brand name "Kalpaka". By an order in writing dated May 14, 1981 placed on and accepted by the plaintiff at 75C Park Street, Calcutta within the jurisdiction of this Court, the defendant no 1 through Directorate of Adult Education. Department of Education agreed to purchase 600 "Kalpaka" two band Transistor sets with leather case at the agreed rates of Rs. 235.00p. per set and Rs. 40/- per leather case plus 4% Sales-tax aggregating the amount of Rs. 1,71,600/-. The defendant no. 2 agreed with the plaintiff at 75C Park Street, Calcutta to render services regarding execution of the said contract by and between the plaintiff and defendant no. 1. The job of the defendant no. 2 was that of Liaison services between the plaintiff and the defendant no. 1. The defendant no. 2 had no authority from the plaintiff to receive any payment from the defendant no. 1 in respect of the said contract for or on behalf of the plaintiff. The contract between the plaintiff and the defendant no. 1 as incorporated in the said order expressly stipulates that the payment in respect thereof would be made against delivery and no amount can be paid in

advance. Pursuant to the said contract the plaintiff duly delivered to the defendant no. 1 in its Adult Education Department at Patna the said 600 "Kalpaka" Transistors/Radios in good and sound condition in or about July 1981. The goods were duly accepted by or on behalf of the defendant no. 1 without raising any objection as to quantity or quality thereof. The plaintiff.did not sell or supply leather cases for the said Transistor set and the supply thereto was not insisted upon by or on behalf of the defendant no. 1. The" contract between the parties thus stood mutually modified to that extents The plaintiff submitted to the defendant no. 1 its Invoice dated September 30, 1981 for a total sum of Rs. 1.46,640/- computed at the agreed rate of Rs. 235/- per set together with 4% Sales-tax. The defendant no. 1 duly received and accepted the said Invoice. A copy of the order and a copy of the Invoice have been annexed to the plaint as part of the plaint. Not having received any payment against the said choice the plaintiff by a letter dated December 21. 1982 made a representation in writing- to the Director, Education Department, Govt, of Bihar and authorised its representative to collect payment of the said sum of Rs. 1,46,640/-. But no such payment was make and instead by a letter dated April 5. 1983 the defendant no. 1 (sic) that all payments due on the supply had been made to the defendant no. 2 by two instalments i.e. Rs. 73,320/- by a cheque dated May 23. 1981 as advance and Rs. 98,040/- by a cheque dated September 1, 1981, aggregating Rs. 1,71,360/-. The plaintiff is unable to appreciate the modus operandi of defendant no. 1 in making payment to the defendant no. 2 without any authorisation from the plaintiff and that too by cheques drawn not in favour of the plaintiff but in favour of the (sic) no.Further, the first instalment was paid in advance which was a clear breach of terms of the contract between the plaintiff and the defendant no. 1. The second payment was also made even before submission of the Invoice. What is intriguing is that against the contractual dues of the plaintiff amounting to Rs, 1,46,640/-. payments aggregating Rs.1,71.360/-. were alleged to have been made by defendant no. 1 to the defendant no. 2. The haste with which the payments were made was unprecedented foF a Govt. Department. The said payment cannot constitute payment of the contractual dues of the plaintiff, the defendant no. 1 remaining liable to make the payment of the said legitimate dows of the plaintiff. However, defendant no. 1 being a Government Department the plaintiff persuaded the defendant no. 2 to make the payment and in acknowledgement of its liability, the defendant no. 2 drew- a cheque dated July 21, 1983 in favour of the plaintiff for Rs. 1,46,640/- and delivered the same to the plaintiff at 75C Park Street, Calcutta. The said cheque drawn upon SBI was however dishonoured on or about August 20, 1983 by the Drawee Bank on the ground of fund being not arranged for and further that the payment had been stopped by the Drawer. Even thereafter the plaintiff tried to persuade the defendant no. 2 to make the said payment which the defendant no. 2 agreed to make by instalments in a meeting held at 75C Park Street, Calcutta. The plaintiff tried to have a commercial solution but failed. The defendant no. 2 did not pay any amount to the plaintiff. It is obvious that the two defendants acting in collusion and conspiracy with each other perpetrated a fraud upon the plaintiff, the plaintiff is entitled to and claims interest at the rate of 18% per annum which is the current- lending rate of Nationalised Banks relating to commercial transactions., In the premises the defendants jointly and severally

are liable to pay to the plaintiff a total, sum of Rs. 2.19,606/. which inspite of demands the defendants have failed and neglected to pay. A notice u/s 80(1) of the;.Code, of Civil Procedure was - duly-served upon the.defendant no.1 on or about May 30, 1984 without. any material result. In the Circumstances plaintiff prays for- leave under Clause 12 of the Letters Patent and claims a decree for Rs. 2,19,606. Interim interest and interest on the judgment have also been prayed for.

2. Both the defendants have filed "written statements. They have raised pleas about jurisdiction and limitation. Whereas defendant no. 1 has asserted that the defendant no. 2 was the duly authorised dealer and/ or agent of the plaintiff and as such payments made to the defendant no. 2 should be considered as payments to the plaintiff, particularly when acceptance of the order for the supply was acknowledged and confirmed by the defendant no. 2 by its letter dated May 21, 1981 addressed to the Deputy Director, Adult Education, Govt, of Bihar, Patna. It has been alleged that the goods under the contract between the parties were delivered by the defendant no. 2 for and on behalf of the plaintiff and the same were accepted by the Department concerned as would appear from a copy of the delivery challan dated 24.8.81 issued by the defendant no. 2 addressed to the Deputy Director, Adult Education, New Secretariat, Patna. A copy of the challan is annexed with the written statement. All other allegations of the plaintiff has been denied by the defendant no. 2 addressed to the Deputy Director, Adult Education, New Secretariat. Patna. -A copy of the challan is annexed with the written statement. All other allegations of the plaintiff has been dented by the defendant no. 1. It has been asserted that the defendant no. 1 duly complied with the terms of the contract between the parties and that- the Department having paid to the defendant no. 2, the authorised dealer of the plaintiff there cannot be any dues remaining which can be claimed by the plaintiff.

3. So far as the defendant no. 2 is concerned, although a written statement was filed, laut during the course of hearing the learned Advocate Mr. Dipayan Ghowdhury of the defendant no. 2 prayed for Leave to retire on 27th May. 1995;Such Leave was granted and the suit was directed to proceed ex-parte against the defendant no. 2. However after evidence on behalf of the plaintiff and the defendant no. 1 was concluded and the date was fixed for argument, an application was filed by the defendant no. 2 through Mr. K. K. Boral. Advocate, for leave to contest the suit. By an order dated August 28, 1995 the said application was allowed on payment of cost but thereaifter inspite of several adjournments being (sic) the defendant no 2 did not appear and/or cross-examine the plaintiff"s witness. On January 12, 1996 Mr. k.k Boral. Advocate, prayed for leave to retire for want of instruction. Leave was granted and plaintiffs witness was released. In the written statement the defendant no. 2 stated that in terras of the order, as it required that a specific symbol should be embossed on each Transistor and that equivalent number of leather cases should be supplied, the defendant no. 2 did the embossing and supplied the leather cases. That the defendant no. 2 had no authority from the plaintiff to receive any payment from defendant no. 1 in respect of the said order/contract has been denied; Supplied of 600 Transistor sets to the defendant no. 1 has been denied. It has been

stated that plaintiff by its conduct waived its right to receive the payment from the defendant no. 1. ML allegations of the plaintiff has been denied by the defendant no. 1.

4. Upon pleadings of the parties the trial continued under the following issues:

ISSUES.

1. Has the Court jurisdiction to entertain and try this suit?

2. Is the suit barred by limitation?

3. Was the defendant no. 2 an agent of the plaintiff, and in that capacity received payments of Rs. 1,46,640/- being the price of the goods supplied as alleged by the defendant no. 1.

4. Had the defendant no. 2 the necessary authority to receive such payments on plaintiffs behalf and the defendant no. 1 had any authority to make payment to the defendant no. 2 of the amount due to be paid to the plaintiff

5. Has any notice u/s 80 of the CPC been served upon the defendant no. 1? If so, is the notice legal, valid and sufficient.

6. To what relief, if any. is the plaintiff entitled?

DECISION

5. issue No. 1 : Exhibit-A for the plaintiff and Exhibit-4 which is the original of Ext-A for the defendant no. 1 are one and the same, being the order of the Deputy Director, Adult Education, New Secretariate, Patna addressed to the Deputy Manager "Sales" Kerala State Electronic Development Corporation, limited, 75C Park Street, Calcutta-700 016. A copy of this order was forwarded to the defendant no. 2. By this order the plaintiff was directed to supply 600 "Kalpaka" two Band. Transistor sets with leather case and 4% Sales-tax for the total amount of Rs. 1,71,600/-. The order was addressed to the plaintiff and was received by the plaintiff at its office a 75C Park Street, Calcutta which is within the Jurisdiction of the Court. It was not a case of invitation to submit tender but straightway order upon the manufacturer cum-seller for supply of the goods. The order was, received in normal course of business by post or courier as evidenced by PW 1 P.J. Thomas, vide Answers to Questions No. 10 & 11, 132 & 133 and 143 & 144. It is stated in this order that payment would be made against delivery and no amount would be paid as advance. A copy of this order was forwarded to the defendant no. 2 as admitted by DW I S. K. Lall in cross-examination, vide Q. No. 9. In Answer to Question No, 104 to 109 DW 1 says that the order for the supply of the Transistor sets was placed by the defendant no. 1 on the plaintiff and that the declaration form in respect of the Central Sales-tax payable for the goods to be supplied by the plaintiff. It has been admitted by this witness that the Bihar"s Sales-tax at that time, was 3% and that as such if the supplier had been the

defendant no. 2 Sales-tax would have been less but since the supplier was from Calcutta higher Sales-tax at the rate of 4% was chargeable on the goods supplied and the same was liable to be paid by the plaintiff from Calcutta. In Answer to Question no. 139 this witness stated that the plaintiff demanded for payment from the defendant no. 1 directly from Calcutta. This being the position, it goes without saying that the cause of action or at least a part of the cause of action arose within the jurisdiction of this Court Mr. Auddy for the plaintiff argued that the accepted principle of law that the debtor must seek the creditor still holds good and in this connection he relied on two Division Bench decisions of this Court reported in AIR 1985 Cal. 74 and AIR 1964 Cal. 418 in support of his contention that in the facts of the case it has to be taken that a part of the cause of action has arisen within the jurisdiction of this Court. There is no convincing answer from the other side on this point.

6. in regard to plaintiffs cause of action as against defendant no. 2, the averments, made in the plaint in paras 3, 9,.19 & 16 as proved by PW I in Answer to Questions No. 6, 7, 78 to 99 coupled with Exhibits I. J & K leave no room for doubt that the cause of action as against defendant no. 2 also arose within the jurisdiction of this Court.

7. Furthermore, the suit was instituted with leave of the Court under Clause 12 of the Letters Patent, vide order dated 10-9-84 passed by C.K. Banerjee, J. No application for revocation of such leave has been made.

Accordingly, the issue is answered in plaintiffs favour in the affirmative.

8. Issue No. 2 : The plaintiff being indisputably a Government company, limitation is 30 years for recovery of any money due, vide. Article 112 of the Limitation Act (West Bengal Amendment). However, the goods were supplied in August 1981. Bills were submitted on September 30. 1981. Payment was to be made against bills. Admittedly payment was made by two instalments by cheques dated May 23, 1981 and September 1, 1981 to defendant no. 2. But this was kept concealed till the plaintiff made a demand when on April 20, 1983 vide Ext-H and oral evidence of D.W. 1 fW.No. 151) the defendant no. 1 intimated to the plaintiff for the first time about such payment As would be shown shortly, defendant no. 2 had no authority to receive payment on behalf of the plaintiff. (sic), on July 21, 1983 the defendant no. 2 drew a cheque in plaintiffs (sic) for making over plaintiffs dues. The cheque was bouched. The (sic). was filed on 5-9-84.The suit is saved. Then again, as will be seen shortl, then was a fraud practised upon the plaintiff in collusion and canspiracy of both the defendants. That being so, the time of instituting the suit for recovery of the money due on the supply has to be computed from the time when the fraud became known to the plaintiff for the first time, vide Section 17(l)(a) and (b) of the Limitation Act, 1963. The suit has been filed within 3 years from the date of acknowledge about the fraud. As against the defendant no. 2. the acknowledgements in writing vide the cheque" which was dishonoured being Exhibit-1 collectively and Exhtbit-K and the discussion between the plaintiff and the defendant no. 2 held at Calcutta on 24-11-83 (Ext-K) leave no room for doubt that the limitation is saved. The issue is

answered in the negative in favour of the plaintiff.

9. issue No. 5 : It appear that a notice u/s 80 CPC was sent to the defendant no. 1 by registered post with A.D. A copy of the notice along with A/D. card hearing stamp of the defendant no. 1 and the postal receipt are collectively marked Exhibit-L. Perusing the notice it appears that the same is valid, legal and sufficient Accordingly the issue.is decided in plaintiffs favour in the affirmative.

10. Issue Nos. 3 & 4 : There is no denying that the order for supply of the goods was served upon the plaintiff at its office address at Calcutta. It has already been shown that the Sales-tax declaration forms were also sent from the Patna Secretariat to the plaintiff at its Calcutta Office. Payment as stipulated was to be made on supplying the goods and no advance was payable by the defendant no. 1 or claimed by the plaintiff. It is, however, an admitted position between the defendant no. 1 and defendant no. 2 that long before the supply was made in or about July 1981, the defendant no. 1 made an advance of the.sum-of Rs, 73,320/- by a cheque dated May 23, 1981 in favour of defendant no. 2. Another sum of Rs. 98,040/- was paid by a cheque dated September 1, 1981 by the defendant no. 1 of the defendant no.2, the total aggregating Rs. 1.71,360/- was thus paid by the defendant no. 1 to the defendant no. 2 for the supply of 600 "Kalpaka" Transistor sets by the plaintiff to the defendant no. 1 as per order as contained in Exhibit-4 served upon the.plaintiff. Perusing the materials on record it seems to me that at some point of time the defendant no. 2 acted in between the defendant no. 1 and the plaintiff. But thereis no piece of evidence on record to show that the defendant no. 2 was the authorised dealer of the plaintiff. No letter of authority or any dealership has been annexed or exhibited. The plaintiff supplied the goods and sent the bill directly to tile defendant no. 1. How the defendant no. 1 could pay the huge sum of Rs. 73,320/- in advance, before the supplies Were received is a mystery. They send instalment payment"of Rs. 98,041/- was also made before even the bill was drawn. Clearly the defendant no. 1 acted in hot haste. But while when there was a clear stipulation that no advance could be claimed, he.v an advance of such a huge sum. could be paid and that too directly" to the defendant no. 2 who was at been a broker but not admittedly the principal upon whom the order for supply was made is beyond comprehension. That the advance had been paid to the defendant no. 2 and that the balance was also paid to the defendant no. 2 was not even intimated to the plaintiff. The defendant no. 2 also did not intimate the plaintiff that it had received the payment in full on Behalf of the plaintiff. True, plaintiff.supplied only the Transistor sets and not the leather cases and certain embossing which perhaps was to have been made on each of the set was not made by the plaintiff. If defendant no. 2 did this job. namely, embossing and supplying the cover, the defendant no. 2 at best could claim price for the said goods at the rate stipulated in the agreement. But the defendant no. 2 not only accepted the whole payment though they were not the manufacturer or the seller but also kept concealed the facts of receipt of the payment. Considering the whole gamut of the transactions as evidenced by the exhibits on record, there remains little room for doubt that the payment that was made to the defendant no. 2

by the defendant no. 1 was collusive and fraudulent and conspiratorial, as otherwise there would be no reason to suppress the fact of payment from the plaintiff who bore huge expenditure In manufacturing, selling and delivering the products to the defendant no, 1 at Patna. The defendant no. 2 did not have to undertake any expenditure in this supply but they merrily received the payment And when this came to the knowledge of the plaintiff and the plaintiff demanded payment from the defendant no. 1 as also later from the defendant no. 2, the defendant no.l issued a cheque which was dishonoured because of paucity of fund, as also because payment had been stopped by the defendant.no. 2. Thus, the -intention of the defendant no. 1 and defendant no. 2 is much too evident Defendant no. I was not to make any advance under the terms of the order served upon the plaintiff but the advance was made by a cheque to defendant no. 2. And the fact of payment was not made known to the plaintiff There is no declaration of the plaintiff that defendant no. 2 was their Dealer or authorised agent The second instalment was also paid by a cheque to defendant no. 2 before the bill was raised. Again none of the defendant no. 1 or 2" toilmated the plaintiff And this suppression continued till the plaintiff demanded the price from the defendant no. 1 whereupon the defendant no. 2 issued a cheque for the price of the goods to the plaintiff. But the cheque bouched. Then a meeting took place. Defendant no. 2 promissed to pay by instalment but dishonoured/the promise. Defendant no. 2 has not also contested plaintiffs allegation of fraud having been practised upon the plaintiff by the defendant no. 2 collustvdy with the defendant no. 1 The defendant no. 2 collusively with the defondans no, 1. The defendant no. 2 has not adduced any evidence to prove any agency or even(sic) under (sic) plaintiff. There was no authority from the plaintiff upon defendant no. 1 and 2 to make the payment to the defendant no. 2.

11. Thus by making the payment other than to the supplier upon whom the order"was placed and by receiving the payment, the deafendand no. 1 and the defendant no. 2 jointly and severally committed fraud upon the plaintiff. Clearly, the defendant no. 1 and the "defendant no. 2 were in league in depriving the plaintiff from receiving the price of the goods which plaintiff admittedly supplied and which were admittedly received by the defendant no. 1. Hence both defendants are jointly and severally liable in making the payment.

12. The issues are decided in plaintiff s.favour in terms of the above.

13. Issue No. 6 : The suit succeeds against both the defendants.

The.Court fees paid on the plaint are correct. Therefore, it is ordered that the suit be decreed on contest with cost against both the defendants. The plaintiff do get a decree for Rs. 2,19,603.00p. along with usual cost, interim interest arid interest on judgment and future interest @ 15% per annum till the decree is satisfied. Both the defendants shall be jointly and severally liable towards satisfaction of the decree.

In the facts and circumstances of the case the defendant no. 1 is saddled with the further compensatory cost of 1000 (One thousand) G.Ms. 16. In the facts and circumstances of the case the concerned authority of the defendant no. 1 may consider whether appropriate probe should be made for fixation of liability for the payment of the advance in breach of the stipulation contained in the order for supply for initiating a suitable criminal case or at least a departmental proceeding against the concerned official.