

(2008) 09 DEL CK 0252

Delhi High Court

Case No: Regular First Appeal 386 of 2005

Skanska Cementation India Ltd.
(Now known as ITD Cementation
India Ltd.)

APPELLANT

Vs

D.D. Amar Nath and Another

RESPONDENT

Date of Decision: Sept. 4, 2008

Acts Referred:

- Contract Act, 1872 - Section 70

Hon'ble Judges: Sunil Gaur, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: Sandeep Sethi, Mohit Bakshi and Lakshay Sawhney, for the Appellant; S.M. Mittal, for R-1, for the Respondent

Final Decision: Allowed

Judgement

Pradeep Nandrajog, J.

CM No. 10565/2005

1. The appellant which was known as "Kvaerner Cementation India Ltd." before the suit was filed got name changed to "Skanska Cementation India Ltd." before appeal was filed. During pendency of the appeal the name has been further changed to "ITD Cementation India Ltd." The certificate issued by the Registrar of Companies, Mumbai dated 26.5.2005 has been annexed with the application.

2. We allow the application.

3. Amended memo of parties filed along with the application (at page 112) is taken on record.

RFA No. 386/2005

1. Heard learned Counsel for the parties.

2. Perused the Trial Court record.

3. The appellant is aggrieved by the impugned order dated 7.4.2005 declining leave to defend and as a consequence decreeing the suit filed by the respondent No. 1.

4. Respondent No. 1 invoked the summary jurisdiction of the Court when a suit was filed praying that a decree in sum of Rs. 6,08,369/- be passed in its favour and against the appellant and respondent No. 2.

5. It was stated in the plaint that the first respondent had supplied flooring material vide invoice No. 002110 dated 15.2.1997 and had raise the invoice in sum of Rs. 3,89,236/-.

6. It was stated that under the invoice interest @ 24% per annum was payable for overdue payment after 15 days of the raising of the invoice. It was pleaded that the appellant and respondent No. 2 kept on acknowledging liability but did not make payment raising an inter-se dispute between the appellant and respondent No. 2.

7. In para 3 of the plaint it was pleaded:

3. That in February, 1997 the defendant No. 1 viz. Kvaerner (for short), formerly - "Trafalgar", needed wonder floor Antistatic P.V.C. Flooring for one of its projects being executed at Surajpur, Noida and placed an order through M/s. Premier Vinyl, the manufacturers, being their distributors, on the asking of the defendant 2, their sub-contractors for "Interiors" for the said job.

8. The appellant formally known as "Kvaerner Cementation India Ltd." filed an application seeking leave to defend and projected a defence which flows out of averments made by respondent No. 1 in para 3 of the plaint.

9. It was pleaded that it had engaged services of respondent No. 2, Eastern Interiors Pvt. Ltd., impleaded as defendant No. 2 in the suit, for executing certain interior finishing work of the company at Surajpur U.P. It was pleaded that the works awarded to Eastern Interiors Pvt. Ltd were for supply of material and execution of the tendered works at site. It was pleaded that the execution of the work required procurement and thereafter laying antistatic PVC flooring. It was stated that Eastern Interiors Pvt. Ltd. placed an order on the first respondent for supply of the material in question and hence liability to pay to the first respondent was that of the second respondent.

10. To further bring home the point that the inter-se dealings were between the first respondent and the second respondent, in para 9 of the application seeking leave to defend it was pleaded as under:

9. That the invoice in question referred and relied upon by the plaintiff has been wrongly prepared in the name of defendant No. 1 whereas said invoice was to be prepared in the name of defendant No. 2 and simply because the name of defendant No. 1 is entered in the invoice, will not make liable the defendant No. 1 to

pay the invoice amount as also other charges as included in the invoice. Form "C" was/is to be delivered by defendant No. 2 who placed order with plaintiff for supplying material in question. It is an important fact to be submitted that had the defendant No. 1 been placed an order in respect to material in question, defendant No. 1 who has been carrying business in Delhi, would not have to deliver Form "C" which is deliverable only on Interstate transactions between the parties. Had the defendant No. 1 been placed an order with plaintiff, the defendant No. 1 would have been made liable for delivery of form ST-1 or form ST-35 and not form "C", as claimed in the invoice in question and in default thereof, the defendant No. 1 could have been made liable for payment of sales tax @ 6% and not 4% as stated in Invoice in question.

11. With reference to the invoice it was pleaded in the application seeking leave to defend that since the delivery was effected at the site of the work, the first respondent wrongly raised the bill in the name of the appellant. It was pleaded that merely because an employee accepted the invoice would not mean that the appellant was liable, for the reason the invoice could not be treated as a contract between the parties; the appellant being a company, only a person duly authorized could bind the appellant company.

12. The first respondents oppose the application seeking leave to defend and referred to the fact that the invoice was accepted by the employee of the appellant and that admittedly the goods were consumed at Surajpur Project of the appellant.

13. Declining leave to defend the learned Trial Judge has held that documents filed showed that both parties impleaded as defendants i.e. the appellant and respondent No. 2 kept on admitting their liability but avoided payment. The second reason is that the invoice shows receipt of the goods at the premises of the appellant. There from learned Trial Court has concluded that since the goods were appropriated by the appellant, notwithstanding there being no contract between the parties Section 70 of the Contract Act would be attracted.

14. Since the invoice stipulated that if payment was not made within 15 days interest would be charged @ 24% per annum the suit was decreed as prayed for. It be noted that the sum of Rs. 6,08,369/- prayed for to be decreed had two elements, being Rs. 3,89,236/- representing the value of the goods and the remaining amount being the pre-suit interest.

15. We note that while considering the application seeking leave to defend the concern of the Court at the moment is not to probablize the defence by evaluating the same with reference to the documents relied upon. What has to be seen is, whether a plausible defence is raised which if succeeds would non-suit the plaintiff.

16. As is to be noted from para 3 of the plaint, the first respondent himself admitted that the interior works of the appellant was subcontracted by it to Eastern Interiors Pvt. Ltd. The first respondent sought a decree jointly and severally against the

appellant and Eastern Interiors Pvt. Ltd.

17. It is thus obvious that the first respondent was not too sure whether under the contract it was to receive the money from the appellant or the Eastern Interiors Pvt. Ltd.

18. That apart, the defence of the appellant that it had awarded a lump sum contract to Eastern Interiors Pvt. Ltd. who was to procure the material and consume the same at site and thereupon receive money from the appellant; viz-a-viz the first respondent, in our opinion, shows a good defence that the appellant has not to pay any money to the first respondent.

19. Needless to state an issue would arise for consideration being whether the owner of a work is liable for the dues of his sub-contractor to 3rd parties?

20. If this triable issue arises we see no escape from the conclusion that case would be made out for grant of a leave to defend.

21. In this connection we may briefly note that the learned Trial Judge has not considered the plea in para 9 of the application seeking leave to defend which, we note, has gone un-rebutted in the reply filed by the first respondent thereto.

22. Indeed, the works of the appellant were at Surajpur in State of U.P. If the first respondent had to supply goods from Delhi to the appellant at U.P. the same would have attracted levy of Central Sales Tax being inter state sale. Indeed, the issue of form "C" and the issue of form "ST-1" or form "ST-35" also shows that a triable issue arises in relation to the said defence projected.

23. We fail to understand as to how Section 70 of the Indian Contract Act, 1872 would be attracted. Section 70 is attracted where a person lawfully delivers anything to another person not intending the delivery to be gratuitous and the other person enjoys the benefit thereof. Said other person is bound to recompense the former or restore the goods delivered.

24. Prima facie Section 70 would have no application where the owner of a land appoints a contractor to execute certain works on the land and agrees to pay the contractor the agreed amount under the Contract Act. If the contractor has individually contracted with 3rd parties for supply of goods to the contractor which he would use at the site, the owner of the land would prima facie be not liable to the sub-contractors or the vendors.

25. We note that since respondent No. 2 did not enter appearance and hence failed to contest the suit instituted by the first respondent, a decree already stands passed against respondent No. 2.

26. We allow the appeal.

27. The impugned order dated 7.4.2005 and the consequential decree of even date passed is set aside.
28. Appellant's application seeking leave to defend is allowed unconditionally.
29. Parties are directed to appear before the learned Trial Judge on 20.10.2008.
30. The appellant is directed to file the written statement before the learned Trial Judge on said date.
31. At this stage we note that on 24.5.2005 appellant was directed to deposit 50% of the decretal amount. Said amount has been released to the first respondent.
32. Since the appellant has been entitled to an unconditional leave to defend we order restitution.
33. Since the first respondent has secured restitution by means of a bank guarantee we directed the Registrar General of this Court to encash the bank guarantee and pay over the realized amount to the appellant through it's counsel.
34. Needless to state we have looked at the issue with reference to the parameters of leave to defend. Thus, nothing stated in this order would be treated as an expression on the merits of the rival claims. Learned Trial Judge would decide the issue after evidence is recorded in light of the evidence which has been led.
35. No costs.
36. TCR be returned.