

The Firm Styled Messrs. G. L. Kilikar

Vs

The State of Kerala.

Civil Appeal No. 1928(N) of 1966

(G. K. Mitter, C. A. Vaidialingam, P. Jagmohan Reddy JJ)

26.04.1971

JUDGMENT

MITTER, J. -

1. This is an appeal by certificate from a judgment and decree of the Kerala High Court dismissing the plaintiff-appellant's suit for damages claimed on the basis of a breach of contract and allowing, in modification of the decree of the Trial Court, a decree for a sum of Rs. 10,750/- only with interest at 3% p.m. from the date of institution of the suit. The Trial Court had awarded the plaintiff a decree for Rs. 80,745.62 which was inclusive of Rs. 69,995.62 by way of damages, Rs. 10,000/- representing the amount deposited by the plaintiff in terms of the contract sued upon and Rs. 750/- as interest on the said deposit amount. The Trial Court also awarded interest at 6% p.a. on the sum of Rs. 10,000/- from the date of the decree.

2. The facts circumstances leading to the institution of the suit are as follows. The appellant entered into a sales agency agreement with the Travancore Cochin State on May 11, 1950, the material clauses whereof were as follows :

"1. The agents are given the sole distributorship of the products of the Travancore Plywood Industries including plywood tea chest panels, battons, plywood commercial sheets etc.

2. The agency is to be for a period of one year in the first instance with an option to the agents to continue for a like period or for such further period not exceeding four years to be notified to the Government.

3 and 4. X X

5. The agents to be entitled to a commission of 5% on sales up to Rs. 5 lakhs and 7 1/2 on sales over and above the said figure.

6. The commission is to be payable on all supplies made against orders placed by the agents with the Travancore Plywood Industries (a State venture) either within the agency or outside the agency area.

7 and 8. X X

9. The quality of the articles supplies shall conform to standards prescribed by the Forest Research Institute, Dehra Dun..... The Travancore Plywood Industries shall be

solely responsible for the quality of the supplies.

10. Claims for shortages, replacements for defective manufacture or defective cutting or difference in size or for supplies not conforming to the specifications in any other manner whatsoever are to be met by the Travancore Plywood Industries at their one cost and expense. The agents shall be kept fully indemnified against all claims arising from any of the above defects or for cancellation of contracts by buyers on grounds of defective supplies.

11. The agents to deposit with the Government as security for the due fulfilment of this contract a sum of Rs. 10,000/- in the shape of Government bonds and interest on the bonds to be paid to the agents.

12. The agents guarantee a minimum annual sale of Rs. 5 lakhs worth of the products of the Travancore Plywood Industries. If at the end of the twelve months from the date of the commencement of this contract, the actual value of the goods sold on which the agents are... eligible for commission as per Clause 5 is found to be less than Rs. 5 lakhs due to default on the part of the agents, the, damages computed on the basis and in the proportion of Rs. 2,000/- for every lakh of rupees worth of goods by which the actual sales for that year fall short of the guaranteed annual sale of Rs. 5 lakhs shall be paid by the agents to the Government. The Travancore Plywood Industries shall not, however, be liable to pay damages if the full quantity indented for could not be supplied for want of stock.

13. On breach by the agents of all or any of the terms and conditions herein contained it shall be open for the Government to terminate this contract forthwith without prejudice to the rights of either party accrued before the date of such termination."

3. By mutual agreement the date of commencement of the agreement was changed from May 11, 1950 to November 1, 1950 and the agency was to be for five years. The sales for the year ending October 31, 1951, were worth Rs. 5,09,789-5-4; the corresponding figure for the year November 1, 1951 to October 31, 1952, was Rs. 6,73,831-8-3 but in the third year ending on October 31, 1953, the net sales came to no more than Rs. 3,35,196/-. On December 10, 1953, the Government of Travancore Cochin cancelled the agreement on the ground of failure of the plaintiff to secure orders for the minimum sum of Rs. 5 lakhs during the year ending October 31, 1953. They also claimed damages on the basis of Clause 12 of the agreement. The plaintiff was equally prompt in serving a notice under Section 80 of the Code of Civil procedure of their intended suit against the Government on December 15, 1953. They filed the suit on January 24, 1955.

4. The plaintiff's case was that the cancellation of the agency agreement was not justified and the fall off in the sales was due to the deterioration in quality of the goods manufactured by the Travancore Plywood Industries, hereinafter referred to as T.P.I., and was "traceable only to the breach of the contract by the defendant in the sense that it refused or failed to maintain the guaranteed standard of quality in the products manufactured". There was no lack of efforts on the part of the plaintiff to secure orders and actually the plaintiff secured an order for the supply of 34,700 sets of tea chest panels on December 5, 1953, from Kannan Devan Hills Produce Company Ltd., Kunnar (hereinafter referred to as K.D.H.P.) who purchased large quantities of the defendant's products. The plaintiff submitted that it had suffered substantial damages by the premature

cancellation of the agency and by the default on the part of the defendant in fulfilling its obligations under the agreement in regard to its duty to maintain the guaranteed standard of quality of the products. The damages were quantified on the basis of the commission which the plaintiff would have earned during the period January 10, 1954 to October 31, 1955, calculated on orders executed in the past. Plaintiff also claimed refund of the initial deposit of Rs. 10,000/- with interest at 6%.

5. The defendant denied the allegations as to default in its written statement and pleaded that it had always maintained a high quality in its manufacture. According to the defence the complaint as to the deterioration in the quality was put forward for the first time in October, 1953, without any regard for truth and only because the plaintiff had sold goods of the manufacture of other producers to the defendant's customers.

6. The Trial Court framed a large number of issues and came to the conclusion that there was defect in the quality of supplies made by the defendant and that the deficiency in the sales in the third year of the agency was due to defect in quality of the teacheest panels manufactured by the defendant without any default on the part of the plaintiff. Accordingly it held that the termination of plaintiff's agency before the expiry of the period of the agreement was unjustified and the plaintiff was entitled to damages for such wrongful cancellation besides the return of the amount deposited with interest.

7. The High Court in appeal took a different view. It went elaborately into the question of the alleged defect in the quality of plywood panels, etc., supplied by the T.P.I and came to the conclusion that it was not possible to hold that the panels and other products manufactured by the T.P.I were below the standard prescribed for or were of inferior quality. According to the High Court all that the plaintiff had been able to establish was that for a short period K.D.H.P. did not place orders with T.P. I. and resumed placing orders with them after an inspection. The High Court held that this by itself did not prove conclusively that the sales fell off on account of defect in the quality of the goods of T.P.I particularly in view of the fact that the area in which the agency was operative was a large one and K.D.H.P. were not the only customers of the products of T. P.I. in the said area. The correspondence referred to be the High Court led it to conclude that though there might have been some hesitation on the part of the K.D.H.P. to go in for the article manufactured by T.P.I that fact by itself would not justify the plaintiff's failure to fulfil its obligations under Clause 12 of the agreement. The High Court was not satisfied that the fall off in the sales for the third year to a figure well below Rs. 5 lakhs was attributable to any default on the part of the Government in maintaining the standard prescribed. It also held that the evidence adduced in the case showed that the plaintiff did not make any steady effort to promote the sale of the products of T.P.I and this failure on its part constituted sufficient cause justifying the termination of the agency by the defendant. However, inasmuch as the defendant had not preferred any appeal against the rejection of its to a set off

claim to a set off of Rs. 6,890-0-6 as on March 31, 1954, against the security deposit negatived by the Trial Court, the High Court found the plaintiff entitled to a decree for Rs. 10,750/- with interest at 3% from January 24, 1955. On the question of costs the High Court held that the parties were entitled to pay and receive costs in proportion to their success and failure both the courts.

8. There can be no dispute that in order to succeed in its claim to damages the plaintiff must establish that the cancellation of the agreement before the expiry of the period fixed was wrongful. Clause 13 of the agreement undoubtedly empowered the defendant to terminate the agency in case of appreciable shortfall in the guaranteed annual sale of products worth Rs. 5 lakhs in terms of Clause 12. The last mentioned term would not apply inter alia if T.P.I failed to maintain the quality

of its products leading to the buyers such as K.D.H.P. refusing to place orders with T.P.I

9. Counsel for the appellant submitted that the evidence adduced went to prove such refusal and referred us to batches of letters bearing on the question of the defect in the quality of the goods supplied by T.P.I. The exhibits to which our attention was drawn relate solely to the supplies made to K.D.H.P. The first set of exhibits refers to the complaint of a firm in London known as P.R. Buchenan & Co., dated March 6, 1953, to its suppliers from Calcutta, James Finlay & Co., Ltd. enclosing a sample of plywood taken from a chest manufactured out of T.P.I.s' panels. The complaint was that because of the defect in the quality the panel nails had pulled out of some tea chests which required cooping on arrival at London. In forwarding the copy of the letter of complaint to the Chief Conservator of Forests T. P.I. the General Manager of K.D.H.P. commented that "in view of the adverse report received in your plywood I am considering placing my orders elsewhere". The Chief Conservator tried to explain away the defect by saying that in the course of preparation of the plywood panels the glue line had dried up before application of pressure but he had instructed the Manager of T.P.I to be extra careful in selection of plywood so as avoid use of defective panels in future. The Manager of T.P.I did not take the matter lightly and wrote back to the Manager K.D.H.P. on April, 23, 1953, drawing his attention to the fact that the factory of T.P.I had been supplying over 10 lakhs pieces of plywood to K.D.H.P. from 1941 and defects in 2 or 3 chests did not call for any drastic step like diverting orders elsewhere, at the same time offering to replace any panels which might turn out to be defective. The correspondence does not show that the plaintiff was in receipt of any copies of the above correspondence and it was the Manager of the T.P.I who sent a copy of his letter to the plaintiff with a request that the plaintiff should contact Mr. Hill of K.D.H.P. in a diplomatic manner to remove the misunderstanding and to secure continuance of customs. There is no letter on record to show that the threat mentioned in the letter of K.D.H.P, dated April 14, 1953, was ever carried into action. Apparently no fresh orders were coming from the said source as on July 13, 1953, the Manager of T.P.I wrote to the plaintiff referring to large stock of panels of different sizes which had accumulated in the factory and mentioning that no appreciable orders had been received from K.D.H.P for three months although the prior orders had all been executed by April 10, 1953. The plaintiff was requested to procure fresh orders and reference was made to such requests in the past. Nothing tangible appears to have come out as a result of the correspondence which followed and on September 3, 1953, the Manager of T. P.I. wrote to the plaintiff saying that although at a meeting of August 19, 1953, a partner of the plaintiff had promised to contact K.D.H.P. within the month he was still in the dark about efforts made to secure orders from K.D.H.P. The plaintiff was informed of the great accumulation of stocks in the factory and warned that inaction on its part might adversely affect its position as sole agents. The plaintiff's answer, dated September 23, 1953, shows that it had received other letters from the defendant in the past and was only sending an interim reply. There is a reference in this letter to a meeting with someone in authority of K. D.H.P. and to information received that their decision in letter of April 16, could not be revised by the writer hoped to be able to rectify matters on the return of the General Manager of K.D.H.P. to India within about a month. The above letter was followed by a letter of November 27, 1953, from plaintiff to T.P.I to say that the Manager of K.D.H.P. (R. Walker) had agreed to place an order for 33 or 34 thousand sets of panels provided he received a favourable report from his Estates Manager after inspection of T.P.I's panels to make sure that they were of prescribed quality. The letter of December 8, from the plaintiff to the Chief Conservator of Forests shows that K. D.H.P. had placed a large order and it was suggested that the panels should be inspected before despatch by a Government Inspector and that lowest prices available should be charged.

10. In view of the above, it is hardly, necessary to examine the next complaint regarding quality of

panels which appears to have started with the letter of James Finlay & Co., to K. D.H.P. on November 25, 1953. This complaint too was based on the grievance of P. R. Buchanan & Co., to the effect that there had been a number of instances of teas being contaminated by what was believed to be the immaturity of the wood used for chest battens and also by a strong smelling cement used in the manufacture of the plywood panels. It is also to be noted that this complaint was received after the expiry of the third year of plaintiff's agency and cannot have influenced the K.D.H.P. in withdrawing its custom from T.P.I before October 31, 1953. Notwithstanding such complaints, the plaintiff was able to inform the defendant on December 8, 1953, that on its intercession K.D.H.P had placed an order for 36,700 sets of plywood panels but the suppliers should take precaution in ensuring the despatch of goods of required standard to avoid complaints from overseas buyers.

11. In our view, the absence of orders from K.D.H.P. is very satisfactorily accounted for by the plaintiff's dealing with K.D.H.P. which is illustrated by certain documents bearing dates between April 25, 1953 and June 18, 1953. Ext. P-103, dated April 25, addressed by K.D.H.P. to the plaintiff contains an order for 3,100 sets battens urgently required without any stipulation as to the source of supply and only requiring inspection of 5% of panels by a Government Inspector. The price seems to be above that of T.P.I Ext. P-102 is a similar letter covering an order of 9,000 complete chests the plaintiff being asked to commence manufacture for immediate supply. In neither of those letters is there any ban placed on supply of T.P.I's goods. There are other letters of this type with orders for panels or chests written on June 3 and June 9, 1953. The last letter of the series, dated June 18, 1953, contains an order for a fairly large quantity of goods again without any interdict as to supply from T.P.I

12. It would however still have been open to the plaintiff to prove the attitude of K.D.H.P. about supplies originating from T.P.I by calling evidence to that effect. Neither R. Walker, the Manager who was supposed to have issued a direction against supplies for T.P.I nor Blair Hill who was filling the role of the Manager in Walker's absence was examined in the case. There was no record produced from the office of K.D. H.P. to show that such a ban had been noted or registered. As already stated there is no letter from K.D.H.P. to the plaintiff intimating that goods of T.P.I's manufacture were not to be supplied. The letters evidence only the possibility of stoppage of orders.

13. The only witness relied on by the plaintiff in this connection, was one Daniel who was Headclerk to the Traffic Manager of K.D.H.P. from 1944 to 1954. He claimed to have been in charge of the transport department of the company for 32 years and on the strength thereof had the temerity to say that the company had stopped placing orders with T.P.I because of adverse reports from the company's customers. He admitted that such decision had been taken by R. Walker who had been away from Indian for six months but added that nobody could go against Walker's decision in his absence.

14. In our view the evidence of Daniel to the above effect is wholly unconvincing. A head clerk of a traffic department is hardly a person likely to have personal knowledge of such a vital decision taken by the General Manager of a company which managed a very large number of tea estates. Besides, the orders placed by K.D.H.P. between April and June, 1953, betray that they were not very selective over the source of supply and trusted the plaintiff to secure panels for them and even manufacture chests itself. We cannot bring ourselves to hold that the plaintiff if so minded could not have placed the orders of K.D.H.P. with the defendant. The evidence leads us to the conclusion that the plaintiff was alone responsible for securing fairly substantial orders from K.D.H.P. in the third year of the agency and placing them elsewhere without any justifiable cause.

15. In the result, we must hold that it was the plaintiff who was responsible for breach of the obligations imposed under Clause 12 of the agreement and the defendant's termination of the agency agreement was not wrongful. The appeal therefore fails and is dismissed subject to the modification mentioned below. The trial Judge had allowed interest on the sum of Rs. 10,000/- at 3% up to the date of the decree and thereafter at 6%. The High Court did not deal with the question but allowed post decree interest at 3% only in modification of the Trial Court's decree. In our view the appellant should be allowed interest at 6% after the date of the decree of the Trial Court and at the rate of 3% prior to that date. The appellant will pay the costs of the respondent of this appeal but we do not propose to modify the order for costs made by the High Court.

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