Diva XL Pte Ltd v Lalasis Trading Pte Ltd
[2003] SGHC 97

Case Number : Suit 929/2002

Decision Date : 25 April 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Philip Jeyaretnam SC (Rodyk & Davidson) for the plaintiff; Goh Peng Fong (Rodyk & Davidson) for the plaintiff; S Karthikeyan (Karthikeyan & Co) for the defendant

Parties : Diva XL Pte Ltd — Lalasis Trading Pte Ltd

Contract – Sale of goods – Non-delivery of goods – Claim for refund of deposit paid.

1 The parties are private limited companies carrying on the business of trading in computer products. The plaintiff is claiming the refund of deposits paid by it to the defendant in respect of two contracts for the purchase of a product described as 'Pentium P4 CPU' (the CPU's, for short). It is also claiming damages for breach of contract. The formation and existence of the two contracts were largely not disputed.

2 The first contract was for the purchase of 3,000 pieces of CPU's. This contract was made on 10 June 2002 as evidenced by a purchase order of that date. It was not disputed that the goods under this contract would be delivered on 12 June 2002 but delivery was delayed and subsequently only partly fulfilled. The purchase price was US$187 per CPU or a total of US$577,830 (converted to S$1,037,204.85 by agreement between the parties). It was not disputed that a sum of S$950,000 was received by the defendant with $100,000 made on 11 June 2002 and the balance $850,000 on 12 June 2002. What the defendant denies is that the entire sum was a deposit for the purchase price. The plaintiff alleged that the first contract called for payment by way of cash or telegraphic transfer on delivery of goods. However, the defendant requested for a pre-delivery payment to facilitate delivery from the defendant's own supplier. The deposits were thus paid by the plaintiff in order to oblige and help the defendant. Eventually, only 2000 pieces of the CPU's under the first contract were delivered.

3 The second contract was for 2,880 CPU's as evidenced by the purchase order dated 25 June 2002. The purchase price was lower in this contract, namely US$186. The goods were to be delivered on 28 June 2002. None of the CPU's under the second contract were delivered. The plaintiff had paid a sum of $250,000 by way of deposit for this contract. The defendant refunded two sums of money to the plaintiff one was S$100,000 and the other US$15,000 (about S$26,400). The plaintiff's principal witness, Mirthipati Subramanyam ('Subbu') explained that the plaintiff ordered more CPU's in spite of the delay in delivery under the first contract because the plaintiff had a ready buyer and the price quoted for the second contract was lower. I accept Subbu's explanation for reasons I shall elaborate shortly.

4 Thus, in this suit the plaintiff sought the refund of S$258,530.10 being the difference between the price of the 2,000 CPU's delivered and the deposit of S$950,000 under the first contract. It is also claiming US$4,000 by way of damages for breach of contract. I shall revert to the issue of damages shortly. The plaintiff is also claiming a refund of S$123,600 being the difference between the deposit of $250,000 and the partial refund of S$126,400 (comprising the US$15,000 and S$100,000) under the second contract. It is also claiming US$43,200 as damages for breach of contract. I shall deal with the issue of damages here together with that under the first contract.

5 The main issue at trial revolved around the reason why the defendant denies that it is obliged to

refund the sums of $258,530 and $126,400 respectively, under the two contracts. To understand that ground, it is essential to determine how the contracts came to be made.

6 The plaintiff and defendant had only one previous dealing prior to the two contracts in question. That other deal concerned the sale of some blenders by the defendant to the plaintiff in March 2002. That deal was brought about through one Rajesh Kumar ('Kumar'), the general manager of the plaintiff. At the material time Kumar reports to Subbu who is the President and Chief Financial Officer of the plaintiff. Prior to joining the plaintiff, Kumar ran his own business under the name of Fifth Avenue Electronics Pte Ltd ('Fifth Avenue').

7 The present contracts in dispute concerned three principal persons namely, Kumar and Subbu from the plaintiff and one Goenka Mahesh Kumar ('Goenka') for the defendant. Goenka, who is a director and shareholder of the defendant, also carries on a sole proprietorship business under the name of Zirco International. Zirco had dealt with Fifth Avenue previously through Kumar. Goenka testified that Fifth Avenue owed Zirco over $300,000.

8 It was Goenka's evidence that the two contracts in question in this action between the plaintiff and the defendant were concluded between Kumar on the plaintiff's behalf, and himself (Goenka), on the defendant's behalf. The essence of Goenka's evidence, and thus the defendant's case, was that the first contract was made on the condition that Kumar will first discharge all debts owed by Fifth Avenue to Zirco. He testified that the total amount owed by Fifth Avenue to Zirco then was $348,988.20. He said that the sum of $100,000 paid (in cash) on 11 June 2002 and $248,988.20 out of the sum of $850,000 paid (in cash) on 12 June 2000 were used to pay the debt by Fifth Avenue to Zirco. Consequently, according to Goenka, out of the $950,000 received over the two days, only $601,011.80 was payment towards the first contract.

9 Goenka's evidence in respect of the $100,000 payment on 11 June 2002 was that Subbu and Kumar visited him at his office, and after exchanging business cards, Subbu left. Kumar then took out $100,000 and paid it over saying that it was part payment of Fifth Avenue's debt to Zirco. Goenka's evidence in respect of the $850,000 payment on 12 June 2002 was that Subbu and Kumar arrived at the Robinson Road branch of the Bank of India as arranged. He stated:

> 'As Kumar had previously said he would be paying the balance of the Zirco account I accepted the sum of $850,000 as follows:
>
> (a) $248,988.20 being payment of the balance due under the account with Zirco; and
>
> (b) $601,011.80 being part payment towards the purchase under invoice LLS/5130/2002/SIN @ US$187 per piece converted at the rate of 1.7950 per US dollar.'

10 The plaintiff disputes Goenka's evidence. Subbu, whose evidence I find to be more probable than that of Goenka's, said that it was he, and not Kumar, who handed the $100,000 over to Goenka on 11 June 2002. He said it was also he, and not Kumar, who paid the $850,000 to Goenka on 12 June 2002.

11 Neither party called Kumar as a witness. There was no dispute that Kumar, no longer the plaintiff's employee when the trial began, was at all material times available to be called by either party. Mr Karthikeyan, counsel for the defendant, submitted that the onus to call Kumar as a witness lay with the plaintiff and that the court should draw an adverse inference against the plaintiff for their failure to call Kumar. Mr Jeyaretnam in reply relied on a criminal case *Satli bin Masot v Public Prosecutor* [1999] 2 SLR 637 for the proposition that the court should not draw an adverse inference

where the absence of the witness does not leave a gap in the prosecution case. *Satli* was concerned with the prosecution's failure to call certain witnesses and the consequent duty of the court under s 116. I would prefer not to rely on precedents from criminal cases in civil trials because the burden of proof is not the same, and although the enunciated principles may appear to have universal application, the entire case would normally have to be read since it provides the context in which the principle, or interpretation of a principle or rule, is embedded. I would thus consider the relevant evidential provision directly, and that is s 116 of the Evidence Act, Ch 97. Section 116 (which does not use the term 'drawing an adverse inference') reads as follows:

> 'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.'

12 Illustration (g) provides that the court may presume that 'evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.' Mr Jeyaretnam argued that Kumar was not a crucial witness to the plaintiff's case, and indeed so. The plaintiff's key witness was Subbu. It was the defendant who says that the money was handed to Goenka. In these circumstances, who ought to call Kumar? Before answering that question, it is important to observe that the purpose of s 116 is to permit, rather than mandate, the presumption of facts under certain circumstances, for there may be cases in which there would be compelling reasons why such presumptions should not be drawn even though the common course of natural events may ostensibly warrant it, or, in the case of illustration (g), some reasonable explanation might be given as to why a particular evidence or witness was not produced when it or he could be produced.

13 If one examines illustration (g) to s 116, it will be clear that the test is largely dependant on the answer to the question, who requires Kumar's evidence more? If the plaintiff calls Kumar, his evidence will be to corroborate Subbu who says that Kumar was not involved in the payment of money to Goenka. We can test this approach in another way – that is, by assuming that the plaintiff had conceded that it was Kumar, not Subbu who handed over the money to Goenka, the plaintiff's case would not have been adversely affected. On the other hand, if the defendant had called Kumar, Kumar will not only have to say that it was he who gave the money to Goenka (a positive act as opposed to an omission if he were to testify for the plaintiff), but more importantly, he would have to testify that Fifth Avenue did in fact owe money to Zirco and that the money he handed to Goenka was to pay Fifth Avenue's debts to Zirco first before appropriating the rest towards payment of the plaintiff's purchase payment tot he defendant. Furthermore, it was obvious to me that all the documentary evidence produced by the defendant to show Kumar's debt to Zirco had no indication that they had been sent to Kumar or Fifth Avenue, or that they had been acknowledged by either. There was, therefore, quite a bit of explanation required from Kumar, especially when the money came from the plaintiff. On the balance, the evidential burden of proving all that lay with the defendant. It is a burden not to be confused with the plaintiff's legal burden of proving that it had paid $950,000 in deposits for goods it did not receive. The defendant does not deny receiving the money. Its case is that it was paid by Kumar and part of it was to be used to discharge the debt of Kumar's company, Fifth Avenue.

14 I hold, therefore, that the plaintiff's case, on the balance, is not affected by Kumar's absence. On the other hand, his absence weakened Goenka's assertion that $348,988.20 was paid to discharge Fifth Avenue's debts to Zirco. The only person who could corroborate that crucial evidence was Kumar himself. I now revert from the evidence that might have been to the evidence that is. There was a dispute as to what the terms of payment were. In this regard, it is clear from the purchase orders and invoices that the payment terms were 'cash on delivery'. The fact that a bank account was provided for payment to be made only meant, without more, that the buyer may pay in advance

into that account. Otherwise, it would be cash on delivery as was the case in the event.

15 Goenka testified that he had scribbled '*Rec'd S$100,000 11/6/02*' on the invoice of 10 June 2002 to indicate receipt of payment from Fifth Avenue to Zirco. I think that Goenka is too experienced a businessman to discharge Kumar's personal debt with so paltry and vague a receipt. I would go further and say that the only reasonable conclusion to be drawn from that scribbled acknowledgement is that it is an acknowledgement of receipt of money in respect of the purchase of goods indicated in that invoice.

16 In respect of the deposit of $850,000, Goenka referred to the handwritten acknowledgement that reads: '*Rcv'd From Diva XL Pte Ltd. Mr Kumar I/C No. 2560700G S$8,50,000*' (sic) to support his story that it was Kumar who handed him the money and, more crucially, that $248,988.20 was to be appropriated to pay Fifth Avenue's debt to Zirco. If I have said that Goenka is too experienced a businessman to endorse the first invoice for the purpose he said it was, then I must add that, equally, he would not, in all probabilities, have made such a vague acknowledgement, twice over. I also find Subbu to be too sensible and experienced to allow a reasonably new employee to carry so much money in cash by himself and then not to check that the money was properly paid over even if he had asked Kumar to deliver the money. If Subbu looked at the two acknowledgements as he surely would have done, he would not have imagined that they signified payment of Kumar's debts. No reasonable person in Subbu's shoes would have drawn such a conclusion.

17 The defendant called three other witnesses but they were either current employees of the defendant or, as is the case of Mr Jalan Mal, a relative (father-in-law) of Goenka. In any event, they presented no sufficient evidence of substance to shake that of Subbu. The defendant had refunded cash in two sums, one in S$100,000 and the other in US$15,000. No credible reason was offered for this except for Goenka to say that Kumar spoke to him everyday to get some money back for 'some very important work'. I agree with Mr Jeyaretnam's submission that it was not a reasonable act in the circumstances. The plaintiff had, in the defendant's view, been in breach for non-payment of a very large sum of money and yet the defendant was happy to return S$100,000 and US$15,000 to it, leaving the defendant to sue for it (as well as the balance unpaid amount).

18 I am thus able to find without much difficulty that Subbu's evidence is the more probable as against all or any of those of the defendant's witnesses. I find, therefore, that the plaintiff had proved its case in respect of the payment of the deposits of $950,000 and $250,000 respectively for the two contracts. There was no question that the goods were not delivered. The issue was whether the defendant was unable to deliver or that the plaintiff refused to accept delivery. The only defence in respect of this issue was Goenka's contention that the defendant was ready to deliver and would have delivered if the plaintiff had made full payment in advance as agreed. I have made the finding that the contracts do not indicate that payment must be made in advance of delivery. Consequently, I find that the defendant had failed to deliver the goods as contracted and accordingly the plaintiff is entitled to the refund of S$382,130.10 after taking into account the part repayment of S$100,000 and US$15,000.

19 Finally, in respect of the plaintiff's claim for damages. The plaintiff would be entitled to damages for breach of contract and the measure would be the difference between the resale price and the contract price. The burden of proof is on the plaintiff but it adduced insufficient evidence of what the resale price was in respect of the first contract. Accordingly, I find that only nominal damages of $100 is to be awarded. In respect of the second contract, I accept Subbu's evidence that the re-sale price was US$203.50. The difference between that and the contract price of US$186 is a total of US$43,200 and I so award that sum as damages for breach of the second contract.

20 The plaintiff's claim is allowed. The defendant is to refund the sum of $384,930 and damages of US$43,200 and S$100. The defendant's counterclaim is dismissed. I will hear parties on costs at a later date.

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