

## IN THE HIGH COURT OF SINDH, KARACHI

IInd Appeal No. 84 of 2011

M/s. AFG International.....*Versus*.....Pakistan Steel Mills Corporation

### **J U D G M E N T**

Date of hearing : 12<sup>th</sup> February, 2018.  
 Date of Judgment : 15<sup>th</sup> May, 2018.  
 Appellant. : Mr. Naeem Suleman, advocate  
 Respondent : Mirza Sarfraz Ahmed, advocate.

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**Mrs. Kausar Sultana Hussain, J:-** This Second Appeal under Section 100 C.P.C. is directed against the judgment dated 31.05.2011 passed by IIIrd Additional District Judge, Malir Karachi, whereby Civil Appeal No. 71 of 2010 was allowed and the order dated 29.05.2010 passed by the learned IInd Senior Civil Judge, Malir Karachi in Civil Suit No. 110 of 2005 was set aside.

2. The facts of the case relevant for the purpose of disposed of this appeal, in brief, are that the respondent filed a Suit for declaration, injunction and recovery of Rs. 10,29,745.80/- being cost for supply of defective quantity Chrome-Magnesite Bricks XMKK-17, inclusive 2% liquidated damages. It was alleged that in the year 2000, the respondent raised indent No. 019569 dated 26.09.2000 inviting tenders on C&F/F.O.R basis for procurement of Chrome-Magnesite Bricks XMKK-17, being used in relining of converter at Steel Making Department (SMD), required likely to 130 tons (on the basis of AAC i.e. 129.117 tons) for the year 2001-2002, in pursuance whereof received tenders from three different bidders/suppliers including the appellant, who are authorized local agent for their principle manufacturer M/s. Sarvesh Refractory private limited India. It is further stated that after scrutiny of tenders of all three firms and also having negotiated with their respective representative, placed purchase order i.e. P.O. No. 12016/CP-2/CT-04 dated 11.07.2001 for supply of total quantity of 130,000 kgs, however, in the first instance, the current established LC was for the shipment of 32,500 kgs under the terms and conditions set forth in the purchase order. As per established LC, the shipment date was 31.08.2001, and the appellant was required to provide NJSP for performance Bank Guarantee (PBG). As per

respondent, the manufacturers/principal of appellant, vide their letter dated 30.08.2001 informed that the shipment could not be effected as per scheduled due to heavy rain and breach of roads in India, and requested for extension of shipment period up to 15.10.2001 without liquidated damages (L.D) charges, which was considered, however, such amendment was issued by the respondent with liquidated damages charges, meanwhile another request was made by the principal of the appellant vide its letter dated 09.10.2001 for further extension of shipment period up to 15.11.2001, so also by the appellant (local agent), vide letter dated 19.10.2001, accordingly under the compelling circumstances, second extension was also granted up to 10.11.2001 with L.D charges. It was alleged that first consignment consisted of 32,500 kgs Chrome-Magnesite Bricks (being one quarter of total tendered quantity) was shipped by the supplier on 10.11.2001 and it was delivered to store (CRB) of the Head Office of the respondent on 16.01.2001 and vide letter dated 08.12.2001 through appellant, Bill of Landing, Guarantee Certificate, Inspection Certificate No. C/933 issued by the Director of a firm viz; M/s. Mitra S.K. private limited dated 07.02.2001 Kolkata-700014 were provided to the respondent. It was further alleged that after having listed the supplied material by the concerned department, it was found not fit for operational requirement and same was rejected, vide Rejection Note No. 020158 dated 18.01.2002 and MRV No. 020118 dated 18.01.2002 on account of its high rate of porosity and that it is not as per given specification. It was alleged that in the aforesaid Warranty Certificate tendered by the principal of the appellant, it was undertaken that they stand Guarantee against pre-mature failure of Bricks due to bad workmanship or improper material and in such cases, they will replace the defective Bricks free of cost within 15 days from the date of receipt of such notice. According to the respondent, vide FAX message, the rejection note was conveyed/informed to the appellant, thereafter, despite a series of correspondence held between the parties, neither the appellant nor their principal supplier managed to replace the defected material, nor in any way compensated the respondent in respect of defected material supplied by them. It was further stated that during the course of a lengthy correspondence, the supplier of the appellant suggested to accept the said material on the basis of price deviation, which was regretted by the respondent purely on

technical grounds and decision was conveyed to the appellant. It was further alleged that in the end, appellant vide their letter dated 29.06.2004 and 26.07.2004 stressed upon respondent to accept the erratic material on price deviation basis at any rate, clearly expressed their inability to get the erratic material replaced from their principal supplier in compliance of the relevant terms of Purchase Order. It was alleged that the last request was also considered, but regretted in the interest of Pakistan Steel. It was alleged that the appellant despite affording extensions and cooperation, neither themselves nor their principal supplier managed to replace the erratic material and after making due adjustment of all adjustable amount as detailed in para-22 of the plaint, a total sum of Rs. 10,29,749.80/- is yet to be recovered from them, whereas, the appellant made appearance and contested the matter by filing written statement, wherein not only denied the claim of the respondent, but also raised preliminary legal objections concerning maintainability of the suit. The appellant had also moved an application under Order VII Rule 11 Read With Section 151 CPC, whereby sought rejection of the plaint on the grounds viz; the suit is barred under Order XXIX CPC being filed by an incompetent person without any authority; for non-joinder of necessary parties viz; M/s. Sarvesh Refractory (Pvt); no cause of action against the appellant as the contract arrived between respondent and company of India M/s. Sarvesh Refractory Pvt. Limited; and that the Court has got no jurisdiction to proceed the matter as the appellant is carrying on business within the jurisdiction of District South. The IInd Senior Civil Judge, Malir Karachi while advertng to application under Order VII Rule 11 CPC rejected the plaint, vide order dated 29.05.2010 on two grounds viz; plaint is time barred under Article 115 of the Limitation Act and it is also hit under Contract Act as respondent failed to implead the principal, and plaint thus not maintainable against agent.

3. Being aggrieved with the said order, an Appeal No. 71 of 2010 was filed before the learned District & Sessions Judge, Malir Karachi on 11.08.2010 by the respondent, wherein objection as to limitation was also raised, in pursuance whereof an application under Section 5 of Limitation Act for condonation of delay in filing the appeal was sought on 02.09.2010, which was resisted by the respondent's side

through Counter Affidavit coupled with an application under Section 151 CPC praying therein to dismiss the appeal as it is time barred.

4. The learned counsel appeared on behalf of the appellant submitted that learned first Appellate Court concerned was not justified in passing the impugned judgment, committed flagrant illegality and did not take into consideration that Civil Appeal No. 71 of 2010 is time barred, even preferred without supporting application for condonation of delay. He further submitted that later-on respondent filed application for condonation of delay on 03.09.2010. He has further pointed out that learned first Appellate Court without discussing the application for condonation of delay in the impugned judgment, allowed the appeal, which is a sheer illegality. Learned counsel further submitted that the plea took by the respondent in the application for condonation of delay that on 28.05.2010, it was last working day of subordinate Court is not a true statement as subordinate Courts remained opened till 31.05.2010 before summer vacations. Learned counsel further pointed out that on 28.05.2010 counsels for both the parties were in attendance, when the matter was adjourned to 29.05.2010, as such the plea of having no knowledge about pronouncement of order by the learned trial Court on 29.05.2010 is incorrect and has been taken just to deviate the bar of limitation. He has further submitted that Civil Appeal before the first Appellate Court ought to have been dismissed being time barred, on the contrary the said point was completely ignored, which sole ground renders the impugned judgment nullity in law. He has relied on

- i. 2003 SCMR 604 (Zulfiqar Ali & others V/s K. Akbar Khan & others)
- ii. 2008 SCMR 284 (Messrs NIDA-E-MILLAT, Lahore V/s Commissioner of Income Tax, Zone-1, Lahore)
- iii. PLJ 1985 Lahore 124 (Abdul Rehman @ Bhiku and another V/s Mukhtar Ahmed & another)
- iv. 2014 MLD 1255 (Sindh) (Javed Ahmed Ansari V/s. Malir Education Society).
- v. 2014 CLD 1499 (Sindh) (Messrs Habib Bank LTD V/s Mahmood Alam Sherani & another).
- vi. 1999 PLC (C.S) 1316 (National Bank of Pakistan V/s Anwarul Haq).
- vii. 2014 CLC 1318 (Sindh) (Muhammad Essa V/s Ali Muhammad & 4 others).

5. In rebuttal the learned counsel for respondent referred the above submissions and contended that in fact Civil Appeal No. 71 of 2010 before learned first Appellate Court was not time barred as Suit No. 110 of 2005 was fixed for order at the verge of summer vacation i.e. on 28.05.2010, but no order was passed by the learned trial Court. He further submitted that since it was last day of Advocate for respondent in Malir Courts, hence it was asked by the Reader of the Court to get next date on some other day, so assuming the same after summer vacation. He further submitted that on 01.07.2010 when the next date of the appeal was enquired, it was informed that suit has been dismissed on 29.05.2010. He further submitted that on the day viz; 01.07.2010, an application for certified copy was moved and certified true copies were supplied on 16.07.2010, thereafter, the appeal before appellate forum was filed after 25 days on 11.08.2010 within prescribed period of limitation. Learned counsel further submitted that there was no intention or deliberate delay and confusion whatsoever appeared just belongs to the order in Suit No. 110 of 2005 was passed on some, un-conveyed date.

6. Submissions put forward by the parties have been considered the order and judgment passed by the Courts supra have been examined, in perspective of the law laid down by the superior Courts, including the citations referred by counsel for both the parties. On examination of record it reveals that the learned Senior Civil Judge, Malir Karachi had rejected the plaint of the respondent/plaintiff as barred by law of limitation. Per learned Judge a suit for compensation for the breach of any contract is to be brought within the period of three years as provided in Article 115 of the Limitation Act. The learned Senior Civil Judge, while deciding the application under Order VII Rule 11 CPC filed by the appellant/defendant opined that in the present case, the respondent/plaintiff have alleged that the defective material was supplied and delivered at the Head Office of the respondent/plaintiff's corporation on 16<sup>th</sup> January, 2002, therefore it was found as the one which did not fulfill the operational requirement as per given specification, hence respondent/plaintiff had three years time from the month of January, 2002 to file the present suit, whereas they have filed the plaint on 14<sup>th</sup> May, 2005, which is barred by the law of limitation.

7. The learned appellate court in its judgment, against the impugned order passed by the learned Senior Civil Judge, Malir Karachi discussed supra referred a letter (Ex-P/21) annexed with the plaint reflects that the appellant/respondent had written a letter in respect of reference dated 14.02.2002 to the General Manager Purchase , Pakistan Steel Mills Limited, Bin Qasim (respondent/appellant), wherein they referred the letter of the appellant/respondent dated 06.02.2002 regarding rejection of material supplied. They offered to the respondent/appellant for re-inspection of the supplied material by the inspection department of the respondent/appellant in order to check quality of material on cost of the appellant/respondent. The respondent/appellant has clearly mentioned in its plaint that during the course of lengthy correspondence, the supplier of the appellant/respondent suggested to respondent/appellant for accepting erratic material on the basis of price deviation but the said proposal of appellant/respondent after thoroughly consideration was regretted on technical grounds, inspite of that the appellant/respondent failed in performing their part in accordance with terms and conditions of purchase order. The contents of the plaint further reflects that appellant/respondent vide their letters dated 29.06.2004 and 26.07.2004 stressed upon respondent/appellant to accept the erratic material on price deviation basis at any rate and clearly expressed their inability to get the erratic material replaced from their principle supplier in compliance of the relevant terms of purchase order. Continuous correspondence between the appellant/respondent and respondent/appellant since the beginning i.e. January, 2002 to July, 2004 proved that it was series/bundle of facts and cause of action therefore, law of limitation is not applicable in the case in hand and the learned appellate court i.e. IIIrd Additional District Judge, Malir Karachi has rightly observed that the respondent/appellant had filed their suit within stipulated period of three years as provided in Article 115 of the Limitation Act, hence it could not be rejected under Order VII Rule 11 CPC.

8. The appellant/respondent has raised further plea in this IInd Appeal that the trial Court passed an order on 29.09.2010, but the appellant/respondent filed Civil Appeal before the learned District & Sessions Judge, Malir Karachi after 58 days of the

order as such it was barred by the Limitation Act, as it was filed beyond the period of 30 days as provided in law, but the learned Appellate Court after hearing the parties, vide judgment dated 30.05.2011 allowed the said appeal without discussing the issues of limitation, while once the matter regarding time calculation then each and every day of delay has to be explained. Per learned counsel for appellant/respondent the learned trial Court passed an order on application of the appellant/respondent under Order VII Rule 11 CPC on 29.05.2010, appellant/respondent applied for certified copy on 01.07.2010, obtained the certified copy on 14.07.2010 and filed appeal on 11.08.2010 after passing almost two months.

9. Before making discussion of the point of filing appeal before learned trial/appellate court, I deem it fit and proper to reproduce here section 4 of the Limitation Act, 1908 as under :-

**Section 4** :..... *“Where court is closed when period expires, where the period of limitation prescribed for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day that court reopens.”*

10. From bare reading of above mentioned law provided in Section 4 of the Act, it is clear that this section is based on the general principle of law enunciated by the Maximus “Lex non cogit--- a dispossibilia” the law does not compel a man to do that which he cannot possibly perform and “Actus Curiae neminem gravabit” an act of the court shall prejudice no man (1980 SCMR 375). This section provides that where the period prescribed expires on a day when the court is closed notwithstanding that fact, the application be made on the day that the Court reopens, so that there is nothing in the section, which alters the length of the prescribed period (1989 CLC 1033). Provision of Section 4 of the Limitation Act, does not deprive the litigants of the benefit of excluding the period of vacations in computing the time of litigants to file a petition during the summer vacations, the litigants are entitled to the benefit of section 4 of the Limitation Act and can exclude the period of vacation while computing the time of limitation for filing suit/appeal. In the instant matter the respondent/appellant has filed an appeal before learned District & Sessions Judge, Malir Karachi on 11.08.2010 against the order of the trial Court dated 29.05.2010 and for obtaining certified copy of that order the learned counsel for

respondent/appellant applied on 01.07.2010 after summer vacations and he obtained such copy on 14.07.2010, while computing the time of limitation for filing appeal it revealed that the learned counsel for respondent/appellant has filed appeal against order of the learned trial Court dated 29.05.2010 within the prescribed period of 30 days as the during summer vacations started from 1st June, 2010 and ending till 30<sup>th</sup> June, 2010, the respondent/appellant was entitled under Section 4 of the Limitation Act to avail benefit of vacations, the period of obtaining copy of judgment/order is excluded to the prescribed period. The respondent/appellant as such filed appeal before learned Ist Appellate Court after 25 days of the order of trial Court, hence the appeal of the respondent/appellant was thus filed within prescribed period. The instant IInd Appeal filed by the appellant/respondent before this Court against the impugned order of first appellate Court dated 30.05.2011 is neither against the law nor any substantial error or procedural defect has occurred and no material point of law has been left undecided, therefore, the present IInd Appeal having no merits is hereby dismissed on merits with no order as to cost. Order accordingly.

**J U D G E**