Thyssen Hynnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd [2002] SGHC 21

Case Number : Suit 766/2001/K, RA 200/2001

Decision Date : 04 February 2002

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Mark Lim (Wong & Leow) for the plaintiff; Loo Dip Seng (Ang & Partners) for the defendant

Parties : Thyssen Hynnebeck Singapore Pte Ltd — TTJ Civil Engineering Pte Ltd

Judgment

GROUNDS OF DECISION

1. The plaintiff and the defendant are both in the construction industry. In 1998, the defendant obtained a sub-contract in respect of part of the work for a project relating to the construction of a depot for the Singapore Mass Rapid Transit System North East line ('the project'). The project involved the erection of a large number of concrete beams and columns over a large area. In September 1998, the parties entered into a contract whereby the plaintiff agreed to sell and the defendant agreed to purchase the plaintiff's formwork system for use in the construction of the project.

2. In July 2001, the plaintiff filed this action pursuant to which it claimed from the defendant the following:

> (a) the sum of $1,032,987 in respect of the outstanding purchase price of formwork supplied;
>
> (b) $339,460.19 as compensation for formwork which had not been returned;
>
> (c) $270,741.68 as compensation for damaged formwork; and
>
> (d) $895,700.77 as the cost of additional material supplied.

In due course, the defendant filed a defence and counterclaim whereunder it claimed the sum of $308,116.26 in respect of what it considered to be overpayment to the plaintiff as well as costs which it incurred by reason of the plaintiff's breach of contract.

3. The plaintiff subsequently filed an application for summary judgment. The defendant resisted this application successfully and was given unconditional leave to defend. The plaintiff appealed. I heard the appeal and allowed it, in part. I ordered that the plaintiff be entitled to enter interlocutory judgment in respect of the formwork which had not been returned by the defendant. Damages for this loss were to be assessed. The defendant has appealed.

The contract

4. The contract was not the normal contract for sale of goods. Although it started by stating that the plaintiff had agreed to sell and the defendant had agreed to buy what was described as the 'THYSSEN HUNNEBECK FORMWORK SYSTEM for Refurbished KST Table Form and Refurbished Manto

Column Form', and set out the lump sum price payable for the same (S$3,000,000 plus GST) it then contained a buy back guarantee. This read as follows:

> '1.2 BUY BACK PRICE
>
> The Buyer [the defendant] guarantees to sell-back and the Seller [the plaintiff] agrees to buy-back 40% of all standard sale equipment from the Buyer as follows:
>
> | | |
> |---|---|
> | Lump Sum Sales Price | S$3,000,000.00 |
> | Less Plywood Sales Price | S$ 300,000.00 |
> | Value of Standard Equipment | S$2,700,000.00 |
> | Value of Buy-Back @40% | S$1,080,000.00 |
> | Value of Equipment after buy back | S$1,620,000.00 |
> | Add in Plywood | S$ 300,000.00 |
> | Buyer pays | S$1,920,000.00 |
>
> *This Buy-back Price will be subject to variation due to lost o r damaged equipment. The Seller will be entitled to compensation for the cost of lost equipment as per Appendix B, C, & D (refer to Buy-Back Terms & Conditions Appendix A).'

It should also be noted that under clause 6, payment for the formwork had to be made upon delivery of the same and that the amount of the payment was the net value after deduction of the buy-back price. Thus, in the first instance, the plaintiff would receive only the ultimate price of $1,920,000 and not the original lump sum price of $3,000,000.

5. Under clause 2 of the contract, the parties agreed on the area of formwork to be delivered in respect of each type to be supplied. The plaintiff also agreed under clause 2.3 to supply the defendant with additional formwork on loan without rental charges in the event that acceleration of the project was required provided that the defendant gave the plaintiff four weeks advance written notice. It was specifically provided that if loan equipment was lost, the plaintiff would be compensated for the lost of the equipment in the manner set out in Appendices B, C and D of the contract.

6. There were also clauses in the contract relating to the fabrication of the formwork. Under clause 3 the plaintiff was obliged to provide the defendant with all necessary shop drawings for the first application of the materials related to the system formwork. It had also to provide two site supervisors at the project site for a period of six months for the purpose of assembly, erection and operation of the system formwork. Under clause 9 it was specified that the defendant was to provide adequate labourers/site personnel who were to liase closely with the plaintiff's site supervisor during the fabrication, erection and dismantling of the formwork on site.

Parties' contentions

7. In the first affidavit filed on behalf of the plaintiff in support of its order 14 application, its general manager, Mr Prins, dealt briefly with the claim for lost formwork. He pointed out that under clause 1.2

of the contract, the plaintiff was entitled to compensation for the cost of lost formwork as set out in the Appendices to the contract. He went on to assert that the plaintiff was entitled to compensation of $339,460.19 (inclusive of GST) for the cost of lost formwork and referred to a schedule annexed to his affidavit. This schedule was a document prepared by the plaintiff which contained very brief details of the type of formwork lost together with the cost of the same. Nine types of formwork were specified but there were no details of the number of individual pieces lost nor the total area of the lost pieces.

8. In 22 and 23 of its defence and counterclaim, the defendant had asserted that under the terms of the contract, the plaintiff was obliged to fabricate the formwork and/or supply the formwork in pre-assembled form ready for use by the defendant. In breach of such obligation, the plaintiff failed to fabricate the formwork and/or supply it in pre-assembled form. Due to the plaintiff's said breach of contract, many of the materials and items supplied had to be cut and consumed in the fabrication and assembly undertaken by the defendant. Accordingly, the quantities of the materials returned could not tally with the quantities supplied. The defendant asserted that the non-return of formwork was therefore due to the plaintiff's own breach of contract and the plaintiff's claim was not maintainable. This assertion was reiterated in the affidavit filed by Mr Teo Hock Chwee, the defendant's managing director, in the order 14 proceedings.

9. Mr Prins replied to Mr Teo's affidavit. He disputed the assertion that the plaintiff had any obligation to fabricate the formwork and/or supply it in pre-assembled form as alleged. He said that it was not possible to pre-assemble the formwork and then take it to the construction site because of the sheer size of the formwork. There was, in fact, a designated area within the construction site for fabrication of the formwork. Mr Prins pointed out that under clause 3 of the contract, the plaintiff's obligation was to provide two site supervisors to supervise the assembly, erection and operation of the formwork on site. He also said that although the plaintiff gave the defendant a quotation of $2,100,000 (sale price less buy-back price) for the supply of formwork, the defendant had itself given a much higher quotation for formwork to the main contractor. The amount quoted by the defendant was $8,851,229. Mr Prins claimed that the higher quotation showed that the defendant knew full well from the onset that it was the defendant's obligation to fabricate the formwork.

10. In a further affidavit, Mr Prins elaborated on his assertion that it was impossible to pre-assemble the formwork. He stated in paragraphs 9 and 10 of his third affidavit that:

> '9. … Due to the height of the tables required, the KST Table Form used on this project was of the fixed leg type (as opposed to folding leg type). The pre-assembled KST Table Forms are several storeys high, as can be seen from the photographs annexed hereto and exhibited as '**MFP-17**'. It would not be possible to transport these to the construction site and the formwork has to be pre-fabricated on site in the configuration required, which would normally consist of six (6) legs along with KST heads and a flat table fixed to the top.
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> 10. For the record, it should be noted that in many formwork systems such as the plaintiff's Manto column forms, the moulds for the concrete are assembled before each separate casting. The speciality of the plaintiff's KST Table Form System is that the table is pre-assembled out of a mixture of steel and timber components to form the finished table shape. These pre-assembled tables are then joined together to form the support of the slab table to be cast. After casting of the concrete slab, the tables are then separated and moved to the next casting area, and they are continuously used in their pre-assembled form.'

Reasons

11. I accepted the plaintiff's submission that the defendant had no ground on which to assert that the plaintiff had to pre-assemble the formwork before delivering it to the site. The photographs annexed to Mr Prins' affidavit showed the massive nature of the formwork once assembled. The parties could not have contemplated any pre-assembly of this formwork. The plaintiff's obligation was to supply the components of its formwork system and the defendant then had to assemble these components into the structures required for the construction of the project. That this was so was made quite clear by the contract which obliged the defendant to provide sufficient labour for the assembly and also required the plaintiff to have two supervisors on site for a period of six months. If the assembly was to take place prior to delivery there would have been no need for the plaintiff's supervisors to go to the site at all let alone for such a long period.

12. It was also provided in the contract that the defendant was to be responsible for the maintenance of the equipment during the construction period and to keep it in good working condition. On completion of the project, the defendant was responsible for the dismantling and rounding up of all the parts and bringing them back to street level. These provisions of the contract were also contrary to the defendant's submission about pre-assembly. If the defendant had nothing to do with the assembly of the formwork and it could be delivered in pre-assembled condition, it did not need to have any responsibility for dismantling since such pre-assembled formwork could also be redelivered in the same condition.

13. The defendant had admitted that it had, in putting pieces of the formwork together for the purposes of the project, cut and consumed parts of the formwork in this fabrication and assembly work. It had further admitted that accordingly the quantities of the materials returned could not tally with the quantities supplied. The defendant was the purchaser of the formwork. If it wanted to rely on the resale provisions in the contract, it had to be able to redeliver what it had purchased originally. It could not do so. It was contemplated in the contract that it might not be able to do so and the defendant agreed that in that event it would pay for those parts of the formwork that it could not redeliver.

14. In my opinion, the defendant had no defence in principle to the plaintiff's claim for the cost of formwork that was not redelivered and thus resold to the plaintiff. The only reason why I gave interlocutory judgment to the plaintiff was that the plaintiff had not sufficiently proved the calculation of its loss at $339,460.19. I considered that it should at an assessment hearing produce the delivery orders and the redelivery orders respectively and then quantify the number and type of pieces of formwork which had not been redelivered so that the court and the parties could calculate the amount due in respect of each of the lost pieces. The defendant would then also have the opportunity of challenging the plaintiff's calculations and/or documents to show that more pieces had been returned than the plaintiff had given credit for.

Sgd:

JUDITH PRAKASH
JUDGE

This does not merit reporting.