

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.282/2001**

% **15th March, 2011**

M/S. SANMATI RICE (P) LTD. Appellant
Through: Ms. Ritu Rastogi, Advocate

VERSUS

SUSHIL RAJA Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 21st March, 2001 whereby the suit of the respondent/plaintiff for damages was decreed on the ground that the appellant allegedly supplied rice which was defective, that is, not as per the sample agreed to between the parties, and also that the weight of the bags in which rice was supplied was less than the stated weight.

2. The facts of the case are that the respondent/plaintiff placed an order upon the appellant/defendant for supply of rice F.O.R. Kandla, Gujarat. The rice was to be non-basmati par-boiled rice, also called sela rice. The rice was supplied by the appellant/defendant to the respondent/plaintiff at Kandla on 27.10.1996 and 29.10.1996. This rice was then exported by the respondent/plaintiff to Dubai, UAE. The respondent/plaintiff contended that the buyer complained that the rice was not of a good quality and also that the quantity of rice in the bags was insufficient. The respondent/plaintiff, therefore, contended that the foreign buyer, M/s. Adil Ahmed Food Stuffs rejected the consignment which resulted in loss to the respondent/plaintiff. The respondent/plaintiff also claimed charges for his trip to UAE.

3. The appellant/defendant appeared and contested the suit. It was stated that the suit was a counter blast to the case filed against the respondent/plaintiff for dishonour of cheques as also another criminal complaint filed against the respondent/plaintiff. It was denied that the rice supplied to the respondent/plaintiff was defective. It was contended that the rice which was supplied was duly checked by the representative of the respondent/plaintiff, one Sh. Ashok Kumar and the stand therefore that the rice was defective was denied. It was also denied that there was deficiency in weight in the rice bags supplied.

4. The Trial Court after the pleadings were complete, framed the following issues:-

“1. Whether this Court has no jurisdiction to try and entertain the present suit? OPD

2. Whether the suit is bad for lack of cause of action? OPD

3. Whether the suit is bad on the account of concealment of the material facts? OPD

4. Whether the plaintiff is entitled for the recovery of money on the account of damages, if so what sum? OPP

5. Whether the plaintiff is entitled for interest, if so what rate and from which period? OPP

6. RELIEF.”

5. The Trial Court while dealing with issue nos. 4 and 5 held that the appellant/defendant was guilty of supply of defective rice and therefore granted damages. The trial Court however did not grant the expenses of the trip of the respondent/plaintiff to UAE. The relevant findings of the Trial Court in this regard read as under:-

“Issue nos. 4 & 5

Whether the plaintiff is entitled for the recovery of money on the account of damages, if so what sum? OPP

&

Whether the plaintiff is entitled for the interest, if so, at what rate and for which period? OPP

Issue no.4 and 5 are co-related to each other so I shall decide both the issues together simultaneously. The onus to prove these two issues are on the plaintiff and Id. counsel for the plaintiff has argued that in consideration of the testimony of

both the witnesses PW1 and DW1 plaintiff is entitled for the recovery of suit amount and he has drawn the attention of the court during the course of argument on para 8,10,11,12, 13 and 14 and exhibited documents from ex.PW1/1 to ex.PW1/4 and stated that plaintiff is entitled to recover the suit amount at the rate of 18% P.A. which is quite reasonable in the business dealing and he relied judgments AIR 1974 Mysur 20 and AIR 1970 Calcutta 142. On the other hand counsel for the defendant has stated that the plaintiff placed order to the defendant nor as broker and he has drawn the attention on the ex.DA and cross examination of PW1 and stated that as per ex.PW1/1 document dt.3/12/96 and he has also drawn the attention of the court on para 8 of the WS and stated that a fax message was sent to the defendant on 14/11/96 stated that 5000 US dollars will be transfer on 25/11/96 to the bank of defendant. The correspondence itself shows that the quality and quantity of the supply was correct, because if there was any deficiency he should not have sent the fax message. He also drawn the attention of the prayer clause of the plaint and stated that the plaintiff is not entitled any suit amount when he is not entitled any suit amount no question arises for the interest. In consideration of the submissions made by the counsel I also perused the file and testimony of both the witnesses PW1 and DW1 but the plaintiff has failed to prove the expenses spent by him as Rs.1,05,689/- on account of AIR fair, lodging boarding, tele-communication etc. besides these expenses which the plaintiff claimed in para 9 of the plaint but as per the exhibited documents ex.PW1/1 i.e. letter of Fadal Akel Trading Est. in which it is written that the net weight of each bag 46.84 kg. It is also written that gross weight of each bag 47.84 kg. and plaintiff has proved vide ex.PW1/2 that the goods received by the foreigner buyers was entirely different to the order and it is also written in ex.PW1/2 not only bags are short but weight of each bag was less than 50 kg. so it is admitted case of the party that the order was placed by the plaintiff for exporting 214 metric tons for non basmati cella rice to the defendant for Dubai (UAE) and defendant supplied 1234 bags for 50 kg. for export to Dubai (UAE) and he sent goods vide GR 5677 and 5770 dt. 22/10/96 and goods were reached at Kandla Port on 27/8/96 and on 29/10/96 and thereafter the plaintiff received fax message which he has

proved ex.PW1/1 and also received a letter which he has proved ex.PW1/2 and even defendant has not produce persons as alleged by DW1 one Ashok Kumar who was the Manager of Sushil Raja to check the quality and quantity of the rice and signed the bill ex.DA at point A while PW1 has denied the same and stated that Ashok kumar is not the Manager of the plaintiff and he is the man of the defendant so defendant has failed to prove that there is one Ashok Kumar who is the Manager of the plaintiff. So the rice were not checked at the time of consignment to Dubai at Kandla Port Airport so plaintiff has suffered a loss of Rs.3,60,000/- due to misconduct of the defendant as defendant without checking the rice supplied the same for exporting to Dubai that was the inferior and unmarkable quality but in the absence of any document which shows that the plaintiff has spent Rs.1,05,639/- on the document of air fair lodging, boarding, tele-communication etc. is the oral testimony of plaintiff is not acceptable. It is very difficult to come to the conclusion that the defendant has spent Rs.1,05,689/- on the air fair lodging, boarding without producing any documentary proof but there is no doubt that the plaintiff has suffered damages by reasons the supply of inferior quality of the rice that was not as per the order so plaintiff is entitled as the damages of Rs.3,60,000/- at the rate of interest 15% P.A. The issue no.4 and 5 are disposed off accordingly.”

6. I am afraid that the learned Trial Court has committed a clear-cut illegality and perversity in holding that the appellant/defendant supplied defective rice which was not as per the sample. In a suit filed for goods not supplied as per sample, it is elementary that the sample by which the sale takes place must be relied upon and compared with a sample from the actual supply or reports filed of the sample by which agreement was entered into as compared to the actual rice which was supplied. Admittedly, no

sample of rice or any report as to what was agreed to be sold was filed in the Trial Court and also there was no sample or report filed to show that when the actual rice was supplied the same was not as per the agreed sample. Not only that, there is no written purchase order filed in the Trial Court as to what exactly is the quality of rice which was agreed to be sold. This is necessary because in order to make out a case of defective supply, it has first to be shown that what was the agreed quality of rice, which was to be supplied under the contract. One clinching aspect that the rice could not be of a defective quality is that the rice was delivered to the respondent/plaintiff F.O.R. Kandla, i.e. free on rail to Kandla in Gujarat. At the stage when the respondent/plaintiff took delivery, he was bound to examine the rice supplied, both for quality and quantity, before exporting the same to Dubai, UAE. If the rice was really defective and insufficient in quantity, as supplied by the appellant/defendant, then not only the respondent/plaintiff should have prepared an appropriate report as to the defective quality of rice before the same was exported, or the rice should not have been exported. It does not lie in the mouth of the respondent/plaintiff to accept the rice, export the same and thereafter contend that the rice is defective, qua quality and quantity when the goods have already been accepted and exported by the

respondent/plaintiff. Useful reference in this behalf to Section 42 of the Sale of Goods Act, 1930 which specifies that the buyer is deemed to have accepted the goods when he does an act with reference to the goods which implies acceptance. Export of rice is a clear cut implication of acceptance that the rice supplied was as per the contract. Another aspect is that that certain cheques were given for payment with respect to the rice supplied to the appellant/defendant, and which cheques would not have been given if the rice supplied was defective. In view of the above, I set aside the finding and conclusion of the Trial Court in the impugned judgment that the appellant/defendant is guilty of supplying defective and insufficient rice. Also, the letter of the so-called foreign buyers in Dubai, UAE would not in any manner help the respondent/plaintiff because there is no correlation in the letter, Ex.PW1/1 which is written by the foreign buyer, to the rice which was sold by the appellant/defendant to the respondent/plaintiff. What is material is the contract and the quality which was agreed to be sold by the appellant/defendant to the respondent/plaintiff and not that was the contract for supply between the respondent/plaintiff and the foreign buyer in Dubai, UAE.

7. The appeal is therefore accepted. The impugned judgment and decree is set aside. The suit of the respondent/plaintiff will

accordingly stand dismissed. Interim orders stand vacated. Decree sheet be prepared. Trial Court record be sent back.

MARCH 15, 2011
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VALMIKI J. MEHTA, J.