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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.90/2002

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26th July 2011

TAS ENGINEERING CO.(PVT.) LTD. Appellant

Through: Mr. Jay Savla with
Mr. Raj Pal Singh, Advs.

VERSUS

M/S G & T RESOURCES WORLD WIDE Respondents

Through: Ms. Amrit Kaur Oberoi with
Ms. Kanica Sabharwal, Advs.

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 is to the impugned judgment and decree dated 15.10.2001 which has decreed the suit for recovery of the respondent/plaintiff on account of failure of the appellant/defendant to pay commission for an order of heat exchangers which was placed upon the appellant by ONGC.
2. The facts of the case are that the parties entered into an agreement dated 25.7.1991 appointing the respondent as the exclusive

marketing agent for the appellant company for the entire product range of desalination plants. The appellant agreed to pay the respondent a commission of 20% of the value of the product which was sold to ONGC. The respondent claimed that it was successful in obtaining order in favour of the appellant for the heat exchangers under the tender No.BRBC/DBG/ENGG/PROB/INV/MECH/HT.EXH-1/91 dated 15.11.1991 issued by ONGC, and since the appellant failed to make payment of commission of Rs.2,35,000/-, the subject suit was filed. The plaint further lays out a case that a cheque of Rs.2,35,000/- drawn on Bank of India, Kalba Devi Branch, Bombay was issued to the respondent, and which cheque was dishonoured on presentation. The defence of the appellant in the Trial Court was that there was no contract to pay commission for the heat exchangers and the contract was only limited to the desalination plants. It was further argued that the cheque which was given to the respondent was given in the hope that the respondent will be able to obtain an order for desalination plants, and since there was no order for desalination plants but only for heat exchangers, the cheque was dishonored on presentation.

3. The only issue therefore which was argued before me by both the parties was as to whether the respondent was entitled to commission

for having obtained an order in favour of the appellant by ONGC with respect to heat exchangers.

4. The Trial Court has dealt with this aspect in paras 20 to 22 of the impugned judgment and the same read as under:-

“20. Now coming to the testimony of PW-1 is concerned, perusal of his cross-examination goes to show that on material on point his testimony remains unchallenged and unshattered. No suggestion was given to this witness that the work order for fabrication of heat exchanger was procured by the defendant with the assistance of their sister concern M/s Avis Marketing Corporation and that the plaintiff had no role to pay in the procurement of the said order. There was no suggestion to this witness that the order from ONGC was procured solely on merits as the defendant had been manufacturing and supplying heat exchanger for past 25 years and out of 11 items tendered, the defendant got order for 3 items from ONGC as the quotation was lowest. Similarly, no suggestion was given to the witness that cheque for Rs.2,35,000/- was given by the defendant to the plaintiff as advance cheque in the month of December, 92 on the understanding and in anticipation that the plaintiff got orders for supply of desalination plant or that cheque was post dated as nature of business transaction was that orders were to be obtained in future. There is also no suggestion that payment of the cheque was stopped by the defendant as the plaintiff had completely failed in fulfilling their obligations under the agreement to procure orders for supply of desalination plant. Under these circumstances, besides the fact that the case set up by the defendant remains unproved, no such case was put to PW-1 Sharabjeet Singh. The record further reveals that agreement Ex.PW1/3 is in respect of “entire product range of desalination plants (fresh water generators)”. It is not disputed that the defendant received order for fabrication and manufacturing of heat exchanger on 7.7.1992 and post dated cheque was given to the plaintiff in December, 92. It is not the case of the defendant that during the

period of December, 92 to May, 93 ONGC had floated any tender. So, the plea of the defendant that cheque was paid to the plaintiff in anticipation for procuring order for supply of desalination plant does not appear to be convincing. Moreover, If the defendant had given the cheque as advance against future order for desalination plant, then the defendant has failed to prove why they instructed their bankers to stop payment in the month of May, 93. Under Section 118 of the Negotiable instrument (cheque in the instant case) was drawn by the defendant for consideration. The burden of proof of failure of consideration was upon the defendant and in the instant case, the defendant has failed to rebut the presumption that cheque was without consideration. Moreover, the agreement between the parties was entered into on 25.7.91 and if at all the defendant wanted to pay any money in advance with a view to enable the plaintiff to procure order for them for desalination plant in future, money could have been given immediately after entering into the contract but that was not done. Keeping in view the fact that the cheque was paid to the plaintiff in December, 92 when ONGC had placed order on the defendant in July, 92 clearly proves that this cheque was given by the defendant in consideration of procurement of order by the plaintiff.

21. It is pertinent to note that PW-1 Sharabjeet Singh has proved letter Ex.PW1/4 dated 16.7.92 written by Rajiv Savara Vice President of plaintiff to defendant vide which defendant was informed that the plaintiff had been successful in getting order no.BRBC/DBG/ENGG/PROV/IMP/MECH/HT.EXH-1/91 dated 7.7.92 for fabrication and manufacture of heat exchanger for total sum of Rs.26,01,455 only and the defendant was also asked to have the necessary documentation done from the bankers at the earliest. Receipt of this letter is not disputed by the defendant. It is not explained by the defendant as to why the plaintiff would have written this letter at all to the defendant, if the order was not procured by the plaintiff. Further more, the plaintiff has placed on record letter dated 20.1.93 Ex.PW1/5 written by the defendant to ONGC informing them about the discussion which they had with representation of ONGC pertaining to

the work order dated 7.7.92 for heat exchanger and copy of that letter was also sent to the plaintiff for information. It does not appeal to reason as to why the defendant would send a copy to the plaintiff if the plaintiff was not associated with the work order. Moreover, no evidence worth the name has been led by the defendant to prove that this work order was procured by them with the assistance of their sister concern M/s Avis Marketing Corporation.

The result of the aforesaid discussion clearly goes to show that this work order was procured by the plaintiff. Moreover, the plea of the defendant the agency agreement was confined to water desalination plant only is also not supported by material on record inasmuch as the plaintiff has placed on record a letter dated 5.5.93 Ex.PW1/8 written by the defendant to the plaintiff and subject matter of that letter also reveals that it was in respect of heat exchanger inasmuch as subject of the letter is,

"ONGC tender BRBC/OBG/P&E/5HP Heatex/92-93

Therefore, the plea that the agreement was for desalination plant only does not appeal to reason.

22. Moreover, it is undisputed case of the parties that before institution of the present suit, the plaintiff served a legal notice Ex.PW1/7 upon the defendant calling upon them to pay a sum of Rs.3,04,912.50 and all the averments as have been made in the present suit were made in the notice. It is not disputed by the defendant that this notice was not received by them. Despite service of the notice, the defendant failed to rebut the allegations made by the plaintiff by sending any reply. Under these circumstances, adverse inference has to be drawn against the defendant. For holding this view, I am fortified by 1980 RLR (note) 44 Kalu Ram vs. Sita Ram, wherein, it was held that if the plaintiff before filing the suit makes serious assertions in a notice to defendant, then defendant must not remain silent if he does so, then adverse inference may be raised against him." (underlining added)

5. I completely agree with the aforesaid findings and conclusions of the Trial Court inasmuch as there was no reason for the respondent to have sent the letter dated 16.7.1992, Ex.PW1/4 to the appellant with respect to the order for the heat exchangers if there was no agreement to give commission for heat exchangers. Further, the Trial Court has rightly held that if there was no agreement to pay commission for heat exchangers, then the appellant would have surely written to the respondent in response to Ex.PW1/4 dated 16.7.1992 that why has such a letter at all be written to the appellant, and which was not done.

6. The Trial Court has further rightly observed that during the period when the cheque was given, there was no tender floated by ONGC for desalination plants and therefore there was no question of giving of the cheque of Rs.2,35,000/- as an advance on the hope of getting an order for desalination plants, and if at any cheque in advance for a proposed order for desalination plants was to be given it would have been given immediately after the agreement in July 1991, however, the cheque was given in December, 1992.

7. The Trial Court has also noted that the respondent sent a legal notice dated 18.10.1994 Ex.PW1/7 claiming the amount of Rs.2,35,000/- as commission but no reply/response was given by the appellant that there was no contract between the parties to pay

commission for heat exchangers. If there is any doubt with respect to the fact that there is, in fact, contract for payment of commission for heat exchangers, the same is removed by the letter dated 5.5.1993 (Ex.PW1/8) which has been written by the appellant to the respondent pertaining to the order for heat exchangers, and the subject matter of the same pertains to an order for heat exchangers, different from the order in question.

8. The most important aspect is that the appellant led no evidence in the Trial Court that there was no agreement to pay commission for the heat exchangers. No evidence was led that the cheque which was paid was not paid towards the commission. No evidence was led on any aspect except evidence of an expert witness as to difference between the heat exchangers and desalination plants.

9. In my opinion, therefore, the Trial Court has rightly believed the case of the respondent/plaintiff and dis-believed the case of the appellant/defendant in the absence of any affirmative evidence on behalf of the appellant to prove its case. If the appellant had strength in its defence, it was bound to lead evidence to the said effect and get its witness cross-examined, and which it failed to do inasmuch as its defence was not a genuine defence.

10. In view of the above, there is no merit in the appeal. The appeal is therefore dismissed leaving the parties to bear their own costs. The Trial Court record be sent back.

The amount deposited in this Court by the appellant of Rs.2,35,000/- be released to the respondent along with accrued interest, if any, towards part satisfaction of the impugned decree. The appeal is accordingly disposed of.

JULY 26, 2011
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VALMIKI J. MEHTA, J.