

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

+ **RFA No.345/2004 & RFA No.347/2004**

% **7th May, 2012**

1. RFA No.345/2004

M/S. SSANGYONG CORPORATION Appellant
Through: Mr. Sanjeev Anand with
Mr. Abhas Kumar, Adv.

VERSUS

THE STATE TRADING CORPORATION OF INDIA LIMITED
..... Respondent
Through: Ms.Sumati Anand, Adv.

&

2. RFA No.347/2004

M/S. SSANGYONG CORPORATION Appellant
Through: Mr. Sanjeev Anand with
Mr. Abhas Kumar, Adv.

VERSUS

THE STATE TRADING CORPORATION OF INDIA LIMITED
..... Respondent
Through: Ms.Sumati Anand, Adv.

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

To be referred to the Reporter or not? **Yes.**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal filed under Section 96 Code of Civil Procedure, 1908 (CPC) impugns the judgment of the Trial Court decreeing the suit of the respondent/plaintiff for recovery of monies paid under a mistake to the appellant/defendant. The mistake on the basis of which amounts were found to be payable to the respondent/plaintiff was that in the Charter Party Agreement, the benefits of certain charges, being the despatch charges, were to be paid to the respondent/plaintiff calculated on “All Time Saved” basis (in short ‘ATS’) and not “Work Time Saved” basis (in short ‘WTS’) and on which latter basis the payments due were calculated. ‘ATS’ unit is a larger unit than the ‘WTS’ unit, and therefore when ‘ATS’ basis is taken there would be a higher amount of despatch charges payable to the respondent/plaintiff by the appellant/defendant instead when the despatch charges are calculated on ‘WTS’ basis. The expressions of “All Time Saved” basis and “Work Time Saved” basis are used with respect to the time taken towards discharge of cargo (being cement in this case), from the hold of the ship to the vessel on the port/dock. For the sake of completeness I must state that in fact two suits of the respondent/plaintiff were decreed by the impugned judgment, however since most of the facts and issues are

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identical in both the suits, for the sake of convenience I am referring to the facts of the suit which is the subject matter of RFA No.347/2004.

2. The facts of the case are that the respondent/plaintiff was appointed by the Cement Controller of India (now re-designated as DCCI, Ministry of Industry) as the importer for importing cement in the country. The respondent/plaintiff therefore entered into contracts with various sellers of cement, one such seller being the appellant/defendant. In the present case, the contracts which were entered into between the parties are the contracts dated 18.11.1977 and 30.11.1977 (two in number), which are identical in terms except the difference in quantity and the period of shipments. Under these agreements, the respondent/plaintiff had contracted to purchase from the appellant/defendant ordinary grey portland cement. The delivery period was from December, 1977 to January, 1978 under the agreement dated 18.11.1977 and during December, 1977 to February, 1978 under the agreement dated 30.11.1977.

3. The appellant/defendant was to arrange the vessels for transportation of the cement to a port in India. The cargo was to be discharged/unloaded from the ship/vessel by the respondent/plaintiff in a fixed time which was agreed to between the parties and called as "laytime".

If extra/additional time was taken for discharge by the respondent/plaintiff then, the respondent/plaintiff was to pay demurrage charges to the appellant/defendant, but if the discharge was completed at an earlier date, the respondent/plaintiff would earn despatch moneys. The charges for demurrage were double the charges for despatch, i.e. the demurrage charges were fixed at US\$3,000 and the despatch was at US\$1,500/-. Under the first contract dated 18.11.1977, 97600/- MT cement was to be supplied to the respondent/plaintiff, and under the contracts dated 30.11.1977, 158900 MT and 83650 MT of cement was to be supplied. The amount of difference on account of mutual mistake of fact which was committed by both the parties by calculating the despatch amount on 'WTS' basis instead of 'ATS' basis came to US\$14,052.10 under the contract dated 18.11.77, and under the contracts dated 30.11.1977 the same came to US\$12,369.80 and US\$20,618.75. The relevant contractual Clauses in this case are Clauses 8, 9 and 10 which read as under:-

8.DISCHARGING RATE:

Cargo to be discharged by Buyer for their time, risk and expenses at an average rate of 1,000 metric tons (One Thousand) at Bombay & 800 metric tons (Eight Hundred) at Cochin per weather working day of 24 consecutive hours. Sunday and Holiday excepted unless used, if used working time to count as laytime.

9. LAYTIME:

Laytime at discharging port to commence at 1 p.m. if Notice of Readiness is given before noon and at 8 a.m. next working day if Notice of Readiness is given during office hours in afternoon, unless sooner commenced, whether in berth or not, time lost in wait for berth to count as laytime. The vessel should be in free pratique. In case the Buyer or his Agent refuses to accept the Notice of Readiness served in the customary manner, it shall be deemed to have been served and accepted by the Buyer or his Agent if it is served through the local telegraph/postal office by cable and/or by Registered Post.

10.DEMURRAGE AND DESPATCH:

Demurrage money to be paid by Buyer to Seller at the rate of US\$3,000 (Three Thousand Only) per day or pro-rate for all time lost. Despatch money to be paid by Seller to Buyer at the rate of US\$1,500 (One Thousand Five Hundred Only) per day or pro-rata for all time saved. Demurrage and despatch payment shall be settled within one week from the date of discharging completion according to time sheet and statement of fact signed by ship master, vessel agent and receivers at discharging port. Buyer shall issue a guarantee for weekly settlement of demurrage in favour of Indian Shipping or other Indian Company nominated by "Seller".

4. The appellant/defendant laid a two-fold defence. Its first defence was that there was agreed modification of the original agreements between the parties whereby it was agreed that calculation of despatch will not be on the 'ATS' basis but will be on 'WTS' basis. The second defence

was that the suit was barred by limitation inasmuch as the
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respondent/plaintiff could have discovered the mistake with due diligence and therefore the respondent/plaintiff was guilty of negligence and not mistake. Once the case is of negligence and not of mistake, the respondent/plaintiff, it was pleaded by the appellant/defendant, cannot take the benefit of Section 17(1)(c) of the Limitation Act, 1963.

5. After the pleadings were completed, Trial Court framed the following issues:-

- “1. Whether the pltf. is entitled to the suit amount? OPP
2. If so rate of interest to which the plaintiff is entitled?
3. Whether the suit is not barred by limitation? OPD
4. Whether the suit is bad for misjoinder of cause of action?
5. Whether there is no cause of action in view of the fact and that accounts between the parties have been finally settled as stated in preliminary objection no.3 of the WS filed by the defendant? OPD
6. Whether this court has no territorial jurisdiction to try the present suit?
7. Relief.”

6. The aspect as to whether there was a settlement between the parties for the respondent/plaintiff to take despatch money on ‘WTS’ basis

and not on ‘ATS’ basis, has been dealt with by the Trial Court qua issue no.5
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and while dealing with this issue the Trial Court has held and observed as under:-

“7. It has been alleged in the written statement that at the time of settling the accounts and even at the time of computation of time sheets it was mutually agreed between the parties that the basis for computing the despatch money would be on WTS band not on ATS. It has however, been admitted in the written statement that the contracts between the parties provided for computation of despatch money on ATS basis.

8. The plaintiff is a company fully owned by Govt. of India and is a large corporation. Admittedly, the terms and conditions settled between the parties were reduced into writing. Admittedly, the written contract between the parties, provided for computation of despatch money on ATS basis. Therefore, it cannot be accepted that there was a subsequent oral agreement between the parties whereby written term of the contract as to basis for computing the despatch money was modified. Had there been any such modification, the modified term would definitely have been reduced into writing, particularly when the plaintiff is a Govt. company. Had there been any modification of the terms of the contract, the defendant would definitely have insisted upon reducing it into writing instead of taking the risk of the plaintiff denying the modification at a later date.

9. It has been alleged in the written statement that at the time of computation of despatch money and then at the time of settling the accounts, it was mutually agreed between the parties that the basis for computing the despatch money would be WTS and not ATS. Admittedly, computation of time-sheets took place much earlier than the alleged settlement of accounts. There is

no evidence that the officials of the Plaintiff Company and defendant company had nay joint meeting before computation of time sheets. The written statement does not disclose on which date and at which place the parties agreed to compute time sheets on WTS basis instead of ATS basis. Written statement does not disclose which official of the plaintiff company agreed to calculate the desptach money on WTS basis instead of ATS basis. DW-1 Hyeume Jin Choe is the only witness produced by the defendant. In his affidavit also he has not given these particulars. In these circumstances, I have no hesitation in holding that there was no agreement between the parties at the time of computation of time sheet that the basis for computing the despatch money would be on WTS basis instead of ATS.

10. Admittedly a meeting took place between the officials of the plaintiff company and defendant company at New Delhi during October-November'1984. According to DW-1 during discussions, the parties had copies of contracts before them and after discussions, it was agreed that a net amount of USD 73775.05 was to be paid by the defendants to the plaintiff in full and final settlement of all claims and counter claims w.r.t demurrage and despatch accounts in respect of 5 contract. He has further stated in his affidavit that at the time of settling the accounts it was agreed that despatch money shall be computed on WTS basis. On the other hand PW-2 Sh. A.S.Dutta, who admittedly attended these meetings have specifically stated that there was no discussion in the meeting and only calculations were available before them. He denied that the parties had contacts with them during discussions in October-November'84 and they knew the terms of contract and took a conscious decision for calculating the despatch on WTS basis. The letter written by the plaintiff company to the defendant on 6.11.84 does not give any indication

that the parties had consciously agreed to calculate despatch money on WTS basis instead of ATS basis. There is no contemporaneous document either from the defendant or the plaintiff, stating therein that parties had consciously agreed, in the meeting held at New Delhi in October-Novemeber'84, to calculate despatch money on WTS basis. Therefore, I am not inclined to believe DW-1 on this part of his affidavit.

11. Another important aspect in this regard is that if the parties had already agreed at the time of computation of time sheets, to calculate despatch on WTS basis as alleged in the written statement there would have been no occasion for them to take a similar decision in the meeting held in October-Novemebr'84. In my view this is yet another circumstance which falsifies the plea taken by the defendant in this regard.

12. I have gone through the correspondence between the parties. None of the letters suggest that there was a conscious agreement between the parties to modify the written terms of the contract and to calculate despatch money on WTS instead of ATS basis. Had there been any such agreement, either at the time of computation of time sheets or at the time of meetings which took place in October-Novmeber'84, some indication of that would have been found in correspondence between the parties. In fact when the plaintiff sent revised calculations to the defendant, on ATS basis after discovering the mistake, the plea taken by the defendant was altogether different. Therefore, I hold that there was no oral agreement between the parties to calculate desptach money on WTS basis instead of ATS basis.

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The issue is decided against the Defendant and in favour of plaintiff.” (underlining added)

7. A reference to the aforesaid paragraphs shows that the Trial Court arrived at the following salient conclusions to hold that there was no settlement as was urged by the appellant/defendant:-

- i) If there was a modification of the contract, considering that the respondent/plaintiff is a Government Company, the modification would surely have been reduced in writing. In fact, even the appellant/defendant instead of taking risk would have insisted for the modification to be reduced in writing.
- ii) The written statement does not disclose the date and place where the agreement was entered into to show that the despatch moneys will be calculated on 'WTS' basis and not on 'ATS' basis. The written statement also did not disclose which official of the respondent/plaintiff agreed to calculate the despatch money on 'WTS' basis and not on 'ATS' basis.
- iii) The correspondence between the parties do not suggest any conscious agreement to reduce the calculation of despatch charges from 'ATS' basis to 'WTS' basis.

8. I do not find any absurdity, perversity or illegality in the aforesaid findings and conclusions of the Trial Court. Surely, when the consequences of a modification would run into lacs of rupees, the respondent/plaintiff being a public sector undertaking, none of its officers would have taken the risk of giving monetary benefit to the appellant/defendant by calculation of despatch money on 'WTS' basis instead of 'ATS' basis without bringing the modification of the contract into writing and more so without the necessary sanction of the appropriate higher authorities. I am therefore of the opinion that there was no settlement as alleged by the appellant/defendant to make payment of despatch money on 'WTS' basis instead of contractual 'ATS' basis.

9. On the issue as to whether the suit was barred by time, the Trial Court has held that it cannot be said that the suit is time barred in view of the provision of Section 17 of the Limitation Act, 1963 inasmuch as the mistake was such which could not have been discovered earlier than 6.2.1985. Trial Court has held that in every mistake there is always some built-in amount of negligence, however, the negligence so as to be such to take the case out of 'lack of due diligence', is not found in the facts of the present case for it to

be held that the respondent/plaintiff cannot be entitled to the benefit of
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Section 72 of the Contract Act, 1872. The Trial Court has held that the actions of the respondent/plaintiff amount to mistake in the facts of the present case and the mistake committed by the respondent/plaintiff was discovered only when the letter dated 6.2.1985, Ex.P-1 was sent to it by the office of the Cement Controller, Government of India. If the period of limitation is computed from 6.2.1985, the suit having been filed within 3 years thereafter i.e. on 27.1.1988, the same would be within limitation. Trial Court has also referred to the fact that merely because the accounts of the respondent/plaintiff are audited cannot mean that in every case a mistake must necessarily be discovered. Finally, the Trial Court has concluded that there is no evidence that the respondent/plaintiff could have discovered the mistake before the receipt of letter dated 6.2.1985 from the Cement Controller, Govt. of India.

10. Sitting as a First Court of Appeal, I am entitled to reappraise both findings of fact and law of the Court below. I have examined the evidence which was led in this case in the form of lay-day sheets, statements of facts and time sheets, and which are documents drawn up on the completion of discharge from the vessel. It is thereafter that the facts and

figures were/are calculated and the same were sent by the
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appellant/defendant to the respondent/plaintiff. These documents have been exhibited in the Trial Court as exhibit PW2/51 to PW2/63. When we look at the time sheets which have been sent by the appellant/defendant to the respondent/plaintiff, the same show that the calculations have been shown to be made on 'ATS' basis, although in reality it was on 'WTS' basis without so being mentioned. The final calculation specifically refers to only 'ATS' basis and not 'WTS' basis. In the time sheets sent by the appellant/defendant to the respondent/plaintiff, there is absolutely no narration of calculation on 'WTS' basis. The contract provided for calculation of despatch charges on 'ATS' basis, and once time sheets are prepared by the appellant/defendant stating the same to be on 'ATS' basis, and not on 'WTS' basis, surely, there may be some amount of overlooking or an implied trust of the respondent/plaintiff in taking the 'ATS' figures contained in time sheets as 'ATS' figures only and not 'WTS' figures which they actually were, however, the same would be a mistake and not negligence for it to be argued that there is a lack of due diligence on behalf of the respondent/plaintiff. The position would have been different if the time sheets had shown both the calculations on 'WTS' basis and on the 'ATS' basis, but the final figures of despatch thereafter would have been

shown only payable on 'WTS' basis, and in which circumstances it could have been open to the appellant/defendant to contend lack of due diligence because the contract specifically provided for calculation of despatch money only on 'ATS' basis but the time sheets in that theoretical case would be showing payment of despatch money on 'WTS' basis and not 'ATS' basis, in which case the negligence would have writ large on the face of the record, however, that theoretical position has not emerged in actual fact. On the contrary what has happened in this case is that there is a single calculation on 'ATS' basis and therefore its consequent acceptance on behalf of the respondent/plaintiff as the contract provided for 'ATS' basis and surely this is therefore only a mistake because the respondent/plaintiff accepted the time sheets as they were presuming that calculations made therein are actually on 'ATS' basis and which is the basis of calculation as per the contract and not on 'WTS' basis on which the calculations were made although the heading was 'ATS' basis. Once the basis of calculation was as per the contract on 'ATS' basis, surely, a mere mistake in not ensuring to check that actually the figures were on 'WTS' basis and not on 'ATS' basis as apparently stated, in my opinion, is definitely not such position for it to be

held by the Trial Court, some amount of negligence is always implicit when a mistake is committed, however, the negligence must be of that order so as to take the case out of the concept by lack of due diligence. In the facts of the present case, considering the fact that the time sheets were prepared by the appellant/defendant on 'ATS' basis, and which is the calculation as per the contract which provided for calculation on 'ATS' basis, I hold that there is no negligence on behalf of the respondent/plaintiff so as to decline it the benefit of Section 72 of the Contract Act, 1872. The mistake cannot be called such that it could have been discovered with 'due diligence' as per Section 17 of the Limitation Act, 1963.

11. Learned counsel for the appellant/defendant has sought to rely upon the Division Bench judgment of this Court in the case of *Life Insurance Corporation vs. Raghunath Prasad Almal & Ors.*, 44(1991) DLT 521 to argue that once there is negligence i.e. lack of due diligence, the respondent/plaintiff should not be entitled to the benefit of Section 17 of the Limitation Act, 1963. In fact this judgment was also cited before the Trial Court and which has distinguished the said judgment on facts. All I need to say is that the law with respect to whether an act is a mistake or negligence, i.e. lack of due diligence necessarily has to be facts specific. Whereas the
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facts in one case may show that there is only a mistake, facts in another case may show that the mistake could have been discovered due to due diligence and therefore the mistake is not a mistake as is known to the law but is in fact gross negligence. In the facts of the present the factual context was that the time sheets which were provided by the appellant/defendant to the respondent/plaintiff mentioned calculation of despatch money on 'ATS' basis and it was this 'ATS' basis which was the unit to be applied in terms of the contract causing the respondent/plaintiff to commit mistake by taking the figures as 'ATS' calculations, where in reality, though shown as 'ATS' calculations, they were in fact 'WTS' calculations. As already stated hereinabove, and reiterated herein, if the time sheets would have specified two methods of calculation on 'WTS' basis and 'ATS' basis and thereafter the 'WTS' calculations were claimed, then, the respondent/plaintiff may have been guilty of negligence and lack of due diligence, however, once only one basis of calculation of despatch money viz 'ATS' basis is given in the time sheets, there resulted an implied trust and acceptance thereof by the respondent/plaintiff, and which can only be termed as a mistake and definitely not negligence.

of probabilities in this case makes it more than abundantly clear that the appellant/defendant is seeking to take advantage of unjust enrichment and retaining moneys with it which were not due to it. The appellant/defendant took up a case of an alleged agreed modification, and which the Trial Court has for valid reasons held that there was no such agreement for modification of the contract for acceptance of despatch money on 'WTS' basis instead of on 'ATS' basis. An Appellate Court will not interfere with the findings and conclusions of the Trial Court, unless the conclusions of the Trial Court are illegal or perverse. In addition to the reasoning given by the Trial Court, I have given an additional reasoning, and which I am entitled to do so under Order 41 Rule 24 CPC, the additional reasoning being based on the time sheets which have been sent by the appellant/defendant itself to the respondent/plaintiff.

13. In view of the above, I do not find any merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs.

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14. The facts of this case and the issues in this case are more or less identical with the facts of RFA No.347/2004 which has been disposed of by me above. There may be some difference in facts and figures qua this case,
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however, the basic issues decided in both the cases are the same. The only additional argument urged on behalf of the appellant in this case is that between the parties there were arbitration proceedings and in which arbitration proceedings, it was held that there was an agreement between the parties to make payment on 'WTS' basis and not on 'ATS' basis and which Award has been upheld by this Court even including at the stage of appeal and thus it must be held that there was an agreement for 'WTS' basis. I may state that unfortunately law with respect to challenge of an Award is different than law as applicable when I am sitting as an Appellate Court under Order 41 CPC. Ordinarily, Courts do not interfere with an Award, once reasons are given in the Award, unless the Award is in violation of the public policy under Section 34 of the Arbitration and Conciliation Act, 1996, A Court which hears objections under Section 34 of the said Act ordinarily does not interfere with an Award. If the original Court does not interfere with the Award, the Appellate Court hearing appeal against the judgment dismissing the objections, has further limited scope. Therefore, I do not think any judgment in arbitration proceedings between the parties, can have any bearing on the result of this appeal, as my jurisdiction sitting as an

read with Order 41 CPC is different. The present appeal is also therefore dismissed leaving the parties to bear their own costs.

MAY 07, 2012
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VALMIKI J. MEHTA, J