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

+ RFA 179/2004

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Judgment reserved on 15.04.2013

Judgement delivered on 31.07. 2013

M/S. JINDAL POLYESTER LIMITED Appellant
Through: Mr. Vikramjeet Banerjee &
Ms. Anne Mathew, Advs.

Versus

SHRI N.K. MODI Respondent
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. Aggrieved by the judgement and money decree dated 22nd December, 2003 passed by the trial court, the appellant-defendant has preferred this appeal.
2. The respondent-plaintiff filed a suit for recovery of ₹4,99,872/- together with interest @ 12 per cent per annum and costs against the appellant with the allegations that respondent was proprietor of M/s. Modi Transport Contractor having its office at New Delhi. The appellant

hired tankers of respondent for transporting furnace oil from Indian Oil Refinery (IOL) at Mathura to the appellant's factory at Bulandshahr, Uttar Pradesh. The respondent used to pay transportation charges @ ₹ 300/- per kilometre. During the period 29.11.2000 and 25.12.2000 the tankers of the respondent undertook 24 trips for transporting the oil from Mathura to Bulandshahr in respect whereof Bill No.MTC/2000-01/358 (Ex.PW1/8) amounting to ₹1,41,600/- towards freight charges was raised on the appellant. The respondent's tankers took another 42 trips between Mathura and Bulandshahr between 16.12.2000 and 31.1.2001 for which Bill No.MTC/2000-01/364 dated 31.1.2001 (EX.PW1/10) amounting to ₹2,52,000/- was again raised. Both the bills remained unpaid despite reminders. Letter dated 20.3.2001 written by the respondent also did not yield any result, thus, the suit for recovery of ₹4,99,872/-, that is, ₹3,93,600/- involved in the bills plus ₹1,05,272/-

towards interest @ 12 per cent per annum w.e.f. 31.1.2001 and costs of the proceedings.

3. In the written statement appellant took preliminary objections, *inter alia*, that the suit was beyond the pecuniary jurisdiction of trial court since the total amount as claimed would come to ₹5,03,808/- as on 27.5.2003. Territorial jurisdiction of Delhi court was also challenged on the ground that the registered office of appellant was situated at Gulaothi in Uttar Pradesh; goods were transported from Mathura to Bulandshahr both in Uttar Pradesh, thus, the cause of action had also arisen outside the territorial jurisdiction of Delhi. On merits, appellant did not dispute the arrangement between the respondent and appellant with regard to transportation of furnace oil from Mathura to Bulandshahr. It was also not disputed that respondent had raised bills Ex.PW1/8 and Ex.PW1/10 for the amounts mentioned therein. Number of trips undertaken by the tankers were also not disputed. However, it was alleged that the respondent was not

entitled to the amounts involved in the bills on account of short delivery due to pilferage by the respondent's drivers. The appellant took a plea that shortage of 17,094 litres of oil was noticed thus, the contract was brought to an end. The value of 17,094 litres of furnace oil calculated @ ₹9.55P. per litre came to ₹1,64,073.75P., which was deductible from the bill No.364 of ₹2,52,000/- . Another sum of ₹30,000/- was deductible towards SLR charges mentioned in the bill since the LG/GR were not enclosed. As regards Bill No.358 for ₹1,41,600/- is concerned, it was alleged that ₹5,533/- was deductible on account of shortage in supplies. Thus, as per the appellant only a sum of ₹1,93,993/- was payable which it was ready to pay to respondent. The appellant further alleged that no interest, much less, @ 12 per cent per annum was payable since the appellant was always ready to pay ₹1,93,993/- to the respondent after making deductions towards the short supplies and SLR charges.

4. In replication the respondent denied the allegations levelled in the written statement and reiterated the averments made in the plaint. It was further alleged that three tankers were loaded with furnace oil from Mathura on 31.1.2001/1.2.2001 and reached the factory of the appellant on 2.2.2001. The drivers and the helpers of the tankers were illegally confined, beaten and forced to sign papers by the appellant's engineers, to create short delivery. The appellant detained the tankers and released the same only on 7.3.2002. Respondent filed FIR No.51/2002 dated 8.3.2001 with police station Gulaothi in this regard. As regards pecuniary jurisdiction, it was stated that respondent had restricted its claim for ₹4,99,872/-, thus, the suit was within the pecuniary jurisdiction of trial court. As regards territorial jurisdiction, it was alleged that appellant was having its office in Delhi and had been carrying on its business in Delhi, thus, Delhi courts were having territorial jurisdiction to entertain the suit.

5. Trial court framed following issues.

“1. Whether this court has no territorial jurisdiction to entertain the present suit? OPD

2. Whether the plaintiff is entitled for the recovery of the suit amount or not? If so to what amount? OPP

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

Additional issues

1. Whether there was any short delivery of material by the plaintiff to the defendant? If so, whether the defendant is entitled to deduct amount from the suit amount on account of short delivery of material? If so what amount? OPD

2. Relief.”

6. The respondent examined himself as PW-1. As against this the appellant examined its Store Incharge Mr. Sujit Goswami as DW-1. The appellant as well as respondent also proved certain documents on record. Upon scrutiny of the ocular as well as documentary evidence on record, trial court has held that appellant had failed to prove that there was short delivery of the furnace oil inasmuch as the bills were not only duly proved but had also been

admitted by the appellant, thus, were liable to be paid by the appellant. Accordingly, trial court decreed the suit for the amount involved in the bills, that is, ₹3,93,600/- together with costs and pendente lite and future interest @ 6 per cent per annum. Issue on the point of jurisdiction was also decided in favour of respondent and against the appellant.

7. I have heard learned counsel for the appellant, considered the written submissions and have perused the trial court record carefully. I am of the view that trial court has misread the evidence adduced by the parties to arrive at a finding that the appellant had failed to prove the short delivery of furnace oil. It appears that the trial court was swayed from the ocular version of respondent as against the documentary evidence, which was brought on record by the appellant and duly proved. The trial court was also swayed by the fact that respondent had filed an FIR against the appellant to the effect that the drivers and helpers of the tankers were beaten by the appellant's

officials and the tankers were detained, which, on the face of it, appears to have been filed as an afterthought that too after lodging of complaint by the appellant with the local police station on 5th March, 2001. Trial court has returned a finding that FIR was lodged by the respondent immediately after the incident which is also not correct since it was filed after about one month of the incident.

8. It is not in dispute that respondent was carrying on the transport business and appellant had hired services of respondent for transporting the furnace oil from IOL, Mathura to its factory at Bulandshahr. It is also not in dispute that respondent had raised bills Ex.PW1/8 and Ex.PW1/10 amounting to ₹1,41,600/- and ₹2,52,000/- respectively. The only dispute is with regard to adjustment of amounts towards short delivery and SLR charges. As per the appellant shortage was noticed in three tankers which had arrived in the factory of appellant on 2.2.2001. According to appellant there had been short delivery even prior thereto, which in my view has

remained unproved. PW-1 has categorically deposed that on 2.2.2001 when three tankers reached at the appellant's factory the shortage was noticed; when drivers and helpers of the tankers were confronted with this fact they admitted in writing that they had pilferaged the oil in transit. They were asked to bring the owner so that oil is unloaded in his presence. The drivers left the factory. No one came to the appellant's factory till 14.2.2001. Accordingly, vide letter dated 15.2.2001 the respondent was asked to visit the factory. In response thereto the respondent vide letter dated 20.2.2001 sought forgiveness for the incident. The appellant filed an FIR on 5.3.2001 at the local police station. Only thereafter a representative of respondent came to the factory of appellant with local police on 6.3.2001 in the evening and was asked to come during the day time. Accordingly, he came on 7.3.2001 in the morning and in his presence the tankers were decanted and the actual quantity of the shortage was noted down. Only thereafter a false FIR

was lodged by the respondent on 8.3.2001 propounding the story of illegal confinement of the drivers and helpers of the tankers. The documents as mentioned by DW-1 in his deposition and placed on record have been duly signed by the drivers and helpers of the respondent inasmuch as their signatures were duly admitted by the respondent in his cross examination. However, respondent took a plea that the signatures were obtained by exercising force. In my view this plea has remained unproved since the drivers and helpers, who are signatory to exhibits PW1/D-B to PW1/D-D, had not been proved in the witness box. The respondent was admittedly not present at the site on 2nd February, 2001. If that is so then he is not the best person to depose about the events which took place at the site inasmuch as his knowledge in this regard at best can be said to have derived either from the drivers/helpers or some other sources. Only the drivers and helpers of the tankers, who were present with the tankers and had signed Ex.PW1/D-B to Ex.PW1/D-D,

could have proved the defence of respondent on this point. It has been denied by DW-1 that the drivers and helpers were illegally confined or were made to write abovenoted documents. In these circumstances only drivers and helpers would have been the best persons to depose about the manner in which these documents were written and/or signed by them. Since the drivers and helpers have not been produced in the witness box by the respondent an adverse inference under Section 114 of the Evidence Act, 1872 can safely be drawn against the respondent that they would not have supported the respondent's version had they been produced in the witness box.

9. The factum of pilferage as indicated in Ex. PW1/D-A to Ex.PW1/D-D is also supported by the letter dated 20.2.2001(Ex.DW1/4) of the respondent wherein the respondent has acknowledged the incident and tendered his apologies. Under the head 'subject' the respondent has referred to the mischief done by the drivers by

stating: “Due to my illness I had heart problem Hospitalised in my absence the driver done a mischief for that I pray to you whatever the damrages normal I can able to pay”. Not only this he had agreed to pay demurrage up to ₹2.50 lakh inasmuch as given liberty to appellant to deduct the same from the pending bills. The contents of this letter clearly support the exhibits PW1/D-B and PW1/D-D and makes the plea of illegal confinement of drivers and helpers and their signing the documents under pressure of officials of appellant appears to has been taken as an afterthought in the FIR lodged Ex.DW1/5 (Colly) as late as on 8.3.2001. The appellant has proved the complaint dated 5.3.2001 written by it to the Station House Officer of the Police Station Gulaothi wherein the incident of 2.2.2001 has been categorically mentioned inasmuch as it has been stated that neither the respondent nor any of his representative had came forward to get the tankers unloaded. There is yet another letter written by the appellant to the Station

House Officer, Police Station Gulaothi on 7.3.2001 wherein it has been specifically mentioned that tankers were unloaded in the presence of the Manager of respondent and the shortage of furnace oil was noticed inasmuch as short supply found in each tanker was also noted therein. It is only thereafter, the respondent filed FIR on 8.3.2001. The circumstances in which the FIR has been lodged clearly indicates that the same had been lodged as an afterthought.

10. From the discussions made hereinabove it is clear that short supply was there but appellant has failed to prove that it was to the tune of 17094 litres. Short supply as mentioned in the letter dated 7th March, 2001 (Ex.DW1/5) is to the tune of 9147 litres. Calculating at the rate of ₹9.55P the cost of short supplied oils comes to ₹87,353.85 and only this amount appellant is entitled to deduct for the total amount of ₹3,93,600.
11. As regards SLR is concerned, DW-1 in his cross-examination has feigned ignorance as to what this word

denotes. Accordingly I am of the view that appellant has failed to prove that it is entitled to adjust ₹30,000/- towards SLR. Accordingly, I am of the view that respondent shall be entitled to ₹3,06,246.15/- that is ₹3,93,600/- minus ₹87,353.85.

12. I do not find much force in the contention of learned counsel for the appellant that Delhi court had no territorial jurisdiction to entertain and try the suit since the furnace oil was ferried from Mathura to Bulandshahr within the State of Uttar Pradesh inasmuch as respondent office and trading of appellant is in Bulandshahr. The appellant as well as respondent have their offices in Delhi inasmuch as the correspondence was exchanged between them in respect of the transaction in question in Delhi, much is evident from the exhibit DW1/4 written by the respondent to appellant at its Delhi office. Appellant has itself placed reliance on this correspondence; meaning thereby that there had been discussions between the parties in respect of the transaction in question at Delhi as

well, thus, part cause of action had arisen in Delhi as well.

13. In my view respondent is entitled to interest since appellant had failed to remit even the amount which according to it was payable to respondent. Entire amount was withheld by the appellant. Respondent was deprived of use and benefit of the amounts while appellant continued to retain and utilise the same in its business
14. Accordingly, impugned decree is modified. A decree in the sum of ₹3,06,246.15/- together with costs and interest @ 6 per cent per annum from the date of the bills till date of payment is passed against the appellant and infavour of respondent. Amount released to respondent during the pendency of appeal shall be given adjustment of. Decree sheet be drawn.
15. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

JULY 31, 2013

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