

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.83 of 2008

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Indian Oil Corporation Ltd., Maurya Lok Complex, Dak Bunglow
Road, District- Patna Appellant

Versus

1. State of Bihar through Ram Swaroop Prasad Yadav, Executive
Engineer, Irrigation Division, at Birpur, District- Supaul
.....Plaintiff..... Respondent Ist set
2. General Manager Consumer (Bitumen), G- Ali Yavar, Jung
Marg, Bandra (East), Mumbai-400051
3. S. K. Sinha, D.J.M., Bihar, Indian Oil Corporation Ltd. (M.D.),
Maurya Lok Complex, DakBunglow Road, Patna 800001
4. V. Kumar, Chief Divisional Manager, Indian Oil Corporation Ltd.
(M.D.), Maurya Lok Complex, Dak Bunglow Road, Patna
800001

..... Defendants..... Respondents 2nd party

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Appearance :

For the Appellant : Mr. KALI DAS CHATTERJI, Sr. Advocate
Mr. Amlesh Kumar Verma

For the Respondent No. 1: Mr. Amit Prakash, GA -13
Mr. Rajeev Shekhar, AC to GA-13

For the Respondents no. 2 to 4:- Mr. J. S. Arora, Sr. Advocate
Mr. Shailesh Kashyap, Advocate
Mr. Sanat Kumar Mishra, Advocate

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**CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN
SHARMA**

C.A.V. JUDGMENT

Date: 22-09-2016

The instant appeal has been filed against the judgment and decree dated 08.06.2015, decree sealed and signed on 17.06.2015 by Sri Hyrday Narayan Shukla, the then Sub-Judge-Ist, Supaul, District- Supaul in Money Suit No. 4 of 2001 whereby and whereunder the suit was decreed directing the defendants to pay Rs. 35,00,000/- with 12 % interest to the State of Bihar from 24.06.1999 till its realization within two months, failing which 6 % additional interest will be payable to the State of Bihar. The

defendant no. 1 is the appellant whereas the plaintiff is respondent no. 1 and defendants no. 2 to 4 are respondents no. 2 to 4.

2. The plaintiff, the State of Bihar through Ram Swaroop Prasad Yadav, Executive Engineer, Irrigation Division, Birpur, District- Supaul has brought this suit against Indian Oil Corporation, Patna and its officials for realization of Rs. 35,00,000/- with 18 % interest from the date of payment of the bank draft till its realization and for payment of compensation.

3. Briefly stated, the case of the plaintiff is that the plaintiff being Executive Engineer, Irrigation Division, Birpur, District Supaul and the Director of Department at Birpur used to execute the work of Canal, Road, Bridge and Building construction whereas the defendant no. 1 is the commercial firm and used to do its business in the name of Indian Oil Corporation Ltd. and defendants no. 2 , 3 and 4 are its officials. The special repairing work of pitch road relating to western embankment division Nirmali 1 kilometer to 15 kilometer Kunauli Border, 1 kilometer to 35 kilometer Rajaram Patti, 35 kilometer Rajaram Patti to 47 kilometer Nirmali of Western embankment, Nirmali Ghigardih Link Road 0-00 to 28 and Balan Marginal embankment Kishunpatti to 4.15 kilometer Belha, were allotted to this Division by transferring the same from western embankment Nirmali vide Department Letter No. 3435 dated 19.12.1998 and for the aforesaid work there was need of Bitumen, resulting, for executing



the work within time the Executive Engineer, Nirmali, vide his letter No. 1931, dated 30.11.1998, invited tender and for the Bitumen to be used in the aforesaid work, Delivery Order of Bitumen 80/100 grade 462-927 metric ton was issued by Sri Kedar Nath Prasad, Director, Purchase and Transport Patna vide letter no. 01 dated 06.02.1999 to D.G.M., Bihar, Indian Oil Corporation Ltd. 3/A Maurya complex, Dak Bungalow Road, Patna and Executive Engineer, Western Embankment Division, Nirmali was deputed for taking the delivery of the Bitumen. Further case of the plaintiff is that vide letter no. 3455 dated 18.12.1998 issued by the Joint Secretary, Water Resources Department, Govt. of Bihar the aforesaid repairing work was allotted to Irrigation Division, Birpur and Water Resources Department, Birpur vide letter no. 77 dated 26.02.1999 through its Director requested to Purchase and Transport, Water Resources Department, Patna for correction as for the aforesaid work Executive Engineer, Irrigation Division Birpur was deputed and requested for communication of the same. The Director, Purchase and Transport, Patna vide his letter no. 204 dated 10.03.1999 made Executive Engineer, Irrigation Division, Birpur as Consignee for taking delivery of 462-927 metric ton bitumen. Thereafter, the Division received proforma invoice regarding Bitumen 80/100 grade 462-927 from Indian Oil Corporation, Patna. The price value of the Bitumen, according to the condition of work order, issued by the Director, Purchase and

Transport, Water Resources Department, Patna, vide letter no. 01, dated 06.02.1999, was Rs. 38,80,498.49/-. But vide letter no. 470, dated 31.03.1999, issued by the Superintending Engineer, Flood Control and Monitoring India Ltd., Patna, only Rs. 35,00,000/- was allotted, so, the proforma invoice was restricted up to Rs. 35,00,000/- and the Delivery Order was issued accordingly, after deduction of income tax of Rs. 70,000/- and commission on draft, four drafts were prepared in favour of Indian Oil Corporation Ltd. Patna on 31.03.1999 from Central Bank of India, Birpur Branch which are as follows:-

1. Bank Draft No. 015390 dated 31.03.1999-	9,00,000/-
2. Bank Draft No. 015391 dated 31.03.1999-	9,00,000/-
3. Bank Draft No. 015392 dated 31.03.1999-	9,00,000/-
4. Bank Draft No. 015393 dated 31.03.1999-	7,23,750
Total	- Rs. 34,23,750

4. All the four bank drafts were sent by Irrigation Division, Birpur vide letter no. 423 dated 17.04.1999 through special messenger Sanjay Kumar, Additional Divisional Officer, Civil and Road, Sub-Division, Bathnaha which was received by defendant no. 3 on 26.04.1999. The defendant no. 3 informed personally to Nand Kishore Sinha, Executive Engineer in Division that at present bitumen is not available in stock. No communication was received from the office of defendant between 26.04.1999 to 30.08.1999 to the Irrigation Division, Birpur, District- Supaul regarding supply of



bitumen. Thereafter, it was informed by the office of Indian Oil Corporation Ltd., 3/A, Maurya Complex, Patna, vide letter dated 23.08.1999, which was received in the office of plaintiff on 31.08.1999, that now stock of bitumen is available at Uluberia Packaging Plant and he is in a position to supply the same and as such authorize any person for the same. On the same day i.e. 31.08.1999 a letter of Indian Oil Corporation dated 25.08.1999 was received from Senior Bitumen Manager, Indian Oil Corporation, Marketing Division, Eastern Region, by which Irrigation Division, Birpur was informed that authorized person is receiving the bitumen from Uluberia Packaging Plant. Chief Engineer, Water Resources Department, Birpur was informed regarding those two letters, which were contradictory to each other, and regarding non-receiving of any delivery Chalan and non-authorization for receiving the Delivery Order of bitumen on which direction was issued for inquiry and report before the Chief Engineer, Water Resources Department, Birpur. Thereafter, from the office of Chief Engineer, Water Resources Department, Birpur, vide letter no. 3836, dated 18.06.1999, Sri Nand Kishore Sinha, Executive Engineer was sent to Patna for inquiry from the Indian Oil Corporation, Patna. But on 19.09.1999 the office of the Indian Oil Corporation, Patna was closed so no information was gathered. On 20.09.1999, Sri Nand Kishore Sinha was informed by Sri Alok Mishra, Chief Divisional Manager, Indian Oil Corporation Ltd.,



Patna that another person received Delivery Order for receiving bitumen by forging the signature and already received the bitumen from the godown of Indian Oil Corporation situated at Uluberia. On this information the plaintiff came to know about the act of cheating and forgery of defendant firm for misappropriating the paid amount of Rs. 35,00,000/- for supply of Bitumen, resulting, Sri Nand Kishore Sinha, the then Executive Engineer, Irrigation Department, Birpur, lodged first information report against the defendant firm. The defendant firm was called on for supply of Bitumen but the defendant firm neither supplied the Bitumen nor returned the amount of Rs. 35,00,000/- to Irrigation Division, Birpur. Thereafter, order was issued for lodging this suit by the Commissioner and Secretary, Irrigation Department, Patna and the suit was accordingly, filed. Further it is stated by the plaintiff that in spite of receiving the amount of Rs. 35,00,000/-, the defendant firm neither supplied the ordered bitumen nor returned the aforesaid amount, resulting, construction and repairing work was not done causing inconvenience to general public and on refusal of returning the amount by defendant firm court fee of Rs. 50,000/- was deposited by fixing the suit value of Rs. 35,00,000/- by annexing the letters as detailed in paragraph 24 of the plaint filed on behalf of plaintiff.

5. After issuance of notice, on behalf of defendants Indian Oil Corporation and other three defendants, on 15.02.2003, Sri A.



B. Singh, Chief Manager, Law and Constituted Attorney, Indian Oil Corporation Ltd. appeared with power and on behalf of all the defendants and for filing written statement, filed time petition which was allowed and the date was fixed on 07.03.2003 and the defendants regularly, till 15.07.2003, took time for filing written statement and, on 02.08.2003, they became absent, resulting, finally, on 26.03.2004, noticing the absence of defendants and further noticing the period of more than 90 days, they were debarred from filing their written statement and the suit was heard as no one was appearing on behalf of defendants. Their evidence was also closed and after hearing the arguments the suit was fixed for judgment.

6. The learned Sub-judge, on the basis of pleadings of plaintiff and for disposal of money suit, framed the following issues:

- (1) Whether the suit as framed is maintainable ?
- (2) Whether the plaintiff has got valid cause of action to file the suit ?
- (3) Whether this suit is time barred ?
- (4) Whether the plaintiff Govt. of Bihar made payment of Rs. 35,00,000/- through bank drafts to the defendants Indian Oil Corporation for supply of Bitumen ?
- (5) Whether the Bitumen was supplied by the defendants?

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- (6) Whether the plaintiff has the right to receive the cost of Bitumen i.e. Rs. 35,00,000/- with cost of suit and compensation from the defendant firm ?
- (7) Whether the plaintiff has the right to receive any other relief or reliefs ?

Issues no. 3 and 4 were taken together and it was decided in favour of the plaintiff and against the defendants.

Issues no. 1 and 2 were also taken together and both were decided in favour of the plaintiff and against the defendants.

Issues no. 5 and 6 were also taken together and were decided in favour of plaintiff and against the defendants and accordingly, the suit was decreed.

7. The defendant no. 1 being aggrieved and dissatisfied with the judgment and decree, filed this appeal challenging the legality, maintainability and correctness of the same on the ground that in passing the ex-party judgment and decree the learned trial court failed to scrutinize as to whether the plaintiff has had discharged the burden of prove in proving its case. In view of the admitted facts in the plaintiff's pleading and the evidence on record, the suit was fit to be dismissed having no cause of action. The plaintiff has failed to prove that the defendant Corporation did not deliver the quantities of bitumen for the price paid by the plaintiff, Ext. 8 which is the letter of the Chief Engineer of Birpur Division to the Executive Engineer, Irrigation Division, Birpur, it is



admitted that the plaintiff was in receipt of Delivery Order No. HPBG 13344 dated 04.08.1999 issued by the defendant Corporation in favour of the plaintiff, on the strength of which the plaintiff was to take delivery of bitumen from defendant's plant at Uluberia in the State of West Bengal. The Delivery Order constitutes the document of title within the meaning of Sale of Goods Act whereby the buyer acquires title to the goods with the issuance of delivery order on 04.08.1999 by the defendant Corporation, the property in the goods passed in favour of the plaintiff and plaintiff became owner of the goods and thereafter, only physical possession of the goods remained to be taken. It is no where alleged that Delivery Order was issued to other person than the authorized representative of the plaintiff and, as such, Ext. 8 is a clear admission of the fact that the plaintiff was in receipt of the Delivery Order. In view of letter contained in Ext. 7/A dated 01.09.1999 it is clear that actual delivery of bitumen from the defendant's plant was taken by the authorized representative of the plaintiff. No evidence was led on behalf of the plaintiff to prove that the defendant Corporation had acted negligently or fraudulently in issuing the Delivery Order and or handing over the product to some unauthorized person. There is no allegation that the Delivery Order subsequently was removed/stolen from the custody of the plaintiff and, as such, the very foundation of allegation of unauthorized lifting of bitumen is lacking. There is no



doubt that the Delivery Order remained through in the possession of the plaintiff and no person other than the plaintiff representatives would have had access to the said document. Exts. 7 and 8 clearly prove that the product as had been actually lifted by the plaintiff and or by its authorized representatives. There is no evidence on record which discloses that the delivery of possession of bitumen was taken by unauthorized person. Had the lifting been actually done by unauthorized person, the plaintiff, after being informed by the defendant vide letter dated 25.08.1999 that the process of lifting had begun, would have been alarmed and would have promptly issued orders to the defendants to stop supply but admittedly, no such step was taken by the plaintiff. Evidence on record shows that it was more than 3 weeks from the receipt of letter dated 25.08.1999, plaintiff tried to make out a case of unauthorized lifting. The said story is clearly after thought as it is contrary to the actual state of affairs. The defendants liability as seller ceases as the contract stands discharged by issuance of Delivery Order, there is no evidence on record that actual delivery of possession of the goods sold could not be taken by the plaintiff on account of negligence or fraud on the part of the defendants. Safe custody of the goods was entirely responsibility of the plaintiff. Money claim against the defendants is not maintainable in absence of any fraud or negligence on the part of the defendants. Resulting, in the light of the Sale of Goods



Act, no material facts have been brought on record to show that official of the Bitumen Plant of the defendant Corporation had not paid any heed to the purchaser for verifying the authenticity of the authorized representative for the plaintiff and allow some unauthorized person to take away the quantity of bitumen pursuant to the Delivery Order. In view of the letter, Ext. 7A, unauthorized lifting of bitumen is unbelievable. The said letter was written after receipt of the letter of the defendant Corporation dated 25.08.1999 wherein the plaintiff had been informed that the process of lifting of bitumen from Uluberia Plant had begun and in Ext. 7/A the Executive Engineer, Birpur had merely sought directions from the Chief Engineer as to what should be done with the quantities of bitumen in view of the shifting of the road construction work from the plaintiff's division to some other Division Nirmali. Further the said Ext. 7/A is totally silent on unauthorized lifting. Thus, only inference can be drawn that the story of unauthorized lifting of bitumen is purely concoction and lifting of bitumen had actually taken place. In view of Ext. 7/A, the entire case of the plaintiff and it is sufficient enough to dismiss the suit of the plaintiff. Considering the aforesaid facts, the trial court should have held that the plaintiff has miserably failed to prove the case of unauthorized lifting. The trial court failed to appreciate the fundamental principle of law that the burden of prove its case lies on the plaintiff and the plaintiff can only succeed on the strength



of its own case and not from the weakness of the case of the defendants. Non-appearance of the defendants and not filing written statement was no ground to decree the suit. The trial court erred in not applying its judicial mind. Further the trial court at Supaul had no territorial jurisdiction to entertain the suit as no part of action had arisen within the territorial limits of Supaul jurisdiction. Neither the defendants reside nor carry on business within the said limits and, as such the judgment and decree being otherwise, erroneous is fit to be set aside. Respondent no. 2 and 4 have also supported the case of the appellant that the suit of the plaintiff was fit to be dismissed as the plaintiff has failed to prove its case and no relief can be granted to the plaintiff. The documents brought on the record by the plaintiff are sufficient to dismiss the suit. Ext. 7/A completely falsifies the case of the plaintiff and on that ground alone the suit was fit to be dismissed. PWs 1 and 2 who are not competent witness to prove the case of the plaintiff, it was Sri Nand Kishore Sinha who was competent to depose in this case as he lodged the first information report and he was authorized to inquire and report about the matter but he has been withheld intentionally and, as such, adverse inference can be drawn against the plaintiff for withholding said Sri Nand Kishore Sinha.

8. On the other hand, on behalf of respondent no. 1 it is submitted that the learned Sub-Judge-I has rightly decreed the



suit and had passed the judgment correctly. Ext. 8 and 7/A do not infer any adverse against the case of the plaintiff, rather it is a fact which has been stated. In Ext. 8 there is no admission regarding receipt of delivery order and the entire grounds and argument taken by the appellant are baseless, on the basis of pleadings and evidences available on the record, learned trial judge has rightly passed the judgment and decreed the suit. There is no illegality and incorrectness in the judgment and decree and the same are fit to be confirmed. Non-examination of Sri Nand Kishore Sinha is not vital in the suit. He was transferred and in his place the plaintiff has brought the suit and he has been examined as PW 1 and has fully supported the case of the plaintiff. The case is based on documentary evidence and all the exhibits are sufficient enough to prove the case of the plaintiff. The defendants after appearance failed to file written statement as they have got no case to defend and left the case unattended. Admittedly, two FIRs were lodged one by Indian Oil Corporation and other by said Sri Nand Kishore Sinha. The defendant intentionally did not bring his first information report on the record and, as such, adverse inference ought to have been drawn against the defendants for withholding everything from the court.

9. On the basis of rival contentions of the parties, following points are for consideration before this Court:-

(i) Whether the plaintiff received Delivery Order issued by

the defendant Corporation in favour of the plaintiff for supply of bitumen and whether in the office of the plaintiff the said Delivery Order of bitumen was misused ?

(ii) Whether the suit has been rightly decreed and whether the appellant is not liable to pay the decretal amount to the plaintiff ?

(iii) Whether Nand Kishore Sinha who has lodged the first information report was necessary to be examined on behalf of the plaintiff ?

10. Points No. (i) :- The plaintiff to prove his case has examined two witnesses who are Ram Swaroop Prasad Yadav, the then Executive Engineer, Irrigation Division, Birpur, District Supaul as PW 1 and Sikandar Chaudhary, the then Divisional Cashier, Irrigation Division, Birpur, District Supaul. They have fully supported the case of the plaintiff as made out in the plaint and have stated that two contradictory letters were received in the office of the plaintiff on 31.08.1999, one dated 23.08.1999 (Ext. 5/B) and another dated 25.08.1999 (Ext. 5/C). In Ext. 5/B the Executive Engineer, Irrigation Division, Birpur, Supaul was informed that now the product is adequately available at Uluberia Packaging Plant and to depute representative for uplifting the product immediately and the person reporting to Uluberia should carry the copy of Delivery Order issued by the Patna Divisional Office, copy of CR/CTA issued either by the Patna D. O. or by



Regional Office at Kolkata of Indian Oil Corporation Limited and authority letter duly verified by Patna Divisional Office of Indian Oil Corporation and it was requested that representative should be sent on top priority so that entire Delivery Order quantity is uplifted within 31.08.1999. The address of Uluberia Packaging Plant and contact number were also given in the said letter (Ext. 5/B) Whereas in Ext. 5/C it was informed that with reference to delivery order No. HPBG-1344 dated 04.08.199 for 387 metric ton issued by Patna State office of Indian Oil Corporation for the supply of packed Bitumen at Uluberia, authorized representative has already started uplifting 80/100 grade packed Bitumen from Uluberia and request has been made to furnish the challan-wise details of upliftment to the said office. In Ext. 8 which is a letter of Chief Engineer Irrigation Department, Birpur to the Executive Engineer, Irrigation Division, Birpur, there is no admission that the plaintiff was in receipt of Delivery Order No. HPBG 1344 dated 04.08.1999 issued by the Indian Oil Corporation in favour of the plaintiff. This Ext. 8 contains direction to the Executive Engineer, Irrigation Division, Birpur to inquiry into the matter as there are contradictions in the letter dated 23.08.1999 and 25.08.1999 which was received in the office on 31.08.1999. So argument of the learned counsel for the appellant that Ext. 8 is admission, appears incorrect. Further from Ext. 7/A it does not reveal that actual delivery of bitumen from the defendant's plant was taken by



the authorized representative of the plaintiff rather Ext. 7/A is a letter addressed to the Chief Engineer, Irrigation Department, Birpur from the Executive Engineer, Irrigation Division, Birpur, Supaul wherein it has been mentioned that to supply the bitumen the amount of Rs. 35,00,000/- has already been deposited in the office of Indian Oil Corporation but it has come to notice that the work of that road has been allotted to another division and as such necessary direction be given in this connection. There is nothing regarding upliftment of bitumen by any person and moreover by authorized representative of the plaintiff in Ext. 7/A which is dated 01.09.1999. The argument of learned counsel for the appellant appears not tenable. PWs 1 and 2, both have not been cross-examined and their testimonies have remained unrebutted. From Ext. 8/E which is a letter addressed to Executive Engineer, Irrigation Division, Birpur, from the office of Chief Engineer, Irrigation Department, Birpur that the then Executive Engineer Sri Nand Kishore Sinha (suspended) was given draft of Rs. 34,23,750/- for supply of Bitumen from Indian Oil Corporation Limited, Patna, then, it was informed that bitumen is not available in stock and as soon as bitumen will be available Delivery Order will be issued but no communication was done between 26.04.1999 to 30.08.1999 and on 31.08.1999 two letters were received, one dated 23.08.1999 and another dated 25.08.1999. Then, the Executive Engineer, Birpur Division informed that he has



not received any Delivery Order and no one has been authorized to receive the bitumen from his office. In the Ext. 8/E it is further mentioned that the letter issued from Indian Oil Corporation contains contradictory statement and it reveals that some forgery has been committed at their part. The Indian Oil Corporation, Patna and Sri Nand Kishore Sinha (suspended), the then Executive Engineer, have lodged FIRs on 15.09.1999 and on 20.09.1999 having case No. 369 of 1999 and 375 of 1999. Thus, it is manifest that Indian Oil Corporation has also lodged first information report at Kotwali Police Station but that FIR has not been brought on the record by the defendants and has been intentionally suppressed. Further the defendants after appearing in the suit and after taking time on several dates to file written statement left the case unattended and did not file any written statement. This goes to reveal that something has been done in the office of Indian Oil Corporation, resulting, bitumen was supplied to unauthorized person on the basis of forged papers. There is nothing on the record by which it can be said that Delivery Order bearing no. HPBG 1344 dated 04.08.1999 issued by the Indian Oil Corporation in favour of the plaintiff was received in the office of the plaintiff and on the strength of that Delivery Order the bitumen was supplied. The argument advanced by the learned counsel for the appellant, learned counsel for respondent no. 2 to 4 appear not tenable rather from perusal of the Exhibits, available on the



record, it is manifest that no Delivery Order was received in the office of the plaintiff and further no one was authorized by the plaintiff to take supply of bitumen and someone has committed forgery in the office of Indian Oil Corporation. Learned Subordinate Judge has rightly held that in spite of receipt of Rs. 35,00,000/- through bank draft, bitumen was not supplied to the plaintiff and, as such, the plaintiff is entitled to decree for the amount of Rs. 35,00,000/- with cost.

11. Learned Subordinate Judge has considered the evidences available on record correctly and properly and I also confirm his findings in this regard.

12. Learned counsel for the appellant has cited Section 2 (4) of the Sale of Goods Act, 1930. In the present case, the document of title to goods has not passed to the plaintiff and as such the document of title of goods i.e. the delivery order bearing no. HPBG/1344 dated 04.08.1999 was not received in the office of the plaintiff and as such the document of title to goods was not transferred to the plaintiff by the defendant. Further Section 26 of the Sale of Goods Act, 1930 has been cited wherein it is mentioned that risk *prima facie* passes with property. This section runs as follows :-

"26. Risk *prima facie* passes with property.- Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether

delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party."

13. In the present case the property was not transferred to the buyer so question of the goods are at the buyers risk does not arise. Further ruling cited reported in **AIR 1961 Supreme Court 1065** in the matter of **Bayyana Bhimayya and another. Appellants v. Government of Andhra Pradesh, Respondent** is also not applicable in the present case. Here, no delivery order was given to the plaintiff. The plaintiff after supply of bank draft to the defendant waited for a long time for communication as to whether the Bitumen was available or not and surprisingly, on 31.08.1999 two contradictory letters were received in the office of the plaintiff: one dated 23.08.1999 (Ext. 5/B) and another dated 25.08.1999 (Ext. 5/C). It is true that in Ext. 7 there is nothing regarding Ext. 5/B and 5/C and further no letter was issued to Indian Oil Corporation to stop the supply of Bitumen from the office of the plaintiff, that did not discharge the liability of the defendant for supplying the Bitumen to an authorized person having copy of a delivery order and other papers as required in



Ext. 5/B. Further reliance has been placed on a judgment reported in **(2014) 2 Supreme Court Cases 269** in the matter of **Union of India and others Appellants Versus Vasavi Cooperative Housing Society... Respondents**, paragraph 15 and 28. It is true that in a suit for declaration of title the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set-up by the defendants would not be a ground to grant relief to the plaintiff. Here, in the present case, the plaintiff has clearly proved his case and the decree has not been granted on the weakness of the case of the defendant. The Apex Court in paragraph 28 has again reiterated that the plaintiff has to succeed only on the strength of his case and not on the weakness of the case set-up by the defendant in a suit for declaration of title and possession. Here, the defendants has not filed written statement and there is no case of the defendant, they left the case unattended and the allegation as made out in the plaint intentionally and knowingly has not been rebutted. So, this ruling is also not helpful to the appellant. In plaint, paragraph 11, it is specifically mentioned that Irrigation Division, Birpur, District-Supaul never received any delivery challan from Indian Oil Corporation regarding supply of Bitumen, neither Irrigation Division, Birpur authorized any one for supply of bitumen and PW 1 has fully supported the said facts whereas against that there is



no rebuttal on that point. It is wrong to say that from the document of the plaintiff itself its case is not proved rather all the documents clearly go to prove the case of the plaintiff as made out in the plaint. The first information report lodged by Sri Nand Kishore Sinha has been brought on record which is Ext. 10 but the first information report lodged by Indian Oil Corporation has not been brought on the record. From Ext.10 also it reveals that no Delivery Order was received in the office of the plaintiff nor any person was authorized for supply of bitumen. In Ext.10 it is mentioned that it appears that another person after forging the signature has obtained the Delivery Order on 01.08.1999 and bitumen has also been supplied to unauthorized person causing loss of Rs. 35,00,000/- to the plaintiff. It is surprising that in letter dated 23.08.1999 information was given regarding availability of bitumen but just within two days another letter dated 25.08.1999 it was informed that Bitumen is being uploaded and this makes some misdeeds committed in the office of the defendant. The appellant has not been able to show that the Delivery Order was handed over in the office of the plaintiff regarding supply of bitumen and on the strength of that Delivery Order the bitumen was supplied. As the Delivery Order was not handed over to the plaintiff and, as such, its misuse in the office of the plaintiff does not arise. The Delivery Order was never issued by the defendants to the plaintiff and neither the plaintiff nor his any

authorized representative received the Delivery Order for supply of bitumen. This point is decided in favour of respondent no. 1 and against the appellant and respondents no. 2 to 4.

14. Point No. ii- As it has already been held above, the suit was rightly decreed and there is no illegality or incorrectness. The defendant have intentionally and knowingly left the case unattended, resulting, the facts pleaded in the plaint and the evidence adduced on behalf of the plaintiff were not rebutted and remained uncontroverted. The plaintiff on the other hand has succeeded in proving its case by cogent and reliable evidences. PWs 1 and 2 have fully supported the case of the plaintiff and further Ext. 1 to Ext. 10 are sufficient enough to prove the case of the plaintiff. The suit of the plaintiff has not been decreed on the weakness of the case of the defendants rather the plaintiff has succeeded in proving his case by its own evidence. Thus, it is held that the suit of the plaintiff was rightly decreed and the defendants/appellant is liable to pay the decreetal amount with interest to the plaintiff respondent no. 1. Accordingly, this point is also decided in favour of the respondent no. 1 and against the appellant and respondents no. 2 to 4.

15. Point no. iii- Sri Nand Kishore Sinha has lodged first information report which is Ext. 10 and the same is on the record. He has been transferred and as such PW 1 has brought this suit and he has been examined in the suit. Non-examination of Sri

Nand Kishore Sinha is not vital because the suit has been decreed on the basis of documentary evidences available on the record also. First information report lodged by Sri Nand Kishore Sinha has legally been brought on the record which is Ext. 10 so, nothing has been suppressed. The first information report lodged by the Indian Oil Corporation has not been brought on the record that has intentionally been suppressed. So, it can safely be held that non-examination of Sri Nand Kishore Sinha is not fatal for the suit of the plaintiff and accordingly, this point is also decided in favour of respondent no. 1 and against the appellant and respondents no. 2 to 4.

16. In the result, this first appeal is hereby dismissed on contest but under the circumstances without cost.

(Jitendra Mohan Sharma, J)

avin/-

AFR/NAFR	AFR
CAV DATE	22.09.2016
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