

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.1299 OF 2016
WITH
CAF/2154/2017**

Indiana Rubbers & Plastics ... Appellant

Vs.

Orion International ... Respondent

Mr.V.M. bhardwaj for the Appellant
Mr.S.A. Sawant for Respondent No.1

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: SEPTEMBER 6, 2017**

P.C. :

1. This appeal is directed against the judgment and order dated 6.5.2016 passed by the City Civil Court at Bombay in Summary Suit No.9568 of 1999 by which the the said Suit was decreed and the appellant/defendant is directed to pay a sum of Rs.98,500/- with interest @ 9% p.a. from the date of filing of the suit to the plaintiff. The Respondent/plaintiff has placed the order for supply of 3000 collapsible water tanks with the appellant / defendant. The total amount of those water tanks was approximately Rs.2,02,500/-. Purchase Order was placed on 20..1998, which is supposed to be the contract between the parties on sending a

sample of water tank to the plaintiff was binding on the defendant as per the terms and conditions of the purchaser order and all the pieces of water tanks were to be delivered to the plaintiff on or before 30.8.1998. On the date of the purchase order i.e., on 20.7.1998, the plaintiff paid Rs.50,000/- to the defendant. On 28.7.1998, further Rs.25,000/- was paid. Thereafter, on 12.9.1998, further amount of Rs.23,500/- was paid by the plaintiff to the defendant. However, as per the case of the plaintiff, the defendant failed to supply 3000 pieces of collapsible water tanks, which was the important date as per the purchase order and the plaintiff who was carrying on a business of manufacturing and supply of high quality of corporate gifts, could not hand over the goods to its clients and therefore, it was not accepted by the clients. It was the case of the plaintiff that the samples shown were of inferior quality and no improved water tanks as per the suggestions were ever supplied and therefore, the plaintiff has sent a legal notice in August, 1999 through advocate thereby cancelling the contract and demanded the amount paid by the plaintiff to the defendant. Thereafter, the plaintiff filed Summary Suit for recovery of amount of Rs.1,20,602.50 i.e., the Principal sum of Rs.1 lakh and interest @ 18% p.a. from 1.9.1999 till realisation of the actual amount. As

the appellant/defendant had earlier denied the allegations made in the notice, have obtained leave to defend and filed affidavit in reply denying all the averments made in the plaint. According to the defendant, goods were manufactured as per the requirement of the plaintiff and 3000 pieces of collapsible water tanks were ready for delivery on 30.8.1998. However, when the defendant demanded money from the plaintiff of 3000 water tanks, the plaintiff was neither ready for payment nor the delivery was accepted by the plaintiff. Therefore, the defendant is not liable to pay any amount to the plaintiff. The money paid by the plaintiff against the purchase order was consumed for the production of 3000 collapsible water tanks and thus, nothing can be paid.

2. The trial Court framed issues and held that the defendant had committed breach of the agreement by not supplying water tanks of a standard quality and within time and he is entitled to recover Rs.98,500/- and accordingly, decreed the suit.

3. Mr.Bhardwaj, learned Counsel for the appellant, has submitted that the judgment and decree passed by the learned Judge is wrong and illegal and is required to be set aside. He went through the evidence of the witnesses for both the sides. He

submitted that the 3000 collapsible water tanks were ready on 30.8.1998. As per the contract, it was binding on the plaintiff to make full and final payment on the same day at the time of delivery. However, the plaintiff could not pay the money. The plaintiff did not take delivery of the 3000 collapsible water tanks. He has further submitted that the plaintiff communicate anything thereafter to the appellant but sent the notice nearly 11 months after cancelling the contract and asked for the refund of the money. He relied on the reply given by the defendant and argued that in the notice that in the and affidavit in reply, the defendant has taken consistent stand that the goods were ready. The sample was sent and thus, there is a complete adherence to the date of the supply of 3000 collapsible water tanks on 30.8.1998.

4. In support of his submissions, he relied on the admission given by Smt.Suraina Rane i.e., the plaintiff, in her affidavit itself, where she has stated "I say that the said Surendra Malhotra of the defendant has been asking me to put more money and take delivery of 3000 pieces. I say that since the item manufactured is of substandard quality, I refused to do so". The learned Counsel submitted that there is no communication from the side of the

plaintiff about the sub-quality of the product. Under such circumstances, the learned Judge has erred in not considering the defence of the defendant.

5. Per contra, Mr.Sawant, the learned Counsel, has highlighted the evidence and admission given by Mr.Suresh Malhotra in his cross-examination. In the cross-examination, he has admitted that he has not produced any documentary evidence to show that the final product was ready on 30.8.1998 on record. He has also admitted that he had never written any letter informing the plaintiff that 3000 tanks were ready for delivery on 30.8.1998. The learned Counsel has argued that time was the essence of the contract and therefore, a strict adherence to the time was the main condition. However, it was violated and thereafter, the plaintiff's clients also did not approve the sample goods which were earlier sent by the defendant and hence, the contract was cancelled.

6. The point of determination in this appeal is framed as follows:

Whether the learned trial Judge erred in believing that the appellant has breached the terms and conditions of the

contract and especially on the point of date of delivery i.e.,
30.8.1998?

Answer: No.

7. This being initially a summary suit based on a purchase order, a contract, it is necessary to look into the terms and conditions of the said document. The purchase order dated 18.7.1998 is not disputed by the authorities. On one side, the delivery schedule is mentioned that delivery will be made at the Khar office of the plaintiff within four weeks after the date of the purchase order and thereafter 7 to 15 days to be taken for production of 3000 water tanks and anyhow, the total production was to be completed by 30.8.1998. Thus, there is no dispute about the last date of delivery. In the special instructions, it was agreed between the parties that the sample was to be shown and then, the product is to be improved as per the requirement or suggestions i.e., by making the base more sturdy by putting four support points and increasing the thickness of the base. It is also specifically mentioned that in the event of delay, if the buyers won't accept, then, the plaintiff shall not be able to take the delivery. As

per the payment terms, Rs.50,000/- was to be paid by cheque at the time of delivery and the balance amount was to be paid against the delivery after checking the quality and quantity of the goods. Thus, the undisputed terms and conditions in the purchase order, are clear and unambiguous. It is the case of the plaintiff that the initial samples which were sent were faulty and there was no improvement as per the special instructions in the purchase order. However, except the oral evidence of the plaintiff and the notice, there is no other written evidence on record to show that the plaintiff has informed the defendant that the product is required to be improved and it is faulty. Therefore, to that extent, the plaintiff has not discharged his burden.

8. However, the plaintiff has paid a total amount of Rs.75,000/- before 30.8.1998 and the balance amount was required to be paid at the time of delivery. There is also an admission on the part of the plaintiff that payment of Rs.23,500/- was made after 30.8.1998 i.e., on 12.9.1998. Thus, it can be said that after 30.8.1998, till 12.9.1998, the plaintiff was ready to accept the delivery. However, as per the terms and conditions of the contract, it was binding on the defendants to supply 3000 pieces of collapsible water tanks to

the plaintiff. The submissions of the learned Counsel that the product was ready on 30.8.1998 cannot be accepted unless in absence of some documentary evidence. The learned trial Judge has considered the evidence of delivery challans marked at exhibits 15 to 21. However, he has also discussed the contents in those challans that by these delivery challans only 2 to 4 tanks were delivered as samples. Thus, the defendant has used a method of sending tanks alongwith challan. Thus, the burden is on the defendant to prove that he has delivered 3000 pieces of tanks to the plaintiff on or before 30.8.1998. A letter or any document disclosing that 3000 pieces of water tanks were ready for delivery would have been sufficient to establish that defendants have complied with the terms and conditions of the contract and kept the goods ready on the D-date. As pointed out, the admissions given by the defendant in the cross-examination that there is no document to show that 3000 pieces of water tanks were ready and he never sent any letter to the plaintiff asking him to take delivery of 3000 water tanks are very material, destroying the defence of the defendant. The submissions are made by the learned Counsel for the defendant that there were phone calls between the parties by the defendant to the plaintiff to take the delivery cannot be

considered as a proof in a Court of Law unless CDRs are produced or some corroborative evidence is tendered.

9. In the circumstances, the defendant could not discharge the burden that though the defendant was ready with 3000 water tanks, on account of failure to pay the balance amount by the plaintiff, the contract was not materialised. The fault lies with the plaintiff, cannot be accepted. Hence, appeal is dismissed.

(MRIDULA BHATKAR, J.)