THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.529 of 2017

JUDGMENT:

This appeal is filed under Section 100 of Civil Procedure Code assailing the judgment and decree dated 16.08.2011 in A.S.No.103 of 2010 on the file of the Court of Special Judge for trial of Cases under SCs & STs (POA) Act – cum - Additional District Judge, Vizianagaram, wherein and whereby the decree and judgment dated 11.09.2008 in O.S.No.240 of 2005 on the file of the Court of Senior Civil Judge, Vizianagaram, decreeing the suit filed by the plaintiff for recovery of an amount of Rs.1,69,802/-, was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the second appeal are briefly as follows:

The plaintiff is the firm carrying on business in wheat and wheat products under the name and style of M/s.Maheswari Flour Mills having its business place at Vizianagaram. The defendants released the price list of wheat for quintal for the months of August, September, October and November 2002. The plaintiff placed order in the month of September 2002 for supply of 2312 matric tones of luster lost wheat and paid the entire amount, vide R.O.No.1(i) wheat/OMMSS (D) K2 11471 dated 24.09.2002 from NABHA (Patiala region), Punjab to Vizianagaram vide R.R.No.J 175132 dated 05.10.2002, as per the approved price list. After receiving the said amount, the stock as ordered was dispatched from NABHA to Vizianagaram. According to the terms and conditions of the policy and price list, the freight charges should be paid by the authorities of Food Corporation of India at the loading point and accordingly forwarded the railway receipt to the office of third defendant after endorsing the same in favour of the plaintiff. The authorities of goods shed at Railway Station, Vizianagaram claimed additional amount under the head of difference of freight charges of Rs.1,10,758/- and the plaintiff was forced to pay the same. Thereafter, the third defendant on 20.05.2003 sent a letter stating that the difference of freight has been referred to the Divisional Manager, Food Corporation of India, Sangrur for clarification and the Regional Office, Hyderabad, while marking a copy to the plaintiff firm, where under the defendants clarified that the under charges claimed by the railway authorities are not in order. The third defendant addressed a letter dated 23.02.2004 where under it was mentioned that the railway receipt No.175132 was issued without collecting the prevailing rate of Rs.6,650/- for matric tone during the month of October 2002 and directed third defendant by NABHA, Patiala region to collect a sum of Rs.1,51,699/- from the plaintiff. The third defendant addressed a letter dated 25.08.2004 stating that the plaintiff paid approved rate prevailing in September 2002 at the rate of Rs.6,655/- per quintal, but approved rate in October 2002 at the rate of Rs.6,665/- per quintal had to be paid. Hence, the suit for recovery of freight charges.

4. The third defendant filed written statement denying all the averments made in the plaint making a counter claim of Rs.1,85,270/- representing set off an amount of Rs.1,10,758/- and another claim of Rs.74,512/- contending that as per the allotment order dated 24.09.2002, the rates as on the date of delivery of stock are applicable. Hence, the plaintiff had to pay the price at the rate of Rs.6,650/- for metric tone, but paid Rs.6,550/- for metric tone and hence, the difference amount had to be paid by the plaintiff.

5. Basing on the above pleadings, the following issues were framed:

1. Whether the plaintiff is entitled to recover the suit amount?
2. Whether the plaintiff is liable to pay counter claim amount?
3. To what relief?

6. During the course of trial, on behalf of the plaintiff, P.W.1 was examined and Exs.A1 to A35 were marked. On behalf of the defendants, D.W.1 was examined and no documents were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff is entitled to recover the freight charges of Rs.1,10,758/- from the defendants with interest and

dismissed the counter claim. Feeling aggrieved by the judgment and decree of the trial Court dated 11.09.2008 in O.S.No.240 of 2005, the defendants preferred A.S.No.103 of 2010 on the file of the Court of Special Judge for trial of Cases under SCs & STs (POA) Act – cum – Additional District Judge, Vizianagaram. The first appellate Court after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff is entitled for freight charges of Rs.1,10,758/- with interest and dismissed the appeal. Hence, the defendants preferred this second appeal.

8. Heard Sri Dantu Srinivas, learned counsel for the appellants-defendants and Sri Bankatlal Mandhani, learned counsel for the respondent-plaintiff.

9. The question of law urged by the learned counsel for the appellants is as follows:

> "Whether the findings recorded by the Courts below are perverse?"

10. It is not in dispute that the plaintiff firm placed order for supply of 2312 matric tones of luster lost wheat and 865.492 matric tones in favour of sister concern of the plaintiff. The defendant corporation supplied the wheat to the plaintiff as per the order in the month of December 2002. The case of the defendants is that the plaintiff has to pay the price of the wheat as prevailing in the month of December 2002 (Rs.6,650 per matric tone) and not as in the month of September 2002

(Rs.6,550/- per matric tone). The defendants filed counter claim claiming difference of amount. The trial Court dismissed the counter claim of the defendants. The defendants did not choose to file appeal or cross appeal assailing the legality of dismissal of counter claim. The judgment and decree of the trial Court dismissing the counter claim of the defendants became final in view of non-filing of regular appeal or cross appeal.

11. As per the terms and conditions of the agreement, the defendants have to pay full freight charges. For one reason or other, the defendants had not paid the full freight charges to the railways. When the plaintiff approached the railway authorities at Vizianagaram, they refused to deliver the stock of wheat without paying the additional freight charges i.e., Rs.1,10,758/-. The plaintiff having no other alternative, paid the additional freight charges and took delivery of the wheat. In the written statement, the defendants clearly admitted that they have to pay full freight charges. It is not in dispute that the defendants have not paid the additional freight charges. The plaintiff got issued a notice directing the defendants' authorities to pay additional freight charges. The defendants have taken a plea that the plaintiff has to pay an amount of Rs.1,51,699/- towards difference of price, therefore, the plaintiff itself has to pay an amount of Rs.40,941/- after deducting the amount already paid by it. As observed earlier, the counter claim of the defendants was dismissed. The defendants having admitted their obligation to pay full freight charges had not paid the additional freight charges to the plaintiff. Both courts concurrently held that the

defendants have to pay the additional freight charges of Rs.1,10,758/- to the plaintiff.

12. It is a settled principle of law that an admitted fact need not be proved. The defendants having admitted that they have to pay full freight charges, bound to pay the difference of freight charges to the plaintiff. Whether the defendants are liable to pay the full freight charges or not is purely a question of fact. The first appellate Court is the fact finding final Court. The findings recorded by the Courts below are based on the agreement between the parties. The defendants are not entitled to go beyond the terms and conditions of the original agreement. Both Courts concurrently held that the plaintiff is entitled to recover the freight charges from the defendants. The findings recorded by the Courts below are based on evidence, much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellants that the findings recorded by the courts below are perverse. This Court while exercising the jurisdiction under Section 100 CPC shall not lightly to interfere with the concurrent finding of fact recorded by the Courts below.

13. In **Municipal Committee, Hoshiarpur v. Punjab SEB**[1], while dealing with the scope of Section 100 of CPC, the Hon'ble apex Court held at paragraph No.16 as follows:

> 16. … … A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot

[1] (2010) 13 SCC 216

> entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. ... ...

14. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that there is no question of law much less substantial question of law involved in this appeal and the appeal is liable to be dismissed.

15. In the result, the Second Appeal is dismissed at the admission stage with costs through out. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

21st December, 2017
Rns