

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.03.2018

PRONOUNCED ON : 09.04.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.2029 of 2003
and
C.M.P.No.18511 of 2003

M/s.S.K.F.Bearings India Limited,
rep. by its Principal Officer,
having registered office at
M.G.M. Building, Nethaji Subash Road,
Mumbai - 2. ...Appellant/Appellant/1st Defendant

Vs.

1. N.P.K.R.R. Co-operative Sugar Mill,
Thalainayiru, rep. by its Admiunistrators,
having office at Thalai Nayiru,
Mayiladuthurai Taluk, Nagapattinam District.
.. Respondent/1st Respondent/Plaintiff

2. Transport Corporation of India Ltd.,
Mumbai -3.
represented by its Principal Officer,
having office at
No.7, Madha Industrial Estate,
B.M.Marg, Cresant Floors, Oorli,
Mumbai -3.
.. Respondent/Respondent/Defendant

3. Transport Corporation of India Limited,
Mayiladuthurai
rep. by its Branch Manager,
No.112, Mahatma Gandhi Road,
Mayiladuthurai, Nagapattinam District.
...Respondent/Respondents 2 & 3/
Defendants 2 & 3

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the Principal District Court, Nagapattinam dated 02.06.2003 made in A.S.No.33 of 2002 confirming the judgment and decree of the Additional Sub Court, Mayiladuthurai dated 10.07.2001 made in O.S.No.8 of 1999.

For Appellant : Mr.S.Sounthar

For Respondents: No appearance

Set exparte

Vide Order dated 22.03.2018

J U D G M E N T

This second appeal is directed against the judgment and decree dated 02.06.2003 passed in A.S.No.33 of 2002 of the file of the Principal District Court, Nagapattinam confirming the judgment and decree dated 10.07.2001 passed in O.S.No.8 of 1999 on the file of the Additional Subordinate Court, Mayiladuthurai.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for recovery of money.

4. The case of the plaintiff in brief is that, towards the maintenance of the machineries of their factory, purchase orders were placed with the first defendant at Mumbai, as detailed in the plaint on 15.03.1996 and 06.04.1996 respectively for the total price of Rs.2,32,200.80/- and the two consignments were sent through the second defendant, a carrier having registered office at Mumbai and the branch office at Mayiladuthurai and the invoices of the first defendant dated 25.07.1996 for the above said amount had been sent through Kumbakonam Central Co-operative Bank Limited, Illanthoppu Branch, along with the lorry receipt of the second defendant and the consignments were booked by the first defendant with the second defendant on 26.07.1996 to be forwarded to the third defendant and the plaintiff remitted the amount with the bank and cleared the lorry receipts and invoices abovestated and the plaintiff took delivery of the two consignments from the third defendant on 28.08.1996 and 07.09.1996 and the technical officials of the plaintiff found in the packages contained only the rollers and not bearings in complete form and without the bearings, the rollers will be useless and the fact that, only rollers were received had been recorded in the stores goods receipts of the plaintiff certified by the engineers of the plaintiff dated 28.08.1996 and 07.09.1996 and the plaintiff addressed the first

defendant on 12.09.1996, 20.09.1996 and 25.09.1996 informing the fact and requested to replace the materials. The first defendant's representative D.Raveendran also inspected the materials supplied in the plaintiff premises and found only rollers were supplied and in the letter dated 13.11.1996 addressed to the plaintiff, the first defendant instructed the plaintiff to lodge a complaint with the transporters, namely the defendants 2 and 3 and D.Raveendran, the representative of the first defendant in his letter dated 31.12.1996 instructed the plaintiff to lodge the complaint with the second and third defendant and in spite of many letters, the first defendant simply replied the plaintiff to workout the remedies with the defendants 2 and 3 and the Insurance company and the first defendant as per their quotations has mentioned that they will make necessary insurance for the consignments to be sent and only the person forwarding the consignments through the carrier should insure the goods before forwarding and the first defendant in their letter dated 12.09.1996 informed the plaintiff to return the goods on freight to pay basis, the plaintiff by letter dated 17.12.1997 informed the first defendant that, the consignments will be returned and the lorry receipts will be sent through bank and the first defendant should pay the amount and get clearance of the lorry receipts and for the said purpose requested to mention the name of the bank, but the first defendant never replied nor complied with the suggestions of the plaintiff and the plaintiff issued a legal notice on 28.03.1998 to all the defendants calling upon them to pay the suit amount and freight charges at Rs.1259/- with interest at 12% from 07.09.1996, when the second consignment was received and though the defendants have received the notices, neither replied nor complied with the demands and the first defendant failed to supply the specific materials as per the purchase orders of the plaintiff and thereby the plaintiff has been put to loss and deliberately the first defendant also not taken the return of the materials nor replaced the same with correct materials and the defendants 2 and 3 being the carriers are also liable to pay the suit amount and hence the suit.

5.The case of the first defendant in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. No part of the cause of action arose within the jurisdiction of the court at Mayiladuthurai and hence the court at Mayiladuthurai has no jurisdiction to entertain the suit. According to the first defendant, the orders of the plaintiff for the purchase of the materials were placed with the first defendant at Mumbai and accordingly, the contract was accepted by the first defendant at Mumbai, the goods delivered at Mumbai and the first defendant has its permanent office at Mumbai, hence the court at Mayiladuthurai has no jurisdiction to try the

suit. Even otherwise, the carriers only i.e. the defendants 2 and 3 are answerable to the suit claim and not the first defendant. There has been an inordinate delay on the part of the plaintiff in remitting the amount for the goods, the plaintiff also omitted to inform the defendants immediately of any defect in the supply and in case of suspicion or doubt, the plaintiff should have asked for open delivery, which has not been done by the plaintiff. In case of the defective goods or inferior quality, the plaintiff should return the articles or any part thereof permanently, however the plaintiff has not adhered the abovesaid provision and refrained from sending the materials back to the first defendant and till date chosen to retain the goods and hence not justified in claiming the refund of the price amount. The plaintiff leisurely sent a telegram and thereafter the letter complaining about the goods supplied and the retention of the goods till date by the plaintiff would militate against his claim. It is false to state that the defendant's representative inspected the goods and the defendant in their communication directed the plaintiff to lodge the complaint with the defendants 2 and 3, the carriers and the defendant having delivered the goods to the carriers, the plaintiff is not entitled to any relief as against the first defendant and the suit is therefore liable to be dismissed.

6.The case of the defendants 2 and 3 in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. There is no cause of action for the plaintiff to lay the suit against the defendants 2 and 3. It is true that the defendants 2 and 3 were entrusted with the goods by the first defendant for transportation to Mayiladuthurai and accordingly, the packages given by the first defendant without any personal inspection of the contents of the same were transported and the packages arrived at Mayiladuthurai intact and without any damages and were collected by the plaintiff's men on 28.08.1996 and 07.09.1996 after payment of the freight charges as levied and accordingly the cases/goods were delivered to the plaintiff in the same condition as were received from the first defendant and hence the plaintiff has no cause of action as against the defendants 2 and 3 and the court at Mayiladuthurai has no jurisdiction to entertain the suit and further no notice u/s.10 of the Carriers Act was given within the stipulated period and hence the suit is liable to be dismissed.

7.In support of the plaintiff's action, P.Ws.1 to 3 were examined. Exs.A1 to A30 were marked. On the side of the defendants, D.W.1 was examined. Exs.B1 to B19 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to hold that the plaintiff is entitled

to recover the sum of Rs.2,32,200.80/- without interest from the first defendant provided the plaintiff sent back the goods to the first defendant and accordingly granted the decree in favour of the plaintiff as against the first defendant. The trial court dismissed the plaintiff's suit as against the defendants 2 and 3. The first appellate court on an appreciation of the materials placed concurred with the judgment and decree of the trial court. Impugning the same, the second appeal has been laid.

9. The second appeal has been admitted on the following substantial question of law.

Whether the Courts below erred in law in coming to the conclusion that the goods of agreed description was not delivered to the first respondent overlooking the legal presumption available to seller under Section 39(1) of the Sale of Goods Act that delivery of goods to carrier for the purpose of transmission is deemed to be delivery of goods to buyer?

10. There is no dispute that following the purchase orders placed by the plaintiff with the first defendant, the consignments were forwarded by the first defendant through the defendants 2 and 3, the carriers to the plaintiff and according to the plaintiff when the consignments were checked on receipt of the same, found to be not in-consonance with the materials for which the purchase orders had been placed and accordingly, it is the case of the plaintiff that the first defendant had been apprised of all the defects in the materials supplied and further according to the plaintiff, the first defendant's representative also came to Mayiladuthurai and inspected the goods supplied and found the deficiency and thus according to the plaintiff, the first defendant failed to supply the materials as indented and further as the first defendant had also failed to take further steps to get back the defective materials as instructed, it is the case of the plaintiff that, the first defendant as well as the carriers i.e., the defendants 2 and 3 are liable to pay the suit amount with interest as prayed for.

11. The first defendant has raised the defence that the court at Mayiladuthurai has no jurisdiction to try the suit as no part of the cause of action arose at Mayiladuthurai. According to the first defendant, all the transactions concerning the transportment of the consignment took place at Mumbai and further according to the first defendant, if according to the plaintiff, the goods supplied did not conform to the purchase

orders, the plaintiff should work out its remedy only as against the defendants 2 and 3 Carriers and further according to the first defendant, the plaintiff before seeking the recovery of the suit amount, should entrust the goods back to the first defendant and the plaintiff having failed to do so, ceases to get any right of claim of the recovery of the suit amount and hence the suit laid by the plaintiff is liable to be dismissed.

12. The defendants 2 and 3 has raised the defence contending that they had been entrusted with the consignment in sealed packages and accordingly delivered the same as received from the first defendant to the plaintiff without any damages and hence not liable to pay the suit amount as prayed for by the plaintiff and further according to the defendants 2 and 3, the plaintiff's suit should fail for the failure of the issuance of the statutory notice as per section 10 of the Carriers Act and therefore the suit is liable to be dismissed.

13. In so far as this case is concerned, it is found that the parties are not in dispute as to the placement of the purchase orders by the plaintiff with the first defendant as regards the materials prescribed in the purchase orders. The materials were sent through the carriers i.e., the defendants 2 and 3, it is found that on receipt of the goods, the plaintiff's officials found that the goods did not tally with the description of the materials mentioned in the purchase orders and accordingly, recording the said fact, had informed the first defendant about the defects in the goods and further according to the plaintiff, the first defendant's representative D.Raveendran inspected the goods and found the deficiency and despite several communications, as the first defendant failed to pay the amount sought for, according to the plaintiff, they had been necessitated to lay the suit.

14. In this connection, it is found from the documents marked as Exs.A9 and A10, goods receipt notes dated 28.08.1996 and 07.09.1996, the items supplied did not tally with the materials placed under the purchase orders. Accordingly, it is found that the plaintiff within the time allowed, had informed about the deficiency or the defects in the goods supplied to the first defendant through various communications, it is also to be noted that the telegram copy which has been marked as Ex.A11 also been sent by the plaintiff to the first defendant. The first defendant as such not disputed about the above said communications sent by the plaintiff complaining about the defects in the goods supplied and however, would apprise the plaintiff to return the goods on freight to pay basis, so as to enable them to take further action on verification of their records. Now, according to the plaintiff, though the plaintiff had communicated with the first defendant that the consignment

would be returned, provided the first defendant, name the bank through which the lorry receipts could be sent for getting clearance and as the first defendant thereafter did not respond or take any further action, it is stated that the plaintiff has not returned the goods and further according to the plaintiff, even otherwise the first defendant is liable to return the amount received by it, towards the defective goods supplied.

15.It is further noted that the defendant's representative had inspected the goods and admitted about the deficiency in the goods supplied. In this connection, from the communications from the plaintiff sent to the first defendant, the reply has been sent by the first defendant's representative D.Raveendran marked as Ex.A23 whereunder, no dispute has been raised as to the inspection of the goods and also admitting about the deficiency in the supply of goods, it has been informed by him directing the plaintiff to prefer the complaint with the carriers for further course of action. Similar reply has been sent by the first defendant to the plaintiff marked as Ex.A22, directing the plaintiff to lodge the claim with the carriers. It is thus found that, as rightly determined by the Courts below, there is no specific denial of the defects in the goods supplied by the first defendant and accordingly, the first defendant's representative, by way of Ex.A23 did not challenge the same. Equally, the first defendant also in its communications had been only informing the plaintiff to take further course of action with the carriers for their remedy.

16.It is found that, according to the case of the first defendant, the goods ordered were entrusted to the carriers for transport to the plaintiff and as the goods got damaged in transit, it is their case that, only the carriers are responsible for the loss if any, sustained by the plaintiff. However, in this case, it is found that, D.W.1 examined on behalf of the first defendant, during the course of his evidence has admitted that, when the carrier came to their warehouse, the goods were completely packed and sealed for delivery to the carrier and the carriers do not know as to, what is inside the box, however, they give dimensions and gross weight of the consignment and in this case, both the boxes were handed over to the carrier on the same date and the transporter did not again reweigh the consignments before lifting the same, takes them on trust and as a premier firm, they take over precaution to pack in tamper proof and full of proof boxes and sealed the frame with steel strips and company seals so that, that would be tamper proof and in the light of the above said evidence of D.W.1, it is found that the consignments were packed by taking all the necessary precautions with seals completely so as to be in tamper proof and accordingly, when it is found that the transporter takes the delivery of the consignments as such

without any further verification, it is seen that, the case of the first defendant that, the consignments would have been lost or misappropriated or replaced etc., during the transit at the instance of the transporters as such cannot be accepted. In this connection, as per the evidence tendered by the plaintiff through P.Ws.1 to 3, consignments on receipt were opened and the weight tallied with the Way bills and accordingly, only on the opening of the packages, the defects in the goods were noticed by the plaintiff. In this connection, D.W1 has also admitted that only if any defect is noted as regards the weight of the consignment, at the delivery point open delivery would be required and considering the materials placed in this matter, it is found that as no difference in the weight has been noticed as such and when according to the first defendant, the packages were sealed intact with tamper proof protection and further according to the first defendant, when the carriers had received the goods on trust from them and when at the destination point, according to the plaintiff, no difference in the weight has been noticed, therefore, there is no scope for open delivery recourse, it is found that, only on opening the packages, the defects in the goods were noticed and accordingly, the same had been duly noted by the plaintiff to the first defendant. In such view of the matter, the case of the first defendant that the defendants 2 and 3 are responsible for the defects in the goods as such cannot be accepted in any manner.

17.As above noted, when the materials placed, go to disclose that the first defendant's representative had also noted the deficiency in the supply of the goods and the same is also confirmed by the said representative vide Ex.23 communication and the only point that had been raised by the said representative and harped upon by the first defendant is requesting the plaintiff to approach the carriers i.e., the defendants 2 and 3 for working out their remedy and when from the evidence of P.Ws.1 to 3 coupled with the materials placed by the plaintiff marked as Exs.A1 and A30 go to show that, as rightly determined by the Courts below, the plaintiff has established the deficiency of the goods supplied by the first defendant as against the purchase orders placed and in such view of the matter, it is found that the plaintiff is entitled to recover the suit amount with interest as prayed for from the first defendant.

18.The contention has been put forth by the first defendant's counsel that as per section 39 (1) of the Sale of Goods Act, 1930, once the goods had been delivered to the carrier for the transmission to the buyer, the same is prima facie deemed to be a delivery of the goods as ordered and therefore, it is contended that, as the carrier had received the goods intact on delivery at Mumbai, the first defendant cannot

be held to be responsible for the loss of the goods during transit from Mumbai to Mayiladuthurai and it is therefore contended that the plaintiff has no cause of action as against the first defendant. However, it is found that the abovesaid contention put forth by the first defendant's counsel, does not merit acceptance. A reading of section 39 of the Sales of Goods Act, 1930 wholly would go to show that unless otherwise authorized by the buyer, the seller should take all reasonable steps with the carrier having regard to the nature of the goods supplied and if the seller omits to do so and the goods are lost or damaged in the course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself and may hold the seller responsible for the damages. When on the basis of the materials placed, it is found that no change in the weight is noted at the destination point and the seals are found to be intact, it is found that the transporters as such cannot be held responsible for the damage or the loss caused to the goods concerned and when it is found that, the first defendant's representative has not disputed the deficiency in the goods supplied vide Ex.A23, it is seen that the provision of section 39 of the Sale of Goods Act, 1930 would not come to the rescue of the first defendant. That apart, the first defendant is expected to insure that the goods supplied as per law and when it is found that, considering the offer made by the first defendant vide Ex.B6, it is seen that the first defendant had agreed that, if the goods are dispatched by the road, they could arrange the insurance of the consignment on behalf of the plaintiff and accordingly, it is found the first defendant should have taken the necessary steps for insuring the goods sent. Considering the invoices of the first defendant marked as Ex.A3 and A4 as well as the offer terms contained in Ex.B6, it is found that the goods should have been insured by the first defendant before delivery and the first defendant having failed to do so, it is seen that the goods shall be deemed to be sent at the risk of the first defendant during the transmit and in such view of the matter, the first defendant cannot be allowed to contend that the goods on delivery to the carriers, its responsibility ceases to exist. On the other hand, on a reading of the provisions contained in section 39 of the Sales of Goods Act, 1930 wholly, as well as the provisions contained in section 41, pertaining to the buyers right of examining the goods and section 42, the acceptance of the goods by the buyer on delivery, it is found that only on the goods being examined by the buyer at the delivery point and found to be correct, the buyer is not deemed to have accept the goods and in such view of the matter, the contention of the first defendant's counsel that its responsibility comes to an end at the delivery point at Mumbai itself as such cannot be accepted and considering the facts and circumstances, when it is found that the defects in the goods had been noticed only at the delivery point at

Mayiladuthurai by the plaintiff and accordingly, the plaintiff having informed the same to the first defendant as abovenoted and the same had also been confirmed by the first defendant's representative as above discussed and when the first defendant as such has also not seriously controverted other than directing the plaintiff to work out his remedy as against the defendants 2 and 3, the carriers and when it is found that the carriers are not responsible for the loss of the goods, particularly, when the consignments were delivered at the destination intact, it is found that, as rightly determined by the Courts below, it is only the first defendant, who is responsible for the deficiency in the goods supplied and therefore, liable to pay the suit amount with interest as claimed in the plaint.

19. The trial court based on the communication sent by the first defendant, marked as Ex.A12 held that the plaintiff should have returned the goods back to the first defendant for sustaining its claim of recovery of the suit amount and accordingly, granted the relief in favour of the plaintiff on the abovesaid lines. However, it is found, on facts and circumstances of the present case, there is no need for the plaintiff to return the goods back to the first defendant. A reading of section 43 of the Sale of Goods Act, 1930 would go to show that unless or otherwise agreed, where the goods are delivered to the buyer and he refuses to accept the same, having the right so to do, he is not bound to return them to the seller, but it is sufficient, if he intimates the seller that he refuses to accept the same. In this case, as above seen, the plaintiff has complained about the defects in the goods supplied to the first defendant through various communications and accordingly called upon the first defendant to pay the amount paid to the plaintiff. In so far as this case is concerned, the plaintiff had already paid the amount for the goods supplied by the first defendant, the plaintiff has established that the goods supplied by the first defendant did not tally with the purchase order, in such circumstances, when the plaintiff had already paid for the goods rejected as not conforming to the contract, as per section 43 of the Sale of Goods Act, 1930, there is no necessity on the part of the plaintiff to return back the goods to the first defendant for claiming the suit amount. No doubt in the present case, there has been communications between the parties as to the return of the goods supplied. However, when it is found that as per the case of the plaintiff, the first defendant had not come forward to take back the return of the goods by complying with the suggestions put forth by the plaintiff vide their letter dated 17.12.1997 marked as Ex.A26, whereunder the plaintiff had directed to furnish the name and address of the bankers so as to enable them to negotiate the documents through the bankers for sending back the goods, however, the first defendant has failed to respond to the

same and accordingly, it is found that the plaintiff has been necessitated to issue the legal notice marked as Ex.A27 dated 28.03.1998 and subsequently on the failure of the defendants to comply with the demand made under the legal notice, it is found that the plaintiff had laid the suit. In such view of the matter, as the first defendant had failed to take appropriate steps to get back the return of the defective goods supplied in terms of the letter marked as Ex.A26, the Courts below had failed to consider the import of the same in the right perceptive, also when it is noted that the plaintiff has paid the entire amount for the goods rejected as not conforming to the contract, though the plaintiff has no lien upon the said goods, it is found that, however, the plaintiff cannot be imposed any condition to get back the amount paid for only on the return of the goods received by them to the first defendant. At the foremost, there is no such agreement between the parties for the return of the goods. Even if there is such an agreement, as the first defendant had failed to take appropriate steps to get back the defective goods as above discussed and particularly, when the plaintiff has already paid the entire amount for the defective goods, it is found that the plaintiff is not, as such, bound to return the same to the first defendant other than intimating about the damages in the goods and in such view of the matter, it is found that the plaintiff is entitled to get back the amount paid for the defective goods with interest without the return of the goods to the first defendant.

20. The legal presumption sought to be raised of the first defendant's counsel by way of relying upon section 39(1) of the Sale of Goods Act, 1930 cannot be made applicable to the facts and circumstances of the present case. When it is found that the above said determination of the delivery of the goods could only be taken prima facie and considering the facts and circumstances of the case wholly, in the light of the other provisions of section 39 of the Sale of Goods Act, 1930 coupled with sections 41 and 42 of the said Act, it is found that the first defendant having failed to ensure the reasonable care in the despatch of the goods ordered and the buyer is entitled to take the delivery of the goods at the destination only on examining the goods after ascertaining whether they are in conformity of the terms of the contract and on examination of the goods, the buyer namely the plaintiff has immediately apprised the first defendant about the defects in the goods supplied, it is seen that further more, the plaintiff has also established that the goods supplied by the first defendant are not conforming to the description of the materials ordered by way of the purchase orders in question and further on the facts and circumstances of the case, the plaintiff is not bound to return back the goods to the first defendant, he having paid the entire price amount for the defective goods already and in addition to that when the

first defendant has failed to take appropriate steps to get back the return of the goods, it is found that the plaintiff is entitled to recover the suit amount from the first defendant with interest as prayed for without any necessity of the return of the goods back to the first defendant as determined by the Courts below. The substantial question of law formulated in the second appeal is accordingly answered against the first defendant and in favour of the plaintiff.

21. In conclusion, the judgment and decree dated 02.06.2003 passed in A.S.No.33 of 2002 of the file of the Principal District Court, Nagapattinam confirming the judgment and decree dated 10.07.2001 passed in O.S.No.8 of 1999 on the file of the Additional Sub Court, Mayiladuthurai are modified by setting aside the condition imposed by the Courts below in directing the plaintiff to return back the goods supplied by the first defendant for entitling the plaintiff to obtain the sum of Rs.2,32,200.80/- without interest from the first defendant and instead the decree is granted in favour of the plaintiff that it is entitled to recover the whole of the suit amount with subsequent interest at 6% till repayment with costs from the first defendant and in other aspects the judgment and decree of the Courts below are confirmed. Accordingly, the second appeal is disposed of. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Principal District Judge,
Principal District Court, Nagapattinam.
2. The Additional Sub Judge,
Additional Sub Court, Mayiladuthurai.
3. The Section Officer,
VR Section, High Court. (2 Copies)

+1cc to Mr.S.Sounthar, Advocate, S.R.No.26008

S.A.No.2029 of 2003

RK(CO)

CS/08/05/18