IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.10.2018	Delivered on: 24.01.2019

CORAM
THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM
S.A.No.1773 of 2001

M/s.Greaves Cotton & Company Limited .. Appellant

Vs.

1.The Administrator,
Cheyyar Co-operative
Sugar Mills Limited

2.The Tamil Nadu Sugar
Corporation Limited
TASCO rep.by
its General Manager ...Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree made in Cross Appeal No.14 of 2000 dated 18.04.2001 on the file of the first respondent, Principal District Judge, Tiruvannamalai, confirming the judgment and decree in O.S.No.34 of 1999 dated 25.06.1999 passed by the Subordinate Judge, Cheyyar, Tiruvannamalai.

For Appellant : Mr.Karthik Ram Mohan for
: Mr.S.Ramasubramaniam Associates

For Respondents: P.Mani for R1
: R2- set exparte

JUDGMENT

This second appeal has been filed by the first defendant against the judgment and decree passed by the Principal District Judge, Tiruvannamalai, in Cross Appeal in A.S.No.14 of 2000 dated 18.04.2001 reversing the judgment and decree of the Sub-Judge, Cheyyar, Tiruvannamalai District in O.S.No.34 of 1999 dated 25.06.1999 in respect of disallowing a portion of the plaintiff's claim.

2. The first respondent herein had filed a suit in O.S.No.34 of 1999 on the file of the Sub Judge, Cheyyar, Tiruvannamalai District, for recovery of a sum of Rs.1,60,985.19/- with interest from the first defendant.

The first defendant made a counter claim in the written statement to direct the plaintiff to pay a sum of Rs.1,09,433.22/- with interest. The learned Sub Judge, Cheyyar, Tiruvannamalai District, by the judgment dated 25.06.1999 had partly decreed the suit directing the first defendant to pay a sum of Rs.1,08,305.74/- with subsequent interest at the rate of 12% per annum from the date of plaint till the date of decree and thereafter at the rate of 6% per annum till the date of realization. He also partly allowed the counter claim of the first defendant and directed the plaintiff to pay a sum of Rs.58,000/- with subsequent interest at the rate of 12% per annum from the date of plaint till the date of decree and thereafter at the rate of 6% per annum till the date of realization.

3. The first defendant, feeling aggrieved, filed an appeal in A.S.No.14 of 2000 on the file of the Principal District Judge, Tiruvannamalai, against the decree passed against it. The plaintiff had filed A.S.No.78 of 2000 on the file of the Principal District Judge, Tiruvannamalai, against the allowing of counter claim. The plaintiff had also filed a Cross Appeal in A.S.No.14 of 2000 against disallowing the claim of Rs.52,279.45/- as liquidated damages for the delayed supply of Gear boxes. The Principal District Judge, Thiruvannamalai, by the common judgment dted 18.04.2001 had dismissed both the appeals viz., A.S.No.14 of 2000 and A.S.No.78 of 2000. However, he allowed the cross appeal, directing the first defendant to pay an additional sum of Rs.52,279.45/- with interest at the rate of 12% per annum from the date of plaint, till the date of decree, as damages for the delayed supply of gear boxes at the rate of 5% on the basic value. Aggrieved by the allowing of Cross Appeal in A.S.No.14 of 2000, the first defendant had filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

4. The averments made in the plaint, in brief, are as follows:-

(a) The plaintiff is running Sugar Mills for production of Sugar and it is under the control of the second defendant herein. The second defendant had an understanding with the first defendant for supply of machineries to the Sugar Mills. On the guarantee of the second defendant, the first defendant had agreed to supply machineries and the payment for supply will have to be made by the plaintiff directly to the first defendant under the advice to the second defendant. At the instance of the second defendant, a purchase order was placed on 30.01.1989 with the first defendant for the supply of 62 gear boxes and 5 dinodrives. The first defendant has to deposit as E.M.D a sum of Rs.50,000/-. The plaintiff on their part must pay to the first defendant an advance of 20% on the basic price of these articles. Further, the first defendant has to supply the aforesaid materials by the end of June 1989. Failure to complete the supply within the stipulated date, will make the first defendant liable to pay penalty at 5% of the basic value of gear boxes and also 3% penalty for dynodrives. In accordance with the said agreement, on 22.02.1989, the plaintiff had paid a sum of Rs.2,08,718.00/- as advance. The first defendant instead of supplying the machineries in lot, was sending gear boxes and dynodrives in various instalments and the first defendant used to send vouchers through banks and immediately on receipt of the vouchers the plaintiff used to remit amounts as disclosed in the vouchers. The plaintiff could not scrutinise the accounts when such supply was made because, the settlement of accounts can only be made after the entire lot was received by the plaintiff.

(b) In some cases, the first defendant adjusted a portion of the advance from the advance paid by the plaintiff. The first defendant claimed a sum of Rs.14,07,530.44/- through the bills. But they received a sum of Rs.15,06,190.98/-. So, the first defendant received a sum of Rs.98,660.94/- as excess amount. In respect of penalty as the supply of gear boxes were completed only on 11.05.1991 instead of June 1989, the first defendant has to pay 5% of the basic value of these 62 gear boxes and this comes to Rs.52,279.45/-. So far as, dynodrive is concerned, as the supply was made only in September 1999, instead of June 1989 penalty at 3% on the basic value of the dynodrive comes to Rs.9645.20/-. In all, therefore on these three counts the first defendant has to pay a sum of Rs.1,60,585.55/-. Therefore, the suit is filed for the recovery of Rs.1,60,585.55/- with 12% subsequent interest, as it is a commercial transaction.

5. The averments made in the written statement filed by the first defendant, in brief, are as follows:-

(a) It is true that the first defendant, who is a manufacturer-cum-supplier of machinery entered into an agreement for supply of machinery parts namely, gear boxes and dynodrives to the plaintiff's factory. The same was at the instance of the second defendant. The contract had been effected by means of orders placed by the second defendant on behalf of the plaintiff for the above items in accordance with work orders dated 30.01.1989. The first defendant had paid EMD of Rs.50,000/- which was returnable on performance of the contract. The first defendant had duly supplied the machineries after fabricating the same in accordance with the requirements of the second defendant. A total number of 62 gear boxes were supplied between January 1989 and August 1989. By 31.05.1989, 54 gear boxes were supplied and the remaining 10 were supplied in July 1989 and August 1989. The dynodrives were supplied in due times. Eventhough the work order stated that the goods ordered should be supplied within a particular time, time was not essence of the contract. The fact also remains that there was a substantial compliance with regard to periods of delivery and further the plaintiff did not suffer any damages whatsoever by the small delay of few days in the supply of machinery. Admittedly, the work contemplated by the order was carried out only long after, in the month of November 1991, that is long after the supplies were completed. In the above circumstances eventhough there was a clause referring to the levy of penalty for delayed delivery, the same cannot be invoked by the plaintiff since there was no damages caused to them. So, the purported levy of penalty by the plaintiff is totally unwarranted and illegal and uncalled for. Further, the claim for damages with reference to the whole of the quantity of the ordered machinery is totally unjustified and not maintainable in law.

(b) As per the bills submitted by the first defendant for supply, the plaintiff has to pay a sum of Rs.15,43,618.22/- to the first defendant. As against this, the plaintiff has paid only a sum of Rs.15,16,603.00/- leaving a balance of Rs.27,015.22/-. Additionally the first defendant had paid the EMD of Rs.82,418/-. Aggregating the above, the plaintiff has to pay a sum of Rs.1,09,433.22/- for which the first defendant is making a counter claim against the plaintiff. The claim of the plaintiff is unsustainable and the same is barred by limitation. Therefore, the first defendant prayed to dismiss the suit with costs and to allow the counter claim filed by the first defendant.

6. The averments made in the additional written statement filed by the first defendant, in brief, are as follows:

The quantification of the damages by way of liquidated damages is meaningless. The mere prescription of percentage cannot give rise to a right for damages. Whether it is penalty or damages, the basis is the same and therefore the claim for penalty is unjustified and illegal. Therefore, the first defendant prayed to dismiss the suit.

7. The averments made in the counter statement filed by the plaintiff are in brief as follows:

The allegation that the plaintiff has to pay a sum of Rs.15,43,618.22/- appears not correct. E.M.D for gear boxes for Rs.50,000/- and also for dynodrives totalling to Rs.58,038/- alone is with the plaintiff. The EMD can only be refunded after finalisation of account and not earlier. Therefore, the plaintiff prayed to dismiss the counter claim filed by the first defendant.

8. Based on the aforesaid pleadings, the learned Sub Judge, Cheiyyar, Tiruvannamalai, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, one witness was examined as PW1 and Ex.A1 to Exs.A27 were marked as exhibits. On the side of the first defendant, one witness was examined as DW1 and Ex.B1 was marked as exhibit.

9. The learned Sub-Judge, Cheyyar, Tiruvannamalai, after considering the materials placed before him, found that the suit is not barred by limitation. He further found that as per the agreement, the first defendant has to supply 62 gear boxes before the end of August 1989 and 5 dynodrives before the end of June 1989. He further found that the first defendant had supplied gear boxes within the stipulated time, and hence, the plaintiff is not entitled to claim damages in respect of supply of gear boxes. However, he found that the dynodrives were not supplied within the stipulated time and hence, the plaintiff is entitled to claim damages for the delayed supply of dynodrives that would come to Rs.9,645.20/-. He further found that the first defendant had supplied 62 gear boxes and 5 dynodrives for the value of Rs.14,70,735.44/- but it had actually received a sum of Rs.150619.98/- and hence, the first defendant has to return a sum of Rs.98,660.54/- as excess payment. Accordingly, he decreed the suit, directing the first defendant to pay a sum of Rs.1,08,305.74/- and rejected the rest of the claim of the plaintiff. Insofar as, the counter claim is concerned, the learned Sub Judge, Cheyyar, Tiruvannamalai, found that the first defendant has not proved that he has deposited a sum of Rs.82,418/- as EMD. Further, he found that since PW1 has admitted in his evidence that the first defendant had deposited a sum of Rs.58,000/- as EMD, the plaintiff is bound to return the said amount of Rs.58,000/- with interest.

10. The first defendant, feeling aggrieved, filed an appeal in A.S.No.14 of 2000 on the file of the Principal District Judge, Tiruvannamalai, against the decree passed against it. The plaintiff had filed A.S.No.78 of 2000 on the file of the Principal District Judge, Tiruvannamalai, against the allowing of counter claim. The plaintiff had also filed a Cross Appeal in A.S.No.14 of 2000 against disallowing the claim of Rs.52,279.45/- as liquidated damages for the delayed supply of Gear boxes. The Principal District Judge, Thiruvannamalai, by the common judgment dted 18.04.2001 had dismissed both the appeals viz., A.S.No.14 of 2000 and A.S.No.78 of 2000. However, he allowed the cross appeal, directing the first defendant to pay an additional sum of Rs.52,279.45/- with interest at the rate of 12% per annum from the date of plaint, till the date of decree, as damages for the delayed supply of gear boxes at the rate of 5% on the basic value. Aggrieved by the allowing of Cross Appeal in A.S.No.14 of 2000, the first defendant had filed the present second appeal. The first defendant has filed the present second appeal against the allowing of the Cross Appeal filed in A.S.No.14 of 2000.

11. This Court, at the time of admitting the second appeal, had formulated the following substantial questions of law:-

> "1. Whether the lower Appellate Court erred in holding that admittedly the 62 gear boxes were not supplied time " completely overlooking the evidence in the case and the finding of the trial Court that the 62 gear boxes were supplied well before August 1989 the time stipulated under the contract" and whether as such the finding of the Appellate Court is contrary to the direct evidence on record?
>
> 2. Whether the decree for the amount of penalty stipulated in the contract is not contrary to Section 74 of the contract Act?"

12. Heard, Mr.Karthik Ram Mohan, the learned counsel for the appellant and Mr.P.Mani, the learned counsel for the first respondent.

13. Substantial Questions of law 1 and 2:

The learned counsel for the appellant/first defendant has submitted that the lower Appellate Court erred in holding that the 62 gear boxes were not supplied in time, completely overlooking the evidence in the case and the finding of the trial Court that the 62 gear boxes were supplied well before August 1989 the time stipulated under the contract. He further submitted that even assuming that some of the gear boxes were not supplied within the time stipulated in Ex.A1 and Ex.A3, the plaintiff cannot impose penalty, unless it proved a loss. In support of his contentions, the learned counsel for the appellant relied upon the decision in Kailash Nath Association Vs. Delhi Development Authority and another, reported in (2015) 4 SCC 136.

1. In the said decision, the Hon'ble Supreme Court in paragraph No.43, 43.1 to 43.7 has observed as follows:-

2.

> " 43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:
>
> 43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

> 43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression " whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss in difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

15. Per contra, the learned counsel for the first respondent/plaintiff has submitted that the evidence of PW1 and PW1 would clearly show that the gear boxes were not supplied within the time stipulated in the contract. He further submitted that the trial Court failed to appreciate the evidence in proper perspective, but, the first Appellate Court has properly appreciated the evidence and held that the gear boxes were not supplied by the first defendant within the time stipulated in the contract and hence the first defendant is liable to pay penalty of 5% of the basic value of the gear boxes and accordingly, the first Appellate Court has allowed the Cross Appeal filed by the plaintiff and therefore, he prayed to dismiss the second appeal.

16. The Gear Boxes were supplied by the first defendant as detailed in the following chart:-

Sl.Nos.	Exhibits Nos.	Date of Bills	Quantity supplied
1.	Ex.A5	20.01.1989 / 20.02.1989	15
2.	Ex.A6	28.02.1989	1
3.	Ex.A7	28.02.1989	12
4.	Ex.A8	20.03.1989	5
5.	Ex.A9	31.03.1989	2
6.	Ex.A10	31.03.1989	3
7.	Ex.A11	31.03.1989	1
8.	Ex.A12	20.04.1989	2
9.	Ex.A13	29.04.1989	5
10.	Ex.A14	29.04.1989	4
11.	Ex.A15	29.04.1989	2
12.	Ex.A16	09.05.1989	1
13.	Ex.A17	23.05.1989	1
14.	Ex.A18	31.05.1989	1
15.	Ex.A19	10.07.1989	8
16.	Ex.A20	31.08.1989	2
	Total		65

17. The aforesaid chart shows that the first defendant had supplied 65 gear boxes from 20.02.1989 to 31.08.1989. As per Ex.A1 purchase order dated 30.01.1989, the plaintiff gave orders for 62 gear boxes only. Further, the said gear boxes should be delivered before July 1989. Subsequently, the plaintiff had issued amended purchase order dated 22.05.1989 vide Ex.A3. In that document the plaintiff had stated that the gear boxes should be delivered before the end of August 1989 instead of July 1989. So, it is clear that the first defendant should supply 62 gear boxes before the end of August 1989. But contrary to the same, the plaintiff has stated in the plaint that the gear boxes should be supplied by the end of June 1989. The plaintiff cannot claim that the gear boxes should be supplied before June 1989.

18. As already pointed out that the aforesaid chart would show that eventhough the plaintiff had issued purchase order for 62 gear boxes vide Ex.A1, the first defendant had supplied 65 gear boxes before 31.08.1989. The trial Court taking into consideration of the fact that the first defendant had supplied the gear boxes under Ex.A5 to Exs.A20 between January 1989 to August 1989 has held that there is no delay in supplying the Gear boxes and has rightly rejected the claim of the plaintiff with regard to the penalty. But the first Appellate Court without properly appreciating the evidence, erroneously reversed the findings of the trial Court and allowed the Cross Appeal as if the first defendant had supplied the gear boxes after expiry of the stipulated period. Therefore, the said findings of the first Appellate Court are liable to be set aside.

19. Since the appellant/first defendant had supplied the gear boxes within the stipulated time as mentioned in Ex.A3, this Court is of the view that it need not go into the question, as to whether, the plaintiff is entitled to claim penalty under Section 74 of the Contract Act.

20. For the aforesaid reasons, this Court is of the view that the first Appellate Court erred in allowing the Cross Appeal and hence, the Second Appeal is to be allowed. Accordingly, the substantial questions of law are answered infavour of the appellant/first defendant.

21. In the result, the second appeal is allowed. No costs. The judgment and decree passed by the first Appellate Court in Cross Appeal in A.S.No.14 of 2000 dated 18.04.2001 are set aside restoring the judgment and decree passed by the trial court.

dna Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

1.The Principal District Judge,Tiruvannamalai.

2.The Subordinate Judge, Cheyyar,Tiruvannamalai.

Copy to The section officer,
VR Section,High court,Madras

+1cc to Mr.S.Ramasubramaniam Associates , Advocate SR.No. 5701

+1cc to Mr.P.Mani, Advocate SR.No. 5869

S.A.No.1773 of 2001

A.SK(26/03/2019)