

Reserved on : 27.03.2019

Pronounced on :02.04.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

C.R.P. (NPD) No.1773 of 2009 &

M.P.No.1 of 2013

Mr.R.Subramaniam

.. Petitioner

Vs.

1. No.672 Attur Vivasaya Urpathiyalargal
Co-operative Sangam Ltd.,
Rep. By its Secretary,
Attur, Salem District.

2. The Deputy Registrar (Middle),
Co-operative Association,
Attur Division,
Attur, Salem District.

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the judgment and decree passed in C.M.A. (CS).No.15 of 1999 on the file of the Principal District Court, Salem dated 04.02.2008 confirming the judgment and decree passed in A.R.C.No.1051 of 94-95 on the file of the Registrar, Co-operative Societies, Attur dated 14.05.1998 to set aside the same.

For Petitioner : Mr.A.C.Muthusamy
for Mr.A.Sundaravathanan

For Respondents : Ms.P.Shanthi Rakkappan – R1

Mr.N.Manikandan
Government Advocate (CS) - R2

ORDER

Aggrieved over the concurrent finding of the Registrar of the Co-operative Societies and the Co-operative Tribunal, the present revision has been filed.

2. Brief facts leading to filing of this revision is as follows :

The revision petitioner has purchased cotton in auction from the first respondent on 15.03.1992, 19.04.1992 and 31.05.1992 for the value of Rs.8,49,873/-. As per the conditions, the revision petitioner has to deposit the entire sale price within 10 days of such auction. The condition also stipulates that the purchaser shall remove the produce within 10 days of the purchase and if not removed, it will lie at the risk of the purchaser. As the revision petitioner did not remove the cotton, the first respondent sent notices to the revision petitioner on 29.9.92, 23.11.1992 and 15.02.1993. However, the revision petitioner has not paid the amount nor taken the delivery of the cotton. Accordingly, the respondent has re-auctioned the cotton on 15.03.1993. Accordingly, the dispute

is raised for recovery of a sum of Rs.5,00,600.20, the difference in price. The dispute has been referred to the Co-operative Registrar under section 90 of the Tamilnadu Co-operative Societies Act. The Registrar in his Order passed an exparte award against the revision petitioner for recovery of a sum of Rs.9,89,798/-. The award also included 22% interest. As against which the revision petitioner filed an appeal before the Co-operative Tribunal in C.M.A.15 of 1999. The Co-operative Tribunal dismissed the appeal. As against which, the present revision came to be filed.

3. The learned counsel appearing for the revision petitioner has submitted that when the revision petitioner has violated the terms and conditions of the auction and neither paid the amount nor removed the goods within 10 days, the respondent ought to have re-auctioned the same immediately or within a reasonable time. The produce purchased is cotton, which is amenable for decolourisation and weight loss. Whereas, the respondent has re-auctioned the produce after one year and sold for lesser price. Hence, it is the contention of the learned counsel for revision petitioner that the respondent ought to have taken reasonable care in re-auctioning the produce within a reasonable time. They should have taken steps to mitigate the damages and they have failed to re-auction the cotton within a reasonable time. They allowed the cotton to lie in the godown. By passage of time, the quality of the cotton reduced and its value also diminished. Hence, submitted that without showing due diligence to mitigate

the damages, the respondents, now cannot claim the entire difference in price as damages from the revision petitioner. The Joint Registrar as well as the Tribunal has not at all gone into this aspect.

4. It is the further contention of the learned counsel that the interest awarded by the Joint Registrar and the Co-operative Tribunal is also against settled principles of law. Discretion has not been properly exercised by the Co-operative Tribunal. Hence, submitted that the Order of the Registrar and the Co-operative Tribunal required to be set aside or modified by this Court. In support of his submissions, he relied upon the judgment in **Kannu Reddiar Vs. T.Palanirajan and 4 others** reported in **1995 – 2 – L.W. 169** and **The Secretary, K.1161 Kalingarayan Palayam Primary Agricultural Co-operative Credit Society Ltd., Vs. Chinnusamy and another** reported in **2017 (4) CTC 636**.

5. The learned counsel appearing for the respondent, Co-operative Society contended that having purchased cotton in an auction, the revision petitioner has failed to pay the value of the cotton within 10 days as per the conditions stipulated for sale. The condition No.7 makes it clear that every purchaser shall remove the produce within 10 days of auction. Otherwise, the goods will lie at the risk of the purchaser and the Society does not take any responsibility for such produce and the society may cancel the transaction in such case and again sell it by auction and recover the loss from the purchaser.

Admittedly, in this case, notices were sent to the petitioner for removing the goods. But the revision petitioner has not removed the goods nor paid the amount. Hence, the cotton has been re-auctioned for lesser amount. Accordingly, the dispute is raised for recovery of the amount, loss caused to the society and the dispute has been referred for recovery of Rs.5,00,600.20 with interest at the rate of 18%. Hence, submitted that the Order does not require any interference and prayed for dismissal of this revision.

6. The dispute has been referred for recovery of the difference price of the cotton in re-auction along with interest. The dispute has been referred for recovery of a sum of Rs.5,00,600.20. It is not in dispute that the revision petitioner has purchased the cotton from the first respondent on 15.03.1992, 19.04.1992 and 31.05.1992 for Rs.8,49,873/-. Similarly, the conditions of such sale stipulates that as per the condition No.3 the purchaser shall pay the value of the purchased produce within 10 days. Similarly condition No.7 is as follows :

“7. Every purchaser shall remove the produce within 10 days of the auction of payment for as otherwise directed as laid down in condition No.3 above. If not removed, it will lie at the risk of the purchaser. The society does not take any responsibility in such case and again shall it by auction and recover the loss from the purchaser accrued thereby.”

Though the clause 3 and 7 makes it mandatory for the purchaser to pay the purchase money within 10 days and remove the produce purchased from the society, the clause No.7 gives a discretion to the seller to cancel the transaction and again sell it by re-auction and recover the loss from the purchaser. Though Clause No.7 does not stipulate the period in which such discretion should be exercised by the society to re-auction the produce, the society cannot be a silent spectator for years together without exercising the option of re-auction immediately.

7. Admittedly, the produce purchased by the revision petitioner is cotton and cotton has been purchased on 15.03.1992, 19.04.1992 and 31.05.1992. It is to be noted that the cotton is amenable to decolourisation and weight loss. Once its weight is reduced by passage of time and colour is faded, its original value will be diminished. There is no dispute in this regard. When the respondent is entitled to claim damages for breach of any condition by the revision petitioner, the respondent ought to have taken some steps to mitigate the damages. If the respondents have exercised their option of reselling the cotton immediately within a reasonable time, there would not have been any weight loss or decolourisation and the value of the cotton would not have diminished. The records indicate that re-auction was conducted only in the year 1993, i.e., 17.02.1993 and 19.02.1993 and the auction was concluded on 29.07.1993 and the respondent has claimed damages of Rs.4,53,217.25 and

interest at the rate of 18% per annum as on 29.07.1993, as a difference in price in sale of the cotton.

8. As already discussed, when the party to the contract seeking damages for goods sold and not removed within the stipulated time, the seller has to show that they have also taken steps to mitigate the damages. If the goods are not removed within 10 days as per the conditions stipulated, the seller should have exercised discretion to cancel such sale and bring the goods for re-auction within a reasonable time. But they have not done so. Atleast they should have taken steps within a reasonable time of three months. It appears that they have issued notice only 29.09.1992 for the first time. Even after notice, they remained silent and goods were sold in the year 1993 in re-auction. When they failed to exercise their responsibility to mitigate the damages, they cannot claim the damages in entirety. Had the cotton sold immediately after breach of contract by the revision petitioner, it would have fetched more or less the same rate for which the revision petitioner has purchased in the year 1992. There would not have been much difference in price. The cotton is amenable for decolourisation and also weight loss due to passage of time. Such being the position, the respondents ought to have taken steps to mitigate the damages. But they have not done so. In this regard, it is useful to refer Section 73 of India Contract Act, which reads as follows :

“73. Compensation of loss or damage caused by breach of contract :

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract: When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.”

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The explanation to Section 73 of the Indian Contract Act makes it clear that in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance

of the contract must be taken into account. The respondents, having sold the cotton and having found that neither the price paid within 10 days as per the conditions nor the goods were removed, have not taken any measures to remedying the damages and the inconvenience caused due to non performance of the contract.

9. It is also worth of referring Section 54(2) of Sale of Goods Act and the same deals where the unpaid seller shall exercise his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damager for any loss occasioned by his breach of contract. Sub clause (2) of Section 54 of the Sale of Goods Act envisages such option shall be exercised within a reasonable time. The reasonable time cannot be meant that the seller can take their own time. In the given case, they took action only in the year 1993 for resale of the cotton. Therefore, certainly they are not entitled to claim the entire damages under the pretext of loss due to difference in price.

10. Admittedly, the revision petitioner has also breached the conditions. He has not paid the sale price immediately after the auction within 10 days as per 3 and 7 of the conditions of auction. But for the breach, without taking any measures to mitigate the damages, in my view, the respondent cannot claim the

entire difference in price. Hence, this Court is of the view that both the parties are guilty of non performance of the conditions and both are equally liable for such inconvenience or loss to the Society. Accordingly, the award of the Registrar directing the damages of difference in price money to be paid by the revision petitioner is modified and the revision petitioner is directed to pay 50% of the same.

11. As far as the interest is concerned, the Registrar and the Co-operative Tribunal have not even gone into the interest aspect. The law is well settled that the arbitrator or Tribunal are not obliged to award interest from the date of claim, only at the contractual rate. In fact, the arbitrator and the Tribunal shall award any reasonable rate of interest in terms of the judgment in **N.M.Veerappa vs. Canara Bank** reported in **1998(1) CTC 219** as held by the Honourable Supreme Court. But the Courts below have not exercised their discretion in awarding the interest properly. When the discretion has not been exercised judicially, such an Order is also liable to be interfered.

12. In a judgment in **M/s.United Solvent Extractions Private Limited Vs. The Tamil Nadu Civil Supplies Corporation Limited, represented by its Regional Manger, Vellore** reported in **2004 (4) M.L.J. 65**, this Court in has held as follows :

“21. The plaintiff has claimed interest at the rate of 6% per

annum, from the date of plaint till the date of payment. The damage or loss sustained by the plaintiff is the difference in price, which had happened due to the breach of contract committed by the defendant. It is not the case of the plaintiff Corporation, that the defendant enjoyed the benefit of the goods, by removing the same, but failed to pay the amount or something like that. Under the facts and circumstances of the case, it is sufficient, if the plaintiff is compensated to the actual loss. It is not necessary that compensation amount should carry interest from the date of plaint. Therefore, in our considered opinion, it may not be proper to charge the defendant, with interest from the date of plaint and justice would be met, if the defendant is directed to pay interest, from the date of decree considering the peculiar nature and circumstances of the case. In this view, the interest awarded by the trial Court from the date of plaint has to be modified, confirming the rest of the judgment, as such, for the reasons assigned supra.”

Admittedly, in this case also, the goods were not removed and the respondent is also guilty of latches. They have not taken any measures to mitigate the damages.

13. Accordingly, this revision is partly allowed and the revision petitioner is directed to pay 50% of the difference in price of cotton sold during the re-auction on 17.02.1993 and 19.02.1993 along with 6% interest on the amount from 15.05.1998 till the date of realisation. Consequently, the connected miscellaneous petition is closed. No cost.

02.04.2019

vrc

To

1. The Principal District Judge,
Salem.
2. The Deputy Registrar,
Co-operative Society,
Attur.



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N.SATHISH KUMAR, J.

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Order in

CRP.(NPD) No.1773 of 2009

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