IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 05.11.2020

Coram::

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1103 of 2009
& M.P.Nos.1 & 2 of 2011

M/s.Bhoruka Steels Ltd.,
Rep. By its Branch Manager,
Regd. Office at Mahadevapuram,
White Field Road, Bangalore - 560 048,
Office at 179, Thambu Chetty Street,
Chennai - 600 001. ... Appellant/Defendant

/versus/

M/s.Steel Complex Ltd.,
Rep. By its Managing Director,
Mr.K.P.Vijayakumar, Cheruvannur,
P.O.Box No.42, Feroke - 673 631,
Calicut, Kerala District. ... Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of C.P.C., against the decree and judgment dated 13.02.2008 made in A.S.No.400 of 2006 on the file of the Additional District Court-cum-Fast Track Court No.II, Chennai - 1, confirming the decree and judgment of the Trial Court dated 30.06.2005 made in O.S.No.3813 of 2001 on the file of the VIIIth Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.D.Kanagasundaram

For Respondent : Mr.Sunil Prakash,
for Mr.T.Viswanatha Rao.

JUDGMENT

(The case has been heard through video conference)

Heard the Learned Counsel for the Appellant and the Learned Counsel for the respondent.

2. This Appeal is filed against the concurrent findings of the Courts below. The aggrieved defendant has filed the present Second Appeal.

3. The case of the appellant is that during the year 1997-1998, the cargo ship M.V.Pacific Hiro and M.V.Rio Madeira, was carrying steel scrap to the Port of Chennai for the plaintiff. The defendant was authorised to oversee the delivery of cargo and to that effect an agreement was entered between committee of receivers and representatives of stevedores and the defendant on 24.08.1995. The defendant being a stevedores ought to have delivered 99% of the goods as per the agreement and if there is any shortage, it was agreed to compensate at the rate of Rs.7,000/- M.T. When the cargo in M.V.Pacific Hiro reached Chennai Port Trust with 2000 MT steel scrap, only 1980 M.T scrap delivered to the plaintiff, though as per the bill of lading, 0.170 M.T steel scrap in excess was unloaded and charge was paid for the said cargo. The defendant failed to deliver the goods to the plaintiff in time. With much delay, 1966.490 M.T scrap was delivered to the plaintiff. For shortage of 33.510 M.T scrap, as per the agreement, the defendant is liable to pay a sum of Rs.94.570/- and due to the shortage and belated delivery the plaintiff has suffered monetary loss to a tune of Rs.1,20,729.32. In spite of repeated request, the defendant had not compensated the damage as per the terms of agreement dated 24.08.1995. Hence, the defendant is liable to pay compensation @ 18% interest from 25.08.1997 till the date of payment.

4. Similarly, in the other ship M.V.Rio Madiera, against 2200 M.T scrap imported, there was a shortage of 10.354M.T scrap. For the delayed supply and shortage, the plaintiff has incurred loss of Rs.83.958.65. Therefore, the suit for Rs.2,13,457.79, in respect of short delivery of cargo in M.V.Pacific Hiro and for a sum of Rs.1,40,763.97 for short delivery of cargo in M.V.Rio Maderia with 18% interest was laid.

5. The suit claim was defended by the plaintiff herein through his written statement contending that the transaction in respect of cargo shipment in M.V.Pacific Hiro was handled by clearing and forwarding agent M/s.South India Corporation (Agencies) Ltd. the clearing agent has allotted only 1087.68 MT to the plaintiff. Similarly, the cargo shipment in M.V. Rio Madiera, the clearing agent had allotted 2000 M.T scrap. Since, the clearing and forwarding agent M/s.South India Corporation Agencies Limited being a necessary party, the suit is bad for non-joinder of proper and necessary party. Further, the transactions took place in the year 1997-98. As per the memorandum of understanding, the agreement got concluded on

07.05.1998 since the suit has been filed after five years, the suit is badly barred by limitation. As per the memorandum of understanding dated 07.05.1998, the defendant agreed to pay a sum of Rs.63,924/-. However, the said memorandum of understanding was not concluded since the plaintiff did not sign the memorandum of understanding. The plaintiff owes Rs.22,894/- to the defendant in connection with the transaction of cargo imported through shipment M.V.Nips. In memorandum of understanding, it was agreed by the parties that the said due will be adjusted towards the short supply of 10 M.T scrap. The plaintiff, who has suppressed all these materials facts, has filed the suit beyond the period of limitation and without impleading necessary parties. Hence, it has to be dismissed.

6. The Trial Court based on the pleadings, formulated following issues:-

(i). Whether the plaintiff is liable of short supply?

(ii). Whether the suit is bad for non-joinder of South India Corporation Agencies as a necessary party?

(iii). Whether the plaintiff is entitled for the suit claim?

(iv). To what are the reliefs?

7. The Trial Court after referring the terms of contract which is marked as Ex.A.1 and the deposition of D.W.1, has held that the M/s.South India Corporation Agencies, the clearing and forwarding agent is not a necessary party.

8. Regarding the shortage of goods delivered and the liability of the defendants, the Bill of Lading and scrap card marked as Ex.A.10 and Ex.A.13 were taken into consideration along with the terms of contract, held the defendant/appellant is liable to compensate the loss with 18% interest for the value of the shortage.

9. As far as the limitation is concerned, the Trial Court has observed that the 1st cargo reached the Port on 02.01.1998 and the 2nd cargo reached the Port on 11.05.1998. The suit for recovery of money filed on 17.11.2000. Therefore, the suit is well within the period of limitation. Having held so, the suit claim was decreed with 9% interest from the date of claim.

10. Aggrieved by the said decree and judgment, the defendant has preferred Appeal before the Additional District Court, Fast Track Court, Chennai.

11. The Lower Appellate Court framed point for determination and after re-appreciating the evidence confirmed the judgment and decree of the Trial Court and dismissed the appeal.

12. In the Second Appeal, the Learned Counsel for the appellant has impugned the concurrent finding of the Courts below on the ground that there is no material evidence to show that the appellant has short delivered the cargo. Merely based on the allegation of the plaintiff, the Court below have decreed the suit without proper appreciation of evidence.

13. M/s.South India Corporation (Agencies) Limited being the clearing and forwarding agent is a proper and relevant party to authenticate the statement of materials transported. The appellant being a stevedoring agent, only to facilitate the delivery and if at all there is any shortage, they cannot be found fault. It is the responsibility of the clearing and forwarding agent, who had certified the total shortage suffered in the vessel particularly "M.V.Rio Madeira". The total cargo transported to these vessels has been distributed by M/s.South India Corporation Agencies and they are the proper party to substantiate the statements regarding the material transported and distributed.

14. Ex.B.2 the minutes held between the plaintiff and the defendant would reflect the true state of affairs. The Courts below had considered these documents in piecemeal and has held that there was shortage of 10 MT which has been adjusted towards the balance payment to the appellant. Ex.B.2 ought to have been taken as a whole and if at all any liability to be fixed against the defendant, it should be in terms of Ex.B.2.

15. The Learned Counsel for the respondent would submit that he has contacted his client through mail but the mail bounced back undelivered and his enquiry indicates that the respondent company has been taken over by some other company and there is no instruction from his client in this regard.

16. The Learned Counsel appearing for the appellant besides canvassing the merits of the appeal would submit that, pursuant to the interim order passed by this Court 50% of the decreetal amount with costs has been deposited by the appellant and offered to pay another Rs.1,00,000/- in full and final settlement.

17. The Learned Counsel for the respondent is not in a position to deliberate on this proposal. He has no instruction from his client. De hors of the above proposal for settlement, when it is made clear that the respondent company is no more in existence, this Court is bound to deal with the appeal on its merits based on the material records.

18. The specific case of the plaintiff/respondent is that there was an agreement between the plaintiff and the defendant regarding transshipment of scrap and in the said course of transaction in two cargo ship, there were shortage of cargo below 99%. As per the terms of agreement, the defendant is liable to compensate the value of the shortage materials.

19. In the written statement, the defendant has tabulated the quantum of cargo handled:-

I. M.V.Pacific Hiro

I.A. No.	SCR No.	Party Name	BL/Oty	Direct	Plot Total	Actual Shortage	Quantity to be delivered at BSL Plot.
1727/10	2.255	Steel Complex	1000.000	31.500	968.440	1,000.000	33.5301
1727/11	-do-	-do-	1000.000	56.230	910.240	966.470	1878.680

II. M.V.Hio Maderia

I.A. No.	Party Name	BL/Oty	Direct	Plot	Total	Actual Shortage	Quantity to be delivered at BSL Plot.
1060.202318	Steel Complex	1,000.000	12.080	1,087.920	1,000.000		
1060.21	-do-	1,000.000	24.990	1,057.900	1,082.890	17.110	2,145.820
	Total	2,200.000	37.070	2,15.820	2,182.890		

20. The specific case of the defendant is that, they are not responsible for the alleged shortage and the value claimed by the plaintiff is totally misconceived and based on surmises. It is an admitted fact that the entire transaction is moderated, regulated and oversee by the M/s.South India Corporation Agency, which is the clearing and forwarding agent.

They have documented all the custom paper and handed over the goods to the defendant to be delivered. From the above tabular column, provided by the defendant, in their written statement, this Court finds that the quantum of scrap handed over to the defendant by the clearing and forwarding agent has been delivered to the plaintiff. Further, the memorandum of understanding entered between the parties, which is marked as Ex.B.2 prima faciely prove that there was a counter claim to be settled to the defendant in respect of the cargo dealt by them on behalf of the plaintiff in ship M.V.Nips.

21. The suit is not only filed for recovery of value of the material short delivered but also for the damages caused due to delayed delivery of goods. The bill of lading for these two cargos indicates that the goods were loaded somewhere in the August 1997 but reached the Port of Chennai on 02.01.1998 and 11.05.1998 respectively. For delayed delivery, the defendant, who is the stevedores cannot be held responsible. However, when the parties have decided to arrive at a settlement over the dispute and has entered into a memorandum of understanding, the liability of the defendant ought to have been restricted only to that extent and not more than that. But, the Courts below failed to differentiate and distinguish the composite claim made by the plaintiff towards shortage of materials and damages for delayed delivery and decreed the suit in entirety.

22. Had the Courts below properly appreciated the difference in the claim made by the plaintiff in the suit, the total decree amount could not have been what now being passed against the appellant.

23. Since the transaction is of the year 1997 and the suit was filed in the year 2001, by now more than 25 years passed, this Court is of the view that, the agreed amount by the plaintiff to buy peace, can be the decree amount entitled for the plaintiff to receive.

24. Taking note of the fact that the appellant herein has already deposited Rs.1,37,000/- in the E.P.No.328 of 2009 in O.S.No.3813 of 2001 on 09.11.2009 and ready to pay another additional amount of Rs.1,00,000/- towards full and final settlement. This Court modifies the decree of the Courts below to the effect that, the appellant shall deposit the additional amount of Rs.1,00,000/- in the E.P.No.328 of 2009 account, within a period of eight weeks, from the date of receipt of a copy of this judgment. On such deposit, the respondent is permitted to withdraw the entire amount deposited in the E.P.No.328 of 2009 account on filing proper application.

25. Accordingly, the Second Appeal is disposed of. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

bsm

To,

1. The Additional District Court-cum-Fast Track Court No.II,
   Chennai - 1.

2. The VIII Assistant Judge,
   City Civil Court, Chennai.

3. The Section Officer,
   V.R.Section, High Court,
   Madras.

+1cc to Mr.D.Kanagasundaram, Advocate Sr.35981
+2cc to Mr.T.Viswanatha Rao, Advocate Sr.36214, 36199

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& M.P.Nos.1 & 2 of 2011

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