BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 23.06.2021
CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
S.A.(MD)No.733 of 2012

Narasu's Saarathy Enterprises Private Limited,
through its Managing Director,
M.V.Balasubramaniam,
S/o.Muthu Venkata Rajasekaran,
16-A, Court Road, Post Box No.725,
Johnsonpet, Salem - 636 007.
(Amended vide Order dated 27.04.2021 made in
C.M.P.(MD)No.9802 of 2018)
... Appellant / Respondent / Plaintiff

Vs.

1. Patvolk,
Division of Forbes Gokak Ltd.,
88, World Trade Avenue,
Harbour Estate,
Tuticorin - 628 00.

2. Lloyd Treistine D,
Nagiazione S.P.A.,
Passeggio S.Andrea - 4, 34123 Trieste,
Italy.

3. Lloyd Treistine D, Nagiazione S.P.A.,
22, Martin Road, 0701, Kingsun Building,
Singapore.
... Respondents / Appellants / Defendants

Prayer: Second appeal filed under Section 100 of C.P.C., against the Judgment and Decree passed in A.S.No.67 of 2005 on the file of the Principal District Court, Thoothukudi, dated 27.07.2011 partly allowed the Judgment and Decree in O.S.No.215 of 2000 on the file of the Sub Court Thoothukudi, dated 02.08.2004.

For Appellant : Mr.P.S.Sundaram

For Respondents : Mr.Vipin P.Varghees,
for M/s.V.J.Mathew & Co.

* * *

J U D G M E N T

This second appeal arises out of a suit for damages.

2. The plaintiff in O.S.No.215 of 2000 on the file of the Sub Court, Thoothukudi, is the appellant herein. The plaintiff placed an import order with an Australian company for supply of 551.080 metric tones of wheat. The goods were despatched from Sydney through a vessel under bill of lading No.SY913266 dated 15.10.1999. The goods were loaded in 25 full container loads. Tuticorin port was fixed as the port of destination. The plaintiff had engaged an agency for clearing the goods and despatching the same to their factory at Salem. The shipper loaded the entire consignment on 15.10.1999. Defendants 2 and 3 were the liners who had undertaken to transport the goods from Sydney to Thoothukudi. The first defendant was their agent. On account of the negligence on the part of the defendants, the goods instead of landing at Thoothukudi port, landed at Mumbai port. A circuitous route was taken. In normal circumstances, delivery which should have been taken 30 to 40 days was delayed by more than three months. The goods reached Colombo and then went to Mumbai. The shipment reached Tuticorin by train. The plaintiff claimed that he suffered loss to the tune of Rs.4,17,805/-. The losses were quantified under seven distinct heads. Adding the interest component, the plaintiff filed the aforesaid suit for directing the defendants to pay a sum of Rs.4,56,335/- with interest. Defendants 2 and 3 filed written statement controverting the plaint averments. Based on the divergent pleadings, the trial Court framed the necessary issues. On the side of the plaintiff, as many as five witnesses were examined. Ex.A.1 to Ex.A.48 were marked. On the side of the defendants, D.W.1 was examined. Bill of lading dated 15.10.1999 was marked as Ex.B.1. After considering the evidence on record, the trial Court by judgment and decree dated 02.08.2004 partly decreed the suit by directing the defendants to pay the plaintiff a sum of Rs.4,11,255.50/- with interest @ 6% p.a. from the date of plaint till the date of payment.

3. Aggrieved by the same, the defendants filed A.S.No.67 of 2005 before the Principal District Judge, Thoothukudi. By the impugned judgment and decree dated 27.07.2011, the judgment and decree passed by the trial Court was modified and the appeal was partly allowed and the liability of the defendants was reduced to Rs.82,793/- to be paid with interest @ 6% p.a. from the date of plaint till the date of realization. Challenging the same, the plaintiff has filed this second appeal.

4. This second appeal was admitted on 22.06.2021 on the following substantial question of law:-

" Whether the first appellate Court misapplied Section 73 of The Indian Contract Act by interfering with the award of damages under some of the heads of loss quantified by the plaintiff? "

5. The learned counsel appearing for the plaintiff reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellant and interfere with the impugned judgment and decree by restoring the decision of the trial Court.

6. Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment and decree do not call for any interference.

7. I carefully considered the rival contentions and went through the evidence on record.

8. The learned counsel appearing for the respondents raised very many contentions. He spread a large canvas. According to him, Ex.A.1 bill of lading is a multi-modal transport of bill of lading and that the carrier can choose any mode of transport and any route for transport and shipment. When the goods were delivered, the seals were intact. He drew my attention to Clause 20 of Ex.B.1 and placed reliance of the decision of the Bombay High Court rendered in ***S.K. Networks Company Ltd. Vs. Amulya Exports Ltd. and Others*** reported in MANU/MH/1068/2006 and the decision of the Hon'ble Supreme Court rendered in ***British India Steam Navigation Co. Ltd. V. Shanmughavilas Cashew Industries*** reported in MANU/SC/0467/1990. He relied on a few other decisions such as

1. **M/s.Carborandum Universal Ltd Vs. M/s. M.G.International Transports GMBH** on 30 October, 2014, S.A.No.6 of 2008 Madras High Court.
2. **Caravel Shipping Services Pvt. Ltd. V. Premier Sea Foods Exim Pvt. Ltd.** Kerala High Court (Sep 8, 2015).
3. **Albany Ins. Co. V. M/V Sealand Uruguay**, 2002 WL 1870289 (S.D.N.Y. 2002).

9. The learned counsel appearing for the respondents would strongly submit that the defendants are not liable. He also questioned the very jurisdiction of the Indian Courts to entertain the suit. Since as per relevant clause of Ex.B.1 the Court at Trieste, Italy, alone can adjudicate the dispute. The learned counsel relied on a catena of decisions in this regard. He would also state as per Section 230 of The Indian Contract Act, the first defendant who is a mere agent cannot be fastened with any liability. His further contention is that since no specific time had been mentioned in the contract for the delivery of the cargo, the defendants cannot be fastened with the liability even if the delivery was slightly delayed and more so when the plaintiff had taken the goods. The learned counsel filed detailed argument notes also. Though I heard the submissions of the learned counsel at length, I am not in a position to consider the said contentions for a very simple reason. After the plaintiff had substantially succeeded before the trial Court, the respondent herein filed appeal before the Principal District Judge, Thoothukudi. The first appellate Court framed the following seven issues:-

1) Whether the civil Court in India has got jurisdiction to try the dispute involved in the suit?

2) Whether the suit is bad for non-joinder of necessary parties?

3. Whether the plaintiff has no locus standi to file the suit?

4. Whether the 1st appellant / 1st defendant is not responsible for the damages to the quality and quantity of the cargo or not?

5. Whethe the appellants / defendants are liable for the claim made under different heads by the plaintiff or not?

6. Whether the judgment and decree of the trial Court is legally sustainable or not?

7. To what other relief?

10. The first point was answered against the respondents herein and it was held that the civil Court in India had the jurisdiction to try the dispute involved in the suit. It was also held that the suit was not bad for non-joinder of necessary parties. The plaintiff was declared to have locus standi to maintain the suit. The first defendant was also held liable to answer the plaintiff's claim. The defendants were found to have committed breach of contract on account of late delivery of goods by adopting circuitous route and therefore held liable for damages for the loss caused to the plaintiff. Thus, almost every contention urged by the learned counsel appearing for the respondents before this Court were answered against them by the Courts below. The respondents had not succeeded fully before the first appellate Court. Their appeal was only partly allowed. They had been directed to pay a sum of Rs.82,793/- with proportionate cost and interest. Even though the first appellate Court rendered adverse findings against the respondents herein, the respondents herein did not file any cross appeal. If the respondents had succeeded before the first appellate Court fully, they could have definitely supported the same before this Court and also questioned the adverse findings even without filing any formal cross objection. But in this case without filing a cross appeal, the respondents cannot question the adverse findings rendered against them. Therefore, the scope of the present appeal is only regarding the quantum of damages and nothing else. The first appellate Court had held that the plaintiff was not entitled to damages under certain heads as quantified by them. Therefore, the technical objections raised by the learned counsel appearing for the respondents such as lack of jurisdiction and non-maintainability of suit stand rejected.

11. The point for consideration is whether the first appellate Court was justified in denying some of the claims of the appellant herein. The first appellate Court had held that the plaintiff was entitled to survey expenses of Rs.36,378/- as per Ex.A.19 and expenses incurred for fumigation to the tune of Rs.16,500/- as per Ex.A.18. The first appellate Court had sustained the claim for shortfall and quantified it at Rs.29,915/-. It however rejected the plaintiff's claim that they spent Rs.1,78,500/- by purchasing equivalent quantity of goods from the local market. The first appellate Court brushed aside the plaintiff's claim with an observation that it was not the case of the plaintiff that they always used to import wheat and out of the imported wheat, they used to produce the saleable goods. According to the first appellate Court, had there not been any imported wheat, the plaintiff would have only bought the wheat only from the local market and that in any event, since delivery of the wheat was taken, they would have made good the loss. Therefore, the claim was rejected as speculative.

12. Section 73 of The Indian Contract Act is as follows:-

> **73. Compensation for 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.

This provision was considered by the Hon'ble Division Bench of Madras High Court in ***Hajee Ismail Sait And Sons Vs. Wilson And Co.*** (***AIR 1919 Mad 1053).*** The rule is that where there is a market at the place of delivery, the damages are the difference between the contract price and the market price on the date of delivery. That would be the case particularly, where the buyer was under consequential contractual obligations to third parties. The appellant is a flour mill. The goods in question would be taken to the plaintiff's factory premises and after grinding, the product would be sold to third parties. The specific assertion of the plaintiff is that he was under such obligation to sell the product to third parties. The plaintiff had examined witnesses in this regard and their testimony could not be challenged. On account of the delay in delivery, the plaintiff had made purchases from PEC Ltd., and Food Corporation of India as evidenced by Ex.A.24. The difference in cost had come to Rs.1,78,000/-. The details were given in the plaint are as follows:-

"Average cost per MT 40,52,351 / 551.080 = Rs.7353.47 or Rs.7353.00. Purchase from PEC Ltd., 500.000 MT due to non-arrival of containers Billed Rate : Rs.7020/- Clearing Expenses - Rs.340 to Hari & Co. Frieght Rs.350/- Total = 7710/-

Difference in excess paid - Rs.7710.00 - Rs.7353 = Rs.357 MT.
Total difference - 357 x 500.00 Rs.1,78,500/-."

The plaintiff was made to pay the extra cost of Rs.1,78,500/- because the goods did not arrive in time. The plaintiff was entitled to expect the goods to be delivered at the delivery point during the middle of December 1999. By making purchases from the local market, the plaintiff had mitigated the loss that he could have otherwise claimed from the defendants. Thus, the claim of the plaintiff under this head falls clearly within four corners of Section 73 of The Indian Contract Act. The first appellate Court erred in denying the claim under the aforesaid head. I therefore answer the substantial question of law in favour of the appellant. However, the claim of the loss of profit quantified at Rs.1,04,526/- is clearly not sustainable. There is no dispute that the plaintiff eventually received the goods. The damages claimed by the plaintiff for having incurred extra cost by making purchases from the local market and the claim of loss of profits do not go together. The plaintiff had raised damages under the following seven heads:-

i) Survey expenses
ii) Fumigation expenses
iii) Legal fees
iv) shortfall
v) purcahses from local market
vi) Loss of profit
vii) Interest claim to bankers

The trial Court accepted all heads except the claim incurred towards legal fees. The first appellate Court negatived the claim made under heads 5 to 7 also. I have already held that the claim made towards extra cost involved under the purchase of wheat from the local market is sustainable. I have also held that heads 5 and 6 do not go together. The seventh claim is also not sustainable. The defendants are not concerned about the financial arrangement which the plaintiff may have with their banker. I uphold the denial of the seventh claim also. The impugned judgment and decree is modified and the defendants are directed to pay a sum of Rs.2,85,389/- (Rupees Two Lakhs Eighty Five Thousand Three Hundred and Eighty Nine only) with interest @ 6% p.a. from the date of plaint till the date of realization. This second appeal is partly allowed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note:

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Principal District Judge,
   Thoothukudi.

2. The Sub Judge,
   Thoothukudi.

3. The Record Keeper, V.R.Section,
   Madurai Bench of Madras High Court,
   Madurai.

S.A.(MD)No.733 of 2012
23.06.2021

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