



O.S.A.No.169 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.03.2023

Pronounced on : 24 .03.2023

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.B. BALAJI

O.S.A.No.169 of 2017

and

C.M.P.No.10845 of 2018

M/s.Albbert and Company Pvt. Ltd.
Having branch office at No.13/1
Whannels Road, Egmore, Chennai 600 008,
Represented by its Director

... Appellant

Vs.

1.The Food Corporation of India,
Having its Regional Office
at No.124, Greams Road,
Chennai – 600 006
Represented by its General Manager

2.M/s.Inteer Occean Shipping Pvt. Ltd.
Having at Branch Office at
No.61, Sivanthi Kulam 1st St.,
Tuticorin – 628 002.

... Respondents



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Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules r/w. Clause 15 of Letters Patent, against the judgment and decree dated 03.02.2017 in C.S.No.275 of 2010.

For Appellant : Mr.V.Krishnamoorthy
For R1 : Mr.M.Imthias
For R2 : Given up

J U D G M E N T

S.S. SUNDAR, J.

This Original Side Appeal is filed against the judgment and decree, dated 03.02.2017, passed by a learned Single Judge of this Court in C.S.No.275 of 2010 on the original jurisdiction of this Court. The plaintiff in the suit in C.S.No.275 of 2010 is the appellant in the above appeal.

2.The appellant filed the suit in C.S.No.275 of 2010 praying for a decree directing the 1st defendant/1st respondent herein to pay a sum of Rs.52,66,101.68 together with interest @ 18% p.a. on a sum of Rs.34,38,392/- from the date of plaint till the date of realization. The

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appellant is a company incorporated under the Companies Act, 1956, and is carrying on business in Stevedoring, Handling, Transportation, Clearance of cargoes received at Tuticorin Port. The 1st respondent M/s.Food Corporation of India (hereinafter referred to as “M/s.FCI” for brevity) is a Government company, which procures and imports food grains and stores them in their warehouses or hired godowns throughout this country, for distribution to the general public, from time to time. The 2nd respondent is the agent in respect of the Vessel called M.V.YICK WING in which the cargo which is the subject matter of the suit was transported and discharged at Tuticorin Port.

3.It is admitted that the State Trading Corporation of India Limited had imported wheat from a foreign seller in Switzerland and 38,415.70 Mts of wheat of Russian origin arrived at Tuticorin Port. Since the goods were imported on behalf of the 1st respondent, the 1st respondent invited sealed tender under Two Bid System in February, 2006, for appointment of Contractors for Stevedoring, Clearance, Handling and Transport of food grains, etc., at Tuticorin Port for a period of one year which is extendable at



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the discretion of M/s.FCI, subject to the terms and conditions of the tender documents. It is admitted that the appellant, who participated in the tender, quoted a sum of Rs.348 per MT as composite rate for Stevedoring, Handling, Clearance and Transport at Tuticorin Port. The 1st respondent appointed the appellant as the Contractor for handling the Vessel M.V.YICK WING and for Stevedoring, Handling, Transportation, Clearance of cargo arriving at Tuticorin Port and transport all such quantities as may be required from Port docks to storage godowns owned and hired by the Contractor and handle all food grains and pack them in gunnies and transport them to FCI storage godowns or to any other place. The appellant was appointed by letter of acceptance dated 22.11.2006, accepting the appellant's offer of Rs.384/- per MT as composite rate, as per the terms and conditions of the tender notification dated 25.02.2006. As per the acceptance letter, the appellant was required to pay a Security Deposit of Rs.9,46,000/-. Towards additional security and insurance policy, the appellant was required to furnish a Bank Guarantee for a sum of Rs.50,000/- and to take insurance policy for a sum of Rs.10 Crores and 60 Lakhs. Out of Rs.9,46,000/- towards Security Deposit, 50% was remitted and 50% shall



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be adjusted from the first bill submitted by appellant.

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4.The Vessel M.V.YICK WING was berthed at Tuticorin Port on 24.11.2006 and Draught Survey Report was conducted to assess the total quantity of wheat which was on Board. As per the Draught Survey Report, it was admitted that the quantity of wheat that was unloaded from the Vessel was 38,415.710 Mts. The plaintiff commenced the unloading of cargo on 24.11.2006 and completed the same on 11.12.2006. There was no complaint of any mishandling or wrong handling and it is admitted that there was some amount of supervision by the officials of M/s.FCI in the entire operation. It is the specific case of the plaintiff/appellant in the plaint that the total quantity actually received was 38,276.577 Mts of wheat and the same was distributed to various warehouses in the State of Kerala, Bihar, West Bengal and Tamil Nadu, as per the instructions of the 1st respondent, by 27.12.2006. It is admitted that most of the quantities were transported through rail and the remaining small quantity was transported through road to the destinations as directed by the 1st respondent. It is admitted that, after unloading of cargo, the entire quantity of wheat was transported to the



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storage godown within the Port premises, from where the food grains were packed in gunny bags and thereafter transported to various places as per the instructions of 1st respondent.

5. After the award of contract to the appellant, a sum of Rs.4,73,000/- was deposited by the appellant with the 1st respondent towards Security Deposit. It is admitted that a sum of Rs.4,73,000/- was recovered by the 1st respondent from the appellant from the bills payable to the appellant as per the terms of the contract. It is also admitted that a sum of Rs.14,47,242/- was withheld by 1st respondent from the payments due as per the pending bills. After the completion of transportation of entire commodity, at the request of 1st respondent to release the Bank Guarantee, a sum of Rs.10,00,000/- was remitted by the appellant to the 1st respondent. In the plaint itself, it is alleged that a sum of Rs.45,150/- was recovered by the 1st respondent excessively towards full bag shortages. Therefore, according to the plaintiff, a sum of Rs.34,38,392/- is the amount payable by the 1st respondent to the appellant in relation to the handling and transportation of wheat on behalf of the 1st respondent. The appellant also claimed a sum of



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Rs.12,88,810.68 towards interest @ 18% p.a. for the amount due under the first three heads. The plaintiff claimed further interest @ 18% p.a. on the sum of Rs.10,00,000/- paid by the appellant towards release of Bank Guarantee, to the tune of Rs.5,38,899/- for the period from 13.09.2007 till plaint. The plaintiff, therefore, filed the suit for recovery of a sum of Rs.52,66,101.88 from the 1st respondent.

6.The suit was contested by the 1st respondent M/s.FCI. While admitting a sum of Rs.34,38,392/- payable by the 1st defendant to the plaintiff as claimed by the appellant/plaintiff, the 1st defendant pleaded that a sum of Rs.25,67,739/- is the amount payable by the plaintiff/appellant to the 1st respondent under different heads. After deducting the amount claimed by the 1st respondent/1st defendant from the plaintiff, the 1st defendant contended that they are liable to pay only a sum of Rs.8,70,653/-.

7.The learned Single Judge, after recording the pleadings, framed the following issues :



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“1. Whether this Court has the jurisdiction to try the present suit as the entire cause of action, if any, has arisen only in Tuticorin, where the suit cargo was discharged and where the alleged loss occurred?

2. Whether the plaintiff has not right to sue this defendant as there was no contract of privity between the plaintiff and this defendant?

3. Whether the second defendant is a proper or a necessary party to the present suit?

4. Whether as per the provisions of Section 230 of the Indian Contract Act, this defendant can be made personally liable or any personal decree can be passed against this defendant, as this defendant acted as an agent for a disclosed principal i.e., the charterers of the vessel “M.V. Yick Wing”?

5. Whether the present suit is barred by limitation as per the provisions of the Carriage of Goods by Sea Act?

6. Whether the liability and responsibility of the charterer ceased as soon as the notice of readiness was given to enable the plaintiff and the first defendant to discharge the cargo as per the terms and conditions of the charter party and the Bill of Landing?



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7. Whether the present suit is maintainable in view of the fact that when the contracting party, i.e., the first defendant has not made any claim for shortage, the plaintiff who is a stranger to the contract of carriage cannot dispute the quantity discharged from the vessel or question the method (draught survey) of ascertaining the quantity discharged from the Vessel?

8. Whether the liability for the alleged shortage is attributable to this defendant after the entire cargo was discharged, bagged and dispatched to various destinations nominated by the first defendant?

9. Is the plaintiff is entitled for any interest at the rate of 8% p.a. as claimed in the plaint in the absence of specific agreement between the parties?

10. Is not the first defendant is entitled to deduct the cost of the cargo resulted due to the short supply as per the tender terms and conditions?

11. Whether there was short supply by the second defendant while discharging the cargo as shore out turn?

12. Whether the weight of the gunny bags was less than 650 grams per bag?



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13. Whether there was excess wheat packed to match the average gross weight of 50.650 kgs to match the gross weight instructions of the first defendant?

14. Whether the plaintiff is entitled to a judgment and decree directing the first defendant to pay the plaintiff a sum of Rs.52,66,101.68 together with interest at the rate of 18% per annum no Rs.34,38,392.00?

15. To what relief the plaintiff is entitled?”

8.On behalf of the appellant/plaintiff, Exs.P1 to P28 were marked through P.W.1 and no other witness was examined on behalf of plaintiff/appellant. The 1st defendant examined the Assistant Grade-I (Depot), by name Mr.M.Esakkimuthu, as D.W.1 and marked Exs.D1 to D7.

9.The learned Single Judge found that Issue Nos.2, 3, 4 are not relevant or necessary, as those issues relate to the 2nd defendant in the suit, against whom, no relief is prayed for in the suit. The learned Single Judge observed that Issue Nos.6, 7 and 8 were framed on the basis of averments made in the written statement filed by the 2nd defendant. Since the plaintiff



did not seek any relief against 2nd defendant, the learned Single Judge found that the Issues Nos.6, 7 and 8 need not be considered.

10.On the first issue relating to maintainability of the suit before the original jurisdiction of this Court, the learned Single Judge held that this Court has jurisdiction to try the suit. On the 5th issue relating to limitation, learned Single Judge held that the suit is not barred by limitation, as the 1st defendant himself has admitted that the accounts are not settled.

11.Even before this Court, the issues regarding jurisdiction and limitation are not raised and moreover, findings of the learned Single Judge are supported by admitted facts and reasons.

12.While deciding the other issues, the trial Court held that the plaintiff is liable for shortage of 139.133 Mts of wheat and held that the said amount has to be deducted from the amount payable by the 1st defendant to the plaintiff after completion of transportation. The learned Single Judge further considered the claims made by the 1st defendant against the



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plaintiff/appellant and justified them. As a result, accepting the case pleaded by the 1st defendant that the 1st defendant is entitled to deduct a sum of Rs.25,67,739/- under various heads as claimed by them in the written statement, the learned Single Judge of this Court granted a decree only for a sum of Rs.8,70,633 by partly decreeing the suit. For the part amount decreed, the interest payable was held to be 6% p.a. from the date of plaint till the date of realization.

13. Aggrieved by the judgment and decree of the learned Single Judge, the plaintiff has preferred the above appeal.

14. Learned counsel appearing for the appellant/plaintiff submitted that the appellant was never the custodian of the imported wheat and was just performing the work of Stevedoring and handling, as per the terms of tender dated 25.02.2006. Referring to the contract, learned counsel submitted that the entire operation of discharge of wheat from the Vessel on to the Wharf, transportation of goods from Wharf to the Port Warehouse, bagging and weighment at the Lorry Weigh bridge and loading on to



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railheads and lorries, was done within the Port premises under the direct supervision and control of the 1st defendant/1st respondent and therefore, the appellant cannot be held liable for shortage of goods. Learned counsel then submitted that the wheat as per the Draught Survey Report cannot be taken as final and the goods discharged at the Port cannot be the basis for fixing the liability on the plaintiff, who is just a transport Contractor.

15.Learned counsel appearing for the appellant/plaintiff further submitted that the weight recorded by the Port Lorry Weigh Bridge should be the basis for calculation of weight that was unloaded from the ship and that there is no shortage in the exact weight of wheat discharged from the Vessel, if the weight recorded at the Port Lorry Weigh Bridge, where the quantity of wheat unloaded from the ship was physically weighed, is taken into account. Learned counsel then submitted that the wheat imported were filled and sealed in gunny bags supplied by the 1st respondent and that the average weight of gunny bags was taken as 650 grams, whereas the actual weight of each gunny bag is around 500 grams. It is contended that, as a result, when loaded, the wheat loaded in each gunny bag was more than 50



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kg at the time of standardisation and that the shortage was only due to this arrangement.

16.Learned counsel appearing for the appellant also disputed the liability of the plaintiff under other heads and submitted that the 1st defendant, who has admitted the entitlement of plaintiff, has not produced any document to prove their contention that 1st defendant is entitled to deduct amounts from the amount payable by the 1st defendant to the plaintiff after execution of the contract. Learned counsel also made his submissions pointing out the position that the claim under each head as found in the written statement, is not proved in the manner known to law. Pointing out that some of the claims are not even supported by specific pleadings in the written statement, the learned counsel further submitted that the plaintiff/appellant is entitled to recover the amount as claimed in the plaint.

17.Per contra, learned counsel appearing for the 1st respondent/1st defendant, referring to the clauses in the agreement, submitted that the major claim as found in the written statement towards shortage is admitted



and established by the 1st respondent. Stating that the Draught Survey Report conducted to assess the total quantity of wheat which was discharged from the Vessel is binding on parties and that the actual quantity released from the Vessel is accepted as 38,415.710 Mts, it is contended by the 1st defendant that the plaintiff, having admitted the quantity of wheat distributed to various warehouses as 38,276.577 Mts, is responsible for the shortage of 139.133 Mts of wheat, as per the terms and conditions of the contract.

18.Learned counsel for the 1st respondent further pointed out that the case of plaintiff that the empty gunny bags were approximately weighed, cannot be accepted, as this issue was never raised by the plaintiff at the time of packing of wheat. Learned counsel then submitted that the claim of plaintiff that they have distributed wheat more than that was discharged from the Vessel, goes contrary to the case regarding short supply on account of standardisation by assuming the weight of gunny bags as 650 grams instead of the actual weight of each gunny bag which is around 450 grams. Learned counsel then submitted that, though the 1st defendant claimed the



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value of commodities to the tune of 90.508 Tonnes of wheat towards transit loss, it was reduced to 3.2 Tonnes at the request of the plaintiff and that the 1st defendant was very reasonable.

19.Stating that the plaintiff has not denied their liability at the time of exchange of notices, learned counsel for the 1st respondent submitted that the learned Single Judge has rightly accepted the amounts claimed by the 1st defendant and held that the plaintiff is liable for all the amounts stated in the written statement as per the tender conditions.

20.There is no issue between the parties as regards the terms of tender conditions and their binding nature as a concluded contract between the parties. Since there is no issue regarding the amount payable by the 1st defendant to the plaintiff, namely, a sum of Rs.34,38,392/- as claimed by the plaintiff in the plaint, the main issue required to be resolved is whether the 1st defendant is entitled to deduct the amounts as pleaded in the written statement under various heads, as per the terms and conditions of contract. Therefore, from the pleadings, the findings of the learned Single Judge and



the arguments advanced by the learned counsel on either side, the following points arise for consideration in this appeal :

- i. *Whether there was short delivery of wheat to the tune of 139.133 Mts, as alleged by 1st defendant ?*
- ii. *Whether the 1st defendant is entitled to deduct the cost of cargo as a result of shortage, as per the terms and conditions of the tender ?*
- iii. *Whether the actual weight of gunny bags supplied by 1st defendant for packing the food grains was less than 650 grams per bag and whether the contention of the plaintiff that every bag contained excess wheat more than 50 kg, is true ?*
- iv. *Whether the 1st defendant is entitled to deduct the amounts under various heads as indicated in the written statement and whether the 1st defendant has discharged the burden to prove the liability of appellant/plaintiff under various heads as pleaded by the 1st defendant ?*
- v. *Whether the plaintiff is entitled to more interest than 6% p.a. awarded by the trial Court ?*

Point Nos.(i) to (iii) :

21.Pursuant to the tender notification, the 1st respondent accepted the offer of the plaintiff for the rate Rs.384 per Metric Ton as composite rate for



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Stevedoring, Handling, Clearance and Transport contract at Tuticorin Port for handling the Vessel M.V.YICK WING. The letter of acceptance was given to the plaintiff only on 22.11.2006 after the arrival of Vessel on 11.11.2006. The following dates and events are not in dispute :

<i>Dates</i>	<i>Events</i>
Vessel arrived	: 0600 Hrs on 11.11.2006
Free Pratique granted	: 0060 Hrs on 11.11.2006
Custom Inward Clearance Granted	: 1400 Hrs on 15.11.2006
Arrival Draft	: F:10.70 Mtr A:10.70 Mtr
N.O.R. Tendered	: 0600 Hrs on 11.11.2006
N.O.R. Accepted	: 1710 Hrs on 24.11.2006
Pilot Boarded for berthing	: 1445 Hrs on 24.11.2006
Vessel Berthed at Berth No.8	: 1700 Hrs on 24.11.2006
Initial Draft Survey conducted	: From 1715 Hrs to 1845 Hrs on 24.11.2006
Hatch Opened	: From 2130 Hrs to 2200 Hrs on 24.11.2006
Gangs Boarded	: 2200 Hrs on 24.11.2006
Number of Hatches/Hooks Available onboard	: 5 Hatches/5 Hooks
Vessel Discharge commenced	: 2355 Hrs on 24.11.2006
Vessel Discharge completed	: 0430 Hrs on 11.12.2006

22.For the purpose of measuring the actual quantity of wheat discharged from the Vessel, there is an arrangement by which a survey was



conducted by an Expert to assess the actual quantity of wheat which was discharged from the Vessel. It is pertinent to mention that the survey was conducted when the cargo was discharged from the Vessel from each of the five hatches. Hatchwise discharge of cargo as per the survey is indicated below :

<i>Hatch No.</i>	<i>Quantity (WMT)</i>	<i>Grade</i>
I	6024.400	Wheat of Russian Origin
II	7873.290	Wheat of Russian Origin
III	8557.140	Wheat of Russian Origin
IV	8645.090	Wheat of Russian Origin
V	7315.790	Wheat of Russian Origin
Total	38415.710 MT	

23.It is seen that, as per the custom and practice, a joint survey was done by all the parties pertaining to the shipment and as per the joint survey, it was determined that the actual quantity of wheat as per the bill of lading was duly accounted by the carrier and there was no complaint of shortage or damage either by the plaintiff or the 1st defendant who is the party to the contract of carriage. As per the tender conditions, the plaintiff is responsible for conducting weighment at Port Lorry Weight Bridge and the representatives of the Contractors are required to be present at the time of



checking of weights at the loading/unloading points. As per the written statement, the joint survey conducted is binding on all the parties to the contract and therefore, the total quantity arrived at the Port and discharged from the Vessel cannot be disputed by the plaintiff unless there is proof to show that the joint survey was not properly conducted.

24.Sub-Clause (14) of Clause XXI of Terms and Conditions reads as follows :

“14.The contractors shall report all short landings, discharge of torn and slack bags or damaged cargo immediately to the General Manager (TN Region), CHENNAI or to his representative to the port and file claims normally within the prescribed time in accordance with the Charter Party or Bill of Lading with copies to the General Manager (TN Region), CHENNAI or to his representative at the Port who will prefer the claim with the steamer agent concerned. If the charter party / bill of lading is not available with contractor at the time of discharge of the vessel, the copies available with the steamer agents or the Captain of the vessel shall be verified for the purpose. The contractor shall be bound to make good to the corporation any losses arising from



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their failure to file the claim in time on the steamer agent concerned.”

25.Sub-Clause (14) of Clause XXI and other terms and conditions clearly indicate that the plaintiff has undertaken to inform the 1st defendant about the shortage and that the plaintiff is bound to make good to the 1st defendant any losses arising from their failure to file their claim in time on the steamer agent concerned. In the present case, the plaintiff has not even impleaded the steamer, but the steamer agent as 2nd defendant. The plaintiff has not made any claim as against the 2nd defendant for any shortage. Except sending a notice to the 2nd defendant making an attempt to fix the responsibility on the 2nd defendant/2nd respondent, absolutely there is no evidence in this case to indicate that the plaintiff had ever proceeded against the steamer for short delivery. It is only after the show cause notice is issued and a claim is raised against the plaintiff by the 1st defendant, an attempt is made by the plaintiff as if he has made a claim for short delivery.



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26. In this case, the fact remains that the plaintiff has handled only 38,276.577 Mts of wheat and that there was a shortage of 139.133 Mts of wheat being the difference between the actual quantity discharged from the Vessel and the quantity of wheat handled and transported to the various warehouses and godowns of M/s.FCI by the plaintiff. The plaintiff appears to have accepted the joint survey for arriving at the actual quantity of wheat discharged from the Vessel. Therefore, it is now too late for the plaintiff to contend that there was no actual shortage between the quantity discharged and the quantity handled and transported by the plaintiff on behalf of 1st defendant, pursuant to the contract. The plaintiff has taken stands which are diagonally opposed to each other. While contending that there was short delivery, the plaintiff equally says that excess quantity was handled and transported by plaintiff than the quantity received from the Vessel by stating that there was a huge loss while standardisation by packing wheat in gunny bags. It is contended that each gunny bag was weighing between 450 grams and 650 grams, the plaintiff has projected a case as if, at the time of standardisation, each gunny bag was packed with wheat to weigh 50.650 kg and that there was excess filling by 200 grams of wheat in each bag as the



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actual weight of the gunny bag supplied by 1st defendant was less than 650 grams.

27.It is admitted by the plaintiff that, after the arrival of Vessel in the berth on 24.11.2006, a survey was conducted, while discharging the cargo from the Vessel. Only when the transportation was half way through, the plaintiff issued a notice to the 1st defendant about the possible excess packing on 04.12.2006. Had the plaintiff informed the 1st defendant at the beginning of packing of wheat in gunny bags, the 1st defendant would have been in a position to physically verify and deal with the situation. While examining the case of plaintiff that the gunny bags were not weighing uniformly at 650 grams per gunny bag, it is admitted that there is variation between bag to bag. The plaintiff, who was in a position to establish any difference in the weight assumed and the actual weight of gunny bags resulting in excess filling, has not satisfactorily let in evidence to prove its case. The plaintiff has examined their Manager as P.W.1, who is not even competent to speak about the relevant facts. This Court is unable to accept the case of plaintiff that the shortage was on account of excess filling at the



time of standardisation. The plaintiff admitted that the total quantity despatched by them was 38,276.578 Mts and the plaintiff also reported the shortage to 2nd defendant who disputed any shortage in the actual quantity discharged from Vessel on the basis of survey. In such circumstances, the burden lies on the plaintiff to prove his version that shortage was due to standardisation by assuming the average weight of gunny bags as 650 grams. Except a letter in the middle of transportation, no attempt was made by plaintiff to prove the average weight of gunny bags supplied by 1st defendant.

28.The other reason assigned by plaintiff is that there was excess transportation by pointing out that the 1st defendant has admitted transportation of 1249 bags in excess of bags accounted. In the context of accounting the gunny bags, it is admitted by the 1st defendant that the actual number of gunny bags used for despatching to various destinations is more. This has been clarified by D.W.1 during evidence that excess baggage of 1249 bags did not mean that there was excess weight recorded corresponding to 1249 bags despatched by the plaintiff.



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29. Having regard to the inconsistency in the pleading and evidence, this Court is unable to countenance the arguments of learned counsel for the appellant/plaintiff to buttress the stand of plaintiff that there was no shortage of wheat to the tune of 139.133 Mts. Therefore, this Court holds that there was a shortage of 139.133 Mts of wheat and ***the defendant is entitled to recover a sum of Rs.16,97,423/- towards short delivery of 139.133 Mts of wheat at the rate of Rs.12,200/- per Metric Tonne as per the contract. Accordingly, Point Nos.(i) to (iii) are answered against the appellant/plaintiff.***

Issue No.(iv) :

30. Apart from making a claim against the plaintiff towards short supply of wheat, which has been answered in favour of the 1st defendant by this Court while answering the earlier issues, the 1st defendant has pleaded that they are entitled to recover certain amounts from the amount payable by the 1st defendant to the plaintiff in terms of the contract and has sought recovery under the following other heads :



S. No.	Description	Quantity	Rate Rs.	Amount Rs.
2.	Rail transit loss	3.209	12200	39150
3.	a. Gunnies consumed in excess	736	25	18400
	b. Gunnies reported as damaged by the agency	697	25	17425
	c. Gunnies received as SHS from agency	10535	10	105350
	d. Gunnies returned by contractor in wet and damaged condition	4250	25	106250
4.	DC and trailer detention charges on account of delayed clearance of gunnies received through CONCOR	0	0	39857
5.	Differential income tax on account of assessment of IT liability on given amount including service tax	0	0	44000
6.	Amount paid to port trust towards balance rent for the period from 23.12.2006 to 27.12.2006	0	0	338463
7.	Interest for delayed period (a) Rs.14.75 for Rs.3,38,163 (due dated 23.12.2006 amount remitted on 23.10.2009)	0	0	161421
			Total	2567739

31.Let us consider the justification of each claim for recovery as per the written statement in the following order :



A) Liability of plaintiff towards rail transit loss :

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32.The 1st defendant issued a show cause notice by a communication dated 30.07.2007. In the show cause notice, the 1st defendant claimed a sum of Rs.11,04,198/- towards cost of short delivery due to transit loss. However, after receiving an explanation from the plaintiff, the quantity assessed by way of short delivery due to transit loss was reduced from 90.508 Mts to 3.209 Mts and the 1st defendant claimed only a sum of Rs.39,150/- towards rail transit loss. The reduced quantity appears to be a concession given by the 1st defendant considering the other circumstances. *Therefore, this Court finds justification for the sum of Rs.39,150/-, as the major portion of claim had been given up. This shortage may be due to the difference in actual weight recorded at the destination points.*

B) Liability of plaintiff towards gunny bags consumed in excess, reported as damaged, received as SHS and returned by contractor in wet and damaged condition :

33.The excess consumption of gunny bags numbering 736 was admitted by the plaintiff even in their explanation, dated 07.08.2007, to the show cause notice. The 1st defendant has reported that 697 gunny bags and



4250 gunny bags were reported as damaged and returned by contractor in wet and damaged condition and therefore, the plaintiff was liable to pay a sum of Rs.17,425/- and a sum of Rs.1,06,250/- respectively. Neither from the show cause notice nor from the subsequent correspondence, we are able to justify the claim merely on the basis of correspondence. As against the show cause notice claiming that approximately 36,968 were either damaged or excessively consumed, the 1st defendant has reported return of 10,535 gunny bags and the return of gunny bags accounting to the entire quantity of gunny bags supplied by the 1st defendant to the plaintiff/appellant except 736 gunny bags. Regarding damage caused to the gunny bags supplied by 1st defendant/1st respondent to the plaintiff, the claim is based on estimation done by the 1st defendant. To the show cause notice, the plaintiff has properly accounted the return of all the gunny bags except 736, which is stated to be consumed in excess. The 1st defendant has claimed the value for all damaged gunny bags at Rs.25/- per gunny bag, except the quantity of 10,535 gunny bags which are valued at Rs.10/- per gunny bag.



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34. The 1st defendant, merely by showing the show cause notice and the reply, cannot make an assumption that the plaintiff has accepted the claim. Though in the reply to the show cause notice, the plaintiff admit that the value for damaged gunny bags should be reduced to 50% of the cost, this Court finds no categorical admission that the plaintiff is liable to pay for the damages caused to the gunny bags as per the terms of the agreement. The pleadings as well as the evidence of D.W.1 are not helpful to resolve the issue. When the 1st defendant seeks to deduct the amount from the amount payable by the 1st defendant to the plaintiff, it is for the 1st defendant to prove the claim by satisfactory evidence. This Court does not find enough evidence to substantiate 1st defendant's claim towards damages caused to the gunny bags fixing responsibility on the Contractor. ***Except allowing a sum of Rs.18,400/- for 736 gunny bags which are admittedly consumed in excess, the claims under other three heads towards damages caused to gunny bags are not sustainable.***



C) Liability of plaintiff towards DC and trailer detention charges on account of delayed clearance of gunnies received through CONCOR :

35.A sum of Rs.39,857/- is sought to be recovered from the contractor on account of delay caused by the appellant in clearance of gunnies from the place of carrier (M/s.CONCOR). When a show cause notice was issued demanding a sum of Rs.39,857/- towards trailer detention charges, in response to the show cause notice, the plaintiff issued an explanation, dated 07.08.2007, in the following lines :

“Further, the gunny bales were already arrived at Tuticorin Port through containers but unloaded at Concord CFS godowns, before awarding contract to us. Due to failure of previous contractor by not lifting the gunny bales, within the time limit, the bales were kept in the godown under godown demurrages. The container yard officials, has categorically informed that the bales will be released only after the collection of demurrages from the concerned parties. The matter has also been brought to the notice of Dist. Office immediately for payment of demurrages to the container yard for early release of gunny bales. On payment of demurrage by FCI, we have cleared the bales without further demurrages to FCI. The demurrages were occurred due to the failure of



defaulted contractor and not by us. As the consignment in question was already under demurrage, the charges should not be collected from us. The benefit of free time for clearance of bales from yard should be given to us and consequent demurrages are to be passed on to the defaulted contractor. It is requested to examine the same and accord free time as in the case of original contractor and drop the proposal demurrages recovery from us.”

36.The 1st defendant, by a communication dated 13.09.2007, among other things, indicated that, as regards demurrage for container, the matter is under examination and decision will be communicated to the appellant/plaintiff. However, this Court finds no further communication except the written statement projecting a claim for a sum of Rs.39,857/- towards demurrage charges. As admitted by the parties, the contract was awarded in favour of the plaintiff after the Vessel reached the Port and was berthed for unloading. Therefore, this Court is unable to find any valid reason for not accepting the explanation offered by the plaintiff. No factual material or dates are given by the 1st defendant to prove how the responsibility or liability can be fixed on plaintiff for demurrage charges



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paid by the 1st defendant on account of delay in clearance. ***Therefore, this***

Court disallows the claim of 1st defendant towards trailer detention charges.

D) Liability of plaintiff towards differential Income Tax on account of assessment of Income Tax liability on given amount including Service Tax :

37.The 1st defendant has claimed a sum of Rs.44,000/- under this head. This Court finds no clue from the facts stated in the written statement as to how this amount is payable by the plaintiff to the 1st defendant. Even in the show cause notice, this Court does not find any basis for this claim in reference to the terms and conditions of tender. Therefore, this Court finds that the 1st defendant miserably failed to establish this as an independent claim, especially when the burden lies on the 1st defendant to prove the liability of plaintiff while executing the contract on behalf of 1st defendant.

Therefore, this Court disallows the claim of 1st defendant towards differential Income Tax or Service Tax.



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E) Liability of plaintiff for the amount paid towards balance rent and interest for delayed payment of rent :

38.A sum of Rs.3,38,463/- is claimed by the 1st defendant towards the amount paid to Port Trust towards balance rent for the period from 23.12.2006 to 27.12.2006 and a sum of Rs.1,61,421/- towards interest for delay. This Court is unable to find any justification for claiming a sum of Rs.1,61,421/- towards interest from the plaintiff. It is admitted that a plot was allotted to M/s.FCI by proceedings dated 25.11.2006, based on the request of the Area Manager of M/s.FCI, Tuticorin. It is admitted that the rental charges were remitted by M/s.FCI from 25.11.2006 to 22.12.2006. However, there was a delay in payment of rent for the period from 23.12.2006 to 27.12.2006. Therefore, the Port Trust, by communications dated 03.06.2009 and 17.02.2010, demanded a sum of Rs.3,38,463/- towards rent and a further sum of Rs.1,61,421/- towards interest for the delayed payment.

39.From the sequence of events, it is admitted that the plaintiff has cleared the entire amount payable. It is admitted that the entire cargo was



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despatched by 28.12.2006. The liability towards rental charges is not denied by the plaintiff. However, the plaintiff has denied its liability towards interest for the delayed payment, as the 1st defendant was holding excess money payable to the plaintiff upon execution of the agreement. ***Therefore, this Court holds that the 1st respondent is entitled only to a sum of Rs.3,38,463/- towards rental charges, but not the amount claimed by way of interest for the delayed payment.***

40.Point No.(iv) is answered accordingly.

41.To sum up, the defendant's claims under various heads as pleaded in the written statement are answered as follows :

<i>S. No.</i>	<i>Description</i>	<i>Amount claimed under this Head Rs.</i>	<i>Result</i>
<i>1.</i>	<i>Difference between draught survey and bagged despatch quantity (Point Nos.(i) to (iii) in this appeal)</i>	<i>1697423</i>	<i>Allowed</i>
<i>2.</i>	<i>Rail transit loss</i>	<i>39150</i>	<i>Allowed</i>
<i>3.</i>	<i>a. Gunnies consumed in excess</i>	<i>18400</i>	<i>Allowed</i>
	<i>b. Gunnies reported as damaged by the agency</i>	<i>17425</i>	<i>Disallowed</i>
	<i>c. Gunnies received as SHS from agency</i>	<i>105350</i>	<i>Disallowed</i>



S. No.	Description	Amount claimed under this Head Rs.	Result
	<i>d. Gunnies returned by contractor in wet and damaged condition</i>	<i>106250</i>	<i>Disallowed</i>
4.	<i>DC and trailer detention charges on account of delayed clearance of gunnies received through CONCOR</i>	<i>39857</i>	<i>Disallowed</i>
5.	<i>Differential income tax on account of assessment of IT liability on given amount including service tax</i>	<i>44000</i>	<i>Disallowed</i>
6.	<i>Amount paid to port trust towards balance rent for the period from 23.12.2006 to 27.12.2006</i>	338463	Allowed
7.	<i>Interest for delayed period (a) Rs.14.75 for Rs.3,38,163 (due dated 23.12.2006 amount remitted on 23.10.2009)</i>	<i>161421</i>	<i>Disallowed</i>
	Total Amount allowed	2093436	

42. In view of the above, out of the amount claimed by the 1st defendant in their written statement to the tune of Rs.25,67,739/-, this Court finds that the 1st defendant can only claim a sum of Rs.20,93,436/-. When it is admitted that the 1st defendant is holding an amount of Rs.34,38,392/- towards refund of amount collected from the plaintiff, while the transport contract was enforced, **this Court finds that the 1st defendant is liable to pay a sum of Rs.13,44,956/-.**



Point No.(v) :

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43.The agreement between the plaintiff and the 1st defendant is commercial in nature and the 1st defendant is keeping the excess amount despite it is admitted that a sum of Rs.8 Lakhs and odd is payable even in the written statement. Therefore, this Court finds no valid reason to deny interest @ 12% p.a., having regard to the nature of contract and issues between the parties. ***Point No.(v) is answered accordingly.***

44.As a result, having regard to the findings of trial Court insofar as the liability of plaintiff under several heads indicated in the written statement and the excess money held by 1st defendant, the judgment and decree of the learned Single Judge are modified by holding that ***the plaintiff is entitled to recover a sum of Rs.13,44,956/- with interest @ 12% p.a. from the date of plaint till the date of payment.*** The 1st defendant/1st respondent is directed to make the payment now found as due, within a period of three months from the date of receipt of a copy of this judgment.



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45.In fine, the judgment and the decree passed by the learned Single Judge in C.S.No.275 of 2010, dated 03.02.2017, is modified to the extent indicated above. **Accordingly, this Original Side Appeal is partly allowed with proportionate costs.** Consequently, connected miscellaneous petition is closed.

(S.S.S.R., J.) (P.B.B., J.)
24.03.2023

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Internet : Yes

Index : Yes / No



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S.S. SUNDAR, J.
and
P.B. BALAJI, J.

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Pre-delivery Judgment in
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24.03.2023