THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.08.2023

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MRS. JUSTICE R.KALAIMATHI

O.S.A.No.40 of 2017
and
C.M.P.Nos.3753 & 4773 of 2017

1.The Chairman,
Tamil Nadu Electricity Board,
NPKRR Maaligai,
800, Anna Salai, Madras – 600 002.

2.The Chief Engineer,
Mettur Thermal Power Project,
Mettur Dam 636 402,
Salem District.

3.The Superintending Engineer,
Mechanical-II,
Mettur Thermal Power Station,
Mettur Dam-636 402,
Salem District. ...Appellants

Vs.

Padmavathi Transport Contractors
rep. by its Partner,
N.Balasubramanian,
Office at No.131, Anna Salai,
Rasipuram 637 408, Salem District. ...Respondent

Prayer: Original Side Appeal filed under Order XXXVI Rule 1 of O.S. Rules r/w. Clause 15 of the Letters Patent Appeal, against the judgment and decree dated 22.02.2016 made in C.S. No.976 of 1991.

For Appellants : Mr.J.Ravindran, AAG
Assisted by Ms.M.Sneha

For Respondent : Mr.R.Parthasarathy, Sr. Counsel
for Mr.Rahul Balaji

J U D G M E N T

(Judgment of the Court was made by **R.SUBRAMANIAN, J.**)

This appeal is by the defendants/ TANGEDCO in C.S.No.976 of 1991. The suit was filed by the respondent seeking a money decree for a sum of Rs.27,74,000/- with further interest at 18% p.a. i.e., Rs.16,71,473/- from the date of plaint till the date of realisation.

2. The basis of the claim was as follows:-

i) For the sake of convenience, the parties will be referred as per the rankings in the suit. The plaintiff, who is a Transport Contractor, had entered into four agreements for segregation of coal at the Mettur Thermal Power Plant of the defendants on 10.11.1987, 10.03.1988, 11.04.1988 and 14.07.1988. The duration of each of the said agreements were for three months. According to the plaintiff, it had unloaded 3,86,678 metric tons of coal and other agencies unloaded 57,614 tons of coal. Thus, the total stock of coal available was 4,43,293 metric tonnes. Out of the said quantity, the plaintiff had segregated 3,99,506 tons of coal, for which the plaintiff had received payment only for 3,00,894 tons. According to the plaintiff, it did not receive payment for 98,612 tons of coal segregated by it. The plaintiff made several requests for payment. The second defendant namely, the Chief Engineer of the first defendant recommended payment for 50,403.07 tons i.e., Rs.8,54,332.03. The Board did not accept the recommendations and refused payment, which led to the filing of the suit.

ii) The suit was resisted by the defendant contending that once the final payment has been made and the security deposit had also been refunded, the plaintiff is not entitled to claim any amount. The only plea that was taken in the defence in paragraph 5 of the written statement was the above plea and no other plea was raised.

iii) Pending suit, the plaintiff had applied to call for certain documents from the defendants to establish the fact that there was actually an error in the gravimetric measurement of coal which led to shortage in the weight of the coal that was segregated. Certain correspondence between the defendants and the Bharat Heavy Electrical Limited (BHEL) was also called for. Though these documents were produced, they were not marked as exhibits and the Hon'ble Single Judge of this Court, by judgment dated 17.09.1998 dismissed the suit.

iv) Aggrieved over the same, the plaintiff had preferred an appeal in O.S.A.No.28 of 1999. The said appeal came to be allowed on 08.12.2003. While setting aside the judgment and decree, the Hon'ble Division Bench remanded the suit to the trial Court with a direction to mark the letters that were called for as exhibits, allow the parties to lead evidence on those exhibits and thereafter dispose of the suit after considering those exhibits. Consequent upon the order of remand, those five documents were marked as Exs.D10 to D14 and both the plaintiff and the defendants let in evidence on the contents of the documents. The Hon'ble Single Judge of this Court, who heard the suit after remand, concluded that the contents of Exs.D10 to D12 and Ex.D14 would conclusively show that there was a mistake in the gravimetric measurement of the coal that was segregated by the plaintiff and the plaintiff had in fact, handled more coal than 3,00,894 tones, for which payment was made to the plaintiff. The Hon'ble Single Judge also on the basis of those documents and the recommendations of the second defendant contained in Ex.D12 concluded that the plaintiff would be entitled to handling charges for 50,403.07 tons of coal segregated by it at the rate of Rs.16.95 per metric ton. Thus, the additional amount payable to the plaintiff is Rs.8,54,332.03. No doubt, this recommendation was rejected by the Board/second defendant which led to the filing of the appeal.

3. Mr.J.Ravindran, learned Additional Advocate General appearing for the appellant would vehemently contend that the suit itself is barred by limitation and the plaintiff is guilty of suppressing these documents namely, Exs.D10 to D12 & D14 in the plaint. Therefore, he is not entitled to any relief in the suit. From the contentions of the learned Additional Advocate General, the following points emerge for consideration:-

1)Whether the suit could be said to be barred by limitation?

2)Whether the plaintiff is guilty of suppression of Exhibits D10 to D12 & D14?

3)Whether the trial Court was right in concluding that the plaintiff has handled 50,403.07 tons of coal in excess of 3,00,894 tons?

4. On the first question, we must straightaway point out that there was no plea of limitation in the written statement and there was no issue framed on limitation either at the first instance or after remand. Therefore, we do not think that we should allow the defendant to raise the plea of limitation in the appeal. Since limitation is a mixed question of fact and law, we do not think that we should allow the appellant to raise it for the first time in the appeal.

5. As regards Question No.2, in the evidence of P.W.1 after remark, P.W.1 had categorically stated that none of these documents namely, Exs.D10 to D12 and D14 were marked to the Plaintiff. They are all internal correspondence between the defendant and the BHEL or between the second defendant and the Tender Committee of the

first defendant. Therefore, the plaintiff could not have had an occasion to know about the documents. The learned Additional Advocate General pointed out the evidence of P.W.1, who in his cross examination on 03.02.2011 had admitted the fact that he was aware of the documents and contended that the plaintiff is guilty of suppression. We do not think that we can accept such an argument. A person will be aware of the document but when the documents were not marked to him and he is not a party to the documents, knowledge of the contents cannot be imputed to him. In fact, it is the defendant, who is guilty of suppression of those documents, during the pendency of the suit. Those documents were internal correspondence between the first defendant and the Chief Engineer/ the second defendant. There is also a correspondence between the defendant and the BHEL. If at all any one is guilty of suppression of facts, it is only the defendant, who is guilty of suppression and not the plaintiff. Moreover, non disclosure of these documents in the plaint in our considered opinion will not affect the case of the plaintiff. These documents were summoned by this Court during the pendency of the suit at the instance of the plaintiff only to show that there was a mistake in the gravimetric measurement and the said fact was admitted in the official correspondence by the defendants with BHEL. At best, these documents can be stated to be evidence of a fact. It is settled law while facts are to be pleaded, existence of evidence of the facts need not be pleaded. Therefore, we do not think that we could non suit the plaintiff on the ground that it suppressed these documents. Adverting to the claim of the plaintiff and the decree granted by the Hon'ble Single Judge after remand, once we find that these exhibits D10, 11, 12 and 14 demonstrate that the plaintiff had handled more coal than what it was paid for, it becomes the duty of the defendants to pay up the segregation charges for the difference in quantity. The trial Court had also extensively adverted to the judgment of the Hon'ble Supreme Court in ***United India Insurance Co. Ltd., & Another Vs. Samir Chandra Chaudhary*** reported in ***2005 (5) SCC 784*** to buttress his conclusion to the effect that these exhibits D10 to D12 & D14 constitute admission of a fact by the defendants. The Hon'ble Single Judge has also adverted to the judgment of the Hon'ble Supreme Court in the ***State West Bengal Vs. M/s.B.K.Mondal & Sons*** reported in ***AIR 1962 SC 779***. In support of his conclusion that the plaintiff's claim will fall under Section 70 of the Indian Contract Act, 1872. We may also usefully refer to the contents of Exhibit D12 i.e., the note of the Chief Engineer, Mettur Thermal Power Station addressed to the Tender Committee, wherein he has given the reasons for the shortage in the measurement. The relevant portion of the said letter reads as follows:-

> *"After segregating the lump coal, stones etc., the powdered coal was loaded into lorries and transported to stacker-cum-reclaimer reach for reclaiming and feeding to the Units through Stacker-cum-reclaimer. To reclaim the coal by Stacker-cum-reclaimer the powdered coal was to be stacked to a height of upto 5 mtrs., while stcking the coal, the coal was dumped layer by layer to the above height. After stacking one layer the coal was levelled by using bulldozer so as to enable the lorries to travel further on this layer to form another layer. Also a number of lorries were to travel on this layer to dump the coal. In the same way the heap was formed with a number of layers, to reach the height by using bulldozer and lorries. While doing so, the coal was compacted considerably. As the coal was to be fed to the Units to and there, the measurements of the heaps*

were taken on such compacted condition.

Thus the volumes obtained were converted into weight by multiplying by the specific gravity of coal as O.8. Based on the above weight the bills were claimed and paid to the contractor.

The specific gravity of O.8 for the coal was adopted as given in the Buckau-wolf manual for sttacking of crushed coal normally through stacker in a loose heap. The compactness of the heap of segregated coal stacked was not taken into account while arriving the weight of the coal. This would have been the reason for the difference in weight of coal segregated by the contractor.

The rate per tonne of coal to be segregated ws Rs.16.95. The total payment involved is Rs.8,54,332.03 (50.403.07 x Rs.19.65)"

6. The above report would conclusively establish that the plaintiff has not been paid for the entire quantity of coal handled by it. It is a settled law that the plaintiff is entitled to payment for the entire quantity of coal handled by it. Hence, we do not see any merits in the

appeal and accordingly, the appeal is dismissed. Consequently, connected Miscellaneous Petitions are closed. There shall be no order as to costs.

(R.S.M.,J.) **(R.K.M.,J.)**
16.08.2023

DP

Internet:Yes
Index:No
Speaking order
Neutral Citation : No

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