



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

SECOND APPEAL NO. 97 OF 2024

M/s. Nitika Pharmaceutical
Specialities Private Limited,
Having its Regd. Office at 26,
Pankaj-Prabha Co-operative Housing
Society, Dharampeth, Nagpur,
Through its Director
Shri Ravleensingh Khurana.

(Erstwhile known as M/s.Nitika
Chemicals, Plot No.85,
Wanjari Layout, Pili Nadi Industrial
Area, Kamptee Road, Nagpur.)

.... **APPELLANT**

// VERSUS //

Biochem Zusatzstoffe,
Handels-und Produktionsges, mblH.
Having its Regd. Office at
KustermeyerstraBe 16, 49393 Lohne,
Germany, Through its
Director Eckhard Tholke.

.... **RESPONDENT**

Mr. Anand Jaiswal, Senior Advocate assisted by Mr. Gopal
Sawal, Advocate for Appellant.

Mrs. Gauri Venkatraman, Advocate with Yash Venkatraman,
Advocate for Respondent.

CORAM : SANJAY A. DESHMUKH, J.

DATE OF RESERVING THE JUDGMENT : 19.09.2024.

DATE OF PRONOUNCING THE JUDGMENT : 18.12.2024.

JUDGMENT.

1. Heard. **Admit.** Heard finally with the consent of the learned Advocates for the parties.

2. This second appeal is preferred against the judgment and decree passed by the Adhoc District Judge-1, Nagpur in Regular Civil Appeal No.416/2019, dated 09.02.2024. The said judgment was preferred against the judgment and decree passed by the 16th Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No.1528/2011, dated 23.07.2019.

3. **Facts of the plaintiff's case are as under :**

(i) The plaintiff is a manufacturer and Trader of Feed additives, premixes and complementary feed stuff. The defendant is a manufacturer of Calcium Stearate among other products, and has its plant at Pilli Nadi Industrial Area, Nagpur. The plaintiff, therefore, through the authorized Competent Authority, approached the defendant and requested the supply of Calcium Stearate Feed Grade. The defendant, in response to the email dated 13.02.2009, provided quotation along with other information and relevant documents. The defendant assured the plaintiff about the quality standards of their product as per USFDA/WHO-GMP norms and the standards

prescribed under the EU Feed legislation. Therefore, the plaintiff agreed to transact with the defendant.

(ii) The plaintiff, by email dated 17.02.2009, relying on the assurance given by the defendant, requested the defendant to submit the data-sheet, MSDS and GMP Standard to their Quality Management (QM) Department. The defendant agreed to furnish those details by email on the same day. The defendant also agreed to provide best quality and service to the plaintiff.

(iii) Subsequently, numerous emails were exchanged between the plaintiff and the defendant. The defendant repeatedly assured the plaintiff that products were being manufactured according to the WHO-GPM norms, and that they were using raw material of vegetable origin. The defendant by its email dated 10.11.2009, communicated that “there will not be any chances of contamination by dioxine content, it will be nil and heavy metal content is also within range”. Based on this assurance, the plaintiff, decided to purchase the Calcium Stearate Feed Grade from the defendant. Accordingly, a Contract dated 21.01.2010 was executed between the plaintiff and the defendant for supply of 60,000 Kgs. of Calcium Stearate Feed Grade at the costs of Rs.75,000/- (Seventy Five thousand Euros). Clause-10 of the Contract, stipulated that,

“goods shall meet requirement of E.U. Feed Legislation and must be free flowing and Homogenous”. In Clause-11 of the said Contract stipulated that, “the seller accepts full liability in case goods do not meet the specifications as submitted and will compensate any losses in this case”. Accordingly, in pursuance to the Contract, the plaintiff made a payment of 44,485.15 Euros, on 06.05.2010.

(iv) In the month of December-2009, the defendant dispatched first consignment of Calcium Stearate and it was received by the plaintiff on 19.01.2010. A quality and standard test was conducted of the supplied goods, and they are found to be contaminated and a very high dioxin content. The plaintiff communicated this defect to the defendant by email dated 08.02.2010. The defendant assured further analysis of Dioxin content would be conducted by their technical department. However, the defendant subsequently dispatched the second consignment of the same nature of goods, without rectifying the defect. This consignment also contained a very high level of dioxin, exceeding the limits imposed by E.U. Feed Legislation. Therefore, the plaintiff was not permitted to use the goods by the local authorities viz. Landesamt für Verbraucherschutz und Lebensmittelsicherheit (LAVES). Therefore, the goods were rejected for their poor quality.

(v) The plaintiff informed the defendant immediately by email dated 06.05.2010 and 07.05.2010 that the goods were of poor quality, and were outright rejected by the local authority, and caused the plaintiff to suffer a loss of business.

(vi) The defendant did not reply/comply with the emails sent by the plaintiff. The plaintiff confirmed and verified through S.G.S. International Laboratory that the goods supplied were contaminated, containing very high levels of heavy metals and dioxin content. The said fact was communicated to the defendant by the plaintiff via email dated 07.10.2010. On 10.05.2010, the plaintiff received a report from the S.G.S. International Laboratory regarding the analysis of the goods. The defendant failed to rectify the defect in the goods supplied by it.

(vii) The plaintiff, thereafter, sent another email dated 21.01.2010, requesting the defendant to ship back the goods and repay the money as per the Contract dated 21.01.2010. In the third week of June-2010, the defendant communicated plaintiff with an assurance that it would arrange to have the spoiled goods shipped back. Numerous emails dated 9th, 16th, 25th and 28th June were also received by the plaintiff. However, no action was taken by the defendant to ship back goods and repay the money.

(viii) The plaintiff continuous to incur the costs for the storage of rejected goods, which are still in stock at 'Biochem's Storage' in Lohne/Germany. The conduct of the defendant demonstrated that it was fully aware of the substandard quality of the goods, supplied to the plaintiff. This caused the plaintiff enormous loss and damages, not only due to the purchase the same product at a higher price, but has also to the detriment of the plaintiff's reputation and goodwill.

(ix) The plaintiff, therefore, issued notice dated 31.08.2010 to the defendant through the Khaitan & Company, a legal firm at Mumbai. The defendant received the said notice, but failed to respond except one reply dated 09.09.2010. Consequently, the plaintiff was constrained to file a suit for compensation totally 102,784.20 Euros, equivalent to Rs.67,88,050.64/-

4. **The Defence of the Defendant :**

(i) The defendant admitted to the transaction involving the supply of Calcium Stearate Feed Grade. The defendant also admitted to the email correspondence between the parties. Through email, the purchase order was sent and requested the defendant to sign it. The defendant signed the Contract on 19.11.2009. The plaintiff failed to comply with the terms of supply declaration in accordance with the EU Feed Legislation to the German based company, as per Clause-4 of

the said Legislation, it is mandatory for the plaintiff to obtain written confirmation from the defendant that the products do not exceed the maximum limit of undesirable substances such as dioxine, heavy metal etc. as specified by the EU Feed Legislation. However, the plaintiff neither demanded such written confirmation from the defendant nor did the defendant provide the same to the plaintiff. Therefore, the defendant denied that the goods do not meet the requirement of EU Feed Legislation lacks substance.

(ii) After receiving the goods from the defendant, as per purchase Contract dated 19.11.2009, the plaintiff was satisfied with the specifications of the goods supplied by the defendant. Consequently, on 13.01.2010, the plaintiff issued an email informing the defendant that it would like to purchase a new container of the same goods. Accordingly, the plaintiff sent email dated 20.01.2010 confirming the order for 12 MT Calcium Stearate USP. Accordingly, the purchase Contract dated 21.01.2010 was executed between the plaintiff and defendant for the supply of Calcium Stearate Food Grade USP. Therefore, as per the terms of the Contract, the issue of goods meeting the requirement of EU Feed Legislation does not arise, as food and feed are two distinct categories. The Calcium Stearate Food Grade is used in the product consumed by human beings, whereas Feed is consumed by animals. The Contract does not

mention the maximum content of dioxine. Since the specification of product was agreed by the plaintiff, there is no breach of contract on the part of the defendant as alleged by the plaintiff.

(iii) The plaintiff failed to demonstrate that reasonable steps were taken to mitigate the losses and consequences arising from the alleged breach of the Contract required by settled law. Therefore, the question of damages does not arise. There is no documentary evidence to substantiate the plaintiff's case. Therefore, prayed for dismissal of the suit.

5. The learned trial Court partly decreed the suit and the learned First Appellate Court dismissed the appeal.

6. The Advocate for the appellant, submitted that though there are concurrent findings against the defendant, the plaintiff's claim is not proved. The expert was not examined and the emails and invoices of Lehmann & Voss and Company were not proved, nor was the Certificate under Section 65-B of the Indian Evidence Act produced and proved. Although, the claim of plaintiff to be computer generated invoices, there are no specific pleadings regarding the alleged loss of business in the plaint.

7. The learned Senior Advocate for the appellant further submitted that the argument advanced by the learned Advocate for the appellant/defendant were not considered, and no reasons were provided in the judgment by the trial Court, particularly regarding the proof of rejection of the alleged goods by the local authority LAVES. The plaintiff only averred in his plaint that the goods were rejected by the local authority. But no document in support of the said rejection of the goods were produced on record. This argument was not considered. There are no findings regarding the report in the German language, which is not translated. The report of German laboratory was also not proved through the expert testimony. The learned trial Court erroneously relied on the documents. The learned Senior Advocate for the appellant further submitted that, the plaintiff failed to prove the documentary evidence constituting the electronic record.

8. The learned Senior Advocate for the appellant has relied upon the following precedential laws :

- (i) ***Anvar P V .Vs. P K. Basheer & Ors.***, reported in **(2014) 10 SCC 473**, in which law is laid down that, “when original is produced, compliance under Section 65B is not necessary”.

- (ii) ***Shasidhar & Ors., Vs. Ashwini Uma Mathad & Anr.***, reported in ***(2015) 11 SCC 269***, in which law is laid down that, “judgment of first appellate Court must reflect conscious application of mind and by reappreciating evidence it has to decide it by giving reasons and findings”.
- (iii) ***Malluri Mallappa (Dead) through Legal Representatives Vs. Kuruvathappa & Ors.***, reported in ***(2020) 4 SCC 313***, wherein it was held that, “the right of appeal carries with it a right of rehearing on law as well as on fact”.
- (iv) ***Madhukar & Ors., Vs. Sangram & Ors.***, reported in ***(2001) 4 SCC 756***, wherein it was held that, “Court must give reasons in the judgment in support of findings”.
- (v) ***Janak Dulari Devi & Anr., Vs. Kapildeo Rai and Anr.***, reported in ***(2011) 6 SCC 555***, wherein it was held that, “evidence contrary to the pleadings is inadmissible”.
- (vi) ***Shivaji Balaram Haibatti Vs. Avinash Maruthi Pawar***, reported in ***(2018) 11 SCC 652***, wherein it was held that, “the Court cannot record finding on issue which are not part of pleadings”.
- (vii) ***Pepsi Co. India Holding Pvt. Ltd., Vs. Nishiland Park Limited***, reported in ***2012 SCC OnLine Bom 581***.

9. The learned Senior Advocate for the appellant lastly prayed to allow the appeal by setting aside the impugned judgment.

10. The learned Advocate Mrs. Gauri Venkatraman for the respondent/plaintiff, submitted that there are concurrent findings by both the Courts. From the conduct of the defendant through the exchange of emails and upon applying the principle of preponderance of probability, both the Courts have held that, the defendant caused damage to the plaintiff. She pointed out the findings of both the Court on the facts. She further submitted that the evidence has been properly appreciated and there is no scope for interference in the findings of both the Court. The learned Advocate for the respondent, therefore, submitted that there is no substantial question of law to decide, as raised by the appellant/defendant in this appeal.

11. The learned Advocate Mrs. Gauri Venkatraman for the respondent/plaintiff submitted that burden of proving it's case on preponderance of probability has been discharged by the plaintiff. It is therefore, prayed to dismiss the appeal.

12. Perused the impugned judgment, and the judgment of the trial Court as well as the record and proceedings.

13. Initially the burden of proof lies upon the plaintiff. In Civil cases, if there is no clear and convenience evidence, the case can

be proved on the principle of preponderance of probability. This means that the greater weight of the evidence, and not necessarily the greater number witnesses testifying to the fact is sufficient. The evidence must have convincing force. The important evidence is to be weighed, though it is not sufficient to free the mind wholly from all reasonable doubt. The evidence inclines a fair and impartial mind to one side of the issue rather than other. In the case in hand, the conduct of the both sides evidenced by the exchange of emails. The plaintiff was constrained to receive the goods from Foreign Countries, and no emails were responded immediately, except one reply given to the email by the defendant. It is an admission as to lower quality and standard of the goods, prescribed in the EU Feed Legislation. On the contrary, when the defendant does not appear in the witness-box, adverse inference must be drawn against him as per illustration (g) of Section 114 of the Indian Evidence Act, 1872.

14. The learned Senior Advocate for the appellant/defendant pointed out that certificate under Section 65-B of the Indian Evidence Act, 1872 (for short the “Evidence Act”) was not produced to prove the emails and electronic records. The original emails were produced, hence filing of certificate under Section 65-B of the Evidence Act is dispensed with as held in the case of **Anwar P V** cited supra. The

emails are admitted. It's contents are proved as per Section 61 of the Evidence Act. As per Section 58 of the Evidence Act, under the principle that "admitted fact need not be proved". Further, when the transaction of emails and other facts of incident are admitted, the argument of learned Senior Advocate is not acceptable in this regard.

15. There are concurrent fact findings, particularly regarding transaction and the conduct of the plaintiff and defendant on the point of rejection of goods. The loss caused to the plaintiff has been properly calculated by the learned trial Court, and judicial discretion has been exercised in justifying while accepting the evidence of plaintiff. As far as lack of findings on the argument of the learned Advocate for the defendant is concerned, the law is well settled that for the mistake of Court, the party shall not suffer, as held by the Hon'ble Supreme Court in the case of *D.Purushotama Reddy & Anr vs K.Sateesh*, reported in *2008 (8) SCC 505*, based on the principle that, "*Actus curiae neminem gravabit*" i.e. no person shall be prejudiced by an act of Court. Therefore, merely because First Appellate Court did not given some reasons, it is not ground to allow this appeal as the sufficient reasons are given by the First Appellate Court.

16. On perusal of the proposed substantial questions of law raised in this appeal, along with *ratio* laid down in the precedential

laws cited supra by the learned Senior Advocate for the appellant, this Court find that there is no any substantial question of law arises to decide as per Section 100 of the CPC, as raised in the Memo of Appeal. All that argued by the learned Senior Advocate for the defendant was on the facts of the case. Further, there is concurrent findings of facts against the defendant.

17. Considering all these reasons and the laws laid down in the precedential laws submitted by the learned Senior Advocate for the appellant are different on facts and those are not helpful to the defendant. Hence, it is not discussed here and relied upon, as the facts are different and each case must be decided on the basis of it's facts, which are always decisive. Therefore, the argument of the learned Senior Advocate for the appellant is not accepted. The appeal being devoid of merits and deserves to be dismissed. The appeal is **dismissed**. No costs.

(SANJAY A. DESHMUKH, J.)