THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.08.2024

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A. No. 491 of 2009
and M.P.No. 1 of 2009

M/s.Ozone India
Rep. By its Managing Partner
Vishal Waindeskar,
No.902, Abhanga, Kharetown,
Dharampeth,
Nagpur- 440 010 ... Appellant

Vs.

M/s.Auroelectronics,
Rep by its Managing Partner
Andre Viozat and partner
Jayalakshmi
Having office at
A-2, Industrial Estate,
Thattanchavady,
Pondicherry-9. ... Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 28.11.2007 in A.S.No.275 of 2006 passed by the Principal District Judge, Pondicherry, reversing the judgment and decree dated 13.09.2004 in O.S.No. 150 of 2003 passed by Additional Sub Judge, Pondicherry.

For Appellant : Mr.A.Tamilvanan

For Respondent : Mr.M.Hariharan

JUDGMENT

This second appeal has been filed to set aside the judgment and decree dated 28.11.2007 in A.S.No.275 of 2006 passed by the Principal District Judge, Pondicherry, reversing the judgment and decree dated 13.09.2004 in O.S.No. 150 of 2003 passed by Additional Sub Judge, Pondicherry.

2. For the sake of convenience, the parties are referred to as per their ranking in the suit.

3. The case of the plaintiff is that the plaintiff is engaged in the manufacture of water purification plants comprising Ozone generators and other balancing equipments used in mineral water plants and other products. On 09.05.2001, the defendant placed an order for supply of a water pollution and pollution control equipment namely, Ozone Generator Plant with in-built oxygen concentrator and other accessories. The total cost of the above said equipment was Rs.2,22,670/- and the cost of feasibility report was estimated at Rs.1,45,000/- and thus, the defendant agreed to pay totally Rs.3,67,670/- towards the price of the equipment and its technical services. As per the contract, as stated above, the defendant paid a sum of RS.1,00,000/- as advance

by way of two cheques each for Rs.50,000/- drawn on Punjab and Sind Bank and agreed to pay the balance amount of Rs.2,67,670/- in five instalments each at Rs.50,000/- and the last instalment at Rs.67,670/- by five cheques dated 26.06.2001 to 26.10.2001 respectively drawn on the same bank. The technical services and feasibility report were transferred and the equipment was commissioned on 01.06.2001, and was in good working condition at the defendant's site at Raipur, Madhyapradesh from 01.06.2001, on which date the defendant issued a satisfactory installation certificate. Among the above said cheques, the cheques bearing Nos.513618 and 513620 for Rs.50,000/- and Rs.67,670/- respectively got dishonoured on 09.10.2001 and 06.11.2001 respectively due to insufficient funds in the defendant's bank account. The plaintiff received an intimation of dishonour from its banker on 21.11.2001. In this regard, after exchange of E-mail correspondences between the plaintiff and the defendant on 27.12.2001 and 31.12.2001 respectively, the plaintiff has issued a legal notice dated 28.02.2002 to the defendant and since the defendant did not receive it, the plaintiff sent once again the above notice on 25.03.2002 and the defendant had issued a reply dated 11.04.2002 acknowledging its liability, but on 05.04.2002, the cheque was dishonoured. The plaintiff issued a legal notice on 10.08.2002, and thereafter, the defendant did not either repay the amount or give any reply. Hence, the plaintiff filed a suit in O.S.No. 150 of 2003 for recovery of money to the tune of Rs.50,000/- with interest at 24% p.a., totalling to Rs.64,137/-.

4. In the said suit, the defendant filed its written statement and denied all the allegations found in the plaint and admits the purchase of ozone generator plant with inbuilt oxygen concentrator and other accessories. It is stated that the defendant agreed to purchase the machine for Rs.2,22,670 and Rs.1,45,000/- for feasibility report. The machine was installed on 01.06.2001 but the defendant did not receive the feasibility report as agreed by them. After installation of the said plant, at the defendant's site, the chiller of the plant was not functioned property and a complaint was sent by the defendant to the plaintiff. Then, the defendant through E-mail on 12.6.2001 sent another complaint. The said E-mail was replied by the plaintiff on the same day through E-mail and the plaintiff has accepted the liability for removing the defects at its own costs. Since the plant was not properly functioning and the ozone generator was not producing the ozone, defendant sent a complaint to the plaintiff. Another E-mail was also sent on 24.4.2002. The plaintiff has accepted that it has not sent a feasibility report to the defendant and hence, the plaintiff

has no legal right to claim a sum of Rs.1,45,000/- fixed for providing feasibility report. Apart from that, since the said machine was sold to M/s.Lafarge (P) Ltd. and installed there, the plaintiff ought to rectify the defect at that place. Through E-mail dated 03.09.2001 and another E-mail dated 11.09.2001, the defects in the machine were informed to the plaintiff. Thereafter, legal notice dated 23.07.2003 was sent by the defendant and it was acknowledged by the plaintiff. But the plaintiff has not come forward to rectify the defects. The said act on the part of the plaintiff are most arbitrary, contrary to the contract and hence, the plaintiff has no right or authority to file the present suit. Since the defendant has suffered heavy monetary loss, the defendant is entitled to get a sum of Rs.5,00,000/- from the plaintiff towards monitory loss and a sum of Rs.40,000/- towards the mental agony and harassment. Hence, he prayed for dismissal of the suit.

5. Based on the pleadings, the Trial Court framed the following seven issues:

1. Whether the ozone Generator plant was delivered by the plaintiff on 25.05.2001 and commissioned on 01.06.2001 in a good working condition at defendant's site as alleged by the plaintiff?
2. Whether the defendant has issued a satisfactory installation certificate as alleged in the plaint?

3. Whether the defendant has not fulfilled his part of contract?

4. Whether the defendant has suffered heavy monetary loss to the tune of Rs.5,00,000/- as alleged by him?

5. Whether the defendant is entitled to Rs.40,000/- from the plaintiff on account of mental tension and harassment?

6. Whether the plaintiff is entitled for a decree for Rs.64,137/- with subsequent interest at 24% p.a. on Rs.50,000/- from the date of plaint till realisation?

7. To what other reliefs the parties are entitled to?

6. During trial, on the side of the plaintiff, P.W.1 was examined and eighteen documents were marked. On the side of the defendant, D.W.1 was examined and eleven documents were marked.

7. Upon consideration of the oral and documentary evidence, the Trial Court dismissed the suit.

8. Aggrieved by the judgment and decree passed by the Trial Court, the plaintiff filed the appeal in A.S.No.275 of 2006 on the ground that the Trial Court has erred in not applying the principle of preponderance of probabilities and coming to a conclusion that the feasibility report ought to have been furnished by the plaintiff, since there is no specific plea in this regard by the defendant in the written statement and also owing to the fact that the amount

remaining unpaid is far below to the tune of Rs. 1,45,000/- which is the price agreed for feasibility report, and that there is no admission on behalf of the plaintiff in the statement of PW-1 that the plaintiff had not furnished the feasibility report. The learned Appellate Judge appreciated the fact that the alleged failure on the part of the plaintiff firm is to rectify the defects and repairs in the unit. The defendant firm relied on Ex.B3 to B7 letters and contents therein. It has been reported by the defendant firm to the plaintiff firm that the Ozone Generator is not properly working and it needs repair. In Ex.B9-legal notice issued by the defendant, elaborate details have been given regarding the improper functioning of Ozone General unit. Pointing out the contents in the above documents and the evidence of PW-1/Wilson and DW-1/Vishal in this aspect, the learned Counsel for the defendant argued that as per the agreement, the plaintiff firm has to rectify the repairs and in spite of the repeated requests made in this regard, since the plaintiff firm failed to rectify the repairs, the defendant is entitled to get the amount from the plaintiff. Moreover, Ex.A15-Warranty has been relied on by the defendant, in which, there is a condition to the effect that the plaintiff firm has to effect the repairs for free of charge to the unit and the warranty period has started from 25.05.2001. In this regard, the learned Counsel for the appellant/plaintiff argued before the Appellate Court that the unit was installed in a good condition which is evident from Ex.A16-installation certificate, and that the defendant firm without the knowledge of the plaintiff firm sold the unit to another concern namely, M/s.Lafarge (1) Ltd., Nagpur, and the unit got repaired during the transit, and hence, the plaintiff firm cannot be fixed liability in this regard.

(ii). After analysing the evidence on record, the learned Appellate Judge concluded that even assuming that the unit is under repair, as per the warranty, the third party cannot enforce against the warranty against the plaintiff firm. That apart, even assuming that as on date, the plaintiff firm has not attended the repair as per the warranty, then the defendant firm can legally enforce only on that part of the contract, and cannot withheld any amount which is part of the cost of the equipment as well as the feasibility report. As already pointed out, the defendant can put a counter claim requesting the cost of repair from the plaintiff firm in this case, but it is not done so that claim could not be made to the cost of the equipment and feasibility report which the defendant has to pay as per the contract made between the parties. Hence, in any way, the stand of the defendant firm in withholding the amount of Rs 50,000/- is not legally acceptable, and the findings of the Trial Court are not acceptable. The claim of the plaintiff for recovery of sum of Rs.50,000/- with interest is maintainable and hence, allowed the appeal by setting aside the judgment of the Trial Court.

9. Challenging the reversal findings of the Courts below, the defendant filed this Second Appeal and the same was admitted on 01.12.2022 on the following substantial questions of law :-

> a)Whether the Appellate Court is right in not applying the principle of esstopple to the facts of the case?
>
> (b)Whether the Appellate Court is right in not considering the evidence with regard to the non supply of feasibility report, inspite of pleadings to that effect?
>
> (c)Whether the Appellate Court is right in holding that the warranty given by the respondent/plaintiff would not apply to the third party, inspite of the respondent's implead consent for the sale of the equipment to third party?
>
> (d) Whether the Appellate Court has properly appreciated the oral and documentary evidences of the appellant/defendant in the light of the pleadings regarding the non supply of the feasibility report?

10. Learned counsel for the defendant would submit that the learned Appellate Judge has come to the conclusion that the equipment was sold to third party M/s.Lafarge Pvt Ltd, by the defendant's firm without the consent of

respondent/plaintiff, which might have resulted in the non functioning of the equipment. This finding is absolutely erroneous since the defendant's person namely one Senthil has installed the equipment, which could be seen from Ex.B-5 and B-6 and even from Ex.A-3 also reveals the role played by the said Senthil for installation and in attending primary repair works was admitted and there was no objection at any point of time. Hence, the defendant has given implied consent to the plaintiff and also done installation at M/s Lafarge P Ltd/ and they cannot escape from their liability.

11. Learned counsel further submitted that the learned First Appellate Judge has failed to see that even after the installation at M/s.Lafarge site, the respondent/plaintiff was attempting to rectify the fault in the equipment as per Ex.B-3 and B-4, since there was warranty Ex.A-15 for one year. Suddenly when the fault was not able to rectified, in order to escape from the liability clause in the warranty, the plaintiff has conveniently taken a stand that the sale was made without their knowledge, which was erroneously accepted by the learned First Appellate Judge. The learned First Appellate Judge also failed to appreciate the fact that there were sufficient pleadings with regard to the non supply of feasibility report and with regard to the violation of the terms of the

agreement. This being so, the learned First Appellate Judge has erroneously held that there is no plea regarding non supply of the feasibility report by the plaintiff firm. Thus, the findings given by the learned First Appellate Judge that there is no dispute regarding the supply of feasibility report is made without appreciating the pleadings and evidences. Therefore, without any evidence, the learned First Appellate Judge erroneously decreed the suit, which is illegal and liable to be set aside.

12. Learned counsel for the plaintiff/respondent herein reiterated the submissions that found favour with the First Appellate court and prayed for dismissal of this Second Appeal.

13. The First Appellate Court after analysing the written statement filed by the defendant held that there is no plea regarding non-supply of the feasibility report by the plaintiff firm. If there is no plea in the written statement, then whatever may be the quantum of evidence adduced in that regard, that cannot be taken into account, and this is the legal principle. Even then the trial court has considered the evidence in this regard and the statement has taken the stand against the plaintiff firm, it seems to be incorrect, in view of the consideration of the entire evidence adduced in this case.

14. The correspondence between the parties starting from 05.06.2001 and ended by the issuance of legal notice dated 23.07.2003 by the defendant firm to the plaintiff firm claiming compensation from the plaintiff firm. The above said legal notice has been exhibited as Ex.B9, and it was received by the plaintiff firm, and to establish this fact, Ex B10- postal acknowledgement card has been filed. The first correspondence dated 05.06.2001 is exhibited as Ex.B3. E-mail letter sent by the defendant firm to the plaintiff firm and following that letter, there were exchange of letters and correspondences, notices, legal notices covered by Exs B3 to B7 and Exs.A3 to A10, B8, A11, and B9. In none of these correspondences, there is no mention about non supply of feasibility report by the plaintiff firm to the defendant firm. To be specific, even in Ex.B9-legal notice, there is no mention about non supply of feasibility report by the plaintiff firm. Therefore, this Court finds no error in the judgment passed by the First Appellate Court.

15. Hence, the findings rendered by the First Appellate Court is purely based on facts which warrant no interference and the substantial questions of law are answered accordingly.

16. Admittedly, the plaintiff has contested the case for well-high 15

years. Considering the litigation pending between the parties, this Court directs the defendant to pay a total sum of Rs.80,000/- (Rupees eighty thousand) to the credit of O.S.No. 150 of 2003 within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the plaintiff is entitled to withdraw the entire amount, within a period of two weeks by filing appropriate application. If the defendant reneges from making payment as directed herein above, the plaintiff is entitled to file execution application for recovery of the suit claim with interest at 12% p.a. from the date of the suit till the date of the decree of the Trial Court and thereafter, at 9% p.a till the date of realisation .

17. With the above observations, this second appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

27.08.2024

msv
Index:Yes/No
Internet:Yes/No
Speaking order: Non-speaking order

T.V.THAMILSELVI,J.

msv

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