



S.A.No.951 of 2013

S.A.No.951 of 2013

R.N.MANJULA, J.

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This Second Appeal has been listed today under the caption "for being mentioned" at the instance of both the parties.

2. When the matter is taken up today, it is submitted that there is a clerical error in paragraph No.22 of the judgment passed in S.A.No.951/2013.

3. In view of the above submission, the clerical errors crept in paragraph No.22 in the judgment dated 28.11.2024 made in S.A.No.951/2013 is rectified as below:

“22. In the result, this Second Appeal stands allowed and accordingly, the judgment and decree of the learned VI Additional City Civil Court, Chennai dated 22.09.2011 made in A.S.No.368 of 2010 is set aside and the suit in O.S.No.5364 of 2007 on the file of VII Assistant Judge, City Civil Court, Chennai is decreed. No costs.”

4. The Registry is directed to make necessary corrections in the judgment dated 28.11.2024 and issue a corrected copy of the judgment to the parties in this Second Appeal.

06.01.2025

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Note to office: Issue order copy on 21.01.2025



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S.A.No.951 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.11.2024

CORAM

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A. No. 951 of 2013

M/s.Ambica Gen Power

Rep. By its Proprietor Pramod Kumar Daga

No.5, Bakers Street

1st Floor, Chennai-600001.

...Appellant

Vs.

The Superintendent Engineer

Tamil Nadu Electricity Board

CEDC-Central 110 KV

Valluvakottam SS Compex

Chennai-600034.

...

Respondent

PRAYER: Second Appeal is filed under section 100 of the Code of Civil Procedure, 1908, to set aside the judgment and decree dated 22.09.2011 made in A.S. No. 368 of 2010 on the file of the VI Additional City Civil Court, Chennai, confirming the judgment and decree dated 13.10.2008 made in O.S. No. 5364 of 2007 on the file of the VII Assistant City Civil Court, Chennai.

For Appellant : Mr.N.R.Anantha Rama Krishnan

For Respondent : Mr.J.Hemalatha Gajapathy



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S.A.No.951 of 2013



JUDGMENT

The appellant is the plaintiff who had filed the suit for recovery of money and the trial Court has dismissed the same. The appeal preferred by the plaintiff challenging the judgment of the trial Court also dismissed by confirming the judgment of the trial Court. Aggrieved over the same, the appellant / plaintiff has filed the present Second Appeal.

2. The short facts leading to the case of the plaintiff as pleaded by him in the plaint is as under:

2.1 The plaintiff is the dealer of Cocktail Wires in Chennai. The defendant has placed order in P.O.No.29/0607 dated 15.06.2006 and P.O.No.31/0607 dated 15.06.2006 for the supply of TC Fuse wires. The plaintiff was ready to supply the materials and sent a communication dated 03.11.2006 requesting the defendant to amend the value of the order for Rs.3,11,545/- and Rs.3,11,370/-. The defendant did not send any reply.

2.2. The plaintiff has issued legal notice on 08.01.2007 informing the defendant that they cannot supply the materials and called upon the defendant to cancel both the orders and



WEB COPY

S.A.No.951 of 2013



to refund the security deposit. On receiving the plaintiff's lawyer's notice, the defendant sent a letter dated 24.01.2007 wherein he had stated that the materials were not supplied and that a sum of Rs.62,439/- will be recovered from the outstanding bills payable to the plaintiff. A sum of Rs.29,679/- towards liquidated damages and Rs.32,767/- towards difference in price, would be recovered from the outstanding bills payable to the plaintiff. Similarly the defendant has written another letter dated 25.01.2007 stating that a sum of Rs.1,52,768/- will be recovered from the outstanding bills payable to the plaintiff. The defendant has no authority to claim the above sum by alleging that he suffered damages. Only because of the failure on the part of the defendant to amend the value of the order, the plaintiff could not supply. There is no breach of contract on the part of the plaintiff and hence the plaintiff is not liable to pay any amount.

2.3. Even if it is presumed that the plaintiff is liable to pay any damages to the defendant he ought to have appropriated it against the security deposit paid by the plaintiff by



WEB COPY

S.A.No.951 of 2013



invoking Clause 5 of the Purchase Order but the defendant cannot withhold or adjust at his own whims from the dues payable to the plaintiff for the goods already supplied. The defendant cannot adjudicate himself about the dues without the participation of the plaintiff. Hence the defendant is liable to pay whatever sum he has deducted so far and hence the plaintiff has filed the suit for recovery of a sum of Rs.2,77,937/- with interest @ 27% on the same.

3. The defendant resisted the suit by making his following contention in the written statement :

3.1. The defendant sent various communications from 28.08.2006 to 30.10.2006 and intimated that the plaintiff has failed to deliver the materials and he was also asked to supply the materials within 7 days from the date of receipt of the notice and on his failure to supply, the purchase order will be cancelled without any correspondence. Subsequently, the defendant had also sent the cancellation of purchase order on 24.01.2007 and 25.01.2007. The failure on the part of the plaintiff to supply the materials was not due to the failure to



WEB COPY

S.A.No.951 of 2013



amend the value of the purchase order because the defendant has already stated in his communication dated 10.11.2006 that the amendment is not feasible as per the terms and conditions of TNEB and the plaintiff was asked to supply the materials as per the purchase order.

3.2. The plaintiff had suppressed these communications and filed the suit. The defendant board was in emergent need of Fuse Wire of 12 SWG and it had to place the order with some other agency on a higher price and thereby the board had incurred loss and suffered inconvenience. As per Clause 16 of the Purchase Order it has been clearly mentioned that the amount due from the supplier to the Board shall be adjusted from the pending payments against the purchase order. Clause 7 of the Purchase Order would also state that the Board is at liberty to cancel the order if the supply was not completed within the delivery period notwithstanding the liquidated damages applicable for the belated supplies. The same was informed to the plaintiff vide letters dated 24.01.2007 and 25.01.2007. As per Clause 5 of Terms and Conditions, if the purchaser incurs any loss or damage on



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S.A.No.951 of 2013



account of breach of the terms and conditions any other amount arising out of contract becomes payable by the contractor to the purchaser shall be appropriated in whole or part from the security deposit and the deposit will not be refunded. Clause 5 of the Purchase Order would also state that security deposit shall bear no interest and hence the plaintiff cannot claim any interest either on his security or any other amount claimed by him. The defendant had acted only as per the terms and conditions of the purchase order and hence the suit is devoid of any merits.

4. On the basis of the above pleadings, the trial Court has framed the following issues:

- “
- 1.வாதி வழக்கில் கோரியவாறு தொகைணப் பெற உரியவரா?
 2. இந்த வழக்கு பிரதிவாதி கூறவதுபோல் தேவையற்றதா?
 3. வேறு என்ன பரிகாரம்?”

5. During the course of trial, on the side of the plaintiff, one witness was examined as P.W.1 and Exs.A1 to A12 were marked. On the side of the defendants two witnesses were examined as D.W.1 and D.W.2 and Exs.B1 to B11 were marked. At the conclusion of the trial and considering the



evidence available or record, the trial Court dismissed the suit and the appeal preferred by the plaintiff challenging the judgment of the trial Court also dismissed by confirming the judgment of the trial Court. Now the plaintiff has filed this second appeal.

6. The learned counsel for the appellant submitted that the respondent / defendant had acted in an unilateral manner and taken every step to his advantage and thereby deducted the amounts payable to the plaintiff without any basis; even if it is assumed without admission that the appellant is liable to pay any damages, that cannot be done arbitrarily without giving any opportunity to the plaintiff and without setting the claim adjudicated by an appropriate forum.

7. The learned counsel for the respondent submitted that whatever deduction made by the defendant is only in accordance with the terms of the purchase order and hence the substantial question of law will not arise. The appellant knowingly paid the security deposit and agreed to the terms of the contract. After agreeing to the terms, he cannot now come and agitate by making submissions contrary to the terms.

8. In Ex.B5(series), final letter sent by the defendant with regard to the



FPO 29 and FPO 31, it has been stated that 7 days notice is issued for material purchase. This would show that the demand for the supply was still pending.

9. It appears from Ex.B11 dated 20.06.2006, that the defendant had purchased the materials from other third party supplier. Even while corresponding with the plaintiff, for supplying materials by sending vide Exs.B5 and B6 (series) on 30.10.2006, the defendant had purchased the materials from third party from 20.06.2006. Ex.B11 should be created document for the sake of this suit. Ex.B11 was not mentioned in Ex. B5 and B6.

10. From the submissions made by the respect counsels, I feel the following substantial questions of law arises for consideration:-

“(i) Whether in law the Courts below are right in not appreciating the arbitrary adjustment of unadjudicated claim made by the respondents as mentioned in Exs.A6, A7 and A8 ?

(ii) Whether in law the Courts below are right in not considering the fact that the respondent had violated the principles of natural justice and he had unilaterally deducted the amount from the dues payable to the plaintiff ?

(iii) Whether in law the first appellate Court is right in dismissing the appeal without appreciating the legal



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position that the respondent /defendant cannot adjust the claim for damages without getting it adjudicated by adopting the principles of natural justice. ”

11. The purchase order placed by the defendant was on 15.06.2006 for supply of 850 kilograms of Fuse Wire. It was agreed between the appellant and the respondent that +5% weight tolerance can be allowed. The unit price per kilogram was agreed at Rs.349.07. After taking the order, the plaintiff manufactured fuse wire to the weight of 892 kg and 897.500 kg and whose value was worked out to Rs.3,11,370/- and to Rs.3,11,545/- respectively. As the value had exceeded Rs.3,00,000/- the plaintiff asked the defendant to alter the value according to the weight of the commodity which was ready for supply. The defendant neither replied nor amended the value of the order. But the contention of the respondent is that they are not authorized to place orders beyond the maximum limit Rs.3,00,000/- and hence, the request of the plaintiff cannot be acceded.

12. The plaintiff appears to have taken advantage of the +5% weight tolerance and had manufactured 892 kgs of Fuse Wire against the order placed for 850 kgs. The problem arose only because of the inability on the part of the respondent to alter the value beyond the maximum limit of



Rs.3,00,000/-. As the respondent /TNEB knows pretty well that 5% weight tolerance is available. In that case they ought to have restricted their purchase order somewhere for approximately 816 kgs /815 kgs in order to accommodate the 5% weight tolerance. Had it been done, the excess 5% weight tolerance availed by the appellant /plaintiff would not have altered the value beyond Rs.3,00,000/-. Because the value for 816 kgs at the rate of Rs.349 would work out to Rs.2,89,784/-. By giving +5% weight tolerance on the excess side would come to 40 kg. So the plaintiff could have manufactured only 856 kgs whose value would be Rs.2,98,744/-, which is below Rs.3,00,000/-. But the respondent /defendant have placed an order for the whole volume of Rs.3,00,000/- and had alone given 5% weight tolerance. If the 5% weight tolerance clicks on the excess side, naturally it would result in the product value exceeding Rs.3,00,000/-.

13. Had the defendant informed to the plaintiff at the earliest possible opportunity, about the maximum limit of the purchase value, the plaintiff would have been careful in not using 5% weight tolerance on the excess side.

14. In response to the reminders sent by the defendant on 30.10.2006



vide Ex.B5 and B6(series), the plaintiff had sent a letter on 03.11.2006 stating that the materials were ready for supply. He has further stated that 5% weight tolerance was on the excess side and that had crossed the maximum purchase value of Rs.3,00,000/-. Thus the purchase value was worked out to Rs.3,11,317/- in order to enable him to give delivery. The respondent submitted that the defendant had sent a reply on 10.11.2006, which is marked as Ex.B7 and informed the plaintiff that the amendment to the purchase value is not possible because of the terms and conditions of the TNEB.

15. The categorical contention of the plaintiff is that he is not in receipt of the letter dated 10.11.2006. Without getting any response from the respondent, the plaintiff has sent a legal notice on 10.01.2007 for not issuing the amended value and proceeding to get the commodity. Thereafter, the respondent had cancelled the purchase order on 25.01.2007 and recovered a sum of Rs.1,52,768/- only from the outstanding bill payable to the plaintiff under several heads. The respondent claims that as per the terms and conditions of the purchase order, failure to deliver would invite liquidated damages and loss of security deposit and that had been rightly worked out as per the terms and conditions of the contract. But the



categorical contention of the plaintiff is that he was not even aware of the letter viz., Ex.B7 dated 10.11.2006, alleged to have been sent to him.

16. Even the respondent witness was cross-examined during the trial and had stated that there is no proof to show that Ex.B7 letter dated 10.11.2006 has been served on the plaintiff. In the letters dated 24.01.2007, which have been marked as Ex.B8 series also, there is no reference about the letter dated 10.11.2006. In fact in Ex.B8 series the dates of all the letters sent have been mentioned in the reference, except the letter dated 10.11.2006.

17. Even in the letter dated 10.11.2006 the respondent has not stated anything clear as to the maximum value for which the order can be placed. It is simply stated that as per the terms and conditions of the Tamil Nadu Electricity Board, the amendment cannot be issued as prayed by the petitioner. When such an important letter, which is a king pin to continue or revoke the purchase order placed with the plaintiff, the respondent ought to have ensured that the said letter ought to have been served on the plaintiff. In the absence of any reference about Ex.B7 and the subsequent letter sent cancelling the purchase order through Ex.B8 series also creates doubtful



about the genuineness of the contention of the defendant that he had sent Ex.B7 to the plaintiff.

18. It is the submission of the defendant that they are forced to place orders from some other supplier in view of the failure on the part of the plaintiff to supply the order within the time. In this regard, Ex.B11 purchase order is produced. Ex.B11 is dated 20.06.2006. It is claimed by the defendant that they need to spent extra value of money at the rate of Rs.387/kg of fuse wire against the price of 349/kg agreed by the plaintiff. But the facts remains that until 30.10.2016, the communication between the plaintiff and the defendant were active and the defendant had been urging the plaintiff to deliver the order Ex.B5 and B6(series). In such case, it is difficult to believe that an order has been placed as early as on 20.06.2003 by accepting a higher price per unit by the defendant. If the defendant on his own volition has placed an order on 20.06.2006 unmindful of the lowest quote given by the plaintiff on 15.06.2006 the defendant cannot shift the blame on the plaintiff. In fact the alleged communication Ex.B7 informing the plaintiff about inability of the defendant to amend the purchase value itself has been communicated to the plaintiff only on 10.11.2006. But as stated already in the cancellation order Ex.B8 dated 24.01.2007 there is no



reference about Ex.B11 letter dated 10.11.2006. As the defendant had cancelled the order and sent a communication to the plaintiff on 24.01.2007 informing him that he had failed to deliver the order as agreed and that the deduction would be made towards damages and difference in price from the outstanding bills payable to the plaintiff, the plaintiff has sent a legal notice on 30.03.2007 and the defendant has also claims damages as per the terms. The cancellation order sent by the defendant dated 24.01.2007 and 25.01.2007, which have been marked as Ex.B8(series), the defendant had claimed that a sum of Rs.61,439/- and Rs.1,52,768/- are respective damages recoverable from the outstanding bills payable to the plaintiff. The defendant unilaterally had assessed liquidated damages and difference in price and claim that forms part of the contract.

19. The very contention of the plaintiff is that he did not commit any failure to perform his part of contract. He had stated that the terms of the purchase order had permitted 5% weight tolerance in the purchase order itself and only in terms of that he had produced 892 kgs at the request of the defendant to send the amended purchase value. In fact, the correspondence made by the plaintiff he has also pointed out that the purchase orders dated 15.06.2006 has got a contradictory note of allowing



+5% weight tolerance but limits the total value Rs.3,00,000/- for the sake of clarity, the above para of the purchase order is given as under:-

“ *Supply of Tinned copper fuse wire of size 14 SWG. As per IS 1926/1981 and its amendments up to date (In 1 kg roll approximately).*

Note: + 5% weight tolerance will be allowed but limited to a total PO value of Rs.3,00,000/-

Splitup Details:-

<i>Rate per kg.</i>	<i>Rs.335.00p</i>
<i>Sale Tax @4%</i>	<i>Rs. 13.40p</i>
<i>SC on ST @ 5%</i>	<i>Rs. 0.67p</i>
	<i>-----</i>
	<i>Rs.349.07p</i>
	<i>-----”</i>

20. The defendant omitted to clarify their own contradictions in the purchase order where they have allowed +5% weight tolerance knowing pretty well that if the agreed price value per unit of Rs.349/- is applied for +5% weight tolerance that would definitely cross the purchase value of Rs.3,00,000/-. It is wrong on the part of the defendant to allow +5% weight tolerance but restricting the price to Rs.3,00,000/-. As stated already, if the maximum limit of the purchase value of the defendant should be seen not exceeding Rs.3,00,000/-, he ought to have placed an order less than 850 kgs in order to accommodate +5% weight tolerance. Having failed to do so, it is unfair on the part of the defendant to claim damages from the plaintiff.



In fact, the defendant had failed to inform the plaintiff that their purchase value cannot exceed Rs.3,00,000/- and hence, they cannot revise the purchase value order. The alleged communication dated 10.11.2006 informing the plaintiff about the inability to amend the purchase order is a self-serving and self-styled document. When all these contentious issues were not resolved before any adjudicatory authority, the defendant cannot be proceeded to deduct any alleged damages from the outstanding bills payable to the plaintiff. In fact, the terms of the purchase order does not even have a clause about the arbitratory mechanism or any other mechanism to settle the disputes arising out of the contract. The standard form of contract adopted by the defendant appears to have clauses to protect only the interest of the defendant and not the other party in the event of any failure or short fall committed on the side of the defendant. As the defendant has proceeded to deduct damages in an unreasonable and unfair manner without getting the dispute as to the liability of the plaintiff to pay damages adjudicated, the plaintiff has filed the suit claiming damages from the defendant.

21. The Lower Appellate Court without appreciating the merits on the side of the plaintiff as discussed above, had proceeded to dismiss the



S.A.No.951 of 2013

appeal preferred by the plaintiff. Hence, the substantial question of law is answered in favour of the appellant /plaintiff.

22. In the result, this Second Appeal stands allowed and accordingly, the Judgment and Decree of the learned VI Additional City Civil Court, Chennai dated 22.09.2011 made in A.S. No. 368 of 2010 confirming the judgment and decree of the learned VII Assistant Judge, City Civil Court, Chennai, dated 13.10.2008 made in O.S. No. 5364 of 2007 is set aside. No costs.

28.11.2024

Index : Yes
Speaking order : Yes
NCC : Yes

Maya

To

1. The VI Additional Judge
City Civil Court, Chennai.
2. The VII Assistant Judge
City Civil Court, Chennai.
3. The Section Officer,
V.R. Section,
High Court, Madras.



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