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**(2010) 01 SHI CK 0016**

**In the High Court Of Himachal Pradesh**

**Case No : Regular Second Appeal No. 417 of 2000**

Diwakar Dutt Bhardwaj

APPELLANT

Vs

H.P.M.C.

RESPONDENT

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**Date of Decision : 07-01-2010**

**Acts Referred:**

**Citation : (2010) 01 SHI CK 0016**

**Hon'ble Judges : Deepak Gupta, J**

**Bench : Single Bench**

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## **Judgement**

Deepak Gupta, J.—This Regular Second Appeal is directed against the judgment of the learned District Judge, Kinnaur at Rampur Bushahr, H.P. passed in Civil Appeal No. 7 of 2000 dated 2.6.2000 whereby he has allowed the appeal filed by the respondent (HPMC) and set-aside the judgment and decree of the learned Senior Sub Judge, Kinnaur in Civil Suit No. 52-1 of 91 decided on 20.11.1999. This appeal was admitted on the following substantial question of law:

Whether the lower Appellate Court had misinterpreted and mis-construed the statements of the witnesses and the document Exbt.PW-1/A which has resulted in gross injustice in the case?

2. The appellant (hereinafter referred to as the plaintiff) instituted a suit for recovery of Rs. 90,000/- against the defendant. The case set out was that the plaintiff is an horticulturist. He also takes other orchards on contract. In the apple season of the year 1990 the plaintiff had purchased standing apple crop/ fruit in various areas of Tehsil Theog. After purchase of the fruit he brought 359 crates of apple to the cold store being run by the defendant at Oddi on 25.9.1990. According to the plaintiff, there was an implied agreement whereby the defendant was to keep the fruit in a proper condition on behalf of the plaintiff. The plaintiff was to pay a sum of Rs. 3.50 per month per crate to the defendant. In addition thereto the plaintiff was to pay labour charges @ .50 paise per crate. On 24.10.1990 the plaintiff visited the cold storage and to his utter surprise and dismay found that the ceiling of the Chamber No. 4 of the cold

storage where his fruit was stored had been damaged. The refrigeration system was not working properly. According to the plaintiff he learnt that the ceiling of the Chamber No. 4 broke on 12.10.1990. The plaintiff issued notice on 24.10.1990 itself to the defendant. On 25.10.1990 he applied to the Tehsildar to visit the spot who accordingly visited the spot. According to the plaintiff the fruit of 359 apple crates is equal to 450 apple boxes and the market value thereof at the relevant time was Rs. 90,000/-. Hence, the suit.

3. The defendant contested the suit. The receipt of 359 apple crates was not denied. According to the defendant the fruit had not been graded and was still required to be graded. According to the defendant the cold store was in working condition and the plaintiff did not turn up to grade his apple after 25.9.1990 despite notice. The defendant also states that the plaintiff never visited the cold storage on 24.10.1990. According to the defendant since the plaintiff did not turn up to collect the fruit, a Committee headed by the Tehsildar, Kumarsain was constituted and in his presence the apple fruit of the plaintiff was opened on 22.2.1991. Thereafter, 123 boxes were sent to the market and 155 boxes of culled fruit were sent to the Fruit Processing Plant, Parwanoo. 34 boxes were destroyed. According to the defendant after adjusting the amount received for the fruit sold the defendant was entitled to recover Rs. 2,440.65 from the plaintiff and counter claim to this effect was filed.

4. The following issues were framed in the suit:

(1) Whether the plaintiff is entitled to the suit amount if so, to what extent and on what rate of interest? OPP.

(2) Whether the defendant is entitled to set off the suit amount, if so, to what extent? OPD.

(3) Whether the suit is not maintainable in the present form? OPD.

(4) Whether the suit is properly valued for the purposes of Court fees and jurisdiction? OPP.

(5) Relief.

5. The learned trial Court came to the conclusion that the defendant was entitled to recover a sum of Rs. 1800/- from the plaintiff but also held that the plaintiff was entitled to recover from the defendant a sum of Rs. 90,000/- and therefore decreed the suit in favour of the plaintiff and against the defendant for a sum of Rs. 88,200/- plus interest @ 12% p.a. on this amount.

6. The learned lower Appellate court has set-aside this judgment. The learned Lower Appellate Court has discussed the evidence in detail. Normally this Court would not re-assess evidence but this is a case of decree of reversal and on going through the evidence I find that some of the observations of the learned lower Appellate Court are totally against the material on record and are perverse to that extent.

7. The first question which arises is as to whether the fruit in the apple crates was graded or not. The plaintiff has not produced the original receipt which according to him is lost. The defendant produced and proved on record the carbon copy of the receipt which is Ext.DA. According to this receipt 359 PVC crates of loose and ungraded apple were lodged in Chamber Nop.4 of the cold store of the defendant. Therefore, the claim of the plaintiff that he had deposited the apples after grading is not accepted to be correct. This finding of the learned lower Appellate Court in this behalf is upheld.

8. The next important question is whether there was any break down in Chamber No. 4 of the cold store. The plaintiff has stated that he visited the cold store on 24.10.1990 when he found that it was damaged and not working properly. He has examined PW-, Gopal Sharma who was the Tehsildar Kumarsain at the relevant time. According to PW-1 on 25.10.1990 he received an application from the plaintiff to visit the spot. Thereafter he visited the spot and made the following observations:

26.10.90. I endorse the contents of application. On the request of applicant Shri Divakar Dutt Sharma I visited the Cold Storage Chamber in H.P.M.C. complex Oddi on 25.10.1990 after noon and found that where the apple boxes of applicant were stored; the cold storage Chamber was not functioning properly due to breakage in thermoseal Chamber of cold storage Chamber. The dust of thermoseal was found deposited on the upper layers of apples. Due to variation in temperature there is every likelihood that the purpose of storage of apple crop be forfeited. Hence, on my enquiry the assistant Marketing Officer assured me of proper care to the boxes of applicant and further told that he will transfer the stored apple boxes of applicant to another Chamber of cold store which is functioning properly. The application of applicant is genuine and requires immediate attention.

Sd/-26.10.90."

9. The trial Court believed this witness but the learned Lower Appellate Court has disbelieved the statement of PW-1 on the ground that PW-1 had not prepared memorandum of inspection on 25.10.1990 and had endorsed his report as reproduced above on the application Ext.PW-2/B which is dated 26.10.1990. The learned lower Appellate Court has held that the report of the Tehsildar is a procured report and according to him the Tehsildar should not have carried out the spot inspection on the oral request of the party.

10. The plaintiff had also produced PW-3 Lalit Kumar, photographer who had stated that he had taken the photographs Exts.PW-3/A to PW-3/D of the apple fruit of the plaintiff in October, 1990. His statement has been totally disbelieved on the ground that the cash memo Ext.PW-3/1 is dated 19/6 and according to the learned Judge the photographs must have been taken in June, 1991 when the stone fruit season was at its zenith. In my view the findings of the learned lower Appellate Court on this issue are perverse since certain important

documentary evidence has not at all been taken into consideration. According to the plaintiff he visited the cold store on 23rd/24th October, 1990. The defendant denies this visit. This stand of the defendant is belied from document Ext.DW-2/A dated 25.10.1990 which is a letter addressed by the defendant to the plaintiff in which it is clearly stated that the plaintiff visited the cold store on 23.10.1990 in connection with grading and packing of the fruit. In this letter it is stated that thereafter the defendant did not come for grading. This belies the stand of the defendant. Ext.PW-2/A is a notice by Sh. Charanji Lal, Advocate on behalf of the plaintiff. This is a detailed notice about the deposit of the apple boxes and specific allegations have been made in this notice that on 24th October, 1990 when the plaintiff visited the cold store he found that the roof of the cold store had been uprooted and the cold storage system was not in working order. It is specifically stated that on inquiry the plaintiff had been informed that the roof had been damaged on 12.10.1990. The plaintiff had also complained that he was never informed about the damage to the cold storage. On 25.10.1990 the plaintiff sent a letter to the Tehsildar/Executive Magistrate, Kumarsain praying that the Tehsildar should conduct spot examination of the cold store. In this letter it is also clearly stated that the applicant had requested the photographer from Bobby Studio, Kumarsain to take photographs of the damaged chamber, ceiling, apple fruits etc. and that he will produce the photos as and when required. It is not disputed that this document was received in the office of the Tehsildar. The learned lower Appellate Court has rejected the report of the Tehsildar mainly on the ground that he had not prepared an inspection report and that Ext.PW-2/B is dated 26.10.1990 whereas the report is that of 25.10.1990. This is total misreading of evidence. In fact letter Ext.PW-2/B is dated 25.10.1990 and the endorsement Ext.PW-1/A made on the letter itself by the Tehsildar is dated 26.10.1990 in which he has stated that he visited the spot on 25.10.1990. There was no reason not to accept this report. The Tehsildar may not have followed a proper procedure inasmuch as he did not give any notice but it cannot be held that such inspection was not carried out by the Tehsildar.

11. Another important factor is that the learned trial Court has not taken into consideration Ext.PW-2/C which is a reply sent by the HPMC on 7.11.1990 to the notice Ext.PW-2/A. In this reply it is nowhere stated that the allegation made in the notice that the cold store was damaged is incorrect. Therefore, in my view the learned lower Appellate Court totally misread the evidence and ignored certain material pieces of evidence and as such this Court is entitled to interfere. There was total misinterpretation and mis-reading of the evidence which has led to perverse finding.

12. Having come to the conclusion that the cold store was damaged it is obvious that the defendant is liable to reimburse the plaintiff for the loss suffered by him. Unfortunately, the plaintiff has not led any cogent evidence to show what was the weight of the fruit in each crate. The plaintiff claims that each crate contains 1.5 apple boxes whereas according to the defendant a crate has less apples than an apple box. However, neither party led any cogent evidence in this regard.

Therefore, reliance will have to be placed on the report of the Committee constituted by the defendant itself which found that there were 123 filled boxes of good quality apple which were sent for sale to Delhi. It also found that there were 155 filled boxes of B-grade culled fruit and 34 filled boxes of rotten fruit which were destroyed at site. Therefore, according to the evidence of the defendant itself there were 312 boxes of fruit.

13. PW-1 had stated that the value of a good quality of apple fruit was 200 to 240 per box. Since even according to the defendant there were 123 boxes of good quality fruit, if price of these is taken at Rs. 220/- per box it works out to Rs. 27,060/-. The plaintiff led no evidence as to what was the value of B-grade apples or the value of culled fruit. The defendant sold 155 boxes of culled fruit for Rs. 2795/-. 34 boxes were destroyed. The value of these boxes of apples even if they are taken at the culled value rate would work out to Rs. 613/-. Therefore, the value of the fruits is assessed at Rs. 30,468/- in all. As held by both the courts below the defendant is entitled to Rs. 1800/- on account of storage and labour charges. As such the plaintiff is entitled to a sum of Rs. 28,668/-. On this amount the plaintiff shall be entitled to interest @ 6% p.a. from the date of filing of the suit i.e. 8.7.1991 till payment/deposit of the amount.

14. Accordingly the judgment and decree of the learned lower Appellate Court is set-aside. A decree for a sum of Rs. 28,668/- is passed in favour of the plaintiff-appellant and against the defendant-respondent along with interest @ 6% p.a. from the date of filing of the suit i.e. 8.7.1991 till payment/deposit of the amount. Parties are left to bear their own costs. A decree sheet be drawn up in the aforesaid terms.

15. The appeal is disposed of in the aforesaid terms.