
(2016) 03 GAU CK 0057
In the Gauhati High Court
Case No : RFA No. 68/2002

Hazi Abdus Salam Barlaskar

APPELLANT

Vs

Kanco Enterprises Ltd. and Others

RESPONDENT

Date of Decision : 29-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 22, Section 96
Contract Act, 1872 — Section 73, Section 74

Citation : (2016) 163 AIC 593 : (2017) 1 GauLT 254

Hon'ble Judges : Suman Shyam, J.

Bench : Single Bench

Advocate : S.K. Ghosh, Advocate, for the Appellant; A.C. Sarma, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Suman Shyam, J.—1. Heard Mr. S.K. Ghosh, learned counsel appearing for the appellant. Also heard Mr. A.C. Sarma, learned counsel representing the respondent.

2. This appeal filed under Section 96 of the Code of Civil Procedure is directed against the judgment and decree dated 31-08-2001 passed by the court of learned Civil Judge (Sr. Div.) No. 2, Cachar, Silchar in Money Suit No. 19/1984, partly decreeing the suit of the respondent/plaintiff for an amount of Rs. 5,62,919.69/-. The appeal has been preferred by the defendant No. 1.

3. The Plaintiff's case, in brief, is that the plaintiff M/s. Bengal Tea and Industries Ltd. was the owner of Paloi Tea Estate whereas the defendant No. 1 was the lessee in respect of Rahman Nagar Tea Estate. The plaintiff had been purchasing green leaf leafs from the defendant No. 1 by entering into bilateral agreements from time to time. Accordingly, the original plaintiff viz. M/s. Bengal Tea and Industries Ltd. a public limited company, and the appellant/defendant No. 1 had entered into an agreement dated 04-02-1983, inter alia, laying down the terms and conditions for purchase of green tea leafs by the plaintiff from the defendant

No. 1 whereby and whereunder, the defendant No. 1 had agreed to sell green tea leafs to the plaintiff during the period from 01-04-1983 to 31-12-1983, the total quantity being 3,20,000 k.g. Under the said agreement, the plaintiff had agreed to purchase the said quantity of green tea leafs for the aforesaid period @ Rs. 1.85 per k.g. Prior to entering into the said agreement, the plaintiff had advanced an amount of Rs. 11,000.00 per week during the period from 24-01-1983 to 31-03-1983. As per the agreement dated 04-02-1983, the plaintiff had made a weekly advance of Rs. 12,000/- on every Monday of the week which was required to be adjusted against the price of the green tea leafs to be supplied by the defendant No. 1. It was also agreed to by and between the parties that after adjustment of all the advances paid by the plaintiff under the said agreement, the defendant would be entitled to the actual market price of the green tea leafs but if there was any outstanding balance of unadjusted advance amount paid by the plaintiff even after supply of the aforesaid 3,20,000 kgs. green tea leafs, the defendant No. 1 would supply green tea leafs at the same rate until full and final adjustment of the advanced amount. It was also agreed by the parties that the plaintiff would hold a lien over the entire tea crops of the defendant's Tea Estate for the year 1984 until the advance amount paid by the plaintiff was fully liquidated and until full and final adjustment of the advance amount, the green tea leafs of the defendant Tea Estate of 1984 season would stand hypothecated to the plaintiff. Besides the above, an amount of Rs. 46,137.24/-, which was the outstanding balance of the advance amount payable by the defendant No. 1 to the plaintiff for the previous season was also to be treated as carried forward advance component under the agreement dated 04-02-1983 and the said amount was also to be added to the total advance amount to the credit of the plaintiff. Besides the cash component as mentioned above, the parties to the agreement had also agreed that 7 bogs of "ata" and 3 bags of "rice" would be supplied by the plaintiff to the defendant from 01-04-1983 onwards and the price of the said articles shall also stand adjusted against the weekly payments on account of green tea leafs as per the agreed rate.

4. As per the agreement dated 04-02-1983, the parties had also agreed that the defendant No. 1 would not have any right to operate his factory, save and except on every Wednesday, until such time the advance paid by the plaintiff stood fully adjusted against the green tea leafs. In terms of the aforesaid agreement the defendant No. 1 began to supply the green tea leafs to the plaintiff company against which regular accounts were also maintained at the Paloi Tea Estate of the plaintiff. The defendant No. 1 had also verified such account maintained by the plaintiff at the Paloi Tea Estate from time to time. However, while the aforementioned arrangement was in place, the plaintiff could notice that the defendant No. 1 was not allowing any rebate on wet tea leafs and further that the entire quantity of plucked tea leafs were not being supplied to the plaintiff as per the agreed terms as a result of which, the plaintiff company was compelled to issue a letter to the defendant No. 1 to rectify the aforesaid position. On the face of such objection raised by the plaintiff, a meeting was held between both

the parties whereby the defendant No. 1 had admitted the aforesaid allegation of the plaintiff but had requested the plaintiff to allow him to retain a small portion of the plucked tea leafs during the period from 18-05-1983 to 31-05-1983 for manufacturing about 750 kgs. of tea at his own factory. Although the plaintiff had agreed to the aforesaid request made by the defendant No. 1 yet, even thereafter, the defendant No. 1 did not adhere to the terms and condition of the agreement dated 04-02-1983, in so far as the supply of green tea leafs was concerned. On the contrary, the request made by the plaintiff to adhere to the terms and condition of the said agreement was turned down by the defendant No. 1 on the plea that the price of the tea leafs had increased substantially in the auction market as compare to the old price prevailing at the time of entering into the agreement dated 04-02-1983 and as such, a demand was made by the defendant No. 1 to enhance the price of the green tea leafs supplied under the agreement dated 04-02-1983, which request was falsely claimed by the defendant No. 1 to have been conceded to by the Manager of the plaintiff's Tea Estate.

5. It is the further case of the plaintiff that when the request made to the defendant No. 1 for supply of the requisite quantity of green tea leafs under the aforementioned agreement was pending appropriate response from the defendant No. 1, the plaintiff had paid a further amount of Rs. 50,000/- to the defendant No. 1 as advance at his request. However, despite such positive gesture shown by the plaintiff, defendant No. 1 continued to default in supply the agreed quantity green tea leafs to the plaintiff company as per the terms and condition of contract agreement dated 04-02-1983, as a result of which, a sum of Rs. 1,62,919.69/-, as per details indicated in the statement appended to the plaint, being the outstanding amount had become due and payable to the plaintiff from the defendant No. 1.

6. It is the further case of the plaintiff that when the defendant No. 1 was found to have short supplied the green tea leafs corresponding to the contractual period, by issuing the letter dated 10-02-1984, the plaintiff had once again requested the defendant No. 1 to continue with the supply of green tea leafs as per the conditions contained in the agreement and complete the supply of 29,549 kgs. of green tea leafs which remained due from the defendant No. 1 out of the total contractual quantity of 3,20,000 kgs. However, despite receipt of the aforesaid letter dated 10-02-1984, no response was forthcoming from the defendant No. 1 on the aforesaid matter. On the contrary, the defendant No. 1 had issued a back dated letter on 10-02-1984 demanding enhancement of the price of the tea leafs claiming the rate of the tea leafs @ Rs. 3.00/- per k.g. so as to include even the quantity that had already been supplied under the agreement dated 04-02-1983 and had demanded that the outstanding amount of Rs. 1,62,919.69/- be and adjusted with the difference of price of tea leafs already supplied by adding an amount Rs. 1.15 paise per kg. The plaintiff has stated that the defendant No. 1 has supplied 293451 kgs. of green tea leafs out of the agreed quantity of 3,20,000 kgs., thereby leaving a balance of 26549 kgs. The

plaintiff had claimed that as per the stipulations contained in the contract agreement, the defendant No. 1 was bound to supply the balance quantity of 26,549 kgs. of green tea leafs to the plaintiff at the agreed rate of Rs. 1.85/- per k.g. which he had failed to do. As such, the defendant No. 1 had acted in breach of the contract dated 04-02-1983. The plaintiff had therefore, claimed to be entitled to recover an amount of Rs. 1,12,322/- being the loss of profit that the plaintiff would have earned by manufacturing tea out of 26,549 kgs. of green tea leafs after deducting the manufacturing cost and expenses as per detailed analysis indicated in Annexure- 7 to the plaint.

7. Over and above the aforementioned amount, the plaintiff had also claimed a further amount of Rs. 3,73,442.71/- as damages and compensation on account of loss of profit earnings by the plaintiff due to breach of contract agreement dated 04-02-1983 by the defendant No. 1 as per the calculations projected in Annexure- 6 to the plaint. In the above manner the plaintiff had claimed to be entitled to recover an amount of Rs. 6,48,695.35/- in total from the defendant No. 1.

8. The defendant No. 1 had contested the suit by filing written statement. However, proforma defendant No. 2 and 3 did not contest the suit as a result of which the suit proceeded ex-parte against them.

9. In his written statement the defendant No. 1 has generally denied the averments made in the plaint and further stated that since there was no clause in the contract agreement for payment of any damages for breach of contract, hence, the plaintiff ought to have instituted the suit for specific performance of contract. Since the same has not been done, hence, the plaintiff's suit was not maintainable. While disputing the correctness of the accounts maintained by the plaintiff, the defendant No. 1 had stated that by the letter dated 10-02-1984, a demand was made for payment of a sum of Rs. 1,75,827.76/- from the plaintiff on account of green tea leafs supplied up to the month of December, 1983 being the difference in the price of green tea leafs due to increase in the price of the tea leafs, after deducting the amount of Rs. 1,62,919.69/- claimed by the plaintiff being the outstanding unadjusted advance amount.

10. Based on the pleadings of the parties, the learned Trial Court had framed the following issues:

- "1) Whether there is cause of action for the suit?
- 2) Whether the suit is maintainable in the present form?
- 3) Whether there was any agreement between the parties on 4.2.83 and that effect plaintiff advance any amount to the defendant in accordance with the terms of agreement and any breach from the side of the defendant?
- 4) Whether the plaintiff has a lien over the entire tea crops of 1984 and whether the green tea leafs of 1984 season stands hypothecated to the plaintiff?

- 5) Whether the claim of the plaintiff is genuine, true and correct?
- 6) Whether there was any failure on the part of the plaintiff to refix the price of the green tea leaf?
- 7) Whether the plaintiff has locus standi to bring this suit?
- 8) Whether the plaintiff company was in existence at the time of institution of this suit?
- 9) Whether the claim of the plaintiff is barred by limitation?
- 10) To what relief, the plaintiff is entitled to?"

11. The plaintiff side has examined three witnesses and exhibited 15 documents whereas the defendant side had examined one witness and exhibited 8 documents.

12. After hearing the learned counsel for the parties and on appreciation of the materials available on record, the learned Trial Court had decided the issues in favour of the plaintiff thereby holding that the plaintiff was entitled to recover the amount as prayed for in the suit. However, the learned Trial Court had given a rebate of Rs. 85,775.62/- from the total amount claimed by the plaintiff on the head of damages and compensation as well as the price of unsupplied green tea leafs, thereby, reducing the amount prayed for by the plaintiff to the above extent. Consequently, the suit filed by the plaintiff stood decreed for an amount of Rs. 5,62,919.69/-.

13. Being aggrieved by the aforesaid judgment and decree passed by the learned Trial Court, the defendant No. 1, as appellant, is before this Court by filing the instant appeal.

14. Mr. S.K. Ghosh, learned counsel for the appellant submits that the respondent i.e. M/s. Kanco Enterprise Ltd. was not in existence when the suit was filed on 14-08-1984 by the original plaintiff M/s. Bengal Tea and Industries Ltd. As such, the present respondent cannot maintain the instant suit by substituting itself in place of the original plaintiff since the appellant had not signed any contract agreement with the present respondent for supply of green tea leafs. As such, submits Mr. Ghosh, the learned Trial Court had erred in law in deciding the issue No. 7 in favour of the respondent by holding that the plaintiff has locus standi to maintain the suit.

15. Mr. Ghosh, further submits that it is the admitted case of the plaintiff that M/s. Bengal Tea and Industries Ltd. i.e. the original plaintiff was amalgamated with M/s. Bengal Tea and Fabrics Ltd. Thereafter the M/s. Bengal Tea and Fabrics Ltd. got amalgamated with M/s. Kanco Enterprise which is a public limited company. The learned counsel submits that after the amalgamation of M/s. Bengal Tea and Industries Ltd. with M/s. Bengal Tea and Fabrics Ltd. the former company became dead and as such the rights and liabilities existing in favour of the original plaintiff also stood extinguished under the law. Such being the position,

the present plaintiff or M/s. Bengal Tea and Fabric Ltd. could not have got their names included as the plaintiff in place of the original plaintiff since such recourse is not permissible in the eye of law. In support of his aforesaid argument Mr. Ghosh has placed reliance upon a decision of the Hon'ble Apex Court in the case of Saraswati Industrial Syndicate Ltd. v. Commissioner of Income Tax, reported in , 1990 (Supp) SCC 675 and a decision of this Court in Brooke Bond Lipton India Ltd. (M/s) v. State of Assam, reported in , 2004 (3) GLT 444. Decision of Delhi High Court in the case of Yapi Kredi Bank (Deutschland) Ag v. Mr. Ashok K. Chauhan & Ors.

16. As regards the findings and conclusion recorded by the Trial Court in issue Nos. 5 and 10 Mr. Ghosh submits that there is not even an iota of evidence available on record to prove and establish the fact that the plaintiff company had suffered any loss due to the non-supply of green tea leafs by the defendant No. 1. Such being the position, there was no basis for the learned Trial Court to come to a conclusion that the plaintiff was entitled to any amount on account of damages and compensation due to loss of profit and also on account of non-supply of the green tea leafs as alleged in the plaint.

17. Refuting the aforesaid arguments Mr. A.C. Sarma, learned counsel appearing for the respondent submits that although the money suit had originally been instituted by M/s. Bengal Tea and Industries Ltd. yet, during the pendency of the suit the said company was amalgamated with another public limited company, viz. M/s. Bengal Tea and Fabric Ltd. on the basis of a scheme of amalgamation dated 09-11-1987 approved by the Calcutta High Court. As per the aforesaid scheme, the assets and liabilities of the former company stood transferred in favour of the transferee company. Thereafter, by the scheme of amalgamation dated 20-04-1998 approved by the Calcutta High Court, the company M/s. Bengal Tea and Fabric Ltd. was voluntarily amalgamated with the present plaintiff. The learned counsel submits that the original plaintiff was replaced by the transferee company by virtue of the order passed by the Trial Court which was unsuccessfully challenged by the appellant before this Court. Such being the position, no fault can be found with the decision and reasoning of the learned Trial Court in respect of the issue No. 7 holding that the respondent plaintiff did have the locus standi to maintain the suit.

18. On the question of findings and conclusions recorded by the Trial Court in respect of the issue Nos. 5 and 10, the learned counsel for the respondent submits that it is not in dispute that an amount of Rs. 1,62,919.69/- out of the advance amount paid by the plaintiff to the defendant No. 1 has remained unadjusted. It is also the admitted position of fact that as per the terms and condition of the agreement dated 04-02-1983, the defendant No. 1 was obliged to supply the balance quantity of 26549 kgs. of green tea leafs. As such, the plaintiff was entitled to recover damages for the losses suffered by it due to deliberate breach of contract committed by the appellant. However, notwithstanding the same, the learned Trial Court had granted a rebate of Rs.

85,775.62/- from the amount recoverable by the plaintiff from the defendant No. 1 in exercise of its discretionary powers in the matter having regard to the peculiar facts and circumstances of the case.

19. As regards the amount awarded by the Trial Court on account of damages and compensation due to breach of contract committed by the defendant No. 1 the learned counsel submits that the plaintiff side had lead sufficient evidence in support of the statements and figures furnished in Annexures- 2, 5, 6 and 7 appended to the plaint showing the detail calculation of the losses suffered by the plaintiff. Taking note of such materials available on record, the learned Trial Court had arrived at a conclusion that the plaintiff company was entitled to recover an amount of Rs. 4,00,000/- on account of damages and compensation as well as the price of the balance quantity of 26,549 kgs. of green tea leafs. He submits that since the entitlement of the plaintiff for adjustment/recovery of Rs. 1,62,919.69/- has remained undisputed, hence, the amount of Rs. 5,62,919.69/- decreed by the learned Trial Court is justified in the facts and circumstances of the case and the same does not call for interference by this Court.

20. I have heard learned counsel for the parties and have also perused the materials available on record. After hearing the learned counsel for the parties what is apparent is that the appellant is pressing this appeal primarily on two grounds, viz. the lack of competence of the substituted plaintiff to continue with the suit after amalgamation of the original plaintiff with M/s. Bengal Tea and Fabric Ltd. The other ground on which the impugned order has been assailed is that there was no evidence on record for the court below to award the amount under the head of damages and compensation. Such being the position, I propose to decide the appeal by framing the following two points of determination:--

"(A) In view of the amalgamation of M/s. Bengal Tea and Industries Ltd. with M/s. Bengal Tea and Fabric Ltd. and the subsequent amalgamation with M/s. Kanco Industries, whether the substituted plaintiff company was competent to continue with the suit?"

21. From the materials available on record it can be seen that the Money Suit No. 19/1984 was instituted by M/s. Bengal Tea and Industries Ltd. on 14-08-1984 before the court of the then Asstt. Sessions Judge, No. 1, Cachar, Silchar, [now, Civil Judge (Sr. Div.)] against the present appellant as defendant No. 1 and two others as proforma defendants. It further appears from the record that a scheme of amalgamation dated 09-11-1987 providing for merger of M/s. Bengal Tea and Industries Ltd. with M/s. Bengal Tea and Fabric Ltd., a public limited company was approved by the Calcutta High Court. As per the aforesaid scheme of merger, all properties, assets and liabilities of the transferor company immediately before the amalgamation stood transferred in the name of the transferee company. It further appears from the record that by a subsequent scheme of merger dated 20-04-1998 approved by the Calcutta High Court, M/s. Bengal Tea and Fabric Ltd. stood merged with M/s. Tuscon Resources Ltd. Under

the aforesaid scheme of merger, all properties, assets, right and powers including those involved in suits and appeals pending by or against the transferor company on the date of merger stood assigned in favour of the transferee company. It is not in dispute that M/s. Tuscon Resources Ltd. was subsequently renamed as M/s. Kanco Industries which is the present respondent/plaintiff.

22. It further appears from the records that pursuant to the order dated 09-11-1987, on 24-05-1996 an amendment petition was filed by M/s. Bengal Tea and Fabric Ltd. for replacing the existing plaintiff by the said company and the amendment was allowed by the Trial Court by order dated 12-12-1996. The present appellant had preferred a revision petition bearing No. 103/1997 before this Court challenging the aforesaid order dated 12-12-1996 which stood rejected by the order dated 18-08-1997.

23. Thereafter, pursuant to the amalgamation that took place by virtue of the order dated 20-04-1998 as mentioned above, M/s. Kanco Industries had filed an amendment petition on 20-01-1999 seeking to replace itself in place of the plaintiff M/s. Bengal Tea and Fabric Ltd. The present defendant No. 1 had filed objection against the said prayer. Eventually, by the order dated 14-02-2000 the prayer for amendment was allowed by the Trial Court and M/s. Kanco Industries was brought on record by substituting the existing plaintiff. The appellant did not challenge the order dated 14-02-2000 as a result of which the same has attained finality in the eye of law. In this manner the present respondent came to be substituted in place of original plaintiff and had continued with the suit which was ultimately decreed by the Trial Court on 31-08-2001.

24. The provisions for substitution of plaintiff by its representatives where the right to sue survives is dealt under Order XXII of the CPC. The Order XXII Rule 10 of the CPC deals with procedure to be followed by the court in case of assignment before delivery of final judgment. Order XXII Rule 10 CPC reads as follows:

"10. Procedure in case of assignment before final order in suit.--(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

From a reading of the aforesaid provisions what can be seen is that a transferee pendente lite can be made party to a suit with the leave of the Court if there is assignment or creation or devolution of interest during the pendency of the suit.

25. In the case of Devendra Kumar Sarewgee & Ors. v. Purbanchal Estates (P) Ltd. & Ors. reported in (2006) 9 SCC 199 the Hon'ble Apex Court while discussing the law as regards substitution under Order XXII Rule 10 CPC has

observed as follows:

"11. This Court after detailed consideration of the case-law in *Raj Kumar v. Sardari Lal* has held that the transferee pendente lite is treated in the eye of the law as a representative-in-interest of the judgment-debtor and bound by the decree passed against the judgment-debtor. In case of an assignment, creation or devolution of any interest during the pendency of any suit, Order 22 Rule 10 CPC confers a discretion on the court hearing the suit to grant leave to the person in or upon whom such interest has come to vest or devolve to be brought on record. Bringing on a lis pendens transferee on record is not as of right but in the discretion of the court."

26. In the case of *Dhurandhar Prasad Singh v. Jai Prakash University & Ors.* reported in , (2001) 6 SCC 534 it was also observed by the Apex Court that under Order XXII Rule 10 CPC, where there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved and this entitles the person who has acquired interest in the subject matter of the litigation by assigning or creation or devolution of interest pendente lite or suitor or any other person interested to apply to the Court for leave to continue the suit.

27. The law laid down in the aforementioned decisions has been reiterated by the Hon"ble Apex Court in the subsequent decision rendered in the case of *Thomson Press (India) Ltd. v. Nanak Builders & Investors Pvt. Ltd. & Ors.* reported in , 2013 (5) SCC 397.

28. What clearly follows from the above decisions of the Apex Court is that where there has been an assignment or creation or devolution of the interest in the subject matter of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. The power to permit such substitution as per Order XXII Rule 10 CPC is a discretionary power of the Court which power is required to be exercised keeping mind the facts and circumstances of each case.

29. As has been mentioned hereinabove, under the respective schemes of amalgamation, there has been an assignment of rights, interests and liability of the transferor company in respect of all the properties and assets including the rights ensuing under the agreement dated 04-02-1983 upon the transferee Company. Since, the merger of the companies took place during the pendency of the suit whereby there has been assignment of interest in respect of the subject matter of the suit in favour of the respondent, hence, the present respondent/plaintiff was a transferee pendent-lite and was entitled under the law to continue with the suit due to the leave granted by the court in that regard.

30. In the case of *Saraswati Industrial Syndicate Ltd.* (Supra) relied upon by the appellant, the core issue arising for decision was as regards the effect of amalgamation on the identity of the transferee company with regard to its tax

liability and hence, the said decision would not have any application in the facts of this case. Similarly, the decision of this court in the case Brooke Bond Lipton India Ltd. (Supra) as well as that of Delhi High Court in the case of Yapi Kredi Bank (Deutschland) Ag (Supra) deals with the question pertaining to the true entity of the transferee company on completion of merger. The aforesaid decisions relied upon by the appellant does not lay down the proposition of law that in case of assignment of rights and interest in the properties and assets of the transferor company, the transferee company, being the transferee pendente-lite will be incompetent to continue with the suit or proceeding. As such, the aforesaid decisions relied upon by the learned counsel for the appellant would be of no assistance to him in the facts and circumstances of the present case. In that view of the matter, I am of the opinion that the learned trial court had rightly decided the issue No. 7 on the point of locus in favour of the plaintiff and against the defendant No. 1.

The next point of determination arising in this appeal is:--

"(B) Whether the Trial Court had committed an error in deciding the issue Nos. 5 and 10 by decreeing the plaintiff's suit for recovery of damages and compensation?"

31. A reading of the plaint goes to show that the plaintiff has not only pleaded the material facts and particulars but has also supported such pleadings by appending Annexures- 5, 6 and 7 to the plaint giving the detail calculation of the amount due and recoverable by the plaintiff company from the defendant No. 1 on various heads. In Annexure-5 of the plaint, the plaintiff has given the statement showing the quantity of tea leafs supplied by the defendant No. 1 on different dates w.e.f. 01-01-1983 to 31-12-1983. Again in the Annexure- 6 appended to the plaint, the plaintiff has also given a statement showing the total profit it would have earned had the defendant No. 1 supplied the tea leafs against the outstanding amount of Rs. 1,62,919.69/-, which according to the plaintiff comes to Rs. 3,73,442.71/-. The Annexure- 6 of the plaint is quoted herein below for ready reference:

32. During the course of trial, the plaintiff side had produced the Green Leaf Register (Exhibit-10) as well as the Cash Book i.e. Exhibits- 12, 13 and 14 in support of its claim. The plaintiff side had also produced the accounts statement (Exhibit-15). The aforesaid evidence lead by the plaintiff establishes the veracity of the calculation projected by the plaintiff in the plaint.

33. On the other hand, save and except making a general averment in the statement to the effect that the account statement submitted by the plaintiff as annexures to the plaint are incorrect, the defendant No. 1 had failed to adduce any evidence in rebuttal so as to disprove the claim made by the plaintiff. As a matter of fact, what emerges from the record is that the defendant No. 1 is not denying the fact that 26,549 kgs. of green tea leafs was not supplied by it to the plaintiff nor disputing the claim of the plaintiff that an amount of Rs.

1,62,919.69/- is lying due from the defendant No. 1 as the unadjusted outstanding advance amount. On the contrary, the pleaded case of the appellant/defendant No. 1 is that due to the increase in the price of the tea leafs, the appellant would rather be entitled to receive enhanced value of the tea leaf @ Rs. 3.00/- per k.g. for the tea leafs supplied under the agreement dated 04-02-1983. Such a claim appears to have been unilaterally made by the defendant No. 1 in total contravention of the terms contained in the agreement dated 04-02-1983. It would be pertinent to note herein that although such a stand had been taken in the written statement yet, the defendant No. 1 did not make any counter-claim in the suit.

34. The signing of the contract agreement dated 04-02-1983 is not in dispute nor is it denied that under the said agreement, the defendant No. 1 was obliged to supply green tea leaf to the plaintiff at the rate of Rs. 1.85/- per k.g. until the entire advance amount stood fully adjusted. Such being the position, there can be no doubt about the fact that the defendant No. 1 had acted in willful default of the agreement dated 04-02-1983 by not supplying the balance quantity of 29549 kgs. of green leafs to the plaintiff against the outstanding advance amount of Rs. 1,62,919.69/-. Therefore, the plaintiff would be entitled to recover the said amount from the defendant No. 1 besides such further amount as damages and compensation as may be permissible under the law.

35. From the plaint it can be seen that the plaintiff had given the details showing the losses suffered by it due to breach of contract by the defendant No. 1. The defendant No. 1, being a tea planter has not made any attempt to specifically deny the correctness of claim made in Annexure-6, more particularly those entries pertaining to the price of made tea and cost factors involved in tea production. Hence, the figures shown in the said statement read with the evidence available on record forming the basis for the claim of damages and compensation has to be accepted as correct by the court.

36. From a careful scrutiny of the pleadings of the parties as well as the evidence brought on record it is established that the defendant No. 1 had deliberately acted in breach of contract by failing to supply the requisite quantity of tea leafs to the plaintiff in satisfaction of total outstanding advance amount at the contractual rate of Rs. 1.85/- per k.g. Tea leaf being a seasonal product and a special article of commerce which is not readily available in the open market, it can be validly presumed that due to short supply of the agreed quantity of the green leafs by the defendant No. 1, the plaintiff would have suffered losses. The question that would, therefore, arise for determination in this case is as to whether in the absence of proof of actual losses being suffered by the plaintiff, can the court award monitory compensation as damages.

37. In the case of Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported in , (2003) 5 SCC 705 the Hon'ble Apex Court has held that it would be impossible for the Court to assess the compensation arising from breach of contract in every contracts and as such, the Court would be entitled to award

reasonable compensation on the basis of a genuine pre-estimate by the parties as the measures of reasonable compensation. The observation made by the Hon"ble Apex Court in paragraph 68 of the said decision is quoted herein below:

"68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measures of reasonable compensation."

38. Again in the case of MSK Projects India (JV) Ltd. v. State of Rajasthan & Ors. reported in , (2011) 10 SCC 573, the Hon"ble Apex Court had gone on to observe that a claim for damages as expected profit out of contract cannot be disallowed on the ground that there was no proof that the contractor has suffered actual loss to the extent of amount claimed on account of breach of contract. The principle of law enunciated by the Apex Court in the case of MSK Projects India (JV) Ltd. (Supra), in my considered opinion, would also be applicable in the facts and circumstances of the present case where the respondent/plaintiff had admittedly failed to supply the quantity of tea as per the terms and conditions of the contract agreement. The particulars furnished in the plaint, more particularly the projections made in the Annexures- 6 and 7 therein, affords a realistic basis for the court to make a valid assessment of a just and reasonable compensation payable to the plaintiff in the facts and circumstances of the present case. The view taken by the learned trial court in the facts of the case, is a plausible one and therefore, the amount awarded as damages and compensation is not only found to be just but also reasonable. For the foregoing reasons, it is held that the trial court had rightly awarded damages and compensation to the plaintiff in terms of the prayer made in the plaint.

39. Coming to the claim of the plaintiff for recovery of the amount of Rs.

1,12,332.91/- it is seen that the said amount has been claimed on account of loss of profit due to short supply of 26,549 kgs. of green leafs as per the projections made in Annexure-7 to the plaint. However, as would be evident from the observations made above, the plaintiff had already included the entire quantity of short supply of tea leafs as against it claim for damages and compensation which it was entitled to claim against the advance amount of Rs. 1,62,919.69/- in the statement annexed as Annexure-6. On the basis of such calculation, damages and compensation has already been awarded to the plaintiff on account of loss of profit. Obviously, therefore, the quantity of 26,549 kgs. of green leaf would come within the purview of the said claim. As such, the plaintiff cannot again claim further amount of compensation on account of loss of profit for non-supply of 26,549 k.g. of green leafs from the defendant No. 1 since accepting such a claim, in the facts of the present case, would amount to unjust enrichment of the plaintiff at the cost of the defendant No. 1. There is nothing on record to justify the claim for any additional amount on account of damages due to loss of profit. As such, it is held that the learned trial court had erred in admitting the claim of the plaintiff for recovery of an additional amount of Rs. 1,12,332.91/- on account of loss of profit due to non-supply of 26,549 kgs. of green tea leafs.

40. In view of what has been held above, the money decree passed by the learned trial court calls for modification. Hence, it is provided that the plaintiff would be entitled to recover an amount of Rs. 1,62,919.69/- (Rupees one lakh sixty two thousand nine hundred nineteen and sixty nine paise) only being the un-adjusted advance amount paid to the defendant No. 1. That apart, it would also be entitled to recover damages and compensation for an amount of Rs. 3,73,442.71/- (Rupees three lakh seventy three thousand four hundred forty two and seventy one paise) only from the defendant No. 1 due to loss of earning and profit suffered by the plaintiff on account of breach of contract committed by the defendant No. 1. As such, the plaintiff would be entitled to realize an amount of Rs. 5,36,362.40/- (Rupees five lakh thirty six thousand three hundred sixty two and forty paise) only in total from the defendant No. 1.

41. It is to be noted herein that from the total amount awarded to the plaintiff under the impugned decree, the learned trial court had granted a rebate of Rs. 85,775.62/- to the defendant No. 1. From a reading of the impugned judgment, it is not clear as to the specific head on account of which the rebate was granted. Be that as it may, the respondent has not preferred any appeal against that part of the decree wherein the trial court had granted the aforesaid rebate. Moreover, rebate granted by the trial court has to be worked out from the total amount that is legitimately found to be due and payable by the defendant No. 1 to the plaintiff. Such being the position, it is provided that an amount of Rs. 85,775.62/- shall stand deducted from the total amount payable to the plaintiff under the modified decree. In the result, it is held that the plaintiff would be entitled to recover an amount of Rs. 4,50,586.78/- (Rupees four lakhs fifty thousand five hundred eighty six and seventy eight paise) only from the

defendant No. 1 after adjustment of the amount of rebate.

This appeal stands partly allowed.

However, having regard to the facts and circumstance of the case, there would be no order as to cost.

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