
(2006) 02 MAD CK 0123

In the Madras High Court

Case No : A.S. No. 138 of 1992 and C.M.P. No. 8941 of 1992

Madurantakam Co-operative Sugar Mills

APPELLANT

Vs

M/s. Sri Hari Traders by Proprietor Arasalan

RESPONDENT

Date of Decision : 08-02-2006

Acts Referred:

Limitation Act, 1963 — Section 18, 19

Citation : (2006) 02 MAD CK 0123

Hon'ble Judges : K. Mohan Ram, J

Bench : Single Bench

Advocate : G. Kathirvelu, for the Appellant; R.V.R. Nallasivam and Mr. A.K. Kumaraswamy, for the Respondent

Final Decision : Allowed

Judgement

K. Mohan Ram, J.—The defendant in O.S. No. 592 of 1988 on the file of the Sub-Court, Erode is the appellant in the above appeal. For the sake of convenience, the parties are referred to as per their ranking in the suit.

2. The brief facts of the case are as follows:

Pursuant to the Purchase Order dated 19.01.1985 placed by the defendant, the plaintiff supplied 201 tonnes and 810 Kgs of neem deoiled cake powder to the value of Rs. 2,52,262.50. Thereafter, pursuant to the Purchase Order dated 18.03.1985, the plaintiff supplied the defendant 236 tones and 320 Kgs of neem deoiled cake powder to the value of Rs. 2,95,400.00. The plaintiff had thus supplied goods to the defendant to the value of Rs. 5,47,662.50. The price agreed was Rs. 2,350/- per tonne of ground nut deoiled cake and Rs. 1,250/- per tonne of neem deoiled cake powder. The Purchase Order specified that the neem deoiled cake powder should contain 2.5% Nitrogen. It was agreed that 70% of the value of the goods should be paid on receipt of full quantity of goods and 30% should be paid after receipt of analytical report. The defendant had made a total payment of Rs. 4,65,405.35 on various dates, leaving unpaid a sum of Rs.

82,257.15. The plaintiff sent a notice on 17.11.1987. The defendant sent a Cheque bearing No. M 244578 for Rs. 28,894.60 dated 02.01.1988 towards a portion of the amount due to the plaintiff and the cheque was encashed. The cheque was enclosed with a letter. The plaintiff received the said amount without prejudice to his rights. Subsequently, since the defendant failed to pay the balance amount, a legal notice dated 14.04.1988 was sent. A cheque dated 02.01.1988 was sent by the defendant along with his letter dated 04.01.1988 towards the portion of the amount due and payable to the plaintiff and hence the suit is in time. The plaintiff claimed interest at 9% per annum from 02.01.1988 on a sum of Rs. 53,362.55.

3. The defendant contested the suit by filing a written statement containing the following averments:

As per the purchase order of the defendant company at padalam dated 19.01.1985 and 18.03.1985 the plaintiff has to supply 300 tonnes of groundnut deoiled cake with 7.5% nitrogen and 200 tonnes of neem deoiled cake powder with 2.5% Nitrogen and has to supply 200 tonnes of ground nut deoiled cake with 7.5% Nitrogen and also 300 tonnes of neem deoiled cake powder with 2.5% Nitrogen, respectively. The price agreed upon, on both the order is Rs. 2,350/- per tonne of ground nut oil cake and Rs. 1,250/- per tonne of Neem Oil Cake Powder. In the two purchase orders, the following three conditions have been specifically mentioned and agreed upon:

Note 1. Please depute your representative within three days from the date of your supply so as to enable us to take joint sample which will be sent to chemical testing analytical laboratory Guindy and the re-suit of the analytical test will be final and binds on both sides.

2. If the Nitrogen content goes below 7.5% for ground nut deoiled cake and 2.5% neem deoiled cake powder, proportionate amount will be deducted from the value.

3. Packing in 70/75 Kg. standard bags. In the column mode of payment it is mentioned as "70% payment on receipt of the full quantity and 30% payment after receipt of the analytical report".

The plaintiff supplied 438.130 tonnes of neem deoiled cake powder in spite of the intended quantity of 500 tonnes and the supplied quantity should have contained 2.5% Nitrogen. But the test of the analyst at Guindy revealed lesser percentage of Nitrogen. On the basis of the test report, the price has been relatively reduced as per the terms and conditions contained in the Purchase Order and a further sum of Rs. 28,894.60 was paid to the defendant and thus, over and above the account due to the plaintiff amounts have been paid by the defendant. No further amount is payable much less the sum of Rs. 53,362.55, as claimed by the plaintiff. Though the first test report is binding on both the parties, when the plaintiff requested for the second test, it was explained to them that the second sample may vary from the first sample and the time lag may also help vary the

contents of the sample. Though it was not obligatory on the part of the defendant to send the samples for the second test, only out of grace, the samples were taken and sent for test again. As per the second test report, the percentage from the new sample varied from 2.23% to 2.75%. Only out of grace, an average was arrived at and total amount payable was calculated on the average and the difference of Rs. 28,894.60 was paid on the specific understanding that it will be gracefully accepted and the matter will be closed. Contrary to that, the plaintiff has filed the suit. No further amount is payable by the defendant to the plaintiff, since the cause of action has arisen within the Sub-Court, Chengalpet, Erode Court has no jurisdiction to entertain the suit.

4. On the above said pleadings, the Trial Court framed the following issues, namely:

i)Whether the plaintiff is entitled for the suit claim?

ii)Whether the Court has got territorial jurisdiction to try the suit?

iii)To what relief the parties are entitled?

During Trial, one Padmanaban was examined as P.W.1 on the side of the plaintiff and Exs.A-1 to A-9 were marked and one M. Raman was examined as D.W.1 on the side of the defendant and Exs.B-1 to B-14 were marked.

5. On a consideration of the oral and documentary evidence adduced in the case, the Trial Court accepted the case of the plaintiff and decreed the suit as prayed for. Aggrieved by that the defendant has filed the above appeal.

6. I heard, Mr. G. Kathirvelu, learned counsel appearing for the appellant and Mr. A.K. Kumarasamy, learned counsel appearing for the respondent.

7. The learned counsel for the appellant submitted that the suit is barred by limitation, as the suit has been filed beyond three years from the date of payment made by the defendant, Ex.A-5 will not amount to acknowledgment u/s 18 or 19 of the Limitation Act as claimed by the plaintiff and on this ground alone the appeal should be allowed. The learned counsel further submitted that the rejection of the two test reports obtained from the Guindy Laboratory is erroneous and the procedure adopted by the defendant for arriving at the percentage of Nitrogen content in the goods supplied by the plaintiff is proper and accordingly the deductions made by the defendant is in accordance with the terms and conditions contained in the Purchase Order. The reasoning of the Trial Court for rejection of the two test reports is erroneous. Regarding the question of territorial jurisdiction, the learned counsel did not advance any arguments.

8. In support of his contention, the learned counsel for the appellant relied upon the judgment of this Court reported in Union of India Vs. Tubes and Malleables Ltd. Madras and Another, and 2005 (1) M.L.J. 532 (D.B.) : 2005 1 L.W. 612 (M/s. Bharat Heavy Electricals Limited Vs. M/s. Dowel Erectors). The main thrust of the argument of the learned counsel for the appellant is on the question of limitation.

In Ex.A-5 dated 04.01.1988, it is stated by the defendant that the cheque is enclosed in settlement of Deft cost of N.O.D.C. (For 308.420 Mt), when it is specifically stated in Ex.A-5 that a sum of Rs. 28,894.60 is being sent in settlement of deficit cost to N.O.D.C. (for 308.420 Mt), the defendant has made it clear that, there was no more obligation on their part and they were not liable to pay anymore amount in respect of the claim of the plaintiff. In those circumstances, it was not open to the plaintiff to rely upon the payment made by the defendant to save the bar of limitation. The learned counsel submits that there was no acknowledgment in writing as contemplated u/s 18 of Limitation Act, nor or there any payment made on account of the debt as contemplated by Section 19 of the Act.

9. Per contra, the learned counsel for the respondent by relying upon the judgment of the Apex Court reported in Tilak Ram and Others Vs. Nathu and Others, submitted that the suit is in time. The learned counsel further submitted that the method adopted by the defendant for deducting the amount on account of deficiency in Nitrogen content of the goods supplied by the plaintiff is not correct. Since, the two test reports reveled varying percentage of deficiency of Nitrogen in the goods supplied by the plaintiff, the Trial Court was right in rejecting both the test reports.

10. Now, I have to consider whether the suit is filed in time. In the case reported in AIR 1979 Madras 215 (Union of India Vs. M/s. Tubes and Malleables Limited, Madras and another), the contention of the Railways was that the payment made by cheque was in full and final settlement of the claim raised by the plaintiff therein and that therefore there was no outstanding, according to them, which was ever payable as a debt or which could be deemed to have been impliedly acknowledged as the liability or obligation on the part of the Railway thereafter to be satisfied. The plaintiff in that case had contended that he had received such payments under protest, so there was no automatic acceptance of the same in favour of the full and final settlement and the date on which the cheques were tendered to the plaintiff would give to a fresh cause of action. In that case, it was conceded by both sides that if the date of the cause of action for the suit is reckoned, as the date on which the open delivery of the goods was given at the place on destination, then the suits have been filed beyond three years and two months from those dates. In that factual background, the question that arises for consideration, in that case, was whether the receipt of the cheque tendered by the Railway, but said to be in full and final settlement of the claim raised by the plaintiff, who received it under protest, would give raise to a fresh cause of action within the meaning of one or the other of the provisions of the Limitation Act.

11. His Lordship, the Honourable Mr. Justice Ramaprasada Rao, Chief Justice has held thus, No doubt, the payment was accepted under protest, but, so far as the person who made the payment is concerned, he was emphatic that it was in full and final settlement. He did not reserve any obligation to respect any future claim on the part of the payee. A voluntary act on the part of the payee by which

he said that he was receiving the cheque under protest, could not revive the obligation which had been extinguished by the overt act on the part of the railway, when they sent the cheque, proclaiming contemporaneously that the payment was made in full and final settlement of the claim made by the plaintiff. In these circumstances, I am unable to agree with learned counsel for the respondent that such payment accepted by him under protest did revive the cause of action and kept alive his right.

In the judgment reported in 2005 (1) M.L.J. 532 (D.B.) (M/s. Bharat Heavy Electricals Limited Vs. M/s. Dowel Erectors), it has been held thus,

The essential conditions for a valid acknowledgment are: (1) Must be of a liability (2) The liability must relate to some existing debt or other obligation regarding the right on the date of acknowledgment, and (3) It must be in writing and signed by the person against whom the acknowledgment is claimed and the acknowledgment must be before the expiry of the period prescribed for a suit or application in respect of such claim. Mere sending of letter by the company claiming certain amounts due to them, without any reference to the adjustment or any exiting liability, as well as the relationship of debtor and creditor in respect of the disputed claim, certainly will not come within the meaning of acknowledgment as contemplated u/s 18.

In the judgment reported in Tilak Ram and Others Vs. Nathu and Others, relied upon by the learned counsel for the respondent paragraph no. 10 reads as follows:

10. The right of redemption no doubt is of the essence of and inherent in a transaction of mortgage. But the statement in question must relate to the subsisting liability or the right claimed. Where the statement is relied on as expressing jural relationship it must show that it was made with the intention of admitting such jural relationship subsisting at the time when it was made. It follows that where a statement setting out jural relationship is made clearly without intending to admit its existence an intention to admit cannot be imposed on its maker by an involved or a far-fetched process of reasoning.

The passage extracted from the judgment reported in Union of India Vs. Tubes and Malleables Ltd. Madras and Another, will show that the receipt of the cheque tendered by the defendant, but said to be in full and final settlement of the claim raised by the plaintiff, who received it under protest would not give rise to a fresh cause of action within the meaning of one or the other of the provisions of the Limitation Act. The learned counsel for the appellant submits that the above said judgment squarely applies to the facts of the instant case, whereas, Mr. A.K. Kumarasamy, learned counsel for the respondent submits that in the letter relied upon in the judgment reported in AIR 1979 Madras 215, the words "in full and final settlement of the claim" have been used whereas, in the instant case, the cheque had been sent "in settlement of deficit of cost of the goods". There is a difference between the words "in full and final settlement of the claim" and "in

settlement of the deficit of cost of the goods". I am unable to agree with the submissions of the learned counsel for the respondent. The defendant in this case has clearly stated that the cheque is being sent in settlement of the deficit cost of N.O.D.C. (for 308.42 Mt). From these words, one cannot infer that the statement in question amounts to admitting the subsisting liability or the right to claim. We cannot say that the statement contained in Ex.A-5 was made with an intention of admitting a jural relationship subsisting at the time when it was made. In my considered view, the ratio laid down in Union of India Vs. Tubes and Malleables Ltd. Madras and Another, squarely applies to the facts of this case. In my view, the judgment reported in Tilak Ram and Others Vs. Nathu and Others, relied upon by the respondent instead of helping him, it helps the appellant. In that judgment, the Supreme Court has clearly laid down that, where a statement setting out jural relationship is made clearly without intending to admit its existence an intention to admit cannot be imposed on its maker by an involved or a far-fetched process of reasoning. If we consider Ex.A-5 in the light of what the Honourable Supreme Court of India has said, it cannot be said that the defendant intended to admit a creditor/debtor relationship between the plaintiff and the defendant and therefore, I am unable to accept the contention of the learned counsel for the respondent.

The statement on which a plea of acknowledgment is based must relate to a present subsisting liability, though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship of debtor and creditor between the plaintiff and defendant. In this case, a perusal of Ex.A-5 shows that there was no intention on the part of the defendant to admit the jural relationship of debtor and creditor. Therefore, it will not give rise for a firm cause of action. The suit was filed on 12.09.1988 and 70% payments were made on the following dates by the defendant to the plaintiff, viz., on, 25.03.1985, 04.04.1985, 06.06.1985 and 09.07.1985, as revealed from Ex.B-1. If the period of limitation is calculated from the above said dates, the suit is clearly out of time and is barred by limitation. Only if the period of limitation is calculated from 04.01.1988, when the cheque was sent by the defendant to the plaintiff with Ex.A-5, the suit will be in time. I have held that Ex.A-5 cannot be construed to be an acknowledgment of liability u/s 18 or 19 of the Limitation Act. The suit is clearly barred by limitation and on this short ground alone the judgment of the Trial Court is liable to be set aside and the appeal allowed. But, however, I feel that on merits also the appeal is liable to be allowed for the following reasons:

The Purchase Order Ex.A-3, contains the following two clauses:-

1. Please depute your representative within three days from the date of your supply so as to enable us to take joint sample which will be sent to chemical

testing Analytical Laboratory, Guindy and the result of analytical will be final and binds on both side.

2. If the Nitrogen content goes below 7.5% for groundnut deoiled cake powder and 2.5% for neem deoiled cake powder proportionate amount will be deducted from the value.

But admittedly, the plaintiff did not send his representative within three days from the date of his supply to enable the defendant to take joint sample for sending the same for chemical testing. So, the defendant took samples in the absence of the representative of the plaintiff and sent for chemical testing to the Analytical Laboratory, Guindy. The test report is Ex.B-10 dated 21.05.1985. When the defendant brought to the notice of the plaintiff Ex.B-10, the plaintiff requested the defendant to take samples and send it for testing for the second time and accordingly again the samples were taken and sent for testing for the second time. The test report is Ex.B-13 dated 01.11.1985. It is pertinent to point out that the plaintiff did not raise any objection on the ground, that the samples were not taken within three days from the date of supply, whereas he only wanted the samples to be taken again and sent for testing. Since, he himself has asked for the second testing, he should abide by the result of the testing. This aspect has not been considered by the Trial Court. The Trial Court on the other hand has stated that if the defendant had considered the second test report to be correct that should have been accepted and the balance should have been paid without deducting any amount or otherwise the average of the test results found in the second test report should have been arrived at, and on that basis, the price for the goods should have been calculated. The Trial Court found fault with the method adopted by the defendant. The Trial Court has stated that the defendant is bound to explain as to why the samples were taken belatedly and sent for testing; but they have not given any explanation and on that ground, the Trial Court has held that both the reports should be rejected. But this was not the stand taken by the plaintiff and actually this was not the case of the plaintiff. For the notice dated 14.04.1988, issued by the plaintiff, the defendant has sent a reply Ex.B-14, dated 30.05.1988. In the said reply it has been specifically stated that the neem deoiled cake powder supplied by the plaintiff had lesser percentage of Nitrogen varying from 1.69% to 2.38% as per the first report and as per the second report it varied from 2.23% to 2.75% and only out of grace the average was arrived at and the total amount payable was calculated on the average and accordingly the balance amount was sent. But curiously, the plaintiff in paragraph no. 11 of the plaint after referring to its legal notice dated 14.04.1988 has stated that the defendant had not sent either the amount or any reply to the notice. It is also stated in paragraph no. 12 of the plaint that no reason has been given to the plaintiff at any point of time, as to why no reply is sent by the defendant for withholding the amount, whereas as pointed out above, the defendant had sent a reply Ex.B-14 dated 30.05.1988, containing the reasons for the deduction. In spite of receiving the said reply, the plaintiff not only has failed to question the right of the defendant to make deductions from

the amount payable to the plaintiff towards the deficiency in the Nitrogen content, but has conveniently stated that no reply had been sent. When the plaintiff himself has not questioned the right of the defendant to deduct on account of deficiency in the Nitrogen content as per the terms contained in the Purchase Order and when the plaintiff himself has not challenged the validity of the two test reports, it is not open to the Trial Court to make a special pleading and reject the test reports. Hence the reasoning of the Trial Court in rejecting the two test reports and finding fault with the procedure adopted by the defendant in arriving at the value of the deductions to be made is not correct. The reasoning of the Trial Court in this regard is not only erroneous, but is also not based on the pleadings in the case. Therefore, I am unable to agree with the findings of the Trial Court. The defendant is entitled to deduct the proportionate value for the deficiency of Nitrogen content in the neem deoiled cake powder Supplied by the plaintiff and therefore the plaintiff is not entitled to the suit claim. Accordingly, the judgment and decree of the Trial Court is set aside and the appeal is allowed but no costs. Consequently, the connected C.M.P. is closed.