

(2011) 11 DEL CK 0408

In the Delhi High Court

Case No : Regular First Appeal No. 775 of 2002

M/S. Pitambar Coated Papers Ltd.

APPELLANT

Vs

Indira Gandhi National Open University

RESPONDENT

Date of Decision : 29-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2011) 11 DEL CK 0408

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Nagesh Kapoor, for the Appellant; Aly Mirza, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal (RFA) filed u/s 96 Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 28.9.2002. By the impugned judgment Trial Court dismissed the suit for recovery of Rs. 4,17,029/- filed by the appellant / plaintiff.

2. The facts of the case are that the respondent / defendant placed an order upon the appellant / plaintiff for supply of Art Paper, Art Card vide orders dated 1.10.1997 and 12.11.1997. The appellant / plaintiff supplied total of 300 Mts. of the art card of the total value of Rs. 1,22,10,514/- and the respondent / defendant also made various payments. The appellant / plaintiff alleged that a sum of `2,44,234/- remained due. The subject suit, therefore, came to be filed for recovery of Rs. 2,44,234/- plus an interest of Rs. 1,72,795 making a total of Rs. 4,17,029/-.

3. The respondent / defendant contested the suit on the ground that the appellant / plaintiff in terms of the contract had to supply the Art Card having a density of 1.2 cc/gm but however when the cards were tested and test report obtained, it was found that the density was only 0.91/0.92 cc/gm and consequently a penalty of 2% of the price was levied i.e. the total price was paid

less the amount of 2%. It was prayed that the suit, therefore, be dismissed inasmuch as the total price less 2% stood already paid to the appellant / plaintiff.

4. The main issue, therefore, in the present case was with respect to whether the appellant / plaintiff supplied the Art Card in terms of the contract. The relevant issue in this regard was issue no.2 before the Trial Court and which issue reads as under:

Whether the Plaintiff did not supply quality specifications of 300 Mts. Art Card as per contract signed between the parties? OPD.

5. This issue has been rightly and exhaustively dealt with by the Trial Court by giving the following findings and conclusions:

8. It is admitted case of the parties that the defendants had placed order for supply of 300 MTs Art Card on the plaintiff and the same was supplied by the plaintiff to the defendant. It is also not in dispute that as per the agreement the plaintiff was to supply that much quantity of Art Card having property bulk of 1.2 cc/g.

The plea of the plaintiff is that the plaintiff had supplied Art Card as per the specifications agreed between the parties; that the Art Card was used by the defendant and no complaint was ever received from any quarter by the defendant through their empanelled publishers; that Art Card supplied by the defendant was below the agreed specifications, the defendant should have returned the same to the plaintiff. However, the defendant did not return the Art Card in question and, therefore, the defendant is liable to pay the balance sum of Rs. 2,44,234/- on account of balance value of goods, supplied by the plaintiff to them.

9. DW Sh. O.P. Bangia, Asstt. Registrar of the defendant has deposed that samples of the Art Card were sent to Central Pulp and Paper Research Institute, Saharanpur for laboratory test. He has further deposed that the samples were tested in that laboratory and were found to be of bulk of 0.91 and 0.92 cc/g instead of 1.2 cc/g as agreed between the parties. He has proved the Test Report dt.3.2.98 which is Ex.DW.1/8 to 1/9 (collectively).

Plea of the plaintiff is that the lab test report Ex.DW.1/8 and 1/9 (collectively) is false and fabricated and has been manipulated by the defendant. However, the plaintiff has failed to bring on record anything either by his own evidence or through cross-examination of DW O.P. Bangia to substantiate his plea. It is admitted case of the parties that the goods in question were delivered by the plaintiff to the defendant in instalments from 23.10.97 till 8.2.98. The Lab Test Report Ex.DW.1/8 to 1/9 (collectively) reveals that samples were received in the Central Pulp and Papers Research Institute, Saharanpur on 28.1.98. The samples were tested in the laboratory and the report which is dt. 3.2.98 was given by the experts of the Central Pulp and Papers Research Institute. These facts clearly go to show that there is not much delay in sending the samples by the defendant to

the Central Pulp and Papers Research Institute. There is also no delay by the institute in conducting the test on the samples received from the defendant. The samples were received in the institute on 28.1.98. The same were tested within time and test report was given on 3.2.98. The instant suit was instituted by the plaintiff on 21.5.01. It is not that the samples were sent by the defendant to the institute after institution of the suit and the samples were tested and the report was given by the experts during pendency of the suit. In the light of these facts there are no grounds to disbelieve the test report. Besides, there is no apparent reason for the officials of the institute to give a false report. Besides, the samples were sent by the defendant to the laboratory for test in accordance with the agreed terms and conditions as contained in the agreement Ex.DW/12 to 1/6 (Collectively). Perusal of that agreement reveals that as per clause - 11 thereof it was agreed between the parties that the quality / specifications of the product will be got decided from Govt. Laboratory at the discretion of the defendant. In the light of this the defendant was within its rights to send the samples to the aforesaid institute for test and for expert opinion with regard to quality / specifications of the Art Card supplied by the plaintiff to them. In the light of these facts it is found that there are no grounds to disbelieve the expert report given by the aforesaid institute. Admittedly it was agreed between the parties that the plaintiff shall supply Art Card of the property bulk of 1.2 cc/g. However, as found by the test report conducted at the Central Pulp and Papers Research Institute, Saharanpur, the property bulk of the Art Card was only 0.91 and 0.92 cc/g. In the light of this it is held that the plaintiff did not supply Art Card to the defendant as per the specifications agreed between the parties. Issue is accordingly decided in favour of the defendant and against the plaintiff.

6. I completely agree with the findings and conclusions of the Trial Court because the test reports dated 3.2.1998 exhibited as Ex. DW1/8 to Ex. DW1/9 clearly showed that the density of the Art Card supplied was only 0.91/0.92 cc/gm instead of the contract density of 1.2 cc/gm. Surely, the appellant / plaintiff is not entitled to a higher price than the quality / value of the products supplied. If the appellant / plaintiff supplied product with a lesser value, the respondent / defendant was surely entitled to reduce 2% as penalty in view of the breach of contract, which really was in fact reduction of the price for the lesser value of the material supplied. Learned counsel for the appellant sought to argue that the test report dated 3.2.1998 exhibited as Ex. DW1/8 to Ex. DW1/9 cannot be looked into because the author of this report did not enter into the witness box. In my opinion, this argument is without merit because the counsel for the appellant / plaintiff admits that no objection was raised to the exhibition of the documents at the time when they were exhibited. Accordingly, in view of the decision of the Supreme Court reported as R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, appellant is not entitled to raise this objection. In fact, counsel for the respondent / defendant points out that the appellant / plaintiff itself has used this report in the cross-examination of the witness of the respondent / defendant.

7. In view of the above, the Trial Court has rightly dismissed the suit because the appellant / plaintiff cannot get more than the value of the goods actually supplied and the penalty was really a reduction of the lesser value of the goods supplied.

8. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial court record be sent back.