

(2012) 02 DEL CK 0376

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 28 of 2006

Union of India

APPELLANT

Vs

M/s. S.S. International

RESPONDENT

Date of Decision : 07-02-2012

Acts Referred:

Citation : (2012) 02 DEL CK 0376

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Geeta Sharma with Ms. Priya Singh, for the Appellant;

Final Decision : Dismissed

Judgement

Pratibha Rani, J.—Two suits numbered as CS(OS)587/1982 and CS(OS) 288/1983, the former filed by M/s S.S International and the latter by Union of India have been disposed of by a common judgment dated July 30, 2005 and pursuant thereto two separate decrees have been drawn up. The instant appeal, as per the opening sheet pertains to the decision in the suit filed by the Union of India. No appeal has been filed against the decision pertaining to CS(OS)587/1982. In the suit bearing CS(OS) No. 587/1982, M/s. S.S. International prayed for a decree of declaration to the effect that rejection made by UOI in respect of 43.663.948 MT kishmish was void and illegal. Decree in sum of Rs. 5,41,234.85 was prayed for as per details given in para 48 of the plaint.

2. CS (OS) No. 288/1983, filed by Union of India prays for a money decree of in sum of Rs. 6,44,736.87 on the ground that out of the 95 MT stock supplied, 33.649.949 MT went bad during the warranty period and after disposing of 20.668.364 MT by public auction, Union of India could realize only a sum of Rs. 1,47,500.81 as against payment in sum of Rs. 7,36,613.30 made to M/s. S.S. International towards the price payable under the terms of the contract. Union of India also claimed a sum of Rs. 39,138.77 towards freight charges, incidental and back loading charges and further sum of Rs. 1,753.35 towards

advertisement and a sum of Rs. 14,732.26 towards sales tax @ 2%. Thus, Union of India claimed Rs. 7,92,237.68 towards condemned stock and after adjusting Rs. 1,47,500.81, realized through auction, decree prayed for was in sum of Rs. 6,44,736.87.

3. The appeal is liable to be dismissed on the short point of res judicata being applicable. The reason is that claim of M/s S.S. International was based upon the averment that the kishmish supplied by it was as per the warranty specifications and thus full price as per contract was payable in respect of the quantity supplied and for the balance quantity which was not lifted, it was sold at a price of Rs. 25 per kg. as against Rs. 35.55 per kg. being the contract price. Rs. 5,484 towards cold storage charges were also prayed for.

4. Thus, at the core of the dispute was the same matter in issue i.e. whether the goods supplied were defective justifying Union of India in not lifting a quantity weighting 10.952 MT which was sold by M/s S.S. International at a lesser price and whether the goods which were supplied were defective entitling Union of India to a refund for the payment made.

5. The learned Single Judge has returned a finding against Union of India i.e. its claim that the goods supplied were not as per warranty was not proved and thus claim filed by Union of India has been dismissed and that file by M/s S.S. International has been decreed.

6. In the judgment reported as 1993 (3) SC 1202 Premier Tyres Ltd. v. Kerala State Road Transport Corporation it was observed, in para 3, that where the main issue is common in two suits and one appeal was dismissed either as barred by time or abated, the impugned decision operated as res judicata in the other appeal. Similar was the view expressed in the decision reported as Ram Prakash Vs. Smt. Charan Kaur and Another, which decision is fairly similar to the instant case even on facts. Two cross suits each claiming money decree, having at the core the same matter in issue, were decided by a common decision and only one appeal filed pertaining to one decree was held to be barred by res judicata since the other decree had become final.

7. The relevant facts, with respect to the merits may also be noted by us, for the reason, even on merits the appellant has no case. The reason is that U.O.I. floated tender for supply of 96 MT "Kishmish". The bid submitted by S.S.I was accepted vide acceptance letter dated 25.11.1980. The contract was governed by (a) the special conditions of contract as forwarded by the UOI (b) the General conditions of Contract (Form DGS&D-68 Revised) except clause 14(8) and clause 24 thereof as contained in the pamphlet "Conditions of Contract by Government of India" as amended from time to time (c) the terms and conditions stated in the said acceptance of Tender dated 25.11.1980. The tender submitted by S.S.I. was accepted vide letter dated 15.11.1980 for supply of 96 MT of "Kishmish" as per the rate and schedule as under :-

Quantity (M.T.)

Delivery Dates

Rate

23.00

12.12.80}

Rs. 35.55 per kg

15.00

10.01.81}

18.00

10.02.81}

12.00

10.4.81 }

11.00

10.5.81}

Rs. 35.75 per kg

1.00

10.6.81}

10.00

10.7.81}

6.00

10.8.81}

8. The goods supplied were to conform to ASC specification No. 67. S.S.I was also required to give the warranty in accordance with the standard warranty clause. However, S.S.I did not give any warranty in terms of the warranty clause or otherwise but the warranty period was indicated in the challan for being conformed during the pre-delivery inspection by UOI. When the material was offered for inspection, samples were drawn and sent to Composite Food Laboratory for testing and the bulk corresponding to the said sample was sealed by the officer of U.O.I. Thus, S.S.I could not have any access to the bulk to which samples were drawn and it was just required to wait for the report of the Laboratory which was also required to conduct test about the shelf life of the "Kishmish" to enable to determine the warranty period. S.S.I delivered 85 MT of "Kishmish". The balance 11 MT could not be delivered as the contract was repudiated by U.O.I. Certain supplies were not made by the due date, however, out of total quantity of 85 MT dispatched, 43.663.948 MT was declared unfit for

consumption. First intimation about the supply gone bad was received by S.S.I. on 30.03.1981 calling upon S.S.I. to make good the loss and refund Rs. 3,57,566.20p towards the cost, freight etc. which was complied with by S.S.I.. Thus, in view thereof, no dispute is left to be adjudicated upon on the quantity of 10.044 MT.

9. The dispute arose when further supplies were also rejected on the ground that stocks found infested, taste and smell not present, percentage of moisture, discoloured units, dirty units, mouldy/ID units and units with stalks above specification limits etc. What turned the entire issue of rejection of supply as suspicious for S.S.I. was that out of the rejected quantity of 33.619.948 MT, U.O.I. made available only 20.668.364 MT without explaining where the balance quantity of 12.951.584 MT had gone. The stand taken by S.S.I. was that this huge quantity was consumed and if despite being rejected being unfit for human consumption, such a huge quantity was not made available as part of the rejected lot, the inference to be drawn was that it has been used for human consumption for which no evidence was led by UOI to rebut this inference.

10. As per SSI, samples were lifted from the supplied stock without associating it.

11. The learned Single Judge has held that Union of India had not established that the warranty clause was breached and found it strange that after rejecting the entire lot supplied except 10.044 MT which had yet to be supplied, part of the goods were consumed and from which it has been inferred that the same were as per the specifications. Not associating SSI when samples were redrawn has been held fatal to the case of Union of India and lastly the fact that at the pre-shipment level samples were lifted and tested and found to be in order and when samples were lifted the stock was sealed, has been held against the Union of India.

12. The reasoning of the learned Single Judge is correct and we affirm the same. We highlight that Union of India rejected 30.619948 MT of Kishmis but actually returned only 20.668364 MT and there is no explanation as to what happened to the balance. As per SSI the quantity was consumed. Further, of the quantity returned, 5.107 MT was again accepted. There is utter irrationality in the conduct of the Union of India. The appeal is accordingly dismissed firstly as being barred by res judicata and secondly even on merits.