

**THE HON'BLE SRI JUSTICE N.R.L.NAGESWARA RAO**

**APPEAL SUIT NO. 944 OF 1998**

**JUDGMENT:-**

The first Defendant in O.S.No.39 of 1982 on the file of the Court of the Principal Subordinate Judge, Guntur, is the appellant herein.

2. The suit was filed for recovery of a sum of Rs.49,648-20 Ps. The allegations in the plaint goes to show that the plaintiff deals in Tobacco. The plaintiff contacted the first defendant at Bangalore and he was informed that Tobacco stem bits and scrap is in the custody of the second defendant and the plaintiff purchased the same weighing 82,747 kgs at Rs.0.05 Ps per Kg, which was accepted by the first defendant in the Letter dated 02.05.1981. The delivery has to be given by the second defendant. The plaintiff accordingly paid a sum of Rs.4,137-35 Ps. On 05.05.1981 the first defendant addressed a letter to the second defendant for delivery of the stocks. The plaintiff approached the second defendant, but the delivery was not effected as there was arrears from the first defendant. At the request of the plaintiff, the first defendant deputed their General manager, but in spite of it, the stock was not delivered. As on 26.05.1981, the value was increased between Rs.0.60 Ps to Rs.0.70 Ps per Kg, but by letter dated 22.05.1985, the second defendant claimed that apart from weighing charges and loading charges, the cost of the containers should also be borne by the plaintiff and the sale is on as-is-where-is basis. The plaintiff cannot be directed to pay the cost of the container. The first 2<sup>nd</sup> defendant has failed to deliver the goods. As the second defendant failed to deliver the goods, the first defendant wrote a letter on 17.06.1981 to one Maddi Venkataratnam to use his good offices in the matter of the delivery of the goods. Accordingly, the plaintiff approached him, but he also declared his helplessness. This was intimated to the first defendant on 04.07.1981. On 28.07.1981 the

second defendant intimated the plaintiff to take delivery of the stock and the stocks that were shown only about 25,000 Kgs and the balance was not shown. The same was intimated to the second defendant on 05.08.1981. The plaintiff having vexed with the fraudulent conduct of the defendants issued a registered notice on 26.09.1981 and the plaintiff has to purchase identical quality at Rs.0.60 Ps per Kg and supplied to his vendors during June to September, 1981. The plaintiff claimed damages and therefore, the suit was filed for recovery of the said amount.

3. The first defendant filed a Written Statement contending that the Court at Guntur has no jurisdiction and admitted the sale of the Tobacco stems and also receipt of money from the plaintiff. The delivery instructions were given to the second defendant and visit of the General Manager is also admitted. It was pleaded that the rise of the price is not correct. As per the sale condition, the expenses in respect of weighing, loading and transportation should be borne by the plaintiff. No new conditions were imposed. The plaintiff failed to take delivery of the goods and it is his fault. The claim is not tenable and there are no damages suffered by the plaintiff. The suit is therefore liable to be dismissed.

4. The second Defendant denied the liability and pleaded that there was no privity of contract and consequently pleaded for dismissal of the suit.

5. On the basis of the above pleadings, necessary issues were framed for trial. The trial Court after considering the evidence of Pws. 1 to 3 and Exs. A.1 to A.27 and also the evidence of DW.1 and Ex.X.1, decreed the suit of the plaintiff. Aggrieved by the said judgment, the present appeal is filed.

6. The point that arises for consideration is:

Whether the plaintiff is entitled for a sum of Rs.45,510-85 Ps

granted by the Court below?

7. **POINT:**

There is no serious dispute between the parties about the contract for sale of 82,747 Kgs of Tobacco at Rs.0.05 Ps per Kg and that the entire consideration was said to have been paid. This transaction is said to have been taken place in April, 1981 and thereafter the first defendant is said to have written a letter to the second defendant and the second defendant did not deliver the goods.

This being a suit for damages, it is for the plaintiff to prove the quantum of damages. Though the plaintiff claims that he has purchased the stems from open market from June to September, 1981 at Rs.0.60 Ps per Kg, no proof of the purchase is filed and there is also no evidence as to who purchased the same and who sold the same. During the course of evidence, EX. A.27, which is an invoice said to have been raised with M/s Maddi Venkataratnam Company was sought to be relied upon as if the plaintiff has purchased the stems, but this fact was not mentioned in the plaint. In fact, the evidence of PWs. 2 and 3 also does not disclose about the purchase. The evidence of PW.2 is only about the varying price. The evidence of PW.3, who is the brother of the plaintiff-PW.1, is about the transaction between the plaintiff and the first defendant. Therefore, their evidence cannot be taken into consideration to the effect that the plaintiff suffered actual loss by purchasing goods in the open market on the date of breach committed by the first defendant.

8. The mere fact that there was raise in the prices is no relief for the plaintiff to get excess amount. In fact, by August, 1981, nearly 25,000 Kgs are available, but the plaintiff himself has failed to take the delivery of the same. Therefore, even if any breach is committed by the defendants, it can only be with regard to the balance of 60,000 Kgs of Tobacco stems, for which, the plaintiff can claim the differential

rates. While considering the damages under Section 73 of the Contract Act, it is the duty of the plaintiff to show as to what was the excess amount paid by him. In fact, there is no such material to show what was the excess amount. In 1983 when the Receiver was appointed pending suit, on 29.01.1983 the receiver sold 23,431 Kgs for a price of Rs.9600/-, which comes to above Rs.0.40 Ps per Kg. That being so, there being no material to show that from June, 1981 to September, 1981, the plaintiff has purchased the stems at 0.60 Ps or 0.70 Ps, the Court below has definitely erred in granting damages at 0.55 Ps per Kg for the total amount. In fact, when 23,431 Kgs are available, there is no reason as to why the plaintiff should refuse to take delivery of the same. Consequently, on this aspect the plaintiff will not be entitled for any excess amount. After deducting 23,431 Kgs from 82,747, the balance quantity of goods that has to be delivered will be about 59,316 Kgs. Since the plaintiff has not proved the actual loss or any steps taken by him to mitigate the damages, the value cannot be calculated at 0.55 Ps. The plaintiff cannot get more than the value of 0.05 Ps for 23,431 Kgs, which comes to Rs.1171.55 Ps. Therefore, from the value of 4,137-30 Ps, which was admittedly paid and the plaintiff will be entitled to the balance of amount of Rs.2,965.75 Ps. Therefore, the plaintiff will be entitled for refund of this amount with interest thereon.

9. Consequently, the decree of the trial court is modified and the plaintiff is found to be entitled to a sum of Rs.9,600/-, which was realized by Court auction towards the value of 23,431 Kgs if not already withdrawn and also further entitled to a sum of Rs.2,965.75 Ps with interest at 12% P.A. from the date of suit till the date of decree and at 6% P.A. from the date of decree till the date of realization.

10. Accordingly, the appeal is partly allowed. Each party do bear their own costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

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**JUSTICE N.R.L. NAGESWARA RAO**

Date: 11-06-2013  
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