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

APPEAL SUIT Nos.371 of 2001 and 2825 of 2004

COMMON JUDGMENT:

Both appeals arise out of a common judgment in O.S.No.175 of 1995, on the file of the I Additional Senior Civil Judge, Visakhapatnam. The defendant is appellant in both the appeals. The parties are referred to as arrayed in the lower Court.

The plaintiff has called a tender for supply of Shalimar inter-Chleme regular paint anti-fouling No.3.I-3 149-159 packing 20 litres to an extent of 1600 litres and the defendant happened to be a tenderer and a purchase order was given on 28-05-1991 at the rate of Rs.99.75 ps per litre and a total cost of Rs.1,59,520/- was paid. As per the condition, the supply has to be made within four to six weeks from the date of intent letter. As per the condition, the paint is subject to the testing by M/s.Hindustan Shipyard Limited (for short 'HSL'). It appears that the plaintiff has received the paints and when they were sent for HSL for testing, they were found to be of inferior quality and thereafter correspondence has taken place between the plaintiff and defendant calling upon the defendant to replace the items according to the specification agreed upon between the parties. The defendant has not done so and on the other hand, at a later stage, demanded the plaintiff to get the items tested by Andhra University, which was not accepted. Thereafter a final notice was given by the plaintiff for rejection of the goods and calling upon the defendant to pay the money. Subsequently, the paints were purchased from Bombay Paints Limited, for a higher price and the plaintiff demanded the differential amount and filed the suit.

The defendant filed a written statement denying the allegations in the plaint about the quality of the goods as being not of agreed standard. The defendant also disputed about the correctness

of the certificate issued by the HSL. It was also further contended that the goods were rejected illegally and without any basis. In fact, the defendant demanded a re-test of the goods by the Andhra University, but the plaintiff has evaded to do so. Further, the plaintiff has not taken proper care in getting the test report communicated to the defendant and the defendant is deprived of the said certificate and the contents are not known. Further, it is pleaded that as per the contract the defendant is not liable for risk purchase and the enhanced amount if any paid by the plaintiff. It is also the claim of the defendant that due to the actions of the plaintiff and black-listing its name, it suffered loss of reputation and therefore a counter claim was made for a sum of Rs.4,52,727/- for damages.

On the basis of the above pleadings, the following issues have been framed for trial:

1) Whether the cancellation of the purchase order and the repudiation of the contract by the plaintiff is illegal, arbitrary as contended by the defendant?

2) Whether the defendant is liable to pay damages in the event of rejection of the material supplied?

3) Whether the printed special conditions on the reverse of the purchase order does not form part of the contract and hence they are not binding on this defendant and that the alleged clause 16 of the special conditions is not applicable?

4) Whether the plaintiff failed to return the plaint supplied in compliance of the tender conditions, as such the defendant is not liable to refund any amount?

5) Whether the plaintiff is entitled to recover the suit amount as prayed for?

6) Whether the defendant is entitled to recover the amount mentioned in the counter statement from the plaintiff as pleaded by the defendant?

7) To what relief?

On behalf of the plaintiff, P.W.1 is examined and marked Exs.A.1 to A.11. On behalf of the defendant, D.W.1 is examined and marked Exs.B.1 to B.4. After considering the evidence on record, the learned Senior Civil Judge, decreed the suit of the plaintiff for a sum of

Rs.3,98,553-59 ps and dismissed the counter-claim of the defendant. Aggrieved by the said judgement, A.S.No.371 of 2001 was filed questioning the decree passed by the Court for realisation of the amount; and questioning the rejection of the counter-claim, A.S.No.2825 of 2004 was filed.

The points that arise for consideration are:

1) Whether the plaintiff is entitled for the suit amount and the rejection of the goods being of not specified quality, is legal?

2) Whether the plaintiff is entitled for the expenses incurred under the risk purchase by payment of excess money from the Bombay Paints Limited?

3) Whether the defendant suffered loss of reputation and damage and entitled for the counter claim?

4) Whether the judgment and decree passed by the learned I Additional Senior Civil Judge, Visakhapatnam, is legal and sustainable?

POINTS:- There is no dispute about the fact that there was an agreement between the plaintiff and the defendant for supply of 1600 litres of paint with some specifications and the tender filed by the defendant was accepted. It is also not in dispute that as per the terms of the tender and the purchase order-Ex.A.1, both parties have agreed that the items supplied by the defendant shall be tested by the HSL. According to the case of the plaintiff, the goods supplied by the defendant were tested by HSL and according to the test, they did not satisfy the quality which was agreed to be given. Therefore, on the basis of such report, the goods were not accepted and the plaintiff has requested the defendant to take back the goods and also supply the goods of good quality. Ex.A.3 is the letter, dated 07-10-1991 informing that “Test for the flexibility and adhesion failed.” Therefore, the defendant was requested to return the goods, replace the goods or return the amount.

Evidently, the goods were supplied to the plaintiff under Ex.A.1 in June, 1991. Another letter was followed under Ex.A.4 dated 21-10-1991. Again under Ex.A.5, letter dated 20-03-1992, it was informed that if the goods are not replaced within 15 days from the date of Ex.A.5, a risk purchase will be taken. Thereafter a letter under Ex.A.6 dated 21-04-1992 was addressed by the defendant to the plaintiff informing that the matter was taken up with the authorities at Hawrah and they are arranging to get a fresh batch of paints for replacements. It was also further informed that in the meantime they will arrange to take back the stocks already delivered. But subsequently, for the fist time, under Ex.A.7 letter dated 13-05-1992 a request was made by the defendant to arrange a test for the above paints in the Andhra University Laboratory. This request was rejected under Ex.A.8 dated 22-05-1992. Therefore, from the date of Ex.A.3 till A.6, the defendant has not made any request for a further test in the laboratory and on the other hand before making a request for re-test in Andhra University under Ex.A.6, information was given to the plaintiff informing that they are taking steps to get fresh batch of paints and for replacement and to take back the stocks. The above correspondence clearly goes to show that the present claim of the defendant that their request for re-test was not accepted and the rejection of the goods on the basis of the certificate issued by the HSL is not proper, cannot be accepted.

Before considering the above aspect, the learned counsel for the defendant contends that the burden is on the plaintiff to prove that the goods are of inferior quality when they were supplied with the certification from the manufacturer and in this case there is no positive evidence on the side of the plaintiff to prove the inferior quality of the goods and therefore, the rejection is bad. In this connection, it is to be noted, no doubt, the certificate, which is said to have been given by the HSL was not furnished to the defendant but at the same time, the letter under Ex.A.3 refers to the test report. Therefore, the plaintiff has

informed the defendant about the nature of the goods being of inferior quality. If really the defendant was prudent and confident about the quality of the goods, immediately, a reply should have been given by the defendant to get the goods tested from the Andhra University or from any other laboratory. It is to be mentioned that for a long period till April, 1992 the defendant kept quiet without questioning the reason for rejection of the goods. Furthermore, the defendant has also not asked the plaintiff to furnish the report of the HSL about the lack of quality. Therefore, when an allegation of inferior quality of goods is made against the defendant supported by the report of the laboratory, which was mutually agreed between both the parties, then the burden is definitely on the defendant to prove that the report of the HSL is not correct. But in this case the defendant has kept quiet for a long time and it is only having agreed to replace the same and take back the goods in April, 1992, for the first time in May, 1992 the request for re-test by the Andhra University was made. Added to that, even during the trial also, the defendant has not chosen to examine the manufacturer or the chemist who has certified about the quality of the goods being proper and as per the standard agreed between the parties. Therefore, when the report given by the HSL, which was mutually agreed by the parties to give such a report is against the defendant, the defendant has to disprove the same. Furthermore, when the quality is disputed, it is for the defendant to show that the goods are as per the quality. Therefore, from all the circumstances, it is clear that it is the defendant who has failed to prove that the goods that were supplied by him are of the agreed quality and also further failed to prove that the test report of the HSL is wrong. Therefore, for the above reasons, it cannot be said that the rejection of the goods by the plaintiff is improper or against the contractual obligation between the parties. Having regard to replace the goods, the defendant has failed to replace or take return of the same and therefore the money which he has received towards the value of the goods which is

Rs.1,55,444-25 ps, is to be refunded to the plaintiff.

As can be seen from the evidence of P.W.1 in cross examination, out of 1600 litres which was supplied, 200 litres were utilised and therefore, the value of the same has to be deducted and therefore the amount payable by the defendant comes to Rs.1,35,494.25 ps (Rs.1,55,444.25 ps – 19,950/- {200 x 99.75}).

The plaintiff also made a claim that after the order with the defendant was cancelled, a purchase order was given to Bombay Paints on 09-01-1993 for a sum of Rs.2,73,920/- and therefore the difference of amount of Rs.1,18,475.75 ps was paid in excess and therefore, the defendant has to make good this amount.

Reliance is placed by the plaintiff on clause No.16 of the purchase order-Ex.A.1 which reads as follows:

> "In case of failure to supply the stores in terms of this purchase order by the due date or such mutually agreed extended date, the purchaser reserves the right to cancel the outstanding quantities against the order and repurchase the stores at the risk and expense of the defaulting contractor."

The learned counsel for the defendant contends that this clause 16 has no application and it only relates to the failure to supply by due date and therefore, the risk purchase does not cover any facts of this case. This contention was negatived by the learned Senior Civil Judge. In fact, in a similar suit between the parties, it was held that this clause does not apply, but the lower Court did not accept the said contention. The question before the Court is whether the clause 16 covers a case of supply of the goods without keeping the standard as agreed upon. A plain reading of clause 16 shows that the party has to supply the goods in terms of the purchase order within the due date. Evidently, the essential terms of the supply order is the quality of the goods and it cannot be separated. Therefore, in such circumstances, the risk purchase made by the plaintiff has to be taken into consideration and the liability of the defendant cannot

be rejected.

Next question before the Court is whether the plaintiff has taken necessary steps to mitigate the damages or the loss and whether the defendant can be made liable for total amount of the claim made by the plaintiff. Evidently, the goods were supplied in June, 1991; the test was conducted immediately and by April, 1991 the plaintiff has informed the defendant about the failure of the test and called upon the defendant to replace the goods. Thereafter for a long time correspondence was made with the defendant for replacing of the goods. If a party wants to reject the goods being of sub-standard quality and not according to the agreed standard, then the action should be taken immediately. Evidently, the cause of action for going for risk purchase has arisen immediately after the certificate given by the HSL about the failure of the test and even by October, 1991 when the plaintiff realised the poor quality. Therefore in such circumstances, the plaintiff should have gone to the risk purchase immediately and the reason for a prolonged correspondence and going for a risk purchase in 1993 i.e., nearly 1 ½ year after the quality of the goods having found to be not good, will not entitle the plaintiff for recovery of the total value of the difference which is said to have been paid to Bombay Paints Limited under the second purchase order. I feel the interest of justice would meet in stead of granting the differential amount as claimed by the plaintiff, a sum of Rs.40,000/- is granted towards damages for breach of contract committed by the defendant in supplying goods of lesser standard. Therefore, the total amount that the plaintiff will be entitled to is Rs.1,75,494.25 ps (Rs.1,35,494,25 ps + Rs.40,000/-).

So far as the counter-claim of the defendant with regard to the loss of reputation and black-listing its name by the plaintiff is concerned, naturally it is for the defendant to prove that the

reputation was lost in the business community and further the business was also lost because of the black-listing made by the plaintiff. It is for the defendant to prove the above allegations. Except the evidence of D.W.1, no other witness was examined to show that due to the action of the plaintiff, any other customer has gone back from purchasing the goods from the defendant. Further, there is no proof on record to show that the sales of the defendant have come down after the rejection of the goods by the plaintiff and thereby putting a black mark in the market about the quality of the goods. In fact, there is absolutely no material to show that any of the Directors of the defendant firm were questioned by anybody about the failure in the quality. It is to be noted, at some times, it happens that even a product manufactured by a reputed company fails and that itself is no ground to say that rejection of the goods on that ground has caused loss of reputation to the company. Therefore, in view of the above circumstances, the grievance of the defendant cannot be taken as justiciable and the rejection of the claim for counter claim does not call for any interference.

Accordingly, A.S.No.2825 of 2004 is dismissed. But in the circumstances without costs. A.S.No.371 of 2001 is allowed in part and the suit of the plaintiff is decreed for a sum of Rs.1,75,494.25 ps with interest at 12% p.a., from 09-01-1993 till the date of decree and with subsequent interest at 6% p.a., till the date of realisation. The plaintiff is entitled for proportionate costs in the lower Court. Each party is directed do bear their own costs in this appeal.

JUSTICE N.R.L. NAGESWARA RAO

18th February, 2011
VJL