**(2010) 07 DEL CK 0416**

**Delhi High Court**

**Case No:** Regular Second Appeal No. 127 of 2010 and C.M. No. 11661 of 2010

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| Hightech Electrothermics and Hydropower Ltd. | | APPELLANT |
| | Vs | |
| Indo Arya Central Transport Ltd. | | RESPONDENT |

Date of Decision: July 7, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100

Hon'ble Judges: Indermeet Kaur, J

Bench: Single Bench

Advocate: Vikas Aggarwal, for the Appellant; Nemo, for the Respondent

Final Decision: Dismissed

**Judgement**

Indermeet Kaur, J.

This appeal has been preferred by the appellant/defendant M/s Hightech Electrothermics and Hydropower Ltd. against the impugned judgment dated 27.3.2010 whereby the judgment of the Trial Judge dated 16.11.2009 had been set aside and the suit of the plaintiff i.e. M/s Indo Arya Central Transport Ltd. stood decreed.

2. Factual matrix of the case is as follows:

i. plaintiff and the defendant are both companies incorporated under the Indian Companies Act. Defendant had booked a consignment of 405 metric tons of ferrosilicon packed in jute bags with the plaintiff. The said consignment was to be delivered from Pallakad (Kerala) in an intact and safe condition at Hissar (Haryana).

ii. Defendant acknowledged the bills of the plaintiff and had agreed to make the payment in terms of the agreement dated 21.8.2000 in terms of which the plaintiff had agreed for deduction by 0.5% on a prorate basis if the goods or the material was in shortfall; the permissible limit being 0.5%.

iii. As per the case of the plaintiff, the defendant had illegally and wrongfully withheld the payment of Rs. 59762/-which he is liable to pay along with interest.

3. The Trial Court had framed five issues. The onus to prove issue No. 2 was on the defendant which reads as follows:

Whether the material supplied was short beyond the permissible limit of 0.5%? OPD

4. While disposing of this issue the testimony of PW-1 and DW-1 were considered; the suggestion given to DW-1 that the goods had been packed in a wet condition and they had dried up in the transportation process meaning thereby that the shortage in the material was due to the wet condition of the goods at the time of loading.

5. The suit of the plaintiff was dismissed by the Trial Court having been held to be not proved.

6. In appeal, the Additional District Judge noted that there are certain facts which are admitted between the parties and which the Trial Court had failed to appreciate. The relevant extract of the said admissions is reproduced and read as follows:

Number of documents including correspondences between the parties lying on Trial Court record filed by both the parties are not disputed. The following admitted facts in respect of the transaction in question between the parties are as under:

1. An agreement dated 21.8.2000 Ex.PW-1/6 was entered into between the parties containing the terms and conditions of transaction.

2. As per this agreement, the appellant transported the goods i.e. Ferro Silicon of the respondent company from Palakkad (Kerala) to M/s Jindal Strips Ltd. Hissar (Haryana).

3. That the goods kept in various bags loaded on the trucks of the appellant by the respondent were wet in condition as revealed in the GRs Mark A.

4. Due to wet conditions of the goods, extra baggages were loaded on each and every truck to compensate the loss as admitted by PW-1 as well as mentioned in the letter of the respondent Ex.PW-1/4.

5. That appellant delivered the goods at the destination but the consignment was found short in weight as mentioned in the back of GRs Mark A by M/s Jindal Strips Ltd.

6. That under the agreement dated 21.8.2000 Ex.PW-1/6 the shortage to an extent of 0.5% was permissible otherwise for the shortage beyond this limit, the deduction on pro rate basis was to be made by the respondent from the account of the appellant.

7. That respondent deducted the amount due to shortage of the goods and balance of Rs. 59,762/- was withheld according to pro rate calculations.

8. Appellant demanded this deducted/withheld amount by various letters and the legal notice but the payment was not released to him by the respondent.

7. The Appellate Court had noted that the parties had admitted that the ferrosilicon material becomes heavy when it is in wet condition and reduces in weight when it is in a dry condition. It was also concluded by the Trial Court that the defendant has nowhere alleged that the goods were either stolen or removed from the journey; it was also not the defence of the defendant that any bag was found short at the destination or that the shortage of goods had occurred due to mistake or negligence of the defendant or that the goods had not been delivered in an intact condition at their destination point. The first Appellate Court had concluded that the shortage was not due to any fault or negligence on the part of the plaintiff but because of the nature of the transported goods.

8. Both the Courts had examined the documents in this regard, two of which are very relevant for the purpose of deciding this appeal. Ex.PW-1/5 is the first document which is dated 3.11.2000. It is a letter sent by the defendant to the plaintiff wherein it has inter alia been stated:

The above deductions are on account of excess shortages beyond tolerance of 0.5% of one truck load. We have been debited in excess of this amount by party and we accordingly debited a portion of it duly considering losses on A/c of act of God.

9. As per Ex.PW-1/5 the loss suffered by the defendant has been attributed to ‘an act of God’.

10. Ex.PW-1/10 is another relevant document. This is dated 8.11.2000 and has been addressed by the plaintiff to the defendant. Relevant extract of this communication reads as follows:

In connection with the above, we are to draw your kind attention that 217 tons material out of total of 288 tons which we had lifted was in wet condition. Accordingly our booking staff at the time of loading of material into the trucks has clearly remarked in the GR,s that ‘All Bags in Wet Condition.

The list of such wet consignment are enclosed herewith for your ready reference.

11. This document clearly shows that booking staff of the plaintiff at the time of leading the material into the truck had clearly marked in the GRs that the bags are in a wet condition.

This factual averment is also not disputed.

12. Before this Court, it has been urged that ferrosilicon is a raw form of iron which cannot absorb water. It is, however, not disputed by learned Counsel for the appellant that the jute bags in which the ferrosilicon material had been packed were in a wet condition. This fact has been considered by the Appellate Court and rightly so. Appellate Court, taking judicial notice of certain contingencies had held that

obviously, when the water had been soaked by the jute bags they had become heavier in weight and during the journey from Palakkad to Hissar by truck in the 4-5 day duration the water in the bags would have dried up which had resulted in the weight loss of the material.

13. The questions of law formulated by the appellant in the present appeal find mention on page 2 of the appeal. These questions border upon the interpretation of Ex.PW-1/5 and Ex.PW-1/10 as also the terms and conditions of the agreement Ex.PW-1/6 dated 21.8.2000.

14. Counsel for the appellant has placed reliance upon a judgment cited as Hero Vinoth (minor) Vs. Seshammal, to substantiate his arguments that in certain circumstances where the decision rendered on a material question has violated the settled position of law, a substantial question of law arises. The ratio deduced from this judgment does not come to the aid of the appellant; he has nowhere been able to substantiate this proposition; which position of law has been violated by a reading of which particular document has neither been argued nor explained.

15. The first Appellate Court had in these circumstances rightly concluded that this decrease in the weight could in any manner be the liability of the plaintiff and especially so when no such act of negligence or fault has been levelled by the defendant upon the plaintiff.

16. It is also not the case of the appellant before this Court that something has been read into these documents which did not find mention in them or that the same have not been considered. The Trial Court had drawn inferences from the recitals of the contents of Ex.PW-1/5, Ex.PW-1/6 and Ex.PW-1/10. The judgment of the Appellate Court has been based on a plain reading of the said documents which are clear and unambiguous and have been appreciated in the context of the facts of the case. There is no question of law much less any substantial question of law which has arisen in this case.

17. The Supreme Court in the judgment cited supra qualified the definition of the phrase ‘substantial question of law’ as occurring in the amended Section 100 of the CPC.

It essentially means a question of law having substance, essential, real, of sound worth, important or considerable. Such as question has to be understood as something in contradistinction with ‘ technical, of no substance or consequence or academic merely.

18. There is no such question which has arisen before this Court. The judgment of the two fact finding Courts cannot be faulted with. This Court is not seized of jurisdiction as no substantial question of law has arisen. Appeal is without merit. The appeal and the pending application are dismissed.