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Madras High Court

Case No: O.S.A. No. 61 of 1993

Cotton Corporation of India Ltd.	APPELLANT
Vs	
Kothari (Madras) Limited, Madras	RESPONDENT

Date of Decision: June 26, 2002

Acts Referred:

- Sales of Goods Act, 1930 - Section 16(2), 42

Citation: AIR 2003 Mad 164 : (2003) 1 LW 504 : (2002) 3 MLJ 266 : (2003) 1 RCR(Civil) 21

Hon'ble Judges: S. Jagadeesan, J; K. Raviraja Pandian, J

Bench: Division Bench

Advocate: M.S. Krishnan, for the Appellant; G. Subramanian for V. Narayanaswami, for the Respondent

Final Decision: Dismissed

Judgement

K. Raviraja Pandian,J.

1. The plaintiff who was unsuccessful before the learned trial Judge filed the above appeal by assailing the decree and judgment dated 14.8.1992

made in C.S.No.78 of 1982, which was filed praying for a decree directing the defendant to pay a sum of Rs.36,60,316-10ps together with

interest at the rate of 20 percent per annum on monthly rests basis on a sum of Rs.31,94,920-70ps from the date of plaint till the date of decree

and thereafter at the said 20 percent per annum with monthly rests as of commercial cause.

2. The undisputed facts of the case are as follows:

The plaintiff/appellant was the canallising agent for importation of cotton indented on them by the cotton mills. The defendant/respondent mill

originally placed orders for importation of 1,000 bales of Brazillion, 340 bales of Mexicon, 500 bales of Central American and 1,500 bales of

Central South American cotton, in total 3,340 bales and as such an agreement under Ex.P.5 dated 18.3.1977 has been entered into between the

plaintiff and the defendant. The important clauses in the agreement among other things are that if the defendant fails to take delivery of the goods,

the plaintiff would be entitled to sell the goods to any other party by private sale or by auctions and any loss suffered by the plaintiff would be on

account of the defendant and they would be liable to pay the plaintiff on demand; the defendant would have to pay carrying charge at 2 1/2 percent

to the plaintiff per thirty days from the date of arrival of steamer if the defendant fails to make payment and take delivery of the goods immediately

on arrival; notwithstanding anything to the contrary contained in the agreement, the property and risk in the goods shall pass to the defendant on

shipment and the sale is complete thereon; that in the event of the foreign suppliers supplying cotton of quality and type other than the quality and

type of cotton agreed to be imported and sold, the defendant would have the option either to accept such cotton in substitution of the cotton

contracted for or to cancel the agreement; in the event of acceptance such cotton, all other terms and conditions of the agreement would remain in

force; and in the latter case, the agreement would be cancelled without any consequence to any of the parties thereto. It is also an admitted fact

that the defendant under Ex.P.2 dated 30.3.1977 amended the indent made on the plaintiff to the following extent:

340 bales of Mexican, 500 bales of Central American, 500 bales of Central South American and 500 bales of Brazilion, in total, 1840 bales was

placed on indent on the plaintiff"".

3. There is no controversy in respect of the 340 bales of Mexican and 500 bales of Brazelion cotton in this suit. The controversy in the present

action is that instead of the intended quantity of 500 bales of Central American and 500 bales of Central South American cotton, it was the case of

the defendant that the plaintiff had imported ""Nicaragua cotton"" of 429 bales under invoice No.American/76-77/846 dated 18.3.1977 and 440

bales under invoice No.American/76-77/1009 dated 18.3.1977, which is inferior in quality and thereby the defendant by a telegram under Ex.P.24

dated 18.11.1977 cancelled the contract.

4. The plaintiff in the suit claimed the damages caused on account of subsequently selling the above said bales, which is quantified as stated above

as damages. The claim of the plaintiff was that the defendant by their conduct accepted the Nicaragua cotton, but not cleared and in consequence

thereof, the plaintiff sold the same subsequently and sustained a loss as stated above and sought to recover the same in the suit.

5. The learned trial Judge after considering the material placed before him, in an elaborate Judgment, non-suited the appellant/plaintiff for the relief

sought for, which is now put in issue in the present appeal.

6. The learned counsel appearing for the appellant very innocuously, but very convincingly argued that by the conduct of the defendant subsequent

to the receipt of invoices under Exs.P.9 and P.10 placing much reliance on Ex.P.23 dated 2.11.1977, has impliedly accepted ""Nicaragua cotton

and as such, all the terms and conditions of the agreement under Ex.P.5 would follow and in that event, the defendant is liable to refund the loss

and damage sustained, which is quantified in a sum of Rs.36,60,316-10ps. A faint attempt has also been made by the learned counsel that

Nicaragua"" is one of the region in South America and as such, the Nicaragua cotton is also only a South American cotton and thus sought to

canvass an argument as if the 429 + 440 bales of ""Nicaragua cotton"" imported instead of South American and Central South American cotton of

500 bales, indented for are one and the same.

7. The learned Senior counsel appearing for the respondent argued that what was transhipped by the plaintiff was totally different than the one

indented for with the plaintiff by the defendant and as per the agreement, if the imported goods are not in conformity with the indent made on the

plaintiff, the defendant is entitled to cancel the same and as such, the defendant cancelled the agreement by Ex.P.24 dated 18.11.1977. In such

circumstances, the plaintiff is not entitled to any amount by way of damages. There is absolutely no material to prove the quantum of damages as

claimed by the plaintiff. He further submitted that at no point of time, the defendant has accepted the ""Nicaragua cotton"" and all the

correspondence relied on by the learned counsel for the appellant would not in any way advance the case of acceptance of Nicaragua cotton by

the defendant and prayed for dismissal of the suit.

8. On the above arguments of the learned counsel on either side, the one and only point to be decided in this case is, whether the defendant by

their conduct admitted the importation of ""Nicaragua cotton"" and accepted the same in the place of South American and Central South American

Cotton indented by the defendant? If so, are they liable for amount claimed by the plaintiff?

9. The learned counsel appearing for the appellant/ plaintiff has very strenuously contended that the defendant was clearly informed of the

importation of ""Nicaragua cotton"" in invoice Nos.846 and 1009. The defendant by their letter under Ex.P.11 dated 18.7.1977 accepted to arrange

to open the letter of credit in respect of the said number of bales i.e., 429 + 440 bales and he further contended that the defendant was not in a

position to retire the consignment and requested for 90 days credit under Ex.P.12. The defendant also under Ex.P.14 dated 25.8.1977 requested

the plaintiff to arrange for clearing weighment and controlling of the shipment of cotton to avoid wharfage and demurrage. The same was reinforced

by the other documents Exs.P.16 and P.18. The learned counsel further contended that these material documents clearly show that the defendants

were not in a position to clear the consignment by mobilising necessary funds. That is precisely the reason for cancelling the shipment of ""Nicaragua

cotton"" on the ground that the Nicaragua cotton is not in conformity with the indent made on the appellant.

10. The learned counsel appearing for the appellant has also relied on Ex.P.19, wherein, in the reference column, ""429 bales of Nicaragua raw

cotton ""has been referred to so as to support his argument that the defendant was accepting the importation of ""Nicaragua cotton"". Much reliance

has been placed by the learned counsel for the appellant on Ex.P.23 dated 2.11.1977, wherein the defendant has requested the plaintiff to draw

the documents for presentation to the defendant through the State Bank of India, Nungambakkam, wherein also, the reference as to 429 + 440

bales of American cotton per S.S.Kanishka has been referred to. Thus, the learned counsel elaborated his argument to say that in none of the

documents ranging from 18.7.1977 (Ex.P.11) to 2.11.1977 (Ex.P.23), the defendant has not made out anything against the importation of

Nicaragua Cotton"" and such the conduct of the defendant amounts to accepting the ""Nicaragua Cotton"".

11. The learned counsel relied on the judgment of the Division Bench of this court in M.GULAMALI ABDUL HUSSAIN & CO. VS.

A.P.M.S.MOHAMED YOUSUF AND BROTHER AND ANOTHER reported in 1953(1) M.L.J. 504 to support his contention.

12. We have considered the argument and also the relevant documents referred to above and the evidence adduced on behalf of the parties.

13. We are not able to accept the argument of the learned counsel for the appellant. The reasons are:

The invoice Nos.846 and 1009 are dated 18.3.1977. Under these invoices, a quantity of 429 and 440 bales of Nicaragua cotton were only

transhipped, , which is evident from Exs.P.9 and P.10, which are the invoices. Under Ex.P.6, which is dated 22.6.1977, the plaintiff informed the

defendant by telegram that ""429 bales of type sharp of Central South American cotton are shipped per S.S.Kanishka by Shipper M/s.Agrolal

Commercial Limited from ""Nicaragua"" to Madras against the import licence No.P/T/2436491, which please note."". Likewise, by another telegram

on the even date under Ex.P.7, the plaintiff informed the defendant that ""440 bales type Deca of Central America cotton are shipped per

S.S.Kanishka by Shipper M/s. A.Merideth Jones and Company Limited from ""Nicaragua"" to Madras against import licence No.P/T/ 2725225.

14. Subsequently, under Ex.P.8 dated 16.7.1977 also, the plaintiff requested the defendant to arrange for payment of Rs.28,22,825-39ps by

stating that 429 and 440 bales of ""American cotton"" was shipped per s.s.Kanishka. By Ex.P.11, the defendant sent a letter to the plaintiff referring

the letter of the plaintiff under Ex.P.8, whereby the plaintiff was informed that the Head Office of the defendant at Madras would arrange to open

L/Cs. In that letter, it is very clearly stated that for 429 and 440 bales of American cotton under invoice Nos.846 and 1009 referred to in Ex.P.8,

L.C would be opened by their Head Office at Madras. This letter made it clear that the defendant has understood, in view of Exs.P.6, P.7 and

P.8, all the documents of plaintiff, that what was imported under invoice Nos.846 and 1009 was only American cotton as intended and not

Nicaragua cotton"".

15. The other three documents, which have been relied on to bring home the argument that the defendants accepted the ""Nicaragua cotton"" by

their conduct are Exs.P.16, P.19 and P.23. We will consider these documents now. In Ex.P.16 dated 25.8.1977, a reference has been made as to

Nicaragua cotton"". From the entire reading of that document, we are not able to subscribe that by the reference of ""Nicaragua cotton"" in the letter,

the defendant accepted the importation of ""Nicaragua cotton"" for Central American and South Central American cotton indented. The letter was

addressed to the plaintiff and proceeds as follows:

We enclose copies of our talex of even date addressed to you regarding shipment of foreign cottons on our account. The foreign cottons have

been shipped on our account as follows:

Variety Steamer''s Name Bales shipped

Turkish s.s. Vishva Usha"" 217

Central South) s.s. ""Kanishka"" 429

American)

Central

American s.s. - do - 440

Mexican s.s. ""Jagdeesh"" 300

Russian m.v. ""Sochi"" 861

The above steamers are expected shortly at Madras. We have sofar been informed that M/s.Edward T.Roberson & Son have been appointed as

Controllers for 300 bales Mexican cotton and M/s.General Superintendence Co.(India) Pvt.Ltd. for 429 bakes of Nicaragua Raw cotton.

The letter further proceeds about the defendant''s clearing agents and of his information about the inadequate facilities at Madras Port Trust for

controlling the weighment and other formalities for clearance of shipment as inadequate, which are not relevant for our purpose. From the above

stated portion of the letter, it is very clear that the defendant was of the clear opinion that 429 and 440 bales were of Central South American and

Central American cotton.

16. The other document Ex.P.19, which was addressed to the General Superintendence Co. (India) Pvt.Ltd., wherein, in the reference, it is stated

that ""429 bales of ""Nicaragua Raw Cotton"" shipped per s.s. ""Kanishka"" from Corinto to Madras"". The letter proceeds that the defendants

requested the plaintiff to talex the shipper for necessary permission to allow controlling the weighment of the shipments in the godown of the

defendant''s clearing agent. Except the reference as to ""Nicaragua cotton"", there is nothing in the letter to suggest that the defendants have accepted

the ""Nicaragua raw cotton"". The reference has been explained in the evidence of P.W.1 - one P.N.Narayanan that whenever a reply is sent to a

letter, the reference stated in the said letter would be re-produced in the reference in their letter. We are also of the view that except the reference

as ""Nicaragua raw cotton"" in that document, there is nothing in the body of the letter about their acceptance. The mere reference, which has been

satisfactorily explained by P.W.1, cannot ipso facto be taken as an acceptance of ""Nicaragua cotton"" by the defendant.

17. The other document on which much reliance has been placed by the appellant''s counsel is Ex.P.23, which is a letter by the defendant to the

plaintiff, wherein, after making a reference of 429 + 440 bales of American cotton per s.s.""Kanishka"", the letter proceeds thus:

The steamer carrying the above cotton is expected around the second week of November, 1977. You may draw the documents for presentation

to us through State Bank of India, Nungambakkam.

In reference column as stated earlier, it is referred to only as ""429 + 440 bales American cotton per s.s.""Kanishka""""", which also makes it clear that

the defendants were of the clear view that what was transhipped by the plaintiff on account of the defendant was only American cotton and not

Nicaragua cotton as contended. Further, the letter makes much more clear that till 22.11.1977, the date of letter, the documents were not drawn

for presentation though it was contended that the sale was over on High Sea by drawing the documents in favour of the defendant.

18. Yet another document which clinches the issue against the plaintiff is Ex.P.18, which is a letter written by the defendant to the plaintiff and

which runs as follows:

We refer to the following consignments shortly arriving on our account in India:

i)Inv.No.Turkish/76-77/855 dt.8-7-1977 for Rs.6,86,273.10 for 217 bales of Turkish cotton per s.s. VISHVA USHA

ii)Inv.No.American/76-77/1009 dt.8-7- 77 for Rs.14,21,177.18 for 440 bales of Central American Cotton per s.s.KANISHKA

iii)Inv.No.American/76-77/846 dt.28- 6-77 for Rs.14,01,648.20 for 429 bales of Central-South American cotton per S.S.KANISHKA

iv)Inv.No.Mexican/ 76-77/935 dt. 21- 7-77 for Rs.9,53,786.79 for 300 bales of Mexican Cotton per S.S.JAGDISH

v)Inv.No.Russian/76-77/1012 dt.11-8-77 for Rs.27,20,270.18 for 861 bales of Russian cotton per M.V.SOCHI.

The letter further proceeds that the defendants were in acute financial difficulties. If the steamer carrying the cotton was already arrived and the

landing dates were declared, it was sure that the Port Trust authority were levying demurrage and wharfage and that would add the cost of cotton

and the defendant requested the plaintiff to make arrangement for clearance of the goods from docks to avoid payment of demurrage and

wharfage. This document is dated 29.8.1977.

19. From this, it is very clear that 440 bales and 429 bales of ""Nicaragua cotton"" under invoice No.1009 and 846 are only treated by the

defendant as Central American and Central South American cotton as indented by them and further as advised by the plaintiff themselves in their

documents in Exs.P.6, P.7 and P.8. The fact remains that the defendants even prior to the arrival of the vessels and even prior to the drawing of

the documents by the plaintiff in favour of the defendant cancelled the contract on 18.11.1977 under Ex.P.24. Hence, the argument on the contra

that by conduct, the defendants impliedly accepted the ""Nicaragua cotton"" for Central America and South Central American cotton has not been

proved by the plaintiff in our opinion.

20. The other aspect of the argument of the learned counsel for the appellant was that the defendant was financially not in a good position to clear

the consignment and that was the reason for cancelling the contract and for that purpose, he relied on Exs.P.14 and P.18. Of course, from those

documents, we could see that the defendant has requested the plaintiff for accommodation of 90 days credit and also requested for clearance,

weighment and storage of goods to avoid demurrage. But those documents themselves made it clear that in spite of the indent made for the

quantity of bales for consumption for the months of June, July and August, as seen from Ex.P.1, the goods were expected to arrive at Madras Port

during November. The defendants were placed in a position to clear 270 bales of Turkish cotton per S.S.Visha, 300 bales of Mexican cotton per

S.S.Jagadish, 429 bales of South American cotton per S.S.Kanishka (which were under dispute) and 400 bales of Central American cotton as per

S.S.Kanishka (which is under dispute), 861 bales of Russian cotton per M.V.Sochi. All these bales were expected to arrive at the Madras Port in

a bunch during the month of November. The defendant sought for accommodation as evidenced under Exs.P.12 and P.14 and this aspect of the

matter has been explained by the defendant under Ex.P.21 to the effect that the shipment period for the cotton indented was for the period of May,

June, July and August, 1977 as given in the statement. Not a single bale of cotton was shifted during the month of May. As far as Brazellian cotton

is concerned, though the shipment period stipulated was June, July, the cotton was shipped only in the month of August. The defendant has

contracted for the above cotton for May, June, July and August shipments considering that the cotton will reach the defendant on stage by stage

basis as indented for between July and September when the indigenous cotton was not available in adequate quantity. However, the object was

defeated and all the shipments are likely to arrive in bunch involving heavy outflow of cash at one time. This letter under Ex.P.21 clearly states that

the request made under Exs.P.12 and 14 was only because of reason of bunch up arrival of the bails.

21. It is quite natural that even a very well established and financially sound company would feel the pinch of the finance position when it is placed

to clear as many as 270 + 300 + 429 + 400 + 861 = 2260 bales at a time. Be that as it may, the fact remains that the 429 and 440 bales of

Nicaragua cotton"" transhipped by the plaintiff on account of the defendant is not as indented and the documents relied on by the plaintiff to bring

home the case that by conduct, the defendant has accepted the ""Nicaragua cotton"" in the place of Central American and South Central American

cotton indented for has not been proved.

22. The learned counsel appearing for the appellant relied on the decision of this Court in M.GULAMALI ABDUL HUSSAIN & CO. VS.

A.P.M.S.MOHAMED YOUSUF AND BROTHER AND ANOTHER reported in 1953 (1) M.L.J. 504 to contend that in a C.I.F. Contract,

the purchaser is bound to accept the documents which represent the goods and honour the draft and is not entitled to raise at that stage any

question as to whether the goods are in accordance with the contract or not. If after taking delivery of the goods, it is found that they are not in

accordance with the contract, then of course the purchaser has a right to reject the goods and to pursue his remedies against the seller. As against

this, the learned counsel appearing for the respondent relied on the judgment rendered by the very same learned Judges of this Court in K.

Jagannatham Chetty Vs. V. Parthasarathy Iyengar (dead) and Others, wherein this Court has held thus:

In a C.I.F. Contract, the purchaser is entitled to reject the goods as not being in accordance with the terms of the contract notwithstanding that the

property in the goods has passed to him by delivery of the bills of lading if he had no opportunity to inspect the goods before. It is only when he

does any act which is incorrect with the ownership of the seller that he loses his right of rejection u/s 42 of the Sale of Goods. But where the

purchaser exercises his right and gets the goods sold by auction at the risk of the seller, thereafter the purchaser''s right is only to damages for

breach of warranty. Even if there is no express warranty in the circumstances of this case, u/s 16(2) of the Sale of Goods Act there would be an

implied condition that the goods shall be merchantable quality.

23. We are inclined to prefer the latter judgment, in the sense, the judgment reported in K. Jagannatham Chetty Vs. V. Parthasarathy Iyengar

(dead) and Others, because in the case on hand, the parties entered into agreement under Ex.P.5 and Clause 26 of the agreement clearly states

that in the event of the foreign supplier supplying cotton of quality and type other than the quality and type of the cotton by the agreement agreed to

be imported and sold, the mill will have the option either to accept such cotton under the agreement in substitution of the cotton contracted for or

to cancel this agreement in the event of acceptance of such contract, all other terms and conditions of this agreement will remain in force. In the

latter case, the agreement will be cancelled without any consequence to any of the parties thereto. When such a specific clause has been agreed to

and on facts, it was found that what was transhipped by the plaintiff on account of the defendant was a different quality of cotton than the one

indented for and it was also manifest from Ex.P.30 circular of the plaintiff themselves, wherein the ""Nicaragua cotton"" has been shown as a

separate variety of cotton than the variety of Central America, South Central America, Brazil, Guatemala, Paragua, Mexican and the rates in

rupees per candy C.I.F, Bombay as given for ""Nicaragua cotton"" is also in variance with other type of cotton and what was transhipped was not

indented for and also under Ex.D.2, Nicaragua has been shown as a separate variety and further in the absence of any material to accept the

contention that the defendant has accepted the ""Nicaragua cotton"" by their conduct, we are of the view that the plaintiff has not succeeded in their

attempt to fasten the liability of the damages on the part of the defendant.

24. The learned counsel appearing for the appellant has also relied on the decision of the Court of Appeal in PANCHAUD FRERES S.A. v.

ETABLISSEMENTS GENERAL GRAIN COMPANY reported in LLOYD''S LAW REPORTS 1970) VOL.1 53 to contend that if a man,

who is entitled to reject goods on a certain ground, so conducts himself as to lead the other to believe that he is not relying on that ground, then he

cannot afterwards set it up as a ground of rejection, when it would be unfair or unjust to allow him to do so. In that case, originally, the goods

consigned were not accepted on the ground that it did not correspond with the number stated in the bill of lading and on such refusal, the

arbitration proceedings were commenced, the Umpire upheld the buyer''s claim. Sellers appealed to Committee of Appeal of London Corn Trade

Association Limited, where, for the first time, the buyers contended that they were entitled to reject the goods on the ground that they were not

shipped during the contractual shipping period. The sellers conceded that they had breached the contract by reason of the false date on the bill of

lading, but contended that the buyers had waived the breach, and that, in any event, any claim based on that ground was in effect a new claim, and

was time barred. In that facts of the case, it was held by the Court of Appeal that there were documents available with the buyer to know that the

date incorporated in the bill of lading was false date, particularly, with reference to the date of the quality certificate issued for the goods and by the

conduct of the buyer he deemed to have waived that ground of shipment of the goods after the contracting period. But the facts of the present case

are not akin to the reported case. Here is a case, in all the documents as referred to earlier, except the two invoices, the plaintiff has corresponded

with the defendant as if the goods imported by the plaintiff on account of the defendant were as indented by them. On the contrary, in none of the

correspondences, as referred to earlier, the plaintiff has proved that the defendants by their conduct accepted the ""Nicaragua cotton"".

25. Section 42 of the Sale of Goods Act also made it clear that the buyer is deemed to have accepted the goods when he intimates the seller that

he has accepted them or when the goods have been delivered to him and he does not act in relation to it, which is inconsistent with the ownership

of the seller or when after the lapse of reasonable time, he retains the goods without intimating the seller that he has rejected the same. None of the

ingredients as mentioned in Section 42 of the Sale of Goods Act is applicable to the facts of the present case, in the sense, that the defendant has

not accepted ""Nicaragua cotton"" by any specific intimation to the seller and he has not acted in relation to them, which is inconsistent with the

ownership of the seller and he has not informed his rejection after lapse of reasonable time. In this case, even prior to the documents were drawn in

favour of the defendants and even prior to the arrival of the ship, the defendant has rejected.

26. In view of the fore-going discussion, we are of the considered view that absolutely no case has been made out by the appellant so as to

interfere with the judgment and decree of the learned trial Judge.

Hence, the Original Side Appeal is dismissed. However, there shall be no order as to costs.