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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ RFA 133/2005

Decided on 26<sup>th</sup> August, 2014

SURINDER KUMAR SHARMA ..... Appellant  
Through: Mr. S.P. Pandey, Adv.

Versus

PUNJAB NATIONAL BANK ..... Respondent  
Through: None.

**CORAM:**  
**HON'BLE MR. JUSTICE A.K. PATHAK**

**A.K.PATHAK, J.(ORAL)**

1. Appellant filed a suit for recovery of goods and money against the respondent before the trial court praying therein that respondent be directed to deliver 26.767 metric tonnes of first quality paper and 13.093 metric tonnes of second quality paper of totalling to 39.807 metric tonnes and/or in the alternative pay ₹2,07,543/- being the market value of the said goods. It was further prayed that a decree of ₹3,70,926.48 details whereof were given in para 18 of the plaint, be also passed.

2. In para 18 of the plaint bifurcation of ₹3,70,926.48 has been given, as under :-

|       |   |                          |
|-------|---|--------------------------|
| (i)   | Excess amount realised by Bank.   | ₹1,71,892.16             |
| (ii)  | Adjustment on account of excess billing and excess payment of paper strips.                                   | ₹34,240.00               |
| (iii) | Interest on item No. (i) @ 12% p.a. for 26 months (₹2,061.32 p.m. x 26).                                      | ₹53,594.32               |
| (iv)  | Security<br>Interest thereon @ 12 % p.a. from 3.10.1981 till to date  | ₹50,000.00<br>₹18,000.00 |
| (v)   | Adjustment for payment for excise to truck owner.<br>Interest thereon @ 12 @ p.a. from 22.7.1982 till to-date | ₹20,000.00<br>₹5,200.00  |
|       | Total Amount =  | <b>₹3,52,926.48</b>      |
|       | In addition to the above amount, the plaintiff claims following adjustment also:-                             |                          |
| (vi)  | Adjustment for uncoated paper.  | ₹18,000.00               |
|       | Grand Total =   | <b>₹3,70,926.48</b>      |

3. Appellant alleged that he had agreed to purchase stock of coated paper for ₹9.58 lacs from the respondent. The said paper was manufactured by M/s Regal Papers Mills Ltd. which was under liquidation. The stock was lying in the factory premises of M/s Regal Papers Mills Ltd. but was in

possession of the respondent bank as it was hypothecated by M/s Regal Papers Mills Ltd. with the respondent. Appellant had agreed to purchase the coated papers vide Agreement of sale dated 3<sup>rd</sup> October, 1981. The prices were fixed at the ex-mill rates plus 24% above the said price. The stock was to be lifted by the appellant on 'as is where is' basis. Transportation charges were to be borne by the appellant. Sales tax and excise tax were to be borne by the respondent.

4. Appellant lifted 77.062 metric tonnes of papers and paid ₹7,50,457.37 to respondent. However, remaining stock could not be lifted on account of hurdles created by the respondent. Respondent changed the terms of sale and had illegally taken cash security of ₹50,000/- from the appellant. One truck carrying stock of papers was intercepted and impounded by the Excise Department at Ghaziabad and could be released only on 18<sup>th</sup> August, 1982 pursuant to the order passed by the High Court. Appellant had to pay ₹20,000/- to the truck owner which amount he was entitled to recover from the defendant @ 12% per annum with effect from 22<sup>nd</sup> July, 1982. It was further alleged that stock of papers consisted of paper strips as well for which the market price at ex-mill rate with 24% extra cater to ₹1.92 per kg. As against this, respondent charged ₹6.20 per kg. Thus, appellant was

entitled for refund of difference @ ₹4.28 per kg amounting to ₹34,240/-. It was further alleged that respondent had charged excess amount by 24% amounting to ₹1,71,892.16 and appellant was entitled to refund of this amount as well. Delay was caused by the respondent as its officials who created hurdles, inasmuch as, quality of paper deteriorated due to moisture. It was further alleged that appellant was not allowed to lift the remaining paper from the godown, inasmuch as, value thereof was too exaggerated.

5. In the written statement, it was alleged that appellant was not entitled to a decree of specific performance since it had made an alternative prayer for recovery of ₹2,07,543/-. Requisite court fee had not been paid. Respondent alleged that appellant had filed incomplete copy of Agreement dated 3<sup>rd</sup> October, 1981 and had intentionally suppressed Annexure I appended with the Agreement. In the said annexure, description of each category of goods and the rates of goods of 'standard size' and 'off size' agreed to be sold had been given. The said annexure contained the price as mentioned by M/s Regal Papers Ltd. Annexure I was integral record of Agreement dated 3<sup>rd</sup> October, 1981. It was stated that respondent had allowed credit facilities to M/s Regal Papers Mills Ltd. which had gone under liquidation. According to the terms of Agreement of hypothecation

respondent had taken possession of hypothecated goods. Vide order dated 5<sup>th</sup> December, 1980 passed in Company Application No. 599/1980 filed in Company Petition No.24/1980, Delhi High Court directed the respondent to dispose of the stocks, accordingly, a letter was circulated to several paper merchants including the appellant, dealing in the trade, inviting quotations for the sale of 58.758 metric tonnes of first quality and 58.174 metric tonnes of second quality creased paper. On receiving quotations papers were sold to appellant vide Agreement dated 3<sup>rd</sup> October, 1981. Value of the stock was roughly estimated at ₹9.58 lacs. This figure did not include 24% over and above the 'ex-mill rate' as per Annexure I provided in clause 2 of the Agreement. Mother of appellant Smt. Gomti Devi created equitable mortgage in favour of the respondent bank in respect of her property bearing no. 2459, Ward No. 5, Naiwara Street, Chawri Bazar, Delhi by depositing title deeds of the said property for due performance of contract. Pursuant to letter dated 28<sup>th</sup> September, 1981 appellant also deposited a sum of ₹50,000/- with the respondent as cash security. Vide letter dated 28<sup>th</sup> September, 1981 appellant had made following requests:-

- (a) The security deposit of ₹1 lakh be reduced to ₹50,000/- to be adjusted towards final instalment of purchase.

- (b) Equitable mortgage of the properties of Smt. Gomti Devi (plaintiff's mother) be accepted as collateral security.
- (c) The amount of first lifting be reduced from ₹1 lakh to ₹70,000/-.
- (d) The period of lifting the goods be enhanced from two months to three months.

6. The aforesaid letter was written prior to the Agreement dated 3<sup>rd</sup> October, 1981. It was denied that respondent created hurdles in lifting of the papers by appellant. On the contrary, respondent extended time for lifting the paper. Vide letter dated 14<sup>th</sup> May, 1982 appellant confirmed that respondent had extended the time for lifting the remaining stock. Respondent alleged that appellant started raising unnecessary objections about the quality of some categories of goods and demanded reduction in rates and some rebate and discounts on frivolous grounds. Respondent wrote several letters to appellant, that is, letter dated 18<sup>th</sup> June, 1982, 19<sup>th</sup> June, 1982, 16<sup>th</sup> July, 1982, 17<sup>th</sup> November, 1982, 28<sup>th</sup> December, 1982 and 11<sup>th</sup> January, 1984 as also the notices dated 17<sup>th</sup> July, 1982, 31<sup>st</sup> July, 1982, 23<sup>rd</sup> September, 1982, 8<sup>th</sup> December, 1982, 8<sup>th</sup> June, 1984 and 3<sup>rd</sup> July, 1984 through its counsel, in order to persuade appellant to abide by the terms of Agreement dated 3<sup>rd</sup> October, 1981 and take delivery of remaining stocks lying in the factory. It was further stated that Central Excise Department of

its own had intercepted the truck. Since appellant failed to lift the balance stock cash security deposit was forfeited.

7. In replication, appellant denied averments made in the written statement and reiterated and reaffirmed what had been stated in the plaint.

8. On the pleadings of the parties following issues were framed by the trial court on 28<sup>th</sup> August, 1985 :-

1. Whether the suit for specific performance of the contract requiring the defendant to deliver balance quantity of paper claimed by the plaintiff to be weighing 39.807 metric tonnes (26.767 M.T. first quality and 13.093 M.T. second quality) maintainable?
2. Whether the suit is properly valued?
3. Whether the plaintiff took delivery of 77.067 M.T. of paper and made payment of ₹7,50,457.37 under agreement dated 3.10.81 of which Annexure-I forms part?
4. Did defendant commit breach of the aforesaid agreement or any term thereof and if so to what effect?

5. Whether the demand of cash security of ₹50,000/- by the defendant was illegal and if so is the plaintiff entitled to return of the same with interest and again if so at what rate and for what period?
6. Whether the plaintiff paid a sum of ₹20,000/- to truck owner as charges as stated in para 8 of the plaint and if so is the plaintiff entitled to the refund of the same with interest from the defendant and again if so at what rate and for what period?
7. Whether the plaintiff is entitled to claim adjustment of ₹34,240/- on account of differences of market price of Patti (strips) as per para 9 of the application and if so to what effect?
8. Whether the amount of ₹7,50,457.37 stated to have been paid by the plaintiff to the defendant includes the excess amount of ₹1,71,892.16 @ 24% and if the plaintiff is entitled to adjustment of this amount from the defendant with interest and again if so at what rate and for what period?
9. Whether the defendant has committed breach of the agreement dated 3.10.81 and if so to what amount is the plaintiff entitled on that account or otherwise?

10. Whether the plaintiff was ready and willing to perform his part of the contract and if so to what effect?

11. Relief.

9. Appellant examined himself as PW1. As against this, respondent examined Shri Rati Ram Baghotia, Senior Auditor as DW1. Agreement dated 3<sup>rd</sup> October, 1981 was proved as Ex. PX-1. Respondent had proved the documents as Ex.P-1 to Ex.P-49. Appellant had proved number of documents which have been exhibited as DW-1 to D-57.

10. After hearing the learned counsel for the parties and perusing the record, trial court has held that appellant was entitled to ₹20,000/- with interest @ 9% per annum from November, 1982 till the realisation. This amount has been awarded towards the expenses paid by appellant to truck owner, in view of impounding of truck by the Excise Department. As regards other claims are concerned, trial court has held that appellant was not entitled to the same. As regards Issue No. 1 is concerned, trial court has held that respondent was permitted by the High Court to dispose of the balance quantity of the papers, thus, specific performance could not be granted, inasmuch as, appellant had himself prayed for payment of ₹2,07,543/- in lieu of the goods. As regards Issue No. 2 is concerned, trial court has held that suit was properly valued and appropriate court fee was

paid thereon. This issue was decided in favour of the appellant. Issue No. 3 has been decided against the appellant. Trial court has held that in the Agreement Ex.PX-1 a specific reference was made about Annexure I wherein rates were duly specified. Appellant had taken delivery of 77.06 metric tonnes on payment of ₹7,50,457.37 which was in accordance with Annexure I. Issue Nos. 4 and 10 have been decided together and against the appellant. Trial court has held that it is the appellant who was not ready and willing to perform his part of contract. As per Agreement Ex. PX-1 stock was to be lifted on 'as is where is' basis. Despite this appellant tried to raise dispute with regard to price, quantity and quality of the goods. Trial court held that it is the appellant who was reluctant to lift the paper and has to blame himself for the same. Issue No. 5 has also been decided against the appellant and in favour of the respondent. It is held that vide letter dated 28<sup>th</sup> September, 1981 appellant had himself offered security, thus, ought not have raised the plea that terms were changed after the Agreement. As regards Issue No. 6, same has been decided in favour of the appellant and a sum of ₹20,000/- has been awarded to the appellant in respect of the charges paid by him to the truck owner. Issue Nos. 7 and 8 have been decided against the appellant and in favour of the respondent. Trial court has

concluded that rates as specified in the Agreement were applied, thus, appellant was not right in saying that excess amount was charged. Issue No. 9 has also been decided in favour of the appellant.

11. I have heard the learned counsel and perused the trial court record carefully and do not find any illegality or perversity in the impugned order. I am of the view that findings rendered by the trial court are in conformity with the evidence adduced by the parties, inasmuch as the view taken by the trial court is a possible view and cannot be interfered with. The view taken by the trial court in no way can be said to be perverse.

12. Agreement dated 3<sup>rd</sup> October, 1981 Ex.P-1 reads as under :-

#### AGREEMENT

“In consideration of Punjab National Bank, Tropical Building, Connaught Circus, New Delhi hereinafter referred to as bank which expression shall include its assigns successors in interest) allong M/s Surender Kumar Arun Kumar (hereinafter referred to as purchasers which expression shall include our heirs, executors, administrators, assigns and legal representatives) to purchase the entire stocks of coated paper manufactured by M/s Regal Papers Ltd. lying at their factory situated at Kavi Nagar, Ghaziabad UP in possession of the bank on terms and conditions and in the manner hereinafter provided, we the purchasers thereby agree as follows:-

1. The sale shall be affected by the bank on “as is where is” basis and all transportation and octroi charges shall be borne by the purchaser.
2. The sale price of the goods sold by the bank shall be the ex-mill rate (as per annexure I) plus 24% thereof in respect of all brands of the paper.
3. The purchaser shall lift the entire stocks value at ₹9.58 lacs approx. within a period of three months from the date hereof.
4. The purchaser shall deposit in cash or by bank draft in advance the purchase price calculated in terms of conditions No.1 before taking delivery of the stocks in parts. A single lifting of stock shall not be less than Rs. One lac. The first lifting will be of ₹70,000/-.
5. The goods will be lifted in assorted lots.
6. The witness whereof the purchasers have herein set their hands this day of October, 1981.

(SD)”

13. A perusal of the Agreement clearly shows that appellant had agreed to lift the entire stock within a period of three years on ‘as is where is’ basis. Prior to the Agreement stock was lying in the factory of respondent and was inspected by the appellant. After negotiations Agreement dated 3<sup>rd</sup> October, 1981 was entered into, hence appellant was bound by the terms thereof. Ex-mill rates have been duly mentioned in the Annexure I which forms integral part of Agreement. It was further specified in Clause 2 of the Agreement

that bank shall be entitled to ex-mill rate as per Annexure I plus 24% thereof in respect of all brands of the paper. Accordingly, appellant had no right to challenge the quality, quantity as also rates. After lifting large quantity of stock at the rates as agreed, it appears, in order to wriggle out from his contractual obligations appellant avoided to lift paper on flimsy grounds of quality and rates of paper, which he was estopped from raising in view of the terms of Agreement dated 3<sup>rd</sup> October, 1981.

14. Cash security was offered by the appellant himself vide his letter dated 28<sup>th</sup> September, 1981 prior to the execution of Agreement, therefore, appellant cannot claim that terms of Agreement were unilaterally changed by the respondent subsequently by asking to furnish cash security. The issue of cash security was made clear even prior to the Agreement, thus, appellant cannot be heard to allege that terms of contract were changed subsequently. As regards creating of hurdles by the respondent bank is concerned, no evidence has been led in this regard, inasmuch as, bank appears to have cooperated and granted sufficient time to lift the goods. Three month's time was extended vide letters dated 18.3.1982(Ex.P4), letter dated 25.3.1982 (Ex.P5), letter dated 18.6.1982 (Ex.P9) and letter dated 19.6.1982(Ex.P10) respondent requested the appellant to lift the goods but

to no effect. Again vide notice dated 16.7.1982(Ex.P12) respondent called upon the appellant to take delivery. Finally, vide notice dated 22.4.1982(Ex.P-16) appellant was informed that in case delivery was not taken the goods would be sold. This clearly indicates that respondent gave sufficient time to appellant to lift the stock in terms of the Agreement. As against stipulated period of three months appellant was given one year time. Appellant himself is guilty of breach of contract. As regards interception of truck by the Excise Department is concerned, respondent had no role to play in it. It was an independent act of Excise Department of intercepting the truck. Thereafter, legal steps were taken and ultimately goods were released pursuant to the orders of this Court that too due to cooperation and efforts of respondent. This incident cannot be taken as that of creating hurdles by the officials of respondent.

15. For the foregoing reasons, I do not find any perversity or illegality in the impugned judgment and decree. Accordingly, appeal is dismissed.

**A.K. PATHAK, J.**

**AUGUST 26, 2014/ga**