

HIGH COURT OF SINDH KARACHI

IInd Appeal No.88 of 2022

[M/s Olympia Chemicals Limited versus M/s Westgate International Pvt Ltd. & Ors.]

Appellant : Through Mr. Kashif Nazeer advocate
Respondent No.1 : Through Mr. Naveed Ahmed advocate
Date of hearing : 08.11.2023 and 15.11.2023
Date of decision : 03.04.2024

J U D G M E N T

KAUSAR SULTANA HUSSAIN J.- This appeal has been directed against the concurrent findings of two Courts below. Respondent/plaintiff had instated Civil Suit No.748 of 2019 [*Re: M/s Westgate International Pvt. Ltd versus M/s Olympia Chemicals Limited*] before learned Xth Senior Civil Judge Karachi Sought [**Trial Court**] against appellant/defendant for recovery of an amount of Rs.45,30,443/- which was decreed on merit vide judgment and decree both dated 27.01.2021, against which present appellant/defendant preferred Civil Appeal No.79 of 2021 [*Re: M/s Olympia Chemicals Limited versus M/s Westgate International Pvt. Ltd & another*] before learned VIth Additional District Judge Karachi South [**Appellate Court**], however same was dismissed vide judgment dated 25.02.2022 followed by decree of even date. For the sake of reference the judgments and decrees passed by Courts below are hereinafter referred to as impugned judgments and decrees.

2. Case of the respondent/plaintiff, as per memo of plaint, is that plaintiff is a service provider registered Company under Companies Act and use to provide services such as screening, loading and transportation, while the appellant/defendant, being chemical Company, use to produce Soda Ash by using coal as its energy fuel for supply to its customers; that a consignment of 20,000 M. tons of coal was imported by the appellant/defendant and plaintiff was appointed by the defendant for shifting, screening and loading of the said coal; that such contract between the plaintiff company and defendant company was oral, however, various emails in this regard were exchanged between the management of both companies from 30.10.2017 to 29.11.2017; that plaintiff shifted a quantity of 19898.600 M. tons from PIBT till 28.11.2017 for screening and further loading purpose, which was duly screened by the plaintiff's staff in presence to two watchmen as well defendant's Godown Incharge; that coal, when received in Godown, was not in good condition and the same was duly informed to defendant by the plaintiff through email dated 30.10.2017; that quality of coal

has increased quantity losses during screening due to high moisture, high ash and large number of stones, but same was already informed by the plaintiff to defendant and same was confirmed by Olympia Lab through coal analysis summary alongwith SGS reports under their own email dated 14.03.2018; that the screening and loading was concluded on 28.03.2018 under the instructions of defendant and thereafter respondent/plaintiff approached the appellant/defendant for releasing of outstanding amount of Rs.45,30,443/- but the appellant/defendant, despite exchange of emails, letters and legal notice, failed to pay the same, and finally aforesaid suit was filed, which was decreed on merit and appeal filed there-against by the appellant/defendant stood dismissed, hence this second appeal.

3. Learned counsel for the appellant/defendants argued that impugned judgments and decrees have been passed without taking into consideration the contentions of appellant/defendant and as such are result of misreading of evidence; that both Courts below have failed to consider that respondent/plaintiff had failed to completely discharge his obligation as the respondent/plaintiff was required to screen and transport a quantity of 20000 M. tons of coal not only from PIBT to Hawksbay Godown but also from Godown to appellant's/defendant's company; that both Courts below have failed to appreciate that approximately a quantity of 900 M. ton of coal was found short for which the respondent/plaintiff is liable to compensate the appellant/defendant and Director of respondent/plaintiff namely Abdul Hameed Awan also issued a Cheque dated 03.03.2018 in this regard; that it was pleaded before the learned trial Court through submission of minutes of meeting dated 09.03.2018 that a quantity of 19051 M. tons was dispatched in total from Hawksbay Godown to the appellant and its customers and same was duly signed and agreed by the appellant/defendant and respondent/plaintiff and the Director of respondent/plaintiff namely Abdul Hameed Awan also agreed to justify weight loss by moisture difference, however the respondent/plaintiff relied upon 19.05.2018 whereby respondent/plaintiff stated that a total quantity of 19477 M. tons of coal had been delivered to the appellant/defendant and its customers and though such statement/letter contradicts the version of respondent/plaintiff taken in minutes of above meeting, yet no such issue was framed by the learned trial Court; that respondent/plaintiff had brought on record a letter dated 16.09.2018 whereby credit balance was shown for the balance confirmation on 30.06.2018 by the appellant/defendant, however, on 24.09.2019 appellant/defendant sent another letter whereby debit balance of Rs.7,619,557/- was shown for the balance confirmation on 30.06.2019 and the respondent/plaintiff deliberately did not bring the said letter in the notice of learned trial Court; that findings of both Courts below are based on fake emails produced by respondent/plaintiff and both Courts below have failed to consider rightful emails produced by the appellant/defendant.

He finally prayed for allowing this appeal and setting aside of impugned judgments and decrees.

4. Contrary learned counsel for the respondent/plaintiff argued that concurrent findings based on the documentary evidence are available in favour of the respondent/plaintiff and that appellant/defendant has failed to point out any material error or defect in the impugned judgments and decrees, therefore, no interference is required by this Court and the appeal is liable to be dismissed.

5. I have heard the learned counsel for the parties and have perused the material available on record.

6. Perusal of record reveals that work of screening and loading of coal carried out by the respondent/plaintiff on behalf of appellant/defendant is an admitted position, as besides documentary evidence, during cross-examination it is stated by the witness(es) of the appellant/defendant, that *“it is correct to suggest our company engaged plaintiff for screening process on trial basis. It is correct to suggest that screening and shifting process were completed on 27.03.2018”*.

7. However, as is appearing from the contentions raised on behalf of the appellant/defendant, an amount of Rs.45,30,443/- claimed by the respondent/plaintiff has been withheld by the appellant/defendant only on the ground that approximately a quantity of 900 M. ton of coal was found short for which respondent/plaintiff is required to compensate the appellant/defendant. In order to appreciate the said contention I have gone through the documents as well as evidence produced/led by both parties. The plaintiff in support of its claim had examined its CEO/Director Abdul Hameed Awan, who produced various emails exchanged between the management of appellant/defendant and said Abdul Hameed Awan being CEO/Director of respondent/plaintiff. The email dated 08.11.2017 produced at Ex.P/3 shows that same was sent to CEO/Director of respondent/plaintiff [Abdul Hameed Awan] by the Director of appellant/defendant namely Mustafa Manoo, which states that *“Dear Hameed sb. you have my consent to shift our 20,000 MT coal to Hawksbay godown and screen it for us. As conveyed by you the cost of doing this will be PKR 800 per ton”*. Whereas the email dated 13.05.2017, which was sent by Director of respondent/plaintiff [Abdul Hameed Awan] to Director of appellant/defendant [Mustafa Manoo] and CC whereof to Faisal, reads as under:

“Sir we have visit jointly with your Mr. Chaudary Ejaz Sab PIBT to see coal heap of your consignment. Coal looks high moisture and there is good size coal of 25-50 mm. Please note that due to high moisture during screening moisture will lost and we have to bear handling lose more 1% approx.

We will start shift coal by tonight to our hawksbay yard for screening. Kindly advise us if you have any comments.”

8. The appellant/defendant had not denied anywhere that Mustafa Manoo was/is not their Director and/or authorized person, rather DW Ijaz Choudary during cross-examination stated that *“it is correct to suggest that communication in respect of suit consignment was took place through account of Shah Faisal and same were CC to me”*. Besides the appellant/defendant had also examined Shah Faisal, who during cross-examination deposed that *“it is correct to suggest that my e-mail address is faisal@olympiagroup.com.pk. It is correct to suggest that the communication/correspondence in respect of suit consignment was took place through my account and account of Ijaz Choudhary Sahab”*. It is specifically stated in the plaint that before start of subject consignment the appellant/defendant was duly informed by the respondent/plaintiff about probability of loss during screening of subject consignment due to high moisture and the said claim of respondent/respondent has been substantiated by the email, reproduced above.

9. As mentioned above, the appellant/defendant has only denied the payment of outstanding amount to respondent/plaintiff on account of shortage of approximately 900 M. ton coal, however perusal of emails, reproduced above, makes it clear that management of appellant/defendant was within knowledge about probability of loss prior to start of subject consignment which is further strengthened by the fact that DWs of appellant/defendant namely Ijaz Choudhary and Shah Faisal stated during cross-examination that they were personally involved in transaction on behalf of the company, therefore, in my view, if the management of the appellant/defendant had any concern in this regard they could have raised the same prior to completion of task, but they remained silent and did not raise any objection, therefore the respondent/plaintiff cannot be held accountable and denied his due right for the loss, if any.

10. As far as contention of appellant/defendant that the impugned judgments and decrees have been passed on the basis of fake emails is concerned, it appears that CC of all emails exchanged between the Directors of both parties, as mentioned above, was also sent on faisal@olympiagroup.com.pk, which admittedly belongs to DW Shah Faisal, who is Sales Manager of appellant/defendant. The said DW Shah Faisal has not denied receiving of emails from the respondent/plaintiff. Even otherwise the appellant/defendant had not moved any application before the FIA authorities and/or the Courts below for verification of said email address.

11. Perusal of record further shows that though it is alleged by the appellant/defendant that respondent/plaintiff had sold out the shortage coal in open market, however, DW Qadir Ghous, who is Manager of appellant/defendant,

stated during cross-examination that “*it is correct to suggest that delivery Challan were issued by defendant company to the Godown. It is correct to suggest that without issuance of delivery Challan no one can obtain coal from Godown*”. Irrespectively the appellant/defendant had lodged FIR bearing No.50 of 2019 against the Director of respondent/plaintiff in this regard, but the said Director was acquitted of the charge by the learned trial Court vide judgment dated 20.01.2020 by holding that matter is of civil nature and the prosecution has failed to prove its case beyond shadow of doubt, however, there is no record before this Court that whether the appellant/defendant had filed any civil proceedings against the respondent/plaintiff after passing of above judgment in criminal case, nor challenged the said judgment before appellate forum, which prima facie establishes that appellant/defendant had no case at all.

12. In view of the above discussion I am of the view that impugned judgments and decrees passed by Courts below are well reasoned and are not suffering from any material error or defect, which may call for interference by this Court. Accordingly the captioned appeal stands dismissed being without merit and in consequence whereof the impugned judgments and decrees passed by Courts below are maintained.

JUDGE

Faheem/PA