A THE STEEL AUTHORITY OF INDIA AND ORS.

v.

NEW MARINE COAL CO. (PVT.) LTD.

FEBRUARY 14, 1996

B [K. RAMASWAMY AND S. SAGHIR AHMAD, JJ.]

Code of Civil Procedure, 1908

Suit for recovery—Agreement for supply of Grade-I Coal—Grade-II Coal supplied but price of Grade-I Coal collected—Over-payment adjusted in subsequent bills—Trial Court holding that in the absence of counter-claim and court fee thereon, adjustment not to be made—Suit decreed—On appeal, High Court confirming the decree—On appeal held, appellants entitled to adjust the over-payments from future supplies by the party on discovery of the fraud—Matter remitted to Trial Court—Appellants to be given an opportunity to adduce evidence of total supplies made and the price of Grade-I and Grade-II Coal during the relevant period—Over-payments to be adjusted and fresh decree drawn within six months.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3496 of 1982.

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From the Judgment and Order dated 20.5.82 of the Patna High Court in Appeal from Original Decree No. 30 of 1973.

Jaideep Gupta and K.J. John for the Appellants.

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B.B. Singh and Rajiv Singh, for the Respondent.

The Following Order of the Court was delivered :

This appeal by special leave arises from the judgment and order dated May 20, 1982 in F.A. No. 30 of 1973 of the Division Bench of the High Court of Patna dated May 20, 1982. The admitted facts are that M/s. Kirkend Coal Company which is now renamed as new Marine Coal Company Ltd. (for short, the 'plaintiff') laid a suit to recover a sum of Rs. 1,13,000 towards the value of the coal supplied to the appellant—defendant. The case of the appellants is that the plaintiff was to supply Grade-I coal between December 7, 1962 to June 1967. Instead of Grade-I coal, Grade-II

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coal was supplied but price of Grade-I coal was collected. under the agreement Ext. C series, a clause in the contract was :

> "We agree for any adjustment as may be necessary on account of quality or quantity of supply to be made from our bills or subsequent bills."

Thereunder they are entitled to adjust the over payment made during the period of December 1962 to June 1967 and accordingly they made adjustment. After framing of issues and adduction of evidence, the trial Court found that though there was such an agreement for adjustment, unless that appellants placed either set of or counter claim and pay the court fee, they are not entitled to the relief. Consequently, the suit was decreed. On appeal, the High Court found that in the light of the agreement and adjustment from future bills the appellants were entitled to adjust the same from the future supplies since fraud was discovered for the first time under Ext. D in the year 1969. After it was pointed out by the Audit Department that the plaintiff had supplied Grade-II coal but collected the price of Grade-I coal, the appellants were entitled to adjust the same. But from the evidence on record about 12,038 tones of coal was supplied but what was the total quantity of the coal supplied between December 7, 1962 and June 1967 has not been brought on record and even the price which prevailed for Grade-II and Grade-I coal during the relevant period was not produced. Consequently, the appellant cannot succeed in avoiding the decree. Thus, the appeal was dismissed.

The question, therefore, is : whether the High court was justified in dismissing the appeal and confirming the decree of the trial Court on the facts of this case? It was found by the High Court, as a fact, and we agree with the same, that under the agreement between the parties the excess or over-payment was required to be adjusted in the pending or subsequent bills and the parties were bound by the same. Consequently, the appellants are entitled to adjust the over-payments from the future supplies made by the plaintiff. It is also found that the plaintiff committed fraud demanding and collecting payment of the price of Grade-I coal while in fact Grade-II coal was supplied to the appellants. After the discovery of the fraud, the appellants started adjusting the amounts of over payments from the future bill payable to the plaintiff. Having found this fact, necessarily, the High Court either would have called for a finding from trial Court, after giving

A opportunity to the parties, and adjudged the rights of the parties or would have remitted the matter to the trial Court to give an opportunity to the appellants to place on record evidence in this behalf. We think that the latter course would be more feasible. Accordingly, we set aside that part of the judgment of the High Court and the decree of the trial Court and remit the suit to the trial Court. The trial Court is directed to give an B opportunity to the appellants to adduce evidence of the total supplies made during the period from December 7, 1962 to end of December 1967 and also the prevailing price of Grade-I and Grade-II coal. It is seen that if the supply is in excess of 12, 038 tones, as found by the High Court, the same should also be taken into account to find out what was the amount actually C of over-payment received by the plaintiff, adjust the same towards the amount payable to the plaintiff, and then to draw decree accordingly. This would be done within a period of six months from the date of the receipt of the copy of the order.

The appeal is accordingly allowed. No costs.

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G.N. Appeal allowed.