

(2013) 12 KAR CK 0523

In the Karnataka High Court

Case No : Regular First Appeal No. 651 of 2009 (MON-DB)

M/s. Vijayanand Roadlines Ltd.,

APPELLANT

Vs

M/s. Wyeth Limited and Mr. B.S. Mahesh

RESPONDENT

Date of Decision : 06-12-2013

Acts Referred:

Citation : (2013) 12 KAR CK 0523

Hon'ble Judges : K.L. Manjunath, J;A.V. Chandrashekara, J

Bench : Division Bench

Advocate : Vishwanath R. Hegde, for the Appellant; Ganapathi Hegde, for Dua Associates for R1 and R2, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Manjunath, J.—The legality and correctness of the Judgment and decree passed by the City Civil Judge, Bangalore, in O.S. No. 7279/2000 dt. 25.3.2009 is called in question by the appellant herein. The appellant herein was defendant-2 in the suit. The suit was instituted by the 1st respondent-plaintiff for recovery of Rs. 13,97,286-47 ps. together with interest at 22% p.a. from the date of suit till the date of realization along with the cost of the suit.

2. Respondent-2 in this appeal was defendant-1. For the better appreciation of the facts of the case, the parties will be referred as per their status before the Trial Court.

3. The plaintiff is engaged in the manufacture and distribution of pharmaceutical products and cosmetics. According to the plaint averments, based on the order placed by the 1st defendant, a consignment was sent to the 1st defendant through the 2nd defendant M/s. Vijayanand Roadlines Ltd. The value of which was of Rs. 9,04,633-48 and consignment was expected to be delivered to the 1st defendant at Mysore. The consignment was dispatched on 3.10.1997. The 1st respondent was required to retire the way bill from the Bank by paying the value of the goods and on production of the way bill by the consignee the goods would

be delivered. The 2nd defendant transporter was required to deliver the consignment to the consignee i.e. the 1st defendant. On the ground that the consignment was not delivered to the 1st defendant, a demand was made by the plaintiff-consignor to recover the value of the goods after deducting the freight charges along with interest. The 2nd defendant transporter pleaded before the trial court that on the oral instructions of the plaintiff the consignment was delivered to the 1st defendant. The Bank returned the documents to the plaintiff as they were not retired by the consigner. In the circumstances, suit came to be filed.

4. The suit was contested by both the defendants. It was the specific case of the 1st defendant that the consignment was not delivered to him by the 2nd defendant and he did not take delivery of the same. Therefore, it was contended by the 1st defendant that there was no cause of action against the 1st defendant and suit had to be dismissed.

5. The 2nd defendant-appellant filed the written statement admitting the receipt of the consignment from the consignor and the responsibility of delivering the consignment to the 1st defendant after the bank documents were duly retired. According to the 2nd defendant, on the oral instructions of the plaintiffs company, the consignment was delivered to the 1st defendant and in view of the delivery of the goods, the 2nd defendant is not answerable to the suit claim and hence suit to be dismissed.

6. It was also contended that the court of Bangalore had no jurisdiction to entertain the suit as the Head office of the 2nd defendant is in Hubli and all transactions are always subject to Hubli jurisdiction.

7. It was also contended that the suit filed by the plaintiff was barred by limitation. In order to prove their respective contention the following issues were framed by the Trial Court:

1) Whether the plaintiff proves that defendants are liable to pay a sum of Rs. 13,97,286.47 with interest at 22% p.a. till realization?

2) Whether the 2nd defendant proves that he is only a transporter and that he is not liable to pay the suit claim?

3) Whether the 2nd defendant proves that this suit is barred by limitation?

4) Whether the 2nd defendant proves that this court has no jurisdiction to entertain this suit?

5) What order or decree?

Addl. Issue framed on 22.2.2008

1) Whether Plaintiff proves that there is cause of action?

2) Whether the 1st defendant proves that this court has no jurisdiction as pleaded in the written statement?

8. In order to prove their respective contentions, one Devanathan the staff of the plaintiff was examined as P.W. 1. He relied upon Ex. P1 to 32. The 1st defendant B.S. Mahesh was examined as DW1 and on behalf of the appellant-2nd defendant one Nagappa, an Accountant was examined as DW2. The defendants did not rely upon any documentary evidence.

9. The Trial Court after considering the evidence let in by the parties held issue-1 partly in affirmative, issues-2 to 4 in negative, additional issue-1 in affirmative and 2 in negative and ultimately the suit of the plaintiff came to be decreed against the appellant-2 defendant herein for a sum of Rs. 13,97,286/- together with interest at 12% p.a. from the date of suit till the date of realization at Rs. 8,70,583/-.

10. Aggrieved by the Judgment and decree of the Trial Court the present appeal is filed.

11. We have heard the learned counsel appearing for the appellant and the 1st respondent-plaintiff. The 2nd respondent who is defendant No. 1 before the Trial Court has not contested this appeal.

12. In this appeal, the appellant has also filed an application under Order 41 Rule 27 of CPC producing 12 documents by filing an affidavit of the Managing Director of the appellant.

13. According to the appellant, the appellant could not produce the documents to prove that the consignment was actually delivered to the 1st defendant and for having delivered the consignment the acknowledgment could not have been produced in the trial court since the documents were produced before the 15th Addl. Chief Metropolitan Court, Bangalore in connection with the complaint in CC No. 32084/1999 and other connected matters. It was also contended by the appellant at the time of arguments that the suit has been decreed against the appellant and the same is contrary to the evidence let in by the parties. According to him, P.W. 1 has failed to prove the plaintiffs case since the appellant contended that consignment was delivered to the 1st defendant on the oral instructions received by the appellant and that the same has been proved by examining Nagappa - DW2. According to him, the evidence of Nagappa, has not been properly appreciated by the Court below. In the circumstances, he requests the court to allow the appeal and also the application filed under order 41 Rule 27 CPC and remand the matter to the Trial Court for fresh consideration in accordance with law.

14. Per contra, the learned counsel appearing for the 1st respondent-plaintiff submits that the grounds urged by the appellant are not tenable. According to him when the consignment was entrusted to the appellant by the plaintiff with a specific instruction that consignment shall be delivered to the 1st defendant on production of the way bill on retiring the documents from the Banker and hence the appellant could not have delivered the consignment to the 1st defendant. Even if the appellant has delivered consignment to the 1st defendant without

making payment to the plaintiff either by the 1st defendant or by the 2nd defendant, the appellant cannot be permitted to contend that there is no liability on it. According to him, on oral instructions the consignment worth Rs. 9,04,633/- could not have been delivered by the appellant to the 2nd respondent. He further submits that the alleged oral instructions of the plaintiff has not been proved by the appellant.

15. He further submits that the application filed under Order 41 Rule 27 CPC is also required to be dismissed because even if the appellant has delivered the goods to the 2nd respondent-1st defendant, it is only an inter se arrangement between the appellant and the 2nd respondent and at best the appellant can proceed against the 2nd respondent for recovering money from the 2nd respondent. Therefore, there is no necessity for this court to consider the application filed under Order 41 Rule 27 CPC and remand the matter to the Trial Court.

16. Having heard the counsel for the parties, we have to consider the following points in this appeal:

- 1) Whether the Trial Court is justified in decreeing the suit against the appellant herein since the consignment has been delivered without production of the way bill and documents by the 1st defendant after remitting the value of the goods to the Banker?
- 2) Whether the appellant has proved that the consignment was delivered to the 1st defendant on the oral instructions of the plaintiff and
- 3) Whether the application filed under Order 41 Rule 27 CPC requires to be allowed?

17. Since points-1 and 2 are interlinked with each other, we would like to consider them together.

18. The undisputed facts in this appeal are:

That the appellant is not disputing that the consignment entrusted by the plaintiff was to be delivered to the 1st defendant. The appellant carrier was expected to deliver the consignment to the 1st defendant only after production of retiring very bill from the banker by paying the value of the goods to the banker.

19. It is the specific case of the appellant that on the oral instructions of the plaintiff goods were delivered to the 1st defendant. The 1st defendant is denying the receipt of the goods. It is also not in dispute that the way bill sent through the Bank remained with the Bank. Later on the Bank returned the same to the plaintiff which would conclusively prove that payment was not made. Therefore, the burden is heavy on the appellant-2nd defendant to prove that there were specific instructions from the plaintiff to deliver the consignment to the 2nd defendant orally contrary to the procedure for honouring bank documents before delivery of consignment. When the appellant is contending contrary to the

documentary evidence namely, the way bill and consignment, it is for the appellant to show how and when and by whom the oral instructions were given on behalf of the plaintiff to the 2nd defendant-appellant to deliver the goods. When oral instructions are pleaded by the appellant contrary to the documentary evidence, such contentions are to be pleaded in detail in the written statement. Therefore, it for us to consider the written statement filed by the appellant herein.

20. On perusal of the entire written statement, it is clear that the appellant could not have delivered the goods on oral instructions to the 2nd respondent that too without the 1st defendant getting the documents released from the Banker. In the entire written statement, the person who gave oral instructions and the person who received the oral instructions from the appellant have not been disclosed.

21. Be that as it may, even if such details are not given, if the appellant is able to show that such instructions were received from the plaintiff and based on such instructions the 2nd defendant-appellant has acted upon, we can still consider the case of the appellant P.W. 1 is one Devanathan who has been examined on behalf of the plaintiff who was working as Sales Administration Officer of the plaintiff company. We have seen his cross-examination. No suggestion is put to him by the appellant's counsel in regard to the instructions given by the plaintiff Company to the 2nd defendant to deliver consignment on account of oral instructions.

22. Similarly, we have also seen the evidence of Nagappa who has been examined as DW2 on behalf of the appellant. He is working as Cashier-cum-Accountant in the office of the appellant. In his examination-in-chief he does not mention as to who gave oral instructions on behalf of the plaintiff to deliver goods to the 1st defendant. Except the self-serving testimony of DW2 there is nothing to prove the contentions urged by the appellant. In the cross-examination he has admitted as hereunder:

I Received instructions from my Manager i.e. Manager received instructions over phone and he communicated to me. At that time one P.R. Ramanand was the Manager. We have delivered the goods to D-X 1 on 30th October 1990. One Mahesha has taken delivery.

23. From the above admission, it is clear Nagappa did not receive any instructions from the plaintiff Company to deliver the goods orally. According to him, his Manager instructed him over phone to deliver the goods to defendant-1. One Ramanand was the Manager who has given instructions. Even if we accept the contentions that there were oral instructions from the plaintiff to deliver goods, Ramanand was the best person to give evidence to prove the contentions and he has not been examined. For the reasons best known to the appellant, Ramanand has not been examined to prove its contention. In this background, if the Trial Court has decreed the suit on the ground that the goods entrusted for transportation to the appellant by the plaintiff has not been delivered in

accordance with law and in the absence of returning consignment to the plaintiff by the appellant, this Court cannot find fault with the appreciation of the evidence by the Trial Court. Therefore, points-1 and 2 are answered against the appellant.

24. So far as the application filed under Order 41 Rule 27 CPC is concerned, even if the appellant has documents to show that the goods were delivered to the 1st defendant, such delivery would be contrary to the terms of the contract. At best it is a collusion between the 1st and 2nd defendant inter se. Under such circumstances it is for the appellant to proceed against the 1st defendant, if at all it can recover the amount. Even otherwise no purpose would be served in remanding the matter to consider the application filed under Order 41 Rule 27 CPC because the said documents are relied upon by the appellant to show that consignment was delivered to the 1st defendant. As stated supra, if the consignment is wrongly delivered to the 1st defendant, the same nothing to do with the claim of the plaintiff. In the circumstances, the said point is also answered against the appellant.

25. In the result, the appeal is dismissed. Parties to bear their costs. It is open for the appellant to proceed against the 1st defendant, if at all it can institute a suit in accordance with law. At this stage, the learned counsel for the respondents submits that at the time of admission the appellant has deposited certain money which has been invested by the Registry pursuant to the orders of this court in F.D. in the ING Vysya Extension counter, Bangalore. The amount deposited by the appellant along with the interest accrued thereon till now shall be paid to the respondent No. 1. The same shall be adjusted towards the decretal amount.

Appeal is dismissed with costs.