

(2012) 10 NCDRC CK 0068

In the National Consumer Disputes Redressal Commission

Rajasthan Art Emporium

APPELLANT

Vs

KUWAIT AIRWAYS , Daga Air Agents

RESPONDENT

Date of Decision : 01-10-2012

Acts Referred:

Citation : 2012 0 NCDRC 578

Hon'ble Judges : Vinay Kumar , J.M.Malik J.

Advocate : M.Malhotra , Madhurima Tatia , Avijeet Bhajabal , Dinesh Sabharwal , Preeti Mechan

Judgement

1. M/s Rajasthan Art Emporium filed this complaint before this Commission in September, 1997 against Kuwait Airways and Daga Air Agents. This Commission decided the complaint on 21.5.2003. The complaint was partly allowed. Aggrieved by that order, the complainant approached Hon "ble Supreme Court. The Hon "ble Supreme Court vide its order dated 15.3.2011, was pleased to hold as follows: "We are not persuaded to agree with the submission. Further, the National Commission did not commit any error in granting the amount of US\$ 36440 towards the short delivery. The relief so granted by the National Commission is based on appreciation of the material available on record. Be that as it may, the respondent did not prefer any separate appeal challenging the correctness of the order of the National Commission in awarding the said amount towards the short delivery but preferred cross objections which in our considered opinion, are not maintainable. For the aforesaid reasons, this appeal is allowed setting aside the finding recorded by the National Commission so far as it concerns the issue relating as to whether there was any delay in delivering the consignment. The matter, is accordingly, remitted for fresh consideration by the National Commission. We make it clear that we have not expressed any opinion, whatsoever, on the question as to whether there was any delay at all in delivering the consignment as the same is required to be gone into by the National Commission. "

2. IT is not out of place to mention here that after the receipt of the order from

the Hon "ble Supreme Court, it was reported by the Registry that file is not available/traceable. Thereafter, the file was reconstructed with the help and assistance of both the counsel. For that, we are grateful to them in getting the file prepared. IT is also noticed that, whenever, the Hon "ble Supreme Court calls the record, in few cases, the file is not traced out after its remand. The registry is directed to be careful and keep tabs on the file till its final disposal. The case of the complainant is as follows. The complainant is exporter of all kinds of handicrafts articles with several countries including USA. The complainant had received an order from M/s Williams Sonoma Inc. USA for supply of handicraft goods. Those were to be sent on urgent basis. The opposite parties above said assured the complainant that the goods will be delivered within seven days. The complainant tendered three shipments to the opposite party No. 1 through opposite party No. 2. The complainant was informed that three consignments as detailed in the complaint were to be delivered on 29.7.1996, 31.7.1996 and 31.7.1996.

However, the said consignments did not reach the destination at Memphis (USA). On enquiry, the opposite party No. 1 gave a revised delivery schedule which mentioned the date of delivery on 6.8.1996, 31.7.1996/3.8.1996 and 6.8.1996 in respect of all the three consignments. However, the said goods did not reach the destination as per the revised delivery schedule also. The buyer also informed the complainant that the goods had not reached them and displayed their annoyance. They also warned the complainant that their future relationship was in jeopardy. M/s Williams Sonoma Inc. is complainant "s one of the largest overseas buyer. The opposite parties 1 and 2 were approached time and again but those efforts did not ring the bell.

On 19.8.1996, the above said buyer expressed its anguish vide letter dated 23.8.1996 and informed the complainant as follows. "Further more, Kuwait Airways can "t even tell us where the remaining cartons are. Apparently, Lufthansa is responsible for the forwarding of Kuwait "s freight. Once goods arrive in Chicago, Lufthansa arranges for their on forwarding to Memphis through Alliance. Alliance delivers the goods to their CFS-LTD. Ltd. is a bonded warehouse in Memphis and the freight is held there until it clears Customs. "

It also transpired that 69 cartons were lying with Lufthansa. The opposite party No. 1, by its letter dated 30.8.1996 addressed to opposite party No. 2 accepted the short delivery. On 7.9.1996, the complainant made a modest claim against the opposite party for refund of full freight, leaving the other claim of loss of business etc. In response to said request, the opposite party No. 2 confirmed having short delivered 104 cartons out of 288 cartons but did not state whether the other cartons had arrived at the destination. Legal notice dated 4.8.1997 was sent but it evoked no response. Ultimately, this complaint was lodged with the prayer that the opposite party No. 1 be directed to refund a sum of Rs.24,48,345/- being the fair charges for the above said three consignments; pay a sum of Rs.20 lakh as compensation for loss of business and reputation,

pay US\$ 7042.00 being the value of the goods short delivered; pay interest @18% as well as cost of litigation. This Commission vide its order dated 21st May, 2003 was pleased to hold: "On the basis of average weight of each piece, with regard to two AWB "s, we find that there has been short delivery of 1822 Kgs. As per Rule 22 of Carriage by Air Act, multiplying this weight by US \$ 20 per kgs., amount payable shall work out to US \$36440 which becomes payable by the Ist OP to the complainant for loss of goods hence Ist OP is directed to pay this amount along with interest @9% from 1.10.1996 till the date of payment alongwith cost which we fix at Rs.10,000/- . "

3. THE opposite parties have contested this case. THE opposite party No. 1 has denied all the allegations. According to it, there was no deficiency in service rendered by opposite party No. 1. All reasonable care in performing their duties under the Contract of Carriage were discharged. No specific instructions were given by the complainant with regard to the time by which the consignments had to reach its destination. Time was not the essence of contract entered into between the parties. Only 44 pieces were short delivered. The opposite party No. 2 while almost supporting the case of the complainant, made the following averments. The opposite party No. 2 was a booking agent for Kuwait Airlines. The relationship between the complainant and the opposite party No. 2 runs on good faith and the complainant and opposite party No. 2 are honouring their commitments. It is admitted that the opposite parties were interested in sending their goods to M/s William Sonoma Inc. on urgent basis and this was the only reason the complainant wanted to send the goods by AIR. The complainant was provided tentative schedule of arrival of the goods at Memphis by opposite party No. 1. The goods were supposed to reach Memphis by 31.7.1998. The opposite party No. 1 expressed its inability to deliver the goods as per tentative schedule provided to the complainant earlier, thus, a revised schedule was provided to the complainant. Thereafter, the role of the opposite party No. 2 came to an end. The goods were given in custody of Kuwait Airlines. However, opposite party No. 2 was worried about the goods sent by the complainant and was providing all assistance to the complainant in getting information either from opposite party No. 1 or from agent in USA to know the fate about the packets sent by the complainant. We have heard the learned counsel for the parties and gone through their written synopses. Learned counsel for the opposite party No.1 vehemently argued that there was no delay on the part of opposite party No. 1. There was no express condition. The case goes to reveal that time was not the essence of the contract. The evidence on record goes to show that the goods arrived at the destination on 23.8.1996. Thereafter, it took time in making the custom clearance. Under these circumstances, no fault can be attributed on the part of opposite party No. 1. The complainant has failed to prove that there was urgent need of these goods as the same were to be sold in an exhibition. He argued that this is an afterthought and there is no evidence that the complainant or his buyer urgently needed them.

4. AGAIN, the goods were neither fragile nor of perishable nature. Even when the

revised delivery schedule was submitted there was no protest from the complainant. The substantial portion of the goods arrived in time. Therefore, there is no delay in delivery in such like circumstances as was held in *Saddler Shoes Pvt. Ltd. vs. Air India* 1995 (III) CTJ 904 CP (NCDRC). He also referred to one judgment reported in *S. Sundaram Pillai vs. V. R. Pattabiraman*, AIR 1985 SC 582 where it was held that words "willful default " appears to indicate that default in order to be willful must be intentional, deliberate, calculated, and conscious, with full knowledge of legal consequences flowing therefrom which is not the present case. Again, any loss suffered by the consignee can be fastened upon the carrier by the consignor unless or until carrier has been informed and the same risks are incorporated as condition before entering into contract of carriage and carrier was being expressly been communicated to have prior knowledge of any alleged loss of profit or business association between consignor and consignee in case of delay, which is not the present case. We have marshalled the evidence on record and we are unable to locate any substance in the arguments urged by learned counsel for opposite party No. 1. The arrival schedule of goods is mentioned in the fax message sent by Daga Air Agents which clearly goes to show that the goods arrived at Chicago Memphis on 29.7.1996, 31.7.1996, 31.7.1996. Since the said consignment did not reach the destination, M/s Rajasthan Art Emporium wrote to the opposite party that on 7.8.1996, they received a message from buying agent of the consignee on 3.8.1996, wherein he informed that they were surprised to inform that none of the shipments scheduled had reached Chicago till 3.8.1996 and all the shipments were lying at Kuwait. They were provided with revised flight schedule wherein the consignments were to reach subsequently. Other shipments did not reach the destination even as per revised flight schedule according to which the goods were to reach the destination on 6.8.1996

On 30.8.1996, Kuwait Airlines informed the opposite party No. 2 that the goods were received at Memphis and US custom authorities will clear the shipments and all the shipments will be recounted at the agents bounded warehouse. The goods received on 30.8.1996 were only in part as also admitted by opposite party No. 1 by its letter dated 24.9.1996.

5. IT is also clear that the buyer was annoyed due to the above said delay. A telex message dated 13.8.1996 has been placed on record. The same is reproduced as follows: "RE: Rajasthan All Shipments Please convey to Mr. Singhal my disappointment with his performance. We still have not received the goods which were aired via Kuwait Airways almost one month ago. Now, everything is considerably later than promised when he was in San Francisco. Our future relationship is in serious jeopardy. " (EMPHASIS SUPPLIED)

It is clear that the buyer was the largest customer of the complainant. The said thing is apparent from the graph showing sales to Williams Sanoma Inc. USA. Relevant portion is reproduced as under:-

YEAR	FOR	VALUE	AMOUNT IN Rs.
1992-93	5459062	1993-94	31014056
1994-95	39251245	1995-96	59378597

1996-97 48491406 1997-98 5250736

6. THE complainant also placed on record the certificate of B. K. Boob, B.Com. F.C.A., Chartered Accountants, Member Ship No. 8272, which has certified the above said details as follows. "Details of yearwise sales to M/s William Sonoma Inc. USA. FINANCIAL YEAR F.O.B. VALUE AMOUNT IN Rs. 1992-93 54,59,062.00 1993-94 3,10,14,056.00 1994-95 3,92,51,245.00 1995-96 5,93,78,597.00 1996-97 4,84,91,406.00 1997-98 52,50,736.00 It is thus clear that the complainant had suffered a huge loss due to this transaction. The record reveals that the goods were received on 3.9.1996. Section 19 of the Carriage by Air Act 1972 make provision for compensation in case of damaged delivery of goods. Section 19 runs as follows: "19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods. " Section 13(3) of the same Act further provides as under:- "(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage. "

Moreover, the following rules form part of Air Ticket. Provisions 4 and 6 of the Air Ticket are relevant and are reproduced hereunder:- "4. Except as otherwise provided in carrier 's tariffs or condition of carriage, in carriage to which the Warsaw Convention does not apply carrier 's liability shall not exceed USD 20.00 or the equivalent per kilogram of goods lost, damaged or delayed, unless a higher value is declared by the shipper and a supplementary charge paid. 6. In cases of loss, damage or delay of part of the consignment, the weight to be taken into account in determining carrier 's limit of liability shall be only the weight of the package or packages concerned. "

7. ALL these facts and circumstances clearly establish negligence, inaction and passivity on the part of the opposite party No. 1. The question of willful default does not arise. When the goods are not delivered within 7 days, the fault certainly lies at the door of opposite party No. 1. In view of the rules cited above and the fact the opposite party No. 2 itself admits that the goods were to be sent on urgent basis, the question whether the time was the essence of the contract pales into insignificance. Even if there was no time fixed for reaching the destination, yet the buyers desire to have the goods immediately as is apparent from the above said buyer 's letter. In foreign countries, you have buyers of a thing for some particular time/season. If they do not get the goods, the buyers mostly change their view and do not wait for the goods for a long time. In view of the above discussion, three aspects are to be considered, firstly, buyer was annoyed and he stopped giving sufficient orders to the complainant. The complainant suffered huge loss because of lack of orders. Secondly, opposite party No. 1 is liable to pay as per rules quoted above. Thirdly, it has to be borne in mind that the goods which already reached their, became useless in absence of their counter parts, which were delayed or due to the short delivery or were lost.

It has to be presumed that when the goods are sent by Air the fact that time is essence of the contract automatically becomes a part of contract. The complainant has paid Air freight Rs.24.48 lakh equivalent to US \$ 70000 whereas the sea freight for the said cargo cannot be more than the US \$ 7200. The complainant paid 10 times so that there should be timely delivery of the goods in question. Again the sea cargo would have taken 25 to 30 days but the Air cargo took more than 30 days.

8. LEARNED counsel for the complainant submitted that in Sarkar on evidence (15Edn. 1999) at P. 1724 under the heading "Negligence " it is stated:- "As a rule negligence is not to be presumed; it is rather to be presumed that ordinary care has been used. The rule goes not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent of goods entrusted to their care have been lost or damaged or delayed in delivery (Ross v. Hill, Jones S15). The law will conclusively presume that the carrier has been guilty of a negligence unless he can show that the loss or damage was occasioned by what is technically called the "act of God ", or by "King "s enemies. "

The learned counsel for the complainant submitted that the complainant is entitled to US \$ 20 per kg. of the weight of the goods consigned under Warsaw Convention (as amended by the Hague Protocol) as incorporated in Rule 22(2) of Schedule II of the Carriage by Air Act, 1972, governing International Carriage. Admittedly the total weight of the three consignment was 26859.5 kg. Accordingly, complainant is entitled to damages @ \$20 per kg. He also cited a case titled "The Manager, Air India Ltd. and Ors. V. M/s India Ever Bright Shipping and Trading Co. reported in II (2001) CPJ 32(NC) the full bench of this Hon "ble Commission held that the complainant would be entitled to US \$ 20 per kg. of the weight of goods consigned for not delivering the consignment on time.

We see some force in this argument. The record reveals that the complainant has already received a compensation of 1822 kg. It would not be proper to pay it the double compensation for the same goods. It cannot have the benefit of both the worlds. The total weight was 26859.5 kg. After deduction of this weight the remaining comes of 25037.5 kg. It is entitled to compensation of 25037.5 kg. multiplied by US \$ 20 each kg., the total comes to US \$ 500750 that will exceed the sum of Rs.20,000,00/-. We, therefore, order that complainant will be entitled to have US \$ 500740 or Rs.20,000,00/- whichever is lesser amount. Apart from that he will get 9% p.a. compensation with effect from 31.7.96 till its realization. We also award litigation charges and compensation for harassment and mental agony in the sum of Rs.5 lakh in favour of the complainant and against the opposite party No. 1. The said compensation to be paid within 3 months failing which it shall carry interest @9% p.a. The complaint against opposite party No. 2 stands dismissed. The complaint stands disposed of.