
(2003) 05 DEL CK 0018
In the Delhi High Court
Case No : Suit No. 400 of 1983

Ramnath Exports Private Ltd.

APPELLANT

Vs

The Chairman, Air India and Another

RESPONDENT

Date of Decision : 19-05-2003

Acts Referred:

Citation : (2003) 6 AD 281 : AIR 2003 Delhi 461 : (2003) 3 BC 374 : (2006) 2 CTLJ 94 : (2003) 105 DLT 341

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Girish Aggarwal, for the Appellant; Rajesh Kr. Jha, for the Respondent

Judgement

J.D. Kapoor, J.—This is a suit for recovery on account of cost of goods shipped by the plaintiff for delivery to the buyers at Denmark booked through the defendants. The plaintiff firm is engaged in business of import and export. The case of the plaintiff in brief is that the plaintiff was placed with an order from Denmark buyer M/S Gording Skofabrik A/S, Alunden 2, 6690 Gording, for supply of 3000 pairs of leather Shoe Uppers to be consigned to M/S Gording Skofabrik A/S, Alunden2, 6690 Gording, Denmark through their agent M/S Senn-Nordica Aps, Denmark vide his Telex Message No. 12610-LJ dated 24.11.80 and plaintiff perform invoice NO. 213/80-1353 dated 18.12.80 for Rs. 2,30,193.75 duly confirmed by the consignee.

2. The plaintiff firm at the first instance shipped 30 packages containing the footwear uppers vide their invoice NO. 213/81-1266 for Rs. 1,15,608.75 under Air India Airway Bill NO. 098-32259861 dated 7.3.81 from Delhi to Esbjerg Airport, Copenhagen, Denmark. The plaintiff firm thereafter shipped the balance 30 packages of the consignment under the order of the buyer and shipped the same under Air India Airway Bill No. 098-32260163 dated 12.3.81.

3. The shipment under Airway Bill dated 12.3.81 was duly delivered to the consignee in Denmark. The consignment under Airway Bill dated 7.3.81 which

was airlifted from Delhi to Bombay on Flight NO. AI-195 dated 13.3.81 and from Bombay to Luxembourg Germany on Flight NO. AI-2044 dated 16.3.81 was not delivered to the consignee.

4. The plaintiff firm had asked the Cargo Sales Manager, Air India, New Delhi vide their Telex NO. 3136 dated 2.4.81 to confirm flight number from Luxembourg to Esbjerg Airport, Copenhagen because the buyers of the plaintiff firm had not received the consignment.

5. The plaintiff was informed by their clearing agent that the subject consignment had been misplaced in transit in which the defendants ought to be liable for the damages on account of losses suffered by the plaintiff. The plaintiff firm lodged a claim on defendant no. 2 for the losses involved to the tune of Rs. 6,57,175.66 vide their letter NO. REL. 213/81-19496 dated 30.4.81 as detailed in para 8 of the plaint.

6. The Clearing Agents of the plaintiff firm M/S Lemuir Air Express requested the Cargo Sales Manager, Air India vide their letter NO. AF/6257/379/80-81 dated 6.5.81 to settle the claim of the plaintiff. Subsequently, the plaintiff firm vide their letter No. REL.213/81-16961 dated 18.8.81 forwarded to the defendants the documents as required vide Air India Letter No. DL/PR-CL-48-2736/GBR dated 12.5.81 with a view to enable the defendants to take necessary action in the matter.

7. On 31.8.81 vide their Cargo irregularity report the defendants informed the plaintiff firm that the subject consignment was lying undelivered and heavy storage charges were accruing and finally the defendants asked for alternative disposal instructions. The plaintiff firm vide their letter NO. REL.213/4-81/17104 dated 4.9.81 apprised the defendants of the true facts.

8. There was protracted correspondence during the period 7.9.81 to 21.4.82 between the plaintiff firm and their agents M/S Lemuir Air Express on one hand and the defendants on the other culminating in the issuance of defendants' letter NO. DL/FR-CL/48 dated 21.4.82 addressed to the plaintiff firm intimating that the head office of the defendants was seized of the matter and that the defendants were reminding them.

9. Thereafter, the defendants' office vide letter NO. DL/FR-CL/1969 dated 31.5.82 informed the plaintiff firm that the consignment in question has been received on 1.6.81 and delivered to the consignee after necessary bank release on 3.6.81 and as such the case stood closed. Due to inordinate delay in the delivery of the consignment to the consignee, the plaintiff firm had lost quite a good business with resultant huge losses and further loss of reputation in foreign market. The defendants were informed of the position and it was clearly stated that the plaintiff firm was no longer interested in the goods since the goods covered under the subject consignment were in the nature of target seasonal requirement of the buyer and due to inordinate delay in the delivery to the consignee, the consignee was not prepared to accept the same.

10. That having been disillusioned of the conduct of the defendants, the plaintiff firm approached Shri Raghu Raj the Chairman of Air India for early settlement of the case of the plaintiff firm.

11. That vide their communication dated 2.3.83, the defendants admitted the booking of the subject consignment at Delhi, the lodging of complaint of non-delivery of the consignment on 4.4.81 along with the plea that the subject shipment stands abandoned having been lying unclaimed for more than a year and finally that the defendant is not liable for the losses sustained by the plaintiff.

12. According to the plaintiff the defendants are liable to the plaintiff to pay the amount of Rs. 7,13,788.66 inclusive of the value of the claim amounting to Rs. 6,57,175.66 together with sum of Rs. 56,613/- on account of interest on Rs. 1,57,175.66 from 7.3.81 to 6.3.83 at the rate of 18% per annum and interest at 18% pendentelite from 7.3.83 till payment is made to the plaintiff. According to the plaintiff he has suffered immensely firstly because the consignment was trial order on the plaintiff firm by the buyer and due to negligence on the part of the defendants not only that particular buyer was lost to the plaintiff forever but then the reputation of the plaintiff in foreign market has been seriously impaired. Hence, this suit.

13. In Written Statement the defendant has taken the stand that they as carriers have airlifted the consignment to its destination as per contract, no liability accrues or arises against the defendants and it is a matter solely between the plaintiff and the consignees since the consignee has refused to take delivery of the consignment. Again absolving the liability, the defendant has taken the stand that as per the conditions of the contract of carriage, the carrier in whose custody the alleged mishandling has occurred is personally and wholly responsible for liability, if any arising out of such mishandling or negligence. The suit consignment as per Airway Bill No. 098/8225 9861 dated 7.3.81 was moved up to Brussels by the defendants and at Brussels the same was transferred to M/ S Luftansa for further carriage to Copenhagen. At Copenhagen the goods were transferred to M/S Scandinavian Airlines Systems for onward carriage to Esbjerg, the destination. Hence assuming that there was any mishandling of the alleged goods after they were transferred to Luftansa or to Scandinavian Airlines systems for onward carriage, the said carriers alone are liable, it at all, for damages allegedly suffered by the plaintiffs.

14. On merits the defendants have taken the plea that the plaintiff having not given alternate disposal instructions to the defendants inspire of request, the plaintiff alone is to be blamed and no liability whatsoever arises against the defendants. Thus, in short the defense is that the defendant is merely a carrier and has followed all the terms and conditions of the contract of carriage. The consignee having failed and neglected to take delivery of the consignment, if the plaintiff has any remedy at all, the same can lie only against the consignee. Merely because the defendants vide its letter dated 12.5.81 asked the Lemuir Air Express as clearing agent to submit the relevant documents without prejudice so

as to make an enquiry into the allegations made by the plaintiff, the said letter cannot be construed as admission by the defendants of any liability.

15. As regards the failure of the plaintiff to give the alternative disposal instructions and other averments, the defendant has come up with the following pleas: -

"That on receipt of letters from the plaintiff maintaining therein that the consignment was not received by the consignee and that for the said reason the plaintiff had not received payment from them, the defendant once again took up the matter with M/S Scandinavian Airlines Systems, the final carrier, to ascertain whether the consignment was delivered to the consignee after obtaining the necessary bank release. The defendant was once again informed by the said Scandinavian Airlines Systems by telex confirming that the consignment was delivered after obtaining the necessary Bank release. The defendants informed the plaintiff accordingly. The plaintiff then requested the defendant to obtain from the delivering carrier that is M/S Scandinavian Airlines Systems a copy of the Bank release. There was no response to various communications of the defendant to the said Scandinavian Airlines Systems, and finally the defendant was informed by them that the shipment was lying undelivered at the destination as the consignee or his agent had refused to pay the incidental charges. On further clarifications by the defendant from the said final carrier, the defendant was informed by the said Scandinavian Airlines Systems vide letter NO. NR/OJK/BT-1/9861 dated 17th February 1983 that the contradictory replies regarding the suit consignment was due to a mix up of the said shipment with another for the same consignee. The Scandinavian Airlines Systems also stated in the said letter the consignee refused to take acceptance of the goods, and in spite of several irregularity reports sent by Scandinavian Airlines Systems, there was no response and as such the shipment was abandoned after lying unclaimed for one year. This was clearly on account of failure of plaintiff to give disposal instructions as directed by the defendants and as such the defendants are not liable for any damages or losses.

However, in the replication, the plaintiff reiterated its averments and emphasized that it is the defendant who is solely liable and it was the obligation of the defendant to see that the consignment reaches its destination."

16. Vide order dated 15.5.86, the following issues were framed for determination:-

1. Whether the plaint has been signed, verified and instituted by a duly authorised person?
2. Whether the suit is not maintainable as alleged in paragraph 1 of the preliminary objections of the written statement?
3. Whether the suit is bad for non joinder of Lufthansa, Scandinavian Airlines Systems and M/S Gording Skofabrik A/S Aluden?

4. Whether the defendants have committed the breach of contract of carriage?
5. Whether the plaintiff is entitled to damages? If so to what amount and against whom?
6. Whether the plaintiff is entitled to interest? If so at what rate and to what amount?
7. Relief.

17. In support of its case, the plaintiff has examined five witnesses out of which four are official witnesses. PW 1 S. S. Rana is the Public Relation Inspector of Post Office Haus Khas. He has proved the postal receipt vide which certain communications were dispatched by the plaintiff to the defendants. These receipts are Ex. PW 1/1 to Ex. PW 1/6. He was not certain whether the remaining receipts marked A-1 to A-7 were issued by any postal authority or not and if so by which post office.

18. PW 2 D. S. Dutta is the Traffic Supervisor of the defendant Air India. He only produced the summoned record to prove the various letters and documents sent by the plaintiff to the defendant from time to time. These have been proved as Ex. PW 2/1 to Ex. PW 2/33. There are several other communications and documents which were shown to him but he could not produce the records as these were old records and were not available with them.

19. PW 3 D. L. Kubba is another official of post office. He was examined to identify the signatures of the office who issued the postal receipts. He identified the postal receipts issued by Haus Khas Post Office from the stamps and the same are Ex. PW 3/ 1 to Ex. PW 3/7.

20. PW 4 R. L. Khanna is the Deputy Manager of Lemuir Air Express i.e the clearing agent. Though he was directed to produce certain record but he could not do so as he was not able to trace the same because of the records being 15/10 years old. At the same time he stated that the plaintiff firm was known to him and his firm has been acting on behalf of the plaintiff firm for shipment in respect of the goods exported to foreign countries. He has identified the letter dated 9.4.1981 written by clearing agent to Mr. H.L. Malik, Cargo Sales Manager-NI, copy of which was endorsed to the plaintiff. The said letter is Ex. PW 4/1.

21. PW 5 Anil Kumar is the General Manager of the plaintiff firm. He identified the signatures of Director Radhey Lal on the plaint and other documents. As per the Power of Attorneys executed in favor of Mr. D.C. Anand and Mr. Amrish Kumar Advocates. He further deposed that Radhey Lal was duly authorised by the Board of Directors to file the present suit. He produced the original minutes book in this regard and also proved the resolution dated 28.2.1983. According to him vide title deeds Ex. PW 5/6, the plaintiff informed the buyer about the dispatch of the goods to him. Series of communication between the plaintiff and the defendant were referred and proved by the witness.

22. The documents proved by him are exhibit PW 5/1 to 5/39. As many as more than 313 documents were shown to the witness in the cross-examination by the defendant which were exchanged between them. He produced accounts of the foreign buyer to whom the goods were supplied by the plaintiff firm in order to show the loss suffered by the plaintiff on account of non-delivery of goods to the buyer in question. As many as 70 invoices were produced by him which are marked as Exhibits PW 5/59 to 5/123. The enclosure of the invoices containing the export documents were produced which are marked as Exhibit PW 5/124 to PW 5/313. The comparative statement of exports for the year 1980-81 to 1986-87 prepared by him was proved as Exhibit PW 5/314. However he denied that plaintiff was aware that Air India did not operate to the place of destination of their consignments and two other airlines were involved in the process and also that defendant was not liable though the consignment was handed over to its Clearing Agents for forwarding the same to defendant. He perused the letter dated 4.9.1981 wherein it was stated that plaintiff was not interested to take delivery of the consignment after six months and request was made to finalise the claim immediately. According to him the buyer would not take delivery of goods after a lapse of six months as the goods were semi-finished and they had to make the shoes from the same and the buyer refused to take delivery in view of delay. It also admitted that plaintiff did not give any instruction to the defendant to bring back the consignment to India but he denied the suggestion that they did not ask the defendants to return the consignment as they did not want to pay warehouse and demurrage charges. According to him it was the sole responsibility of the defendant to handle their consignment not the other two Airlines or Clearing Agent as they were basically involved with defendant and it was their responsibility to handle their consignment.

23. On behalf of defendants one Mr. J.S. Tanwar, Manager, Commercial Department appeared as DW-1. His testimony in brief is that if a consignment has to be sent to a place where the defendants are not operating, the defendants ship the goods to the nearest point and thereafter they dispatch the goods to the destination with some other carrier or carriers and in the instant case, the defendants shipped the goods up to Frankfurt and from Frankfurt to Copenhagen, the goods were taken by Lufthansa and from Copenhagen to Easberg they were taken by SAS Airlines. On factual aspect the witness deposed that consignee did not take delivery of goods and the defendants asked the plaintiff to suggest an alternative buyer but the plaintiff failed to do so and instead filed the claim. He further stated that since the goods were abandoned by the consignee, they were handed over to the local authorities. According to him, an airway bill is a tripartite contract between the shipper, the airline and the consignee and Therefore shipper is fully aware if the goods have to be shipped by some airline. Moreover there was no condition that goods were to be delivered with utmost urgency. Though he was not aware of the person who handled the transaction on behalf of the defendants at the relevant time as he was posted in head office but still from the record and other documents he

deposed that there was no delay in making the shipment because there was no time limit prescribed in the airway bill. However, he admitted that it was the responsibility of the defendants to ensure that the goods reach Easberg, Denmark. He denied that consignee did not take delivery of the goods because there was a delay in shipment.

Issue No.1

24. Though this issue is not pressed but even otherwise plaintiff has successfully proved the authority of Mr. Radhey Lall who executed the power of attorney being the Chairman of the plaintiff Company as well as having signed, verified and instituted the suit by virtue of resolution by Board of Directors in his favor. Issue no. 1 is decided in favor of the plaintiff.

Issue No. 2

25. The objection as to the maintainability of the suit raised by the defendants is that dispute is solely between the plaintiff and the consignee and since the consignee has refused to take delivery of the consignment, the suit is not maintainable. I am afraid the choice is of the plaintiff to sue against whom its claim can succeed. Since the main plank of the claim of the plaintiff is that defendants on account of their negligence failed to deliver the consignment in time to the buyer and the buyer was Therefore justified in not taking the consignment, the objection is meaningless and is devoid of merits. The issue is decided in favor of the plaintiff and against the defendants.

Issue No. 3

26. Again the objection that suit is bad for non-joinder of Lufthansa, Scandavian Airlines Systems and M/s Gording Skofabrik A/s Alunden as defendants is groundless as it is for the plaintiff to establish the liability of the defendants and the breach of contract, if any, committed by the defendants. In view of the statement of witness of the defendants that defendants also cannot escape from its liability if plaintiff succeeds in proving the negligence against the defendants itself renders this objection infructuous. Non-joinder of necessary parties may be fatal to the suit filed by the plaintiff if the defendants succeeds in showing that the plaintiff had no cause of action against the defendants. plaintiff is not bound to join other two parties as defendants. It is a case solely directed against the defendant as in the perception of plaintiff, the defendants had the responsibility to see that the consignment reaches the buyer irrespective of the fact as to how many channels he used in the process. The issue is decided in favor of the plaintiff and against the defendants.

Issues Nos. 4 and 5

27. These issues are taken up together as the finding of issue No. 5 depends upon the finding of issue no. 4. The main contention of Mr. Irish Aggarwal, learned counsel for the plaintiff in support of the fact that defendants have committed the breach of contract and as such has relied upon the following

facts:-

(i) The plaintiff booked the consignment in 7.3.1981 which was airlifted by defendants on 13.3.1981 and 2.4.1981.

(ii) The plaintiff was informed that consignee had not yet received the consignment through its Clearing Agent and immediately, on 30.4.1981 the plaintiff lodged claim with defendants.

(iii) Clearing Agents of the plaintiff also wrote a letter dated 6.5.1981 to settle the claim of the plaintiff but till 30.8.1981, the defendants never relied any of the letters asking them to locate the consignment and hand it over to the consignee.

(iv) It was for the first time on 31.8.1981 that the defendant informed the plaintiff that the goods were lying undelivered in spite of the fact that plaintiff had brought to its notice the non-receipt of consignment by the buyer.

(v) That there is admission of the defendant vide their letter dated 2.3.1983 to the following effect :-

"On receipt of your complaint regarding non delivery of the consignment to the consignee, our office immediately took up the matter with SAS in Esbjerg who by a misunderstanding confirmed to us that the consignment was delivered to the consignee which position the latter explained as a mix up of this shipment with another for the same consignee and it was only when we took up the matter with SAS to ascertain whether the shipment was delivered after obtaining necessary Bank Release and to furnish us with a copy of the Bank Release that SAS advised us for the first time that the shipment was lying undelivered at the destination as the consignee or his agent had by then refused to pay the incidental charges. We took this matter strongly regarding this discrepancy on the part of SAS that they replied to us saying that the shipment has now been abandoned after lying unclaimed for more than a year and admitted that there has been undue delay which was entirely due to the misunderstanding explained by M/s. SAS at the destination."

28. On the contrary, Mr. Rajesh Kr. Jha, learned counsel for the defendants has contended that allegations against breach of contract by the defendants centres around the fact that the consignment did not reach in time and reached after six months from the date of booking whereas airway bill dated 7.3.1981 (Exhibit PW 5/5) does not stipulate any time limit within which consignment has to reach and Therefore time was not the essence of the contract and further when the plaintiff was informed about the arrival of the consignment at the destination and refusal of consignee to take the delivery because of accruing of various incidental charges, plaintiff refused to give any alternative instructions for disposal, and as such there is no breach of contract on the part of defendants even though the liability of the defendant stopped at Frankfurt when consignment was transferred to Lufthansa and further when Lufthansa transferred the consignment to SAS Airlines.

29. Learned counsel further contended that when a consignment is booked in the carrier, the liability of the carrier is to see that the consignment reaches its destination and if the consignee refuses to accept the consignment may be for any reasons whatsoever, the obligation of the carrier is to inform the consignor either through agent or directly and at the same time ask the consignor to suggest the alternative buyer for disposal and if the consignor fails to provide the alternative mode of disposal of the consignment, the liability of the carrier ceases.

30. Learned counsel referred to plethora of documents, communications as exchanged between the defendants and the consignee and the Agent and the first such communication on receipt of information of the refusal to the consignee to accept the consignment is the letter through which defendant asked the plaintiff to suggest alternative way of disposal and moreover the plaintiff never declared that these were seasonal goods nor had they declared the value of goods and for want of these details or particulars, time was deemed not the essence of the Contract as for transmitting goods, such a party has to make extra payment and it was for want of these details that the time ceased to be the essence of the contract.

31. I am afraid none of the contentions has substance. In the airway bill, the descriptions of the goods have been given as leather shoes upper and it also mentions the value of the customs on which the plaintiff paid the necessary charges. Secondly the defendant has neither proved any document on record nor has filed any document to show that there was no time limit fixed between the parties and even if there was no time limit mentioned in the invoice, it was excepted that the consignment should reach within reasonable and minimum period and to say that six months period was reasonable does not mean that the goods can be retained or not sent to the buyer for a year or so. The fact that goods were air booked shows the urgency. Otherwise why a party should spend extra money by sending the goods through air if time is not essence. If such an interpretation is given to the terms of contract the whole of the sending the consignment through air would stand frustrated. The moment goods are dispatched by way of invoice through air cargo the expectation is that goods will reach the consignee within the reasonable period of their arrival at the airport of final destination. The defendants have already admitted in their letter dated 2.3.1983 that there has been undue delay in the delivery of the goods. As regards the liabilities of other two airlines, there was no privity of contract between the plaintiff and those airlines and if at all it was, it was between the defendants and those airlines. The parties between whom privity of contract exists are the only parties which can be saddled with liability and no other party. In the instant case, the defendant executed the airways bill with the plaintiff stating the same to be taken from Delhi to Easberg. Hence the contract of the plaintiff was entirely and solely with the defendants.

32. Now the question arises whether the plaintiff is entitled to damages and loss of reputation. May be defendants accepted to deliver consignment within

reasonable period but for failure of the defendants for any reasons whatsoever does not mean that consignor is entitled to such damages. Even otherwise plaintiff has failed to produce any document or witness to show what kind of damages or loss it has suffered from the non-delivery of this isolated consignment. Further to show that reputation of the plaintiff has gone down in foreign business market or that he on account of this did not send any subsequent consignment to its customers. Even otherwise the damages or loss of business emanating from such an eventuality is difficult to measure. In such cases parties have to prove by way of producing evidence particularly its past and prospective customers to claim the damages on account of loss of reputation.

33. This being the position of law, the liability of non-delivery of consignment in time lay upon defendant. Defendant cannot escape its liability under the guise of asking for alternative mode for disposal of the consignment. The consignee refused to take delivery on account of its late delivery because of goods having become useless and worthless. It does not mean that the defendants can unsaddle themselves from the liability merely by sending communication to the consignor as to how its consignment should be disposed of. Consignment was rendered worthless both for the consignor and consignee for non-delivery within reasonable period. The defendants are Therefore liable to compensate the plaintiff in respect of value of consignment loss of draw back as per shipping bill agents commission @ 10%.

34. As a result suit is liable to the decreed in respect of the aforesaid items and none less. As regards its claim of loss of incentive, reputation in foreign markets the plaintiff is not entitled as there was no eventuality which could have resulted in loss of incentive. The suit is being decreed solely on the ground that defendants did not deliver the consignment within reasonable time and not on any other account nor any other kind of loss or damages and incentive can be granted.

RELIEF

35. In the result, suit is decreed in respect of item nos. (i), (ii) and (iv) only i.e. for Rs. 1,15,608.75 + Rs. 3237.04 + Rs. 11,560.87 totalling Rs. 1,30,406.66/- with interest @ 12% per annum. This interest will accrue from the date of filing of suit till its realisation. Decree sheet be drawn up accordingly.