(2006) 08 DEL CK 0207

In the Delhi High Court

Case No : Regular First Appeal No. 422 of 1984

Sitamarhi Central Coopertive Bank APPELLANT

Vs

Delhi Cloth and General Mills RESPONDENT

Date of Decision : 28-08-2006

Acts Referred:

Carriers Act, 1865 — Section 10
Contract Act, 1872 — Section 191, 194

Citation : (2006) 91 DRJ 696

Hon'ble Judges : T.S. Thakur, J;S.L. Bhayana, J

Bench : Division Bench

Advocate : C.M. Chopra, in RFA No. 422/1984 and K.K. Jain, in RFA No. 405/198, for the Appellant; Shalini Kapoor, O.P. Kakkar, for R1, Rajesh Katyal, for R2 and C.M. Chopra, for R-3 in RFA No. 405/1984, for the Respondent

Final Decision : Disposed Off

Judgement

T.S. Thakur, J.—These appeals arise out of a judgment and decree passed by the Additional District Judge, Delhi, whereby suit No. 95/1979 for recovery of a sum of Rs. 36,000/- with interest pendente lite and till realization at the rate of 12% p.a. on a sum of Rs. 33089.33/- has been decreed against the appellants jointly and severally.

2. The claim made by the plaintiff arose out of negligence of the carrier resulting in the delivery of the goods to an unauthorised person and on account of the negligence of appellants- Sitamahri Central Cooperative Bank Ltd. (hereinafter referred to "SCC Bank") resulting in the loss of the documents entrusted to it for collection of the amount from the consignees.

3. The plaintiff''s case as set out in its plaint was that it had received orders for the supply of goods worth Rs. 33089.33/- to M/s. Government and semi-Government Employees Central Cooperative Stores, Sitamarhi. The said goods were dispatched vide invoices dated 31st January, 1975 through the carrier, M/s. Associated Traders and Engineers Ltd. under five different lorry receipts all dated

30th January, 1975. The invoices and the lorry receipts were to be negotiated through the defendant-Punjab National Bank with instructions to the bank to deliver the documents to the consignees after collecting the payment due to the plaintiff under the said invoices and receipts. The plaintiff''s further case was that since Punjab National Bank did not have a branch at Sitamahri where the consignee was supposed to take delivery of the goods, the collection and payment of the amount had to be arranged through appellant-SCC Bank.

4. Payment of the amount due under the bills was not, it appears, received by the plaintiff, who wrote a number of letters and reminders to the Punjab National Bank as well as to the appellant-SCC Bank, requesting them to either return the documents or pay the amount due in terms of the same. The defendant-Punjab National Bank, however, wrote back to the plaintiff that, according to the information received by it from the appellant-SCC Bank, the bills had been returned by the appellant but the same had not been received by the Punjab National Bank. Reminders issued and demands made for return of the documents or payment of the amount having proved futile, the plaintiff claimed a decree for recovery of the said amount together with interest totalling Rs. 36,000/- jointly and severally from the defendants.

5. The suit was contested by the defendants on several grounds giving rise to as many as 14 different issues. All these issues were decided by the trial Court in favor of the plaintiff culminating in a decree for a sum of Rs. 36,000/- with interest pendente lite and future at the rate of 12% p.a. on a sum of Rs. 33089.33/ and costs of the suit against defendants No. 2 & 3- appellants in these appeals jointly and severally. As against defendant No. 1- Punjab National Bank the suit was dismissed. The present appeals filed by defendants No. 2 & 3 in the suit, namely, the carrier and SCC Bank assail the correctness of the said decree and judgment.

6. We have heard, at considerable length, learned Counsel for the parties and perused the record.

7. Appearing for the appellant-SCC Bank, Ms.Chopra submitted that the said appellant did not have any grievance against the finding recorded by the trial Court on any issue except those on issues No. 3 & 9. She submitted that the trial Court had fallen in error in answering the said two issues against the appellant and in holding that the appellant-SCC Bank was negligent in handling the documents and that there was a privity of contract between the plaintiff on the one hand and the defendant appellant on the other. She urged that the evidence on record did not substantiate the alleged negligence nor was the trial Court legally correct in holding that there was a privity of contract between the appellant and the plaintiff.

8. Issue No. 3 framed by the trial Court relates to the alleged dispatch of documents by defendant No. 2 appellant before us to the Punjab National Bank, Delhi. The trial Court has upon appreciation of the evidence adduced before it

recorded a finding that the appellant Bank had not produced any documentary evidence whatsoever to establish the dispatch of the Lorry Receipts to the Punjab National Bank, Delhi and that the appellant was indeed negligent in the matter in as much it had not established any contact with the consignee or the carrier to ensure that goods were not mis-delivered, lost or damaged on account of the failure of the consignee to have the documents retired . No complaint with the police was lodged by the appellant bank regarding the loss of the documents in transit nor was the carrier instructed to take care in the matter of delivery of goods as the documents had been sent back to Delhi or lost in transit.

9. The trial Court further held that D-2W1 examined by the appellant bank had not stated that he himself had dispatched the documents to Punjab National Bank, Delhi. No one had, according to the trial Court, come forward to say that the documents in question were contained in the envelope which was sent under receipts exhibit DX-1. dispatch of the documents to Delhi was itself disbelieved s by the trial Court in these circumstances. Alternatively it was held by the trial Court that even if the documents had been sent to Delhi by post and were lost in transit, the appellant should have taken all such steps as were expected from an ordinary prudent person to avoid mis-user of the documents which the appellant had not obviously done. A complaint made to the postal authorities was not, according to the trial Court, sufficient to show due and proper diligence of a prudent person in a matter involving banking or commercial activities.

10. We have been taken through the testimony of D-2W1, Sh.Daya Prakash. As rightly pointed out by the trial Court this witness has not stated that the documents in question were dispatched by him personally in terms of postal receipt marked exhibit DX-1. The witness has, in his examination-in-chief, simply deposed that the documents were returned to defendant No. 1 under registered cover. There is no indication in the testimony of this witness as to who actually arranged the dispatch. There is no assertion that the envelope sent under the postal receipts relied upon by the defendant contained the documents in question. What is important is that the witness did not produce the bill return register in which the details of the documents allegedly dispatched by the defendant were entered even when the register was available with the defendant and could have been produced. An entry regarding dispatch is, according to the witness, made in bill return register, dispatch register and the cashbook. None of these registers were, however, produced by the witness. The relevant evidence regarding the alleged dispatch of the documents by the appellant was thus withheld from the Court. The witness also admitted that no report was lodged with the police regarding the loss of the documents nor was any letter addressed to the transporter instructing them not to deliver the goods to anyone since the documents had been lost.

11. In the totality of the above circumstances, we are inclined to agree with the view taken by the trial Court that the dispatch of the documents back to Punjab National Bank was not satisfactorily proved. We are also of the view that the

appellant bank did not take all steps that were necessary to ensure that the goods are not mis-delivered by the carrier. The finding of trial Court on issue No. 3 is Therefore affirmed.

12. The only other issue that was argued by Ms. Chopra relates to the existence of a privity of contract between the plaintiff on the one hand and the appellant-SCC Bank on the other. Issue No. 9 framed by the trial Court brought into focus that part of the controversy. The trial Court has, relying upon the provisions of Section 194 of the Contract Act, held that the appellant was a substituted agent and not a sub-agent as claimed by it. The Court noticed that the bills and the LRs entrusted to the Punjab National Bank themselves stipulated that the payment against the same shall be collected through the appellant-SCC Bank.

13. Before we turn to Section 194 of the Contract Act to examine whether the same has any application, we need to notice certain facts that stand proved. It is not in dispute that the documents had to be negotiated by the consigner and the consignee through the Punjab National Bank, Chandni Chowk, Delhi, who admittedly did not have any branch of its own at Sitamarhi where the consignee was stationed. This position was known to the plaintiff also, for the invoices entrusted to the Punjab National Bank, New Delhi clearly authorised collection of the amount covered there under through the appellant-SCC Bank. In the circumstances, it was but natural for the Punjab National Bank, Delhi to forward the documents to appellant- SCC Bank. The appointment of the appellant- SCC Bank as an agent for collection of the amount covered by the invoices was thus under the specific authority of the plaintiff consigner.

14. That apart, the plaintiff had in terms of a letter dated 4th July, 1973 specifically authorised the Punjab National Bank, Delhi to appoint an agent for presenting the bills/cheques at places where the Bank had no office of its own through an agent nominated by the latter for that purpose. The authorization was in the following words:

If you have no office at the place on which the bill is drawn, you are authorised to appoint an agent for presenting the same for acceptance or payment or delivering the accompanying documents and doing all other acts incidental thereto and such agent will be deemed to have been appointed as our agent.

15. In the light of the above, the appointment of the appellant-Bank as an agent for collecting the amount due under the bills cannot be held to be unauthorised. The question however is whether such an appointment would constitute the appellant as a sub-agent within the meaning of Sections 191 and 194 of the Contract Act. Our answer is in the negative. Section 194 reads as under:

194. Relation between principal and person duly appointed by agent to act in business of agency.-Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

16. It is manifest from a plain reading of the above that the appointment of the appellant would constitute him as an agent of the principal and not as a sub-agent. That is because the appointment was made pursuant to an express authority given to the said bank to name another bank to act for and on behalf of the principal in the matter of collecting the dues under the invoices in question. That position is made amply clear by the illustrations appearing in Section 194 which reads as under:

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A''s agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

17. The present case is akin to what is indicated in both the illustrations. The principal, namely, the consigner in the present case has authorised Punjab National Bank to appoint another bank for collecting the dues against the documents entrusted to Punjab National Bank. If Punjab National Bank does so by nominating the appellant-bank, the appellant would constitute an agent and not a sub-agent. A sub-agent is defined in Section 191 as under:

191. ''Sub-agent'' defined.- A ''sub-agent'' is a person employed by, and acting under the control of, the original agent in the business of the agency.

18. A reading of the above, and a comparison between the provisions of Sections 191 and 194 clearly brings out the difference between the two. If an agent employs another person who acts under the control of the said agent in the business of the agency, the person so appointed is a sub-agent. No element of express or implied authority for any such appointment is present in regard to an appointment made u/s 191. That is not, however, so u/s 194 where the appointment would constitute the person nominated as an agent of the principal only if the same has been made under the express or implied authority of the principal. In the present case, that is what has happened not only because the invoices themselves authorised the Punjab National Bank, Delhi to have the amount collected through the appellant but also because of the specific authorization given by the plaintiff to the Punjab National Bank. The appointment of the appellant-SCC Bank was , Therefore, one made within the contemplation of Section 194 of the Contract Act. The appellant was thus constituted as an agent bringing about a legal relationship between the two and making it liable for any tortuous act resulting in loss to the principal.

19. That leaves us with the solitary ground urged by Mr. K.K. Jain in RFA No. 405/1984. It was argued by Mr.Jain that the suit against the said appellant who happened to be the carrier of the goods is not maintainable as no notice within a period of six months was given to it by the consigner. Reliance was in support of that submission placed by Mr.Jain upon a notice marked exhibit P-33 issued by

the consigner to the Punjab National Bank and appellant- SCC Bank. It was argued on the basis of this letter by Mr.Jain that knowledge about the loss of the goods was acquired by the consigner on 3rd April, 1980 whereas the amount was demanded from the appellant carrier for the first time on 2nd February, 1976 in terms of exhibit P-27. There was thus a violation of the provision of Section 10 of the Carriers Act rendering the suit liable to be dismissed.

20. There is, in our opinion, no merit in that contention. Notice marked exhibit P-33 referred to by Mr. Jain was addressed to the Punjab National Bank and SCC Bank asking for return of the documents entrusted to them and the payment of dues against the same. The notice nowhere states that the goods have been lost, damaged or mis-delivered. There is, Therefore, no question of attributing knowledge to the consigner regarding the alleged loss or mis-delivery of the goods on the basis of the said notice. The mis-delivery of the goods on the contrary came to light for the first time when the representatives of the consigners visited the office of the carrier on 23rd December, 1975 to examine the consignee''s copies of the LRs against which the goods had been delivered. The representatives, it appears, noticed that the goods had been delivered in an unauthorised manner at Sitamarhi. This is evident from letter dated 25th December, 1975 addressed by the consigner to the carrier a copy whereof is marked as exhibit P-25. The said letter would also constitute notice regarding the loss suffered by the consigner as the same simultaneously called upon the carrier to pay the value of the consignment for having made the delivery to a wrong person. The said communication is, in our view, sufficient notice within the meaning of Section 10 of the Carriers Act. The trial Court has, Therefore, rightly held that in the absence of any prescribed format for the issue of a notice u/s 10 of the Act, the communication marked exhibit P-25 would constitute a notice.

21. It was lastly argued by Mr.Jain that the appellant-carrier had, pursuant to an order made by this Court in RFA No. 405/1984, paid the principal amount of Rs. 38,525.15/- to the decree holder. Although initially there was some hesitation on the part of the plaintiff-respondent to acknowledge the payment of the amount, counsel for the respondent eventually made a statement on instructions that the payment referred to by Mr.Jain had indeed been received by the decree holder and adjusted towards principal. The statement of Ms. Shalini Kapoor has been separately recorded to that effect. In the circumstances, all that remains is the recovery of the amount of interest awarded by the trial Court. Since the payment of the principal has been acknowledged before us in the course of these proceedings, the said payment is certified and the amount of interest awarded by the trial Court held to be the only amount recoverable from the defendants-appellants herein jointly and severally. The appeals are disposed of accordingly with that direction leaving the parties to bear their own costs.

