
(2012) 05 BOM CK 0084
In the Bombay High Court
Case No : Suit No. 793 of 1980

The National Textile Corporation Ltd.

APPELLANT

Vs

K.L. Kapadia and Others

RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Carriage by Road Act, 2007 — Section 12, 12(2), 3
Carriers Act, 1865 — Section 8, 9
Contract Act, 1872 — Section 73
Sales of Goods Act, 1930 — Section 39

Citation : (2012) 4 BomCR 658 : (2012) 114 BOMLR 2242

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : U. A. Mahajan instructed by Divekar and Co, for the Appellant; Amit H. Yadav for Defendant Nos.2 and 3, for the Respondent

Judgement

Roshan Dalvi, J.—This Suit is filed for recovery of Rs.84,931.48 with further interest of Rs.79,468.06 @ 6% per annum from the date of the Suit till Judgment and thereafter @ 6% per annum till payment. The plaintiff entered into an agreement with defendant No.1 for appointing defendant No.1 his authorized retail stockist for marketing the fabrics produced by the plaintiff. The plaintiff supplied fabrics from time to time under 11 bills in June, 1978 aggregating to Rs.79,468.06. The goods were sent through defendant No.2 to defendant No.1 under the 10 lorry receipts issued by defendant No.1. Defendant No.2 was required to deliver the goods to defendant No.2 under the lorry receipts duly discharged by defendant No.1 as the consignee. The plaintiff handed over the lorry receipts and bills to defendant No.2.

2. It is the case of the plaintiff that defendant No.2 delivered the goods to defendant No.1 but failed to get the lorry receipts discharged when defendant No.1 took delivery of the goods against the documents of the plaintiff's banker—Central Bank of India. Defendant No.1 failed to honour the documents presented by the plaintiff's banker which were returned to the plaintiff.

3. The case of the plaintiff against defendant No.1 is for the price of the goods delivered to defendant No.1 in the aforesaid manner. The case of the plaintiff against defendant No.2 is upon their breach in the contract of carriage as also breach of trust in delivering the goods without obtaining the lorry receipts duly discharged. The plaintiff seeks to hold both the defendants jointly and severally liable for the price of the goods.

4. In his written statement defendant No.1 has denied the delivery of the goods to him. Defendant No.1 has admitted the presentment of the documents along with lorry receipts by the plaintiff's banker through State Bank of India. Defendant No.1 claims that he could not have made arrangement for the payment of the entire amount of the goods at one time and the plaintiff was not supposed to send the goods of such a big value at one time. Defendant No.1 has accepted that he was supposed to retire the documents by making payments of the bills but has contended that if the goods were delivered at some intervals of time, he would have retired the documents and made payments upon selling the goods in the market. Defendant No.1 has accordingly denied the breach of his agreement with the plaintiff by non payment of the price of the goods either jointly with defendant No.2 or severally.

5. Defendant No.1 has further claimed that later in October, 1978 he purchased the plaintiff's goods under 3 different bills and made payment of those bills. The plaintiff obtained receipts thereupon. Defendant No.1 has relied upon the 3 bills and the receipts issued by the plaintiff.

6. In its written statement defendant No.2 has admitted that in June, 1978 11 consignments of fabrics were discharged by the plaintiff to defendant No.1 through defendant No.2. The consignments were duly delivered to defendant No.1. Defendant No.2 has however denied the requirement of having them discharged by the consignee. Defendant No.2 claims to have received the goods under lorry receipts as per the terms and conditions set out in those lorry receipts. Defendant No.2 has contended that consignments sent to any named person would be delivered directly and the suit consignment was addressed to defendant No.1 by name and was hence directly delivered to defendant No.1 at the place of destination. Defendant No.2 relies upon the letter dated 26th June, 1979 in which the receipts of the goods is admitted by defendant No.1 consequent upon which it claims that defendant No.2 has fully complied with the terms of the agreement and not committed any breach thereof. It is further contended that defendant No.2 was informed not to deliver the goods except by presentation of original lorry receipts. In its written statement defendant No.2 has not produced any documents evidencing any receipt by defendant No.1 of the goods of the plaintiff delivered by defendant No.2.

7. Based upon the aforesaid pleadings Justice D. G. Deshpande as he then was framed following issues on 06.06.2000 which are answered as follows:

ISSUES

1.

Whether the plaintiffs prove that under the contract of carriage and/or in General Law, defendant No.2 committed breach of the same by delivering the goods to the defendants No.1 without obtaining discharge of the Lorry Receipt?

Yes.

2.

Whether the plaintiffs prove that the defendant No.1 has committed breach of the contract by not retiring the documents against payment in respect of the suit goods

No.

3.

Whether the defendant No.2 prove that defendant No.2 delivered goods under Lorry Receipts to defendant No.1

No.

4.

Whether the plaintiffs are entitled to a decree either jointly or severally against the defendants or defendant No.2 in the sum of Rs.84,931.48 p. with interest on the sum of Rs.89,468.06 at the rate of 6 per cent per annum as claimed in the plaint

Yes against

defendant No.2

5.

What order and decree?

As per final
order

8. The plaintiff has led evidence of its officer. Defendant No.1 has examined himself. Defendant No.2 has led evidence of its partner and 2 other witnesses who are its employees. The bills raised by the plaintiff as also the goods delivered thereunder are admitted by defendant No.2 who has defended the suit in the trial. In fact defendant No.2 has produced the original lorry receipts and the duplicate motor lorry receipts in respect of the suit consignments. What happened with the suit consignments would, therefore, have to be ascertained from the oral evidence of the parties. Consequently the original invoices and the banker's documents of the plaintiff are not required to be proved. The plaintiff has relied upon copies of the documents evidencing 11 consignments admittedly dispatched by the plaintiff which may be read in evidence if required. Defendant No.2 has relied upon a letter dated 26th June, 1979 showing the admission of the receipt of the goods by defendant No.1. This letter is not proved in evidence.

ISSUE NO.1 :

9. It is admitted that the plaintiff had sent 11 consignments of fabrics to defendant No.2 to be delivered to defendant No.1. Defendant No.2 claims that the goods are so delivered. However these lorry receipts are not discharged by defendant No.1 by payment. The consignments are sent under the respective lorry receipts dated 30th June, 1978. The lorry receipts show the consignments of the goods subject to the terms and conditions mentioned overleaf. The terms and conditions are in Gujarati language. They have not been translated. Condition No. 8 of the terms and conditions on the reverse of the lorry receipts shows that the goods addressed to self would be delivered on duplicate receipt and the goods in the name of a particular party would be delivered only upon that party. Counsel on behalf of defendant No.2 relied upon this clause. The clause does not rule out obtaining any receipt evidencing the delivery of the goods. When defendant No.2 states that the goods have been delivered, defendant No.2 must prove the same. That could be proved only by the consignee receipting such delivery. Whether or not the lorry receipt is addressed to a specific party named (as in this case) as consignee, which must be directly delivered to that party itself, it cannot be presumed that the goods were delivered at any time and place. It cannot also be said how much of the goods delivered were received except by a receipt evidencing the delivery. This is a general law as regards proof of an act u/s 39 of the Sale of Goods Act, 1930 (SGA) which runs thus:

39. Delivery to carrier or wharfinger.- (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer

Hence upon the admitted delivery of the goods by the plaintiff to defendant No.2, plaintiff would treat the same as delivery to defendant No.1. It was the responsibility of defendant No.2 to deliver to defendant No.1 and prove it by the signature of receipt of defendant No.1 on the lorry receipts. This is not shown by defendant No.2. The terms of the lorry receipts show the contract between the plaintiff and defendant No.2 which the plaintiff made on behalf of defendant No.1 having regard to the fact that consignments were to be delivered as per the invoices of the plaintiff to defendant No.1. The plaintiff complied with the terms of Section 39 of the SGA. Defendant No.2 did not. The plaintiff itself would have been liable for redelivery and in default for damages if defendant No.1 had insisted upon such delivery. The plaintiff would have nothing to show that the goods were delivered to its carrier and would be liable for the acts or omissions of its agent. Hence the plaintiff's claim upon defendant No.2 upon the admitted delivery of the consignments to defendant No.2 for delivery to defendant No.1, defendant No.2 would be liable to the plaintiff for the amounts on the invoices which the plaintiff would have been able to recover from defendant No.1 if the plaintiff could have shown and proved the delivery to defendant No.1. And such proof would be contained in only the lorry receipts returned by defendant No.2 to the plaintiff duly signed by defendant No.1 in acknowledgment of the delivery.

10. Non obtaining a receipt would, therefore, constitute a breach of the contract. It tantamounts to a negligent act or an act in breach of trust reposed by the plaintiff in defendant No.2 to deliver the goods and evidence delivery. For such default by defendant No.2, it would have to bear the compensation u/s 73 of the Indian Contract Act, 1872, the relevant part of which runs thus:

CHAPTER VI

OF THE CONSEQUENCES OF BREACH OF CONTRACT

73. Compensation for loss or damage caused by breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it

11. This is analogous to Section 8 of the Carriers Act, 1865 and Section 12 of the Carriage by Road Act, 2007, the relevant parts of which run thus :

8. Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.- Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any [property delivered] to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants [and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made,

where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants].

12. Conditions limiting exonerating the liability of the common carrier.- (1) Every common carrier shall be liable to the consignor for the loss or damage to any consignment in accordance with the goods forwarding note, where such loss or damage has arisen on account of any criminal act of the common carrier, or any of his servants or agents.

Not proving the delivery of goods by the lorry receipts duly discharged by defendant No.2 is sufficient to prove its neglect or negligence. The plaintiff does not have to prove any such negligence under the separate provisions of Section 9 of the Carriers Act and Section 12(2) of the Carriage by Road Act, 2007, the relevant parts of which run thus:

9. Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.- In any suit brought against a common carrier for the loss, damage or non delivery of [goods (including container, pallet or similar article of transport used to consolidate goods) entrusted] to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.

12.(2) In any suit brought against the common carrier for the loss, damage or non-delivery of consignment, it shall not be necessary for the plaintiff to prove that such loss, damage or non delivery was owing to the negligence or criminal act of the common carrier, or any of his servants or agents.

Consequently the plaintiff would be entitled to receive from defendant No.2 compensation for the loss and damage caused to the plaintiff by non delivery or lack of proof of delivery of the goods sent to defendant No.1 which is the amount under the invoices of the plaintiff drawn upon defendant No.1 which the plaintiff could have claimed from defendant No.1 by proving the delivery of the goods to defendant No.1 through the lorry receipts got acknowledged by defendant No.2 from defendant No.1 evidencing the delivery of goods. Consequently the plaintiff has proved the breach committed by defendant No.2 in delivery of the goods under the consignments. Hence Issue No.1 is answered in the affirmative.

ISSUE NO.2 :

12. Defendant No.1 has not admitted receipt of the goods sought to be delivered by the plaintiff. Defendant No.1 has in fact shown that the few months thereafter the plaintiff delivered the goods under 3 bills which came to be paid by defendant No.1 and which payment has been receipted by the plaintiff. Of course, the suit consignments were not retired by payment. Defendant No.1 has claimed that all the consignments delivered on a single date could not have been paid by defendant No.1 and that the delivery should have been staggered over a period of days. Defendant No.1 has admitted that it has not made payment when the

goods were presented by the plaintiff's banker through State Bank of India. However it is denied that the goods were received by defendant No.1. The fact of the receipt claimed by the plaintiff is not proved by the plaintiff in the absence of the lorry receipts duly discharged showing the receipt of goods upon payment and that is because of the breach and default of the part of defendant No.2 in not obtaining receipt or such discharge.

13. Besides the receipts of the goods relied upon by defendant No.2

pursuant to the admission of defendant No.1 under a letter dated 24th June, 1979 has not been proved by defendant No.2. Such receipt is, therefore, not proved and cannot be presumed by the Court. Consequently the breach by defendant No.1 is not proved. Hence Issue No.2 is answered in the negative.

ISSUE NO. 3 :

14. Defendant No.2 claims to have delivered the goods to defendant No.1 who was named in the invoice of the plaintiff. That claim cannot be proved in the absence of receipts of defendant No.1 made on the lorry receipts sent through the plaintiff's banker along with the goods.

15. The partner of defendant No.2 has led evidence to show how he retrieved the old documents from his firm through his employees being a booking clerk who was preparing lorry receipts and the delivery man who delivered the goods. He has set out the usual course of conduct of delivery. He has however admitted that defendant No.2 delivers goods to the consignee without waiting for the consignee's receipts only when the consignee is known to defendant No.2. He has further deposed that the goods were delivered to consignee in case the name of the consignee is specifically mentioned in the lorry receipts. However that does not mean that the goods can be delivered without obtaining proof of the delivery which would be by a receipt. There is no case made out by defendant No.2 that defendant No.1 was known to defendant No.2 on 02.07.1978 when the suit consignments were delivered to defendant No.1 such as not to obtain the receipt of defendant No.1. In any event non obtaining the receipt or acknowledgment of the goods evidencing delivery of the goods by defendant No.2 as the courier would be at the risk of defendant No.2 for not showing proof of delivery.

16. Defendant No.2 has further led evidence to identify original

motor lorry receipts dated 30.06.1976 bearing Nos. 8256, 8257, 8258 & 8268. He has deposed that these are given to drivers with perforation to be torn and to obtain signatures of the parties to whom the goods are delivered. The 4 motor lorry receipts are without perforation in the handwriting and signature of Narendra Thakkar, an employee of defendant No.2.

17. He has also deposed about the duplicate motor lorry receipts prepared by one Umarshi Bharmal Shah for goods to be delivered by one Manubhai Patel. He has deposed about how Manubhai actually delivered. Since that was hearsay

evidence Manubhai has been examined as DW 4 to prove the documents written by Narendra who has been examined as DW 3. The evidence of these witnesses thus becomes material to consider.

18. Though defendant No.2 has referred to only the Suit 10 lorry receipts in respect of the suit consignments in his written statement, it has produced and sought to prove 4 lorry receipts along with 5 duplicate motor lorry receipts through its witnesses. The original lorry receipts show no acknowledgment of receipt of the consignee. The duplicate motor lorry receipts show handwritten acknowledgments at the foot thereof of one Patel on behalf of defendant No.1.

19. DW 3 one Narendra Thakkar has deposed that the duplicate

motor lorry receipt Nos.8256, 8257 & 8258 out of 5 motor lorry receipts produced by defendant No.2 are in his handwriting and motor lorry receipt No. 8268 is in the handwriting of one Liladhar Lalji Thakkar who was his colleague and who assisted him in preparing the motor lorry receipts. He deposed that both of them were authorized to sign the motor lorry receipts. There is no evidence with regard to motor lorry receipt No. 8259.

20. The duplicate motor lorry receipts sought to be relied upon by defendant No.2 are printed to show "quadruplicate receipts". The printed numbers are scored off so as to make them wholly illegible. The numbers of the Suit 4 lorry receipts, the originals of which are produced by defendant No.2 are written in ink on the duplicate motor lorry receipts. The handwriting in all the 5 motor lorry receipts are identical though they are shown to be in the handwriting of 2 different persons. These documents were not relied upon in the written statement.

21. The evidence of one Manubhai Patel, DW 4 another witness of defendant No.2 is that he actually delivered the goods under the duplicate motor lorry receipts. He used to go to nearby towns to deliver goods in June-July 1978 along with the motor lorry. One Umarshi Bharmal Shah, his colleague in Valsad office had asked him to prepare duplicate motor lorry receipts. This was upon a telephone call received from defendant No.1 by the Valsad office of defendant No.2. The phone call was that defendant No.1 has received the goods purchased by him from the plaintiff through defendant No.2 on 02.07.1978. Defendant No.1 asked him to bring duplicate motor lorry receipts as he did not have consignee's copies for the delivery made to him. Defendant No.1 directed his employee one Patel to sign the duplicate motor lorry receipts to acknowledge lorry receipts for the goods purchased by him from the plaintiff as the same was delivered to defendant No.1 by him on 02.07.1978. He deposed that the duplicate motor lorry receipts were in the handwriting of Umarshi Bharmal Shah whose handwriting he identified.

22. The above evidence has to be read along side the oral evidence

of DW 3 Narendra Thakkar who deposed that the original motor lorry receipts in

his handwriting. A duplicate is required to be made at the same time. A duplicate would be a copy of the original. It is not known why the original is in the handwriting of one employee and duplicate is in the handwriting of another employee of defendant No.2.

23. Besides the evidence of DW 4 Manubhai Patel on behalf of

defendant No.2 shows what he remembered from memory in 2009 of what had transpired in 1978, 2005, 2007 & 2008. His evidence shows that he delivered the goods personally in June-July 1978. His evidence shows that the partner of defendant No.2 Shashikant Dhanotra DW 2 inquired with him about this delivery in 2005, December, 2007 and January, 2008 and he narrated to him the above evidence as of his personal knowledge from memory. The evidence of Shashikant Dhanotra shows how the documents were retrieved from the office of defendant No.2 as they were such old documents. The fact that the duplicate motor lorry receipts have different numbers which are scored off and the numbers of original motor lorry receipts are written in ink as also the fact that they are admittedly in the handwriting of 2 different employees are pointer to the fact that these are not genuine documents executed at the time of the transaction decades ago in 1978.

24. The oral evidence of Manubhai about how defendant No.1 called him with the duplicate motor lorry receipts only to sign them because he had not received the original lorry receipts though he had received the goods is difficult to accept as truthful evidence. There was no reason for the consignee to call for the duplicates to have them signed when he was not called upon to sign. The goods are stated to have been delivered on 02.07.1978. When the telephone call was received is not mentioned in the affidavit of examination-in-chief of Manubhai Patel. The duplicate motor lorry receipts are signed by one D. Patel on behalf of defendant No.1 on 02.07.1978. The evidence does not show that all these happened in a single day. The oral evidence of defendant No.4 deserves to be rejected.

25. The documentary evidence relied upon by defendant No.2 with regard to duplicate motor lorry receipts showing that they are quadruplicates bearing scored off numbers have not been produced in the written statement of defendant No.2. These documents were required to be specifically shown to defendant No.1 in his cross-examination. That has not been done. Counsel on behalf of plaintiff drew my attention to an innocuous but important portion of the evidence under question Nos. 107 & 108 of the cross-examination of defendant No.1 when he was asked who Manubhai was and whether he was coming to defendant No.1 for delivery of the goods. Defendant No.1 replied that he did not know Manubhai. He also replied that he did not know who was coming to deliver the goods.

26. All the goods under the suit transaction are sought to be delivered on 02.07.1978. Hence only a single person would have gone to deliver the goods.

The only other deliveries are in October, 1978 shown by defendant No.1. DW 4 Manubhai Patel has not deposed about those deliveries. Hence there nothing to show that over a period of time several consignments were delivered by defendant No.2 to defendant No.1. The delivery would be essentially only by Manubhai. Defendant No.1 may not remember Manubhai as vividly and distinctly as Manubhai remembers defendant No.1 accepting the delivery. It was, therefore, that defendant No.1 was required to be confronted with the duplicate motor lorry receipts shown to be quadruplicates. That was not done. The case made out by defendant No.2 against defendant No.1 of delivery of goods, therefore, cannot be accepted.

27. The case of defendant No.2 that defendant No.1 is shown to substantiated because that letter is also not shown to defendant No.1 in his cross-examination nor is it otherwise proved.

28. Consequently the evidence led by defendant No.2 of its partner and sought to be corroborated by its employees DW 3 & DW 4 is not credible and is in fact seen to be false. It is, therefore, required to be rejected. Consequently defendant No.2 has not proved that defendant No.2 delivered the goods under the lorry receipts to defendant No.1. Hence Issue No.3 is answered in the negative.

ISSUE NOS. 4 & 5 :

The plaintiff is, therefore, entitled to the decree as prayed against defendant No.2.

ORDER

The Suit is decreed as prayed against defendant No.2. The plaintiff shall be entitled to encash the demand drafts given by defendant No.2 for part of the plaintiff's claim and deposited in this Court in part satisfaction of the decree in this Court.