

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CS(OS) 347/2001

Reserved on 20th February, 2008

Date of decision : 22nd February, 2008

AIR INDIA LTD.

..... Plaintiff

Through Mr. Amit Shukla, Advocate

versus

SHAMA AIRWAYS PVT. LTD. & ORS.

..... Defendants

Through none.

CORAM:

Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Mr. Justice S. Ravindra Bhat

1. That the plaintiff is a Company having its registered office at Hansalaya Building, 5th Floor, 15, Barakhamba Road, New Delhi – 110 001 and is engaged in the business of carrying of the passengers and cargo by air within India and also abroad. For sake of

brevity it is hereinafter referred to as “plaintiff company”. It is represented thorough Ms. Sulekha Srivastava, Asst. General Manager (Commercial) who is well conversant with the facts and circumstances of the case. She is authorized and is competent to file, sign and institute the present suit by the Delegation of Power dated 15.06.1996.

2. The plaintiff avers that the defendant No.1 is a private Limited company and is engaged *inter-alia* in the business of sale of passenger air tickets. Defendant No.1 was an IATA approved Passenger Sales Agent having IATA having IATA Code No. 14-337665 through letter of appointment bearing No.R800/061/dg dated 11th May, 1993. Defendant No.2 is the Managing Director of defendant No.1 and defendant No.3 is the Director of the defendant No.1. Defendant No.2 and 3 are in complete control and are responsible for the conduct of business and affairs of the defendant No.1.

3. The plaint avers that on the basis of representation and request made of the defendant No.2 and 3, the Defendant No.1, it was appointed by the plaintiff as the agent for sale of tickets (domestic and international) sometimes in the year 1993. In terms and conditions of agency, the defendants were required to remit the sale proceeds of passenger tickets to the plaintiff company at the end of every fortnight. To effect the sale of passenger tickets the plaintiff company had provided the defendant with blank

passenger air tickets (cash value documents). The defendants at the end of every fortnight were required to furnish to the plaintiff company the complete details regarding sale of tickets, details of sector and the fare charged from the passenger, while remitting the amount to the plaintiff company.

4. It is averred that in acknowledgment of terms and conditions of the appointment of the defendant No.1 as sales agent, it furnished a bank guarantee No.36194 dated 10th May, 1994 for the sum of Rs.10 lakhs in favor of the plaintiff company towards the performance of the contract. In terms of in terms of the passenger Sales Agency agreement, the defendant No.1 was entitled to a fixed commission on the value of tickets sold.

5. The plaintiff avers that the defendants sold passenger air tickets of plaintiff company and thereafter failed to remit the proceeds on account of sales of passenger tickets. The total amount outstanding is as follows :

Period of Sale

(i)	16 to 31.12.1997	50,42,960
(ii)	16 to 31.12.1997	19,91,010 (Suppl)
(iii)	01 to 15.01.1998	7,99,155
(iv)	16 to 31.01.1998	(Suppl)

(v) 16 to 31.01.1998 17,340 (Suppl)

Total : 81,79,840

6. It is averred that the defendants failed to remit the proceeds within the stipulated period at the end of fortnight and also failed to furnish the details to the plaintiff company of substantial number of tickets which were sold by them. The plaintiff, upon verifying its records found that the defendants were holding 513 unaccounted tickets of which the defendants 358 were utilized to the extent of approximately Rs.71.65 lakhs. It is alleged that the defendants are still in possession of 155 unutilized tickets (Cash Value Documents). The defendants, in utter breach of the terms of appointment failed to account for the tickets.

7. That in order to discharge part liability of the plaintiff company for the sale of tickets for the period 16.12.97 to 31.12.1997, the defendants No.2 and 3 on behalf of defendant No.1 tendered a cheque bearing No. 074223 dated 15.01.1998 for the sum of Rs.45,92,539. The said cheque was drawn on the Jammu & Kashmir Bank Ltd., Connaught Place Branch, New Delhi. The plaintiff company deposited the cheque with their banker, the Bank of Baroda, Parliament Street Branch for realization from the

defendants' banker. However, the said cheque was returned unpaid by the plaintiff's bank through the memo dated 21st January, 1998 with remarks "not sufficient funds".

8. The plaintiff company then caused a notice dated 05.02.1998 issued through its counsel under Section 138 of Negotiable Instruments Act to the respondents. However, the defendants failed and neglected to pay their admitted dues of Rs.45,92,539 even after the statutory period. The plaintiff company finally filed a complaint before the Additional Chief Metropolitan Magistrate, Patiala House, New Delhi u/s 138 of Negotiable Instrument Act and the same is pending adjudication.

9. The plaintiff alleges that the defendants are liable to pay Rs.81,79,840/- (Rupees eighty one lacs seventy nine thousand eight hundred and forty only) towards the gross amount of sale proceeds for the periods as stated in para 9 of the plaint. Apart from this they are also liable to pay an amount of Rs.71.64 lakhs on account of unaccounted 358 utilised tickets. Thus the total of Rs.1,53,43,840 is due from the defendants. It is alleged that according to prevalent regulations of the plaintiff company, if a ticket is not accounted for or surrendered by the agent, then he is liable to be charged the maximum fare on the longest sector for which that ticket can be used.

10. That the defendants made part payment of Rs.10,52,539 through pay order on 22.01.1998 and a cash payment of Rs.1,00,000/- on 27.01.1998 towards payment of

outstanding dues lying in the credit of defendants. The plaintiff also received a pay order No. 116360 dated 23.02.1998 for Rs.10 lakhs from J & K Bank against the bank guarantee provided by the defendants. After deducting the above amounts the total amount due and payable by the respondents is Rs.1,31,92,401/-.

11. Despite service of summons, through publication, the defendants did not appear in the suit; they were set down *ex-parte* on 12-4-2005. The plaintiff relied on affidavit evidence in support of its case and also produced documents.

12. In support of its case, the plaintiff relied upon the affidavit evidence of Ms. Rohita Jadika, its commercial manager, dated 19th July, 2005. The witness generally supported the plaintiff's averments. She also marked documents Exhibit P-1/1 to Exh. P-1/16. These include the notices issued to the defendant; certified copy of the complaint filed, cheque issued by the defendant, the memo of the plaintiff's bank, informing that the cheque was not honoured, letter of appointment of the defendant as the plaintiff's agent; the list of tickets and the amounts recoverable from the defendants and unanswered letters of the plaintiff.

13. It is apparent from the above discussion that the plaintiff had entered into an agreement with the defendants, whereby the latter was nominated as their agent, for selling air tickets. According to the plaintiffs, during the period 1996-1998, though the

defendants was issued 513 tickets which were utilizable, they failed to settle accounts for them, which they were bound to every fortnight. The terms of the agreement between the parties have not been brought on record. A photocopy of the agency agreement entered into in 1993 was filed; yet, the plaintiff did not produce the originals and mark it in the evidence. The evidence available therefore, is confined to letters written to the defendants demanding payment of amounts for the sold and unsold tickets, on 2-3-1998; it is Exh. P-1/6. The details for the amount claimed, i.e Rs. 1,31,92,401/- is Exh. PW-1/7. This document, and other such documents, however are not extracts of books of account; they were not produced at the time of filing the suit. There is no averment in the affidavit that the lists are true extracts of ledgers containing the account of the defendants.

14. The plaintiff, as observed in the preceding paragraph, has not produced the terms of the agreement. In the absence of any express terms, or rules and regulations which bind the parties, either contractually or in law, the claim of the plaintiff as regards unsold tickets, numbering 155 is not sustainable. One can understand that an agent, entrusted with a tradeable commodity though in a position to use it, is unable to do so; it may lead to diminution in value or loss of goods. Subject to rules of appropriation of such goods, the party may be sued for value of goods. Here, however, the defendants were given tickets for sale. 155 of those could not, or were not sold. No evidence was led to show

that the tickets had the effect of blocking a particular segment of any sector, or did so, during any period. In these circumstances, the claim for the notional farthest value of the tickets, in any sector of the plaintiff cannot be granted, without any proof of damage. Thus, the claim as far as it relates to the sum of Rs. 71, 64,000/- has to fail.

15. As noticed earlier, the plaintiff did not produce any extract of its ledger or any book of account; the same was not also produced or noted when the suit was filed. Therefore, the claim for Rs.81,79,840/- (Rupees eighty one lacs seventy nine thousand eight hundred and forty only) towards the gross amount of sale proceeds for the periods as stated in para 9 of the plaint are based only on assertions, except as far as they concern the amounts forming part of the cheque issued by the defendants, which were dishonoured. In the circumstances, the plaintiff cannot be said to have proved the entirety of that claim. What however, has been proved is that a cheque was issued to the plaintiff by the defendant for Rs.45,92,539/-. That cheque was not honoured; a criminal complaint is pending before the competent court.

16. In view of the above discussion, the plaintiff, in the opinion of the court, has been able to prove its case for a decree in the sum of Rs.45,92,539/-. The transactions between the parties was a commercial one, as the defendants were the plaintiff's agents. They did not make any attempt to pay up the amounts. Therefore, the plaintiff is also entitled to

pendente lite and future interest @ 10% p.a. on the said amount. The plaintiff shall also disclose the present judgment to the court trying the complaint preferred by it.

17. The suit has to therefore, partly succeed. It is therefore, decreed against the defendants, to the extent of Rs.45,92,539/- with *pendente lite* interest @10% p.a from the date of institution of the suit till realization, with costs. Let decree be drawn in these terms.

DATED: February 22, 2008

(S. RAVINDRA BHAT)
JUDGE