

IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA No. 132/2005

Judgment delivered on: 16.11.2010

Container Corporation of India Ltd. Appellant

Through: Mr. S.C. Rajpal for the
appellant.

Versus

M/s Delhi Assam Roadways
Corporation Ltd. Respondent

Through: Mr. Manu Beri for the respondent.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR,

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

KAILASH GAMBHIR, J. Oral:

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1. By this appeal filed under Order 41 Rule 1 and Section 96 of the Code of Civil Procedure, 1908, the appellant seeks to set aside the judgment and decree dated 25th October,

2004 passed by the Court of the learned Additional District Judge, Delhi whereby the suit for recovery was decreed in favour of the respondent.

2. Brief facts of the case relevant for deciding the present appeal are that the respondent approached the appellant company at its Bangalore office for transportation of 115 tyres for carriage to New Delhi. That the respondent alleged that there was short delivery of 16 tyres in the said consignment and on intimating the said fact to the appellant there was a survey conducted by the appellant which report stated that the delivery was made with seals intact and no shortage was reported at the time of delivery by the respondent. Consequently, the respondent served a legal notice dated 21.8.2002 on the appellant, but on the failure to pay the said amount of Rs.1,20,000 as price of 16 tyres, the respondent filed a suit for recovery which vide judgment and decree dated 25.10.2004 was decreed for an amount of Rs. 1,20,000 alongwith interest @ 12% from the date of notice. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Counsel for the appellant submits that the respondent had booked the consignment vide inland way bill No. 022181 “on said to contain basis” and, therefore, loading and unloading of the goods was never supervised by the staff of the appellant. Counsel further submits that the respondent had never raised any protest at the time of the delivery of the goods, which fact apparently would show that the goods were not short delivered. Counsel for the appellant further submits that no gate pass of the said consignment could be issued to the respondent on 26th June, 2000 as the goods were received by the appellant only on 27th June, 2000 and the delivery of the same was taken by the respondent on 27th June, 2000. Counsel for the appellant further submits that the learned Trial Court has failed to consider the extracts of the cargo gate register placed and proved on record by the appellant as Exhibits DW 1/1 to DW 1/3, which clearly indicates that the respondent had taken the delivery of the said goods on 27th June, 2000. In support of his arguments, counsel for the appellant has placed reliance on the judgment of the Bombay High Court in *M/s Pawan Oil Industries vs. Union of India* AIR

2006 Bombay 109. The contention of counsel for the appellant is that when the containers reached intact and there was no tampering or damage to the same, then there could not have been any shortage of the goods, which were loaded by the respondent itself being the consigner at the place from where the goods were loaded. Counsel for the appellant also submits that in the cross-examination the respondent took various inconsistent stands by even denying that the goods were not carried out by the appellant in three containers but in two containers. The respondent also denied to have booked the machine along with the consignment of tyres besides denying the fact that the goods were taken in five trucks. Counsel further submits that Exhibit PW- 1/10 was not proved on record by the respondent in accordance with the law as no witness was produced by the respondent from the company, who had issued the letter Exhibit PW 1/10. Counsel for the appellant further submits that the respondent did not disclose in the plaint as to whether the consignment was received with the original seal/intact seals or with the tampered seals. Counsel further submits that no

replication was filed by the respondent to refute the submissions of the appellant made in the written statement. Based on these submissions, counsel for the appellant submits that there is a clear illegality and perversity in the order passed by the learned Trial Court and the same is liable to be set aside.

4. Counsel for the respondent on the other hand submits that the respondent had immediately informed the appellant about the short delivery of the goods on 28th June, 2000 with clear reference to the said gate pass. Counsel further submits that validity of the said gate pass was never questioned by the appellant in reply to the said letter and it is for the first time in its written statement such a false stand was taken by the appellant. Counsel for the respondent has further placed reliance on the copy of the survey report proved on record as Exhibit PW- 1/7, which clearly shows that there was a short delivery of 16 tyers. Counsel for the respondent further submits that the said survey report was submitted by the surveyor appointed by the appellant itself. Learned counsel for the respondent further submits that the respondent had

reimbursed the cost of said 16 tyres to its customer and a letter to this effect received from the customer of the respondent was proved on record as Exhibit PW- 1/10.

5. I have heard learned counsel for the parties at considerable length and have perused the records.

6. Counsel appearing for the appellant laid much emphasis on the inland way bill No. 022181 proved on record as Exhibit PW1/D1 to support his argument that the consignment in question was booked by the respondent "on said to contain basis". Perusal of inland way bill also discloses the nature of the articles booked by the respondent and loaded in the three containers, but nowhere it discloses the quantity of tyres loaded in the packages stuffed in the containers, therefore, the inland way bill does not give any picture of the exact quantity of tyres booked and loaded by the consigner i.e. the respondent herein.

7. The respondent in the suit has claimed short delivery of 16 tyres and the prime document on which the respondent based its claim is the gate pass issued by the appellant at the time of the delivery of the said consignment. The genuineness

of the said gate pass which was proved on record as Exhibit PW 1/4, that indicates the delivery of 99 tyres on 26.6.2000, has been strongly disputed by the counsel for the appellant. The appellant has even disputed the correctness of vehicle number mentioned in the said gate pass. Counsel for the appellant has also claimed that there was no damage to the parcels or tampering in the seals of the containers and, therefore, there could not have been any possibility of any kind of pilferage or shortage of the items loaded by the respondent itself. No doubt these pleas raised by the appellant carry much weight but such pleas in the absence of any corroborated evidence cannot stand on a firm footing. It was for the appellant to have produced the relevant records to prove and establish the fact as to how many parcels were off loaded on the date when the consignment had reached the place of destination and then transported in various trucks/lorries. It was also incumbent upon the appellant to have produced a witness to prove that the parcels were intact and there was no tampering with the seal of the containers. In the absence of any such evidence led by the appellant, the

learned Trial Court rightly relied upon the gate pass proved on record by the respondent as Exhibit PW 1/4. So far the question as to whether the respondent had loaded 115 tyres from Bangalore, it is suffice to mention that the survey report proved on record as Exhibit PW 1/7 sufficiently proves that in all 115 tyres were stuffed in the containers at Inland Container Depot, Bangalore. The said survey report also clearly specifies that the quantity, as per the lorry receipt, were found to tally and thereafter the same were acknowledged by the transporters and then the containers were sealed in the presence of all concerned. It is pertinent to mention here that the surveyors were appointed at the instance of the appellant and, therefore, the appellant cannot dispute the correctness of the said survey report. No investigation report was placed on record by the appellant so as to refute the claim of the respondent although the appellant clearly took a stand that the matter was being investigated into. Section 81 of the Railways Act, 1989, on which reliance is placed by the counsel for the appellant is not applicable to the facts of the present case. Section 81 of

the Railways Act envisages open delivery of consignments where the consignment arrives in a damaged condition or shows signs of having been tampered with whereas in the present case the respondent had complained short delivery of 16 tyres but no such plea was taken by the respondent that it took open delivery of the consignment. The judgment of the Bombay High Court reported in *M/s Pawan Oil Industries (supra)* is also of no help to the case of the appellant as in the said case the consigner had not complied with the prescribed packing conditions and the Railway receipt duly recorded such non-compliance of the packing conditions by the consigner while in the facts of the present case no such case was set up by either of the parties.

8. In the light of the above discussion, I do not find any perversity or illegality in the order passed by the learned Trial Court.

9. There is no merit in the present appeal and the same is hereby dismissed.

November 16, 2010

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KAILASH GAMBHIR, J