

* **HIGH COURT OF DELHI : NEW DELHI**

+ **CS(OS) No.908/2002**

% Judgment decided on: 06.09.2011

M/S NICTO ROADWAYS LTD. Plaintiff
Through: Mr K.R. Gupta, Adv. with Mr Nitin
Gupta, Adv.

Versus

M/S PRIYA INTERCONTINENTAL & ORS. Defendants
Through: Nemo.

Coram:
HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. The present suit has been filed by the plaintiff for recovery of Rs.40,04,966/- against the defendants along with pendente lite and future interest until realization.

2. It is stated by the plaintiff company that it is a public road transport common carrier that also owns the unit known as Nitco Air

Express which works as cargo booking agents with various Airlines for transshipment of consignments to Indian as well as foreign destinations.

3. Defendant No.1 is a partnership firm and defendant Nos. 2 to 5 are its partners. It is stated by the plaintiff that the defendants have been availing the services the plaintiff's said unit at Delhi. Further, it is said that between 22.05.1999 and 17.08.2000 the defendants availed the services of the plaintiff's said unit on credit vide 18 bills for Rs.27,93,162/- (the details of the bills is given in para 2 of the plaint) and after various requests from the plaintiff to the defendants to clear the said amount the defendants issued 15 cheques of the Central Bank of India. However, when the plaintiff presented these cheques for payment at the bank, they were dishonoured. The details of which is given in para 3 of the plaint.

4. The plaintiff issued notice to the defendants asking them to make the payment in lieu of the cheques, but, since the defendants failed to make payment, the plaintiff instituted proceedings under Section 138 of the Negotiable Instruments Act 1881, in the competent criminal court at Jammu.

5. It is averred in the plaint that apart from the principle

amount, the defendants are also liable to pay interest on the outstanding amount of bills from the respective dates @ 18% per annum and as customs of trade and principles of justice and equity, a sum of Rs.12,11,804/- is due from the defendants on account of the said interest upto the date of institution of the present suit. Thus, as per the plaintiff, the defendants are liable to a total amount of Rs. 40,04,966/-, i.e., Rs.27,93,162/- being the principle amount and Rs.12,11,804/- being the interest and further the pendent lite and future interest until the realization of the of the outstanding amount.

6. The case in hand is being contested only by defendant No.2. By order dated 15.02.2006 defendants 3 to 5 were proceeded ex-parte. It is stated in the said order that the defendant No.3 has gone bankrupt and defendant Nos. 4 & 5 though served through publication, failed to appear before the court hence, they were proceeded ex-parte. Defendant No.1 being the partnership firm is deemed to be served in view of the summons issued to its partners.

7. In the written statement filed on behalf of defendant No.2 it is stated that the defendant No.1 was an unregistered partnership firm and defendant No.2 was a sleeping partner in the said firm upto 31.03.1996 and has never entered into any contracts or represented

himself as a partner of the said firm either to the plaintiff or to any other party. Further, it is stated that the defendant No.3 who was the managing partner of the defendant No.1 firm had duly confirmed the resignation of defendant No.2 by his letter dated 30.07.1997 and the Banker of the defendant No.1 firm i.e. Punjab & Sind National Bank also issued a certificate dated 22.07.1997 confirming the resignation of defendant No.2 and discharging her from any liability.

8. It is also stated by the defendant No.2 that it is clear from the bare perusal of the plaint that all the transaction between the plaintiff and defendant No.1 firm took place the year 1999 and 2000 and the defendant No.2 had already resigned from the defendant No.1 firm in the year 1996.

9. After the pleading were complete the following issues were framed:

“1. Whether the plaint has been signed and verified by a duly authorized person, and whether the suit has been instituted by a duly authorized person? OPP

2. Whether the suit is barred by Order II Rule 2 CPC? OPD-2

3. Whether defendant no.2 ceased to be a partner of the defendant No.1 with effect from 31.03.96 as pleaded by defendant no.2? OPP

4. Whether plaintiff rendered services as Cargo Booking Agent for defendant no.1, if yes, on what terms? OPP

5. Whether the plaintiff is entitled to the sum claimed in the suit? OPP

6. Whether the plaintiff is entitled to any interest? If yes, for what period and what rate.

Relief.”

10. Thereafter, plaintiff filed the affidavit of PW-1 Mr. Vinay Kochar by way of examination-in-chief 02.07.2008. But, before the cross-examination of PW-1 Vinay Kochar could be fully concluded, the plaintiff and the defendant No.2 arrived at a settlement on 15.02.2010 whereby defendant No.2 gave a pay order of Rs.100,000/- to the plaintiff who in turn agreed to delete the defendant No.2 from the array of parties. The plaintiff filed the amended memo of parties on 14.03.2011 wherein the defendant No.2 is shown as deleted.

11. No other defendant contested the suit, thus, the evidence adduced by the plaintiff by way of affidavit of PW-1 Mr. Vinay Kochar filed on behalf of the plaintiff has been considered as the ex-parte evidence against the defendants 1 and 3 to 5 who were proceeded ex-parte.

12. As regards issue No.1, the submission of the plaintiff is

that in his statement PW-1 Mr. Vinay Kochar has stated that the plaintiff company has executed a power of attorney in his favour. He produced the original before the court and submitted a copy of the same which is marked as Ex. P-1 and is duly attested by a notary public. The said power of attorney clearly shows that PW-1 Mr. Vinay Kochar has been authorized by the plaintiff company to institute, sign and verify the plaint. Thus, this issue has been proved accordingly and is decided in favour of the plaintiff.

13. As regards issues Nos. 2 and 3, it is stated by the plaintiff that onus of proving these issues was upon the defendant No.2, but now the defendant No.2 is no more a party to this suit, these issues have become infructuous.

14. As regards issue Nos. 4 and 5, it is stated that defendant No.1 had been availing the services of the plaintiff's Nitco Air Express unit and during the years 1999 and 2000 it availed those services on credit vide 18 bills which are proved as Exhibit Nos. P-2, P-6, P-7, P-10, P-13, P-16, P-20, P-23, P-24, P-26, P-30, P-31, P-35, P-39, P-43, P-47, P-48, and P-51. Further, he has proved the certified copies of the 15 dishonoured cheques that have been obtained from the criminal court at Jammu and exhibited as Ex. P-57 (colly) in respect of the

cheques mentioned in serial No.1 and 2 and the remaining cheques as Ex. P-63, P-64, P-73, P-76, P-82, P-87, P-92, P-97, P-98, P-91, P-106, P-116, and P-75, respectively. The certified copies of the return memos of the bank intimating dishonour of cheques, legal notices, postal registration receipts, A.D. cards, courier receipts, complaints filed in the criminal court have also been exhibited. Further, copies of the relative airway bills and the house airway bills and the letters of the plaintiff addressed to the defendant No.1 under the cover of which the original bills, airway bills and house airway bills were sent to facilitate the delivery of consignments ant the respective destinations has also been proved and bear their respective exhibit numbers.

15. Mr. Vinay Kochar has also proved the copy of the plaintiff's letter dated 06.02.2001 addressed to defendant No.1 marked as Ex. P-54 wherein demand for payment was made. Further, the notice sent to defendant No.1, under the Evidence Act, 1872 to produce the original documents, through registered post under certificate of posting is exhibited as Ex. P-125, the postal receipt as Ex. P-126 and the certificate of posting as Ex. P-127. It is stated on behalf of the plaintiff that the testimony of said witness is trustworthy and cannot be discredited. In view of above, it is clear that the

plaintiff has discharged its burden on issues 4 and 5. Thus, the same are decided in favour of the plaintiff and against the defendants.

16. Regarding issue No.6 it is stated by the plaintiff that the plaintiff has claimed interest @ 18% per annum on the outstanding amount of Rs.27,93,162/- from the respective dates of the bills and have quantified the interest amount upto the date of filing of this suit in a sum of Rs.12,11,804/-. It is also stated that there is a condition printed at the bottom of each bill that “interest @ 24% per annum is chargeable on bill not paid on presentation.” And under section 80 of the Negotiable Instruments Act, 1881, interest on the amount of dishonoured cheque is chargeable @ 18% per annum and Mr. Vinay Kochar has also stated that interest @ 18% per annum is payable according to usage and customs of the trade. Thus, I am of the view that the plaintiff is entitled for the interest as claimed. Even otherwise, the plaintiff’s evidence on this issue has gone unchallenged. The issue No.6 also decided in favour of the plaintiff and against the defendant.

17. As far as issue No.7 is concerned, it is stated by the plaintiff that it has proved its case and that it is entitled for a money decree for a sum of Rs.39,04,966/-(Rs.40,04,966/- less 1,00,000/- received from the defendant No.2) on account of principal

(Rs.27,93,162/-) and interest (Rs.12,11,804/-) upto the date of filing of the suit. Further it is stated that the plaintiff is also entitled to interest pendente lite and future on the principle amount of Rs.27,03,162/- until realization at such rate that this court considers appropriate.

18. In the result, the plaintiff is entitled to decree in its favour. The defendants shall pay to the plaintiff the principal amount of Rs.39,04,966/- along with pendent lite and future interest @ 9% p.a. on the principal amount of Rs.27,03,162/- from the date of institution of suit till realization of the decretal amount. The plaintiff is also entitled for cost. Decree sheet be drawn accordingly.

MANMOHAN SINGH, J.

SEPTEMBER 06, 2011