

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.256/2002**

% **9th August, 2011**

M/S. SPEEDAGE EXPRESS CARGO SERVICES & ANR. Appellants
Through: Mr. Ajay Garg, Advocate.

VERSUS

SHRI ANIL KUMAR Respondent
Through: Mr. Rishi Malhotra, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the 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?

VALMIKI J. MEHTA, J (ORAL)

1. This case is on the 'Regular Board' of this Court since 4.7.2011. No one was present for the appellants over these dates of hearing and when information was sent by the counsel for the

respondent, the counsel for the appellants appears and states that he seeks discharge because his client has to engage another Advocate. In my opinion, once the appellants' appeal comes up for hearing, the appellants were bound to ensure representation on their behalf, and since the vakalatnama of the counsel for the appellants has not been discharged, I am not agreeable to adjourn the case. I do not think that merely because the appellants choose to take back the file from the Advocate, and therefore, there is no representation, is a good ground for adjournment in the case. I have therefore gone through the record with the assistance of the counsel for the respondent and am proceeding to dispose of the appeal.

2. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC), is to the impugned judgment of the trial Court dated 24.11.2001 which has decreed the suit of the respondent/plaintiff against the appellants/defendants for recovery of money with respect to transportation services provided by the respondent to the appellants.

3. The relationship between the parties commenced by the agreement dated 5.11.1998 and the last of the agreement entered into between the parties is dated 3.4.2000 and which has been exhibited as Ex.DW1/1. The respondent did various jobs of transportation and

thereafter raised the various necessary Trip Hire Contract Slips (THCS) and whereas some were paid, some remain unpaid and as a result of which an amount of Rs.2,04,700/- became due to the respondent and which since was not paid, the respondent sent a legal notice dated 17.10.2000, which again proved to be of no avail and therefore the subject suit was filed.

4. The appellants/defendants resisted the suit by alleging that the respondent/plaintiff was guilty of violation of agreement by causing heavy financial losses and that the entire dues were paid to the respondent/plaintiff and even the security amount of Rs.20,000/- was refunded at the time of revocation of the agreement. It was alleged that respondent was in the habit of transporting the goods late intentionally and also went to the extent of stealing the important papers relating to the consignment from the office of the appellants for which a police complaint was lodged.

5. The trial Court, after the pleadings were complete, framed the following issues:-

“ISSUES

1. Whether the defendant had paid the entire suit amount as claimed in W.S.? OPD
2. Whether the plaintiff is entitled to a decree of the suit amount as claimed? OPP

3. Whether the plaintiff is entitled to any interest, if so, at what rate? OPP

4. Relief.”

6. The relevant issues are issue Nos.1 and 2. The findings, in this regard, of the trial Court are contained in paras 8 and 9 of the impugned judgment which read as under:-

“8. In order to prove issue no.1 defendants got examined two witnesses viz. Mr. Anil Chanduka and Mr. Rajesh Kr. Pandey. It is testified that the vehicle of Mr. Anil Kumar (plaintiff herein) was engaged by the defendant to transport their material. It is further testified that last agreement was made with the plaintiff on 5.11.98 which expired on 4.11.99. It is stated that defendant had made entire payment before entered into a new agreement. It is stated that on 3.4.2000 a fresh agreement was made same is Ex.DW-1/1. It is deposed that as per Company procedure the vendor used to deposit the challan for payment and accordingly Mr. Anil Kr. (plaintiff herein) submitted 23 challans on 25.7.2000 and whose signatures were also taken at the time of depositing the same as per procedure. It is further made clear that the Register where the plaintiff has put his signatures at the time of depositing the Trip Hire Contract Slips (THCS) is Ex.DW-3/1.

In cross-examination DW1 stated that the defendants used to make the payment against the THCS and sometimes as advance and remaining amount was being paid after submissions of the bills by the vendor. It is further stated in cross-examination that receipt itself is a challan. It is further testified that defendant did not prepared any separate sheet for the payment. It is also deposed that defendants did not use to stamp of entry in respect of making the payment to THCS. It is also testified that defendants used to receive the signatures of the person who received the payment. It is further stated that the plaintiff was continuously in services from 4.11.99 to 2.4.2000. It is also admitted by the DW1 that during the aforesaid period several transactions were made and challans were issued to the

plaintiff against the goods lorry hire. It is also admitted that receipt pertaining to the transactions not produced because same are lying with the head office. It is also admitted that the defendants made the complaint of missing THCS which are Ex.DW-1/2 to Ex.DW-1/9 after receiving the legal demand notice. It is also admitted that no action has been taken by the Police on the complaint of the defendants. It is also stated that the defendants did not clear all the dues in time as per agreement. Ex.DW-1/1 is an agreement dt. 3.4.2000 contains the following clause:-

“If the vehicle is under a Hire Purchase Agreement Contractor should ensure timely payments of installment to the financiers, so as to avoid restraint, seizure of detention of the vehicle which will service with the company. The vehicle should be insured under the motor vehicle Policy providing comprehensive cover including full third party liabilities (unlimited by the contractor at his own cost and the company shall in any way be concerned with the lodging, conducts, pursuit and recovery of claims are damages to won vehicle or for the settlement of any third party claim but such assistance and cooperation as may be required from the company in regard to such claims may be provided by the company.”

From the perusal of the aforesaid it becomes clear that defendants shall make the payment in time. But defendant categorically stated in their testimony that the payments of the plaintiff were not cleared in time. Both the parties had agreed to extend the existing route after modifications of the same. It is stated that entire statement of Account has not been placed on record. It is also admitted that defendants have not prepared a separate receipt for refund of security. I failed to understand as to why the entire statement of A/c has not been produced by the defendants particularly when plaintiff alleging that suit amount is due towards them. Meaning thereby the defendants have withheld the best available evidence, therefore, adverse inference can be drawn against the defendants.

9. DW2 in his testimony deposed that plaintiff demanded the payment and he made a call to the office of the defendants co for his demand about his pending payment. It is also testified that the sent the THC slips to the Accounting Section for the purpose of accounts. It is stated that payment were made to the plaintiff in his presence through cheques but neither the witness has been examined from the bank in order to show the cheque's amount had been credited in the account of the plaintiff nor proved otherwise. DW2 in his cross examination categorically admitted that there was dues in respect of fresh agreement. It is also stated that at the time of cancellation of agreement plaintiff had delivered the goods of the defendants. It is further stated he cannot give the exact figures to the amount due. The defendants have failed to prove the issue no.1 because testimonies of DWs were not corroborated with each other. Rather, defendants themselves proved the case of the plaintiff. DW2 himself stated that there was amount due in respect of fresh agreement but failed to give the exact figures of the amount due. But plaintiff in his testimony categorically states that a sum of Rs.2,04,700/- is due and recoverable from the defendants." (underlining added)

7. I completely agree with the findings and conclusions of the aforesaid paragraphs because it has been admitted that the appellants did in fact receive THCS. In fact, the register of the appellants was proved as Ex.DW-3/1 which showed the signatures of the respondent at the time of depositing of the THCS. It is also recorded by the trial Court that for the first time, the complaint of THCS missing from the office of the appellants was only made after receiving the legal demand notice. It is also recorded by the trial Court that the police has not taken any action on the complaint of the appellants, therefore the complaint would be

without any merit. The trial Court also then arrived at a finding that the appellants failed to file complete statement of account on record, therefore, the stand of the appellants was not believable. The trial Court has rightly held that if various amounts were paid by way of cheques, there was no reason to differ from the practice for making the payment of security deposit in cash and with respect to which even a receipt has not been proved on record. The trial Court thereafter refers to the admission of DW-2 in the cross examination that there were in fact dues with respect to the fresh agreement between the parties viz. the agreement dated 3.4.2000.

8. A civil case is decided on balance of probabilities. The facts show that the trial Court after examining the respective contentions and evidence brought before it, has rightly held that the respondent was entitled to charges for the trips of transportation with respect to which THCS were given to the appellants and the appellants do not dispute receipt of its THCS. Adverse presumption was drawn against the appellants for failing to file the complete statement of account. Merely because two views are possible, this Court would not interfere with one view taken by the trial Court if the said view is not illegal or perverse. I do not find any illegality or perversity in the impugned judgment.

In view of the above, there is no merit in the appeal. Appeal is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

AUGUST 09, 2011
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VALMIKI J. MEHTA, J.