

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

% *Judgment Reserved on: 22.03.2011*
Judgment Delivered on: 25.03.2011

+ **RSA No. 4/2006 & CM Appl.Nos. 187/06 & 10057/06**

M/S. DOOARS TRANSPORT LTD.**Appellant**
Through: Mr. T.A. Francis, Advocate.

Versus

MR. PRAN KAPOOR**Respondent**
Through: Mr. G.S. Kamal, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 13.09.2005 which had reversed the finding of the trial judge dated 11.10.2002. Vide judgment and decree dated 11.10.2002, the suit of the plaintiff Sh. Pran Kapoor seeking recovery of Rs. 2,47,186.77 against the two defendants i.e. M/s. Bhutan Hardware Agency (defendant no. 1) and M/s. Dooars Transport Pvt. Ltd. (defendant no. 2) had been dismissed. Vide the impugned judgment and decree dated 13.09.2005, the suit stood decreed.

2. The case of the plaintiff as recited in the plaint is that he had sold goods to defendant no. 1 on 26.05.1980 vide cash memo no. 6268 for a sum of Rs. 44,226/-; further goods had also been sold, details of which had been given in para 3 of the plaint. Total amount of goods sold by the plaintiff to the defendant were to the tune of Rs. 1,40,542.30/-. These goods were delivered and booked

with defendant no. 2 for carriage vide goods receipts (GR No. 130641 dated 07.06.80, GR No. 130663 dated 11.06.1980, GR No. 130667 dated 12.06.1980 and GR No. 130681 dated 16.06.1980). This was as per the instructions and requirement of defendant no. 1. The documents i.e. related bills of the GR's were presented for payment to defendant no. 1 through their bank situated at Calcutta. Defendant no. 1 assured that the said bills would be honored. The bills were, however, not honored. Plaintiff made enquiries from defendant no. 2 but there was no success. Ultimately, the plaintiff requested defendant no. 2 to re-book the goods back to Delhi at the cost of Plaintiff; even then there was no response. On 27.01.1983, defendant no. 1 made a false claim of Rs. 73,330/- against the plaintiff. Demand notice dated 07.02.1983 was served by the plaintiff on defendant no. 1 with its copy to defendant no. 2. No payment was received. Present suit was filed.

3. In the written statement of defendant no. 1, it was stated that the goods were to be dispatched to Bhutan through Great Eastern Roadways; goods were not as per quality. There was no agreement for payment of interest; goods were to be delivered at Bhutan; defendant no. 1 had not taken any delivery of goods from defendant no. 2; claim of plaintiff is liable to be dismissed.

4. In the written statement of defendant no. 2, it was stated that no notice as required under the Carriers Act had been given. Defendant no. 2 had no option but to auction the goods to recover its money and this was after due notice to the plaintiff; goods in question had been carried by defendant no. 2 from Delhi to Bhutan as per usual terms of trade and business; defendant no. 2 had written several letters to plaintiff that the goods were lying with

them and delivery of the goods was to be taken but to no avail; in these circumstances, defendant no. 1 had to necessarily auction the goods for which he had received the sum of ₹ 59,000/-.

5. On the pleadings of the parties, the following 11 issues were framed. They read as follows:-

- 1. Whether the Plaintiff has no cause of action against the Defendant no. 2?*
- 2. Whether the courts at Delhi have no jurisdiction to try this case?*
- 3. Whether the suit is barred by limitation?*
- 4. Whether any notice is required under the Carriers Act was served by the Plaintiff upon the Defendants? If not, to what effect?*
- 5. Whether the Defendant no. 2 was entitled to auction the goods in question to recover its due?*
- 6. Whether the goods dispatched by the Plaintiff for delivery to Defendant no. 1 at Bhutan were in accordance with the orders placed by Defendant no. 1? If not, to what effect?*
- 7. Whether the delivery of the goods in question was taken by the Defendant no. 1 at Bhutan?*
- 8. Whether the Defendant no. 2 was entitled to adjust the freight, demurrage, interest and sales tax from the sale proceeds of the goods in question as alleged in para no. 9 of its Written Statement?*
- 9. Whether there was a sale of the goods in question so as to attract the liability of sales tax?*
- 10. To what amount is the Plaintiff entitled and from which Defendant inclusive of the amount of interest?*
- 11. Relief.*

6. Defendant no. 1 was proceeded ex-parte. He did not contest the proceedings. Oral and documentary evidence was led.

7. Trial judge was of the view that provisions of Section 10 of the Carriers Act had not been complied with. Mandatory notice had not been given to defendant no. 2; defendant no. 2 was rightfully entitled to auction the goods as plaintiff had not taken them back. Defendant no. 1 had rightly refused to take delivery of

goods as they the goods were not as per quality; suit of the plaintiff was accordingly dismissed qua defendant no. 1. However, a decree of sum of ₹ 2,300 was passed in favour of plaintiff and against defendant no. 2; this was on the view of the admission of Defendant No. D2W1, Sh. Mauji Ram Mittal; this amount was awarded with interest at 9 %.

8. Before the first appellate court, this judgment was reversed. Oral and documentary evidence was re-appreciated. The impugned judgment had noted that notice under the Carriers Act had, in fact, been given; it had been addressed to defendant no. 1 and the copy of the same had been endorsed to defendant no. 2. Said documents were proved as Ex. P8 and P9. Impugned Judgment had also recorded the statement of the counsel for the respondent that notice under Carriers Act was even otherwise not mandatory. Reliance had been placed upon the Gujarat High Court Judgment reported in AIR 1998 Gujarat 178 Saurashtra Ceramic Ind., Wankaner and Another Vs. Sadhana Transport Co., Jamnagar to return a finding that the judgment of the trial court dismissing the suit of the plaintiff on this ground was an illegality; it was set aside. On other counts also, the impugned judgment had reversed the findings of the trial court. While disposing of issue nos. 5, 6, 8 and 9, the impugned judgment had returned the following finding:-

“16. The Ld. Trial Court decided issue No. 5 regarding entitlement of defendant no. 2 to auction the goods to recover the dues against the plaintiff on the basis of deposition of D2W1 coupled with certain documents. What were those documents have not been mentioned in the judgment. It appears that the Ld. Trial Court was referring to documents Ex. X-1 to X-3 which were filed by Defendant No. 2W1 during the course of his cross examination. The counsel for the appellant rightly submitted that AD Ex. X-3 was not put to the appellant in cross examination and could not be considered as such.

17. Moreover, it is quite strange that the plea of auction taken in the written statement of defendant no. 2 was quite incomplete. It did not give the date of auction, the name and address of purchaser. It also did not give the date of notice allegedly sent to the plaintiff, what to say of filing the said notice or postal receipts or AD thereof along with the written statement. It did not produce the auction purchaser or the proceeding of auction to show as to which how many bids were received, names and address of those bidders, amount of bids given by those bidders. It is strange that goods worth ₹ 1,40,542/- were auctioned for ₹ 59,0000/- only.

18. The Counsel for the respondent relied upon clause 10 on back of GR Ex. P-11 which entitled the respondent to auction the goods after 30 days if delivery thereof was not taken or its freight was not paid. This was not the case set up by respondent in written statement. Moreover said clause is unreasonable. To sum up the findings of Ld. Trial Court on issue no. 5 are set-aside and issue is decided in favour of the appellant and against the respondent.

19. It is surprising that issue no. 6 regarding quality fo the goods has been decided against the plaintiff despite the fact that the plea regarding goods being of sub-standard quality were taken by defendant no. 1 who chose not to cross examine. PW-1 or lead his evidence. Findings of Ld. Trial Court on said issue cannot be sustained by any stretch of imagination.

20. There was no dispute between the parties regarding taking of delivery of goods by defendant no. 1 at Bhutan. Hence the Ld. Trial Court was justified in leaving the issue no. 7 open.

21. Issue no. 8 pertained to entitlement of defendant. 2 to adjust freight, demurrage, interest and sales tax from the auction price of goods. In view of my findings on issue no. 5 to the effect that defendant no. 2 was not entitled to auction the goods without prior notice to the plaintiff, there was no question of defendant being entitled to adjust anything from the auction price. Hence the findings of Ld. Trial Court on issue no. 8 are set-aside. The issue is decided in favour of the appellant and against the respondent.

22. Findings of Ld. Trial Court on issue no. 9 are completely confused. The sales tax was claimed by the appellant due to non-furnishing of declaration of exemption by defendant no. 1. Still the Ld. Trial Court returned a findings that defendant no. 2 has a satisfactorily proved and satisfied the court that goods were sold by defendant no. 2 and so there was a valid sale of goods in order to attract liability of sales tax.

23. Anyhow since PW-1 has not pressed claim of sales tax in last line of his examination-in-chief, the issue is decided against the appellant.

24. In view of my findings on issues no. 1 to 6 and 8. I hold that the appellant is entitled to recover ₹ 1,35,542.30 towards balance amount of principal and interest @ 6% per annum from date of dispatch of goods till the date of realization. The appellant will also be entitled to proportionate cost throughout.

Issue nos. 1,2 and 3 were also decided in favour of the plaintiff.

9. This is a second appeal. It has been admitted and on 12.10.2007, the following two substantial questions of law were formulated which reads as follows:-

“1. Where the transaction was covered by specific terms of the contract of carriage of goods, then can the same be interfered by holding that the same are unreasonable, more so, when no such case was set-up by the D.H.?”

2. When a issue has been framed as to which defendant is liable to pay what amount and there are no findings on the vital question of apportioning liability, then is the judgment and decree sustainable in law?”

10. On behalf of the appellant, it has been urged that the terms and conditions at the back of the goods receipts clearly shows that the defendant no. 2 cannot be clothed with any liability; in case of non delivery, defendant no. 2 could keep the goods only upto a period of 30 days after which he had no option but to auction the goods and he had done so. This was after giving notice to the plaintiff. The impugned judgment allowing the claim of the plaintiff is clearly an illegality. Finding being perverse is liable to be set aside.

11. Arguments have been countered. It is pointed out that defendant no. 1 was admittedly ex-parte. The trial judge returning a finding in favour of defendant no. 1 on issue no. 6 holding that the goods were not of the required qualification was absolutely absurd in view of the fact that defendant no. 1 had led no evidence;

he had not even bothered to cross-examine the witness of the plaintiff. In this view of the matter, the impugned judgment had rightly returned a finding that this issue could not have been decided in favour of the defendants. On other counts also, the impugned judgment had correctly and legally after appreciation of the legal evidence reversed the finding of the trial judge which finding now calls for no interference.

12 Perusal of the record supports the submission of the learned counsel for the respondents/plaintiff. Defendant no. 1 was admittedly an ex-parte, he had not led any evidence; he had also not chosen to cross examine the witness of the plaintiff. Defendant no. 2 was the only contesting defendant. In the written statement, the defendant no.2 had set up the case that he had no option but to auction the goods. Details of auction were not given. No date had been given as to when notice had been sent by defendant no. 2 to the plaintiff informing him about this proposed auction.

Clause 10 on the back page of the goods receipts i.e. Ex. P11 shows that defendant no. 2 could have auctioned the goods after 30 days, if delivery thereof had not been taken and freight charges had not been paid but only after a notice in writing to the consignor or consignee.

In para 9 of the written statement, it had been stated that consignments were lying with defendant no. 2 since June 1980 and in spite of verbal intimations and registered letters, defendant no. 1 had not taken delivery of the goods; defendant no. 2 had no option but to auction the goods; since neither the plaintiff nor the defendant no. 1 had taken delivery. However, no further details had been given as to when notice was given either to plaintiff or

defendant no. 1 to take these goods back. D2W1 was the witness who had deposed on behalf of defendant no. 2. He had on oath deposed that he had written a letter to the plaintiff informing him that the goods are lying with them but no one had taken delivery; reminder was again sent on 28.02.1983 but to no effect. None of the aforementioned documents had however been proved/exhibited.

13. Per contra, plaintiff had produced evidence to support his submission that he had requested defendant no. 2 to re-book the goods back at the cost of the plaintiff. The legal notice dated 07.02.1983 sent by the plaintiff to the defendant no. 1 has been proved as Ex. P1; a copy had been endorsed to defendant no.2. Defendant no. 1 vide his letter dated 28..03.1983 informed the Plaintiff that the materials lying with defendant no. 2 have not been received as the same are defective and under –sized. Ex. P-10 is the letter dated 07.03.1983 addressed by defendant no. 2 to the counsel of the plaintiff where again there is no mention that there is any proposal to auction the goods. This letter was written in March. Auction of the goods was admittedly carried on 1st July, 1983; the contention of the defendant no. 2 had also all along has been that he had notified the plaintiff about the said auction; no such document has been placed on record. Option to auction the goods could have been exercised only after due notice in writing to the plaintiff which has not been complied with. Ex. P-10 dated 07.03.1983 does not mention any such proposed auction. In these circumstances, the plaintiff was rightfully entitled to his dues.

14. Findings in the impugned judgment do not call for any interference. Substantial questions of law have been answered

accordingly. Appeal is without any merit. Appeal as also the pending applications are dismissed.

MARCH 25, 2011

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INDERMEET KAUR, J.