

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

+ **RFA No. 132/2003**

% **13th April, 2012**

THE COMMISISONER OF POLICE & ORS. Appellants
Through : Ms. Chaitali, Advocate for Mr. V.K.
Tandon, Advocate.
versus

SHRI SURJEET SINGH & ORS. Respondents
Through : Mr. Rajeev Saxena, Advocate with Mr.
Rajat Mittal, Advocate.

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

To be referred to the Reporter or not? Yes

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 16.8.2002 decreeing the suit of the respondent No.1/plaintiff for recovery of ₹ 3,68,201/- alongwith costs and interest @ 12% per annum. The suit has been decreed for the amount being loss of profits which the respondent No.1/plaintiff claimed were suffered by him on account of failure of the appellants to take vehicles on hire for the balance contractual period by wrongly terminating the contract and blacklisting the respondent No.1/plaintiff. The respondent No.1 expired
RFA No.132/2003 *Page 1 of 10*

during the pendency of the appeal and his legal heirs were brought on record, however, for the sake of convenience, in this judgment, I am referring to the respondent No.1 as the original respondent No.1/plaintiff.

2. The facts of the case are that the defendant No.4/appellant No.2 i.e. the Deputy Commissioner of Police (Provisions and Lines) floated a tender for supply of transport vehicles on hire to the Delhi Police. Respondent No.1/plaintiff submitted its application dated 11.10.1990 and was declared as a successful tenderer and was awarded a contract for supply of vehicles from 8.3.1991 to 7.3.1992 under an agreement dated 8.3.1991, Ex.PW5/2. There were disputes and differences between the parties and the contract was terminated inasmuch as the appellants alleged that the respondent No.1/plaintiff had to give commercial matadors but was only giving nine-seater matadors. The action of termination of contract and the blacklisting of the respondent No.1/plaintiff was challenged by the respondent No.1/plaintiff by filing a Civil Writ Petition bearing No.2308/1992 in this Court and which writ petition was allowed by this Court vide its judgment dated 16.3.1995. By the judgment dated 16.3.1995 this Court set aside the order of cancellation of the contract and the blacklisting of the respondent No.1/plaintiff. The respondent No.1/plaintiff, therefore, filed the subject suit claiming amounts under different heads including the head of having suffered

losses on account of loss of profits of non-supply of the vehicles in the balance period of the contract after passing of the blacklisting order on 24.10.1994 i.e. from 24.10.1991 to 7.3.1992.

3. The appellants filed their written statements and contested the suit. The claim of the respondent No.1/plaintiff was denied. In the written statement in para 13, it was also pleaded that no losses were suffered by the respondent No.1/plaintiff. The other claims of the respondent No.1/plaintiff were also denied.

4. After completion of pleadings, the trial Court framed the following issues:-

- “1. Whether the plaintiff is the sole proprietor of M/s. Royal Travels (Regd.) as claimed by the plaintiff? OPP
2. Whether the present suit of the plaintiff is barred U/s. 140 of DP Act and hence not maintainable? OPD
3. Whether the present suit of the plaintiff is barred by limitation and thus not maintainable? OPD
4. Whether the plaintiff violated the terms and conditions of the contract dt.8/3/91 while supplying the Matadors as per the agreement? OPD
5. Whether the plaintiff is entitled to recover the suit amount of ₹ 4,99,500/- if so at what rate of interest? OPP
6. Relief.”

5. The trial Court by the impugned judgment has dismissed all the claims of the respondent No.1/plaintiff except the claim of loss of profits under which head an amount of ₹ 3,68,201 alongwith proportionate costs and interest @ 12% has been awarded.

6. The only issue which has been argued before me on behalf of the counsel for the parties is with respect to whether or not the impugned judgment can be sustained to the extent it grants loss of profits to the respondent No.1/plaintiff. The trial Court has, in this regard, given the following finding:-

“18. Now the main claim of the plaintiff regarding the loss suffered by the plaintiff for non-plying of the vehicle for the remaining period 25/10/91 to 7/3/92 but for the black listing they would have plied. Plaintiff in support of his case examined attorney of the plaintiff who stated that on an average they were supplying 16 vehicles against per day consideration of 342/- per vehicle and they were after deducting the amount paid for the salary of the drivers, cost of maintenance and diesel maintenance they were earning a profit of ₹ 170/- per day per vehicle and to corroborate this there is statement of General attorney of plaintiff.

19. Counsel for the defendants has argued that plaintiff has failed to prove that on the relevant time they were owner of so many vehicles. The General attorney who has appeared on behalf of plaintiff have failed to give registration numbers of the vehicles in their favour as the matter was old one and they have failed to produce the vouchers of the drivers which they were employed. I am constrained to say in response to the pleadings to this effect, no such plea was raised in the written statement that the plaintiffs were not an average of supplying 16 vehicles per day and earning a profit of ₹ 170/- per day per vehicle. Even otherwise there are more suggestions to the witness of the plaintiff put to this effect that plaintiff was earning a profit of ₹170/- per day per vehicle. Defendants own witnesses had came and proved on record during the relevant period during which the plaintiff would have supplied the vehicle but for black listing they were hiring 30 to 35 light commercial vehicles per day for law and order duties. Regarding the factor that plaintiff has failed to produce evidence to show that on that day they were owning so many vehicle is also not of any consequence, since it was not the terms of the contract between the

parties that the vehicles actually owned will be supplied. Plaintiff on an average was to supply up to 16 or more vehicles per day as per contract and as per requirement and to earn a profit of ₹170/- per day per vehicle which he could not do due to blacklisting done by the defendants in the reminder part of the contract which was for the supply of unlimited vehicles per day. Hence, plaintiff is in a position to prove on balance of probabilities that plaintiff has suffered a loss of profit of ₹ 170/- per day per vehicle for 16 vehicles averaged from 26/10/91 to 7/3/93 totalling to ₹ 3,67,200/-. Hence, this claim has been proved on record on balance of probabilities and it is held that plaintiff is entitled to the said amount.

Hence, this issue is accordingly denied.”

7. In my opinion, the trial Court has misdirected itself and has wrongly decreed the suit for loss of profits. In law, before a supplier of transport vehicles pleads that he has suffered loss of profits which he would have made on account of supply of vehicles to the appellants during the balance period, it is necessary for the respondent No.1/plaintiff to establish two crucial aspects. The first aspect is that the respondent No.1/plaintiff must either be the owner of the requisite number of vehicles which could have been given on hire to the appellants or the respondent No.1/plaintiff should have hire agreements for the vehicles which he had to further supply and hire out to the appellants. The second crucial aspect is that even assuming that respondent No.1/plaintiff was the owner of the vehicles and in fact had vehicles with him which were on lease/hire/licence with him from the owners under agreements, it is necessary to plead and prove that these vehicles remained idle inasmuch as no other person hired those vehicles in the period

from 24.10.1991 to 7.3.1992.

8. It is settled law that a mere breach of contract does not automatically entitle the aggrieved person to losses or loss of profits unless actually he is caused loss of profits.

9. A reference to the trial Court record shows that though the witness, PW-5, Sh. Jagjit Singh on behalf of respondent No.1/plaintiff stated that respondent No.1/plaintiff had 18 to 20 vehicles out of which 12 to 13 vehicles were self-owned, not a single document whatsoever was filed in the trial Court to show the ownership of said 12 or 13 vehicles in the name of respondent No.1/plaintiff. Also, no agreement of any further vehicles licensed out or leased out to the respondent No.1 was also filed before the trial Court. Even for the sake of arguments, if we assume that the respondent No.1/plaintiff was the owner of certain number of vehicles or had with him certain agreements for vehicles which he could have further hired out, yet, it was mandatory upon the respondent No.1/plaintiff to prove that these vehicles were not hired out at all during the balance period from 24.10.1991 to 7.3.1992 and the vehicles remained idle in this period. Obviously, if during the balance period these vehicles, which the respondent No.1/plaintiff had, were in fact hired out to the other parties than the appellants, then, the respondent No.1 would have earned profits from hiring out those vehicles to

the third party.

A reference to all the depositions on behalf of respondent No.1/plaintiff shows that there is not even a whisper in any of the depositions that the respondent No.1/plaintiff made efforts to hire out the vehicles to other parties and in spite of making efforts to hire out the vehicles, these vehicles could not be hired out to other parties, and therefore the vehicles remained idle during the period from 24.10.1991 to 7.3.1992. Surely, the respondent No.1/plaintiff being the owner of the vehicles could have filed its books of account including the log books of different vehicles if those vehicles had remained idle for the balance period of the contract of the respondent No.1 with the appellants. Of course, I am mentioning these aspects of the vehicles remaining idle on the assumption that the respondent No.1/plaintiff was in fact owner of 12 or 13 vehicles and had further other vehicles which he licensed out, although as already stated above, not a single document has been filed on record with regard to ownership of the vehicles of the respondent No.1/plaintiff or any other agreement with respondent No.1/plaintiff of a particular number of vehicles being available to him from a particular person for further hiring out of such vehicles.

10. In terms of provision of Section 73 of the Contract Act, 1872, once there is breach of contract unless causing of loss of profits is actually

proved and established, no decree for damages can be passed. As per the explanation to Section 73 of the Contract Act, 1872, in estimating the loss or damages arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. It must be shown that efforts were made to hire out the vehicles to other parties but in spite of making such efforts, the same were forced to remain idle. I have discussed above that neither has the respondent No.1 proved ownership of the vehicles nor is he having licensed vehicles so that he could have hired out further such vehicles or assuming he was the owner/licencee of the vehicles but the vehicles remained idle in the balance period of contract from 24.10.1991 to 7.3.1992 in spite of efforts having been made. I may note that there is no pleading to the requisite effect in terms of the explanation to Section 73 of the Contract Act, 1872 on behalf of the respondent No.1/plaintiff.

11. Respondent No.1/plaintiff has in this Court filed an application under Order 41 Rule 27 CPC (10 years after filing of the appeal) seeking permission to lead additional evidence. Alongwith the application, six registration documents of six vehicles, said to be owned by the respondent No.1/plaintiff have been filed and one agreement allegedly dated 2.3.1991 for

supply of vehicles by Sh. Madan Singh to respondent No.1/plaintiff of four vehicles.

The purpose of Order 41 Rule 27 is not to allow the parties to set the clock back by over 17/18 years. As per Order 41 Rule 27, documents which were not in power and possession of a person can be sought to be led in evidence if the same were discovered subsequently, and that too only in the interest of justice. The documents which are now sought to be relied upon were always in power and possession of respondent No.1/plaintiff and, therefore, respondent No.1/plaintiff has failed to satisfy the requirement of Order 41 Rule 27 CPC to allow him to lead additional evidence. I also note that the so called registration books/papers which have been filed do not show the ownership of vehicles in the name of respondent No.1/plaintiff from the relevant years i.e.1991-1992. In fact, in my opinion, an endeavour is made to mislead this Court relying on the documents filed with the application under Order 41 Rule 27 CPC because what was to be supplied to the appellants by the respondent No.1 was matadors, and out of six registration slips, five are with respect to buses and not for matadors and sixth one is for a tata truck. This attitude of respondent No.1/plaintiff to mislead the Court, is not appreciated by this Court.

The application under Order 41 Rule 27 CPC being C.M. No. 3636/2012 is accordingly dismissed.

12. In view of the above, respondent No.1/plaintiff had miserably failed to prove his case of the claim of loss of profits. The trial Court has therefore erred in granting a money decree to respondent No.1/plaintiff for ₹3,68,201/- alongwith costs and interest @ 12% per annum.

13. The appeal is therefore accepted. The impugned judgment and decree dated 16.8.2002 is set aside. The suit of the respondent No.1/plaintiff shall stand dismissed. Parties are left to bear their own costs. Trial Court record be sent back.

The amount deposited in this Court alongwith accrued interest, if any, be released to the appellant after a period of 90 days from today.

VALMIKI J. MEHTA, J.

APRIL 13, 2012

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