

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

+ **CS(OS) 302/2010**

VIPIN KUMAR JAIN Plaintiff
Through: Mr. S. Vaidialingam, Advocate.

versus

M/S. FREIGHT LINES INDIA PVT. LTD. Defendant
Through: Mr. Ravi Gupta, Sr. Advocate
with Ms. Meenakshi Sood,
Advocate.

% Date of Decision : October 08, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

1. The aforementioned suit has been filed by the Plaintiff as sole proprietor of M/s. Jain International, engaged in the business of manufacture and export of garments, for the recovery of the value of goods exported by him from the Defendant to whom the goods were entrusted for shipment.

2. The facts relevant for the decision of the suit are that one of the buyers of the Plaintiff, namely, ITTIERRE SPA, ZONA INDUSTRIALE, 86090 PETTORANELLO DI MOLISE (ISERNIA)

ITALY, a Company based in Italy, placed orders upon the Plaintiff for Embroidered Ladies Readymade garments. Pursuant to the same, the said buyer opened a Letter of Credit in favour of the Plaintiff, being L/C No. 411831195757 dated 18.11.2008 for a total value of Euro 407,201.25 (Euro Four Hundred and Seven Thousand Two Hundred and One and Twenty Five Centimes), against which export shipments to the tune of Euro 110682.21 of which the Rupee equivalent was approximately ₹ 73 Lacs were effected.

3. It was a condition of the Letter of Credit that the Plaintiff had to book the goods for carriage only through the Defendant which was the nominated Freight Agency through which the goods were to be transported to the buyer. It was also a term of the Letter of Credit that the Airway Bill was to be issued to the order of the buyer, namely, ITTIERRE SPA (hereinafter “**ITTIERRE**”) and the party to be notified was stipulated as L. GERMANO & COS RL COMMERCITY VIA PORTUENSE 1555, ISOLA P4Z-0014H ROME ITALY (hereinafter “**GERMANO**”).

4. The Plaintiff entrusted the goods to the Defendant for consignment to the buyer in accordance with the aforesaid terms of the Letter of Credit and issued written instruction notes to the Defendant, one for each of the three shipments made. In the said instructions, the Plaintiff instructed the Defendant to consign the goods to the buyer and also mentioned the name of the party to be notified, namely, GERMANO. The Plaintiff submits that the instructions contained in the Letter of Credit were required to be followed to enable payments to be realized thereunder. The details of the three House Airway Bills

issued by the Defendant and handed over to the Plaintiff were as under:-

- (a) HAWB No.004659 dated 15.01.2009.
- (b) HAWB No.004703 dated 29.01.2009.
- (c) HAWB No.004707 dated 03.02.2009.

5. In accordance with the requirements of a House Airway Bill, the number of the Master Airway Bill issued by the actual carrier airlines with whom the Defendant claimed to have booked the cargo was entered in each of the above House Airway Bills issued by the Defendant. The Master Airway Bills were, however, not provided to the Plaintiff.

6. The Plaintiff then presented the necessary documents with its Bankers against the Letter of Credit along with the House Airway Bills issued by the Defendant. When the Plaintiff's Bankers, in turn, presented the said documents to the Bankers of the buyer, the buyer's Bankers refused to make payment under the Letter of Credit and returned the documents to the Plaintiff's Bankers, who submitted them to the Plaintiff.

7. Faced with the buyer's refusal of payment against the Letter of Credit, the Plaintiff enquired of the Defendant the status of the goods that had been consigned to the buyer as per the House Airway Bills of the Defendant. The Plaintiff was shocked to note from the documents provided by the Defendant, namely, the certification of delivery by the carrier airlines, viz., Emirates SkyCargo and Qatar Airways that the cargo booked with them by the Defendant had already been delivered. The Plaintiff, surprised as to how the goods could have been delivered

when the original House Airway Bills of the Defendant had been returned and were in its possession, requested the Defendant to provide the copies of the Master Airway Bills, which were then made available by the Defendant to the Plaintiff. The Plaintiff, from the said copies of the Master Airway Bills, came to know that the Defendant had consigned the goods with the airlines, showing GERMANO (which was the party to be notified) as the Consignee and one GAC Logistics as the party to be notified. The Airlines Certificates provided by the Defendant also confirmed in writing that the goods had been delivered to GERMANO, who was the Consignee named in the said Master Airway Bills.

8. The Plaintiff submits that it has neither received the payment for the goods from the buyer or from the Bankers of the buyer, nor it has the usual recourse to and control over the goods, which it would have had if the Defendant had correctly consigned the goods as per its instructions to the buyer. In that event, the buyer without making the payment and obtaining the original documents from the Bankers, would not have been able to take delivery of the goods, and the goods belonging to the Plaintiff would have become available to the Plaintiff either for return to India or for diversion to any other buyer. The Plaintiff alleges that as a result of the erroneous and negligent act of the Defendant of consigning the goods to GERMANO, *in total violation of the shipping instructions*, the Defendant has enabled GERMANO, who was not the Consignee of the goods, to take delivery without making any payment to the Plaintiff. In this manner, the Plaintiff has not only been deprived of its payment under the Letter

of Credit opened in its favour by the buyer, but has also been deprived of its goods which have gone into the hands of the party to whom they were neither sold nor consigned.

9. Summons of the suit were issued to the Defendant, who, on receipt of the same, filed a written statement categorically denying the case of the Plaintiff. The Defendant, however, admitted that the Plaintiff had entrusted the consignment comprising of Embroidered Ladies Garments to be delivered to their buyer, namely, ITTIERRE, i.e., Consignee in this case. It also admitted that “*while placing the order of cargo, the Plaintiff specifically instructed the Defendant to deliver/ship the consignment directly to the Consignee.*” Paragraphs 3 to 5 of the preliminary submissions to the written statement are significant, which, for the facility of reference, are reproduced hereunder:-

“3. That in the present case two kinds of airway bills was involved. House Airway Bill (HAWB) and Master Airway Bill (MAWB). It is pertinent to mention that Defendant was nominated to handle the shipment through the Consignee agent i.e. L. GERMANO and in these types of shipment where the shipment is through Consignee agent, as per the trade practice, 2 airway bill i.e. Master Airway Bill and House Airway bill is to be issued. As per the instructions of the Plaintiff, HAWB was directly consigned to the consignee (Itierre) wherein the goods were directly released to the Consignee. HAWB shows the name of the actual exporter (i.e. Plaintiff herein) as the shipper and the importer i.e. Itierre company. MAWB mentions Shipper as Freight Lines and Consignee as L. GERMANO & CO.

4. *That it is pertinent to mention that if the House Airway Bill is directly consigned to the Importer then the delivery is directly released by the Defendant to the representative/consignee agent of the Importer i.e. L. GERMANO, who in turn deliver the goods to the Importer, in which case the payment due to the Exporter is not secured. But if the House Airway Bill is consigned to the Bank then the delivery is released against a bank Release Order according to which the Exporter receives the payment of the goods from the Importer and only then the delivery is released.*

5. *That it is pertinent to mention here that in the present case the Exporter i.e. **Plaintiff had clearly sent written instructions to the Defendant to consign the House Airway Bill directly to the Importer, which is also admitted by the Plaintiff in para 7 of the plaint.** Accordingly as per the procedure the goods were released directly to the Importer.”*

10. It is further submitted in the written statement that MAWBs, issued by the Carrier Airlines (i.e., Qatar Airlines and Emirates) mentioned the Shipper as Freight Lines (the Defendant) and Consignee as GERMANO because Carrier Airlines had to deliver the consignment to GERMANO. It is submitted that GAC Logistics was the clearing agent who was to fulfill all the formalities of Customs. It is stated that a *“bare perusal of the written instruction to the Defendant by the Plaintiff would show that the Plaintiff has specified the name of consignee as Ittierre and the party to be notified as L. Germano. Accordingly when the consignment reached to the L. Germano, which is agent of the Importer, L. Germano in turn delivered the consignment to the Ittierre (Importer).”* The Defendant

admits that the Master Airway Bill was not handed over to the Plaintiff at all, which mentioned the Consignee as GERMANO.

11. In the replication filed by it, the Plaintiff reiterated the contents of the plaint and denied the assertions made in the written statement.

12. On the completion of pleadings, a submission was made by the learned counsel for the parties that having regard to the nature of the suit, there was no need to lead oral evidence. It was stated that one formal affidavit would be filed by each party in support of the documents placed on the record, after which the suit be heard finally, without cross-examination of any witness or party.

13. Issues were framed for consideration by order dated February 14, 2011.

14. An affidavit by way of evidence was filed by the Defendant of Mr. Sandeep Singh, an employee of the Defendant, i.e., M/s. Freight Lines India Pvt. Ltd. An affidavit in evidence (rebuttal) was filed by the Plaintiff of Mr. Vipin Kumar Jain (PW1) proving on record the assertions made in the plaint and the documentary evidence filed therewith. The Plaintiff also filed affidavit in evidence of a qualified Translator of Italian language to depose that all the English translations of the Italian documents had been certified by him as true and correct.

15. Arguments at the bar were addressed by Mr. S. Vaidialingam, the learned counsel for the Plaintiff and Mr. Ravi Gupta, the learned senior counsel for the Defendant.

16. Issue Nos.1 to 5, being inter-connected and inter-related, are being dealt with together.

ISSUE NOS.1 to 5

- “1. Whether the suit is bad for non-joinder of a necessary party, namely the buyer ITTIERRE SPA? OPD*
- 2. Whether there is no cause of action against the defendant? OPD*
- 3. Whether the defendant was responsible for the consigning and delivery of the goods of an invoice value of Euro 110,682/21 i.e. Rupee equivalent of Rs.72,36,824/01 to the wrong party and if so to what effect? OPP*
- 4. Whether the defendant followed the Air freight instructions given to it by the plaintiff? OPD*
- 5. Whether the plaintiff is entitled to recover the value of goods of an invoice value of Euro 110,682/21 i.e. Rupee equivalent of Rs.72,36,824/01 from the defendant for breach of the Air freight instructions or alternatively by way of damages? OPP”*

PLAINTIFF’S SUBMISSIONS

17. On the above issues, the learned counsel for the Plaintiff submitted that the essence of the matter lies in the violation of the Plaintiff’s shipping instructions by the Defendant, who was the nominated Freight agent stipulated in the Letter of Credit by the buyer. In view of such a stipulation, the Plaintiff had no choice in the matter of transporting the goods and was bound to book the goods only through the Defendant, as otherwise the condition of the Letter of Credit would be violated. **The Plaintiff gave clear instructions in writing to the Defendant to consign the goods to the buyer,**

namely, ITTIERRE as the Consignee and the party to be notified was GERMANO. Air Freight Instructions issued by the Plaintiff to the Defendant for the three export consignments have been proved on record as Exhibits P11, P12 and P13. A reference was made by the learned counsel for the Plaintiff to the Letter of Credit, Exhibit PW1/1B, to urge that in the said Letter of Credit the name of the buyer has been clearly mentioned as ITTIERRE, while the name of the party to be notified is set out as GERMANO. The Defendant was made aware that the shipments were against Letter of Credit and the details thereof were also mentioned in the instructions Exhibits P11 to P13. Serial Nos.46A and 47A of the said Letter of Credit, which are directly relevant to the present case, read as under:-

“46A: Documents Required

+ SIGNED COMMERCIAL INVOICE IN ONE ORIGINAL AND THREE COPIES SHOWING FULL DESCRIPTION OF MERCHANDISE.

+ PACKING LIST IN ORIGINAL PLUS ONE COPY.

2) ORIGINAL (FOR SHIPPER) AIRWAY BILL ISSUED TO THE ORDER OF ITTIERRE SPA, ZONA INDUSTRIALIE, 86090 PETTORANELLO DEL MOLISE (IS), ITALY, NOTIFY GERMANO AND CO. VIA PORTUENSE 1555 ISOLA P42 COMMERCITY 00050 ROME (PHONE 0665004115).....

47A: Additional Conditions

+ALL DOCUMENTS MUST BE QUOTE THE L/C NUMBER.

+ GOODS MUST BE CONSIGNED FOR SHIPMENT TO FREIGHT LINES LTD.....”

18. It was contended that **the Defendant issued its own House Airway Bills (Exhibits P14, P15 and P16) in which it correctly reflected ITTIERRE as the Consignee and the party to be notified as GERMANO and handed them over to the Plaintiff** mentioning therein the numbers of the Master Airway Bills, thereby leading the Plaintiff into believing that the Consignee in the Master Airway Bills was also the buyer/ITTIERRE. However, although the numbers of the Master Airway Bills (Exhibits P17, P18 and P19) were mentioned in the said House Airway Bills, the Defendant had negligently failed to follow the instructions of the Plaintiff with regard to the consignment of the goods to the buyer, ITTIERRE and as the Plaintiff subsequently came to know, the Defendant had consigned the goods to the party to be notified, namely, GERMANO and reflected the party to be notified as one GAC Logistics. The said Master Airway Bills including the Consigner's copies were retained by the Defendant and not handed over to the Plaintiff. This act of the Defendant resulted in adverse consequences for the Plaintiff. First, the Bankers of the buyer who had opened the Letter of Credit refused to pay against the same, *inter alia*, citing the fact that only House Airway Bills had been submitted and not the Master Airway Bills. Second, owing to the Consignee in the Master Airway Bills being not the buyer but the party to be notified, i.e., GERMANO, it enabled the said party to take delivery from the airlines despite payment for the goods not having been made by the buyer to the Plaintiff. Third, the Consigner and Consignee copies of the Master Airway Bills remained with the Defendant and

must have been transmitted by the Defendant to GERMANO, whereas the same ought to have been handed over to the Plaintiff to enable the Plaintiff to make them part of the documents accompanying the Letter of Credit. Fourth, the Defendant had also committed further violation of the shipping instructions in that while the Defendant was required to enter the flight number and date on the Airway Bills, this was done only in relation to HAWB No.004659 dated 15.01.2009 and not in relation to HAWB No.004703 dated 29.01.2009 and HAWB No.004707 dated 03.02.2009.

19. The Plaintiff being faced with deprivation of payment under the Letter of Credit as also deprivation of its goods issued legal notice dated 18.05.2009 (Ex.P20) claiming the value of the consignments from the Defendant. **In the response sent by the Defendant dated May 26, 2009 (Ex.P21), the Defendant admitted that the Consignee in the House Airway Bills was the buyer, but the Consignee in the Master Airway Bills was L. GERMANO, the party to be notified.** Paragraph 3 of the said reply notice is specifically relied upon, wherein the Defendant stated as follows:-

“As per the HAWB instructions of your client the HAWB was directly consigned to the consignee wherein the goods were released to the consignee directly. MAWB was issued as Shipper-Freight Lines and Consignee – L. GERMANO & CO.”

20. Learned counsel for the Plaintiff contended that the Defendant, however, tried to dispute its liability by stating in its aforesaid communication that it could not be held responsible for non-payment under the Letter of Credit, and that the Plaintiff ought to have

consigned the goods to the Bankers. He submitted that this was an entirely misplaced contention as there was no need to consign the goods to the Bankers, the transaction being under a Letter of Credit. It is only in Non-Letter of Credit Shipments where documents are sent on “DA” or “DP basis” that documents are often consigned to the collecting bank. The Defendant cleverly dodged explaining as to why the buyer was not named as the Consignee in the Master Airway Bills and also as to why the same were not handed over to the Plaintiff.

21. Reference was made by Mr. Vaidialingam to the Uniform Customs and Practice for Documentary Credits (UCP 600) to contend that the said document envisaged that the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP), ICC Publication 645 was a necessary companion to the UCP. The relevant portion of UCP 600 reads:-

“During the revision process, notice was taken of the considerable work that had been completed in creating the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP), ICC Publication 645. This publication has evolved into a necessary companion to the UCP for determining compliance of documents with the terms of letters of credit.”

22. Adverting to the **ISBP, 2007 Revision for UCP 600**, learned counsel contended that as per Sections 134 and 135 of the ISBP, Article 23 of UCP 600 applies and the terms “Consignee”, “Order Party” and “Notify Party” are defined in Sections 143 and 144 of the ISBP as follows:-

“Consignee, Order Party and Notify Party

143. *An air transport document should not be issued “to order” or “to order of” a named party, because it is not a document of title. Even if a credit calls for an air transport document made out “to order” or “to order of” a named party, a document presented showing goods consigned to that party, without mention of “to order” or “to order of”, is acceptable.*

144. *If a credit does not state a notify party, the respective field on the air transport document may be left blank or completed in any manner.”*

23. Mr. Vaidialingam’s submission is that from the above it is clear that the ISBP does not envisage consignment of goods to the notified party or delivery of goods to the notified party. Mr. Vaidialingam also relied upon the definition of “Arrival Notice” in Incoterms (International Commercial Terms), which were created in 1936 for the purpose of providing a set of international rules for the interpretation of the most commonly used trade terms in foreign trade:-

*“Arrival Notice – Notice sent by the carrier informing the **consignee, notify party, and also notify party** of the arrival date of the cargo. Other pertinent information for shipment may be included, such as bill of lading number, weight, charges due and location of cargo.”*

He submitted that though Notify Party had not been defined, it was abundantly clear that the Arrival Notice was to be sent by the carrier to the Consignee as well as to the notify party and that the “Consignee” and “Notify Party” were different parties.

24. Reference was next made by him, *inter alia*, to the following definition of “Notify Party” and “Consignee”, contained in commercial internet websites:-

(i) **“Webster’s Online Dictionary:**

Notify Party - Name and address of a party indicated in the transport document to be notified by the shipping company of the arrival of a shipment.

Secondary Notify Party - The entity designated by the carrier to receive status notifications. Up to two notify parties may be designated on one bill of lading.

(ii) **Freight Glossary and required documents:**

Consignee is the party shown on the bill of lading or air waybill to whom the shipment is consigned. Need not always be the buyer, and in some countries will be the buyer’s bank.

Notify Party is the person or company to be advised by the carrier upon arrival of the goods at the destination port.

(iii) **Glossary of International Trade Terms:**

Notify party: the party who is to be notified when goods arrive at their destination.

(iv) **Creditmanagementworld.com:**

Consignee – Party into whose possession goods are to be delivered.

Notify Party – Party to be notified by the carrier of arrival of the goods at their destination. Normally the notify party is the importer and/or the importer’s agent for clearing goods through customs.

- (v) **Juridical Dictionary:**
Notify Party – A person identified in the bill of lading as the party to be notified by the carrier when the goods arrive at their destination.
- (vi) **IATA:**
CONSIGNEE (CNEE): The person whose name appears on the air waybill or in the shipment record as the party to who the goods are to be delivered by the carrier.”

25. On the basis of the aforesaid definitions, learned counsel contended that the terms “Consignee” and “Notify Party” were different and distinct. “Notify Party” meant party to be notified by the carrier of the arrival of the goods at their destination, while a “Consignee” is a party to whom the goods are to be delivered. This was made clear from Chitty on Contracts, Volume 2, 29th Edition in the following terms:-

“Delivery to the consignee. On arrival of the cargo, the carrier must give notice of the fact to the named consignee, unless the contract provides to the contrary. The consignee is then entitled to require delivery of the air waybill and of the cargo on payment of outstanding charges and compliance with any relevant conditions of carriage set out in the waybill.”

26. It was contended by the counsel for the Plaintiff that the Defendant in the instant case was what may be aptly described as “Freight Forwarder” or “Forwarding Agent”. The Defendant having failed to comply with the instructions of the Consignor and having consigned the goods to the “Notified Party” instead of the “Consignee” was liable to make good the value of the goods to the

Plaintiff. This was sought to be substantiated by the following extract from Halsbury's Laws of England, IV Edition (Reissue), Vol 5(1), which defines "Forwarding Agents" and the "Rights and Liabilities of Forwarding Agents" in paragraphs 575 and 576 as under:-

"575. Characteristics of forwarding agents. A forwarding agent is one who carries on the business of arranging for the carriage of goods for other people; his task is to arrange carriage rather than to effect it. A forwarding agent is not, in general, a carrier. He does not ordinarily obtain possession of the goods and he does not ordinarily undertake the delivery of them at their destination. In normal circumstances his function is merely to act as agent for the goods owner to make arrangements with those contractors who do carry (such as shipowners, road hauliers, railway authorities and air carriers) and to make whatever arrangements are necessary for the intermediate steps between the ship and the rail, the customs or anything else."

"576. Rights and liabilities of forwarding agents. A forwarding agent is liable for failure to make proper arrangements for the carriage of the goods and for any ancillary matters which he undertakes, such as customs clearance. Where he expressly promises to perform a particular act or service, he may be strictly liable for failure to perform that act or service."

27. In the course of his submissions, Mr. Vaidialingam, in the context of breach of freight instructions, relied upon the decision of the Supreme Court in ***Trans Mediterranean Airways vs. Universal Exports and Anr., (2011) 10 SCC 316*** and of this Court in ***Tej Shoe Exporters (P) Ltd. vs. Air India & Anr., 2007 (94) DRJ 512***. Both

the said decisions are apposite and will be adverted to at the appropriate stage.

DEFENDANT'S CONTENTIONS

28. Mr. Ravi Gupta, learned senior counsel for the Defendant, rebutting the contentions of Mr. Vaidialingam, contended that the suit of the Plaintiff is false, frivolous and vexatious on the following grounds:

- (i) The Plaintiff should have claimed the money towards the value of his goods from ITTIERRE. The Plaintiff having failed to get his money back from the buyer has filed the present suit against the Defendant.
- (ii) The Notified Party, i.e., GERMANO was the agent appointed by the Plaintiff himself even before the Defendant was entrusted with the goods for shipment, though it is now falsely claimed by the Plaintiff in the suit that the said GERMANO was the agent of the Defendant in Italy and the goods were wrongly delivered by the Defendant to GERMANO.
- (iii) The Defendant has specifically pleaded in the written statement that the goods were delivered to ITTIERRE, but there is no averment in the pleadings of the Plaintiff that the goods never reached ITTIERRE.
- (iv) It is falsely claimed in the suit that the bank refused to make the payment because of the discrepancy in the documents. This assertion is wholly belied from the letter of the Bankers of

ITTIERRE dated March 19, 2009 (Ex.PW1/2), which clearly states that the buyer, i.e., ITTIERRE had denied the payment in the following terms:

*“We return you herewith enclosed, at our full discharge, involved documents **definitively refused by applicant.**”*

- (v) The suit is bad for non-joinder of both ITTIERRE and GERMANO, who were necessary parties to the suit, the suit being in the nature of a suit for damages. Unless it is proved by the Plaintiff that the goods had not been delivered to the importer, the suit could not proceed against the Defendant. Reference in this context of non-joinder of parties was made to the following judgments:-

- (a) ***Rajo Devi (Smt.) vs. Delhi Development Authority, 2010 VIII AD (DELHI) 592***, wherein it is held that though the statutory provision for mis-joinder and non-joinder of parties (Order I Rule 9 CPC) mandates that no suit shall be defeated by reason of mis-joinder and non-joinder of the parties, the proviso clarifies that nothing in this rule will apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the Court, otherwise the suit or the proceeding will have to fail.
- (b) ***Ramesh Hiranand Kundanmal vs. Municipal Corporation of Greater Bombay and Ors., (1992) 2 SCR 1***, in which case the Hon’ble Supreme Court held that the

touchstone for determining the question of who is a necessary party or a proper party is Order I Rule 10 CPC, and further held that a necessary party is one without whom no order can be made effectively.

- (c) ***Madan Kukreja vs. Banque Scalbert Dupont S.A. & Anr., 164 (2009) DLT 277.*** In the said case, the suit was held to be bad for non-joinder of necessary and proper parties on the ground that the Plaintiff had given no plausible explanation for not proceeding against certain parties, given the fact that the Plaintiff had alleged that the said parties had played a role and also entertained *mala fide* intentions in the matter.

29. It was next contended by the counsel for the Defendant that while Sections 73 and 74 of the Contract Act clearly provide that the Plaintiff is entitled for the actual loss and damage suffered by him, the law is well established that in order to successfully claim such damages, the Plaintiff has to prove that he had taken all reasonable steps to mitigate the loss/damage that a prudent man could have taken. In the absence of any such steps having been taken by the Plaintiff, no decree can be passed in his favour. In the present case, the Plaintiff has not only failed to prove any damage suffered by him, but, has also failed to prove any steps or any effort made by him to recover the money from ITTIERRE. No suit for recovery of money against ITTIERRE or even legal notice for demand has been served upon ITTIERRE by the Plaintiff. [See ***Murlidhar Chiranjilal vs. Harishchandra Dwarkadas, AIR 1962 SC 366; Highway***

Engineering Pvt. Ltd. vs. Union of India & Anr., 63 (1996) DLT 833; Sineximco Pte. Ltd. vs. M.M.T.C. Limited, 2009 (5) AD (Delhi) 748 and European Metal Recycling Ltd. vs. Blue Engineering P. Ltd., (2010) 154 Comp Cas 35 (Delhi)].

30. Learned counsel for the Defendant finally contended that the breach of the Defendant, if any, would make him liable only if the goods in question did not reach the ultimate Consignee, i.e., ITTIERRE and the mere fact that the Defendant has mentioned the name of a wrong party in the Airway Bills, assuming it to be a breach, cannot enable the Plaintiff to succeed. In other words, no liability can be fastened upon the Defendant unless it is proved by the Plaintiff that for such breach of the Defendant, the goods could not reach the rightful Consignee.

31. As regards the Plaintiff's submission that the Plaintiff had no knowledge of the Master Airway Bills, it was submitted that a bare perusal of the House Airway Bills (Exhibits P14, P15 and P16) would show that the respective Master Airway Bill numbers were mentioned in the House Airway Bills and, therefore, the Master Airway Bills were within the knowledge of the Plaintiff.

FINDINGS

32. Dealing with the last contention raised by the Defendant first, this Court finds that the aforesaid contention is not open to the Defendant. The Defendant has clearly stated in the written statement that the Master Airway Bills were not given to the Plaintiff (Para 15 of

the written statement) and re-affirmed that there was no need to handover the Master Airway Bills to the Plaintiff as he was not a part of it at all. In the affidavit by way of evidence, the Plaintiff (PW1) reiterated the averment made by him consistently in the plaint that the Master Airway Bills were not furnished to him by the Defendant in the first instance and were furnished much later. Thus, the submission that the mention of the Master Airway Bills in the House Airway Bills amounts to knowledge of the Master Airway Bills is wholly misconceived. It may be noted that the dates of the House Airway Bills are 15.01.2009, 29.01.2009 and 03.02.2009, whereas the dates of the Master Airway Bills are 24.01.2009, 29.01.2009 and 07.02.2009 in respect of the three consignments shipped by the Defendant, thereby clearly indicating that the Master Airway Bills were prepared later.

33. Adverting next to the contention of the Plaintiff that the scope of the suit is limited to the failure by the Defendant to follow the freight instructions as set out in Exhibits P11 to P13, it would be apposite to note that the Defendant has admitted that the Plaintiff had instructed it to consign the goods directly to the buyer, i.e., ITTIERRE, but that instead the goods were consigned and delivered to GERMANO, which was neither the buyer nor the instructed Consignee. It is also significant that the present case is one where payment was to be made through a Letter of Credit Ex.PW1/1B. The Plaintiff was only concerned with compliance of the LC terms without which it could not receive its payment. The Letter of Credit required the Plaintiff to have the goods consigned for shipment only through the Defendant, i.e., Freight Lines, to the buyer, i.e., ITTIERRE. The

Defendant violated the freight instructions and consigned the goods to a different party leading to the goods not being consigned to and delivered to the buyer. It would thus be both unjust and inequitable to now expect the Plaintiff to proceed on a fishing expedition to trace the goods. The Defendant's aforesaid attempt to widen the scope of the suit in this manner, in the opinion of this Court, is not relevant for the adjudication of the issues in the suit.

34. The contention of the Defendant that the Plaintiff stated that it is trying "to verify possibilities of recovery of payment", also cannot be read out of context and must be read in the context of the reply dated 26.05.2009 from the Advocates of the Defendant (Ex.P21), where the Defendant states: "*.....the HAWB was directly consigned to the consignee wherein the goods were released to the consignee directly.*" This was proved factually incorrect, as subsequently in the written statement the Defendant admitted that the goods were actually released not to the Consignee but to GERMANO, which was only the 'Notify Party', i.e., a party to be notified of the arrival of the shipment by the Airline. It was so described in the LC opened by the buyer ITTIERRE and the Plaintiff had nothing to do with the said GERMANO.

35. Another glaring fact which stares in the face is that GERMANO did not have to pay anything to get the goods because while in the admitted freight instructions Exhibits P11 – P13, the Defendant was asked to collect "freight at destination" and in the HAWBs Exhibits P14 – P16 also the same instruction is reflected; in the MAWBs Exhibits P17 – P19, the Defendant inexplicably has inserted the words

“Freight Pre Paid”, meaning thereby that the Defendant chose to pay the freight on its own instead of following the mandate to collect the same at destination. This clearly points to the fact that something was known to the Defendant regarding GERMANO that it has chosen not to disclose before this Court.

36. The Defendant in its written statement admits that goods were consigned to GERMANO and delivered to GERMANO. Thereafter, the Defendant claims, without any basis, that GERMANO is a Consignee–agent of the buyer. Meaningfully analysed, the Defendant in the written statement alleges that the consignment/delivery to GERMANO is delivery to the buyer–Consignee as GERMANO is allegedly a consignee agent. This the Defendant states is “*as per the trade practice*”, but the Defendant has neither proved any such trade practice as per which it automatically stands proved that the consignee–agent (assuming Germano to be a consignee–agent) further delivers to the buyer nor it has proved as to how the words ‘Consignee’ and ‘Notify Party’ were interchangeable. Thus, clearly, the Defendant has flouted the freight instructions issued by the Plaintiff to the Defendant. It bears repetition that the Defendant/Freight Lines was named in the Letter of Credit and the Plaintiff had no choice except to avail of its services. The ‘Consignee’ and the ‘Notify Party’ were also clearly named in the Letter of Credit and in the freight instructions (Exhibits P11 – P13) issued to the Defendant by the Plaintiff. If the Defendant chose to ignore the aforesaid instructions, it obviously did so at its own peril.

37. The contention of the Defendant that, the Defendant would only be liable if the goods in question did not reach the ultimate Consignee, i.e., ITTIERRE, is also misplaced. Ex.PW1/8R is a certificate of the Plaintiff's Bank confirming that no payment has been received from the buyer against the subject export transactions. This document has not been assailed anywhere by the Defendant, as indeed it cannot be. There is also absolutely no averment or allegation by the Defendant in its pleading that there is any collusion between the Plaintiff and the buyer or that the buyer has made payment for the goods. For the first time these assertions were raised at the time of hearing without any basis. The letter of the Bankers of the buyer, who had opened the LC, informing the Bankers of the Plaintiff that the documents submitted under the LC are being returned as the buyer has refused the same is in accordance with the standard procedure of LC opening Banks. Reference may usefully be made to Article 16.b of UCP 600 in this regard, which reads as under:-

“When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14(b).”

38. In the case of ***Trans Mediterranean Airways v. Universal Exports (supra)*** relied upon by the Plaintiff's counsel, a question had arisen as to whether the appellant could be directed to compensate the Consignor for deficiency of service in the facts and circumstances of the said case being that the agent had made out three Airway Bills for shipping of garments to Spain on behalf of the Consignor through the

appellant carrier, and in the Consignee column the consignment was addressed as:

*“BB SAE Madrid, Spain
Notify: M/S Liwe Espanola S.A.,
Mayor S/N, 30006 Puente Tocinor
Apartado, 741, Morcia, Spain,
LC No.C.1036-92-00276”*

The appellant carrier delivered the consignment to M/s. Liwe Espanola, as according to them, that was the only recognizable address available from the documents furnished by the Consignor. After nine months from the date of the shipment, in response to enquiry from the Consignor, the appellant carrier informed the Consignor that on finding the full name and complete postal address of the Consignee as M/s. Liwe Espanola, the appellant carrier had delivered the goods to it. The Consignor claimed that the Consignee of the said consignment was Barclays Bank, Madrid, and there was only one branch of Barclays Bank in Madrid and since the appellant carrier had wrongly delivered the consignment to the address mentioned in the block column instead of routing it through Barclays Bank, there was deficiency of service. The appellant carrier took the defence that the address given by the agent of the Consignor was incorrect and incomplete, and the only address that was properly given was that of the notified party, to which address they had delivered the consignment. Further, it was contended that at no point of time the appellant carrier was made known that “BB SAE, Madrid, Spain” stood for Barclays Bank, Madrid. It was also contended that the Consignor had received payment from the notified party. The

National Commission, in the impugned order, held that it was not open to the appellant carrier to have delivered the consignment to the notified party without informing the Consignor and ordered payment of compensation to the Consignor. On appeal, the Supreme Court held that it was in total agreement with the conclusion reached by the National Commission as it could safely be presumed that the carriers were fully aware of the Consignee's name, which was indicated in the Consignee's box and they should have notified the notified party immediately after the arrival of the consignment. Since that was not done, the appellant carrier was held liable to make good the loss caused to the Consignor.

39. In *Tej Shoe Exporters vs. Air India (supra)* relied upon by the Plaintiff's counsel, a learned Single Judge of this Court (Hon'ble Mr. Justice Pradeep Nandrajog) while dealing with a case where the delivery of the consignment was not as per the Airway Bill, in that, the consignment was delivered to the Consignee without notifying the Banker named, held that the Plaintiff would be entitled to receive the claimed amount from the Carrier/Air India. It was further held that the measure of damages suffered by a party due to mis-delivery of goods has to be the money which plaintiff would have realized had the goods been delivered as per Airway Bill. The value of the consignment would thus be the measure of the damages. The suit was accordingly decreed keeping in view the value of the invoice as declared in the Airway Bill less amount received by the Plaintiff with pre-suit, *pendente lite* and future interest @ 10%. Significantly, in this case, the goods had been rightly consigned to the Consignee but the

notified party, i.e., the Bank was not informed. Yet, it was held to be a case of mis-delivery of goods for which the carrier was held liable for the invoice value of the goods. The present case, therefore, stands on a better footing. The Defendant has blatantly breached the freight instructions and must accordingly be held liable for the value of goods.

40. This being the position, the aspect of non-joinder of necessary parties pales into insignificance. It deserves to be noted that the objection in the written statement is only regarding non-impleadment of the buyer ITTIERRE. There is no objection regarding non-impleadment of GERMANO though an attempt was made to argue that GERMANO was also a necessary party at the time of final arguments. As regards ITTIERRE, the learned counsel for the Plaintiff contended, and rightly so, that the impleadment of the buyer will amount to a luxury for the Defendant at the costs of the Plaintiff, apart from assisting and aiding the Defendant to run further away from impending liability. As regards GERMANO, the onus of proving Issue No.4, i.e., whether the freight instructions were followed was cast upon the Defendant. The freight instructions admittedly mandated that the Defendant consigns the goods to the buyer ITTIERRE. This is admitted in the written statement and is in fact nowhere denied. At the risk of repetition, it is stated that the Plaintiff has both pleaded and proved that neither ITTIERRE acknowledged that the goods had been delivered nor made any payment for the goods. Original certificate dated 02.05.2011 from BNP Paribas Bank (Ex.PW1/8R) has been submitted by the Plaintiff certifying that no

payment was received against the documents from ITTIERRE. No evidence to the contrary has been adduced by the Defendant.

41. The judgments relied upon by the counsel for the Defendant are also of no avail to the Defendant. *Madan Kukreja's* case (*supra*), which has been heavily relied upon, is on its own peculiar facts. In the said case, *the claim was against a Bank which had opened an LC* on account of a buyer and the Court felt that an effective decree could be passed against an LC opening Bank only if the buyer, who had got the LC opened, was a party, it being the case of the Defendant Bank that it had opened the LC acting on the instruction of its customer. The facts in the present case are altogether different. In the present case, the Plaintiff has no right to relief against the buyer in respect of the controversy involved, as the buyer had no role to play in the Defendant's violation and no liability can be fastened on the buyer on account of the Defendant's violation of the freight instructions. In other words, there is no bar to the passing of an effective decree against the Defendant for violation of the freight instructions in the absence of the buyer.

42. In *Ramesh Hirachand Kundanmal's* case (*supra*), it is held that in deciding as to who is a necessary party each case has to be determined on its own facts [See also *Razia Begum vs. Sahebzadi Anwar Begum and Others*, AIR 1958 SC 886 and *V.N. Verma vs. Smt. Veena Mahajan*, 2012 (127) DRJ 600]. In the case of *Kasturi vs. Iyyamperumal and Others*, (2005) 6 SCC 733 also, it is held that a plain reading of the expression "*all the questions involved in the suit*" occurring in sub-rule (2) of Order I Rule 10 CPC makes it abundantly

clear that the legislature clearly meant that “*the controversies raised as between the parties to the litigation must be gone into only and not the controversies which may arise between the plaintiff–appellant and the defendants inter se or questions between the parties to the suit or a third party.*” The Plaintiff in the suit is *dominus litis* and cannot be forced to add parties against whom he does not want to fight unless it is a compulsion of the rule of law. Adding parties in the case, which will enlarge the scope of the suit, add additional causes of action, attract collateral issues, widen controversies and embarrass the Plaintiff, is not the object and purport of Order I Rule 10.

43. Pertinently, the consistent stand of the Plaintiff in his pleadings and evidence has been that the buyer has till date not made any payment for the goods nor has accepted that the goods were delivered to it. The Plaintiff also categorically states that the goods have not been received back by the Plaintiff. The Defendant has not been able to refute the aforesaid statements made on oath by the Plaintiff; and in order to cover the breach of freight instructions by it is attempting to widen the scope of the suit by urging grounds that are wholly irrelevant for the adjudication of the issues in the suit. This *modus operandi*, in the opinion of this Court, adopted by the Defendant for dislodging the Plaintiff’s claims is wholly unacceptable.

44. As regards the plea taken by the Defendant with regard to mitigation of damages, in order to rely on the law of mitigation, the Defendant has to establish the existence of mitigating circumstances. That it has failed to do by not proving that the undelivered goods were available to or in control of the Plaintiff. It was contended by the

counsel for the Plaintiff, and I think rightly so, that mitigation involves the concept of ‘avoidable loss’ and in this case there was nothing that the Plaintiff could do to avoid loss. In this context, the observations made by the Hon’ble Supreme Court in the case of ***M. Lachia Setty and Sons Ltd. vs. Coffee Board, Bangalore, (1980) 4 SCC 636*** are apposite:-

“14. At the outset it must be observed that the principle of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the court while awarding damages. The correct statement of law in this behalf is to be found in HALSBURY’S LAWS OF ENGLAND (4th Edn.) Vol. 12, para 1193 at page 477 which runs thus:

1193. Plaintiff’s duty to mitigate loss.—The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant’s wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.

Again, in para 1194 at page 478 the following statement occurs under the heading Standard of conduct required of the plaintiff:

The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. . . . In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought

not to be weighed in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty. . . .

The plaintiff is under no obligation to destroy his own property, or to injure himself or his commercial reputation, to reduce the damages payable by the defendant. Furthermore, the plaintiff need not take steps which would injure innocent persons. (emphasis supplied)

In Banco De Portugal v. Waterlow & Sons Ltd. [1932 All ER Rep 181 : 1932 AC 452], Lord Shankey, L.C., quoted with approval the statement of law enunciated in James Finlay & Co. v. N.V. Kwik Hoo Tong, Handel Maatchappij [(1929) 1 KB 400], to the effect: "In England the law is that a person is not obliged to minimise damages on behalf of another who has broken a contract if by doing so he would have injured his commercial reputation by getting a bad name in the trade". In AMERICAN JURISPRUDENCE, 2d, Vol. 22, para 33 at pp. 55-56 contains the following statement of law:

33. The general doctrine of avoidable consequences applies to the measure of damages in actions for breach of contract. Thus, the damages awarded to the non-defaulting party to a contract will be determined and measured as though that party had made reasonable efforts to avoid the losses resulting from the default. Some courts have stated this doctrine in terms of a duty owing by the innocent party to the one in default; that is, that the person who is seeking damages for breach of contract has a duty to minimise those damages. However, on analysis, it is clear that in contract cases as well as generally, there is no duty to minimise damages, because no one has a right of action against the non-defaulting party if he does not reasonably avoid certain consequences arising from the default....."

45. In view of the aforesaid discussion, Issue Nos.1 to 5 are decided in favour of the Plaintiff and against the Defendant.

ISSUE NOS.6 AND 7

- “6. *Whether the plaintiff is entitled to interest on the amount found payable to it by the defendant? If so, on what amount, at what rate and for what period?*
OPP
7. *Relief.*”

46. The interest claimed in the present case is 18% per annum, but no evidence has been led on the issue of interest. Accordingly, the Plaintiff is held entitled to receive from the Defendant Euro 110682.21 keeping in view the value of the invoices as declared in the Airway Bills with pre-suit interest @ 10% per annum from 31.01.2009. *Pendente lite* and future interest is also awarded to the Plaintiff @ 10% per annum. As per the plaint, the Indian Rupee equivalent of Euro 110682.21 would be ₹ 72,36,824.01. The Plaintiff is accordingly held entitled to the sum of ₹ 72,36,824.01 with interest @ 10% per annum from 31.01.2009 till realisation. The Plaintiff would also be entitled to costs against the Defendant.

CS(OS) 302/2010 stands disposed of accordingly.

**REVA KHETRAPAL
JUDGE**

October 08, 2012
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