

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

Reserved on: August 23, 2016
Pronounced on: August 29, 2016

+ RFA 209-10/2005

TRIBHUVAN ENTERPRISES & ANRAppellants
Through: Mr. Girdhar Govind and Ms. Neetu
Singh, Advocates

Versus

THAKAR PETROCHEMICALS LTD. & ANR.Respondents
Through: Mr. R.S. Kela and Mr. Sanjeev
Bindal, Advocates

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

1. Impugned order of 4th January, 2005 decrees the suit of respondents for a sum of ₹3,44,769/- with interest at the rate of 6% *per annum* and dismisses the counter-claim of appellants-defendants. The factual background of this case, as noted in the impugned order, is that appellants-defendants were appointed as Clearing and Forwarding Agents and Stockists of respondents-plaintiffs and on account of appellants-defendants withholding the stock of lubricants, out of outstanding amount of ₹5 lacs odd, security deposit of ₹3 lacs was adjusted and thereafter, suit for recovery of the principal amount of ₹2,32,730/- was instituted on ledger account and interest thereon was also claimed. The stand of appellants-

defendants before the trial court was that the lubricants were of sub-standard quality and were not saleable and the counter-claim was made for refund of security amount with interest and for commission of goods as well as loading and unloading charges. Both the sides had led evidence before the trial court and thereafter, 12 issues were framed. After recording the evidence led by the parties, the trial court had returned the findings in favour of the respondents-plaintiffs and against the appellants-defendants on the counter-claim as well, which are assailed in this appeal.

2. The foremost contention raised by learned counsel for appellants is that there was no privity of contract between appellants and first respondent and so, reliance placed upon the Agreement (Ex. PW 1/3) is of no consequence and trial court has erred in relying upon it. It was pointed out that Form 'F' sent by appellants to second respondent-*Thakar Chemicals* would not constitute a sale as it was a mere transfer and thus, no liability arises and that trial court has gravely erred in decreeing respondents' suit against the appellants.

3. It was emphatically submitted by learned counsel for appellants that the documents on record do not indicate any sale of goods by respondent-plaintiff to appellants-defendants and it was mere transfer of goods and when respondent-plaintiff wanted to appoint appellants as stockist, appellants had refused and had sought refund of security amount of ₹3 lacs, but respondent had failed to refund the security amount.

4. During the course of hearing, learned counsel for appellants had extensively read the cross-examination of respondents' witness-*Sant Lal (PW-1)*. It was also submitted that there is lack of territorial jurisdiction of Delhi Courts to decide this case as the supply of goods was at Gwalior and

no part of cause of action had arisen in Delhi. Reliance was placed by appellants' counsel upon Supreme Court's decision in *Janki Vashdeo Bhojwani and Another v. Indusind Bank Ltd.* AIR 2005 SC 439 to submit that *Sant Lal (PW-1)* could not have deposed on behalf of respondent No.1- *Thakar Petrochemicals Ltd.*. Thus, it was submitted that the impugned judgment deserves to be set aside and suit of respondents ought to be dismissed.

5. To controvert the stand taken on behalf of appellants, it was submitted by learned counsel for respondents that in reply (Ex.PW1/23) to respondents' legal notice, appellants had taken the stand that the goods supplied were defective. It was submitted that appellants had failed to render the accounts and had also failed to return the goods of respondent-plaintiff. Regarding the privity of contract, it was submitted that documents on record clearly indicate that there was communication between the appellants and first respondent as well as second respondent and that first respondent as well as second respondent are sister-concern and so, it cannot be said that there was lack of privity of contract between the parties.

6. It was vehemently submitted that it is not the case of the respondents that there was no sale of goods to appellants and infact appellant-Firm was the consignee of the goods entrusted by respondents to the appellants. It was pointed out that Form 'F' sent by appellants to respondent cannot be disputed and is infact not disputed. It was submitted that the invoices, ledger, delivery challan, goods receipt, etc., placed on record by respondent clearly indicate that the goods were supplied to appellants by the second respondent and the same have been misappropriated by the appellants and so, after adjusting the security amount, the suit amount is due from the

appellants and trial court has rightly decreed the suit of appellants.

7. It was also submitted that as per the Agreement, it was mutually agreed between the parties that the jurisdiction would be of Delhi Courts and infact the goods were supplied from Delhi and substantial cause of action arose in Delhi and infact there is no substance in this appeal and so, it deserves to be dismissed with costs. Nothing else was urged on behalf of either side.

8. Upon hearing the submissions advanced by both the sides and on perusal of the impugned order, the evidence on record and the decision cited, I find that although Clearing and Forwarding Agreement was between the appellants and respondent No.1, but the stocking of the goods for distribution was made available by sister-concern of first respondent i.e. the second respondent. No doubt, the invoices, ledger account, delivery challan, goods receipts, etc., are of second respondent, but Communications of 1st March, 1996 (Ex.PW1/31) and of 2nd May, 1996 (Ex.PW1/32) were sent by appellant to first respondent regarding the stock position of the goods lying with the appellants.

9. The issuance of form 'F' to second respondent by itself would not justify appellants' plea of there being no privity of contract with the respondents because admitted communication of 19th June, 1996 (Ex.PW1/24) by appellants to first respondent talks of submission of form 'F' and transferring of lubricants and goods by respondents to appellants. In such a situation, appellants cannot be heard to say that there was no sale of goods by respondents to appellants and the plea of appellants of there being no privity of contract with first appellant is without any basis as they have not disputed their status of consignee agent in respondents' communication

of 16th August, 1996 (Ex.PW1/22) whereby it was intimated to appellants that due to change in policy, the status of consignee agent was being changed to super-stockists. In the face of overwhelming documentary evidence to show that appellants were the agents of respondents, reliance placed by appellants' counsel upon *Janki Vashdeo Bhojwani (supra)* is of no avail as respondents' witness-*Sant Lal (PW-1)* was well within his right to depose on the nature of transaction between the parties.

10. Although cross-examination of this witness-*Sant Lal (PW-1)* was adverted to in detail by appellants' counsel, but nothing worthwhile had emerged therefrom to discredit the testimony of this witness. The counter-claim of appellants has been rightly negated by the trial court as it stands established from the evidence on record that the security deposit was rightly adjusted by respondents against the outstanding amount. In face of the documentary evidence on record, it cannot be said that there was lack privity of contract between the parties.

11. The jurisdictional plea raised by the appellants is without any basis as the parties had mutually agreed that the jurisdiction would be of Delhi courts and in view of the fact that the goods were supplied to appellants at Gwalior from Delhi by the respondents.

12. Upon considering this case in its entirety, this Court finds no infirmity in the impugned order and no substance in this appeal. Hence, this appeal is dismissed with costs.

(SUNIL GAUR)
JUDGE

AUGUST 29, 2016

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