HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

C.C.C.A. No.139 OF 1999

JUDGMENT:

Suffering a dismissal decree in O.S. No.1368 of 1989, dated 03-11-1998, on the file of the V Senior Civil Judge, City Civil Court, Hyderabad, the plaintiff preferred the present appeal under Section 96 of Code of Civil Procedure, 1908 (for short 'CPC').

2. The suit in O.S. No.336 of 1985 was filed by the defendant in O.S. No.1368 of 1989, requesting to direct the plaintiff herein to deliver the goods and to hold that the defendant herein is not liable to pay any demurrage charges to the plaintiff, and also to direct the plaintiff herein to pay a sum of Rs.1,63,850/- with interest at 18% per annum on Rs.98,600/- from the date of suit till payment towards deterioration of goods value, loss of interest and also for costs. There has been a reference to W.P. No.14069 of 1984 against the Commercial Tax Officer for release of goods. It is unnecessary to refer to O.S. No.336 of 1985, for the reason that no appeal is preferred challenging that portion of the judgment and decree which was dismissed by the trial Court. However, defendant No.1 in O.S. No.336 of 1985 filed O.S. No.1368 of 1989 for recovery of Rs.1,50,932/- with interest and for costs , and against the judgment and decree therein, the present appeal is preferred by the plaintiff.

3. The appellant herein is the plaintiff, while respondent is the defendant in O.S. No.1368 of 1989 before the trial Court.

4. For the sake of convenience, the parties herein are referred to as they were arrayed in the suit.

5. The facts that are necessary for disposal of the present appeal are:

i) The plaintiff has been doing the business on transport of goods throughout the Country owning large fleet of goods of transport vehicles and one of its branches is located at Silvasa, a Union Territory forming part of Dadar Nagar Haveli.

ii) The defendant with its head office at Calcutta and with one of its branches at Hyderabad, entrusted 47 consignment of Tyres and other accessories to the plaintiff at Silvasa for dispatch, by its letter dated 24-11-1983. When the consignment reached Sanga Reddy Check Post, it was intercepted by the Commercial Tax Officer on the ground that the sales tax due on the transported goods was unpaid, but, on persuasion by the plaintiff, their request was accepted. But, however, on 29-12-1983, the Commercial Tax Department made a surprise on the godown of the plaintiff at Hyderabad and inspected its accounts books and other relevant records and directed not to deliver the goods to consignee until further orders.

ii) It is stated that the plaintiff requested the defendant to get the release order from the department. The plaintiff also complained that the Commercial Tax Authorities told that the consignment booked by the defendant in the name of various consignees were bogus, and that that was the reason, the documents were not negotiated through the bank and also issued a notice to show-cause as to why the plaintiff should not be treated as an agent of a non-resident principal and subject to assessment and penalty.

iv) The plaintiff claims that it has approached the Court by filing W.P. No.560 of 1984 and obtained stay on 16-03-1984. But, ultimately, the writ petition was dismissed upholding the powers of the authority for detaining goods. The plaintiff claims that the defendant filed O.S. No.1383 of 1984 on the file of V Additional Judge, City Civil Court, Hyderabad, seeking delivery of goods and also to declare that they were not liable to pay demurrage charges, and the plaintiff filed O.S. No.1412 of 1984 for recovery of demurrage charges, and in O.S. No.1383 of 1984, an interim order was passed directing the defendant herein to deposit a sum of Rs.1,80,000/- by permitting the plaintiff to withdraw the same on furnishing security, and the said order was modified in C.R.P. No.3686 of 1984.

v) The plaintiff also stated that the defendant filed O.S.No.336 of 1985 on the file of the V Additional Judge, City Civil Court, Hyderabad, seeking very same relief as the one sought in O.S. No.1383 of 1984, in which the demurrage charges were claimed by the plaintiff therein, and the trial Court directed to deposit part of the amount of demurrage claimed while permitting the plaintiff to withdraw only Rs.9,000/- and the revisions preferred by both the parties were disposed of by an order, dated 16-08-1985, directing the defendant herein to deposit Rs.50,000/- in O.S. No.336 of 1985 and to furnish the security to the extent of Rs.59,000/- while permitting the plaintiff to withdraw the same on furnishing security. Thus, the plaintiff sought recovery of Rs.1,50,932/-.

6. The claim was resisted by the defendant stating that the action brought by the plaintiff is nothing but a counter-blast to escape its liability to pay demurrage of Rs.1,63,850/-, and the suit is not maintainable under Section 10 CPC in view of the pendency of O.S. No.336 of 1985, as the subject matter is one and the same.

i) The defendant took the stand that the consignments were entrusted to the plaintiff in the ordinary course of transactions of transport from Silvasa to various destinations, and the authority at the check post allowed the consignments when its officials visited the check post and brought to the notice of the authority that the goods were transported from Silvasa, a tax free zone, but not on the persuasion of the plaintiff as alleged.

ii) The defendant has denied its liability to pay demurrage charges, as goods were retained at godown at Warangal under the orders of detention issued by the Commercial Tax Officer and there was no negligence in any manner on its behalf for the delay in taking delivery of the goods from the go-down of the plaintiff, and the plaintiff is a Carrier and is liable to pay the loss sustained by the defendant and only after furnishing bank guarantee and deposit of Rs.50,000/- as ordered by the Court, the defendant got the goods released from the plaintiff's godown at Warangal.

iii) The defendant took the stand that the plaintiff never specified the amount of demurrage charges to be paid except claiming in the suit, and there was no contract between them there-for, and the plaintiff did not challenge or question the action of the Commercial Tax Department and failed to fulfill its obligation as carrier, and the plaintiff left the goods in open space exposed to sun, rain and bad weather and, thus, allowed the goods to be deteriorated and thereby sought to dismiss the claim.

7. The trial Court settled the following three issues:

> "i) Whether the suit is not maintainable?
>
> ii) Whether the plaintiff is entitled to claim and recover Rs.1,50,932/- towards demurrage charges?
>
> iii) To what relief, the plaintiff is entitled? "

8. The trial Court has taken up joint trail of both suits with the suit in O.S. No.336 of 1985, as the leading one. On behalf of the defendant herein, Mr. M. Gopalakrishnan, its Manager was examined as PW.1 and Exs.A-1 to A-58 were marked, whereas, on behalf of the

plaintiff herein, its Manager S.N. Misra was examined as DW.1 and no documents were filed.

9. The trial Court has taken up issue No.2 in other suit and issue No.2 in the present suit touching demurrage charges and recorded a finding against the plaintiff. On issue No.1, held that the suit is maintainable on the ground that the defendant, who took the plea that the suit is not maintainable, has not placed any material to substantiate it nor any arguments were tendered at the time of hearing and held against the defendant, and dismissed the suit claim.

10. Thus, that portion of the judgment which relates to the relief in O.S. No.1368 of 1989 and the decree passed therein, are under challenge in the instant appeal, contending that the trial Court went wrong in dismissing the claim having held that the suit is maintainable and ought to have decreed.

(i) It is stated that the trial Court ought to have taken cognizance of the fact that clause - 6 of the consignment note entitles the appellant to claim demurrage charges for a period of beyond seven days of storage for the consignment from the defendant.

(ii) It is further agitated that the Court below failed to note that the goods were kept in the custody of the plaintiff since 24.11.1983 to 05.10.1985 and were stored in the go-down of the plaintiff and as such the plaintiff is entitled to demurrage charges and also contending that the goods were in the custody of the plaintiff beyond its control and the trial Court ought to have noticed the same and ought to have decreed the suit.

(iii) Thus, the appellant seeks to allow the appeal valuing the suit at Rs,1,50,932/- charging interest at 18% per annum from 11.08.1988 to 30.04.1999 on Rs.1,50,932/- i.e., Rs.2,91,223.29 paise and costs of the suit at Rs.4,025/-, and the total valuation at Rs.4,46,180-29 paise.

11. Heard Sri K. Jaya Kumar, learned counsel for the appellant, and Sri P. Srinivas Reddy, learned counsel for the respondent, and perused the material on record.

12. The only vital issue in O.S. No.1368 of 1989 is the second issue which reads thus:

> "2. Whether the plaintiff is entitled to claim and recover Rs.1,50,932/- towards demurrage charges?"

In O.S. No.336 of 1985, which was the leading suit, in which evidence was recorded in the joint trial along with O.S. No.1368 of 1989, the second issue which is tried along with the second issue of O.S. No.1368 of 1989, reads thus:

> "2. Whether the plaintiff is entitled for a decree declaring that he is not liable to pay any demurrage charges on these consignments?"

These two issues were taken up for recording a common finding. At the cost of repetition, it is to be stated that the plaintiffs in O.S. No.336 of 1985, which is the defendant in O.S. No.1368 of 1989 and carrier, the defendant in O.S. No.336 of 1989, and admittedly, the plaintiff in O.S. No.1368 of 1989 are consignees.

13. The learned trial Court mainly basing on the answers given by DW.1, Legal and Administrative Officer, working in the defendant's branch office, in O.S. No.336 of 1985; it is also in his cross-examination that they detained the goods in the go-down at Warangal on the instructions of the Commercial Tax Officer, Warangal, that in the ordinary course of business, they ought to have delivered the consignment, but detained, but only in view of the direction by the Commercial Tax Officer, Warangal, and the plaintiff never requested the Corporation to keep the goods in the go-down without delivery. The learned trial Judge thereby derived the probability that the said admissions of DW.1 makes it abundantly clear that the plaintiff could not take delivery in view of the order of detention passed by the Commercial Tax Officer, Warangal, but, not intentionally or deliberately and, thereby, arrived at the finding that no negligence or latches can be attributed to the plaintiff. It is not in dispute that the writ petition filed by the plaintiff questioning the detention order was dismissed upholding the order of the Commercial Tax Officer to levy sales tax on the suit consignment and thereby held that only by virtue of the legal order passed by the competent

authority, but not on account of negligence or other latches on the part of the plaintiff or its nominee, delivery of the goods could not be taken.

14. The learned trial Court referred to Clause '6' of the terms and conditions printed on the overleaf of the consignment notes, copies of which are marked as Exs.A-8 to A-56, and as per Clause '6', demurrage charges for the period beyond 'seven days' of storage by the defendants are liable to be paid.

15. The learned trial Judge held that the said clause is inapplicable in the present case since detention of goods was not on account of the default on the part of the plaintiff or its nominee, but the storage was necessitated in view of the legal orders by a competent authority with which the plaintiff has nothing to do. Therefore, he held on issue No.2 in O.S. No.336 of 1985 that the plaintiff was not entitled for the relief of declaration as the relief was not valued and no Court fee was paid. On issue No.2, in O.S. No.1368 of 1989 held in negative.

16. There is no need to refer to extract Clause '6' of the terms and conditions printed on the overleaf of the consignment notes. Obviously for two reasons, the first of which constitutes principal reason. There is no dispute between the parties that the Commercial Tax Officer initially obstructed the consignment at the check-post, Warangal, and though released passenger goods, but surprised the

carriers office at Warangal and served the order which was impugned in the writ petition. Admittedly, this Court held in favour of Commercial Tax Officer's action refusing to quash the said order. The said order was passed on 23.11.1984 which was marked as Ex.A-1, but the said order was modified under Ex.A-2 on 13.12.1984 followed by constant exchange of notices between the parties when the orders of the tax authority directed the goods to be delivered and the plaintiff i.e., consignee have not attempted to seek delivery of goods by necessary implication, that such an order was in force. Thus, it is to be construed that that clause is frustrated by impossibility to perform by either party on account of the tax authority passing the order levying tax and the request made in writ petition being refused. In such an event, the finding recorded by the learned trial Court on issue No.2 cannot at all be faulted. It does not suffer from any legal infirmity. On the other hand, the approach of the learned trial Judge is supported by process of reasoning, not only based on documentary evidence, but also the probabilities aiding the documentary evidence. When viewed in that context, nothing more is required to probe further. Thus, there is no merit in the present appeal.

17. Therefore, the appeal is dismissed confirming the judgment under challenge. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any pending in the appeal stand dismissed.

A. SHANKAR NARAYANA, J

December 5, 2017.
Mgr/ PV