

THE HON'BLE SMT JUSTICE T. RAJANI

APPEAL SUIT No.1556 of 1997

JUDGMENT:

This appeal is preferred by the appellants, who are the plaintiffs before the Court below, being aggrieved by the judgment and decree of the I Additional District Judge, East Godavari, Rajahmundry in O.S.No.109 of 1988 dated 03.06.1996. The dispute between the parties relates to an agreement, which was executed between them with regard to the transfer of a lorry.

2. The plaint averments, so far as are necessary for deciding the issues that arise for consideration, are as follows:

(a) An agreement was entered into between the first plaintiff and the defendant on 02.11.1974, by virtue of which the defendant agreed to transfer a lorry in favour of the first plaintiff on fulfillment of conditions stipulated therein. An advance amount of Rs.15,000/- was to be paid by the plaintiff. The plaintiff paid the said amount, on which he was put in possession of the lorry on 02.11.1974 itself. Further a sum of Rs.36,000/- had to be paid in instalments, as per the clauses in the contract. The plaintiff paid the instalments and the ownership of the vehicle had to be transferred to him but it did not happen, as there was a sequel to the agreement. The first plaintiff executed a power of attorney in favour of the second plaintiff empowering him to hold and run the lorry in terms of the contract and to receive from the defendant all sums of money by way of advance or by way of transport charges.

(b) The second plaintiff was asked to keep the lorry in good condition and render necessary repairs by advancing his own money or by drawing advance from the defendant. The second plaintiff plied the vehicle in compliance with the terms of the contract, one of the terms of the contract being that the first plaintiff should continue to render transport services to defendant even after paying the full sale price of the vehicle. The plaintiffs were under the impression that such condition is valid. The defendant took advantage of the ignorance of the plaintiffs of the fact that such condition is obnoxious in the eye of law and is, therefore, a violation.

(c) On the pretext that the plaintiffs did not ply the vehicle subsequent to 18.03.1981, the defendant high-handedly seized the vehicle on 23.09.1982. The request of the plaintiffs to return the vehicle was declined by the defendant and a demand for Rs.10,000/- was made by the defendant. The plaintiffs then contacted one Mr. R.K. Maheswari, Deputy Chief Executive of the defendant company, through Dr. Nune Satyanarayana, who is a respectable citizen of Rajahmundry and an elected member of Municipal Council. Negotiations were held and it was agreed that Rs.7,500/- was to be paid by the first plaintiff for transferring the ownership of the vehicle in his favour. As such, the plaintiffs paid Rs.7,500/- by way of demand draft dated 24.03.1983. The defendant received the amount but sent an amazing notice to the plaintiffs stating that the defendant incurred an expenditure of Rs.36,399.94 ps. on plaintiffs' account and that the plaintiffs are bound to pay the said amount until which time the vehicle

will not be handed over to them. There is no obligation to pay any further sum to the defendant after remitting Rs.7,500/-.

(d) The defendant, on the other hand, is liable to pay Rs.60,000/- to the plaintiffs towards loss suffered by them. The plaintiffs are also entitled to Rs.7,500/- with interest at 24% per annum from 24.03.1983 till the date of suit, as the defendant collected the said amount under false representations. The suit is filed for declaration that the first plaintiff is the owner of the lorry bearing No.AAP 5321; for consequential injunction directing the defendant to deliver the possession of the lorry to the first plaintiff, after getting the ownership certificate transferred under his name and for recovery of Rs.69,900/- for wrongful detention of plaintiffs' lorry and wrongful detention of their money of Rs.7,500/- from 24.03.1983.

3. The defendant, in his written statement, while denying the averments in the plaint, contended that the suit agreement, in the first place, the agreement is not a hire-purchase agreement, as referred by the plaintiffs and that it is a service cum sale agreement. The intention of the defendant company in entering into the said service cum sale agreement is to ensure proper, regular and efficient transport service to the defendant company by creating an incentive to the agreement.

(a) The terms of the agreement, importantly, are:

1. The first plaintiff must render transport service on the rates fixed by the defendant company from time to time, which would be 20% less than the normal rates fixed for the similar jobs for other contractors transporting the material of the defendant company with their own vehicles.

2. The first plaintiff should render a total transport service for value of Rs.3,67,500/- at the above mentioned rates.
3. The first plaintiff should pay Rs.15,000/- as advance before taking delivery of the lorry and thereafter, Rs.10,000/- per month to make up a total sum of Rs.36,000/-
4. Clauses 10 and 14 of the agreement stipulate that interest at 15.1/2 % per annum shall be paid on every late payment.
5. The defendant will transfer the ownership of the lorry to the first plaintiff five years after the date of the agreement or two years after he completes the transport service valued at Rs.3,67,500/-, whichever is later, if he has paid Rs.36,000/- apart from the initial payment of Rs.15,000/-.
6. On the transfer of ownership of the vehicle, the initial deposit of Rs.15,000/- will be adjusted towards the sale price of the said lorry. The first plaintiff has to pay sales tax in addition.
7. If the contractor contravenes any of the conditions of the agreements, the defendant has right to seize the lorry.

(b) It is further contended that the second plaintiff is the power of attorney holder of the first plaintiff. The plaintiffs never rendered proper service to the defendant company. When the first plaintiff failed to render transport service in the month of July 1979, after taking advance of Rs.29,043.41 ps. on the plea of effecting repairs to the lorry, the defendant company seized the said lorry. The first plaintiff assured the defendant company that he would render service properly and undertook to pay the said amount and also the monthly deposit regularly and he executed an additional agreement dated 09.08.1979 with two guarantors. On that, the defendant released the lorry,

but even thereafter, the first plaintiff was irregular in rendering transport service to the defendant company. The first plaintiff completed the agreement of transport service for Rs.3,67,500/- by 18.03.1981. He has to render service for a period of two years from thereon but the plaintiffs rendered service only for 123 days between 18.03.1981 and 23.09.1982. The lorry was seized on 23.09.1982 due to the said reason.

(c) After lapse of two months, the second plaintiff issued a notice dated 07.12.1982 requesting for the release of lorry. The defendant issued a reply on 14.12.1982 calling upon the first plaintiff to give an undertaking that he would render service properly in order to take possession of the lorry. The plaintiffs did not approach the defendant after receiving the said reply for the reasons best known to them. The defendant being eager to get the transport work done by the plaintiffs through the said lorry again issued a notice dated 17.02.1983 requesting the plaintiffs to approach the defendant within four days from the date of receipt of the notice giving a fresh undertaking as required. In the said notice, it was specifically mentioned that, if the plaintiffs failed to do so, the defendant company would be forced to terminate the agreement. After the receipt of the notice also, the plaintiffs kept quiet. The defendant again got issued notice dated 09.03.1983 terminating the agreement. On receipt of the said notice, the first plaintiff sent a reply dated 24.03.1983 admitting that he has to render services till 18.03.1983 and that he could not render service property, but, however, he requested the defendant to accept Rs.7,500/- as compensation and relive him from the obligation

to render any further service. He also enclosed a demand draft for the said amount.

(d) The defendant informed the first plaintiff that he had to pay other outstanding dues apart from sales tax and called upon him to take the said lorry after paying the above said amount. The plaintiffs did not agree to pay the outstanding dues. There was never any settlement between the parties to receive Rs.7,500/- towards full satisfaction of the claim of the defendant as alleged by the plaintiffs. Further the said amount was sent towards loss occasioned to defendant company for not rendering service properly for two years subsequent to 18.03.1981. As the plaintiff did not approach the defendant, he got issued a notice to 04.02.1984 requesting the first plaintiff to pay Rs.14,397.10 ps., which is the interest due to late payments; Rs.13,873.44 ps., which is the interest due on the advances taken by the plaintiff for effecting repairs to the lorry and Rs.8,129.40 ps. towards sales tax totaling to Rs.36,399.44 ps. within seven days from the date of receipt of the said notice. The plaintiffs did not choose to give any reply nor did they comply with the demand. Again the defendant issued notice dated 07.07.1984 informing that the plaintiff has not paid the amount. After the said notice was given on 07.07.1984, the plaintiffs did not move their little finger knowing fully well of this default, the plaintiffs rushed to the Court and filed the suit.

4. The pleadings led the Court below to frame seven issues, which include the fulfillment of the terms of the agreement dated 02.11.1974 by the plaintiff, which would enable him to claim transfer of the vehicle and whether he paid Rs.7,500/- only in lieu of

compensation for not rendering proper service or in full quittance of his liability and whether he is entitled for damages for Rs.69,900/- for wrongful detention of the lorry.

5. The appeal, though is filed assailing the judgment of the Court below on several grounds, at the hearing, the counsel for the appellants gave up the other grounds except the claim for damages. He submits that the cause with regard to the other issues does not survive. The Court below, under the impugned judgment, made an elaborate discussion on each of the issues framed by it and came to the conclusion that the plaintiff breached the terms of the agreement and consequently, dismissed the suit.

6. Now the point that remains to be considered by this Court would only be whether the plaintiffs are entitled for damages as claimed by them.

POINT:

7. Though the point for consideration is only with regard to the entitlement of the damages by the plaintiff, it needs a discussion on the terms of the agreement, as the breach of the said agreement by the defendant alone would entitle the plaintiff for damages. Exs.A1 and B1 are marked on behalf of the plaintiff and the defendant respectively but the said document is one and the same i.e. agreement dated 02.11.1974. The terms of the agreement are as stated in the plaint. There is a stipulation that the plaintiff has to render transport service for a value of Rs.3,567,500/- and further render service for two years. There is also a stipulation that if the lorry is kept off the road for more

than 30 days during the said period of one year, which is meant for plying the vehicle exclusively for the purpose of the defendant.

8. A cursory look at the plaint averments would suffice to conclude that the plaintiff violated the terms of the agreement, as there is an admission in the plaint itself that service could not be rendered as stipulated in the agreement. P.W.1, who is examined on behalf of the plaintiffs, is the power of attorney holder of the first plaintiff. Though he undertook, while deposing before the Court below during the cross-examination that he would get the first plaintiff to give evidence, he did not get the first plaintiff to depose before the Court. There is no embargo on the acceptance of evidence of the power of attorney holder, if he has personal knowledge about all the facts pertaining to the case and if the claim of the plaintiffs can be sustained with the help of the evidence of power of attorney holder.

9. Counsel for the respondents, while contending that the suit has to go for non-examination of the first plaintiff, relies on a decision of the Supreme Court in *MAN KAUR (DEAD PER LRS.) v. HARTAR SINGH SANGHA*¹, which dealt with the aspect of necessity of examination of power of attorney holder. In that case, the agreement of sale was entered into between the parties through power of attorney holders. Agreement was signed on behalf of the plaintiff by one attorney holder and suit was filed by another attorney holder. There also the attorney holder, who executed the agreement on behalf of the purchaser, was not examined, the other attorney holder,

¹ (2010) 10 SCC 512

who had file the suit, was examined, who stated unawareness of the transaction before issuing of suit notice.

9. In this case, the evidence of P.W.1 shows that the first plaintiff gave power of attorney in favour of the second plaintiff and the defendant is also aware of the same and it is accepted by the defendant that the power of attorney is submitted to the defendant. To that extent, there need not be any problem in concluding that the second plaintiff is the power of attorney of the first plaintiff. For the reasons best know to the plaintiffs, the General Power of Attorney is not filed in the Court below, which lapse makes it difficult for the Court to understand the terms of the power of attorney. But, what can be understood from the evidence of P.W.1 is that he was authorized to ply the vehicle on behalf of the first plaintiff. Whether he was instructed of the terms of the agreement between the first plaintiff and the defendant is not known.

10. Though P.W.1, in his chief-examination, speaks about the terms of the agreement by stating that as per the terms, the plaintiff has to ply the vehicle exclusively for the defendant, in the cross-examination, it become evidence that he was not present when the agreement was entered into and he did not personally enter into the said agreement. He could not speak about the terms of the agreement. He pleaded ignorance about the entitlement of the defendant to collect sales tax, at the time of lapse, after two years period and he pleaded ignorance about the terms and conditions incorporation in Ex.B1 agreement. According to him, they were not informed about those terms and conditions. He was also ignorant about taking of Rs.29,000.45 in July

1979 towards the repairs of the lorry from the defendant. He also does not know about the seizure of the lorry by the defendant due to their failure to ply the lorry after having taken the money from the defendant company as per the terms of the contract. He also does not know about a fresh agreement dated 09.08.1979 which was entered into by the first plaintiff to get the release of the seized lorry and he could not testify whether the agreement shown to him was executed by the first plaintiff. He also pleads ignorance about an important term of the contract, which term has become the point of dispute i.e. to ply the lorry for two more years after the completion of the transport of goods worth Rs.3,66,500/- and whether they had to ply the lorry up to 18.03.1983. But, however, he corrects himself by stating that there was such stipulation in the agreement. He admits that the lorry was seized on 25.09.1982 but he does not know the reason for the seizure of the lorry. He asserts that they plied the lorry as per the terms of the contract as long as the lorry was in fit condition. The terms of the contract would stipulate that the lorry has to be kept in a road worthy condition and the first plaintiff has to look after the maintenance of the lorry. There are no exceptions carved out in the agreement exempting the first plaintiff from plying the lorry due to any unforeseen or unavoidable circumstances as pleaded in the plaint.

11. According to P.W.1, after the seizure of the lorry, they raised a dispute before one N. Satyanarayana, municipal councilor, the defendant wanted a sum of Rs.10,000/-for transfer of lorry to them, but they pleaded inability and an amount was then settled at Rs.7,500/- and they were asked to bring a draft for that amount.

Accordingly, P.W.1 and the first plaintiff went to the defendant company and gave the draft. The Vice-President of the defendant company took the draft and summoned some official and gave that draft to him and asked him to release the vehicle. But that official got some paper typed and obtained signatures of the first plaintiff and took the draft also and advised them to come after two days. The plaintiffs were made to meet twice or thrice and finally, the Transport Manager of the defendant company by name Ladda, told them that they have to pay something more and that they cannot release the vehicle until that balance is paid.

12. This is contrary to the notice that was sent by the first plaintiff with regard to the payment of Rs.7,500/-. Ex.B6 is the said notice, which shows that a draft for Rs.7,500/- is enclosed along with the said notice. It does not state as to how they arrived at the figure of Rs.7,500/-. It does not state about any deliberations in the presence of said Satyanarayana. It only **speaks** that the first plaintiff agrees to compensate the company with a sum of Rs.7,500/-. P.W.1 does not state that the documents on which they were made to sign is this notice marked as Ex.B6. Moreover, Ex.B6 shows that it was issued in reply to the notice dated 09.03.1983. After Ex.B6 notice, the defendant issued a notice, marked as Ex.B3 dated 04.02.1984, informing the first plaintiff that there is an amount of Rs.36,399.94 ps. over and above Rs.7,500/-, which is due to the defendant towards interest on the amount drawn as advance from time to time. The contract stipulates that interest would be charged at 15.50% on every delayed payment. It is stipulated that Rs.1,000/- should be the installment amount and if

there is any shortfall, it has to be made good by the subsequent installment.

13. Ex.B7 is the statement of interest on the late payments of the plaintiffs relating to the lorry from March 1975 to June 1980. The statement shows that as against the monthly installment of Rs.1,000/- that has to be paid only Rs.500/- was paid till December 1977 with default of payment of even that Rs.500/- on few occasions. The statement shows that there are several instances of default and hence, invocation of the interest clause incorporated in the agreement is necessitated by the plaintiffs and it cannot be termed to be illegal. Ex.B8 is also the statement of interest on the advance taken by the plaintiffs relating to the lorry. Ex.B9 is the statement showing the advance payments made to the plaintiff.

14. The first plaintiff, as already observed, did not enter the witness box to deny or contradict the statements under Exs.B7 to B9. There is also no support coming from the evidence of P.W.1 that the demand draft given to the defendant is towards the amount settled in the presence of a mediator Satyanarayana as full and final settlement. Moreover, after receiving the demand draft, which is enclosed with notice Ex.B6, the defendant seems to have issued a notice informing that there is some more amount, which is due over and above Rs.7,500/-. The fact of execution of a subsequent agreement under Ex.B5 itself speaks about the default committed by the first plaintiff. Ex.B5 recites that the first plaintiff owed Rs.29,043.41 ps. by the date of that agreement and an undertaking was given that the said amount would be paid off from his monthly transport bills at Rs.1,000/-.

It is also stipulated that in case of default of any two successive installments, the defendant is at liberty to seize the above vehicle without any objection from the first plaintiff. The first plaintiff also agreed for the seizure of the vehicle, if he contravenes any of the terms of the agreement dated 02.11.1974. The agreement also evidences that he took advance from the defendant from time to time, which amounted to Rs.29,043.41 ps. by that date.

15. The conduct of the first plaintiff is evidenced by his silence to the notice issued by the defendant would throw some light on the conduct, alleged, by the defendant in making payments, which are due to him and also in complying the terms of the contract in which he has to render services for two years after the contract period. Before the Court below through P.W.1, the plaintiffs put forth the difficulties they faced in abiding by the terms of the contract, but, unfortunately, the agreement does not stipulate any clause of equity. Hence, when, obviously, there is a default committed by the first plaintiff, he cannot be compensated with any damages, hence, his claim for damages cannot be sustained.

In the result, the appeal is dismissed. As a sequel, the miscellaneous applications, if any, shall stand closed. In the circumstances, there shall be no order as to costs.

T. RAJANI, J

June 28, 2017
DSK