

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

+ **RFA No. 193/2006**

% **9th October, 2018**

M/S WIMPY INTERNATIONAL LTD. Appellant

Through: Mr. Girdhar Govind and Mr.
Baljinder Singh, Advocates
(Mobile No. 9650172263).

versus

M/S N.F.T. CARRIERS PVT. LTD. Respondent

Through: Mr. Lokesh Chopra, Advocate
(Mobile No. 9958806667).

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the Trial Court dated 16.01.2006 by which the trial court has decreed the suit filed by the respondent/plaintiff for a sum of Rs. 5,60,308/- with interest at 10% per annum and costs.

2. The suit has been decreed on account of the claim of the respondent/plaintiff for monthly charges of a refrigerated van provided by the respondent/plaintiff to the appellant/defendant for transporting the goods of the appellant/defendant.

3. The admitted facts are that in terms of a Contract dated 25.01.2000, the respondent/plaintiff was appointed by the appellant/defendant for the job of transportation of the goods of the appellant/defendant. The respondent/plaintiff claimed that services were provided firstly till 01.12.2002 at the rate of Rs. 75,000/- p.m., and thereafter, at a reduced rate of Rs.65,000/- per month instead of Rs.75,000/- per month. The transportation contract period commenced w.e.f. 11.01.2003 and was meant to expire on 30.10.2003 but the same was further extended by six months upto 30.04.2004. The respondent/plaintiff claimed that the appellant/defendant failed to pay charges due and, therefore, an amount of Rs.5,60,308/- became due to the respondent/plaintiff from the appellant/defendant including the charges of Rs. 65,000/- for the month of April, 2004. The respondent/plaintiff also pleaded that though the appellant/defendant had deducted Tax Deduction at Source (TDS), but no TDS certificates

were provided for the Financial Years 2002-2003 and 2003-2004. Therefore, after serving a Legal Notice dated 19.04.2004, the subject suit was filed.

4. The appellant/defendant contested the suit and did not dispute entering into the Contract dated 25.01.2000 and also admitted the charges at the rate of Rs.75,000/- initially and later at Rs. 65,000/- per month. It was however pleaded by the appellant/defendant that on account of respondent/plaintiff not providing a proper refrigerated van, the appellant/defendant suffered losses and had to compensate its customers. The appellant/defendant pleaded to have suffered a loss of Rs.10,00,000/-. The appellant/defendant, at the time of final arguments also contended that the respondent/plaintiff is not entitled to the suit amount because the respondent/plaintiff, in terms of the contract, was bound to maintain detailed log books showing the kilometers covered by the refrigerated van as payment was as per the kilometers covered and not fixed monthly charges. However, no documents, whatsoever, were filed by the respondent/plaintiff to show the running of the refrigerated van in terms of the specific mileage,

and on what minimum mileage covered every month, would a fixed amount of Rs.75,000/- per month be deemed to be pending.

5. The following issues were framed by the trial court:-

- “(1) Whether the plaintiff is entitled to recovery any amount claimed by it from the defendant? OPP
- (2) Whether the plaintiff is entitled to recover any amount on account of interest? If so at what rate and to what amount? OPP
- (3) Whether the plaintiff is entitled for mandatory injunction as claimed? OPP
- (4) Relief.”

6. The trial court has decreed the suit filed by the respondent/plaintiff by placing reliance upon the implied admissions of the appellant/defendant in its pleadings of not denying the amount due. The trial court has also held that the appellant/defendant has led no evidence to prove as to how the loss was suffered, and how the appellant/defendant had compensated its customers for their losses. The trial court has also held that the appellant/defendant has not set up a counter claim and therefore the claim of loss cannot be looked into. The relevant paras of the judgment of the trial court in this regard are paras 10 to 12, which read as under:-

“10. On the other hand, it has been argued on behalf of the defendant that plaintiff has failed to prove its claim inasmuch as no account books were produced in the court nor the alleged statement of account was proved as per law. Secondly, it is argued that PW-1 could not controvert the plea of the defendant about deficiency of service on account of inefficient refrigeration system in van provided by the plaintiff for transportation of products of the defendant. Therefore, it is argued that plaintiff has not been able to prove the form of contract entered into between the plaintiff and defendant and plaintiff has also failed to prove its claim, hence, suit of the plaintiff is liable to be dismissed. It is further argued that defendant has suffered losses on account of defects in refrigeration system and breaking down of van resulting into contamination and unworthiness of food stuff which occasioned losses to the defendant. It is argued that defendant had to compensate its customers and thus estimated loss on account of same comes to Rs.8 lac. It is further argued that plaintiff discontinued its service, therefore, defendant suffered loss to the tune of Rs. 2 lac therefore the defendant is entitled to recover Rs.10 lacs from the plaintiff. It is further argued that plaintiff did not maintain any log book nor disclosed unutilised mileage out of limits of 3500 Kms per month, therefore, plaintiff is not entitled to recover any amount from the defendant. It is argued that plaintiff has not proved documents properly.

11. From the evidence on record, it stands proved on record that plaintiff and defendant had entered into contract dated 25.1.2000 whereby it was agreed that plaintiff shall make available to the defendant refrigeration system van for supply of its products and defendant shall pay Rs.75000 per month to the plaintiff. It was agreed that payment was to be made within 21 days of receipt of the bills. According to the plaintiff, it wrote a letter to the defendant complaining about non payment of its dues. This letter has been proved as Ex.PW1/4. Plaintiff also discontinued to provide with refrigeration system van w.e.f. 1.12.02. However, it appears that talks between the parties took place and service was restored w.e.f. 11.1.03 when defendant promised to pay the dues. Subsequently the amount of charges for van was reduced to Rs.65000 w.e.f 11.1.03. It also stands proved on record that contract was initially for the period beginning 1.5.02 to 30.10.03 but same was extended upto 30.10.04. Plaintiff has also proved on record that it served the legal notice Ex.PW1/8 by sending it through registered post, receipt of which

has been proved as Ex.PW1/9. Case of the plaintiff is that defendant is liable to pay Rs.5,60,308. In the cross examination of PW-1, it was specifically stated that statement of account PW1/1 proved by the plaintiff is wrong and not as per account. However, if I peruse the Written Statement filed by the defendant, I find that neither the defendant has disputed that contract was entered into between the parties and same is dated 25.1.2000. Nor it has been disputed that under said agreement defendant was to pay Rs.75000 per month for van with refrigeration system which was to be supplied by the plaintiff. In whole of the Written Statement, in para No. 4(1) defendant has not even disputed nor specifically denied that amount claimed by the plaintiff is correct. Its case is that it is not liable to pay amount because plaintiff failed to perform its obligations. In view of the fact there is implied admission on the part of the defendant that amount of Rs.5,60,000/- was due, I am of the view that plaintiff has proved that this amount is due towards the defendant and defendant is liable to pay this amount. Defendant has not proved on record any counter statement of account.

12. Case of the defendant is that plaintiff did not adhere to the terms of the contract as a result of which defendant suffered losses. According to the defendant the loss was on account of (1) breaking down of the van as a result of which the stuff stored in the van resulted into contamination and unworthiness of food, hence, defendant suffered losses. (2) On number of occasions, defendant had to compensate its customers on complaints due to bad refrigeration system of the van. On account of these two kinds of damages it has estimated losses at Rs.8 lacs. Defendant has also claimed damages on account of discontinuation of services of refrigerated van by the plaintiff to the tune of Rs.2 lacs. According to the defendant plaintiff is liable to compensate defendant to the tune of Rs.10 lacs. However, this claim of defendant is in the nature of counter claim. In the Written Statement it has not set up any counter claim nor has paid the court fee so that same should have been taken cognizance of. Rather it has claimed compensation on account of damages suffered by it. Therefore, I am of the view that when defendant did not set up any counter claim, the same can not be gone into. Even otherwise, defendant has not led any evidence showing details of the dates on which van had broken taken and, how much stuff had gone contaminated. Even defendant has not proved any complaint from customers in this regard. Defendant has not placed on record any receipt

showing that it refunded any amount to the customers. Rather in the cross examination DW-1 has specifically admitted that it did not have any record that any compensation was refunded to the customers. Therefore, amount claimed by the defendant can not be allowed. Even otherwise plaintiff has proved on record copy of notice Ex.PW/8 plaintiff has claimed amount of Rs.5,60,308. Ex.PW1/8 shows that notice dispatched on the correct address. When the notice was dispatched on the correct address, presumption is that it received the notice. It did not reply the notice, therefore, inference can be drawn that the defendant accepted the version of plaintiff as set up in the notice. I, therefore, come to the conclusion that plaintiff has proved that it is entitled to recover a sum of Rs.5,60,308 from the defendant. This issue is accordingly decided in favour of plaintiff and against the defendant.”

7. Learned counsel for the appellant/defendant has vehemently argued that the trial court has completely misdirected itself by ignoring the admitted Clauses 4 and 11 of the Agreement dated 25.01.2000. The Agreement dated 25.01.2000/Ex.PW1/3 contains Clauses 4 and 11 which required the respondent/plaintiff to maintain detailed log-books. It is further pointed out that Clause 11 did not fix the entitlement of the respondent/plaintiff to fix charges per month but the fixed charges per month were subject to minimum mileage covered by the vehicle with the fact that if lesser mileage was covered in any month, then the balance mileage would be added up for the next month. It is argued that since the respondent/plaintiff has led no evidence, whatsoever, as required, of mileage covered and as per

Clauses 4 and 11 of the Contract dated 25.01.2000, the respondent/plaintiff cannot succeed merely because of the finding of the trial court of lack of adequate denial, inasmuch as, once the Clauses 4 and 11 of the Contract dated 25.01.2000 are admitted, then implied denial would not make any difference because onus was on the respondent/plaintiff to prove its case as per Clauses 4 and 11 of the Contract dated 25.01.2000. These clauses read as under:-

“4. Your driver would be required to maintain a log book, wherein, all movements of the vehicle shall be recorded. Starting & closing kilometer readings as recorded in the log book must be verified & initialed by our authorized person at the factory on daily basis and a Statement of total mileage utilized during the month duly verified our Factory Manger be submitted alongwith Monthly bill.

11. We shall be at liberty to terminate the contract by giving you 60 days advance notice in writing if the van does not operate within the parameters, and other terms & conditions as stated above.

(a) Payment :

1. Minimum charge of Rs.75,000/- per month on **running of the van upto 3500 Kms.**
2. **The unutilized mileage at the end of each month will be carried over to the next month on month to month basis and shall be accumulated in our favour to our credit.**
3. Additional charge @Rs.11.50/- per Km. For additional running over and above the monthly limit of 3500 Kms.

(b) Period of Contract :

The contract shall be valid for a period of Three years and 6 months. (01st May 2000 to 30th October 2003). The contract shall be effective from the date you provide a new van to our entire satisfaction.

(c) Payment Terms :

1. Bill shall be submitted by you on monthly basis.
2. Payment shall be made within 21 days of the receipt of the bill duly verified by our Factory Manager.

(d) Price Escalation :

1. Transportation charges shall be hiked by 7% at the end of each financial year to take care of increased cost of spares, maintenance and other operational costs.
2. Charges shall be received on mutually acceptable basis in the event of any increase in diesel prices.”

(Emphasis Supplied)

8. Learned counsel for the respondent/plaintiff could not dispute that the respondent/plaintiff has not filed and proved on record any log-book record or connected relevant documents which have the measurement of the vehicles, the kilometer readings as shown in the log-book being verified and any verification being done by the factory manager with respect to the monthly mileage undertaken by the refrigerated van.

9. In my opinion, the arguments of the appellant/defendant deserve to be accepted because the contractual clauses do not fix monthly charges payable by the appellant/defendant to the respondent/plaintiff. As per Clause 11, payment of Rs.75,000/- per month had to be made subject to the refrigerated van running 3500

kms every month. Also, if the van did not run for 3500 kms in a particular month, the balance unutilised kilometers accumulated in favour of the appellant/defendant and had to be carried over to the next month on a monthly basis. Further, Clause 11 makes it very clear that, in fact, if the kilometers covered by the refrigerated van of the respondent/plaintiff exceeded 3500 kms, then for the additional kilometers over and above, the monthly limit of 3500 kms, additional charges at the rate of Rs. 11.50 per km were to be paid by the appellant/defendant to the respondent/plaintiff. Therefore, in a case such as the present, there cannot be lump-sum claim for payment of Rs.75,000/Rs.65,000/- per month by the respondent/plaintiff without first showing the actual distance covered by the refrigerated van. No doubt the refrigerated van did transport goods for the appellant/defendant, inasmuch as, the appellant/defendant claims that the refrigerated van supplied was defective, but yet it is a moot question as to what is the exact amount due to the respondent/plaintiff, because the same can only be calculated in terms of the actual kilometers covered, as shown from the logbook and connected

relevant documents, and with respect to which no evidence, whatsoever, has been led by the respondent/plaintiff.

10. Therefore, the issue which arises is as to what is to be done in the facts of the present case where there is no evidence of the kilometers covered. On one hand, supply of the van by the respondent/plaintiff is undisputed but on the other hand, there is no evidence, whatsoever, led by respondent/plaintiff to show the actual kilometers covered by the van every month, as payment was to be made to the respondent/plaintiff based on the kilometers covered, in terms of Clauses 4 and 11 of the Agreement dated 25.01.2000.

11. I have put this peculiar problem to the counsels for the parties and neither of them have an answer, and therefore, by making best judgment assessment, in the opinion of this Court, the suit is not decreed for the amount as prayed, but only for 50% of the principal amount of Rs.5,60,308/-, i.e. Rs.2,80,154/-. I have no option but to make a best judgment assessment, otherwise, technically the respondent/plaintiff will fail as the onus of proof is on him to show as to how the specific amount claimed in the suit is due and payable, and it is not sufficient for the respondent/plaintiff to prove its claim,

generally, because there cannot be a general decree and only a money decree for a specific amount.

12. In view of the aforesaid discussion, this appeal is allowed partially by setting aside the impugned Judgment and Decree dated 16.01.2006. The suit of the respondent/plaintiff will be decreed for an amount of Rs. 2,80,154/- along with *pendente lite* and future interest till payment at 6 % p.m., simple. The respondent/plaintiff is also awarded 50% of the costs of the suit. Decree sheet be prepared. The appeal is partially allowed and disposed of accordingly.

13. The appellant/defendant, in terms of the orders passed by this Court, had deposited approximately 50% of the decretal amount in the Registry of this Court. Either of the parties may now calculate as to what would be the amount due and payable under the decree passed today, and how the respondent/plaintiff, out of the deposited amount, would be entitled to the particular amount for satisfaction of the decree along with interest.

14. The Registry shall also calculate the exact amount available in this Court as on the date of passing of today's judgment, while also stating the original amount deposited by the

appellant/defendant, and the accrued interest thereon. On such calculation being made, the issue with respect to payment to the respondent/plaintiff from the amount deposited in this Court will be considered. The bank guarantee given by the appellant/defendant is discharged and the same be returned to the appellant/defendant through its counsel within a period of four weeks from today by the Registry.

OCTOBER 09, 2018

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VALMIKI J. MEHTA, J

