Kavitha Exports Vs Forbes Cobak Ltd. and Aitken Spence Shipping Ltd.

Court: Madras High Court

Date of Decision: July 23, 2010

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 37 Rule 1, Order 37 Rule 2, Order 37 Rule 2(1)

Citation: (2010) 4 LW 545

Hon'ble Judges: S. Palanivelu, J

Bench: Single Bench

Advocate: S. Ramasamy for K. Senthilkumar, for the Appellant; V. Bhiman, for Sampathkumar Associates, for the Respondent

Final Decision: Dismissed

Judgement

S. Palanivelu, J.
This appeal has been preferred by the unsuccessful Defendant against the judgment and decree dated 01.08.2003 made

in O.S. No. 6784 of 2000, on the file of the Learned Additional District Judge, Fast Track Court-V Chennai.

2. The following are the averments in the plaint succinctly stated:

2.1. The Defendant is an exporter. The first Plaintiff is the shipping agent of the Defendant. The Defendant shipped STC 137 Cartones of Men''s

L/s. shirts to Gothenburg, Sweden under the bill of lading No. MA 812734 dated 30.08.1998 through the vessel ""Orient Independence"" V-123

sailed from Chennai on 16.09.1998 and arrived at Colombo on 18.09.1998 and was awaiting transshipment by another vessel, namely, ""Ever

Glory"" V-79 ETA. The said vessel was scheduled to carry the cargo from Colombo to Gothenburg, Sweden. While so, due to the accident, it was

detained at Singapore and hence, it could not touch Colombo.

2.2. Due to some reasons, there was a delay in transshipment, as a result of which, the first Plaintiff wanted it to be airlifted. By letter, dated

05.10.1998, the Defendant undertook that all the necessary charges at Colombo will be made by them through their buyer. On request by the

Defendant, the first Plaintiff issued ''no objection certificate'' for delivery of goods at Colombo to the Defendant. The Defendant had a personal

discussion at Colombo with the second Plaintiff on 06.10.1998 and in pursuance of, the job was entrusted to M/s. ACE Cargo Private Ltd. The

first Plaintiff had no intimation about it. The Defendant instructed the second Plaintiff to forward total freight and service bill to them at Chennai

through the first Plaintiff for settlement. The first Plaintiff destuffed the cargo and entrusted it with the second Plaintiff for airlifting the cargo.

2.3. The invoice, dated 14.10.1998, was raised by the first Plaintiff as per the details submitted by the second Plaintiff which contains the

classifications of the charges of the second Plaintiff. Thus, the Defendant is liable to pay Rs. 3,22,556/- towards the freight arrived at after

deducting the freight amount already paid to the first Plaintiff for transport by ship. The first Plaintiff claims interest at Rs. 1,39,563/- for the

principal amount of Rs. 3,23,556/- totalling a sum of Rs. 4,63,119/-. In spite of demands, the Defendant failed to pay the amount and the legal

notice dated 20.11.1999 also did not fructify any fruitful result. Hence, the suit for recovery of a sum of Rs. 4,63,119/- with interest at the rate of

24% per annum and costs.

3. The written statement filed by the Defendant contains the allegations as follows:

3.1. The Defendant admits that he had engaged the first Plaintiff for shipment of the Defendant''s goods from Chennai to Gothenburg, Sweden

based upon the shipment schedule furnished by the first Plaintiff dated 14.09.1998. Thereupon, the Defendant intimated his buyer at Gothenburg

that the goods would be arriving Gothenburg by 12.10.1998 and the Defendant paid a sum of Rs. 49,162.50 to the first Plaintiff towards the entire

freight charges.

3.2. On 21.09.1998, the first Plaintiff informed the Defendant that the connecting vessel at Colombo met with an accident at Singapore and hence,

it would not reach Colombo in time. The first Plaintiff had informed the Defendant that the cargo was expected to be connected to the vessel

M.V.F. Grand"" V-80 which was expected to reach Colombo on 20.09.1998 and expected to reach Gothenburg on 19.10.1998. The Defendant,

on 22.09.1998 by writing, agreed to the change of schedule through the Defendant''s clearing agent M/s. JK Shipping Services Private Limited.

3.3. The Defendant informed the first Plaintiff that the cargo had to reach Gothenburg by 20.10.1998 or else the buyer of Defendant would cancel

the order. That the ship M.V.E. Glory V. 079 would be arriving on 10.10.1998 at Colombo and would be skipping Gothenburg and that the

cargo was expected to connect M.V.E. Greet V.081 which was expected to arrive at Colombo on 06.10.1998 and expected to reach

Gothenburg on 26.10.1998. The Defendant apprehended that he would suffer heavy loss if the cargo did not reach Gothenburg on time. Hence,

the Defendant instructed the Plaintiff to destuff the cargo to Colombo and move the cargo by air to Sweden in order to adjust the delay in sailing

time.

3.4. The Defendant sent his catalogue from Colombo to ""Cajole"", the first Plaintiff to issue ''no objection certificate'' and to aircraft the cargo with

the assistance of the second Plaintiff. When that being the position, the second Plaintiff ought to have collected the airfreight from the first Plaintiff.

But instead, he inflated the freight bill and demanded it from the Defendant. The Plaintiffs have colluded to make this claim against the Defendant.

The provision cited in the plaint namely Order 37, Rule 2 CPC does not apply. The first Plaintiff is a defaulting party and the problem was caused

due to the first Plaintiff. Hence, the suit is not maintainable and may be dismissed with costs.

4. After analysing the pleadings, oral evidence and exhibits, the learned Additional District Judge, Fast Track Court No. V Chennai, decreed the

suit to the extent of Rs. 3,93,337.50 along with the interest at the rate of 6% per annum from 01.08.2000 till recovery with costs, as against the

claim of Rs. 4,63,119/- with interest at the rate of 24% per annum and costs. Aggrieved against the above judgment, the Defendant in the suit is

before this Court in this appeal. The following points have arisen for consideration in this appeal.

(i) Whether the suit is maintainable under Order 37, Rule 1 Code of Civil Procedure?

(ii) Whether there is a ""written contract"" between the parties as required by law?

(iii) Whether the Plaintiff is entitled for the claim as decreed by the Court below?

Points No. 1 and 2:

5. The first Respondent is clearing and forwarding shipping agent of the Defendant. The Appellant''s company exported garments i.e. Men''s shirts

(100% cotton) to the value of Rs. 18,00,000/- Which were entrusted with the first Plaintiff a shipping agent for transshipping from Chennai Port to

Gothenburg, Sweden, under a bill of lading, Ex. B7 they were loaded. It shows that the freight was prepaid. The first Respondent proposed to

transship the cargo from the ship ""Orient Independence"" in which they were loaded at Chennai Port, the another ship (known as ""Ever Glory"" at

Colombo which is the mother vessel. On 16.09.1998, the ship started from Chennai and reached Colombo on 18.09.1998 enroute to

Gothenburg. Ex. B8 is a communication from the first Respondent to the Appellant dated 14.09.1998 stating that the ship would leave Madras on

16.09.1998 and would touch Colombo on 18.09.1998 and at Colombo it would be connected to Ever Glory and after leaving Colombo on

22.09.1998, it would reach Gothenburg on 12.10.1998.

6. Ex. B9 letter from the first Respondent dated 21.09.1998 shows that the vessel of the first Plaintiff i.e. Ever Glory collided with a car carrier at

Singapore, due to which, the same is skipping Colombo and the same was dry-docked and hence, the cargo would be loaded in another ship

Ever Grand"" at Colombo as an alternative arrangement to take the cargo to Gothenburg. It is due to Colombo on 28.09.1998 and it would reach

Gothenburg on 19.10.1998.

7. After the said communication, on 22.09.1998, immediately the Appellant sent Ex. B 10, stating that if the cargo does not reach Gothenburg on

20.10.1998, the order would stand cancelled and hence all measures may be taken to load the cargo on the vessel ""Ever Grand"". On 29.09.1998,

the first Respondent sent Ex. B11 stating that they were conscious to the effect that the subject shipment is an urgent consignment and that they

would proceed with the transshipment of subject container which would reach the next destination on 26.10.1998. On seeing the said

communication, the Appellant apprehending cancellation of the contract with their buyer at Gothenburg, sent a letter under Ex. A5 on 30.09.1998

mentioning that they were forced to request to destuff the cargo at Colombo and move the same by airfreight from Colombo to

Orebro/Norrkoping in Sweden and requesting assistance from the first Respondent since they (Appellant) would face cancellation of the order, if

the goods were not in Sweden by the first week of October 1998 and that they have advised their customers to surrender the original bill of lading

to the agents of the first Respondent office in Gothenburg.

8. On 01.10.1998, the Appellant sent another communication Ex. A6 stating that requiring the first Respondent to issue necessary instructions to

their Colombo office to retain the container at Colombo till necessary arrangements are made to airlift the cargo to Sweden at the earliest. In the

meanwhile, the Appellant appointed an agent for personal discussion with first Respondent in Colombo on 06.10.1998 to enable to get ''no

objection certificate'' and their intention is to bond the cargo at Colombo and move the same to Airport for clearance to Gothenburg and that all

the necessary charges at Colombo will be made by them (Appellant) through their buyer, as evident from Ex. A7 dated 05.10.1998, which plays

vital role in this case. In the said letter, it is also mentioned as follows:

As you are aware as per your original schedule the goods were supposed to be in Gothenburg on 12.10.1998 and due to various reasons cited by

you the goods are delayed for more than two weeks because of which we are now forced to send the cargo by airfreight from Colombo to

Sweden at an excessive rate to avoid cancellation of the order.

9. The above said contents of the letter would go to show that the Appellant was forced to despatch the cargo by airfreight from Colombo to

Sweden since the delay was caused by the first Respondent for more than two weeks. While this letter is gone through, it transpires that only due

to the lapse on the part of the first Respondent it was delayed.

10. Ex. B2 is the debit note as regards airfreight. It comes to Rs. 3,72,719 in which the freight amount already paid to the first Respondent, Rs.

49,163/- was deducted and Rs. 3,23,556/- has been arrived at, which is addressed to the Appellant on 14.10.1998. The first Respondent on

28.10.1998 issued a letter under Ex. B3 to the Appellant requiring to settle the airfreight amount. The goods were sent by British Airways. On

14.12.1998, another detailed letter in similar terms under Ex. B5, dated 07.01.1999 was also sent by the first Respondent to the Appellant. On

03.02.1999, the Appellant sent a letter under Ex. B6 to the first Respondent with regard to the difference in weight. It is a reply to Ex. B5.

11. In the backdrop of the above said circumstances, the Court has to see whether the present suit could be initiated under Order 37, Rule 2,

CPC on the basis of a ""written contract"". Extraction of the provision is more advantageous, which is as follows:

Order 37, Rule 2 Code of Civil Procedure

(2) Subject to the provisions of Sub-rule (1), the Order applies to the following classes of suits, namely:

(a) Suits upon bills of exchange, hundies and promissory notes;

(b) Suits in which the Plaintiff seeks only to recover a debt or liquidated demand in money payable by the Defendant, with or without interest,

arising,-

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

12. Mr. S. Ramasamy, learned Senior Counsel appearing for the Appellant would place much reliance upon a Full Bench decision of the Bombay

High Court, which elaborately deals with the ingredients and legal implications of the provision and the consequences of absence of those

ingredients, which is reported in Jyotsna K. Valia Vs. T.S. Parekh and Co., . After quoting and following various judgments of the Supreme Court

and the Privy Council and referring to the views of the various High Courts, the Bombay High Court has summarised the ingredients and the

following features:

Before answering the issue we must note that there must be the following requirements before a summary Suit would lie:

(1) There must be a concluded contract;

(2) The contract must be in writing;

(3) The contract must contain an express or implied promise to pay.

There is no dispute in respect of the first two predicates. The only issue is in respect of the third predicate. As we have noted earlier, we are not

concerned here with an implied contract, but an implied term in a written contract. The Defendants would be right to contend that an implied

contract is not a written contract. Is a Summary Suit maintainable on an implied term in a written contract with an implied term to pay. In our

discussion we have noted that the expression ""implied"" term is used in different senses. In some contract it would not depend on actual intention of

the parties, but on a rule of law, such as the terms, warranties or conditions, which if not expressly excluded the law imports, as for instance under

the Sale of Goods Act, Marine Insurance Act, Master and Servant and Landlord ant Tenant. To imply a term in the contract as implied term in our

opinion the test laid down by Kim Lewison in ""Interpretation of Contract"" would be relevant. At the same time the Court would have to note that

the general presumption is, however, against the implying of terms into a written contract. It is, therefore, again not possible to lay down a general

Rule as to when an implied term in a contract can be the subject matter of a Summary Suit. The issue before us is limited to an implied promise to

pay. That Would necessarily depend on the facts of each case.

13. In the above said decision, it has been opined that there shall be a concluded contract which must be in writing and the same should be either

by express or implied promise to pay. As far as the summary suit on a settled account is concerned, there must have been a confirmation on the

part of the Defendant as to the claim by acknowledging his liability on the ledger in a running account or on his acknowledgement by any other

definite form. Insofar as the right of the Defendant in the summary suit is concerned, his defence shall not be sham or illusory or practically moon-

shine, in order to get relief and if his defence reveals the above things or any one of them, the Court may show mercy by enabling him to prove his

defence and as a security measure it may impose a condition that he should deposit the amount claimed in the plaint. The order sheet of the case

shows that the Appellant filed I.A. No. 4298 of 2001 before the trial Court and obtained leave to defend on 12.04.2002.

14. Adverting to the facts of the case, it is to be seen whether there is a written and concluded contract and if they were not present, then whether

there is an express or implied promise to pay on the part of the Appellant. In this case, the suit is a not on the running or mutual account and no

ledger has been maintained between the parties. There had been various communications between them and the reading of which would show that

there was a contract between them as to the liability of the Defendant to pay the amount. It is true that due to the lapse on the part of the first

Respondent there was a likelihood of delay for the cargo to reach Gothenburg. It is the legal obligation on the part of the first Respondent to see

the cargo booked by the Appellant to reach Gothenburg within the stipulated time as agreed upon between the parties. But as expected by the first

Respondent, the ships arranged by him were not coming to Colombo Port at the appropriate time which caused the delay.

15. Had the Appellant required the first Respondent to abide by the contract of taking the consignment to Gothenburg within the stipulated time by

any means, then if he had said that the failure on the part of the first Respondent would follow claim of damages for the breach of contract, his

claim could have been genuine. But the Appellant apprehended cancellation of the order by his buyer at Gothenburg and hence, he wrote a letter

Ex. A7 to the first Respondent on 05.10.1998 that their (Appellant) intention to bond the cargo at Colombo and move the same to Airport for

clearance to Gothenburg and all the necessary charges at Colombo will be made by them (Appellant) through their buyer. It is the express promise

of the Appellant in writing to pay airfreight to the first Respondent. (Emphasis supplied)

16. Even though in the later portion of Ex. A7 letter, the Appellant has mentioned that due to various reasons cited by the first Respondent, the

dispatch was delayed and he was forced to send them by air from Colombo to Sweden at excessive rate to avoid cancellation of the order, he has

stopped with it. He has not provided anything in Ex. A7 letter that he had to incur excessive expenses only due to the lapse on the part of the first

Respondent and so he would initiate proceedings to recover the airfreight from him (first Respondent). In the above said state of affairs, the Court

has to necessarily infer that there had been a concluded contract with regard to the payment of airfreight by the Appellant to the first Respondent

and the same has been put in writing by him expressing his promise to pay under Ex. A7. Hence, I am of the considered view that all the statutory

requirements contained in Order 37, Rule 2 have been satisfied in this case and the Appellant is liable to pay the airfreight to the Respondents. The

summary suit in this regard is very well maintainable which has passed the tests as required by law. I answer these points in the affirmative.

Point No. 3:

17. In points No. (1) and (2) answer has been rendered in favour of the Respondents to the effect that the suit is maintainable. The trial Court after

deciding the liability of the Appellant directed him to pay Rs. 3,93,337.50 along with the interest at the rate of 6% from 31.07.2000 till recovery. It

is claimed in the plaint that airfreight of Rs. 3,23,556 along with the interest at the rate of 24% per annum may be directed to be paid from

14.10.1998 to 31.07.2000. The Court below has opined that the interest is excessive and it is of the opinion that awarding interest at the rate of

12% per annum would be just. In view of this Court, the above said conclusion is proper and the same has to be confirmed. I answer this point as

indicated above.

18. On a conspectus of all the materials on record, this Court has taken a view that necessary requirements under Order 37, Rule 2 have been

complied with and hence, the suit is maintainable and it has been established that there was a written promise to pay the airfreight by the Appellant.

Hence, interference with the judgment and decree of the trial Court is not at all warranted which have to be confirmed and they are accordingly

confirmed. The appeal has to fail.

In the result, the appeal is dismissed with costs.