(2004) 03 DEL CK 0103

Delhi High Court

Case No: C.R .No. 330 of 2003

Emery Worldwide (I) Pvt. Ltd.		APPELLANT
	Vs	
Batra Overseas Pvt. Ltd.		RESPONDENT

Date of Decision: March 19, 2004

Hon'ble Judges: Ramesh Chand Jain, J

Bench: Single Bench

Advocate: Nemo, for the Appellant; N.N. Dhingra, for the Respondent

Final Decision: Dismissed

Judgement

R.C. Jain, J.

None appears for the petitioner despite service of Court notice on the counsel for the petitioner. Mr.N.N. Dhingra, learned counsel appearing for the respondent submits that there have been some developments in the matter to the extent that the consignment which was the subject matter of the suit has reached the destination and its delivery has been taken by the respondent''s clients and consequently the respondent is willing to pay the sea-fare instead of air-fare as the purpose of sending the consignment through air has been defeated due to the inordinate delay.

1. This petition is directed against the order of the learned trial court dated 19th December, 2002 by which an application under Order xxxvII Rule 3(5) CPC filed on behalf of the defendant-respondent herein seeking leave to defend a civil suit filed by the petitioner-plaintiff has been allowed and the leave granted to the defendant-respondent to defend a summary suit.

2. The petitioner had filed a summary suit under Order xxxvII CPC based on a cheque issued by the defendant-respondent, payment of which was stopped by the respondent under intimation to the plaintiff. The suit was filed with the averments

that the plaintiff is an air cargo agent and services of which were availed by the defendant for the dispatch and delivery of the defendant''s goods from Delhi to California (USA). A consignment was booked on 9th February, 1998. The freight charges amounting to Rs.92,340/- were paid by the plaintiff-company for and on behalf of the defendant and raised an invoice No.791 dated 9th February, 1998 on the defendant which was sent to the defendant along with the relevant documents including the airway bill for payment. After repeated reminders, the defendant-company issued a cheque bearing No.419542 dated 1st March, 1998 for a sum of Rs.94,526/- drawn on Oriental Bank of Commerce, Overseas Branch, Nehru Place, New Delhi in full and final discharge of their liability against the aforesaid invoice. The aforesaid cheque on presentation was returned with the remark ''''Payment stopped by the drawer''''. The plaintiff-company contacted the defendant-company and also served a legal notice dated 18th March, 1998 but the defendant failed to make the payment, so the suit was filed and proceedings u/s 138 of Negotiable Instruments Act were also lodged against them.

3. The defendant-company being served with the summons for appearance and later for judgment, filed an application seeking unconditional leave to defend the suit in the shape of affidavit of Mr. Sushil Batra, director of the defendant-company and sought leave to defend, inter alia, on the ground that the suit of the plaintiff was not maintainable under the provisions of Order xxxvII CPC there being no written contract between the parties; the suit is barred by limitation as the claim was denied by the defendant-company as far back as on 24th March, 1998 and thereafter no claim was raised. It was also alleged that the defendant-company had given a post dated cheque No.419542 dated 1st March, 1998 to the representative of the plaintiff on 10th February, 198 as advance payment of freight and other charges in relation to the shipment of the defendant''s consignment with clear assurance that the consignment shall be delivered to their foreign buyer in San Francisco in a maximum period of 2-3 days. However, the delivery was not effected for a long period and, Therefore, the defendant had to stop the payment under intimation to the plaintiff. The application was opposed on behalf of the plaintiff. The learned trial court on a consideration of the matter groaned unconditional leave to defend the suit to the defendant.

4. Learned counsel for the petitioner had sought to assail the impugned order primarily on the ground that once the defendant had admitted the issuance of the cheque in question and its stoppage, he was not entitled to any leave on the alleged premises that the consignment was not delivered to their foreign buyer and in any case the Court ought to have protected the plaintiff so far as this amount was concerned by imposing some conditions on the defendant while granting leave to defend the suit to the defendant. The law, when leave to defend a summary suit should be granted or declined is well settled through a catena of judgments of the Apex Court and this Court. Having regard to the totality of the facts and circumstances of this case and the defense plea put forth by the defendant, this

Court is of the opinion that the learned trial court was justified in granting leave to defend to the defendant as the question as to whether the defendant could have validly stopped payment of the cheque in question and whether it was post dated or of actual date which question remains to be answered in the suit raised triable issues which could only be answered after a full fledged trial. In the opinion of this Court, there is no infirmity in the impugned order which calls for any interference by this Court. The revision petition is accordingly dismissed. dusty.