

SUPREME COURT OF INDIA

Dilawari Exporters

Vs.

Alitalia Cargo

C.A.No.8699 of 2002

(D.K.Jain and T.S.Thakur JJ.)

16.04.2010

JUDGEMENT

D.K.Jain, J.:

1. Challenge in this appeal under Section 23 of the Consumer Protection Act, 1986 (for short "the Act") is to the order dated 15th April, 2002 passed by the National Consumer Disputes Redressal Commission (for short "the Commission") in Original Petition No. 156 of 1995. By the impugned order, the Commission has dismissed appellant's complaint alleging deficiency in service on the part of M/s Alitalia Cargo, respondent No.1 in this appeal, on the ground that there was no privity of contract between the appellant and respondent No.1.

“Respondent Nos. 2 and 3 in this appeal are M/s Omni Marg Travels (Pvt.) Ltd., General Sales Agents and M/s Fourways Movers (P) Ltd., Cargo Clearing Agents of respondent No.1 respectively.”

2. The salient facts giving rise to the present appeal are as follows:

“The appellant is engaged in the business of export of readymade garments and handicrafts. They obtained an order from one M/s D.D. Sales, a concern based in New York, USA for supply of 2050 pairs of Cotton Gents Dhotis, 150 sets of Cotton Ladies Ghagra-Choli, 150 pieces of Dupatas, etc. As per the agreement between the appellant and the said concern of New York, USA, these articles had to reach New York, USA before 10th of October, 1994. Accordingly, the appellant handed over the consignment of the said articles to respondent No.3 - M/s Fourways Movers (P) Ltd. on 4th October, 1994 for onward dispatch to New York, for which a House Air Waybill No. FMPL 0841 was prepared by respondent No.3. For the sake of ready reference, the said Bill is reproduced hereunder:

"Shippers Name and Address: Not Negotiable HAWB NO.

M/s. DILWARI EXPORTERS FMPL 0841 1-8 JANGPURA-B, MATHURA ROAD, NEW DELHI-14 INDIA HOUSE AIR WAYBILL FOURWAYS MOVERS PVT. LTD.

39/6-7A, COMMUNITY CENTRE EAST OF KAILASH, NEW DELHI- 110065
Consignee's Name and Address M/S D.D. Sales, 110-53 62ND DRIVE, FOREST HILLS N.Y. 11375, U.S.A. Issuing Carter's Agent (Name and City) Accounting Information FOURWAYS MOVERS P. LTD. "FREIGHT : PREPAID"

NEW DELHI Agent's IATA CODE 14-3-3775 Airport of Departure (Addr. Of first MASTER AWB NO. Carter) NEW DELHI / AZ 055 - 2342 9276 By First Carter Routing & Destination NYC AZ Airport of Destination Currency Declared Value Declared Value for for Customs Customs NEW YORK INR NVD US\$29441.70 Amount of Insurance Rs.1012706-00 The landing information NOTIFY: SAME AS ABOVE. PLS. INFORM CONSIGNEE IMMEDIATELY ON ARRIVAL OF SHIPMENT AT DESTINATION. TEL. NO. (718) - 896-0575. ORIGINAL VISA (3 SETS) COPY OF INVOICE (3 SET) PACKING LIST (3 SET), ALL INDIA HANDICRAFT BOARD CERTIFICATE AND DECLARATION TO ACCOMPANY WITH THE SHIPMENT. Carter Commodity Chargeable Rate/ Total Nature and Weight Item No. Weight Charge Quantity of Goods (Incl. POWERLOOM COTTON GENTS DHOTIES & INDIA ITEM GARMENTS HAND/ EMD/ PRINTED/ ZARI/ APPLIQUE/ BEAD/ MIRROR WORK (P/L COTTON LADIES CHOLI GHAGRA SET & DUPTATTAS) AS PER INV. NO. DE/EXP/358/94-95 Dt. 28-9-94 RBI : DD : 008597 3 48 1360-OK 1360-OK 85.00 115600-00 IEC:NC:05880 0952 Prepaid Weight Collect Other Charges Charge 215600-00 AWB: 60-00 HAWB: 150-00 SB: 175-00 CTG: 500-00 APT: 545-00 INS: 2886-00 Total other charges Due Agent 1230-00 Total other Charges Due Carter 2886-00 FOURWAYS MOVERS PVT. LTD., NEW DELHI Total prepaid 119716-00 4/10/94 NEW DELHI INDIA v.k. Signature of Issuing Carter or its Agent 055 - 2342 9276 ORIGINAL 3 (FOR SHIPPER)"

Simultaneously, a Master Air Waybill on a numbered (055 - 2342 9276) proforma printed by "ALITALIA" -respondent No.1 was prepared. The said Air Waybill, containing relevant particulars, is also reproduced hereinbelow:

"DEK 2342 9276 055- 2342 9276 Shippers Name and Address:

M/s. FOURWAYS MOVERS P. LTD. Not Negotiable 39/6, 7-A COMMUNITY CENTRE, Air Way Bill EAST OF KAILASH, ALITALIA NEW DELHI/INDIA Issued by Alitalia S.p.A. Consignee's Name and Address M/S D.D. Sales, 11053 62ND DRIVE, FOREST HILLS N.Y. 11375, U.S.A. Issuing Carter's Agent (Name and City) Accounting Information FOURWAYS MOVERS P. LTD. "FREIGHT : PREPAID"

NEW DELHI Agent's IATA CODE Account No. 14-3-3775 73279 Airport of Departure (Addr. Of first Carter) and requested Routing NEW DELHI / AZ By First Carter Routing & Destination NYC AZ Airport of Destination Currency Declared Value Declared Value for for Customs Customs NEW YORK INR NVD US\$ 43698.60 Amount of Insurance Rs.1503101-00 The landing information NOTIFY: SAME AS ABOVE. PLS. INFORM CONSIGNEE IMMEDIATELY ON ARRIVAL OF SHIPMENT AT DESTINATION. TEL. NO. (718) - 896-0575. ONE ENV. CONTG. DOCS ATTD. ORIGINAL VISA (3 SETS) COPY OF INVOICE (3 SET), PACKING LIST, M ALL INDIA HANDICRAFT BOARD CERTIFICATE AND DECLARATION TO ACCOMPANY WITH THE SHIPMENT Carter Commodity Chargeable Rate/ Total Nature and Quantity of Weight Item No. Weight Charge Goods (Incl. POWERLOOM COTTON GENTS DHOTIES & INDIA ITEM GARMENTS 48 1993-OKQ 1993-OK 85.00 169405-GRI:AG:493861 00 493995, 493896 HAWB NO: 0841, 0842 Prepaid Weight Collect Other Charges Charge 169405-00 AWB: 60-00 HAWB: 300-00 SB: 250-00 CTG: 500-00 APT: 800-00 INS:4284-00 INS: 2886-00 Total other charges Due Agent 2010-00 Total other Charges Due Carter 4284-00 FOURWAYS MOVERS 4/10/94 NEW DELHI INDIA v.k. Signature of Issuing Carter or its Agent 055 - 2342 9276 ORIGINAL 3 (FOR SHIPPER)"

On 6th October, 1994, a carting order was prepared by "ALITALIA AIRLINES" handing over the consignment to AAI, 5 Cargo Terminal (NITC), IGI Airport, New Delhi-110037 for shipment by Flight AZ-1905. The carting order bore the endorsement "Cargo accepted subject to space". The parties are ad idem that the said House Air Waybill as also the Master Air Waybill were issued under the seal and signatures of M/s Fourways Movers (P) Ltd - respondent No.3. It is pertinent to note at this juncture itself that House Air Waybill No.0841 had the Master Air Waybill No.055 - 2342 9276, the running Bill number printed on ALITALIA's printed bill book. Similarly, the House Air Waybill No.0841 was recorded on the Master Air Waybill."

3. Since the consignment did not reach New York by the stipulated date, M/s D.D. Sales, the importer, cancelled the order on or around 16th October, 1994 and claimed damages from the appellant. The consignment reached the destination only on 20th October, 1994.

4. Alleging deficiency in service on the part of the respondents, in particular by respondent No.1, the appellant filed a complaint before the Commission claiming Rs.22.46 lakhs towards the value of the consignment along with interest at the rate of 18% per annum thereon and Rs.15 lakhs as special damages.

5. The complaint was contested by respondent No.1, repudiating the claim made by the appellant. In the counter affidavit filed by respondent No.1, while denying any negligence on their part resulting in deficiency in service, by way of a preliminary objection, it was pleaded that there was no privity of contract between them and the appellant and, therefore, the

complaint was liable to be dismissed on that short ground. The stand of respondent No.1 before the Commission was that the Air Waybill No.055 2342 9276 dated 4th October 1994, which was issued by respondent No.3 "on behalf of respondent No.1" did not mention the flight number and the date in the column provided for the same, since airlifting of cargo was always subject to load/space. It was reiterated that House Air Waybill No.0842 dated 4th October 1994 was neither issued by respondent No.1 nor on its behalf. Both the parties led evidence before the Commission by way of affidavits. Upon consideration of the evidence on record, the Commission dismissed the complaint on the afore-stated ground, namely, the appellant had no locus standi to file the plaint against respondent No.1. While holding so, the Commission observed thus:

“It is not disputed by the parties that Air Waybill (sic) alone is a contract between the parties. Firstly we see that part III Chapter II of Schedule II of the Act does not even remotely refer to any other document except Air Waybill (sic). We find that on the Air Waybill (sic) which happens to be prima facie evidence of conclusion of contract of the receipt of Cargo and the conditions of Carriage, the name of the Shipper is shown as Fourway Movers Pvt. Ltd., O.P. No. 3, and not that of the Complainant nor is there any evidence/indication of any such capacity of the Respondent No.3 on the Air Waybill (sic). Therefore, it will not be possible to reach in the Air Waybill (sic) what is not set out or indicated therein. It is for this reason that we tend to agree with Respondent No.1 and accept its plea that the complainant has no locus-standi to file the present complaint against Respondent No.1, the Airline. Things would have been different if at the time of booking the cargo the Respondent No.3 had issued a communication to Respondent No.1 that it was acting as agent of the complainant.”

The Commission, thus, declined to go into the merits of the complaint though it did observe that there was a lot that could be said on merits of appellant's case.”

6. Being aggrieved, the appellant - claimant is before us in this appeal.

7. Mr. Arvind Kumar Gupta, learned counsel appearing on behalf of the appellant, submitted that the Commission committed a serious error of law and on facts in dismissing the complaint on the sole ground that the appellant had failed to prove any privity of contract between them and the carrier i.e. respondent No.1. According to the learned counsel, it is clear from the House Air Waybill as also the Master Air Waybill No. 055 2342 9276, that both the bills were prepared contemporaneously by respondent No.3 as respondent No.1 - carter's agent when the consignment was handed over to them, and since the House Air Waybill records the appellant as the Shipper and respondent No.3 as the Issuing Carter's Agent, the mention of respondent No.3 as the Shipper as well as the Issuing Carter's Agent in the Master Air Waybill is of no consequence. It was strenuously urged that from the said Air Waybills, it is clear that respondent No.3 was acting as an agent of respondent No.1 and, therefore, the said respondent, as principal, was bound by all the acts of omission and commission of his agent. It was asserted that the Commission failed to apply its mind on this

aspect of the matter and, therefore, erred in holding that there was no privity of contract between the appellant and respondent No.1.

8. Mr. Sanjay Gupta, learned counsel appearing on behalf of respondent No.1, on the other hand, supported the decision of the Commission and submitted that since the Master Air Waybill is the only contract of carriage between the Consignor and the Carter and in the said Bill, respondent No.3 having been named as the Shipper and M/s D.D. Sales of New York as the consignee, respondent No.1 had no liability towards the appellant, notwithstanding the fact that the appellant had been named as the Shipper in House Air Waybill No. 0841. It was submitted that since as per Part III of Chapter II of the Second Schedule to the Carriage by Air Act, 1972 (for short "the Carriage Act"), it is the consignor who is required to make out the Air Waybill and handover the same to the carrier, it was the responsibility of the consignor to see that all the particulars and details of the cargo inserted in the Air Waybill are correct.

“It was thus, argued that respondent No.1 not being a party to the contract of carriage vis-à-vis the appellant, the said respondent cannot be held to be liable for any delay in delivery of the consignment in question.”

9. There is no quarrel with the proposition that as per Section 4 of the Carriage Act, Rules contained in the Second Schedule govern the rights and liabilities of carriers, consignors, consignees, etc. Rules contained in the Second Schedule apply to all international carriage of persons, baggage or cargo performed by aircraft for reward. Chapter II of the said Schedule enumerates the documents of carriage. Rule 5 of Part III of the said Chapter stipulates that every carrier of cargo has the right to require the consignor to make out and hand over to him a document called as "air waybill"; every consignor has the right to require the carrier to accept this document. Rule 6 provides that the air waybill shall be made out by the consignor in three original parts and be handed over with the cargo in the manner prescribed therein. Rule 10 makes the consignor responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the air waybill. As per Rule 11, the air waybill is prima facie evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage. In the light of these provisions, we agree with the Commission that the "air waybill" is prima facie evidence of the conclusion of the contract; of the receipt of the cargo and of the conditions of carriage.

10. However, the question which, in our view, the Commission has failed to examine is in regard to the capacity in which respondent No.3 was operating and had collected the cargo from the appellant for being shipped to New York. In other words, what was the nature of relationship between respondent No.3 and respondent No.1?

11. Section 186 of the Indian Contract Act, 1872 (for short "the Contract Act") lays down that the authority of an agent may be expressed or implied. As per Section 187 of the Contract Act, an authority is said to be express when it is given by words spoken or written, and an authority is said to be implied when it is to be inferred from the circumstances of the

case; and things spoken or written, or the ordinary course of dealing, which may be accounted circumstances of the case. Section 188 of the Contract Act prescribes that an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. Section 237 of the Contract Act provides that when an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority. There is no gainsaying that onus to show that the act done by an agent was within the scope of his authority or ostensible authority held or exercised by him is on the person claiming against the principal. This, of course, can be shown by practice as well as by a written instrument.

12. Thus, the question for consideration is whether on the evidence obtaining in the instant case, can it be said that respondent No.3 had an express or implied authority to act on behalf of respondent No.1 as their agent? If respondent No.3 had such an authority, then obviously respondent No.1 was bound by the commitment respondent No.3 had made to the appellant.

13. Having examined the question in the light of the two afore- extracted "air waybills", which, according to both the contesting parties, are determinative of terms and conditions of contract between them, we are of the opinion that respondent No.3 had an express authority to receive the cargo for and on behalf of respondent No.1. This is manifest from the Master Air Waybill No.055 - 2342 9276 issued and signed by respondent No.3 on the Air Waybill printed by respondent No.1. But for the said authority, respondent No.3 could not use the Air Waybill proforma printed by respondent No.1. Though it is true that in the said Air Waybill the name of the Shipper has been mentioned as that of respondent No.3 but the said Air Waybill has also been signed by respondent No.3 as the agent of the carter - respondent No.1. The other relevant particulars like, the name of the consignee, the number of the House Air Waybill (0841), etc. tally with the House Air Waybill issued by respondent No.3 to the appellant clearly showing the name of the consignor as that of the appellant. From the said documents, it would, appear that respondent No.3 was, in fact, acting in dual capacity - one as a Shipper on behalf of the appellant and the other as an agent of respondent No.1. That 14 being so, respondent No.1 was bound by the acts of their agent, viz. respondent No.3, with all its results. We are of the opinion that while holding that there was no privity of contract between the appellant and respondent No.1 this vital aspect of the matter escaped the attention of the Commission thus, vitiating its order.

14. In view of the afore-going discussion, we have no option but to allow the appeal and set aside the impugned order. We order accordingly and remit the matter back to the Commission for fresh adjudication of the claim preferred by the appellant on merits. However, in the facts and circumstances of the case, there will be no order as to costs.