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Lucky Forwarding Agency Vs. Smt. Binder Devi and ors.

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Court : Madhya Pradesh

Decided On : Oct-07-2002

Reported in : AIR2003MP261

Judge : Dipak Misra, J.

Acts : CarriersAct, 1865 - Sections 8 and 10; [Consumer Protection Act, 1986](#) - Sections 11

Appeal No. : Writ Petn. No. 2826 of 2001

Appellant : Lucky Forwarding Agency

Respondent : Smt. Binder Devi and ors.

Advocate for Def. : Aditya Adhikari, Adv.

Advocate for Pet/Ap. : Ajay Mishra, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Dipak Misra, J.

1. In this writ petition the petitioner, M/s. Lucky Forwarding Agency, has prayed for issue of a writ of certiorari for quashment of the orders passed by the District

Consumer Disputes Redressal Forum, Rewa (in short 'the District Forum') vide Annexure-P-7 and the affirmation thereof by the State Consumer Disputes Redressal Commission (for brevity 'the State Commission'), in appeal No. 903/96 vide Annexure-P-9 and the confirmation thereof by the National Consumer Disputes Redressal Commission (hereinafter referred to as the National Commission') vide Annexure-P-11.

2. The facts, sans unnecessary details, essential to be stated for the purpose of disposal of this writ petition are that the petitioner is a registered partnership firm engaged in Commission Agency at Lucknow and has no branch Office anywhere in the country. All the partners of the petitioner -Firm reside at Lucknow and none of them voluntarily resides or carries on business at Rewa. As a commission agent, the job of the petitioner is to arrange trucks for transportation of goods and work as negotiator between owner of the goods and the truck owner or transport company. A nominal commission is charged by the petitioner. It is putforth in the petition that the conditions mentioned on the goods receipt clearly stipulates that the petitioner would be no way responsible for the transportation of the goods or for any loss or damage occurred during transportation or due to non-delivery of the goods at the destination. It is putforth that the petitioner performs the job of commission agent and no way assumes role or responsibility of carriers as defined and contemplated under the provisions of Carriers Act, 1865.

3. According to the writ petition the respondents Nos. 1 to 6 are the legal representatives of Late Shri Mirchumal who filed a complaint before the District Forum at Rewa alleging therein that he had sent his representative Uttar Pradesh to purchase 240 quintals of sugar from Kisan Sahkar Sugar Mills Ltd. Mehmudabad, District Sitapur (UP) and gave him two drafts to pay the costs thereof. The representative Dinesh Kumar was instructed to contact the petitioner for arrangement of trucks for the transportation of Sugar so purchased and as per the instructions the representative Dinesh Kumar contacted the petitioner at Lucknow and asked the petitioner to make arrangements of trucks for transportation of sugar. Two trucks were arranged and one of them was truck No. UGB 432. The petitioner received Rs. 2580/- towards part of freight charges and its commission. The truck went to Mehmudabad along with the representative

Dinesh Kumar and after loading 120 bags of sugar proceeded to Rewa. The said truck developed some technical break down near Rai Bareli on 19-2-1995 and, therefore, the representative Dinesh Kumar went to Lucknow to fetch another truck which was arranged by the petitioner for him on payment of freight. When the representative Dinesh Kumar reached the spot he found that the truck was missing and ultimately goods loaded on the said truck did not reach the destination at Rewa.

4. Late Shri Mirchumal filed a complaint in the District Forum indicating that the petitioner was responsible for safe delivery of goods at Rewa and as the same was not delivered the petitioner was guilty of deficiency in service as defined in Section 2(g) of the [Consumer Protection Act, 1986](#) (for brevity 'the Act'). The said complaint was registered as Case No. 98/95. The present petitioner who was the opposite party before the District Forum filed its objection resisting the claims on merits as well as on preliminary ground regarding jurisdiction of the District Forum. It was pointed out that Section 11 of the Act was not attracted to the case at hand as it did not disclose that the cause of action wholly or in part to have arisen within the local limits of district Rewa. In that backdrop it was pleaded that the complaint filed in the District Forum, Rewa Was not maintainable due to lack of territorial jurisdiction. After the death of original complainant the legal heirs were substituted and affidavits were filed. The District Forum decided the dispute on 19-11-1996 by allowing the claim of the respondents Nos. 1 to 6 and directed payment of Rs. 1,41,000/-towards cost of sugar along with interest at the rate of 6% per annum with effect from 19-6-96 till the date of realisation.

5. On an appeal being preferred the State Commission by its order dated 20-1-99 affirmed the order passed by the District Forum. The challenge in revision before the National Commission did not meet with success.

6. It is averred in the writ petition that the Revisional forum has totally erred in law by passing a mechanical non-speaking order without dealing with the issue in question. It is also urged that the District Forum committed manifest error in law inasmuch as it had no territorial jurisdiction to advert to the controversy in issue. It is also highlighted that the State Commission acted with material irregularity in

deciding the legal objection of jurisdiction and proceeded on wrong presumption contrary to material brought on record. Similarly, the dismissal by the National Forum has also been criticised. It is also averred that the Forums below have totally ignored and overlooked the fact of mutual agreement between the truck owner and the goods owner and the fact that the goods owner agreed to entrust the goods to the truck owner at its own risk. It is further pleaded that the Forums below have acted with material irregularity warranting interference by this Court.

7. A return has been filed by the respondents Nos. 2 to 6 contending, inter alia, that the petitioner had raised the preliminary objection regarding lack of jurisdiction of the District Forum, Rewa for taking cognizance of the claim but the said objection was negated by order dated 27-3-96 and hence, the said aspect had attained finality and was not subject to challenge in appeal. It is further put forth that the petitioner had taken payment by Demand Draft for a sum of Rs. 1,41,000/- and despite such payment he had not delivered the goods at Rewa and therefore, the Forum at Rewa had the territorial jurisdiction.

8. I have heard Mr. Ajay Mishra, learned counsel for the petitioner and Mr. Aditya Adhikari, learned counsel for the respondents.

9. It is submitted by Mr. Ajay Mishra, learned counsel for the petitioner that the District Forum had no territorial jurisdiction to entertain the controversy in question. It is also put forth by him that the petitioner had no role to play except arranging the truck in question and on that ground it cannot be made liable to pay the amount as demanded by the respondents. It is also canvassed by him that paragraphs 4, 6, 7 and 9 of the complaint clearly exposit that as far as 'consignment, in question is concerned it reveals that the petitioner was required to work as a Commission agent and, in fact, had acted as commission agent and charged commission for the same and the commission being nominal, the services of the petitioner to hire the truck was satisfactorily done and there is no deficiency in the same. It is also urged by him that the Forum at Rewa had no territorial jurisdiction to entertain the controversy in question raised by the predecessor-in-interest of the respondents Nos. 1 to 6 inasmuch as the truck was hired at Lucknow and the limited agreement between the petitioner and the hirer got completed at Lucknow itself and no part

thereof was required to be performed at Rewa. It is also urged by him that the analysis made by the District Forum for assuming jurisdiction is totally based on irrelevant reasons which requires axing of the order. It is also highlighted that the Higher Forums has not appreciated the findings in proper perspective and they do not withstand closed scrutiny. Mr. Mishra has also submitted that the respondents did not allege that the petitioner became the common carrier and was responsible for actual transportation and, therefore, no case could be made out against it. It is also submitted by him that even if this Court comes to the conclusion that the petitioner was common carrier then the fact that the petitioner had sublet the transportation by assigning the same to the different transporter as per the terms and conditions of Annexure-R-1 should be taken note of and hence, the petitioner cannot be held liable for payment of damages. It is his further submission that the petitioner cannot be fastened with the liability as no prior notice under Section 10 of the Carriers Act was served on the petitioner and in absence of that the proceeding was not maintainable;

10. Mr. Adhikari, learned counsel for the contesting respondents submitted that the petitioner filed a reply before the District Forum and admitted in paragraph 2 that he had filed an affidavit that he was the owner of Lucky Forwarding Agency which was engaged in the work of transportation. It is also urged by him that the petitioner is not entitled to contend that he is only a commission agent to arrange truck for nominal commission as such a stance is contrary to the factual position admitted on record, It is also putforth by him that the petitioner charges transportation fee for transporting goods for hire, and the goods are to be delivered at the door step of the respondents as is perceptible from Annexure-R-1. As per the agreement the part of the transportation fee has been charged that the balance transportation fee has to be paid at the time of delivery. It is also putforth by him that the petitioner is a common carrier and he cannot escape from the liability. With regard to jurisdiction it has been canvassed that the cause of action arose at Rewa as the goods were not delivered at the door steps of the respondents and as per the stipulation in the agreement the balance transportation fee is to be paid at Rewa after delivery and the Demand Draft was made at Rewa, It is also urged by Mr. Aditya Adhikari that where the breach of contract occurred due to non performance there jurisdiction lies. It is also canvassed by him that the

petitioner themselves have informed with regard to disappearance of the truck and themselves have lodged the First Information Report at Lucknow. With regard to the non service of notice under Section 10 of the Act no objection was taken at the earlier point of time and the same is said to have been waived.

11. To appreciate the rival submissions raised by the parties the questions that emerge for consideration are (a) whether the District Forum at Rewa had the territorial jurisdiction to entertain the controversy in question; (b) whether the Consumer Forum was devoid of jurisdiction to decide the Us as there was no deficiency in service; (c) whether the non-service of notice under Section 10 of the Act non suited the respondents to agitate their claim; and (d) whether the liability fastened on the petitioner is totally devoid of substance.

12. First, I shall deal with the issue whether there was any deficiency of service attracting the liability under the Consumers Protection Act, 1986. Submission of Mr. Mishra, learned counsel for the petitioner is that when there was receipt of nominal commission by the petitioner for arranging the vehicle, he cannot be fastened with the liability to bring it within the ambit and sweep of rendering assistance to attract the provisions of the aforesaid Act. It is also urged by him that if the documents brought on record are properly scrutinised they would clearly show that they had clearly agreed in the agreement between the consigner and the truck owner that they would be solely responsible for any loss or damage. Submission of Mr. Adhikari is that the language employed in Annexure-R-1 is of wide amplitude and by no stretch of imagination it can be said that the role of the petitioner was only to arrange the vehicle. To appreciate this scenario I have carefully perused the document contained in Annexure-R-1. It is dated 18-2-95. In the said document it has been mentioned that company received commission for arranging the truck. In paragraph 2 of the application it has been clearly stated that M/s. Lucky Forwarding Agency was making the vehicles available on commission basis and was also engaged in arranging the vehicles in addition to delivery of goods to the customers on the basis of commission at the place of delivery. It has been categorically pleaded that it is the responsibility of the respondents therein to deliver the goods. It has also been pleaded in paragraph 4 that the predecessor-in-interest of the respondents had sent his representative Dinesh Kumar with draft

and after they received the draft it had arranged two trucks and taken the responsibility to deliver the goods at Rewa. On a perusal of paragraphs 6 and 7 the factum of booking is clear. In the written statement the respondents therein in paragraphs 1 and 2 had admitted the fact situation. The District Forum has accepted the factual position. The appellate forum in paragraph 7 of its order took note of the contention and came to hold that the present petitioner was merely an agent is not acceptable. To arrive at the said finding the appellate forum has placed reliance on the lorry receipt which clearly shows that the present petitioner had collected the amount of Rs. 2580/- as commission charges. It is also borne out on record that as the goods carrier was not available, the present petitioner arranged the goods vehicle on his own. In view of this factual backdrop the appellate forum has come to hold that appellant No. 1 therein was not acting merely as a commission agent but as transporter or carrier of the goods. In this context, Mr. Adhikari has placed reliance on the decisions rendered in the cases of Patel Roadways v. Birla Yamaha Ltd. (2000) 4 SCC 91 : (AIR 2000 SC 1461) and Nath Brothers Exim International Ltd. v. Best Roadways Ltd., (2000) 4 SCC 553 : (2000 AIR SCW 2116). In the case of Patel Roadways (supra) their Lordships in paragraph 31 came to hold that liability of the common carrier for loss or damage of goods is more extensive and the liability is that of an insurer. Their Lordships have expressed the view that the absolute liability of the carrier is subject to exceptions : act of God and a special contract which the carrier may choose to enter with the customer. Their Lordships referred to catena of decisions and eventually in paragraph 47 came to hold as under:--

'47. From the conspectus of views taken in the decisions of different High Courts noted above it is clear that the liability of a common carrier under the Carriers Act is that of an insurer. This position is made further clear by the provision in Section 9, in which it is specifically laid down that in a case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence. Even assuming that the general principle in cases of tortious liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to a case covered under the Carriers Act. This is also the position notwithstanding a special contract between the parties. These principles have held the field over a considerable length of time and

have been crystallised into an accepted position of law. No good reason has been brought to our notice to persuade us to make a departure from the accepted position. Therefore we reiterate the position of law noticed above, The consequential position that follows is that the contention of Shri Ashok Desai, learned senior counsel that the respondents herein having failed to establish negligence on the part of the appellant, their claim for damages should be rejected, cannot be accepted.'

13. In the case of Nath Bros. (2000 AIR SCW 2116) (supra) their Lordships came to hold as under :--

'27..... The liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier. It is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants.....'

14. If the facts of the case at hand are tested on the anvil of the aforesaid pronouncements of law, there remains no, iota of doubt that commission agent has to render service and in case there is deficiency, he is liable to pay the damages. The State Forum has recorded a categorical finding that the appellant therein was not acting merely as a commission agent but as a transporter or carrier of the goods and hence, he is absolutely liable to pay if there is any negligence. The appellate forum has also dealt with the concept of owner's risk and referred to the decision rendered in the case of Northern India Goods Transport Co. (Pt.) Ltd. v. Guru Hosiery Factory, Ludhiana, AIR 1964 Punjab 318. The analysis made by the State Forum meets the test of legality and there is no reason to discard the same. The State Forum has taken note of the fact that in the instant case the goods were in the custody of the carrier and when the goods are lost or damaged due to negligence the carrier is riot absolved of its liability. I am of the considered opinion that the aforesaid finding is factually correct and legally sound and there is no reason to differ with the same.

15. Now I shall proceed to deal with the aspect of territorial jurisdiction. It is submitted by Mr. Ajay Mishra that no part of cause of action had occurred within the territorial jurisdiction of Rewa and, therefore, the District Forum could not have entertained the application. To substantiate the said plea he has submitted that the petitioner has acted as a commission agent and his services were hired at Lucknow for engaging the truck and that part of agreement it did perform in a highly satisfactorily manner and nothing remained or required to be performed at Rewa and, therefore, the District Forum at Rewa could have no jurisdiction. Mr. Adhikari, learned counsel for the respondents, sounding a contra note, has submitted that the cause of action arose at Rewa when the goods were not delivered at the respondent's door. It is put forth by him that the balance transportation fee was to be paid at Rewa after the delivery of sugar bags and the demand draft was also to be made at Rewa. It is also urged by him that where the breach of contract occurs due to non performance the Courts at the said place had the jurisdiction. In support of the aforesaid contention he has placed reliance on the decisions rendered in the cases of ABC Laminart Pvt. Ltd. v. A. P. Agencies, Salem, AIR 1989 SC 1239 and P. K. Kalasami Nadarv. K. Ponnuswami Mudiliar, AIR 1962 Madras 44. In the case of ABC Laminart Pvt. Ltd. (supra) in paragraph 7 the Apex Court held as under :--

'7. The first question to be decided, therefore, is whether Clause 11 as aforesaid formed part of the agreement. Mr. Javali submits that Ext. B-1 is an order of confirmation No. 68/59 dated 2-10-1974 from the Sales Executive for the first appellant to the respondent acknowledging the receipt of their order and registering the same subject to the terms and conditions 'overleaf'. The general terms and conditions printed overleaf included the aforesaid Clause 11. We are unable to agree. Admittedly the parties have transacted the business on inter alia basis of Clause 11. There is, therefore, no escape from the conclusion that Clause 11 formed part of the agreement and the parties would be bound by it so long as they would be bound by the contract itself. It is not open to the respondent to deny existence of Clause 11. The submission of Mr. Javali has, therefore, to be rejected.'

16. In the case of P. K. Kalasami (AIR 1962 Madras 44) (supra) their Lordships expressed thus :--

'8..... It is therefore clear that the liability of a common carrier for non-delivery of goods so far as a party to the contract is concerned, can at his option be rested on contract or not. Whether in such a case the claim is made on one basis or other would depend on the construction of the plaint --the substance of it being the decisive factor. In the present case the plaint is clear; reference is made to the contract of carriage of goods not merely as a matter of history but as the starting point of appellant's obligations. It is stated that by the terms of his employment, the appellant was legally bound to deliver safely the goods. The claim made for breach of that obligation is one on the basis of the contract and not on the basis of a tort. Thus there being a contractual obligation to deliver the goods at Coimbatore, a part of the cause of action for the suit arose, at that place.....'

17. If the present factual matrix is tested on the anvil of the aforesaid principles it is perceivable that the contract was entered into at Rewa. The goods were sent from village Mehmudabad and the same was to be delivered at Rewa and, therefore, the complaint was rightly entertained by the District Forum at Rewa. The stance of the petitioner that the District Forum at Rewa had no territorial jurisdiction is sans substance.

18. Presently, I shall proceed to deal with the issue whether the non-service of notice under Section 10 of the Act vitiates the entire proceeding. It is forcefully contended by Mr. Mishra that no notice was served on the petitioner as stipulated under Section 10 of the Carriers Act, though such service of notice is mandatory. He has placed reliance on the decisions rendered in the case of Municipal Corpn. Marwara, Katni v. Lalchand, 2000 (2) MPLJ 228 and P. Ramarao v. P. Nirmala, 1997 (1) MPWN 231. It is his submission that the said service of notice was mandatory and in absence of the same the proceeding could not have been initiated. Per contra, it is submitted by Mr. Adhikari that no objection with regard to non-service of notice under Section 10 was taken at the earliest point of time and, therefore, it should be deemed to have been waived. To bolster his submission he has placed reliance on the decisions rendered in the cases of M. P. Rajya Beej

Evam Farm Vikas Nigam Ltd. v. Shri Durga Transport Service, 1996 Jab LJ 146 : (AIR 1996 Madh Pra 208), Auto Trade and Transport Corporation v. National Insurance Company Ltd. (1997) 2 MPLJ 679 : (AIR 1998 Madh Pra 147) and Martin & Harris Ltd. v. VIADJ, AIR 1998 SC 492.

19. Before I proceed to deal with the legal aspects it is worth noting here that in paragraph 8 of the application the respondents had clearly stated that number of telephone calls and telegrams were made. That apart, personal contacts were also made but no response was shown by the petitioner. In the objection filed by the present petitioner before the District Forum in first line of paragraph 8 the aforesaid fact has been admitted. On a perusal of the same it is quite perceptible that not only no objection was taken but there was a concession that information was given to the petitioner with regard to the claim. In the case of Kerala Transport Company v. Apollo Cables, AIR 1986 Kerala 219 their Lordships held that in absence of plea of want of notice in the written statement amounts to waiver on the part of the defendant. Similar view was expressed in case of JEMT. Co. Socy. v. General Assurance Society, AIR 1978 Punjab 336. In the case of Martin & Harris (AIR 1998 SC 492) (supra) the Apex Court expressed the view that the mandatory condition could be waived by the person who was entitled to notice. It is apposite to state that though the said case was delivered in a different context but would apply in full force to the concept of waiver. In the case of Auto Trade and Transport Corporation (AIR 1998 Madh Pra 147) (supra) T.S. Doabia, J. referred to the decision rendered in the case of Vellayan v. Govt. of the Province of Madras, AIR 1947 PC 197 followed by the Full Bench of Bombay High Court in the decision rendered in the case of Vasant Ambadas v. Bombay Municipality, AIR 1981 Bombay 394 and also took note of the decision rendered in the case of Dharendra Nath v. Sudhir Chandra, AIR 1964 SC 1300 and held in paragraph 5 as under:--

'5. There is a direct authority of this Court reported as Union of India v. Tej Narain, AIR 1957 Madhya Bha 108. In para 5 of the judgment, it was observed that where an objection as to sufficiency of notice under Section 80 was raised at a late stage (delay of over two years), the defendant should be deemed to have waived his right to notice under Section 80 of Code of Civil Procedure, 1908. Reliance on

earlier view expressed by the Nagpur High Court reported as Wasant Shripal v. G. M. Khandekar, 1948 NLJ 212 : AIR 1949 Nagpur 25 and the Bombay High Court reported as Erach Shaw Hormusji v. Secy. of State, AIR 1943 Bombay 160.'

20. It is appropriate to mention here that in the said case the Court was considering the application for amendment preferred under Order VI, Rule 17 of the Code of Civil Procedure, to take a plea that no notice was given under Section 10 of the Act and the learned District Forum refused to entertain the prayer. In my considered view, as no objection was raised in the petition such a plea is not acceptable. Hence, the decisions cited by Mr. Ajay Mishra are distinguishable and I do not find any substance in his submission.

21. Now to the last facet of discussion, whether the petitioner is liable to pay damages to the respondents. As the contentions raised by the petitioner are not acceptable and forums below have dealt with the quantum and that relates to the realm of fact situation. I do not think appropriate that it requires to be dwelled upon in exercise of Article 227 of the Constitution. It is so, as no perversity of approach has been pleaded in that regard.

22. Consequently, the Writ petition, being devoid of merit, stands dismissed without any order as to costs.

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