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Dhl Worldwide Express Vs. Associated Buying Services

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Court : Delhi

Decided On : Mar-24-1999

Reported in : 79(1999)DLT168

Judge : M.K. Sharma, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 37

Appeal No. : I.A. No. 3548 of 1997 in S. No. 2314 of 1996

Appellant : Dhl Worldwide Express

Respondent : Associated Buying Services

Advocate for Def. : Yakesh Anand, Adv.

Advocate for Pet/Ap. : Sandip Narain, Adv

Judgement :

M.K. Sharma, J.

1. The plaintiff has instituted the present suit under Order 37, CPC against the defendant seeking to recover Rs. 27,06,000/-. The defendant entered appearance in the suit on 6.3.1997 after giving notice of such appearance to the Counsel for the plaintiff. Accordingly, an application was filed in this Court seeking for issuance of summons for judgments to the defendant. Summons for judgment was

accordingly issued, on receipt of which the defendant has filed an application under Order 37, Rule 3, CPC along with an affidavit seeking leave to defend the suit. As against the aforesaid application filed by the defendant, the plaintiff has filed its reply and the parties were heard at length on the aforesaid application.

2. The issue that arises for my consideration, at this stage, is whether the defendant could be granted leave to defend the suit and whether the defense sought to be raised by the defendant in the present application could be said to be plausible entitling the defendant to contest the suit as a regular suit.

3. I have considered the pleadings of the parties and also heard the learned counsel appearing for the parties, at length.

4. It is the case of the plaintiff that an agreement was arrived at between the plain tiff and the defendant whereunder the defendant agreed to regularly avail of the services rendered by the plaintiff and send its parcels and documents through them at concessional rates and on other terms and conditions. The aforesaid agreement was in the nature of Shippers' Agreement and was, executed between the parties on 15.2.1995. It was also agreed between the parties that monthly bills/invoices would be raised by the plaintiff for the services rendered by it and that the defendant would be liable to pay the samewithin seven days from the date of such bills/in voices. It was also agreed that on failure to pay the amount due under the invoices that were to be raised from time to time, the defendant was liable to pay interest at the rate of 18% p.a. on the overdue bills.

5. Pursuant to the aforesaid agreement, the defendant availed of the services rendered by the plaintiff and sent various consignments through the plaintiff from the month of February, 1995 till February, 1996. In terms of the regular practice, the defendant entrusted every individual consignment to the plaintiff who then issued an Airway Bill for the same by indicating the destination, contents as well as the weight of the every such consignment. The airway bill was signed on behalf of the defendant by its representative in confirmation of its having entrusted the particular consignment and the plaintiff used to raise a consolidated monthly invoice for all the consignments entrusted during that month by the defendant and charge the agreed price as per the agreement dated 15.2.1995 on the total weight

of all such consignments. The plaintiff raised monthly invoice and charged the price on the total weight of the consignments sent under cover of various airway bills during the said period and maintained a running account of the payments due and received from the defendant from time to time. The defendant defaulted in making payments that became due and payable by it under the invoices raised by the plaintiff within the stipulated time and, thereforee, by several letters the defendant was apprised of the dues standing in its account from time to time and was requested to pay the same in accordance with the contract between the parties. However, in spite of the said letters the defendant failed and neglected to pay the amount that was due and payable by it under the contract and accordingly the present suit.

6. Copies of the airway bills are also placed on record, which indicate that the defendant is to claim for a loss including miss-delivery or damaged shipment within thirty days from the date of acceptance of the shipment by the plaintiff. In paragraph No. 3 of the application filed by the defendant for leave to defend, along with the affidavit, the defendant has stated that no amount is due and payable by the defendant to the plaintiff much less the amount of Rs. 27,06,000/- with interest. However, in a subsequent paragraph, the defendant has admitted that an amount of Rs. 7,10,357/-became due and payable by the plaintiff to the defendant. At another place the defendant has also stated that a sum of Rs. 4,42,703.50 became due and payable by the defendant to the plaintiff as freight charges for the consignments which were actually sent by the plaintiff for and on behalf of the defendant. At one other place, the defendant has also stated that the -defendant did not give business for over Rs. 9,96,970/- to the plaintiff. It is thus apparent that the defendant has been taking up a vacillating and conflicting stand in its defense filed by way of affidavit before this court.

Besides it is also apparent from a reading of the affidavit filed by the defendant that in order to show that the triable issues arise in the present suit, it has been stated that invoices raised by the plaintiff are not in accordance with the rates settled between the parties in the shippers' agreement dated 15.2.1995 and that no interest on the amount due/delayed payment was agreed to by the defendant. It is also contended that some of the consignments that were entrusted by the

defendant and for which the plaintiff claims freight charges were either not delivered or delivered late or lost and thus no freight charges are payable for the same and that some airway bills charged for by the plaintiff do not pertain to the defendant since they are not signed on its behalf.

7. On perusal of the records, particularly documents including the airway bills, Ifind that claim of the plaintiff in the suit is based on the reduced rates as agreed between them in the shippers' agreement dated 15.2.1995. The statement of account read with the shipment airway bill would clearly prove and establish that claim of the plaintiff therein is based on reduced rates as agreed between the parties. The defendant has stated that as against Invoice No. 34/1237 dated 28.2.1995 an amount of Rs. 31,038/- is claimed, whereas only sum payable is Rs. 19,100/-. I have looked into the said document and find that, in fact, the plaintiff has claimed from the defendant a sum of Rs. 19,100/- as against the said invoice and the said amount is also claimed in the present suit.

Similar is the position in respect of invoice dated 28.2.1985 wherein the claim is made only for Rs. 2,900/- and not for Rs. 5,312.50. The amount of Rs. 2,900/- is also claimed in the present suit. Thus, it cannot be said that there is any discrepancy in the amount claimed in the invoice and the suit and what was required to be paid under the shippers' agreement.

8. In respect of the second contention of the Counsel for the defendant that some of the consignments entrusted by the defendant for which the plaintiff claimed freight charges, were either not delivered, or delivered late and / or lost, I may refer to the clause in the shipment airway bill to which reference has already been made, in terms of which claim for lost, miss-delivered and / or damaged shipments should be made within 30 days from the date the goods were accepted for shipment. No such document is brought to my notice by the Counsel appearing for the defendant that, in fact, such a claim was made and /or lodged with the plaintiff by the defendant within the period of 30 days, as stipulated therein. The statements made in the application in that regard also, in my considered opinion, are vague and uncertain without giving details of the airway bills.

9. So far the issue relating to payment of interest is concerned, the shippers' agreement dated 15.2.1995 clearly envisages liability of the defendant to pay the amount mentioned in the invoice within seven days from the date of such invoice and upon failure to do so, the plaintiff would be entitled to charge interest @ 18% p.a. on all overdue payments. thereforee, charging of interest by the plaintiff @ 18% p.a. is in accordance with the terms and conditions stipulated in the contract.

In support of his contention that some of the airway bills charged for by the plaintiff do not pertain to the defendant since they are not signed by it, the Counsel relied upon the documents at page Nos. 42 to 44 of the affidavit. I have looked into the said documents and find that the shipment airway bill at page No. 42 is signed on behalf of the defendant. So far the shipment airway bill at page 43 is concerned, stamp /seal of the defendant appears in the said bill. Only in respect of shipment bill at page No. 44, no signature of the sender appears in the bill. However, it is not disputed that the said bill was received by the defendant, but in spite of receipt of the said bill, no complaint and/ or dispute was raised by the defendant within 30 days from the date of acceptance of the aforesaid shipment and / or receiving the aforesaid shipment airway bill sent to it by the plaintiff claiming the aforesaid amount.

10. Taking into consideration the entire facts and circumstances of the case, I am of the considered opinion that the defense sought to be raised by way of the present application, supported by affidavit, is vexatious and moon-shine defense in order to make out a triable issue. Although, at one stage the defendant stated that it does not owe any money to the plaintiff, at another place it admitted that certain amounts are due and payable to the plaintiff. Thus, the defense raised appears to be not bona fide and has beenmade out only in order to make out a plausible and/or triable issue. The application, thereforee, stands dismissed. The plaintiff is entitled to a decree as claimed in the present suit. The suit filed by the plaintiff accordingly stands decreed for the entire sum of Rs. 27,06,000/- along with costs. In addition, the plaintiff shall also be entitled to interest @ 15% p.a. from the date of decree till realisation.

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