

REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) NO. 78 OF 2002

% Date of Decision : 24th October, 2008.

UNITED INDIA INSURANCE COMPANY LTD.&ANR. ...Plaintiffs.

Through Mr. R.K. Ram, Advocate.

VERSUS

M/S BLUE DART EXPRESS LTD. & ANR. Defendants.

Through Mr. Jay Savla, Ms. Meenakshi Ogra
& Mr. Arundhati Das, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes.
3. Whether the judgment should be reported Yes.
in the Digest ?

SANJIV KHANNA, J:

1. Plaintiff No. 1, United India Insurance Company Limited and plaintiff No. 2, M/s Rolta India Limited have filed the present suit for recovery of Rs.23,53,476/- against M/s Blue Dart Express Limited,

the defendant No. 1. Plaintiff No. 1 claims that it is entitled to file the present suit under Letter of Subrogation and Special Power of Attorney dated 10th September, 1999 executed by plaintiff No. 2.

2. The defendant No. 1, M/s Blue Dart Express Limited is a common carrier and had transported consignment of imported computers and computer peripherals in 52 boxes from Delhi to Military Intelligence Headquarters, 4 Corps, Tejpur, Assam vide carriage way bill dated 1st December, 1998. The delivery was taken on 10th December, 1998 and the consignee viz. Directorate of Military Intelligence, Tejpur, Assam at that time had noticed damage to box No. 2.

3. The plaintiffs claim that the said box was opened on 15th April, 1999 in the presence of the experts of the plaintiff No. 2 and it was found that photo scanner had been damaged and required complete replacement.

4. Plaintiff No. 2 had taken an inland transit insurance policy from plaintiff No. 1 and on account of damage, Rs.23,53,476/- including survey fee of Rs.3,505/- and excluding Rs.2,25,000/- recovered by plaintiff No. 1 from sale of the damaged goods, was paid by plaintiff No. 1 to the plaintiff No. 2.

5. On the basis of Letter of Subrogation and Special Power of Attorney executed by plaintiff No. 2, the plaintiff no.1 insurance

company has filed the present suit for recovery of Rs.23,53,476/- along with interest against the defendant No. 1. It is claimed that the defendant No. 1 was negligent and had caused damage to the goods when they were within their custody and is liable as a transporter.

6. Pursuant to objection taken by defendant No. 1 in their written statement, that the consignor and the consignee as per the carriage way bill were Directorate of Military Intelligence, the plaintiffs had filed an application under Order I, Rule 10 and Directorate of Military Intelligence was impleaded as defendant No. 2. Written statement has been filed on behalf of the said defendant stating, inter alia, that they had no role to play as the goods had been insured by plaintiff No. 2 with the plaintiff No. 1 and plaintiff No. 2 had settled the claim with the insurance company and received payment. They have also stated that when the consignment had reached Tejpur, one box being box No. 2 out of 52 boxes, was found to be damaged. It is also stated that the photo scanner, which was damaged was incapable of repair and had to be replaced.

7. On the basis of the pleadings of the parties, on 24th January, 2006 following issues were framed:-

(1) Whether the plaintiff No. 1 can maintain a suit on the basis of letter of subrogation cum Special Power of Attorney dt. 10/9/99

in its favour by plaintiff No. 2 as alleged in para 2 of the plaint?OPP

(2)Whether the present suit is barred by law of limitation? OPD

(3)Whether the claim of the plaintiff No. 1 based on a Letter of Subrogation-cum-Power of Attorney from the plaintiff No. 2 is maintainable against the present Defendant when the shipment in question recorded Military Intelligence, New Delhi, i.e., Defendant No. 2 as Consignor and(sic)Military Intelligence, Tejpur as Consignee as stated in para 2 of the written statement? OPP

(4)Whether the Plaintiff& Defendant No. 1 are governed by the terms & conditions of the contract dt. 2-12-1994 wherein the liability of the Defendant for any loss or damage to the shipment shall be strictly regulated by the limitation of liability clause and other relevant terms & conditions as mentioned on the Way Bill? OPD

(5)Whether this Court has the jurisdiction to adjudicate upon the present dispute between the parties wherein the Way Bill limits the settlement of all disputes and claims subject to Mumbai jurisdiction? OPD

- (6) Whether the Plaintiff has forfeited its right by not lodging its claim in writing within 30 days of acceptance of shipment as per clause 11.1 of the Way Bill? OPD
- (7) Whether the goods were loaded in sound condition and whether they were damaged enroute due to carelessness and mishandling by the Defendant as alleged by Plaintiff in paras 4, 6, 8 of the Plaint? OPP
- (8) Whether goods were delivered in sealed condition by Defendant No. 1 as alleged by the Defendant No. 1 in para 14 of written statement? OPD
- (9) Whether the Plaintiffs are entitled to the decree as prayed for?
- (10) Relief.

ISSUE NOS. 1 AND 3

8. For the sake of convenience, these issues are being dealt with together.

9. The plaintiffs have filed affidavit of Mrs. R.K. Kala, PW-1, who has placed on record the original insurance policy Exhibit PW-1/1 dated 4th August, 1998. The inland transit insurance policy was taken out by plaintiff No. 2 for transportation of computers and computer peripherals from Delhi by lorry. The said policy is under Marine Insurance Act, 1963. The list of material covered by the policy is

enclosed with Exhibit PW-1/1. Mrs. R.K Kala, PW-1 has further stated that after report of damage was received, Shri Gopal Chandra Kath Hazarika was appointed as a surveyor and loss assessor to assess quantum of damage. Periodical consultations were held with the plaintiff No. 2 and the supplier M/s Intergraph Corporation and thereafter the Surveyor had assessed complete loss of the photo scanner. The survey report has been proved on record as Exhibit PW-1/5. Plaintiff No. 2 had served loss notice dated 19th April, 1999 under Section 10 of the Carriers Act, 1865 marked Exhibit PW-1/6 and the defendant No. 1 had also executed a damage certificate dated 9th August, 1999 marked Exhibit PW-1/7. Plaintiff No. 2 had filed a claim note with the plaintiff no.1 dated 9th September, 1999, marked Exhibit PW-1/8. The plaintiff No. 1 has also proved payment disbursement voucher marked Exhibit PW-1/9 and it has been stated that payment of Rs.23,53,476/- was made by the plaintiff No. 1 to plaintiff No. 2 under the insurance policy. Ms. R.K. Kala, PW-1, has also proved on record the Letter of Subrogation and Special Power of Attorney executed by plaintiff No. 2 in favour of plaintiff No. 1, which has been marked Exhibit PW-1/10. Plaintiff No. 1 had also issued legal notice to defendant No. 1 being notice dated 10th February, 2001, which has been proved as Exhibit PW-1/11. The said legal notice was sent by registered post. In view of Section 79 read with Section 90 of the Marine Insurance Act, 1963 the plaintiff No. 1 has

been able to establish and prove that in view of Letter of Subrogation, Exhibit PW-1/10, they are entitled to file the present suit for recovery against the defendant No. 1.

10. Learned counsel for the defendant No. 1 had submitted that in the Carriage Way Bill, which has been marked Exhibit PW-1/3, name of the consignor has been mentioned as Director General of Military Intelligence, Army Headquarters, New Delhi and, therefore, plaintiff No. 2 was not the consignor. It was stated that Letter of Subrogation and Special Power of Attorney, Exhibit PW1/10, executed by plaintiff No. 2 in favour of the plaintiff No. 1 was of no value and does not furnish right of subrogation to the plaintiff No. 1 to file the present suit as plaintiff No. 2 was not the consignor. The said contention of the defendant No. 1 cannot be accepted in view of the clear stand taken by the defendant No. 2, Director General of Military Intelligence in their written statement stating that they had no role to play and goods had been transported by plaintiff No. 2. Further, plaintiff No. 2 had written notice dated 19th April, 1999, Exhibit PW-1/6, to defendant No. 1 in respect of the said damaged consignment. Receipt of the said notice has been admitted by the defendant No. 1. The said defendant also admits that the fare and transport charges were paid by plaintiff no.2 and not by defendant no.2. The stand of Defendant No. 1, is contrary to their taken in I.A. No. 10932/2008 under Order XI, Rule 14 stating, inter alia, that plaintiff No.2 was the consignor. Even in the

written statement defendant No.1 has relied upon agreement dated 2nd December, 1994, Exhibit DW-1/1, executed between them and plaintiff No.2 and claimed that carriage way bill PW No. 1/3 was issued as per terms of agreement Exhibit DW-1/1.

11. PW-1, Mrs. R. K. Kala along with her affidavit has filed letter dated 26th March, 2006 Exhibit PW-1/12 written by plaintiff No. 2 that the goods were transported by defendant No. 1 in view of the transaction entered into between plaintiff No. 2 and defendant No. 1. Moreover, the plaintiffs had summoned Major Kapil Yadav, Station Workshop, EME, Delhi Cantt., Delhi and his statement was recorded as PW-3. He has categorically stated that the subject matter i.e. the consignment was imported from abroad and was transported by M/s Rolta India Limited, the plaintiff No. 2, as a consignor as per records of Directorate of Military Intelligence. In the cross-examination, he has stated that Directorate of military intelligence was not the owner of the consignment at the time of loading of the goods by defendant No. 1, rather M/s Rolta India Limited, plaintiff No. 2 was the owner. He has stated that in the carriage way bill it was wrongly mentioned that Directorate of Military Intelligence was a consignor and instead M/s Rolta India Limited, plaintiff No. 2, should have been recorded as a consignor in the said way bill Exhibit PW-1/3.

12. In view of the above discussion, issue Nos. 1 and 3 are decided in favour of the plaintiffs and against the defendant No. 1. Plaintiff No. 1 is entitled to file the present suit in view of Letter of Subrogation and Special Power of Attorney, Exh.PW1/10, executed by the plaintiff No. 2.

ISSUE NOS. 4, 5 AND 6

13. These issues being interconnected are being dealt with together.

14. Learned counsel for the parties in connection with these issues had drawn my attention to Section 6 of the Carriers Act, 1865, which reads as under:-

“6. In respect of what property liability of carrier not limited or affected by public notice. Carriers, with certain exceptions, may limit liability by special contract-

The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act 22 of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized

in that behalf by such owner, limit his liability in respect of the same.”

15. The defendant No. 1 relying upon the said Section had submitted that the plaintiff No. 2 and defendant No. 1 had entered into an agreement dated 2nd December, 1994, Exhibit DW-1/1 and under the said agreement they had agreed that all shipments would be subject to terms and conditions of carriage mentioned in the way bill and these terms and conditions would be deemed to be part of the said written contract. My attention is also drawn to the wording of the said clause wherein it is mentioned that liability of defendant No. 1 for any loss or damage to the shipment would be strictly regulated by the limitation of liability clause and other terms and conditions thereto as mentioned in the way bill. On the basis of this document Exhibit DW-1/1, it was submitted that terms and conditions mentioned on the back side of the way bill Exhibit PW-1/3 are special terms and conditions as stipulated in Section 6 of the Carriers Act, 1865 and are, therefore, binding on the plaintiffs and the defendant No. 1.

16. I would have examined this issue in depth and detail and also gone into the question whether the consignment in question had been booked under the agreement Exhibit DW-1/1 as it is the case of the plaintiffs that the consignment in question was not booked under a contract Exhibit DW-1/1, but I find that the way bill PW-1/3 does not contain any special conditions relied upon by defendant No. 1

restricting the claim of damages or prescribing special conditions. Learned counsel for the defendant No. 1 when confronted with the above situation obviously had to accept that there were no special terms and conditions mentioned in the way bill and, therefore, Section 6 of the Carriers Act, 1865 has no application. It was, however, submitted that there could be printing error in the original way bill Exhibit PW-1/3 and, therefore, special terms and conditions had not been printed. If that be so, still the defendant No. 1 cannot rely upon conditions not mentioned in the way bill Exhibit PW-1/3. Defendant No. 1, after arguments had been partly heard, had filed an application being I.A. No. 10932/2008 under Order XI, Rule 14 stating, inter alia, that three copies of the way bill were prepared at the time of booking of the consignment and the plaintiff No. 2 being the consignor may be directed to produce the second copy. I may note here that as per defendant No. 1 himself, the third copy of the way bill was retained by them. The said application was dismissed by order dated 9th September, 2008 pointing out that Exhibit PW-1/3 was an admitted document and at the time of admission/denial of documents was marked Exhibit P-1. It was also pointed out that there is no question of primary or secondary evidence as the document in question is an admitted document. Further, the defendant No. 1 themselves had not produced their copy of the carriage way bill.

17. In these circumstances, the above issues are decided in favour of the plaintiffs and against the defendant No.1 holding, inter alia, that there were no special terms and conditions limiting the liability of defendant No. 1 under Section 6 of the Carriers Act, 1865.

ISSUE NOS. 7 AND 8

18. These issues are inter-connected. Counsel for the defendant relied upon the Way bill exhibit PW1/3 and signature of the consignee below the printed acknowledgment on PW1/3 that the shipment had been received in a good condition.

19. The said contention of defendant No.1 over-looks the clear and categorical written admission made by defendant No.1 in their certificate dated 9.8.1999, exhibit PW1/7 that one package out of 52 packages was delivered in a slightly damaged condition. Therefore, the contention of defendant No.1 that damage had occurred after delivery at the time of installation is contrary to their certificate and is an afterthought. DW-1, Mr. Satyanarayana has admitted issue of damage certificate exhibit PW1/7, by defendant No.1, and he has stated that the said certificate was issued for the sole purpose of enabling the consignor to claim insurance. The certificate exhibit PW1/7 does not mention that the goods were damaged due to negligence and deficiency in service on the part of defendant No.1,

but it is clearly stated that at the time when goods were delivered, one package was in a slightly damaged condition. Damage had, as per certificate of defendant No.1 Exhibit PW1/7 occurred before delivery and was noticed at the time of delivery on 10th December, 1998. DW-1, Mr. Satyanarayana has not disputed and questioned the

said statement made in certificate exhibit PW1/7. In the light of the said admission, the printed lines that the shipment had been received in good condition mentioned in the carriage way bill Exhibit PW1/3, is to be disregarded and is held to be an incorrect statement.

20. We also have evidence of PW-2, Mr. Gopal Chandra Nath Hazarika, who has deposed that the consignment was not be opened by the consignee and installation was to be done in the presence of expert personnel from the M/S. Rolta India Limited, plaintiff No.2. He has stated that on external inspection, one box was found to be damaged and thereafter when box was opened in the presence of the service engineer of plaintiff No.2, it was found that the photo scanner was damaged beyond repair. Manufacturer M/s. Intergraph Corporation as per PW-2 had confirmed that the photo scanner had been damaged beyond repair and required complete replacement. The Photographs of damaged photo scanner were also taken and these have been placed on record and marked exhibit PW2/2. The photographs of photo scanner show that the sealed packages were not opened till photographs were taken. Damage is also visible. Thus it is not possible to accept the contention of the defendant No.1 that the shipment was damaged after delivery.

21. Contention of defendant No.1 that the goods could have been damaged before they were loaded at Delhi is without merit. The way bill exhibit PW1/3 issued by defendant No.1, does not state that any of the packages was damaged. This is also not stated in the certificate exhibit PW1/7, issued by defendant No.1. No evidence and material has been placed on record by defendant No.1 that the consignment was damaged before it was handed over and came in their custody.

22. The plaintiffs have examined PW-3, Major Kapil Yadav, Station Work Shop EME, Delhi Cantt., who has deposed on the basis of official records maintained by the Directorate of Military Intelligence. He has stated that as per official records, Lieutenant Colonel D.K. Gurung was present when the consignment was loaded at Delhi Airport for Tejpur, Assam and at that time no damage was noticed nor anything to that effect was recorded. In fact Lieutenant Colonel D.K. Gurung had recorded in the official books that the consignment when loaded was in sound and perfect condition.

23. In view of the above findings, it is established that damage was caused to the goods after they were loaded in Delhi and before they were delivered at Tejpur, Assam. Admittedly, at that time the consignment was in custody of defendant No.1. I may here refer to Section 9 of the Carrier Act, 1985, which reads as under:-

“Section 9 Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.—

In any suit brought against a common carrier for the loss, damage or non-delivery of goods [including containers, pallets or similar articles of transport used to consolidate goods] entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.”

24. In view of Section 9 of the Carrier Act, 1985, the plaintiffs are not required to specifically prove negligence or criminal act on the part of defendant No.1, its servants or agents.

25. Counsel for defendant No.1 had relied upon Judgment of Supreme Court in **New India Insurance Company Limited Vs. Economic Transport Corporation (1998) 8 SCC 541.** In this decision it was noticed that there was no direct evidence and the litigation had been fought on the basis of inferences on the question of loss and damage. Question of when and who was responsible for the loss or damage was in issue. It was observed that liability could not be passed on the carrier as there was no evidence to establish that the goods had been damaged during transit. The Supreme Court in view of evidence on record did not accept that damage had occurred during transportation. In view of the above findings and peculiar facts as

noticed by the High Court and referred to by the Supreme Court in paragraph 4 of their judgment, it was held that the presumption under Section 9 of the Carriers Act, 1865 relating to negligence did not arise. Presumption of negligence under section 9 arises when loss or damage during carriage is established and in such cases plaintiff need not prove negligence. Damage or loss indicates and establishes negligence. (Refer, ***Patel Roadways Ltd versus Birla Yamaha Ltd.*** reported in AIR 2000 SC 1461 wherein it was held that liability of the carrier on loss or damage to goods is extensive and is that of an insurer).

Issue No.2

26. Articles 10 and 11 of the Limitation Act, 1963 read as under:

Article	Nature of Suit	Period of Limitation	Time from when period begins to run
Article 10	Against a carrier for compensation for losing or injuring goods	Three years	When the loss or injury occurs
Article 11	Against a carrier for compensation for non-delivery of, or delay in delivering goods	Three Years	When the goods ought to have been delivered.

Article 11 of the Limitation Act, 1963, applies to cases where there is non-delivery or delay in delivering goods and in such cases cause of action for filing of a suit for damages begin when the goods ought to have been delivered. Article 10 applies to cases where damage or loss is caused to goods during carriage. It is a case of both parties that Article 10 of the Limitation Act, 1963, is applicable to the present case. Under Article 10 of the Limitation Act, 1963, period of limitation for filing a claim against a carrier for compensation is three years and the time begins from the date when the loss or injury occurs.

Counsel for the Plaintiffs had relied upon the judgment of Supreme Court in the case of **Bootamal Vs. Union of India, Reported in, AIR 1962 SC 1716**. The said decision interprets Article 31 of the Limitation Act, 1908 (corresponding to Article 11 of the Limitation Act, 1963). Article 31 of the Limitation Act, 1908 applies to cases of non-delivery or delay in delivery of goods. In such cases, Supreme Court has held that cause of action would arise when goods were not received at the place of destination within reasonable time. Article 31 of the Limitation Act, 1908 is not applicable to the facts of the present case.

27. The starting point of limitation under Article 10 is the date when the loss or damage occurs and not the date on which loss

or damage comes to the knowledge of consignee or consignor. Knowledge as such is not relevant for Article 10. Date of knowledge of such loss or damage is not made, starting point of limitation for proceedings covered by Article 10 of Limitation Act, 1963. Plaintiffs have not invoked Section 17 of Limitation Act, 1963, which deals with fraud or mistake. In cases where section 17 applies, limitation does not begin to run until the plaintiff or the claimant has discovered fraud or mistake. Further once limitation period begins/starts it does not stop on account of any subsequent disability or inability to institute a suit or make an application and continues to run irrespective of such disabilities. (see section 9 of the Limitation Act, 1963)

28. The date on which loss or injury occurs during transit is within the knowledge of the carrier, unless there is evidence that the consignor/consignee was also aware and had knowledge of the said date. Carrier has to prove date of damage or loss to shipment. (refer to the provisions of Sections 101 to 104 and Section 106 of the Evidence Act, 1872) Normally, consignor/consignee will come to know about damage or loss only upon delivery of the consignment or when notice of loss/damage is given by the carrier. Keeping these aspects in mind, Courts have interpreted Article 10 and held that the relevant date is a date when the loss or injury is caused to the

consignment and not the plaintiff's date of knowledge, but when the carrier is not able to establish and prove the specific date on which loss or injury had occurred and thereby discharge onus, the date of delivery should be taken as relevant date for the purpose of Article 10 of the Limitation Act, 1963. Thus, where a carrier is unable to prove the date on which loss or damage was caused to the consignment, the date of delivery or the date on which carrier informed the party about the loss/damage, whichever is earlier, is regarded as the date of loss or damage for the purpose of starting point of limitation under Article 10 of Limitation Act, 1963. Division Bench of Calcutta High Court in the case of ***Union Of India versus Gujarat Tobacco Company*** reported in AIR 1955 Cal 448, had occasion to interpret Article 30 of Limitation Act, 1908, which was identically worded as Article 10 of Limitation Act, 1963 and it was observed that the limitation period begins to run when the loss or injury occurs. When such loss or injury occurs while the goods were in custody of a carrier, the date thereof would be within the knowledge of the carrier and accordingly, it is for the carrier to establish and prove the date of loss or damage. In the absence of satisfactory evidence on the point or on failure to discharge the onus, the date of delivery to the party should be taken as the relevant date of loss or injury and as the starting point of limitation. The above view has been taken by the Division

Bench of Andhra Pradesh High Court in **Oriental Silk Store Vs. General Manager S.E. Railway, AIR 1961, AP 454**

29. In the present case, the consignment was dispatched from Delhi on 1st December, 1998 and received at Tejpur, Assam on 10th December, 1998, vide way bill exhibit PW1/3. Date of damage or loss is unknown. Defendant No.1 has not discharged the onus. The starting point of limitation, therefore, is 10th December, 1998. The limitation started running from the said date and the suit should have been filed on or before 11th December, 2001, in terms of the Article 10 of Limitation Act, 1963. The suit in the present case was filed on 20th December, 2001 and was returned with the office objections and refiled on 03rd January, 2002. The suit, therefore, is filed beyond period of limitation in terms of Article 10 of the Limitation Act, 1963.

30. Counsel for the plaintiffs had submitted that the goods were found to be damaged on 15.4.1999, when the box was opened in the presence of the representatives of plaintiff No.2 and subsequently when the manufacturer confirmed that the goods were damaged. In this regard, he has referred to notice dated 19.4.1999, exhibit PW1/6, written by the plaintiff No.2. The language of Article 10 of Limitation Act, 1963, does not support

the stand of the plaintiffs. Article 10 does not postpone starting point of limitation after delivery, till the date when the plaintiff/claimant discovers loss or damage after investigation. Quantification or exact extent of damage or loss suffered is not a relevant consideration and not the starting point under Article 10 of Limitation Act, 1963. High Court of Madras in ***Madurai K. Rengian Chettiar Versus Union of India*** reported in AIR 1971 Madras 34, has held that quantum or extent of damage/loss is not relevant and only the date when the damage was caused or loss was suffered has to be ascertained. In these circumstances, the date 15.4.1999, cannot be taken as relevant date or the starting point of limitation.

31. It is a case of the plaintiffs that damage to the consignment was noticed at the time of delivery on 10.12.1998. In paragraph 7 of the plaint, it is mentioned by the plaintiffs that the said consignment reached Tejpur, Assam on 10.12.1998 and consignee took delivery on the same date. At the time of delivery of goods, the consignee had noted damage on box No.2 (pack no.2-27/52, Sr. No.150363). In case contention of the plaintiffs is to be accepted, it will mean that the starting point of the limitation can be postponed to any date as per like and wishes of a party by not opening or by delaying the opening of the damaged consignment.

32. Counsel for the plaintiff had further submitted that the certificate exhibit PW1/7 dated 9.8.1999, amounts to an acknowledgment under Section 18 of the Limitation Act, 1963, and therefore the present suit, filed on 20.1.2001, is within limitation.

33. The question whether exhibit PW1/7 dated 9.8.1999 amounts to acknowledgment of liability under Section 18 of the Limitation Act, 1963, requires examination of the said document.

The same is produced as under:-

“This is to certify that on behalf of M/s Rolta India Limited, we have carried in our network a shipment containing 52 packages vide Airwaybill number 511692193 dated 1st December, 1998 through Truck No. MH04 AG 1260 from MI-17 Delhi to MI-17 Tejpur. The shipment was delivered at MI-17, Tejpur on 10.12.1998 and out of 52 packages, 1 package No.2 was delivered in slightly damaged condition.”

34. Section 18 of the Limitation Act, 1963, reads as under:-

18. Effect of acknowledgment in writing :

1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed

from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b) the word “signed” means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

35. Section 18 of the Limitation Act, 1963, extends period of limitation in cases where before expiry of the period of limitation prescribed, a party acknowledges liability in respect of a property or a right in writing. Writing to constitute acknowledgment under Section 18 should be for a liability in respect of a property or a right claimed against the said party. Acknowledgement may be express or even implied from the written text. Supreme Court in the case of **Shapoor Freedom Mazda versus Durga Prosad**

Chamaria, reported in AIR 1961 Supreme Court 1236, while interpreting corresponding identically worded provisions of Section 19 of the Limitation Act, 1908, has held that three conditions must be satisfied to constitute an acknowledgement:-

- (i) Acknowledgment must be before period of limitation has expired.
- (ii) It must be with regard to liability and in respect of right in question.
- (iii) It must be in writing and signed by the party against whom such right has been claimed.

36. It was also observed that acknowledgment does not create any new right of action but renews it. The statement should be based and must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. The acknowledgment need not be accompanied by a promise to pay expressly or by implication. However, the words used in the acknowledgment should indicate existence of a jural relationship between the parties as that of a creditor and a debtor and the statement should be made to admit such jural relationship. This admission need not be express but must be made in words from which the Court can reasonably infer that the person making the admission intends to refer to the subsisting liability as on the date of the statement and

accept it. Whether any admission is made can be inferred when the intention the maker of the statement is to admit jural relationship between the parties of a debtor and a creditor. Courts lean in favour of liberal construction but this does not mean that where there is no admission it should be inferred. The instrument or statement should be succinctly and tersely examined to find out the substance and intention of the party executing the instrument, whether intention was to acknowledge or admit that the party owed a right or a debt to the receiver of the letter or to the person to whom the letter is addressed. A fair construction has to be made.

37. Recently, in ***Prabharam versus M. Azhargiri Pillai*** reported in (2006) 4 SCC 486, while dealing with a case of acknowledgement in a case of mortgage, it was observed that words must indicate jural relationship between the parties and it must appear that such a statement is made with the intention of admitting such jural relationship. The term jural relationship refers to legal relationship between the parties, with reference to their rights and liabilities.

38. Several judgments of the Supreme Court were referred and examined in detail in the case of ***Hansa Industries(P)***

Limited Versus MMTCL Limited reported in 2004, VI AD (Delhi)

222, wherein the following principles were culled out:-

“19. We can deduce the following principles from the aforesaid judgments which shall have to be applied in a given case to ascertain as to whether writing constitutes an acknowledgment or not:

(a) Acknowledgment means an admission by the writer that there is a debt owed by him either to the receiver of the letter or to some other person on whose behalf it is received. It is not enough he refers to a debt as being due from somebody. He must admit that he owes the debt.

(b) The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature of the specific character of the said liability may not be indicated in words.

(c) Words used in the acknowledgment indicate the circumstances of jural relationship between the parties such as that of debtor and creditors.

(d) It must appear that statement is made with the intention to admit such jural relationship.

(e) Such intention can be implied and need not be expressed in words. In construing the words used in the statement, surrounding circumstances can be considered although oral evidence is excluded.

(f) Although liberal construction is to be given to such statement but where a statement was made without intending to admit the existence of jural relationship, the court cannot fasten such intention on the maker by an involved or far-fetched process of reasoning.

(g) In deciding the question in a particular case, it is not useful to refer to

judicial decision and one has to inevitably depend upon the context in which words are used.”

39. We have to apply the above principles to the certificate exhibit PW1/7, and decide whether the instrument is an acknowledgment. The certificate exhibit PW1/7 states that out of 52 packages, one package No.2 was delivered in a slightly damaged condition. The words used in certificate dated 9.8.1999, exhibit PW1/7 do not show that defendant No.1 admitted any subsisting liability as a debtor of the plaintiff No.2 or any third person. The statement made do not show that the intention of defendant No.1 was to admit jural relationship of a debtor and creditor, who is liable to plaintiff No.2. Legal obligation to pay any amount to the plaintiff No.2 is not admitted. The certificate records statement of fact that at the time of delivery one package was found to be slightly damaged. From this statement alone it cannot be inferred that defendant No.1 had admitted jural relationship of a debtor and a creditor between the defendant No.1 and plaintiff No.2. There is no instrument or material to show that prior to 9.8.1999 defendant No.2 had accepted any claim or liability. There is no such allegation nor has any evidence been produced by the plaintiffs. There are not additional factors or circumstances on the basis of which inference can be drawn that the intention of

defendant No.1 while issuing the said certificate exhibit PW1/7 was to admit any liability. The instrument itself does not admit any liability.

40. DW-1, Mr. K. Satyanarayana in his statement by of examination in chief has stated that the said certificate exhibit PW1/7, was issued for the sole purpose to enable the consignor to claim insurance money from the insurance company. The relevant portion of the affidavit reads as under:-

“I state that Damage Certificate Exhibit PW1/7 is not issued to Plaintiff No.2 as the shipper in the present case is not plaintiff No.2. The Damage Certificate was issued in good faith, without admission of any negligence or deficiency in service and with the sole purpose of enabling the Consignor/shipper to claim the insurance money from its insurance company.”

41. The said witness was not cross-examined by the plaintiffs with regard to certificate exhibit PW1/7 and the above statement. The explanation given by defendant No.1 that the said certificate exhibit PW1/7 was issued only to enable plaintiff No.1 to get the insurance claim, remains untouched and no questions were asked in cross examination of DW-1. I may also note here that some High Courts have held that issue of damage certificate by a carrier to consignor/consignee is not an acknowledgment of liability. Calcutta High Court in ***M/s Balchand Badriprasad Versus Union of India***,

reported in, AIR 1957, Calcutta 666 and Orissa High Court in the case of **National Co-operative Consumer's Federation of India Limited Vs. Union of India**, Reported in, 1996 ACJ 491 have taken the said view. In Balchand's case (supra), High Court of Calcutta has observed that issue of damage certificate by the carrier does not amount to acknowledgement or acceptance of existing liability.

42. Counsel for the plaintiffs during the course of arguments wanted to rely upon photocopy of damage certificates, which had been issued by defendant No.1 in 2005 in other cases. It was highlighted that in the said certificates it was mentioned that they were issued "without prejudice". It was accordingly stated that Exhibit PW1/7 is not a damage certificate but an acknowledgment as the words "without prejudice" were missing. I do not find any force in the said submission and the distinction made. Lack of words "without prejudice" does not make any difference. I am also not inclined to go into and take on record photocopy of alleged certificates issued by the defendant no.1 as they have not been proved and further they are stated to be issued in the year 2005. Counsel for the plaintiff had relied upon decision of Bombay High Court in ***South Eastern Roadways, Bombay versus U.P. State Industrial Corporation Limited***, reported in AIR 1993 Bombay 300. In the said case, in response to a claim letter, the carrier had written back, stating that

the matter “will be settled” by the General Manager, who was on visit to Bombay (Mumbai). The Bombay High Court held that use of words “will be settled” with reference to damage was sufficient to indicate jural relationship between the parties as that of a debtor or a creditor and the mere fact that the amount was not quantified or clarified would not make any difference. The writing would constitute acknowledgement in view of the explanation to Section 18 of the Limitation Act, 1963. The factual position of the present case is different. Defendant No.1 has not acknowledged or accepted liability to pay any amount or jural relationship of debtor and creditor to plaintiff No.2 in certificate exhibit PW1/7.

43. In view of the findings given above, it is held that the suit of the plaintiffs is barred by the limitation.

Relief

44. In view of the findings on issue No.2, the suit of the plaintiffs is dismissed as barred by the limitation. In the facts of the present case there will be no order as to costs.

**(SANJIV KHANNA)
JUDGE**

**OCTOBER 24, 2008.
VKR/P**