

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

+ **RFA No.442/2001**

% **24th February, 2011**

M/S. ASHOKA METAL DÉCOR P. LTD. Appellant
Through: Mr. Dinesh Kumar Gupta with
Mr. Vikas Mishra, Advocates

VERSUS

M/S. PATEL ROADWAYS LTD. Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 28.7.2001 whereby the suit of the appellant/plaintiff for recovery against the defendant/transporter was dismissed.

2. The facts of the case are that the appellant/plaintiff booked two consignments vide GR Nos.2202120 and 2202121 dated 21.8.99 of Crown Corks for transportation to the customers of the appellant/plaintiff. The case

as laid out in the plaint was that the appellant/plaintiff at the time of booking was given number of a different truck but actually transportation was done in another truck which had the goods of one M/s. Haryana Leather and Chemicals Limited. It is pleaded that since the Crown Corks of the appellant/plaintiff are used for packaging of food items, the smell of the other packages of the other consignor got imbibed in the Crown Corks of the appellant as a result of which the consignment of the Crown Corks was rejected by the customers of the appellant. Consequently, the appellant filed the suit for recovery with respect to the value of the Crown Corks from the defendant/respondent.

3. The defendant appeared and contested the suit and stated that the goods were booked as sundry goods and were not to be carried independently on a vehicle which had no other goods. It was further pleaded that admittedly there was no damage to the consignment or any breakage, and the goods were rejected by the customers of the appellant only because of the same having been spoilt on account of a foul smell imbibed from the goods of another consignor. The defendant/respondent therefore prayed for dismissal of the suit.

4. After the pleadings were complete, the Trial Court framed the following issues:-

- “1. Whether the plaintiff booked ‘Metal Cape’ as consignment with the defendant as sundry consignment at owner’s risk? OPD
2. Whether the present suit is bad in law as alleged in preliminary objection no.4 of the written statement?

OPD

3. Whether the plaintiff is entitled to any damages? If so, to what amount? OPP.
4. Whether the plaintiff is entitled to any interest? If so, at what rate? OPP.
5. Relief.”

5. The relevant issues are issue nos. 1, 2 and 3 and all of which could have been dealt with together by the Trial Court. However, the Trial Court has dealt with them independently. The findings and conclusions with respect to each of these issues is that the goods were booked as sundry goods and the appellant/plaintiff failed to prove that there was any contract that the goods should be carried on a separate truck on which no other consignment of any other consignor should be transported. In accordance with the findings of these issue nos. 1, 2 and 3, the suit of the appellant/plaintiff was dismissed.

6. Learned counsel for the appellant has raised the following arguments before this Court:-

- i) The respondent is guilty and liable to pay damages because the respondent was aware of the goods of the appellant as its regular customer and consequently it was liable to pay damages on account of the foul smell which emanated from the Crown Corks on account of transportation with the goods of another consigner. It was argued that this becomes clear from a reading of the letter dated 31.8.1999(Ex.PW1/3) written by the appellant to the respondent and which was replied vide reply dated 9.9.1999 (Ex.PW1/4).
- ii) The second argument was that at the time of the booking, the

respondent gave one truck no. but in fact transported the consignment through another truck which had the goods of M/s. Haryana Leathers and Chemicals Limited.

iii) It was finally argued that in terms of the Carriers Act, 1865, the liability of the respondent/defendant was absolute and the respondent/defendant was liable to compensate the appellant.

7. The Trial Court has rightly arrived at the findings and the conclusions in the following paras of the impugned judgment and decree, and with which I agree:

“8. But for the oral testimony of DW.1 who is the legal executive of the defendant, no evidence has come to be led by the defendants if the plaintiff had booked the metal caps with the defendant for transportation to the respondent. This DW.1 during his cross examination has even admitted that he was not handling the job of booking the goods for the purposes of transportation on behalf of the defendant company for any customer and he had not booked the consignment for delivery for the plaintiff company against the subject G.C.Notes. Not only that, he has even deposed that he did not know as to what the terms and conditions were settled between the representative of the plaintiff company and the representative of the defendant company at the time of booking the goods for transportation against the said G.C.Notes. Needless to say as said earlier, he is only the legal executive of the defendant company. The G.C.Note on which the goods were carried and purportedly incorporated the clause that the goods were to be carried at owner's risk has not been proved by any of the parties. Ex.PW.1/14, a document of the defendant and so admitted to by it, per se establishes that the subject consignments booked by the plaintiff with the defendant for transportation were crown corks. The testimony of DW.1 shows that the plaintiff had not taken the full truck in delivering the goods to the concerned parties as the same were booked as “sundry goods” with them and that the meaning of sundry goods was that the goods were not for the full truck. Said

testimony of DW.1 to such an effect is neither challenged nor rebutted by the plaintiff. It is also admittedly not the plaintiff's case that the consignment booked by the plaintiff with the defendant were to be carried separately in any particular vehicle. In fact, the only case of the plaintiff before the court is that the consignment booked by it with the defendant got spoiled on account of leather chemical being also transported in the same vehicle. The only conclusion thereby is that the consignment booked by the plaintiff with the defendant were booked as the sundry consignments.

12. Onus to prove the issue in hand was heavily upon the plaintiff to discharge. Plaintiff in the suit claims damages for the purported value of the consignments consigned to its consignee vide G.R.No.2202120 and G.R.No.2202121 both dated 21.8.99. Accordingly to the plaintiff the goods against G.R.No.2202120 were against bill no.267 dated 21.8.99 worth Rs.84,371.80p. and the goods against G.R.No.2202121 ere against bill no.268 dated 21.8.99 for Rs.1,10,054.36 consisting of 60 packages weighing 1070 kgs. and that both these consignments were of crown corks and were to be used by the consignee for the purpose of packing of cold drinks, food items but were rejected by the consignee as the said crown corks has picked up smell of chemical. **The plaintiff's case as such for the damages is not on account of loss or the non delivery of goods but is for the alleged damage caused thereto by the defendant carrier during transportation. Defendant on its part does not disputed the fact that the truck in which the plaintiffs supplied consignments were carried t the place of destination also carried the consignment of leather chemicals and it was a different truck than the truck the registration particulars whereof were given on the G.R.Note. On the deliberation on issue no.1, I have already held that the consignments booked by the plaintiff with the defendant were booked as the sundry consignment which implies that the consignments booked by the plaintiff were ordinarily to be transported with the consignment of others. Did the plaintiff give any special instructions for any due care and caution for the transportation of the subject consignments, the pleadings are silent. The only averment in the pleadings is to the fact that the**

plaintiff on number of times sent the goods through defendant to the consignee and the defendant carrier as well aware about the facts that the goods were being used in food items and it was also clearly indicative from the name of the firm itself. PW.1 during his cross examination has even admitted that they did not have any agreement in writing with the defendant that their consignment should be sent separately others. Not only that, he has also deposed that they had not given any instructions in writing for the safety measurement to be followed for carrying their consignment by the defendant. Though said PW.1 has voluntarily deposed during his cross examination that there has been an oral understanding to such an effect, this voluntary utterance in the absence of any plea and any other evidence adduced, I considered cannot have any binding effect. More so such a vague version of PW.1 in the cross examination does not prove as to what was the oral understanding for the safety measures to be followed by the defendant in carrying the consignments of the plaintiff to their place of destination. Plaintiff on its part even failed to prove the G.C.Note. In any event, PW.1 during his cross examination by himself has admitted that in the G.C.Note they had not even specified that their consignments were to be used for food items. **This only goes to show that the plaintiff on its part not only failed to give any special instructions for the due care and caution if required, during the course of their transportation, it on its part even failed to even specify on the G.C.Note, which is a contract note that the subject consignments were to be used for food items.** Then recalling, that the case of the plaintiff is founded on the allegations that the subject consignments were damaged during the course of transportation by the defendant which is denied to by the defendant, to prove the issue in hand it was incumbent upon the plaintiff to prove the nature and extent of damage during the course of transportation. Plaintiff in support of its case has produced only PW.1 S.C.Dua who is the Vice President of the plaintiff and Sh.Naresh Agarwal, PW.2 who is the Finance Manager of the plaintiff. **Neither the consignees who allegedly rejected the subject consignments have been produced nor any kind of correspondence they made with the plaintiff for rejecting the subject consignments have been proved on record.** It is

also not proved that when the consignees received the subject consignments, they received the consignments with or without any reservation, as to the alleged damage. The testimony of DW.1 that the defendant company was never called by the plaintiff to make a joint inspection in respect of the goods damaged during the transportation has gone unchallenged. Plaintiff on its part does not assert that at any point of time it called upon the defendant to conduct any joint inspection for the alleged damage. PW.1 has deposed that on receipt of the complaints from the consignees, he visited the consignee's place at Hamim Pur and saw that consignment lying in a separate room without party at Hamimpur and two of the boxes and after opening few of the bottles (word bottles in the testimony of PW.1 is apparently a clerical error as for the word boxes as the testimony as such read together is in context of the boxes and not the bottles). He smelt foul smell and on the other consignments sent to Hyderabad, he visited Hyderabad and met the same fate and since crown corks used for good product and the consignment was spoiled the said consignment could not be used and so the consignment sent by us was rejected and returned back and they destroyed the same. But for this oral testimony of PW.1 no. evidence as for the damage to the subject consignments has come to be adduced by the plaintiff. This singular oral testimony of PW.1, in my considered view is not sufficient to bring home the allegations of the plaintiff that subject consignments were spoiled during the course of transportation simply because the truck in which the said consignments were carried also carried alongwith some leather chemicals. It is true that the DW.1 has deposed that against the consignments booked in G.C.Note No.2202120 dated 21.8.98 one box was found in damaged condition from amongst the 45 boxes when the goods were delivered and acknowledged by the respondent, it does not permit presumption that the whole consignment was totally damaged and nothing could be retrieved therefrom. For a party, in a claim for damages in the given circumstances, it is, therefore, incumbent to prove the extent of damage. The testimony of PW.1 that the whole consignment was spoiled on account of the smell emanating therefrom, in the absence of any other evidence led, in the circumstance when the plaintiff on its part failed to even call for any joint inspection of the said consignment and the fact the plaintiff on its part allegedly destroyed the subject consignments

only during the pendency of the suit and that too without keeping any sample and without obtaining any report of any chemical Laboratory for the alleged smell or getting any evidence of the goods/consignments received back from the consignee cast serious doubt on the singular uncorroborated testimony of PW.1 that the whole of the subject consignments were spoiled only during the course of the transportation by the defendant. There is also no evidence to show, if the subject consignments when dispatched were in good condition and there could not be any manufacturing defects in the crown corks on account of any manufacturing defect therein. It is true that the liability of defendant carrier is that the insurer that the alleged damage to the subject consignments was not a consequence of any inherent vice in the goods carried or was not attributable to the plaintiffs or the consignee in any event was still to be proved by the plaintiff. Needless to say, though a repetition, it is not the case of loss of goods where negligence can be presumed. I am, therefore, of the considered view, that the plaintiff has failed to discharge the onus to prove the issue no.3 in his favour to any extent. Issue no. 3 is, therefore, decided against the plaintiff and in favour of the defendant.”(emphasis added)

8. I am afraid I am unable to agree with any of the arguments as raised by the learned counsel for the appellant/plaintiff. The Trial Court after referring to the evidence in the case, both oral and documentary has rightly come to a conclusion that the goods in question were not booked by the appellant/plaintiff to be carried on a separate truck in which no other consignment of any other consignor could be transported. The goods were in fact booked as sundry goods and even the consignment note which was proved in the Trial Court did not mention the goods as food grade or there was required transportation through a separate truck in which no other goods of any other person should have been carried. Merely because the transporter carries the goods in a different truck instead of truck mentioned

in the consignment note cannot in any manner impose liability upon the respondent/defendant because suppose, the truck got damaged on the way such as by way of breaking of axle or break down of the engine and so on, would not mean that the consignment could not have been carried on any other truck. Therefore, merely because the consignment is carried on a different truck would not mean that the respondent/defendant is liable, inasmuch as, the appellant had failed to prove a contract to hold the respondent/defendant liable that the goods of the appellant had to be only carried in a separate truck in which no other consignments were to be transported. The letters Ex.PW1/3 and PW1/4 also do not support the case that carriage of goods was to be in a separate truck. So far as the argument that the Carriers Act applies, the argument is without any merit because the consignment in question was admittedly not damaged or broken so that the Carriers Act, 1865 applies. Liability of a carrier under the Carriers Act, 1865 is no doubt an absolute liability but it arises with respect to damage or breakage to the consignment and consequent losses. In the present case, admittedly, consignment was given in a sound and unbroken condition to the customers of the appellant, and even the appellant/plaintiff admitted that there was no damage to the consignment. The only case was that because of the transportation of the goods of the appellant with goods of another consignor certain smell got imbibed in the goods of the appellant resulting in rejection of the goods by the customers of the appellant, I do not therefore find there is scope of applicability of the Carriers Act in the present case.

9. In view of the above, I do not find any merit in the appeal, which is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be send back.

FEBRUARY 24, 2011
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VALMIKI J. MEHTA, J.