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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.508/2002

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14th November, 2011

M/S. DELHI U.P.M.P. TRANSPORT CO. (REGD.) Appellant
Through: Ms. Suman Kapoor, Advocate.
versus

M/S. NEW INDIA ASSURANCE COMPANY LTD. & ANR. Respondents
Through: Mr. Ramesh Kumar, Advocate for
the respondent No.1.

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 filed under Section 96 of Code of Civil Procedure, 1908 is to the impugned judgment of the trial Court dated 31.5.2002. By the impugned judgment the Court below decreed the suit of the respondent No.1-the insurance company, as a subrogee of the rights against the appellant/defendant No.1-carrier for having lost the goods (PVC Resin) which were entrusted to it for its carriage.

2. The facts of the case are that the defendant No.2/respondent No.2 booked a consignment of PVC resin in 2500 sacks weighing 20 Kgs. each for transportation from Bombay to Delhi. The subject goods were insured with the respondent No.1/plaintiff. The goods were loaded in two trucks vide GR Nos.219894 and 219895. The goods received were found short and some of the goods were found in damaged condition. The consignments were tampered and materials weighing 919.5 kgs. were short and a quantity of 4680.5 Kg. was contaminated. A total of 5600 Kgs. was found lost resulting in a monetary loss of ₹2,84,613/- to the defendant No.2/respondent No.2. It transpired that the goods were stolen during the transportation and for which the defendant no.2/respondent no.2 had filed a police complaint. The respondent No.1/plaintiff being the insurance company paid the amount to the defendant No.2/respondent No.2 under the insurance policy and thereafter on the basis of power of attorney and letter of subrogation, filed the subject suit for recovery of ₹3,76,203/-.

3. The appellant/defendant No.1 contested the suit by filing the written statement. The written statement however filed was vague and evasive. It was not disputed that the appellant/defendant No.1 was a carrier who had conducted the transportation of goods. The details with respect to the transportation receipts were also not

denied.

4. The trial Court, after the pleadings were complete, framed the following issues:-

- “1. Whether plaintiff is entitled to claim the suit amount from the defendants? OPP
2. Whether plaintiff is entitled to claim interest? If so, at what rate and for what period? OPP
3. Whether the suit is without any cause of action? OPD
4. Whether the suit is time barred? OPD
5. Whether the suit is liable to be dismissed under Section 10 of the Carriers Act? OPD
6. Whether there was no privity of contract between the parties? OPD
7. Whether the suit is bad for non-joinder of necessary parties? OPD
8. Relief.”

5. Before the trial Court the respondent No.1/plaintiff exhibited and proved the various documents being the goods receipts of transportation being Ex.PW1/3 and Ex.PW1/4, marine policy Ex.PW1/9, short delivery certificates issued by the appellant/defendant as Ex.PW1/11 and Ex.PW1/12, the invoice dated 12.3.1992 containing the value of material as Ex.PW1/5, complaint by the defendant no.2/respondent no.2/owner to the police with respect to theft of goods by employees of appellant resulting in loss as Ex.D1, AD card with respect to legal notice as Ex.PW1/10 etc. The appellant/defendant for the first time in the evidence sought to lay a case that two trucks were hijacked and the goods were stolen by the local people. However, the

trial Court has rejected the theory because it was put up for the first time in the evidence. The trial Court has thereafter held that liability of the carrier is equal to an insurer and therefore held the appellant/defendant no.1 liable relying upon two decisions of the Supreme Court in the cases of ***Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd. (2000) 4 SCC 553*** and ***Patel Roadways Ltd. Vs. Birla Yamaha Ltd. (2000) 4 SCC 91***. The trial Court has held that there was no act of God so as to entitle the appellant from any exemption.

6. Some of the relevant observations of the trial Court in this regard, and with which I agree, read as under:-

“ISSUES NO.1 & 2

Both the issue are tried together because they are inter-connected. The plaintiff has examined its Administrative Officer Sh. B.N. Sharma as PW 1, its Assistant Manager Sh. L.D. Pahwa as PW 3 and Sh. Rajesh Kumar an employee of defendant no.2 as PW2 in support of its case. The said witnesses has proved that the plaintiff is on insurance company, which had provided the insurance cover to the defendant no.2 vide Marine policy Ex.PW1/9 to be effected from any Mexican Port to New Delhi on the consignment of 50 MT of PVC Resin. The said consignment reached at Bombay Port and the clearing agent appointed by defendant no.2 got the consignment cleared and loaded the same in 6 trucks provided by defendant no.1. Four trucks reached Delhi safely. The dispute is in respect of remaining two trucks.- Goods receipt bearing no.219894 & 219895 both dated 13.5.1992 Ex.PW1/3 & Ex.PW1/4 were issued by the defendant no.1 at the time of loading of the goods in the said trucks bearing no.HIH 1119 and HIB 2723. The said trucks had reached the godown of the defendant no.2 at Delhi on

19.5.1992 and at the time of unloading it was found that out of 465 bags loaded in truck in HIB 2723, 15 bags of weighing 300 Kgs. Were missing and another lot of 165 bags was in tempered condition resulting in shortage of 290 Kgs. of material and 3010 Kgs. material was lying in scattered condition in the said truck.

The other truck bearing no.HIH-1119 had also reached on 19.5.1992 and at the time of unloading 100 bags were found to be in tempered condition resulting in loss of 350 Kgs. of material and 1650 Kgs. material was lying scattered in the vehicle. The defendant no.1 had issued two certificates dated 26.5.1992 to the defendant no.2 giving details of the entire loss/damage to the consignment loaded in these two trucks, which are Ex.PW1/11 and PW1/12. The total loss/shortage of material is 940 Kgs. and 4060 Kgs. was found unusable, which was lying scattered in open condition in the trucks, so the total loss claimed by defendant no.2 was of material weighing 5600 Kgs. The value of this material has been duly given in the invoices dated 12.3.1992 Ex.PW1/5 and on the said basis, the defendant no.2 had sent a regd. A.D. notice to the defendant no.1 dated 20th June, 1992 wherein claim was lodged of the approximate value of ₹3,26,000/-. The said claim was duly served on the defendant vide acknowledgment card Ex.PW1/10. The defendant no.2 has also proved the police report to S.H.O., Mangol Puri, lodged by defendant no.2 as Ex.D-1, wherein the defendant no.2 had given the details of the loss caused due to the willful acts of drivers & owners of the truck no.HIH 1119 & HIB 2723. The police was requested to take action in this matter for criminal breach of trust and acts of cheating. This complaint to the police proves that loss was not caused by any "Acts of God". Further it goes on to prove that employees of defendant no.1 had committed acts of criminal breach of trust and the defendant no.1 has vicarious liability to compensate the defendant no.2 in this regard.

The witnesses of the plaintiff have further proved that a detailed Power of Attorney and a Letter of Subrogation Ex.PW1/13, 1/14 were executed by defendant no.2 in favour of the plaintiff wherein it has been mentioned that the full and final settlement of the claim lodged by defendant no.2 with the plaintiff was settled at ₹2,84,613/- in respect of the loss caused during transportation of the material from

Bombay to Delhi and in consideration of the settlement of the claims, the defendant no.2 transferred and assigned all its actionable rights in favour of the plaintiff. The suit was filed on the basis of the Power of Attorney and letter of Subrogation. Since the plaintiff is an insurance company, it has right to file a suit on the basis of the Letter of Subrogation and Power of Attorney executed by the insured after the settlement of its claim and the plaintiff steps into the shoes of defendant no.2 as far as right to file a claim against defendant no.1 is concerned.

Written statement filed by defendant no.1 is vague and evasive. Each and every averment of the plaint has been denied in the written statement. But while appearing as a witness on behalf of the defendant company DW1 has stated that two trucks were hijacked on the way from Bombay to Delhi and the goods were stolen/pilfered by the local people. This evidence is beyond pleadings. As mentioned above, the Written Statement is nothing but denial of all the facts stated in the plaint, although in one of the preliminary objections it has been stated that it is a case of theft but nothing more has been mentioned. So this hijack theory narrated in the evidence for the first time has no basis. It has been further stated by this witness that an F.I.R. was lodged by defendant no.2 regarding this hijack. There is no such F.I.R. but a complaint was lodged to the police wherein it was alleged that the goods were mis-appropriated by the drivers and the owners of the trucks and the said complaint is Ex.D1. This complaint proves that the defendant no.1 has vicarious liability the criminal acts of its employees and agents. The witness has further admitted that damaged goods were handed over to the defendant no.2, so the loss of goods has also been admitted. Issuance of the goods receipts Ex.PW1/3 & 4 have also been admitted in cross-examination. The letters certifying the damage Ex.PW1/11 & Ex.PW1/12 have also been admitted. The seal on A.D. Card Ex.PW1/10 has been admitted meaning thereby that lodging of claim vide regd. A.D. letter dated 20.6.1992 Ex.PW2/D1 has also been proved.

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Mr. B.N. Sharma has stated in his cross-examination that the payment of the entire amount was made to the

defendant no.2 by cheque. This witness has also stated that Letter of Subrogation and Power of Attorney were executed by defendant no.2 in favour of the plaintiff company, but he was not sure, who had collected the draft of the same, he also did not remember who was the person on behalf of the defendant no.2 who was to follow up the matter regarding settlement of the claim with the plaintiff. All these enquiries regarding procedure followed by defendant no.1 do not affect the merits of the claim as the defendant no.1 had already admitted that the loss had taken place during transit and thereafter it is for the defendant no.1 to prove that it was neither negligent nor careless during transit of the goods. Defendant no.1 has failed to discharge this burden and the plaintiff has proved its case beyond doubt. It was held in the matter of Nath Bros. Exim International Ltd. v Best Roadways Ltd. (2000) 4 SCC 533 that "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 that 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.

Further in the matter of Patel Roadways Ltd. v Birla Yamaha Ltd. (2000) 4 SCC 91 it was held 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.

However, the absolute liability of the carrier is subject to the exception where the loss or damage arises from an act of God. An act of God, as has been observed by a Division Bench of the Madras High Court in P.K. Kalasami Nadar case,

will be an extraordinary occurrence due to natural causes, which is not the result of foresight and care, e.g. a fire caused by lightning; but an accidental fire thought it might not have resulted from any act of or omission of the common carrier, cannot be said to be an act of God.”(underlining added).

7. I completely agree with the aforesaid findings and conclusions of the trial Court inasmuch as the appellant/defendant no.1 as a carrier is liable under the Carriers Act, 1865 as an insurer. The loss to the goods was on account of theft of goods during the period of transportation. Further, the appellant/defendant also issued the shortage/loss/damages certificates as Ex.PW1/11 and Ex.PW1/12. The story of hijack which was led for the first time in evidence was obviously a false story which has rightly been disbelieved by the trial Court.

8. Counsel for the appellant sought to argue that respondent No.1/plaintiff did not file the survey report to prove the loss which has been caused and therefore the suit should have been dismissed.

At the first blush, this argument may appear attractive, however, the object of filing of a survey report is to assess the actual loss which has been incurred. In this case, the loss which has been incurred, has otherwise been proved on record by means of other evidence and therefore failure to file the survey report, more so in the facts of the case where goods were stolen by the employees of the

appellant/defendant cannot lead to dismissal of the suit. PW-2 Sh. Rajesh Kumar and who was the employee of the owner/defendant No.2/respondent No.2 specifically deposed to the loss being ₹3,36,000/- but the insurance company sanctioned only an amount of ₹2,84,600/-. There is no cross examination on this aspect as deposed by the witness by the appellant/defendant. In fact, there is no affirmative/positive evidence which was led on behalf of the appellant/defendant that if loss was not ₹2,84,600/- then what was the amount of loss. The trial Court, therefore, rightly on the balance of probabilities has held that loss was caused on account of loss/damages to the goods and for which the suit was decreed.

9. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

VALMIKI J. MEHTA,J

NOVEMBER 14, 2011

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