

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

+ **RFA No.442/2003**

% **9th December, 2011**

M/S. DELHI ASSAM ROADWAYS CORPORATION LTD.

..... Appellant

Through: Mr. Rajiv Bansal, Advocate with Mr.
Manu Beri, Advocate.

Versus

THE ORIENTAL INSURANCE COMPANY LTD. Respondent

Through: Mr. Atul Jha, Advocate with Mr.
Sandeep Jha, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 27.2.2003. By the impugned judgment, the trial Court decreed the suit of the respondent/plaintiff/insurance

company/subrogee for recovery of ₹ 4,75,972/- against the appellant/defendant/common carrier.

2. The facts of the case are that one M/s. K.L.J. Plasticizers, K.L.J. House, 63, Rama Marg, Najafgarh Road, New Delhi booked a consignment of orthoxylene with the appellant/common carrier/transporter. The consignment was booked vide invoice No.083 dated 8.7.1997 for 12.460 metric tonnes of orthoxylene. The chemical was to be carried from Dhaligaon to Pattancheru. The truck in which chemical was being carried by the appellant, and belonging to the insured M/s. K.L.J. Plasticizers, met with an accident on the Jabalpur-Nagpur road on 17.7.1997 due to which the tanker overturned and the contents of the tanker leaked out. The insured sent a notice dated 21.8.1997 to the appellant demanding a sum of ₹ 3,07,460/-, the value which was stated on the invoice. The appellant issued a short/damage certificate dated 26.8.1997 certifying the non-delivery of the entire quantity of 12.460 metric tonnes of orthoxylene. The respondent/insurance company/plaintiff appointed a Surveyor who submitted his report dated 30.7.1997 and it was reported that the loss was ₹ 2,75,236/- being the invoice value of the consigned goods. The insured submitted a claim bill dated 26.8.1997 for ₹ 3,07,407.60/- and which was

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settled at ₹ 2,99,237/-. On paying of this amount of ₹ 2,99,237/- to the insured, the respondent/plaintiff was subrogated to the rights of the insured and the insured executed a letter of subrogation dated 29.10.1997 in favour of the respondent/plaintiff. The subject suit therefore came to be filed against the appellant/defendant.

3. The appellant/defendant in its written statement contended that it was not liable because the goods were carried at “Owner’s Risk”. It was also pleaded that the appellant was not a common carrier within the meaning of the expression as in the Carriers Act, 1865. It was also pleaded that the appellant was not guilty of negligence and therefore the suit was liable to be dismissed.

4. After completion of pleadings, the trial Court framed the following issues:-

“1. Whether the plaintiff is entitled to the suit amount as prayed? OPP

2. Whether the suit of the plaintiff is barred by Limitation? OPD

3. Whether the suit has not been signed, filed and verified by a duly authorized person? OPP

4. Whether the suit of the plaintiff is not maintainable in view of p.o.No.1? OPD

5. Whether the defendant failed to supply the goods to the plaintiff? If so, its effect? OPD.

6. Whether the plaintiff is entitled to the interest? If so, at what

rate? OPD

7. Relief.”

5. The trial Court relied upon the celebrated decisions of the Supreme Court in the cases of *Nath Brothers Exim International Ltd. Vs. Best Roadways Ltd. (2000) 4 SCC 553* and *Patel Roadways Ltd. Vs. Birla Yamaha Ltd. (2000) 4 SCC 91* and has held that a common carrier is liable as an insurer and the common carrier cannot exempt itself from liability by stating that goods were carried at owner’s risk. It was held that liability of a common carrier is equal to the insurer and the only exemption to the liability is an act of God or an act of enemy. In the present case, it was held that there was no act of God inasmuch as the accident was on account of negligence of the carrier. The trial Court has also referred to Section 9 of the Carriers Act, 1865, as per which there is a statutory presumption of negligence against the appellant/carrier. At this stage, it is relevant to refer to few of the paragraphs in the case of *Nath Brothers Exim (supra)* and which read as under:-

“25. We have already reproduced the provisions of Sections 6,8 and 9 above. Section 6 enables the common carrier to limit his liability by a special contract. But the special contract will not absolve the carrier if the damage or criminal act or that of his agents or servants. In that situation, the carrier would be liable for the damage to or loss or non-delivery of goods. In that

situation, if a suit is filed for recovery of damages, the burden of proof will not be on the owner or the plaintiff to show that the loss or damage was caused owing to the negligence or criminal act of the carrier as provided by Section 9. The carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State (or the enemies of the King, a phrase used by the Privy Council). The Calcutta decision in *British & Foreign Marine Insurance Co. v. India General Navigation and Rly. Co. Ltd.*, the Assam decision in *River Steam Navigation Co. Ltd. V. Syam Sunder Tea Co. Ltd.*, the Rajasthan decision in *Vidya Ratan v. Kota Transport Co. Ltd.* and the Kerala decision in *Kerala Transport Co. v. Kunnath Textiles* which have already been referred to above, have considered the effect of special contract within the meaning of Sections 6 and 8 of the Carriers Act, 1865 and, in our opinion, they lay down the correct law.

27. From the above discussion, it would be seen 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 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.

31. Thus the expression “at owner’s risk” does not exempt a carrier from his own negligence or the negligence of his servants or agents.” (underlining added)

6. Learned counsel for the appellant very vehemently argued before this Court that the appellant was not guilty of negligence and

therefore the trial Court has wrongly fastened liability upon the appellant. It
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is also argued that the accident in question was an act of God and therefore there was no negligence of the appellant.

7. I am unable to agree with the arguments as raised on behalf of the appellant inasmuch as they go directly against the judgment of the Supreme Court in the case of *Nath Brothers Exim (supra)* wherein it has been held that the liability of a common carrier is equal to an insurer and the negligence is statutorily fixed upon the common carrier. It is not open to the common carrier to plead lack of negligence and the only way in which liability can be avoided is if there is an act of God. In the present case, it has been established on record that an accident took place. An accident cannot be said to be an act of God and in fact it is an act of negligence which causes loss or damage to the goods in terms of Section 9 of Carriers Act, 1865. I may note that if there is no pleading in the written statement of the appellant of 'act of God', how can an accident which caused the damages/losses become an 'act of God' and what are the facts by which the accident was an 'act of God'. Therefore, in my opinion, the trial Court has rightly decreed the suit of the respondent/insurance company for recovery of the amount which was paid to the insured.

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

VALMIKI J. MEHTA, J

DECEMBER 09, 2011
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