

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: 19.12.2011

+ CS(OS) No. 739/2009

**THE ORIENTAL INSURANCE COMPANY LTD. AND
ANR..... Plaintiffs**

Through: Mr. Santosh Tiwari, Adv. for
Mr. Ram N. Sharma, Adv.

versus

M/S GANPATI CARGO MOVERS Defendant

Through: None

**CORAM:-
HON'BLE MR JUSTICE V.K. JAIN**

V.K. JAIN, J. (ORAL)

1. This is a suit for recovery of Rs.31,49,229/-.

The plaintiff no.1 is an Insurance Company, whereas, plaintiff no.2 is a company registered under Companies Act. The plaintiff no.2 imported 5 refrigeration chillers from M/s Carriers China Ltd., China. The consignment containing two Chillers bearing nos. 64132 and 64136, on arrival at ICD Tuglakabad, it was got custom cleared by plaintiff no.2 and was handed over to the defendant for carriage from ISD, Tuglakabad to job site at DLF Building-8, Phase-II, Gurgaon. The aforesaid

consignment was booked with the defendant vide GR No.7446 dated 24.8.2006. The consignment was loaded in truck/trailor no. HR-38C-7285 was belonging to the defendant. The plaintiff no.2, later learnt that the truck/trailor, in which the Chillers were loaded had capsized while negotiating a pothole near exit gate of ICD Tughlakabad at 8 PM on the same day, as a result of which both the Chillers fell on the road and were badly damaged. Those damaged Chillers were booked by the defendant with M/s Maple Logistics Pvt. Ltd. for its onward journey in another truck/trailor bearing no.HR-38 -5814 vide GR No.2792 dated 27.8.2006.

Vide letter dated 05.12.2006, the plaintiff no.2 lodged a claim with the defendant demanding a sum of Rs.1.12 crores. Since the goods were covered under MCE policy including transit risk, issued by plaintiff no.1 in favour of plaintiff no.2, a claim was lodged by plaintiff no.2 with plaintiff no.1 in respect of loss sustained by it on account of damage of goods.

A Surveyor appointed by plaintiff no.1 company, who, after surveying the spot and carrying out detailed inspection of the damaged Chillers assessed the damage @

Rs.34,37,726/-. The Surveyor also informed the plaintiff that the accident had occurred due to negligence of the driver who was not able to control the vehicle while negotiating a pothole near exit gate of ICD Tuglakabad. The plaintiff no.2 executed documents, as such Letter of Subrogation and Special Power of Attorney in favour of plaintiff no.1, which then became entitled to recover the amount of the claim from the defendant. Since the defendant has failed to pay the aforesaid amount, it has been claimed in the present suit.

2. The defendant was proceeded ex-parte on 19.9.2011 as no one appeared for it despite service.

3. The plaintiffs have 03 filed affidavits by way of evidence. The first witness examined by the plaintiffs is Mr. Lokesh Batra, Manager of plaintiff no.2-Insurance Company. In his affidavit by way of evidence, Mr. Batra has stated that the Chillers imported by them from China were delivered to the defendant for carriage from ISD, Tuglakabad to job site at DLF Building-8, Phase-II, Gurgaon, and the goods were booked with the defendant vide GR No.7446 dated 24.8.2006. He has stated that the goods were loaded on the truck/trailor No. HR-38C-7285. He has further

stated that plaintiff no.2, later learnt that the Chillers which were loaded in truck/trailor, while negotiating a pothole near exit gate of ICD Tughlakabad fell on the road, as a result of which both the Chillers were badly damaged. The defendant arranged to transport the damaged Chillers to the job site through M/s Maple Logistics Pvt. Ltd., vide goods receipt 'Ex.PW1/8'. Since the defendant failed to satisfy the claim lodged with it by plaintiff no.2, the damage goods being covered under MCE policy issued by plaintiff no.1, a claim was lodged by them with plaintiff no.1. A Surveyor was appointed to assess the damages, who assessed the loss for a sum of Rs.34,37,726/-. The plaintiff no.1 paid a sum of Rs.31,49,229/- to plaintiff no.2.

4. Mr. Sandeep Bharti is the Surveyor appointed by plaintiff no.1 company to survey the damaged goods. He has stated that on inspection of the damaged goods, and examining documents such as invoices, whereby these goods were sent to plaintiff No.2, he assessed the loss of plaintiff no.2 to Rs.34,37,726/-, vide his report 'Ex. PW1/13' (colly).

5. Mr. Mahesh Mittal, Divisional Manager of plaintiff no.1 company is the third witness produced by the plaintiff.

He has supported on oath the case set-out in the plaint, and he has stated that a sum of Rs.31,49,229/- was paid by them to plaintiff no.2 vide cheque dated 25.8.2008.

6. 'Ex. PW1/1A' is a copy of power of attorney whereby Mr.K.P.T Kutty was authorized to institute suit on behalf of plaintiff no.2, whereas, 'Ex.PW2/1' is a copy of power of attorney in favour of Mr. Lokesh Bhatra, whereby he was authorized to commence legal proceedings on behalf of the company and to represent the company in all courts and proceedings.

7. The original GR whereby the goods were booked by plaintiff no.2 with the defendant on 24.8.2006 has not been filed by the plaintiff. It has come in the affidavit of Mr. Lokesh Batra that the original lorry receipts meant for plaintiff no.2 was forcefully taken by the driver of the vehicle from the pocket of the official of plaintiff no.2 at the spot of accident, so as to destroy the evidence. Since the defendant has not come forward to contest the suit and not had even responded to the notice received from plaintiff no.2, I see no reason to disbelieve the assertion of the plaintiffs in this regard, and, accept that the aforesaid Goods Receipts was snatched by the driver of the vehicle and was destroyed at

the place of the accident.

‘Ex. PW1/9’ is a copy of complaint lodged by Mr. Rajesh Malik of plaintiff no.2 on 27.8.2006, wherein it is alleged that the damaged goods were being transported by Ganpati Cargo. ‘Ex.PW/10’ is the notice sent by plaintiff no.2, whereby a claim of Rs.1.12 crores was lodged by them with the defendant for a loss sustained by them due to damage of goods on account of negligence and mishandling on the part of the defendant. The notice was sent vide postal receipt dated 13.12.2006, which is attached to the office copy of the notice. The Surveyor’s report ‘Ex. PW1/13’, coupled with the affidavit of Mr. Sandeep Bharti would show that plaintiff no.2 sustained a loss of Rs.34,37,726/- on account of damage of two Chillers bearing nos. 64132 & 64136. ‘Ex.PW1/11’ is the complaint lodged by plaintiff no.2 with the police on 18.12.2006 alleging negligence on the part of Ganpati Cargo in handling the consignment. These documents also corroborate the case of the plaintiff that, in fact, they had booked the goods with the defendant, which after the accident, booked them with M/s Maple Logistics Pvt. Ltd. for delivery at the site.

8. A perusal of the letter of subrogation ‘Ex. PW1/3’

would show that the plaintiff no.2 received a sum of Rs.31,49,229/- from plaintiff no.1 in settlement of its claim for the loss sustained on account of damage of two Chillers bearing nos. 64132 & 64136 under GR No.7446 dated 24.8.2006 and agreed that, if and when, such loss/damage was recovered from the carriers and or third party, it will be deemed to be the compensation of damage to plaintiff no.1. Vide this document, plaintiff no.2 subrogated all its rights and remedies in respect of the aforesaid damage in favour of plaintiff no.1 and authorized it to file the suit in its own name or in the name of plaintiff no.2, in respect of the aforesaid claim.

9. Section 10 of Carriers Act, provides that no suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff. The notice given by plaintiff No.2 to the defendant under Section 10 of Carriers Act is Exh. PW-1/10. Since, notice has been sent on 13th December, 2006, it was given within the prescribed period of 06 months from

the date of the loss suffered by plaintiff No.2. The Notice gives full particulars of the manner in which loss was suffered by plaintiff No.2 and also calls upon the defendant to make good the loss suffered by plaintiff No.2. It, therefore, meets all the requirements of Section 10 of the Carriers Act. In **Patel Roadways Limited vs. Birla Yamaha Ltd.**, AIR 2000 SC 1461, Supreme Court held that the liability of a carrier in India is like that of an insurer and is an absolute liability subject to an Act of God and a special contract which the carrier may choose to enter with a customer. In this regard, the Court referred to the provisions of Section 9 of the Act, which specifically provides that in case of claim of damage or loss to or deterioration of goods entrusted to a carrier, it is not necessary for the plaintiff to establish negligence. It was further held that even assuming that the general principle in cases of tortious liability is that of the party who alleges negligence against the other must prove the same, the said principle has no application to cover the case under the Carriers Act. In **South Eastern Carriers (P) Ltd. vs Oriental F & G Insurance Co. Ltd.** AIR 2004 Kerala 139, the plaintiffs had chartered a truck for carrier of goods. The

truck met with an accident. It was claimed by the carrier that there was no negligence or carelessness on the part of the driver and that the accident had occurred only due to unforeseen and inevitable reasons. Noticing that under Section 8 of Carriers Act the liability of a common carrier is absolute except for Act of God and no evidence had been produced by the carrier to show that the accident had occurred due to Act of God, it was held that the carrier was answerable for the loss of goods even when the loss is not caused by negligence or for want of care on its part. It was held that the only exceptions recognized by the Act are the Act of God and of State's enemies or a special contract that the carrier may choose to enter into with the customer. In **Oriental Insurance Company vs Mukesh & Co.** AIR 2000 MP 35, the goods entrusted to the carrier were gutted by fire during transport. The cause of fire was attributed to sparks emitted at the time of tightening of consignment by nylon ropes at the octroi post. It was held by a Division Bench of High Court that if the fire broke out due to some unknown cause or due to the negligence of coolies, the transporter as the common carrier under Section 8 of the Carrier Act, was liable to pay for the loss of the damage to the consignee.

Hence, once it is shown that the goods in question were entrusted to the defendant for transportation and the same were damaged, before being delivered to the consignee, the defendant would be liable to make good the loss suffered by the plaintiffs, irrespective of the accident, due to which the goods were damaged, took place due to negligence of the driver of the vehicle in which the goods were being transported, or otherwise.

10. Since the defendant has failed to reimburse the amount paid by plaintiff no.1 to plaintiff no.2, the suit is liable to be decreed. The plaintiff no.1 is entitled to a decree for recovery of Rs.31,49,229/-.

ORDER

In view of the above discussion, a decree for recovery of Rs.31,49,229/-with costs and pendent lite and future interest @ 6% per annum is hereby passed in favour of plaintiff no.1 and against the defendant.

Decree sheet be drawn accordingly.

(V.K. JAIN)
JUDGE

DECEMBER 19, 2011
Ka/vn