

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: 19.12.2011

+ CS(OS) No. 738/2009

**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.47,16,327/-.

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. 64133 and 64135 after custom clearance was delivered to the defendant for carriage from ISD, Tuglakabad to job site at DLF Building-8, Phase-II, Gurgaon. The plaintiff no.2, later

learnt that the truck/trailor, in which the Chillers were loaded, while negotiating a u-turn at an intersection at Pul Prahladpur, Badarpur, Delhi in the night intervening 24/25.8.2006, as a result both the Chillers loaded on the truck/trailor bearing no. HR-46-1485 fell on the road and were badly damaged. Those damaged Chillers were booked by the defendant with M/s Maple Logistics Pvt. Ltd. for their onward journey, in another truck/trailor bearing no.HR-37 B-4180.

2. The plaintiff no.2 lodged a claim with the defendant demanding a sum of Rs.1.12 crores being the costs of the Chillers, which were damaged. The goods which had damaged were covered under policy, which the plaintiff no.1 had issued to plaintiff no.2. The plaintiff no.2, accordingly lodged a claim with plaintiff no.1. The Surveyor appointed by plaintiff no.1 company after surveying the spot and carrying out detailed inspection of the damaged Chillers assessed the damage @ Rs.51,57,717/-. 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 the u-turn at Pul Prahladpur, Badarpur, Delhi. Since the total value of the goods was

Rs.1.12 crores and the value of the damaged goods was assessed at Rs.51,57,717/-, the plaintiff no.1 paid a sum of Rs.47,16,327/- to the plaintiff no.2. 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 to 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 this suit.

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

4. The plaintiffs have examined three witnesses in support of its case. PW1, Mr. Mahesh Mittal is the Divisional Manager of plaintiff no.1 company. He has supported on oath the case set-out in the plaint, and he has stated that Power of Attorney 'Ex.PW1/2' and Letter of Subrogation 'Ex.PW1/3' was executed by plaintiff no.2 in favour of plaintiff no.1. He has further stated that the goods which plaintiff no.2 had imported from China and which were delivered to the defendant for carrying the same from ISD, Tuglakabad to job site at DLF Building-8, Phase-II, Gurgaon had a total value of Rs.1.12 crores, which was the

invoice value of those goods. According to him, plaintiff no.1 paid a sum of Rs.47,16,327/- to plaintiff no.2, pursuant to the claim lodged by it with plaintiff no.1 on account of damage to the goods which had imported from China.

6. PW2, Mr. Lokesh Batra is the Manager of plaintiff no.2 company. He has stated that the Power of Attorney 'Ex.PW1/2' and Letter of Subrogation 'Ex.PW1/3' was executed by plaintiff no.2 in favour of plaintiff no.1. He has stated that plaintiff no.1 imported 5 refrigeration chillers from M/s Carriers China Ltd., China, vide documents 'Ex. PW1/4 to PW1/7'. He has further stated that two Chillers bearing nos. 64133 and 64135 were delivered by plaintiff no.2 to the defendant for carrying from ISD, Tuglakabad to job site at DLF Building-8, Phase-II, Gurgaon, vide GR No.7437 dated 24.8.2006. He has also stated that the goods which were damaged during transit were covered by the policy, which plaintiff no.1 had issued to plaintiff no.2 and after survey of the damaged goods by the Surveyor appointed by plaintiff no.1 company, they were paid a sum of Rs.47,16,327/- vide discharge voucher/payment voucher 'Ex.PW1/14'. He has further stated that the goods were

damaged due to negligence, carelessness and misconduct on the part of the employees of the defendant.

PW3, Mr. Sandeep Bharti is the Surveyor appointed by plaintiff no.1 company to survey the damaged goods. He has stated that he held out a survey of the damaged goods and also took their photographs at the premises of plaintiff no.2. He assessed the value of the damaged goods @ Rs.51,57,717/- vide his report dated 14.6.2008.

5. The testimony of PW2, Mr. Lokesh Batra would show that two Chillers, which plaintiff no.2 had imported from China were delivered to the defendant for being transported from ISD, Tuglakabad to job site at DLF Building-8, Phase-II, Gurgaon were loaded in truck/trailor bearing no.HR-46-1485, belonging to the defendant. His testimony also shows that the aforesaid Chillers were damaged when they were actually delivered at the site. The case of the plaintiff is that after accident in which Chillers were damaged, the defendant sent the goods to the destination through M/s Maple Logistics Pvt. Ltd. 'Ex. PW1/8' is the copy of the Goods Receipt whereby the consignment was sent to construction site in Gurgaon.

Since the consignment, which got damaged during transit was covered under the policy issued by plaintiff no.1 to plaintiff no.2, it was under the legal obligation to reimburse plaintiff no.2 for the loss caused to the goods which were damaged in the course of transit.

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.

6. A perusal of the invoices would show that the purchase value of these two Chillers was Rs.1.12 crores. The Surveyor assessed the loss of plaintiff no.2 at Rs.51,57,717/-, vide his report 'Ex.PW1/13' (colly). The

Letter of Subrogation 'Ex.PW1/3' and discharge voucher/payment voucher 'Ex.PW1/14' would show that plaintiff no.1 paid a sum of Rs.47,16,327/- to plaintiff no.2 for the damage, which was caused to the goods in the course of transportation. Thus, the plaintiff no.2 suffered a loss of Rs.47,16,327/-, which it has recovered from plaintiff no.1 after executing the documents, as such letter of subrogation and power of attorney in its favour.

7. 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.

8. 'Ex.PW1/16' is the legal notice to the defendant requiring it to make payment of Rs.47,16,327/- to the plaintiffs. Since the defendant has failed to pay the aforesaid amount, the plaintiffs are entitled to recover it from the defendant.

ORDER

In view of the above discussion, a decree for recovery of Rs.47,16,327/- 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

Kt/vn