

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

AS.No. 938 of 1998

AGAINST THE JUDGMENT IN OS 200/1994 of I ADDL.SUB COURT, KOZHIKODE
DATED 26-02-1998

APPELLANT/1st defendant:

M/S. SOUTH EASTERN ROADWAYS,
40, II MAIN, CKC GARDEN,
MISSION ROAD, BANGALORE 560 027
REPRESENTED BY ITS ERNAKULAM BRANCH MANAGER
AND AUTHORISED SIGNATORY P.M. PAPPACHAN

BY ADV. SRI.D.PEETHAMBARAN

RESPONDENTS/PLAINTIFFS/2ND DEFENDANT:

1.M/S. ORIENTAL INSURANCE COMPANY
DIVISIONAL OFFICE,
SEEMA BUILDING, IIND FLOOR
P.B. NO. 18, G.H. ROADway CALICUT - 1, REPRESENTED BY ITS
SENIOR DIVISIONAL MANAGER.

2. M/S. MAHESWARI AGENCIES,
9/203, SOUTH BEACH ROADway CALICUT. 673 001.

3. M/S. AVATAR TRADING COMPANY
PURANI GODOWN
GAYA.

R1 & 2 BY ADV. SRI.M.JACOB MURICKAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 09-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & BABU MATHEW P. JOSEPH, JJ.

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A.S.No.938 of 1998

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Dated this the 9th day of October, 2015

JUDGMENT

P.N.Ravindran, J.

The appellant is the first defendant in O.S.No.200 of 1994 on the file of the Court of the Subordinate Judge of Kozhikode. Respondents 1 and 2 are the plaintiffs and the third respondent is the second defendant therein. The suit instituted by respondents 1 and 2 for realisation of the sum of Rs.1,07,902/- with interest and costs from the first defendant was decreed after trial by judgment delivered on 26.2.2008 allowing the plaintiff to realise the sum of Rs.1,47,000/- with future interest at the rate of 12% per annum from the date of the suit till realisation as also costs of the suit from the first defendant and its assets. The first defendant has, aggrieved thereby, filed this appeal. The brief facts of the case are as follows:

2. The second plaintiff consigned 75 bags of black pepper having a declared value of Rs.2,02,280/- to the second defendant through the first defendant as per three lorry receipts marked as Ext.A1 series. The consignment was not delivered in time to the second defendant for

the reason that on the way the lorry capsized and fell into a ditch. When delivery of the goods was effected to the second defendant, it was found that 50 bags of black pepper were damaged. There was also short delivery of 23 bags of black pepper. The value of the damaged and short delivered goods, viz. sum of Rs.1,07,902/- was paid by the first plaintiff to the second plaintiff and thereupon, the first plaintiff obtained a special power of attorney and letter of subrogation (Ext.A11). The first plaintiff thereafter instituted O.S.No.200 of 1994 in the Court of the Subordinate Judge of Kozhikode joining the consignor as the second plaintiff and prayed for a decree directing the first defendant to pay the sum of Rs.1,07,902/- with interest at 18% per annum from 13.4.1992 as also costs of the suit.

3. The first defendant entered appearance through counsel and filed a written statement on 31.5.1995. He contended that while the goods were being transported, an accident occurred as a result of which the driver of the lorry lost control and the lorry fell into a ditch. The first defendant contended that the goods were damaged on account of an Act of God and not on account of the negligence or careless of the driver of the lorry and therefore, the first plaintiff is not entitled to claim any amount by way of damages. The first defendant also contended that the consignee (second defendant) was willing to

take the damaged goods amounting to 50 bags of pepper for the sum of Rs.48,000/-, that the second plaintiff agreed to the same and adjusted the sum of Rs.30,000/-from the funds of the second defendant available with the second plaintiff towards the value of the goods and required the first defendant to collect the balance amount of Rs.18,000/- from the second defendant and pay it over to the second plaintiff. The first defendant further contended that accordingly, in terms of the said agreement, it collected the sum of Rs.18,000/-and forwarded the sum of Rs.12,400/- by way of demand draft to the second plaintiff and adjusted the balance amount of Rs.5600/- towards the freight charges due and payable to the first defendant. The second defendant did not enter appearance or file a written statement and was therefore, set ex parte.

4. In the trial court, an officer of the first plaintiff was examined as PW1 and Exts. A1 to A13 were produced and marked. On the side of the defendants, an employee of the first defendant was examined as DW1 and Exts.B1 and B2 were produced and marked. The trial court considered the pleadings and the evidence oral and documentary available in the case and held on issue No.1 that only 75 bags of pepper were entrusted to the first defendant for carriage. On issue No.2, the trial court found that there was short delivery of 75 bags of

pepper. On issue No.3, the trial court held that the sum of Rs.1,07,902/- paid by the first plaintiff to the second plaintiff towards the value of the goods can be accepted as the damage sustained by the insurer. The contention of the first defendant that there was short delivery of goods on account of an Act of God was repelled relying on the decision of this court in **Orient Road Lines v. M.B. Muhammad Hassan Sahib & Co. [1988(2)KLT 619]** and the decision of a Full Bench of this court in **General Traders Ltd. & Another v. Pierce Leslie & Others [AIR 1987 Ker.62]**. The suit was accordingly decreed allowing the plaintiff to realise the sum of Rs.1,47,000/- together with interest and costs. The first defendant has, aggrieved thereby, filed this appeal.

5. We heard Sri D. Peethambaran, learned counsel appearing for the appellant and Sri M. Jacob Murikken, learned counsel appearing for the first respondent. Sri D. Peethambaran, learned counsel appearing for the appellant raised two contentions. The first is that the accident in which the lorry and the goods were damaged was an Act of God and, therefore, the carrier is not liable. The second contention is that the dispute between the parties was settled for Rs.48,000/- as contended in paragraph 9 of the written statement and, therefore, the court below erred in passing a decree as prayed for.

6. Per contra, Sri M. Jacob Murikken, learned counsel appearing for the first respondent (first plaintiff) contended relying on the decision of the Full Bench of this court in **General Traders Ltd. & Another v. Pierce Leslie & Others [AIR 1987 Ker.62]** and the decision of this court in **Orient Road Lines v. M.B. Muhammad Hassan Sahib & Co. (supra)** that the accident to the lorry and consequential damage to the lorry and the goods cannot be termed an Act of God, that even in the Carriers Act, 2007, such a defence is not available and therefore, the contention that the goods were damaged on account of an Act of God is without any merit. As regards the contention that the dispute was settled between the parties for an amount of Rs.48,000/- which was paid in full, the learned counsel contended that apart from the *ipse dixit* of the first defendant, there is no evidence to prove that the second plaintiff had with it any money belonging to the second defendant or that the second defendant had agreed that the entire amount available with the second plaintiff can be adjusted towards the value of the goods or that the second defendant had agreed to pay the balance amount of Rs.18,000/- or had in fact paid it to the second plaintiff through the first defendant. Inviting our attention to Ext.B2 lawyer notice, which was sent only on 12.2.1994, learned counsel contended that no such case was pleaded

in the said notice and, therefore, for that reason also, the said contention is liable to be rejected.

7. We have considered the submissions made at the Bar by the learned counsel appearing on both sides. We have also gone through the pleadings and the materials on record. As rightly held by the trial court, the appellant cannot be heard to contend that the goods carried in the lorry were damaged on account of an Act of God. A Full Bench of this court has in **General Traders Ltd. & Another v. Pierce Leslie & Others (*supra*)** held that where human intervention is involved, Act of God cannot be pleaded. The accident in the instant case occurred when the driver of the lorry averted collision with another lorry. By no stretch of imagination can it be said that it amounts to an Act of God. The said contention was in our opinion, rightly repelled by the trial court and we uphold the same. As regards the contention that the claim was settled for an amount of Rs.48,000/-, apart from the ipse dixit of the first defendant, there is no material to substantiate the same. No such plea was put forwarded in Ext.B2 lawyer notice. Though relying on Ext.B1 demand draft, it is contended that the said demand draft would support the plea put forwarded by the defendants, there is nothing to show that the sum of Rs.12,400/- mentioned therein was realised by the second plaintiff. The appellant has not

produced a certificate from Punjab National Bank to the effect that the sum of Rs.12,400/- covered by the said demand draft, was in fact paid over to the second plaintiff. Apart from the *ipse dixit* of the first defendant, there is nothing to show that the original of the aforesaid demand draft was handed over to the second plaintiff or that it was encashed by him. The appellant has also proved that the said payment was towards settlement of the second plaintiff's claim with regard to the consignment of goods in respect of which, there was short delivery. In short, there is no acceptable evidence to prove the contention of the appellant that the dispute between the parties was settled on payment of Rs.48,000/-.

For the reasons stated above, we hold that there is no merit in the appeal. The appeal fails and it is accordingly dismissed. No costs.

**Sd/-
P.N. RAVINDRAN
JUDGE**

Sd/-

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**BABU MATHEW P. JOSEPH
JUDGE**

True copy

P.S. (Hr.Gr.)To Judge

**THOTTATHIL B. RADHAKRISHNAN
&
BABU MATHEW P. JOSEPH, JJ.**

I.A. No.2358 of 2013 in
A.S.No. 938 of 1998

Dated this the 6th day of November, 2013

ORDER

Thottathil B. Radhakrishnan,J.

The unserved third respondent was ex parte in the court below, who was the 2nd defendant. The first defendant is the appellant herein. The plaint claim is only against the first defendant. The cause of action is based on short delivery of goods to the 2nd defendant to whom the 2nd plaintiff had sent consignment through the first defendant's carrier. The first plaintiff is the insurer. Hence further notice to the third respondent is dispensed with. The appeal is treated as ripe.

**THOTTATHIL B. RADHAKRISHNAN
JUDGE**

AS 938/1998

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**BABU MATHEW P. JOSEPH
JUDGE**

**THOTTATHIL B. RADHAKRISHNAN
&
BABU MATHEW P. JOSEPH, JJ.**
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I.A. NO. 2358 OF 2013
IN
A.S. NO. 938 OF 1998

ORDER

06.11.2013

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