

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.1005 of 2014
and M.P.No.1 of 2014

M/s. Interfreight Services Private Limited,
Registered Office at Sivagami Complex,
2nd Floor, New No.318, Old NO.174,
Thambu Chetty Street,
Chennai 600 001. Appellant

-Versus-

- 1.M/s.A.R.Gherkins (P) Ltd.,
Rep. By Power Agent / Subrogee,
The Oriental Insurance Co. Ltd.,
No.15, Race Course Road,
Guindy, Chennai 600 032.
- 2.The Oriental Insurance Company Limited,
Having their Registered Office
at "oriental House"
P.B.No.7037, Asaf Ali Road,
New Delhi 110 002
Carrying on business at City Branch Office,
No.8, II Floor, No.37, 1st Main Road,
Gandhi Nagar, Adayar,
Chennai 600 020. ... Respondents

This second appeal is filed against the judgment and decree dated 28.02.2014 made in A.S.no.24 of 2012 by the learned VI Additional Judge, City Civil Court, Chennai, confirming the judgement and decree dated 22.11.2010 made in O.S.No.57 of 2008 by the learned III Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.C.Umashankar

For Respondent : M/s.Nageswaran & Narichania

JUDGMENT

The sole defendant in O.S.No.57 of 2008 on the file of the learned III Assistant Judge, City Civil Court, Chennai, is the appellant herein. The respondents are the plaintiffs in the suit.

The respondents filed the said suit for recovery of a sum of Rs.1,00,212/- from the defendant with interest @ 18% p.a. The trial court, by decree and judgement dated 22.11.2010, decreed the suit as prayed for. As against the same, the appellant herein filed an appeal in A.S.No.24 of 2012 before the learned VI Additional Judge, City Civil Court, Chennai. By decree and judgement dated 28.02.2014, the learned Additional Judge, dismissed the appeal thereby confirming the decree and judgement of the trial court. Challenging the same, the appellant is now before this court with this second appeal.

2. The case of the plaintiff in brief is as follows:- The 1st plaintiff is a company doing export business. The 1st plaintiff company wanted to export consignment of "Gerkins in Brine" packed in 80 barrels weighing totally net weight of 14000 Kgs and gross weight of 18000 Kgs to the buyer in Spain. The C & F value of the said consignment is US \$ 3920 as per the invoice No.ARG/020/04-05 dated 09.11.2014 raised by the 1st plaintiff. The said consignment was intended to be exported by ship from Chennai to Port of Bilbao, a port in Spain.

3. The defendant, according to the plaintiffs, is engaged in the business of Sea Cargo and Air Cargo. The 1st plaintiff availed the services of the defendant to transport the consignment from the 1st plaintiff factory at Vandalur-Kelambakkam Road, Pudhupakkam Village, Kancheepuram District, to Chennai Port and to comply with customs clearance and to handover the consignment to the steamer / their agents at Chennai Port for onwards carriage by sea to Spain as per contract dated 01.11.2003 bearing No.EXP/PS/001 between the defendant and M/s.P.S. Apparels, a Registered Export house at No.15, Race Course Road, Guindy, Chennai.

4. On 10.11.2004, necessary statutory clearance certificate was obtained from Central Excise authorities and the said consignment was stuffed in a container No.TTNV 2422488 under Seal No.ANM 5609. The said container containing the consignment was entrusted to the defendant by the 1st plaintiff for safe carriage and customs clearance for export to Spain. When the container was so carried in the lorry arranged by the defendant, it met with an accident on 11.11.2004. As a result, the entire consignment was damaged resulting in a total pecuniary loss to the tune of Rs.1,43,602/-.

5. It is the further case of the 1st plaintiff that there was a marine cargo policy issued by the 2nd plaintiff in favour of the 1st plaintiff covering the above consignment. The policy was issued on 12.11.2004, but, covering the period from 10.11.2004. Since the accident occurred on 11.11.2004 and since the 1st plaintiff suffered loss as stated above, in terms of the said policy, the 2nd plaintiff settled a sum of Rs.1,00,212/- to the 1st plaintiff. The 1st plaintiff issued a letter of subrogation on 14.12.2004 to the 2nd plaintiff to make a claim from the defendant so as to get the above said sum of

Rs.1,00,212/- recovered from the defendant. Based on the said subrogation letter and based on the above transactions, the plaintiffs jointly filed the above said suit in O.S.No.57 of 2008 claiming the above said amount.

6. The appellant/defendant filed a written statement denying his liability to pay the amount. The defendant inter alia contended that there was no valid policy in force covering the risk of loss caused due to transport on land. It was also stated that there was no policy at all issued covering the date of accident. It was also contended that there was no privity of contract between the defendant and the transporter in whose lorry the container was transported which met with the accident. The goods were delivered by the 1st plaintiff only to the transporter and the transporter was arranged by the defendant as requested by the 1st plaintiff. Therefore, the privity of contract was between the 1st plaintiff and the transporter. Thus, the transporter is a necessary party in the suit. Since the transporter was not impleaded as a party, the suit is liable to be dismissed for non joinder of proper party. There was no proper assessment of loss allegedly caused to 1st plaintiff.

7. Based on the above pleadings, the trial court framed appropriate issues. Thereafter, the parties were called upon by the trial court to let in evidence, both oral and documentary. On the side of the plaintiff, an employee of the 2nd plaintiff was examined as P.W.1 and as many as 10 documents were marked as Ex.A.1 to A.10 and on the side of the defendant, one Sri.Prasanna Kumar was examined as D.W.1 and only one document was marked as Ex.B.1. Having considered the above oral and documentary evidences, the trial court decreed the suit and on appeal, the first appellate confirmed the decree and judgement passed by the trial court. That is how, the defendant is now before this court with this second appeal.

8. In this second appeal, several grounds have been raised. Having considered the same, at the time of admission of this second appeal on 21.11.2014, this court framed the following substantial questions of law:-

[1] Whether the courts below are right in decreeing the suit without considering the scope of Order I, Rule 10 of CPC with regard to the non joinder of parties?

[2] Whether the courts below failed to consider the ratio desedendi with regard to privity of contract between the parties?

9. During the course of arguments, it turned out on perusing the grounds of appeal and the evidences available that there are few more substantial questions of law to be framed in the second appeal and therefore, this court framed the following additional substantial questions of law and invited the counsel to make their submission on

these additional substantial questions of law as well. The additional substantial questions of law are as follows:-

[1] Whether the insurance policy [Ex.A.3] covers 11.11.2004 on which date the accident had occurred?

[2] Whether Ex.A.3 is a simple contract of marine insurance or it is a contract of marine insurance extending to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage?

10. The learned counsel for the appellant would submit that a perusal of Ex.A.3 would clearly go to show that it is only a marine cargo policy covering the risk on sea waters alone. Therefore, according to him, the loss caused on land has not been covered under the policy. It is his further contention that the settlement made to the 1st plaintiff by the 2nd plaintiff is not by means of any valid subrogation. Therefore, the 2nd plaintiff is not entitled for the amount claimed in the suit.

11. But, the learned counsel for the respondents would submit that there is no pleading to the said effect at all. Therefore, according to him, it is not open for the appellant to raise the same for the first time before this court. So far as the above contention is concerned, in my considered opinion, there is a pleading in the written statement itself. In the written statement, the defendant has denied the existence of the valid policy covering the risk concerned. The risk is of two types (i) any risk which happens in waters and (ii) any risk which happens on land. As per Section 3 of the India Marine Insurance Act, 1963, the marine insurance is of two types. Section 3 of the said Act speaks of simple marine insurance and Section 4 speaks of mixed sea and land risks.

12. Sections 3 and 4 of the Indian Marine Insurance Act, 1963, read as follows:-

"3. Marine Insurance define - A contract or marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure.

4. Mixed sea and land risks:- (1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or by adventure analogous to a marine adventure, is covered by a policy in the form of marine policy, the provisions of this Act, in so far as applicable, shall apply thereto, but, except

as by this section provided , nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurances as by this Act defined.

Explanation:- 'An adventure analogous to a marine adventure' includes an adventure where any ship, goods or other movables are exposed to perils incidental to local or inland transit."

13. Therefore, the insurance company, viz., the 2nd plaintiff should prove that Ex.A.3 policy is the mixed sea and land risks inasmuch as in the instant case, the accident had occurred on land and not on sea. As rightly contended by the learned counsel for the appellant, a perusal of Ex.A.3 would go to show that the policy in question states that it is a policy known as "MARINE CARGO - Sea - Cover Type A - Single Voyage". But, the learned counsel for the respondents would submit that Type - A policy means a policy which is of mixed sea and land risks. But, absolutely there is no evidence for the same. Going by Ex.A.3 Policy and reading it with naked eyes one could easily understand that it covers sea coverage and it does not cover any risk on land. But, at the same time, I am not inclined to non-suit the plaintiffs without affording opportunity to them to prove as to what "Type-A coverage" means for that evidence is required. Thus, in my considered opinion, if this court, from the evidence, comes to the conclusion that the policy in question covers both the risks on land as well as on sea, there may not be any difficulty for this court to come to the conclusion that there is a valid subrogation. For any reason, if this court comes to the conclusion that the policy in question covers any risk which happened on waters, then subrogation under which the 2nd plaintiff claims the amount is not a valid subrogation and therefore, the defendant is not liable to pay the amount to the 2nd plaintiff. When this was pointed out, the learned counsel on either side submitted that the matter may be remanded back to the trial court to enable both the parties to lead evidence on the above issue.

14. Apart from the above, there is yet another question which requires to be resolved. Ex.A.3 Policy was admittedly issued on 12.11.2004, whereas, the accident was on 11.11.2004. Thus, it is crystal clear that the policy was issued subsequent to the accident. But, the contention of the learned counsel for the respondents is that the premium was paid on 10.11.2004 and thus, the policy has come into effect from 10.11.2004. To this fact, there is no pleading at all in the plaint. The learned counsel for the respondents has produced the Premium Receipt Extract dated 10.11.2004 and Ledger Extract maintained by the 2nd plaintiff to show that premium was paid on 10.11.2004 itself. But, this court cannot rely on these two documents since they were not at all exhibited before the trial court. When this was pointed out, the learned counsel on either side again submitted that if the matter is remanded back, the plaintiffs

would be in a better position to prove these documents so as to establish that the policy [Ex.A.3] had coverage from 10.11.2004 onwards. Similarly, when it was pointed out that there is no sufficient evidence either to prove or disprove the privity of contract between the appellant and the respondents in the matter of engaging the transporter, the learned counsel on either side submitted, for this aspect also, liberty may be given to both the parties to lead further evidence and the learned counsel for the respondents submitted that the respondents may be permitted to implead the transporter viz., the owner of the lorry, as a defendant in the suit. In my considered opinion, in this case, the 2nd respondent insurance company is, after all, fighting for public money and therefore, on a too technical ground, I do not want non-suit the plaintiffs. In my considered opinion, sufficient opportunity need to be afforded to both parties to enable them to have an effective contest so to meet the ends of justice.

15. For all these reasons, I am inclined to allow this second appeal and remand back the matter to the trial court leaving all the above issues open for the trial court to decide afresh after affording sufficient opportunity to both parties to lead evidence, if any, and also permitting the plaintiff to implead the lorry owner as a party.

16. In the result, this second appeal is allowed. The judgment and decree dated 28.02.2014 made in A.S.No.24 of 2012 by the learned VI Additional Judge, City Civil Court, Chennai and the judgement and decree dated 22.11.2010 made in O.S.No.57 of 2008 by the learned III Assistant Judge, City Civil Court, Chennai, are hereby set aside. The suit in O.S.No.57 of 2008 is hereby remanded back to file of the learned III Assistant Judge, City Civil Court, Chennai, with a liberty to the plaintiffs to implead the transporter viz., M/s.JKR Cargo Handling, Chennai, as a party to the suit. The defendant is directed to furnish details of the transporter viz., M/s.JKR Cargo Handling to the plaintiff in writing under acknowledgment. The learned Assistant Judge shall afford sufficient opportunity to both the parties including the party to be impleaded in the suit and dispose of the suit in accordance with law. No costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1.The VI Additional Judge, City Civil Court, Chennai

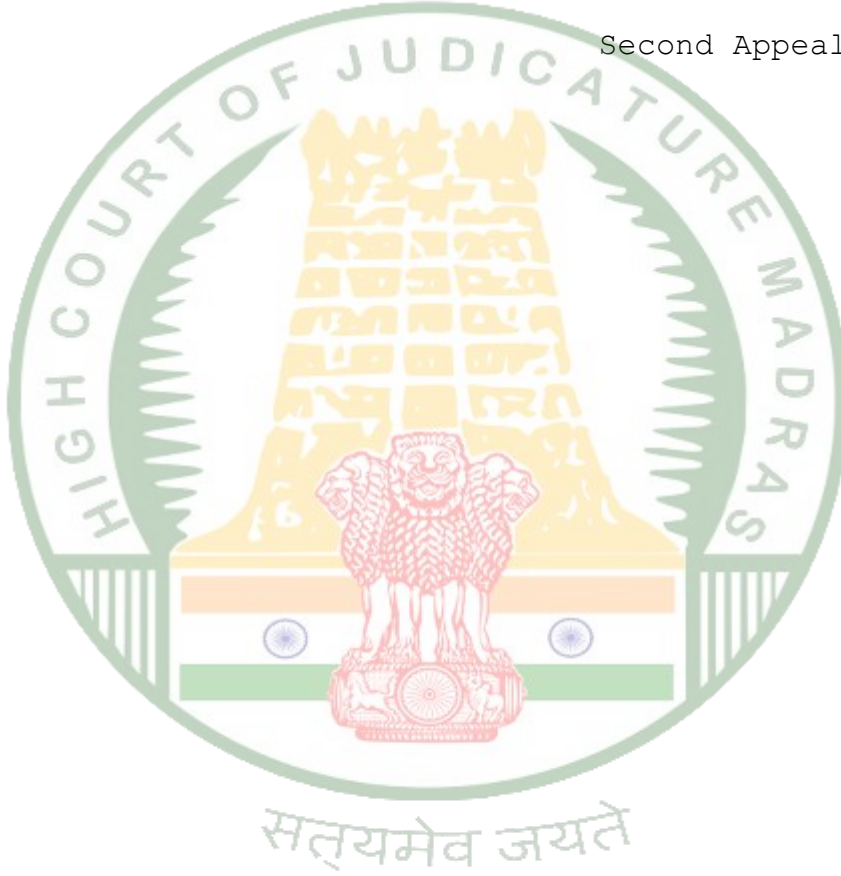
2.The III Assistant Judge, City Civil Court, Chennai.

+1 cc to Mr.C.Umashankar, Advocate,SR.11690

+1 cc to M/s.Naeswaran & Narichania, Advocate,SR.11691.

tej(co)
krd 3/6

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