

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:23.06.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.1127 of 1998

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| Judgment reserved on<br>11.06.2015 | Judgment pronounced on<br>23.06.2015 |
|------------------------------------|--------------------------------------|

1.M/S.Seshasayee Industries Ltd.  
represented by their power agent  
the Oriental Insurance Co.Ltd.  
Vadalore.

2.The Oriental Insurance Co.Ltd.  
New Delhi-110 002.

...Appellants/Plaintiffs

Vs

M/S.Patel Roadways (P) Ltd.  
Patel House, 100  
Sheriff Deoji Street  
Bombay-400 003.

...Respondent/Defendant

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 01.03.1993 on the file of the Principal Sub-Court, Cuddalore and made in A.S.No.251 of 1992 reversing the judgment and decree dated 16.04.1992 on the file of the Additional District Munsif Court, Cuddalore made in O.S.No.587 of 1991.

For Appellants : Mr.G.Guruswaminathan for  
M/s.Nageswaran and Narichania

For Respondent : Mr.M.S.Velusamy

JUDGMENT

The second appeal arises out of the judgment and decree dated 01.03.1993 on the file of the Principal Sub-Court, Cuddalore and made in A.S.No.251 of 1992 reversing the judgment and decree dated 16.04.1992 on the file of the Additional District Munsif Court,

Cuddalore made in O.S.No.587 of 1991.

2.The averments made in the plaint are as follows:-

(i)The first plaintiff herein sold ten stacks of 400 KV Polycone insulators consisting of ten numbers top and ten numbers bottom unit insulators to M/S.National Thermal Power Corporation Ltd., Indore and totally valued at Rs.1,93,487.10. One Stack of Polycone insulator was valued at Rs.15,450/-. Excise Duty at 15%, Central Sales Tax at 4% and Freight and Insurance Charges at Rs.750/- each was valid, collected by the first plaintiff, who thereby became the owner of the suit consignment at all relevant time.

(ii)The suit consignment was severely packed in 20 wooden crates with cushioning on the inside and hoop iron fillings on the outside in order to avoid breakage or damage in transit. The suit consignment thus securely packed was entrusted to the defendant carrier at Vadalur for self carriage and delivery at Indore as per the directions of the purchaser. The defendant carrier accepted the said consignment and issued their claim consignment note acknowledging such entrustment and undertaking to carry and deliver the said consignment in the same good order and condition to the consignee. But the defendant carrier failed and neglected to deliver the said consignment in the same good order and condition. The consignee by their letter dated 01.06.1988 intimated the first plaintiff that one number top insulator was found to be totally damaged at the time of delivery by the defendant carrier. So the defendant carrier is due and liable to compensate the first plaintiff, the owner of the suit consignment.

(iii)A valid notice of loss dated 25.06.1988 was issued by the first plaintiff to the defendant carrier under Section 10 of the Carriers Act, 1865 demanding compensation for the loss caused to the suit consignment when the same was in transit and in the custody of the defendant. The defendant carrier acknowledged receipt of the said notice and issued their damage certificate dated 28.06.1988 admitting and acknowledging the damage caused to one number top 400 KV polycone insulator, but failed and neglected to comply with the demands made by the first plaintiff.

(iv)The suit consignment was insured by the second plaintiff and after settlement of claim under the policy of insurance, the plaintiffs made several demands to the defendant carrier claiming compensation for the damages sustained by them. Since the defendant failed and neglected to compensate the plaintiffs, the plaintiffs constrained to file the suit for a direction to the defendant carrier to pay a sum of Rs.8,726.60 with interest at 12 per cent per annum from the date hereof until the date of payment in full and costs. Therefore, they prayed for decree.

3.The gist and essence of the written statement filed by the defendant are as follows:

(i)The suit is not maintainable and the trial Court has no territorial jurisdiction to entertain the suit. Contract of the carriage was formed at the request of the first plaintiff to the defendant requesting the defendant to carry certain goods belonging to them.

(ii)The request was made under the goods forwarding note, signed and sealed by first plaintiff and issued to the defendant upon receipt of the goods forwarding note, the defendant accepted the terms and conditions and agreed to carry the goods. In pursuance of such agreement, defendant issued a goods consignment note to the first plaintiff.

(iii)As per clause 14 of the goods forwarding note, it has been specifically accepted by the first plaintiff that any disputes arising out of the contract would be submitted to Bombay jurisdiction only.

(iv)The defendant is not a common carrier. Therefore, the attempt of the plaintiffs to invoke any liability of the common carrier upon the defendant is unsustainable both in law and on facts. It warned its customers that the goods of ceramic/glass in nature are accepted subject to the condition that it is carried on the "Owners Risk". The plaintiffs have also signed in the goods forwarding note by agreeing this and hence, the defendant is not responsible for any claim. This defendant is not aware of any letter dated 01.06.1998 stated to have been said by the consignee to the first plaintiff. The letter of subrogation is invalid and there is no cause of action to file the suit. Hence, the defendant prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, D.W.1 and Exs.A1 to A8 and Ex.B1, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the defendant preferred an appeal in A.S.No.251 of 1992 on the file of the Principal Sub-Court, Cuddalore.

5.The learned First Appellate Court has considered the arguments advanced on either side, framed necessary point for consideration, reversed the Judgment and Decree passed by the Trial Court and allowed the appeal preferred by the defendant. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the plaintiffs/appellants.

6. At the time of admission, the following substantial questions of law have been framed:

"1. Whether a plaintiff in a suit against a common carrier for reward should prove negligence on the part of the common carrier?

2. Is the common carrier precluded from raising any objections as regards condition of the packing or the contents after having issued a clean lorry receipt, a negotiable instrument?

3. What is the effect of "Printed clause" "Owners Risk" in the Goods consignment Note?

4. Whether a certificate of fact issued with the words "without prejudice" could facilitate the carrier who issued the certificate to retract from the facts contained therein?"

7. Challenging the findings of the first appellate Court, the learned counsel for the appellants/plaintiffs submits that the first appellate Court ought to have decreed the suit, but it erroneously held that in the invoice it was specifically stated that goods carried on the "Owners Risk" and the packer was not examined to prove as to how goods were packed, further held that P.W.1/Sundaramoorthy, who has not packed the goods, was examined and one Radhakrishnan, who supervised the packing of consignment, was not examined and hence, it is fatal to the case of the plaintiffs. He further submits that the defendant carrier is liable to pay compensation to the first plaintiff for the damages caused. As soon as the consignment has given, it is the duty of the defendant carrier to hand over the consignment in good condition. The plaintiffs have also issued damage certificate Ex.A4, therefore, the plaintiffs prayed for allowing the second appeal by confirming the decree and judgment passed by the trial Court. To substantiate his arguments, he relied upon the following decision:

(i) 2004(4) CTC 273 (Patel Roadways Ltd. (formerly Patel Roadways Private Ltd.), No.100, Sheriff Devji street, Bombay-400 035 v. Seshasayee Industries Ltd., Vadalur - 607 303 and another);

(ii) 2004-2-L.W.663 (Bond Food Products Private Ltd., Registered office at No.80, 4<sup>th</sup> block, Koramangala, Bangalore-560 034 and another v. M/S.Planters Airways Ltd., 13/5, Kalasipalayam, New Extension I floor, Bangalore, 560 002);

8. Resisting the same, learned counsel for the defendant/respondent submits that the suit consignment namely, insulators are made out of china ware, which are easily breakable, for the same, in the consignment note itself it was printed as "Owners Risk". There is no evidence to show that due to the negligence on the part of the defendant/respondent alone, the damages have been caused. Further, the plaintiffs/appellants herein have failed to prove that the consignment has been properly packed by way

of examining packers or supervisor Radhakrishnan. In such circumstances, the first appellate Court has considered all the aspects in proper perspective and rightly dismissed the suit. Therefore, he prayed for dismissal of the second appeal.

9. Considered the rival submissions made on both sides and perused the materials available on record.

10. It is seen from the records that the appellants herein as the plaintiffs filed a suit for claiming damages caused by the defendant/respondent stating that the first plaintiff has sold ten stacks of 400 KV polycone insulators consisting of ten numbers top and ten numbers bottom unit insulators to M/S. National Thermal Power Corporation Ltd., Indore as per invoice No.1682/87-88 and totally valued at Rs.1,93,487.10. The suit consignment has been properly packed in 20 wooden crates with cushioning on the inside and hoop iron filings on the outside in order to avoid breakage or damage in transit. But one number top insulator was found to be totally damaged at the time of delivery by the defendant carrier. Since the goods have been insured with the second plaintiff, the first plaintiff got the compensation. So the first plaintiff has executed a letter of subrogation and special power of attorney dated 07.09.1990 in favour of the second plaintiff. On that basis, the plaintiffs have after issuing valid notice to the defendant filed the suit. The trial Court decreed the suit and the first appellate Court reversed the same, against which, the present suit has been filed by the plaintiffs/appellants. Even though the respondent has raised a plea of jurisdiction, both the trial Court and first appellate Court held that the Court at Cuddalore is having jurisdiction to entertain the suit.

11. Substantial question of Law No.I:

Now this Court has to decide whether the defendant/respondent is a common carrier? According to the learned counsel for the plaintiffs/appellants, the defendant being a common carrier is liable to make the loss sustained by the first plaintiff. He has also relied upon the decision of this Court reported in 2004(4) CTC 273 (Patel Roadways Ltd. (formerly Patel Roadways Private Ltd.), No.100, Sheriff Devji street, Bombay-400 035 v. Seshasayee Industries Ltd., Vadalur - 607 303 and another), wherein it was held that Patel Roadways is a common carrier. In para-17, Section 2 of the Carriers Act defines "common carrier", which is held as follows:

" "common carrier" denotes a person, other than the Government, engaged in the business of transporting property under multinodal transport document or of transporting for hire property from place to place, by

land or inland navigation, for all persons indiscriminately. "

In para-20 of the above decision, it was held as follows:

"20.The learned counsel for the plaintiffs/respondents would contend, that this transport company is advertising through electronic media, and print, inviting the customers, for the transport of the goods, which would also indicate that it is a common carrier. In none of the documents produced, which is used by the defendant, for accepting the goods, we find no restriction of any kind, even reserving right to reject certain classes of persons, in order to say, that they are in the habit of restricting or in other words they are not accepting the goods, for all persons, indiscriminately. D.W.1 had also not spoken how, they are discriminating, when the goods are entrusted to them, for transport. In the absence of any such pleadings and evidence, considering the totality of the circumstances, and the evidence of D.W.1 in O.S.No.52/87, we are of the considered firm opinion, that the defendant comes within the meaning of 'common carrier' as defined under Section 2 of the Act. In this view, the entire provisions of the Act is applicable, and the plaintiffs are entitled to rely upon the provisions of the Act also, to sustain their claim."

In the above decision, it was specifically held that the respondent is a common carrier. So I am of the view, the respondent herein is a common carrier. Thus, the substantial question of law No.1 is answered accordingly.

12.Substantial question of Law No.2 to 4:

Learned counsel for the plaintiffs/appellants submits that damage certificate has been issued without prejudice to the defence. To substantiate his arguments, he relied upon the decision of this Court reported in 2004-2-L.W.663 (Bond Food Products Private Ltd., Registered office at No.80, 4<sup>th</sup> block, Koramangala, Bangalore-560 034 and another v. M/S.Planters Airways Ltd., 13/5, Kalasipalayam, New Extension I floor, Bangalore, 560 002), wherein it was held that report of surveyor was without prejudice and therefore, the same is not relevant to the issue. In para-14.6, it reads as follows:

"14.6.The further contention made on behalf of the defendant is that the report of the surveyor (Ex.A4) was "without prejudice" and therefore, the same is not

relevant to the issue, in view of Section 23 of the Indian Evidence Act, which reads as follows:

"Section 23: Admissions in civil cases when relevant: In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." "

So the certificate has been issued without prejudice, it means that he has every right to agitate. In such circumstances, from which the Court can infer that the parties agreed together that evidence of it should not be given.

13. Considering the aforesaid circumstances of the case, it is the duty of the defendant/respondent to prove that there is no negligence on their part while carrying goods and to prove the same, D.W.1/Nagarajan was examined. As per the decision reported in 2004(4) CTC 273 (Patel Roadways Ltd. (formerly Patel Roadways Private Ltd.), No.100, Sheriff Devji street, Bombay-400 035 v. Seshasayee Industries Ltd., Vadalur - 607 303 and another), damage was occurred due to over turn of the vehicle, when it was parked on the right side of the road. In the case on hand, no such occurrence had taken place. Admittedly, out of 20 consignments, 19 consignments have been in good condition. Only one number top insulator alone was damaged. In such circumstances, the first appellate Court has rightly held that the vehicle was not met with an accident, only packing of goods has been defective.

14. On perusing the evidence of P.W.1, it reveals that he has not personally aware of packing of goods. In his evidence he deposed that a contractor namely, one Radhakrishnan was supervising the packing of goods. But the said Radhakrishnan was not examined to prove that whether the goods are properly packed. Once the defendant/respondent has proved that there is no negligence on their part, the burden is shifted to the plaintiffs/appellants to prove that they packed the materials in good condition. In such circumstances, the first appellate Court has rightly held that in para-8 of the judgment that the appellants/plaintiffs failed to prove that packing of goods was done properly by way of examining the said Radhakrishnan. So the appellants are not proved that packing has been done properly. So there is no evidence to show that damage has been caused by the negligence act of the respondent/defendant carrier.

15. Learned counsel for the respondent/defendant submits that in the consignment note itself, it was stated that if damages are caused

to the goods carried beyond the control of carrier, the carrier is not responsible. So it is appropriate to extract para-23 in 2004(4) CTC 273 (Patel Roadways Ltd. (formerly Patel Roadways Private Ltd.), No.100, Sheriff Devji street, Bombay-400 035 v. Seshasayee Industries Ltd., Vadalur - 607 303 and another), which reads as follows:

"23. The submission of the learned counsel for the defendant/appellant, that the goods were carried at owner's risk also will not relieve the defendant, from paying the amount or extinguishing the liability. A common carrier is liable to the owner, for loss or damages, to any property, delivered to such carrier, to be carried, whether such loss or damage had arisen from the negligence of carrier or any of his servants. The term 'at owner's risk' used in the goods receipt only should mean, if damages caused to the goods, beyond the control of the carrier, such as viz major or act of alien country, giving relief, not otherwise. Thus, irrespective of the fact, that there is a clause in the document, that the goods are carried at owner's risk, will not disentitle the plaintiffs from claiming the damage, or will not relieve the common carrier, against Section 9 of the Act. Useful reference may be made to the following decisions as pointed out by the learned counsel for the plaintiffs."

In the above decision, it was specifically mentioned that the term "at Owners Risk" used in goods receipt means that if damages are caused to goods carried by them beyond control of carrier such as viz major or act of alien country, giving relief, not otherwise. In the case on hand, no accident occurs and no criminal act has been done. Out of 20 packages, 19 packages have been delivered in good condition and one number top insulator alone was found to be damaged. In such circumstances, the appellants herein have not proved that only on the negligent act of the respondent carrier, damage has been caused. So I am of the view, goods are carried on "Owners Risk" and there is no negligence on the part of the respondent carrier. Thus, substantial questions of law 2 to 4 are answered against the plaintiffs/appellants.

16. For the foregoing reasons, the first appellate Court, which is a last fact finding Court, has considered all the aspects in proper perspective and came to the correct conclusion. Hence, the judgment and decree passed by the first appellate Court does not suffer any illegality or irregularity and it does not warrant any interference and they are hereby confirmed.

17. In fine,

- Second Appeal is dismissed.
- The decree and judgment passed by the first appellate Court are hereby confirmed.
- There is no order as to costs.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Subordinate Judge,  
Cuddalore.

2.The Additional District Munsif,  
Cuddalore.

3.The Record Keeper,  
V.R.Section, High Court, Chennai.

1 CC to M/s.Nageswaran and Narichania, Advocate SR.No. 30813

1 CC to Mr.M.S.Velusamy, Advocate SR.No. 30543

TEJ (CO)

PSI (15.07.2015)

S.A.No.1127 of 1998

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