

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on :19.02.2015*
Judgment delivered on :25.02.2015

+ CS(OS) 2033/2010
BRAHM DEV GUPTA Plaintiff

Through Mr.Akhil Sibal, Mr. Kamal Gupta
and Mr.Abhisehk Gupta,
Advocates

Versus

CONTAINER CORPORATION OF INDIA & ANR

.... Defendants

Through Mr.Sudhir Nandrajog, Sr. Adv.
with Mr. Rishi K.Awasthi and
Mr. Raghav Ghai, Advocates.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 Present suit has been filed by the plaintiff Brahm Dev Gupta against the two defendants. The first defendant is the Container Corporation of India Limited (CONCOR) and the second defendant is New India Assurance Company Limited.

2 The case of the plaintiff is that he is carrying on the business of import and export under the name and style of M/s D.S.M. International. He is the sole proprietor. Defendant No.1 is a public limited company.

In the course of its business, the plaintiff had entrusted a consignment meant for export to defendant No.1 along with relevant documents. The said consignment/cargo was entrusted to defendant No.1 on 07.04.2010 at its Inland Container Depot (ICD) at Tughlakabad, Delhi. The value of the consignment, the nature of goods and all other relevant details were declared and made known to defendant No.1; this consignment was accompanied by the copy of the invoice; receipt (CRN Slip) was issued by defendant No.1 acknowledging the aforesaid entrustment.

3 On 10.04.2010, a public notice was issued by defendant No.1 notifying that some of the export cargo kept at its export warehouse at ICD, Tughlakabad had been gutted in fire which had been broken out on 10.04.2010. On inquiry, it was learnt that the consignment of the plaintiff was damaged. This consignment was in the exclusive custody and possession of defendant No.1.

4 M/s Inter Ocean Surveyors Pvt. Ltd. was appointed by defendant No.1 to conduct a joint survey for assessing the loss and damage which has occurred. It was reported that the complete consignment of the plaintiff had been gutted; there was no salvage. This was because of the fire which had broken out on 10.04.2010.

5 On 15.04.2010, the plaintiff submitted his claim for compensation to defendant No.1. Submission of the plaintiff is that the consignment/cargo entrusted to defendant No.1 was covered by an insurance which was issued by defendant No.2, (New India Assurance Company Limited). Defendant No.1 had in fact lodged its claim with defendant No.2 for its claim for damages.

6 The plaintiff is entitled to be compensated. He is restricting his claim to the value of the consignment. Further submission being that under the Right to Information Act, the plaintiff had obtained a copy of the report of the committee constituted by defendant No.1 to inquire into the causes and remedial measure with regards to the fire which had broken out on 10.04.2010 and as per their report, they had found that the system of fire fighting installed at ICD, Tughlakabad is designed for handling small fires and was completely inept for handling fires of the intensity which had broken out on 10.04.2010. Submission of the plaintiff being that he has suffered loss equivalent to Rs.45,01,800/- being the invoice value of his consignment. Interest at the rate of 12% per annum has also been claimed. Further submission is that defendant

No.2 is also a necessary party as defendant No.1 has admittedly obtained his insurance cover from defendant No.2.

7 Written statement was filed by defendant No.1 refuting the averments made in the plaint. It was not denied that cargo from the plaintiff had been received containing 61 packages of Rayon/Viscose Scarves meant for transport; all export consignment received at ICD, Tughlakabad are booked by rail by a shipping company by executing a forwarding note (FN) under Section 64 of the Indian Railway Act (hereinafter referred to as the said Act). This FN contained the terms and conditions which clearly mentioned that the terms were governed by the Railways Act, 1989. Any loss or damage, if caused to the cargo shall be dealt with under the said Act. It was not denied that an accidental fire had broken out on 10.04.2010 in the ICD godown of defendant No.1 at Tughlakabad and the consignment of the plaintiff had also been damaged. It is stated that other exporters had contacted the answering defendant and settled their grievances. Defendant No. 1 had taken a liability insurance cover from defendant No.2 which provided a maximum statutory liability @ 50 per kg. The plaintiff has already submitted its claim to defendant No.1 which is under consideration.

Defendant No.1 does not have a comprehensive insurance policy from defendant No.2; the policy taken by the answering defendant is an indemnifying policy which provides only a maximum damage @ 50 per kg. towards any third party liability. Further submission being that at the time of booking of its cargo, an option was available to the party including the plaintiff to pay the excess % charges on the excess value of Rs.50/- per kg. of the cargo so booked for transportation by rail and in that case, the plaintiff could have claimed the actual booked value but not so now. It is reiterated that the cargo of the plaintiff was not insured under any comprehensive cover; the plaintiff had not taken any insurance cover for its cargo which was meant to be delivered at Dubai. Suit is liable to be dismissed.

8 Separate written statement was filed by defendant No.2. It was stated that the suit is bad for misjoinder of parties and the answering defendant i.e. New India Assurance is neither a necessary and nor proper party. There is no privity of contract between the plaintiff and defendant No.2. It was admitted that defendant No. 1 had obtained an insurance cover from defendant No.2 but it nowhere agreed to indemnify on any count to a third party. Defendant No.2 has only

provided a limited coverage and amount would become payable to the party only after the assessment of the loss at the agreed rate of Rs.50/- per kg. This was clearly in terms of the policy.

9 On 23.02.2011 in view of the submission of the plaintiff, defendant No. 2 was deleted from the array of the parties.

10 Replication was filed reiterating the averments made in the plaint and denying the averments made in the written statement.

11 On the pleadings of the parties, the following issues were framed on 23.08.2011:-

(i) *Whether the defendant is a Railway Administration within the meaning of the expression Indian Railway Act, 1989? If so, to what effect? OPD*

(ii) *Whether the liability of the defendant to compensate the plaintiff for the loss/damage to its goods/cargo is limited to the extent of Rs.50/- per kg. only, as alleged by the defendant? OPD*

(iii) *Whether the fire on 10.04.2010 at ICD, Tughlakabad was not caused by the negligence and/or on account of inadequacy of requisite fire fighting measures/infrastructure on the part of the defendant? OPD*

(iv) *Whether the plaintiff is entitled to recover a sum of Rs.47,56,900/- as claimed for in the plaint? OPP*

(v) *Whether the plaintiff is entitled to interest, if so, at what rate? OPP*

(vi) *Relief.*

12 The plaintiff in support of his case has examined himself. Defendant No.1 has also examined one witness on his behalf.

13 Arguments have been heard. Record has been perused.

14 Issuewise finding reads as under:-

Issue No. 1

15 The onus to discharge this issue was upon the defendant. The defendant claimed himself to be a “railway administration” within the meaning of Section 2 (32) of the Indian Railways Act, 1989. Attention has been drawn to the Notification dated 21.11.1989 published in the Gazette of India, Part-I, Section-I, Government of India, Ministry of Railways, (Railway Board) through its Secretary and proved as Ex.DW-1/1 It reads herein as under:-

“NOTIFICATION

The Government of India have set up 'The Container Corporation of India Ltd. under the administrative control of the Ministry of Railways to develop inter modal services and an efficient and reliable infrastructure for the country's foreign trade as well as multi-model logistics support for domestic trade and industry. By the very nature of will need to maintain constant coordination with Ports, Railways, Customs, Shipping lines, road transport, warehousing agencies and trade and industry for instant information and follow-up for tracking, supply, inter-area balancing and other operational strategies for optimal results in the interest of the economy.

2 *It has been decided that, in view of the above corporation performing the operational and marketing functions for organizing and/monitoring movement of multi-modal traffic on a day-to-day basis throughout the country, the aforesaid Corporation be designated as an operational entity for all purpose. "*

16 This Notification clearly states that CONCOR has been set up by the Ministry of Railways and is an operational entity for all purposes.

17 Attention has also been drawn to the Indian Railway Commercial Manual published by the Ministry of Railways wherein clause 1476 refers to ISO Containers Services. Clause 1476 (b) reads as under

“The Railway Board have authorized CONCOR to issue CONCOR Inland Way Bill (IWB) in lieu of Railway Receipt and also to quote and collect all charges directly from the customer.”

18 The Indian Railway Rules published on 26.09.2006 by the Ministry of Railways under its powers under Section 198 of the said Act have also been perused. ‘Operator’ has been defined under Rule 2 (b) to mean a person who has taken permission to run container trains on Indian Railways, Regulation of Rail Container Operations are contained in Rule 7. Category I includes all existing or future Inland Container Depots including those serving at J.N. Port or Mumbai Port in National Capital Region like Tughlakabad, Dadri and Gurgaon. The present case relates to the warehouse and containers at ICD, Tughlakabad. Attention has also been drawn to the approval process contained in Rule 9. The modalities for granting permission to run trains which includes permission to be taken by Category I i.e. the containers depots serving at Tughlakabad is contained in Rule 11. Submission being that all these factors show that CONCOR is governed by the said Act and falls within the definition of a “railway administration”.

19 These submissions have been refuted. Learned counsel for the plaintiff submits that the defendant is blowing hot and cold and as and when it suits the defendant, it has been taking shifting stands. Attention has been drawn to a judgment of this Court reported as 127 (2006) DLT 517 Mittal Roadways (India) & Anr. Vs. Union of India and Others wherein the stand of the CONCOR was that it is an independent body and as such the Railway Claim Tribunal has no jurisdiction upon it. Submission being that this aspect was decided in favour of the defendant has been affirmed by the Supreme Court in SLP No. 8081/2006 vide its judgment dated 05.01.2012; this was a speaking order of the Apex Court and is binding upon the defendant and he now cannot take up a different stand that he is not an independent body.

20 To counter this submission, learned counsel for the plaintiff has placed reliance upon a judgment of the Rajasthan High Court reported as III (2014) ACC 99 (Raj.) M/s Manglam Cement Ltd. Vs. Union of India and Others. Submission being that the Rajasthan Bench has distinguished the judgment of the Delhi High Court as in that case the Delhi Bench was only considering the question as to whether CONCOR (a public sector undertaking) along with the other five respondents were

rightly dropped by the Railway Claim Tribunal from the array of the parties or not; submission being that the question as to whether the defendant was a “railway administration” within the meaning of Section 2 (32) of the said Act has not been considered by the Delhi Bench and the dismissal of the appeal by the Supreme Court was also on the same premise; the question whether the defendant was a “railway administration” had not been gone into.

21 The Gazette Notification (Ex.DW-1/1) published by the Government of India, Ministry of Railways is an admitted document. This document clearly states that the CONCOR (the defendant) is under the administrative control of the Ministry of Railways. The submission of the learned counsel for the plaintiff that this Notification only deals with the Inter Modal Services and does not mean that the defendant is a railway administration within the meaning of Section 2 (32) of the Railways Act is negated by a plain reading of the Notification coupled with the Railway Commercial Manual and the Rules published by the Ministry of Railways vide its Notification dated 26.09.2006.

22 Ex.DW-1/1 has defined the defendant as an operational entity for all purposes. It clearly states that the Ministry of Railway has set up the CS(OS) No.2033/2010

defendant who is working under its administrative control i.e. under the administrative control of the Ministry of Railways and the various purposes for which it has been set up have been detailed in the said Notification. The Railway Commercial Manual (the text of which has been quoted supra) shows that the Railway Board (admittedly under the Ministry of Railways) has authorized CONCOR to issue Inland Way Bill (IWB) in lieu of railway receipts and to accept all charges directly from the customers; obviously directions have been given by the Ministry of Railways to the defendant as the defendant has taken over the management and operation of ISO containers services including terminal activities at the Inland Container Depots earlier owned and managed by the Indian Railway. This is also clear from the preceding Rule i.e. Rule 1476 (a) which deals with the ISO containers services and reads as under:-

“1476. ISO Containers Services.- (a) Containers Corporation of India Ltd. (CONCOR), a Government of India undertaking under the Ministry of Railways has taken over the management and operation of ISO container services including terminal activities at the Inland Container Depots earlier owned and managed by the Indian Railways.”

23 The Indian Railways Rules, 2006 define ‘operator’ as a person who has taken permission to run container trains. Category 1 of Rule 7 of the said Rules includes the Container Depot at Tughlakabad. The instant case is the case of a Container Depot at ICD, Tughlakabad.

24 Section 2 (32) of the Indian Railways Act reads as under:-

“railway administration, in relation

(a)xxxxxxx

(b) A non-Government railway, means the person who is the owner or lessee of the railway or the person working the railway under an agreement.”

25 Section 2 (37) defines a ‘rolling stock’ which includes locomotives, tenders, carriages, wagons, railcars, containers and vehicles of all kinds working for railways. Submission of the learned counsel for the plaintiff on this count that the warehouse of Tughlakabad is not a container moving on railways and thus does not fit in the rolling stock within the meaning of Section 2 (37) is a mis-understanding of the provisions. ‘Rolling stock’ which includes a container moving on rails does not necessarily mean that the container must at all times be in movement; even as per the case of the plaintiff, these containers were

later put on the trains and the goods of the plaintiff were admittedly then transported through the railways to port from where they taken to their ultimate destination.

26 CONCOR is a public sector undertaking and thus a non-Government railway it is a lessee of the railway. It clearly fits into definition as laid down in Section 2 (32) of the Act; it is a “railway administration”.

27 The judgment of Mittal Roadways (supra) heavily relied upon by the learned counsel for the plaintiff was delivered on an application under Order 1 Rule 10 of the CPC where the question which had arisen for decision was as to whether CONCOR along with five other private respondents was a necessary or a proper party before the Railway Claim Tribunal or not; it was this position which was affirmed by the Supreme Court in the SLP. The ambit and scope which had arisen for consideration in Mittal Roadways both before the Delhi High Court and before the Supreme Court was on the limited question as to whether the defendant (CONCOR) in the proceedings before the Tribunal is a necessary or a proper party and if its presence in those proceedings was required or not. The question whether the defendant was a railways
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administrations within the meaning of Section 2 (32) had not been considered. This is also clear from the last paragraph of the judgment of the Supreme Court; the question as to whether the CONCOR essentially fell within the definition of ‘railway administration’ within the meaning of Section 2 (32) of the Act was not considered.

28 This Court is thus of the view that the defendant has been able to discharge the onus and has been able to establish that it is the “railway administration” within the expression of the said Act. This issue is decided in favour of the defendant and against the plaintiff.

Issue No. 2 to 5

29 All these issues will be decided by a common discussion.

30 Learned counsel for the plaintiff had made a twofold submission. His first submission is bordered on the premise that he is not a “railway administration” within the meaning of the said Act. This question has been answered against the plaintiff and in favour of the defendant. Having affirmed this position, the alternate submission of the learned counsel for the plaintiff is that his claim is even otherwise independent from the provisions contained in the said Act and his liability cannot be

limited in terms of Section 103 of the said Act as has been sought to be set up by the defendant. Submission being that he is governed by the Carriers Act, 1865. Reliance has also been placed upon (2000) 4 SCC 553 Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd., (2000) 4 SCC 91 Patel Roadways Ltd. Vs. Birla Yamaha Ltd. as also another judgment of a Bench of this Court in RFA No.442/2003 M/s Delhi Assam Roadways Corporation Ltd. Vs. The Oriental Insurance Company Ltd. delivered on 09.12.2011. Submission being that a presumption of negligence has to be drawn against the defendant as admittedly the consignment of the plaintiff had been gutted in a fire in the warehouse of the defendant for which he has to be held responsible.

31 Learned senior counsel for the defendant has pointed out that the Carriers Act, 1865 has been repealed and thus the question of applicability of this Act would not arise. Submission being reiterated that after this repeal a new Act has been promulgated which is of the year 2007. Additional submission being that this argument of the plaintiff is even otherwise not sustainable as issue No. 1 already having been decided in favour of the plaintiff and the defendant having been held to be a “railway administration” the provisions of Section 103 of

the Railways Act are applicable; liability is limited; it is only the weight of the goods for which the plaintiff is entitled to be reimbursed.

32 Evidence adduced by the respective parties has been perused. PW-1 Sahdev Gupta was the attorney of the plaintiff Brahm Dev Gupta. He had proved the invoice dated 01.04.2010 as Ex.PW-1/2 which has valued the goods at Rs.45,01,800/-. The copy of the CRN slip dated 07.04.2010 issued by defendant No.1 (an admitted document) was proved as Ex.P-1. The public notice issued by defendant No.1 disclosing the factum that a fire had taken place in their warehouse at ICD, Tughlakabad has been proved as Ex.P-2. The report of M/s Inter Ocean Surveyors Pvt. Ltd. appointed by defendant No.1 has been proved as Ex.PW-1/3. The plaintiff had submitted his claim before defendant No.1 which was through Ex.PW-1/4 dated 15.04.2010. Ex.PW-1/5 and Ex.PW-1/6 were the documents obtained by the plaintiff under the Right to Information Act (RTI) substantiating his submission that the fire safely equipments at ICD, Tughlakabad were inept for handling fire of the intensity which had broken out on 10.04.2010. Legal notice sent to defendant No.1 has been proved as Ex.P-4. It is dated 26.08.2010. Reply to the said legal notice issued by defendant No.1 is dated 01.10.2010

proved as Ex.D-1. This witness was subjected to a lengthy cross-examination. He admitted that whenever the goods are sent for export, they are sent to the warehouse of the defendant where a custom inspection takes places. No formal agreement is reduced into writing when he handovers goods to the defendant. The defendant raises its bill which is paid through cheque. The plaintiff has been dealing with the defendant since the last about 7-8 years. Normally 50-60 consignments are exported through defendant No.1 annually; goods are directly handed over to the defendant. Services of a shipping line agency are taken. It is not necessary to take insurance cover as per international trade usage. The goods in the instant case were garments. He denied the suggestion that he has direct dealing with shipping line agency only and not with defendant No.1. He admitted that the defendant does not mention the value of the consignment when they raise a bill upon the plaintiff but the weight of the consignment is mentioned. He admitted that a sum of Rs.61,000/- has been received as compensation from the defendant.

33 Defendant No.1 has produced one witness. He was Radhey Shyam, Senior Manager from CONCOR. He reiterated the defence

taken in the written statement. It deposed that CONCOR works under the Ministry of Railways in terms of notification Ex.DW-1/1. It was admitted that defendant No.1 received cargo containing 61 packets of Rayon/ viscose Scarves meant for export by rail by the answering defendant; this cargo was received from M/s Oak Shipping Services Pvt. Ltd. at Acharya Niketan, Mayur Vihar. The Carting Order prepared by the answering defendant was handed over to M/s Oak Shipping Services Pvt. Ltd and proved as Ex.DW-1/2. All export consignments received at the ICD, Tughlakabad were booked by rail on the basis of the forwarding note executed by consignor under Section 64 of the Indian Railways Act proved as Ex.DW-1/3. The terms and conditions contained in Ex.DW-1/3 were binding on the parties and the loss, if any, suffered by the party has to be dealt with under the provisions of Indian Railways Act, 1989. Defendant No.1 had taken an insurance cover providing a maximum statutory liability of Rs.50/- per kg. towards any third party liability which has been proved as Ex.DW-1/4. It was reiterated that most exporters had taken their claims for compensation; admitted position being that the plaintiff has also received a compensation of Rs.61,000/-. It was reiterated that at the time when a

cargo is booked, an option is available to freight forwarder (which in this case was M/s Oak Shipping Services Pvt. Ltd.) to book the subject cargo in respect of excess % charge option on excess value of Rs.50/- per kg. so booked and in such an eventuality the freight forwarder could have claimed the actual declared value of the cargo from the answering defendant. The freight forwarder did not exercise this option. The cargo was destroyed in fire on 10.04.2010 which had taken place at ICD, Tughlakabad. A survey had been conducted. The plaintiff had not booked the cargo with the defendant with excess % charge booking; there was no embargo or restriction upon the plaintiff in doing so. The defendant has no obligation apart from Rs.61,000/- which has already been received by him. He admitted that he had received legal notice. This witness was also subjected to a cross-examination. He denied the suggestion that defendant No.1 does not maintain the requisite pressure in the hydrant pumps at ICD, Tughlakabad to deal with a fire; submission being that it was only the technical expert from the concerned department who could probably answer the question more accurately as also the query as to whether jockey pumps were installed in the premises. He denied the suggestion that the fire safety equipment

such as mechanically driven fire engine, trailer pump etc were not available at ICD, Tughlakabad and this was the reason for the fire, which could not be controlled. He denied the suggestion that he is deposing falsely.

34 Admitted facts which have thus come on record are that the plaintiff had booked a consignment of 60 Rayon/ viscose Scarves valued at Rs.47,56,900/- amounting to 400 pieces valued at Rs.1,80,000/- with defendant No.1. This was on 07.04.2010. Admittedly a fire had taken place in the godown of ICD, Tughlakabad on 10.04.2010 which had led to damage of this consignment. A perusal of CRN slip dated 07.04.2010 issued by defendant No.1 (Ex.P-1) shows that 61 packings of readymade garments had been booked by the plaintiff. This document has been issued by defendant No.1. M/s Inter Ocean Surveyors Pvt. Ltd. had submitted their joint survey report (Ex.P-3) which was carried out in the presence of the plaintiff wherein it was observed that the cargo was destroyed; there was no salvage. It was also not feasible to ascertain the exact cause of the fire; it continued for about 7 days. Certain recommendations were made to defendant No.1. This report (Ex.P-3) does not state that there was no sufficient equipment available at ICD,

Tughlakabad which had it been available could have saved the fire. The fire safety equipment i.e. mechanically driven fire engines, transfer pumps were available at the warehouse so also the hydrant pumps. This is evident from the testimony of DW-1. Thus, no negligence or lack of due care can be attributed to the defendant on this count.

35 The documentary evidence of the defendant evidenced that he had issued a CRN dated 07.04.2010 (Ex.P-1). Ex. P-1 makes a reference to the carting order (Ex.DW-1/2). This document was issued by Oak Shipping Services Pvt. Ltd. to the plaintiff (Admittedly Oak Shipping Services Pvt. Ltd. was the agency through whom the plaintiff had booked its consignment with the defendant). This reflects that 61 packets were to be delivered at Jeddah. The weight of the cargo was 1220 kgs and its net weight was 1089 kgs as is evident from Ex.DW-1/4 which is an admitted document. The Bill number was 1138846 dated 01.04.2010. Ex.P-1 also makes a reference to the same bill number as was found mentioned in the carting order. Ex.P-1 is in fact the very basis and foundation of the case set up by the plaintiff. The insurance policy (Ex.DW-1/4) taken by defendant No.1 from defendant No.2 had a limited liability; there was a maximum statutory liability of Rs.50/- per

Kg towards a third party. Option available to a party to book its cargo in 0% charge on the excess value of 50% per kg of the cargo so booked was available option to the plaintiff but the plaintiff has admittedly not used this option. There was otherwise no embargo on the part of the plaintiff to have opted for this option. At the rate of Rs.50/- per kg, the plaintiff already stands compensated, he having received an amount of Rs.61,000/- from the defendant.

36 Section 103 of the said Act deals with the extent of monetary liability in respect of a consignment. Sub-clause 2 is relevant. It is extracted herein as under:-

“Notwithstanding anything contained in sub-section (1), where the consignor declares the value of any consignment at the time of its entrustment to a railway administration for carriage by railway, and pays such percentage charge as may be prescribed on so much of the value of such consignment as is in excess of the liability of the railway administration as calculated or specified, as the case may be, under sub-section (1), the liability of the railway administration for the loss, destruction, damage, deterioration or non-delivery of such consignment shall not exceed the value so declared. tc ”(2) Notwithstanding anything contained in sub-section (1), where the consignor declares the value of any consignment at the time of its entrustment to a railway administration for carriage by railway, and pays such percentage charge as may be prescribed on so much of the value of such consignment as is in excess of the liability of the railway administration as calculated or specified, as the case may be, under sub-section (1), the liability of the railway administration for the loss, destruction, damage, deterioration or non-delivery of such consignment shall not exceed the value so declared.”

37 The Carriers Act of 1865 already stands repealed. The defendant being a “railway administration” within the meaning of the said Act, the provisions of the said Act are applicable to the inter-se transaction between the plaintiff and the defendant. The defendant has rightly invoked Section 103 of the said Act to limit its liability.

38 Issues No. 2 to 5 are decided in favour of the defendant and against the plaintiff.

Issue No. 6 (Relief)

39 The case of the plaintiff on all counts must fail. It is dismissed.

INDERMEET KAUR, J

FEBRUARY 25, 2015

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