

N THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2016

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 453 of 2008
and M.P.No. 1 of 2008

M/s.Kalpaka Transport Co. Ltd.,
Brach Office at 59/1,
College Squire post,
Cuttack, Orrissa State. ..Appellant/Appellant/
Defendant

Vs.

1. M/s. United India Insurance Co. Ltd.,
carrying on business of
General Insurance
having its registered office at
No.24, Whites Road, Chennai-14
and one of its divisional office at
No.144-B, Kalpana Road,
Udumalpet.

2. M/s. Amaravathi Sri Venkatesa
Paper Mills Ltd.,
Madathukulam, Pin - 641 113,
Tamil Nadu. ...Respondents/Respondents/
Plaintiff

Prayer:- This Second Appeal is filed under Section 100 of Civil Procedure Code against the decree and judgement dated 29.11.2004 passed in A.S.No.132 of 2004 on the file of the learned Principal District Judge, Coimbatore confirming the decree and judgement dated 26.03.2004 passed in O.S.No.212 of 2001 on the file of the learned Subordinate Judge, Udumalpet.

For Appellant : Mr.R.Jagadeesan for
K.V.Subramanian Associates.

For Respondents: No appearance.

JUDGMENT

This appeal is preferred by the defendant against the concurrent judgement of the Courts below. The suit is for recovery of money filed by the insurance company and the consignor alleging that the paper worth Rs.2,31,819/- was booked with the defendant transport company with a specific understanding that it should be delivered at Cuttack to one

Binapanic Exercise Works, Gowri Sankar Park, Cuttack-1, but got damaged due to the negligence of the carrier.

2. It is an admitted fact that the goods were booked under various lorry receipts between 22.08.1999 and 28.08.1999 and the goods reached Cuttack on 04.10.1999 but not delivered to the consignee. The strong cyclone on 28.10.1999 and 29.10.1999, caused huge damages to the entire coastal area of the Orissa. In the said nature's fury, the goods kept in the godown of the defendant got damaged. The plaintiffs have arranged a surveyor to assess the damage and he has given a report that the value of the damaged goods is Rs.1,44,610.76 after deducting the cost of salvage of Rs.23,272/-. Hence the insurance company and consignor have filed the present suit claiming a sum of Rs.1,51,620/-.

3. The appellant/defendant had filed a written statement contending on the ground that the damage is due to an act of God and they are not liable to pay any damages. Further it is contended in the written statement that the survey was conducted behind their back and no notice was given to them. While open delivery was effected and the goods have been taken by the consignee in toto, there was no question of loss sustained by the plaintiffs.

4. The trial Court based on the pleadings framed the following questions of law :-

1. Whether the first plaintiff is entitled for the damages as claimed?
2. What other relief the first plaintiff entitled for?

5. On behalf of the plaintiffs, one Joseph Anthony was examined as P.W.1 and 13 exhibits were marked whereas on behalf of the defendant, one Ramesh was examined as D.W.1 and they have relied on 4 exhibits. After considering the evidence let in by the respective parties, the trial Court has concluded that the goods got damaged when they were stored in the defendant's godown. The damage was due to the act of God. However, if the defendant had properly maintained the godown, the damage would have been averted and for the said negligence, he should compensate the 60% damage of the entire loss. Thus the trial Court has restricted the claim of the plaintiffs to the tune of Rs.90,972/- with interest at the rate of 9% p.a., and allowed the suit accordingly.

6. Aggrieved by the judgement of the trial Court, the defendant has preferred an appeal before the Principal District Judge, Coimbatore, wherein the first appellate Court confirmed the judgement and decree of the trial Court holding that though the consignment reached a month before the cyclone, the defendant has not delivered the goods to the consignee and therefore, the defendant alone is responsible for the damage of the consignments which were stored in the

weak cement sheet roofed godown. So he cannot shield his breach of obligation under the guise of cyclone.

7. Aggrieved by the concurrent judgment, the appellant/defendant preferred this second appeal and raised the following substantial questions of law:-

1. "Can the trial Court fix the quantum of loss in a suit which was outside the scope of the pleadings in the suit without any legal right and without any liability on the part of the defendant?
2. Can the appellate Court give a judgement without fully discussing the judgement of the trial Court that is independent of the findings given by the trial Court?
3. Is not a common carrier's liability comes to an end when the goods reaches the godown at the destination whether or not intimation regarding such arrival is given by the carrier to the consignee?

8. The learned counsel for the appellant submitted that once the Court has concluded that the goods were damaged not due to the negligence of the transporter but due to the act of God, it should have concluded that the carrier is not responsible or liable to pay the compensation for such loss. However, the Courts erroneously mulcted the defendant to compensate the consignee to an extent of 60% of the assessed damage. The assessment of the damage itself cannot be taken note of, in view of the fact that the alleged survey was done behind their back. Though the survey report has been marked as Ex.P.6 the surveyor was not even examined to testify the prudence of his assessment.

9. The last limb of the argument by the learned counsel for the appellant is that under Section 10 of the Carriage Act, the aggrieved person, before instituting a suit, should serve a notice in writing to defendant/carrier intimating the loss or injury and also such notice should be issued within six months from the date of knowledge of loss or damage.

10. The perusal of record shows that the cyclone has hit the Orissa coastal area between 28.09.1999 and 29.09.1999. The surveyor has submitted his report on 06.01.2000. Even before that the consignee has taken open delivery on 17.11.1999, which is marked as Ex.A.7. The claim bill dated 31.10.2000 is marked as Ex.A.8. The suit has been presented on 09.10.2001 and there is no evidence to show that the first plaintiff has served notice in writing before the institution of the case, claiming damages from the carrier. The plaintiffs rely upon the thirteen documents, wherein Ex.A.11 to 13 are

the notice served to the defendant and the acknowledgment card. These three exhibits are dated 11.09.2001, just before the institution of the suit and after six months from the date of knowledge of the damages. Thus, it is evident that the suit for damages against the Carrier/Defendant is not in compliance with of Section 10 of Carriage Act.

11. Even otherwise, the judgement and decree of the Court below is liable to be set aside, for the simple reason that the damage was not due to the negligence of the carrier while transporting but due to cyclone when the goods was stored at the carriers godown. Cyclone is the act of God. But for the cyclone, damage would not have caused. So to say that storing the goods under asbestos sheet would amounts to negligence, is highly preposterous. There is no evidence on the part of the consignee, as to why the goods were not taken delivery in time, even though they reached the destination on 04.10.1999 itself. Though the consignee was intimated over phone that the goods reached Cuttack they have not taken delivery. There is no reason to disbelieve this. It is the normal trade practise that any trader who sell their goods to confirm whether the goods have reached the designation and the consignee is expected to get delivery of the goods at the earliest once goods reaches the designation. Just because the transporter of the goods has not collected or demanded demurrage as bailee while the goods were in his possession, it does not mean that he is necessarily responsible for the protection of the goods on all circumstances. In addition to this, the surveyor had conducted the survey without notice to the defendant and he was not even examined as witness to substantiate his report.

12. In support of his submission, the learned counsel for the appellant has relied upon certain judgments of our High Court, out of which, this Court is of the opinion that in the following judgement reported in CDJ 2014 MHC 5693 M/s. Carborandum Universal Ltd., Vs. M/s. M.G.Interenation Transports GmbH is more relevant. Hence the passage is extracted below :-

"25. It is also a settle proposition of law that if the insured has established that there was a damage of the consignment of goods, he would be entitled to claim damages, irrespective of the fact that at whose negligence, fault or carelessness, the damage had occureed. However, to exercise right of subrogation and claim damages, the insurance company should establish that the damage or loss was cased to the consignment, only due to the negligence of the carrier, otherwise, the insurance company cannot claim damages from carrier of the consignment of goods.

26. Here in this case, there is no evidence to show that the alleged damage had occurred due to the negligence of the respondent herein. Unless the insurance company establishes the negligence or improper handling of the consignment, the insurance company would not be entitled to claim damages from the carrier. In other words, if the loss or damage occurred to the consignment, by way of any natural calamity, act of god or by any antisocial element, in the name of Bandh, the carrier would not be liable to pay any damages to the insurance company, the second respondent herein."

13. It is seen from the records that (1) The suit has not been filed after issuing notice within a period of six months from the date of knowledge of damage as contemplated under Section 10 of the Carriage Act. (2) The survey is conducted without notice to the defendant and also the surveyor report is marked as Ex.A.6 without examining the surveyor. (3) The Court below after concluding that the damage is due to the act of god, on the carrier has mulcted with the liability to pay damages at the ratio of 60%. It is also not clear as to how the Courts below came to the conclusion that the contributory negligence on the part of the defendant at the rate of 60% without any basis. Such conclusion arrived at by the Courts below is liable to be set aside and accordingly, it is set aside.

11. In the result, the second appeal is allowed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

rts

To

1. The Principal District Judge, Coimbatore.

2. The Subordinate Judge, Udumalpet.

+ 1 cc to M/s. K.V. Subramanian Associates Advocate SR.74250

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