

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

+ **RSA No.295/2016**

% **30th September, 2016**

M/S JET AIRWAYS (INDIA) LTD. Appellant

Through: Mr. Dhanajai Jain, Advocate.

versus

M/S DHANUKA LABORATORIES LTD. Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.36390/2016 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.36391/2016 (condonation of delay)

2. For the reasons stated in the application, delay of 22 days in re-filing the appeal is condoned.

C.M. stands disposed of.

+ RSA No.295/2016 and C.M. No.36389/2016 (stay)

3. I must begin this judgment with the statement that notable corporations such as M/s Jet Airways, and which is the appellant in this second appeal, must not only be responsible litigants but in fact must ensure that there

is no frivolous litigation especially when as a carrier of goods, the goods are lost by the appellant through its agent carrier to whom the goods were handed over. The frivolousness of the present litigation by the appellant is also clear from the fact that the appellant/defendant led no evidence whatsoever in the trial court to discharge the onus which had shifted upon the appellant/defendant on account of the respondent/plaintiff having led evidence as to the value of the goods lost by the appellant/defendant and also factum of negligence/wilful misconduct and/or misappropriation of goods by the appellant/defendant. With this preface, let us examine the issues at hand.

4. The challenge by this Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is to the concurrent Judgments of the courts below; of the Trial Court dated 11.9.2014 and the First Appellate Court dated 10.6.2016; by which the suit filed by the respondent/plaintiff for recovering the value of the goods lost by the appellant/defendant has been decreed. The suit has been decreed for a sum of Rs.2,57,062/- being the invoice value of the goods with interest at 12% per annum pre-suit and *pendente lite*, with future interest from the date of decree at 6% per annum.

5. The undisputed facts are that the appellant/defendant is a carrier of goods. Respondent/plaintiff received an order from a buyer in Bangladesh i.e M/s NIPA Pharmaceuticals Ltd, Bangladesh for supply of 25 kg of Cefixime Trihydrate BP USP. This order received from M/s NIPA Pharmaceuticals Ltd,

Bangladesh was executed by the respondent/plaintiff by shipping the goods by air through Airway Bill dated 15.2.2010 bearing no.589-1311-2945 issued by the appellant/defendant through its booking agent M/s Perfect Cargo Movers Pvt. Ltd. The goods on being handed over to the appellant/defendant for transportation were thereafter further transferred by the appellant/defendant to its agent for carriage/transportation viz M/s Biman Bangladesh Airlines. The goods did not reach the consignee of the Airway bill and M/s Biman Bangladesh Airlines issued a short landing letter. The respondent/plaintiff thereafter filed the subject suit after serving a Legal Notice dated 20.5.2010 upon the appellant/defendant which failed to yield any result.

6. Before noting the defence of the appellant/defendant, I must at the outset note and reiterate at the cost of repetition that the respondent/plaintiff led evidence in support of its case by proving the value of the goods transported as also the wilful misconduct/misappropriation of goods by the appellant/defendant through its agent carrier, but the appellant/defendant has led no evidence whatsoever in the trial court. Therefore the suit had to be and was decided only as per the evidence which was led by the respondent/plaintiff.

7. The appellant/defendant contested the suit and raised various defences. The first defence was that as per the Airway bill, no value of the goods was given by the respondent/plaintiff and therefore the suit amount cannot be claimed. The second ground was by placing reliance upon Rule 22(2)

of Schedule of the Carriage by Air Act, 1972 as per which the carrier is entitled to limit its liability to a particular amount stated in the provision along with certain additional charges. Accordingly, it was prayed that the suit of the respondent/plaintiff be dismissed.

8. After pleadings were complete, the trial court on 7.5.2013 framed the following issues:-

- “(i) Whether the shipment/goods in question were lost while in possession of the defendant? OPP
- (ii) Whether the plaintiff brought to the notice of the defendant about the special damages/nature of consignment or not? OPP
- (iii) Whether the liability, if so, at all of the defendant is limited as per Section 22(2)(a) of second schedule of the Carriage By Air Act 1972 as amended by Amendment Act of 2009 (*Sic* Section 22(3) of Carriage by Air (Amendment) Act 2009)? OPD
- (iv) Whether the plaintiff is entitled to recovery of Rs.2,57,062.50 as principle amount from the defendant? OPP
- (v) Whether the plaintiff is entitled to pre-suit interest at the rate of 12 per cent per annum amounting to Rs.20,565/- OPP
- (vi) Relief.”

9. The respondent/plaintiff in the course of its evidence duly proved its case. The documents proved by the respondent/plaintiff are Ex.PW1/1 to Ex.PW1/18 and which includes the invoices showing the value of the goods being Rs.2,57,062/-. It was also proved by the respondent/plaintiff that the consignment in question was lost on account of wilful negligence/wilful misconduct on the part of the appellant/defendant and in fact since goods were lost it was to be taken that goods were misappropriated by the appellant/defendant. In view of the evidence led by respondent/plaintiff onus of

proof shifted upon the appellant/defendant, but appellant/defendant led no evidence whatsoever.

10(i) The singular issue to be decided in this second appeal is as to whether the liability of the appellant/defendant is limited as per Rule 22 of the Rules under the Carriage by Air Act, 1972 or whether the appellant/defendant cannot get benefit of this Rule 22 of limited liability because the appellant/defendant is guilty of wilful misconduct as provided in Rule 25 of the said Rules and which provision overrides the provision of Rule 22. I further would like to note that reference in the issues framed will be to Rules 22(2) and 25, inasmuch as, the reference is wrongly made to Rule 22(2)(a).

(ii) For the sake of convenience, Rules 22 and 25 of Schedule of the Carriage by Air Act are reproduced as under:-

“Rule 22.

(1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and goods, the liability of the carrier is limited to a sum of 250 francs and kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that sum is greater than the value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of sixty-five and a half miligrammes gold of millesimal fineness nine hundred.

Rule 25.

(1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the court equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.”

(iii) It is settled law that benefit of the provision of the limited liability of a carrier such as the appellant/defendant under Rule 22 is subject to Rule 25 and which states that the benefit of limited liability cannot be given to a carrier in case the carrier is found guilty of wilful misconduct or conduct equivalent to wilful misconduct. A statement by respondent/plaintiff that goods have been misappropriated is not only a case of wilful misconduct but such act is even more than the case of wilful misconduct, and it is this case of the respondent/plaintiff which was proved that on account of the goods not having been traced and thus in fact the goods have been misappropriated. Obviously, misappropriation cannot be by a legal entity such as the appellant/defendant or its agent airline company, but by its employees or agents who have been dealing with the goods. There are judgments of various courts which hold that once goods are not traced and there is an averment of the same being misappropriated, the case then falls under Rule 25 that there is wilful misconduct or conduct equivalent to wilful misconduct. One such judgment of this Court is in the case of *Vij Sales Corporation Vs. Lufthansa, German Airlines AIR 2000 Del 220*. Of course, whether or not there is wilful misconduct would depend on facts of each case with, of course the onus being

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really on the carrier such as the appellant/defendant who is in control and possession of the goods to show that there is no wilful misconduct because a consignor such as the respondent/plaintiff can only step into the witness box and state so in the examination-in-chief. It is also required to be noted that similar principle with respect to strict liability of a carrier exists under the Carriers Act, 1865 and therefore onus is really upon the appellant/defendant/carrier to show that there is no wilful misconduct. The judgment under the Carriers Act holding strict liability of the carrier is the judgment of the Supreme Court in the case of ***Nath Bros. Exim International Ltd. Vs. BEST Roadways Ltd. (2000) 4 SCC 553*** and which specifies the strict liability of a carrier and how a carrier cannot take benefit of a clause of limited liability. The relevant paras of this judgment are paras 25 to 27. In these paras, the strict liability of a carrier has been equated to the liability of an insurer. These paras 25 to 27 read as under:-

“25. We have already reproduced the provisions of Sections 6, 8 and 9 above. Section 6 enables the common carrier to limit his liability by a special contract. But the special contract will not absolve the carrier if the damage or loss to the goods, entrusted to him, has been caused by his own negligence or criminal act or that of his agents or servants. In that situation, the carrier would be liable for the damage to or loss or non-delivery of goods. In this situation, if a suit is filed for recovery of damages, the burden of proof will not be on the owner or the plaintiff to show that the loss or damage was caused owing to the negligence or criminal act of the carrier as provided by Section 9. The carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State (or the enemies of the King, a phrase used by the Privy Council). The Calcutta decision in *British & Foreign Marine Insurance Co. v. The Indian General Navigation & Rly. Co. Ltd.*, the Assam decision in *River Steam Navigation Co. Ltd. v. Syam Sunder Tea Co. Ltd.*, the Rajasthan decision in *Vidya Ratan v. Kota Transport Co. Ltd.*, and the Kerala decision in *Kerala Transport Co. v. Kunnath Textiles*, which have already been referred to above, have considered the effect of special contract within the meaning of Sections 6 and 8 of the Carriers Act, 1865 and, in our opinion, they lay down the correct law.

26. In the Madras decision in *P.K. Kalasami Nadar v. K. Ponnuswami Mudaliar*, it was held that an act of God will be an extra-ordinary occurrence due to natural causes, which is not the result of any human intervention, but it was held that an accidental fire, though it might not have resulted from any act or omission of the common carrier, cannot be said to be an act of God. Similarly, in *Kerala Transport Co. v. Kunnath Textiles*, it was held that the absolute liability of the carrier was subject to two exceptions. One of them is a special contract that the carrier may choose to enter into with the customer and the other is the act of God. It was further held that an act of God does not take in any and every inevitable accident and that only those acts which can be traced to natural causes as opposed to human agency would be said to be an act of God. In *Associated Traders & Engineers (P) Ltd. v. Delhi Cloth & General Mills Ltd.*, a fire which broke out in a pounded warehouse where the goods were kept was held not to be an act of God and, therefore, the carrier was held liable. This Delhi decision has been relied upon by the learned Counsel for the appellant on another question also to which we shall presently come, to show that the agreement by which the liability of the carrier is sought to be limited must be signed by the owner of the goods, entrusted to the carrier for carriage.

27. **From the above discussion, it would be seen that the liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without lose at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants.**

(emphasis is mine)

11. In my opinion, once the appellant/defendant has admittedly led no evidence whatsoever, and the respondent/plaintiff has led evidence proving the value of the goods and the case as set up in the plaint, the appellant/defendant cannot be said to have discharged the onus upon it that there was no wilful misconduct or misappropriation as was the case of the respondent/plaintiff. Without leading evidence and merely by cross-examination of the witnesses of the respondent/plaintiff/shipper/consignor, a carrier cannot say that it has discharged its onus of proof because onus of proof is discharged by leading positive evidence, with the aspect that positive evidence also ordinarily does not

absolve a carrier because liability of a carrier is a strict liability equal to that of an insurer.

12. Learned counsel for the appellant sought to place reliance upon a judgment of a Bench of five Members of the National Consumer Disputes Redressal Commission in the case of *The Manager, Air India Ltd and Anr. Vs. M/s India Everbright Shipping & Trading Co.* in First Appeal no.451/1994 decided on 20.4.2001 to argue that the present case should be decided as per Rule 22 and hence the limited liability of a carrier such as the appellant/defendant, however, I really fail to understand as to how this cited judgment will apply because the present is a case which will be covered under Rule 25 of the Rules under Carriage by Air Act which states that the limits of liability specified under Rule 22 shall not apply in case of wilful misconduct of the carrier or conduct equivalent to wilful misconduct.

13. Therefore, once the present case is laid out by the respondent/plaintiff as per the plaint as a case falling as a case of wilful misconduct or equivalent to wilful misconduct i.e misappropriation of goods, the case will have to be decided as per Rule 25 and not Rule 22 as argued on behalf of the appellant/defendant.

14. It is seen that in spite of stark facts such as in the present case where the goods of the respondent/plaintiff have indeed been lost by the appellant/defendant, the appellant/defendant led no evidence whatsoever, and that the appellant/defendant is expected to know the law with respect to strict

liability of a carrier because its daily business is of carriage of passengers and goods, yet, in spite of the Legal Notice served way back on 25.5.2010, the appellant/defendant has chosen to continue with the frivolous litigation, in spite of the fact that both the courts below have concurrently held against the appellant/defendant. I may note that the first appellate court has very exhaustively dealt with the issues at hand and also as to how the issue in question is covered under Rule 25.

15. As per the judgment of the trial court, respondent/plaintiff has been benefitted with costs of Rs.5,106/- but the appellate court however did not award any costs to the respondent/plaintiff. Accordingly, this Regular Second Appeal is dismissed with costs throughout against the appellant/defendant for a sum of Rs.50,000/- and which costs shall be paid by the appellant/defendant to the respondent/plaintiff within a period of six weeks from today.

SEPTEMBER 30, 2016
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VALMIKI J. MEHTA, J