IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 14.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.No.21 of 2009
Against
O.S. 6 of 2006

M/s. Kone Elevator India Private Limited,
58, Vanagaram Road,
Ayanambakkam, Chennai 600 095.
Represented by its Managing Director
A. Shankar Krishnan ... Defendant/Appellant

Versus

M/s. Transport Corporation of India,
No.306 – 307, Ashoka Bhopal Chambers,
S.B. Road, Secunderabad.

Regional Office at
No.163, Bells Road,
Chennai 600 006,
Represented by its
Vice President Mr.B.R.Purnia. ... Plaintiff/Respondent

Prayer:- The above named appellant begs to prefer the above memorandum of first appeal against Judgement and Decree dated 09.01.2007 made in O.S. No. 6 of 2006 passed by the Principal District Judge of Thiruvallur.

For Appellant : M/s. R. Murari & B.Dhanraj

For Respondent : M/s. L. Mohan & K. Srinivasan

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J U D G M E N T

Agreived over the decree and judgment of the learned principal district judge Thiruvallur. O.S. No.06/2006, Decreeing suit against the defendant for a sum of Rs. 9,78,319/- together with interest at 6% per annum. The defendant has preferred the present appeal.

2. For the sake of conveniance the parties are referred as a plaintiff and defendant. The Brief facts of the plaintiff case is as follows.

The plaintiff is a company carrying on business in transport as common carrier. The defendant is also a company carrying on business in the manufacture of elevators and other allied parts at Ayanambakkam, Ambathur Taluk. The defendant used to engage the service of the plaintiff for transporting their consignment to various places in India and in Nepal. After mutual consultations a broad agreement was arrived between the plaintiff and the defendant with reference to the rates of the freight charges, the mode of payment, the documents to be furnished by the consignor to accompany the consignment lorries, the duration of transport to various destinations, the responsibility of the transporter in respect of the consignment and other connected matters concerning the transport consignments.

3. Further in case of transport of consignment to Nepal an agreement in writing of the terms of contract for carriage for each and every consignment was entered into between the plaintiff and the defendant. The defendant are to furnish the proper documents to accompany the consignments necessary to clear several check posts enroute to the destination. The defendant also informed that the lorries would be hired for transportations by the plaintiff. Accordingly the defendant has engaged the plaintiff services for transporting the Consignments to various destinations between May 1998 and November 1999. The above transactions the defendant are

due and liable to pay a sum of Rs.10,88,162/- towards the freight charges, a sum of Rs. 27,620/- towards other charges totaling Rs.11,14,782/- towards the above due the defendant paid a sum of Rs.2 lakhs on 23.11.1999. Still the defendants are due a sum of Rs.9,14,782/-.

4. Accordingly the defendant is liable to pay the above amount together with interest at the rate of 12% per annum. It is further case of the plaintiff that the lorries carrying the consignment to nepal were detained at Rexual Border(Nepal) for want of relevant documents. By a letter dated 22.09.1998 the plaintiff demanded the defendant to take steps to release the lorries and to pay the detention charges whereas the defendant by letter dated 24-09-1998 refused to pay the amount on the ground that customs authorities of Nepal had not understood the issue and that the defendants had sent detailed note to the customs authorities of Nepal. Inspite of Several letters to the defendant the defendant not taken any steps to pay customs duty and also detention charges. The plaintiff has paid a sum of Rs.3,38,288/- for clearing the consignments and lorries. The plaintiff had to incurre an

expenditure for defendant a sum of Rs.3,38,288/- at Nepal customs due to discrepancy in the documents.

5. The defendant not furnished proper documents to the plaintiff to accompany the consignments which compelled the plaintiff to incur the expenses so as to release the lorries which were detained for more than 28 days at Nepal customs. Therefore the defendant is liable to reimburse the plaintiff of the expenditure incurred by them in the form of demurrage etc., for an extent of Rs. 3,38,288/-. However the plaintiff claimed a sum of Rs. 3,09,689/- only. It is further case of the plaintiff that the damage to the 15 packages to the tune of Rs.2,36,027/- is not adjustable in the amount payable by the defendant. Hence the suit for recovery of the money. Brief facts of the defendant case is follows.

6. The defendant admitting that plaintiff was engaged in transporting the materials, Stated that the materials were damaged while unloading or during transit. The cost of the material will be deducted from the transporters bill. On account of the careless handling the defendant suffered heavy

damages and in fact the defendant already wrote several letters to the plaintiff calling upon to compensate it. It is further case of the defendant that the material also not delivered in time because of such delay. The defendant asked to replace the materials to the customers. It is further case that the plaintiff has not given a credit for a sum of Rs. 2 Lakhs paid by the way of cheque credited. As far as the consignment sent to Nepal it is the case of the defendant that the plaintiff should not have paid any amount to the custom office. The plaintiff should have asked the customer to bear the said amount. The defendant never asked to pay any such amount to the customs authorities. Hence prayer for the dismissal of the suit.

7. On the basis of the above pleadings the following issues have been framed by the trial court.

(i)Whether the plaintiff is entitled for a sum of Rs.9,78,319/- being the arrears amount of freight charges and other expenditure for the services rendered by the plaintiff?

(ii)Whether the plaintiff is entitled for subsequent interest at 12% per annum till date of realisation?

(iii) Whether the plaintiff had not given a credit for a sum of Rs. 2,00,000/-. said to have been paid by the defendant on 23.11.1999 through cheque No.002276?

(iv) To what relief the plaintiff is entitled?

8. On the side of the plaintiff PW1 examined and exhibit A1 to A16 marked on the side of the DW1 examined and exhibit B1 to B6 marked. After considering the evidence and documents the Trial court decrees the suit for a sum of Rs.9,78,319/- together with the interest at the rate of 6% per annum from the date of plaint till date of realisation in full.

9. Aggrieved over the same the present appeal came to be filed by the defendant.

10. The learned counsel for the appellant canvassed the appeal on 2 grounds, according to the learned counsel the amount paid to the custom authorities by the respondent plaintiff cannot be recovered, as there is a specific contract agreed between the parties. As per Ex.B.1 contract with

regard to the supply of consignments to Nepal it is specifically agreed by the parties that customs duties shall be paid only by the customer as customer already obtained order for 5% concession duty. Therefore the respondent should not have paid the custom duties to the authorities.

11. Further the plaintiff has not placed any material to show that the appellant has not provided necessary documents at the time of loading the consignments at chennai. Hence it is the contention of but the learned counsel for the appellant that it is the duty of the carrier to collect all the documents when the goods were loaded and transported to the Nepal.

12. Therefore it is the contention of the learned counsel that all the documents were taken over by the plaintiff for delivery of consignment to the Nepal. Further lorries were detained for some clarification. It is the duty of the purchaser to clear the customs duty as specifically agreed by the respondent. The plaintiff should have demanded the above amount from the customer as per the contract. The letter dated 22.09.1998 addressed to the defendant has not been

marked to the customer. All these clearly shows that the plaintiff has not made any attempt to direct the customer to pay the Customs duty. Having agreed in the agreement to contact the purchaser to pay the Customs duty plaintiff now cannot seek recovery of amount paid by him to the Customs Authorities.

13. It is further contention of the learned counsel for the appellant that admittedly some damages to the consignment accrued during the transport provided by the respondent/plaintiff. The plaintiff is also in one of the letter not only admitted the damages, but also quantified for a sum of Rs.2,36,097/- when the damages were admitted by the plaintiff the above amount is also to be deducted as against the plaintiff claim. Hence, submitted that after adjusting the damage of sum of Rs.2,36,097/- and other Rs.3,09,689 said to have been paid to the customs authorities. The suit itself not maintenable hence prayed for allowing the appeal. In support of Argument he also placed on reliance on the following judgment.

1. **AIR1997 DELHI 355**(Cofex Exports Ltd v. Canara Bank) R.C. LAHOTI AND S.N. KAPUR,JJ.

Cofex Exports Ltd., Appellant v. Canara Bank, Respondent

2. **CDJ 1954 APHC 043**
   D. Konda Pentiah Versus Chenchu Rangiah.

3. **CDJ 1933 AH HC 007**
   Madan Mohan Garg Versus Bohra Ram Lal.

4. **AIR -1964- (MP) 231**
   State of Madhya Pradesh Versus Raja Balbhadra Singh

5. **AIR -1974- (Mad) 231**
   S. Sathiapal Versus Pandiyan Brick Works & Another

14. Countering the arguments of the learned counsel for the appellant, the learned counsel for the respondent / plaintiff submitted that the lorries sent to the Nepal were detained for more than 28 days without any customs clearness. The same was due to defective documents given by the plaintiff/appellant similarly the plaintiff has claims the detention charges, as the lorries were hired by the respondent this fact also informed to appellant. Despite several communication by the respondent.

15. The appellant has not taken any steps to clear the customs to paying the custom duty. Whereas due to long period of detention of lorries forced the respondent to pay the amount to the Customs authorities a sum of Rs.3,38,388/- to release the lorry. Hence, it is the contention of learned

counsel that the respondent certainly entitled to be reimbursed all the amount paid to the Nepal customs. Further contention of the learned counsel of the respondent with regard to damages for a sum of Rs.2,36,027/- claimed by the appellant. The consignment was insured by the transporter, the appellant has not claimed insurance, Therefore submitted that appeal lacks merits.

16. In the light of the above submissions now the point arise for consideration are

1) Whether the respondent/plaintiff is not entitled to recover a sum of Rs.3,09,689/- paid towards the customs duty at Nepal Border.
2) Whether the appellant is entitled to adjust the amount towards the damages?

Point No.1

17. The suit has been filed by the respondent/ plaintiff for recovery of a sum of Rs.9,78,319/- with the interest of Rs.12% said to be the freight charges and other charges after giving credit to Rs. 2,00,000/- paid by the defendant on 23-11-2009. The above suit amount also includes a sum of Rs.3,09,689/- paid by the respondents/plaintiff to the custom authorities at

the Nepal border, when the lorries were detained in the Border.

18. Apart from that suit was filed for recovery of amount on the various bill related to the freight charges. The defendant has not denied the freight charges claimed by the plaintiff. The pleadings contained in the paragraph 5 of plaint with regard to various bills and due have not even denied in the written statement. It is also admitted by the appellant that respondent services were utilised for carrying the consignments for transporting the consignments to various destinations between May 1998 and November 1999.

19. The bill towards payment pleaded in paragraph 5, of the plaint has not specifically denied, not even a whisper was made in regard to the bills payable by the appellant when the facts stated in the plaintiff were not specifically denied such facts can be taken as admission on the side of the defendant.

20. The only grievance of the appellant in their entire written statement that there was some damages to the goods while unloading and also during transport. The cost of materials damaged be deducted from the transporters bill and

another contention of the appellant in the written statement that the claim of sum of Rs.3,09,689/- paid to the custom authorities ought not have been paid by them. Except the above two defence other aspects pleaded in the plaint is not disputed at all.

21. Though it is pleaded by the defendant that there are some damages during transit it is not even pleaded in the written statement as to the nature of damages and value of the consignment. Be that as it may, the main contention of the learned counsel for the appellant that the court that there was contract between the parties with regard to the consignment sent to Nepal wherein plaintiff is agreed to contact the customs to clear a sum Rs. 3,09,689/- towards customs duty. Whereas the defendant has violated the same much emphasis was made on Ex.B1 contract said to have been entered between the appellant and respondent. Exhibit B1 certifies true copy marked with objection. There was no explanation whatsoever forth coming from the Appellant for non production of the original contract said to have been entered between the parties. Be that as it may, in the class 13 of the contract shows

the carrier responsibilities, clause 13 reads as follows:-

a) Collecting all necessary documents from check post.

b) Obtaining customs clearance at Birgung customs check post.

C) The customs duty will be payable at 5%. The customer Taragon Regency Hotels limited have obtained concessional duty certificate from Nepal Government. Transport corporation of India will contact the customer Taragon Regency hotels limited at Kathmandu who will make the customs duty payment to Transport corporation of India Kathmandu office. Transport corporation of India. Will make the Customs duty payment and deliver the Consignment at site.

22. Though the Custom duty will be payable at 5% concession rate, above terms makes it clear that it is the duty of transporter to contact the customer at Kathumandu. Except the above no obligation whatsoever imposed on Transport Corporation of India. It is the specific case of the plaintiff that since all the relevant documents were not given by the appellant. The lorries were detained at check post.

23. The respondent has immediately contacted on defendant on 28.09.1998 to take steps to release the lorries and also to pay the detention charges. The above pleadings not even denied in the written statements. In E.A3 dated 22.09.1998 the plaintiff/respondent has clearly stated and sent

the letter to the appellant that the lorries were detained for want of some documents and requested them to clear the customs duty and also requested detention charges at the rate of 1,200/- per day.

24. Again under Ex.A5 12.12.1998 and Ex.A6 dated 24.12.1998, the plaintiff has requested the defendant to set right the matter immediately. In Ex. A7 dated 29.12.1998, the defendant has addressed a letter to the consignee at Katmandu, to pay a sum of Rs.50,000/- to the transport corporation. It is the case of the plaintiff that since the lorries were detained for 28 days in check post, he has to pay the customs duty. Though the contract stipulates conditions that the plaintiff has to contact the customers to pay the customs duty, it is to be noted that immediately, when the lorries were detained, the plaintiff has sent a notice to the defendant informing about the detention of the lorries. But the plaintiff has not taken any steps to contact his consignee to pay the customs clearance.

25. At the most, the plaintiff, being transporter, can only contact his customers, in case, the customer does not turn out

to pay the amount. But the plaintiff, being transporter, cannot wait endlessly allowing their lorries to be detained in the check post. The obligations to clear the customs is more on the consigner rather than the transporters. The consigner should have taken steps immediately to contact his customers at Nepal to clear the amount. Therefore, without specific pleadings in this regard in the written statement, now in the appeal stage that too at the time of argument, the appellant cannot canvass a new case to the effect that they are not liable to pay the amount.

26. The transporter, in order to release the lorries detained for more than 28 days, has no other option except to pay the customs duty from his own pocket. It is also informed to the defendant that the transporter cannot endlessly wait for the customer pay the customs duty. It is the duty of the consigner also. Therefore, merely because some conditions was imposed on the plaintiff in the agreement to contact the customer, it cannot be stated that the amount legally paid by the plaintiff cannot be recovered. D.W.1, in his evidence also admitted that lorries were detained at Nepal and that they have not taken any steps to release the lorries. As already

stated, the lorries were detained more than 28 days. It is admitted that when tax is not paid by them, the lorries were detained in the check post. He has also admitted that, after detention of the lorries, plaintiff informed the said detention to them and they have not taken any steps to release the lorries. It is also not known whether the customers have taken any steps to pay the customs duty. Further, they do not have any documentary evidence to show that they were insisting customers to pay the customs duty. Therefore, merely because some obligations were imposed on the transporter to contact the customer that cannot be a ground to deny the legal payment made by the plaintiff, in order to release the lorries, which are unnecessary detained for more than 28 days. The customer even after receipt of information from the consigner were not taken any steps to clear the customs duty. That being the real scenario, one cannot expect the plaintiff, who is only a transporter, to demand the customs duty from the customer. Therefore, the contention of the learned counsel for the appellant that the amount paid by the plaintiff towards customs duty cannot be recovered has no legs to stand.

27. Insofar as the statement that there were also damages to the goods and the same were also quantified and hence, the above amount is also to be adjusted as against the bills of the plaintiff is concerned, it is to be noted that though there are several correspondence between the parties in Ex. A.3 to A16, there is no pleadings in the written statement with regard to the nature of the damages and what was the actual amount arrived towards damages. In the absence of specific pleading with regard to the amount liable to be adjusted, merely on the basis of some admission in one of the correspondence in Ex. A11 that their engineers also issued certificate, it cannot stated that specific amount has been quantified. In the absence of any specific pleadings in that regard, and also failure to produce any evidence to substantiate the nature of the damages allegedly, suffered, the amount with regard to the damages in respect of consignment during transit period, cannot be adjusted, merely on the basis of some surmise.

28. No doubt, in the judgments cited by the learned counsel for the appellant, it has been held that adjustment is

not in the form of counter claim and no court fee is required. Absolutely, there is no dispute with regard to the proposition set out in the above judgments. It is needless to point out that the amount sought to be adjusted as against the plaintiff and also the nature of damages caused to the consignment must be specifically pleaded in the written statement. But in the case on hand, D.W.1 in his evidence has clearly admitted that no documents were filed by them to prove the damages. In the absence of the same, the arguments advanced by the learned counsel with regard to the adjustment cannot be countenanced. Accordingly these points are answered. Judgment of Trial Court is confirmed.

29. In the result, the appeal is dismissed. Consequently, M.P. No. 1 of 2009 is closed.

14.03.2017

msvm

N.SATHISH KUMAR,J.
msvm

Judgment in
AS.No.21 of 2009

14.03.2017