

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.4474 of 2017 (O&M)

Date of decision : 10.10.2017

M/s Kewal Transport Company

...Appellant

Versus

The New India Assurance Company Ltd. and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Deepender Singh, Advocate for the appellant.

ANIL KSHETARPAL, J.

The defendant-appellant, Transporter-Carrier, is in Regular Second Appeal against the concurrent findings of fact arrived at by the Courts below.

The plaintiffs namely New India Assurance Company Limited as plaintiff No.1 on the basis of a Letter of Subrogation and plaintiff no.2- Escorts Construction Equipment Limited filed a suit for recovery of ₹13,61,554/- against the appellant. It is the case of the plaintiffs that the defendant-appellant is a Transporter engaged in the business of transportation of the consignments. Plaintiff No.2 i.e. Escorts Construction Equipment Limited was holding a Marine Cargo Policy issued by plaintiff No.1 for carriage of consignments. During the subsistence of the policy, a consignment of 20RT Hydraulic Mobile Crane Vibrator Roller, was entrusted to the defendant-appellant for carriage and delivery from

Faridabad to Seni, Jharkhand valuing ₹17,77,564/-.

During the transportation, the said consignment was seriously damaged and thereafter the defendant had issued necessary damage certificate confirming the loss enabling plaintiff No.2 to lodge the claim with plaintiff No.1. Surveyor vide his report found that the damage was caused due to mishandling of representatives of the defendant and assessed the loss to the tune of ₹14,86,405/-. The Insurance Company settled the insurance claim with plaintiff No.2 for a sum of ₹13,61,554/-. Plaintiff No.2 thereafter executed a Letter of Subrogation and Power of Attorney in favour of plaintiff No.1. Plaintiff No.1 claims that amount was demanded but on refusal to pay, the suit has been filed. The defendant-appellant contested the suit.

Both the Courts below on appreciation of the evidence available on the file have found that the defendant-appellant is liable to pay the amount.

Learned counsel for the appellant has submitted the following submissions:-

1. There was a special contract between the Escorts Construction Equipment Limited and the appellant and, therefore, the appellant is not liable to pay to the Insurance Company.
2. As per the provision of the Carriers Act, 1865, the claim was required to be lodged with the Carriers within a period of six months which is not proved. Hence, the suit is not maintainable.
3. On the invoice issued to plaintiff No.2, it was boldly written that the consignment is being carried at owner's risk and, therefore, the

appellant is not liable.

At this stage, it shall be useful to notice certain provisions of the Carriers Act, 1865. Sections 6, 8, 9 and 10 of the Carriers Act, 1865 are extracted as under:-

“6. In respect of what property liability of carrier not limited or affected by public notice.- Carriers, with certain exceptions, may limit liability by special contract:-

The liability of any common carrier for the loss or damage to any [property (including container, pallet or similar article of transport used to consolidate goods) delivered] to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice: but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act 22 of 1863 (to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

8. Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.-

Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any [property (including container, pallet or similar article of transport used to consolidate goods) delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be

liable to the owner for loss or damage to any such property other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants.

9. Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.-

In any suit brought against a common carrier for the loss, damage or non-delivery of goods (including containers, pallets or similar article of transport used to consolidate goods) entrusted] to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.

10. Notice of loss or injury to be given within six months.-

No suit shall be instituted against a common carrier for the loss of, or injury to, goods (including containers, pallets or similar article of transport used to consolidate goods) entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.”

It will be noticed that the aforesaid Act has now been repealed and substituted by The Carriage By Road Act, 2007.

1. There was a special contract between the Escorts Construction Equipment Limited and the appellant and, therefore, the appellant is not liable to pay to the Insurance Company:-

Learned counsel has submitted that there was a special contract

between the parties on 01.04.2003. He has referred to Clause 9 of the aforesaid agreement which is signed by both the parties. Clause 9 of the same is extracted as under:-

“9. Transit Insurance shall be arranged by us. However, for any transit damages/shortages, necessary certificate shall be provided by you for lodging claim with the under writers.”

Counsel has submitted that since there was a special contract signed by the owners of such property, therefore, in view of Section 6 of the Carriers Act, 1865, the defendant-appellant cannot be held liable.

I have considered the submission. However, Clause 9 does not in any way absolved the carrier from liability for loss of or damage to any property delivered to him. Clause only provides that owner of the goods shall arrange transit insurance and in case of transit damages, necessary certificate shall be provided by the carrier for lodging the claim. It is nowhere provided that the carrier shall not be liable for transit damages or the owner of the goods would not issue a Letter of Subrogation to the Insurance Company authorising to recover the amount.

2. As per the provision of the Carriers Act, 1865, the claim was required to be lodged with the Carriers within a period of six months which is not proved. Hence, the suit is not maintainable:-

Second argument of learned counsel is that as per Section 10, notice of the loss or injury is to be given within a period of six months of the time when the loss or injury first came to the knowledge of the plaintiff. Learned counsel has stated that although the claim was lodged vide letter dated 01.03.2006 i.e. within a period of six months, however, the same was

not valid as it is on the letterhead of Escorts Limited and not on the letterhead of Escorts Construction Equipment Limited-plaintiff No.2.

Argument of learned counsel is without any substance. Escorts Limited may be an independent company but merely because letterhead of the aforesaid company has been used which is again a group company of Escorts Construction Equipment Limited, the claim lodged cannot be held to be without proper notice. Service of the aforesaid notice has been proved by producing the record of the Indian Posts and Telegraphs Departments. Therefore, there is no merit in the submission of the learned counsel.

3. On the invoice, it was boldly written that the consignment is being carried at owner's risk and, therefore, the appellant is not liable:-

No doubt on the invoice, it has been mentioned that the consignment is being taken "At Owner's Risk", however, such consignment note would not absolve the defendant-appellant in view of the provisions of Section 6 of the Carriers Act, 1865. Section 6 of the Carriers Act, 1865 only carves out one exception i.e. if there is a special contract signed by the owner of such property limiting the liability of the carrier. In the present case, there is no special contract limiting the liability. The contract in writing is available on the file which is dated 01.04.2003. A reading of the aforesaid contract which is duly signed by the parties does not show that the carrier, the appellant, was absolved of the liability on account of the damage to the consignment. In view of the fact that this contract in writing has been signed, the defendant-appellant cannot claim that in view of a note on the consignment invoice, would absolve the defendant-appellant.

In view of the discussions made above and for the reasons

recorded by the Courts below, I do not find any good ground to interfere with the concurrent findings of fact arrived at by the Courts below.

Regular Second Appeal is dismissed.

10.10.2017

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**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No