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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6647 OF 2014.

British Airways	]
New Import Building, International	] <u>Petitioner</u>
Airport Cargo Complex. Andheri (E)	] Original
Bombay 400 099	] Respondent

V/s.

M/s Bhagwandas B Ramchandani	]
Proprietor Mr. Bhagwandas B Ramchandani	] <u>Respondent</u>
Office at: 27/28, Sitaram Building, 2 nd floor	] Original
Opp. Crawford Market, Mumbai 400 001	] Plaintiff

Mr. K. Jagose with Ms. R. Variava i/by
Vikram Philip & Associates, for the
Petitioner.

Mr. Saikumar Pathrud, for the
Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

CLOSED FOR ORDER : 23rd JANUARY, 2018.

JUDGMENT PRONOUNCED ON : 2nd FEBRUARY 2018

JUDGMENT:

1] Heard learned counsel for the petitioner and learned
counsel for the respondents.

2] Rule.

3] Rule is made returnable forthwith with the consent of learned counsel for both sides.

4] This writ petition takes an exception to the legality, validity and propriety of the order dated 5th February, 2014, passed by City Civil Court, Mumbai in S.C. Suit No.5164 of 2012, thereby answering the preliminary issue, "*Whether the suit is barred by limitation prescribed under Section 30 of the Carriage by Air Act, 1972*", in negative.

5] Facts leading to the lis between the parties are not in the realm of dispute. It is admitted that respondent has sent a Cargo containing perishable items like fruits and vegetables through the petitioner Air Ways under AWP No.125 80291886 dated 4th January, 2010, from Mumbai to Canada. Due to bad weather conditions at London Airport, the flight could not depart on 6th January, 2010 to Canada and hence the Cargo which was containing perishable items was damaged and destroyed. Respondent, therefore, lodged a claim with the petitioner, on 13th January, 2010 seeking amount of Rs.1,70,221.56.

6] On 30th June 2010, respondent again sent Cargo

containing similar perishable items like fruits and vegetables, through the petitioner Airways under AWB No.125 8464044 dated 2nd July 2010 from Mumbai to Canada. The said Cargo also could not be transported due to insufficient packaging and the consignee also refused to accept delivery, as a result the Cargo could not be sent and was accordingly destroyed. In respect of this Cargo, respondent lodged complaint with the petitioner on 20th July 2010 for a sum of Rs.4,27,922/-.

7] In respect of both these claims, respondent filed suit against the petitioner on 15th September 2012 before the trial Court bearing S.C. Suit No.5164 of 2012, claiming damages alongwith interest. On 21st June, 2013, petitioner entered appearance in the suit and filed written statement contending inter-alia that the suit is barred by limitation, as per Article 30 Schedule II of the Carriage by Air Act, 1972 (for short, called as, "the Act"). The trial Court accordingly framed preliminary issue on the point of limitation and after hearing arguments of both parties, the trial Court, vide its impugned order, was pleased to hold that the suit was not barred by limitation.

8] The only ground on which the trial Court held that the suit

is not barred by limitation was the alleged acknowledgement of the claim by the petitioner in the reply to the notice dated 28.10.2010 in which the petitioner's advocate suggested to settle the claim at 50% of the claim amount. In view thereof, the trial Court held that as per Section 18 of the Limitation Act, the period of limitation is required to be computed from the time when the acknowledgement was signed and as acknowledgement is dated 28.10.2010, the suit filed on 6.9.2012, is within the period of two years, as per Rule 30 of schedule II of the Act and therefore, it is within limitation.

9] While challenging this order of the trial Court, the submission of learned counsel for the petitioner is that when a special statute like the the Carriage by Air Act, 1972 prescribes the period of limitation of two years, then the provisions of the general statute like the Limitation Act, 1963, cannot be invoked or made applicable to bring the suit within the limitation. In support of his submissions, learned counsel for the petitioner has relied upon various judgments of the Hon'ble Supreme Court and of other High Courts.

10] Per contra, learned counsel for respondent has supported the impugned order of the trial Court by submitting that in the

absence of express bar contained in the Carriage by Air Act, 1972, excluding the application of the provisions of the Limitation Act, the Trial Court was justified in invoking section 18 of the Limitation Act, to hold that the suit is within limitation.

11] Thus, the only issue necessarily arising for consideration in this writ petition is whether the provisions of Limitation Act, especially Section 18 of the Act, which is invoked by the Trial Court, in this case, can be made applicable to the litigation which is governed by the provisions of the Carriage by Air Act, 1972.

12] In this respect, it cannot be disputed that the Limitation Act, 1963 is a general and prior law; whereas the Carriage by Air Act, 1972 is a special and later enactment. Hence as held by the Apex Court, in the case of ***Maya Mathew V. State of Kerala [AIR 2010 Supreme Court 1932]*** the rules of interpretation when a subject is governed by the two sets of enactments are well settled and they are as follows :-

- (i) When a provision of law regulates a particular subject and a subsequent law contains a provision regulating the same subject, there is no presumption that the later law repeals the earlier law. The rule-making authority while making the later rule is deemed to know the existing law on

the subject. If the subsequent law does not repeal the earlier rule, there can be no presumption of an intention to repeal the earlier rule;

(ii) When two provisions of law – one being a general law and the other being special law govern a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail the same shall be given effect;

(iii) If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. The prior special law will continue to apply and prevail in spite of the subsequent general law. But where a clear intention to make a rule of universal application superseding the earlier special law is evident from the later general law, then the later general law, will prevail over the prior special law.

(iv) Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law.

13] In the instant case, it is admitted that the Carriage by Air Act is a special enactment of the year 1972 and therefore later enactment to the general law of Limitation Act, which was enacted in 1963. Hence, as per above said Principle No.2, it will be necessary to ascertain the intention of the rule making authority to know which

law should prevail. For this purpose, if one goes through the provisions of the said Act and the object and reasons for which the said Act was enacted, then it can be seen that the object of enacting the Carriage by Air Act 1972, was to provide a specific period of limitation and thereby to exclude the application of the Limitation Act. A cursory glance to the provisions of the Carriage by Air Act and the reading of the preamble of the Act makes it clear that it was enacted to give effect to the Warsaw Convention (of 1929) for unification of rules relating to international carriage by air to which India is a signatory, and further to give effect to the Hague Protocol of 1955. The Protocol made certain amendments to the Warsaw Convention, 1929. The Warsaw Convention had previously been given effect to in India by enactment of the Indian Carriage by Air Act, 1934 in regard to international carriage and the provisions of the said Act were extended to the domestic carriage as well, subject to certain exceptions, adaptations and modifications in terms of a notification issued in 1964. The liability prescribed under the Act is absolute one. Section 4 of the Act deals with application of amended Convention (Warsaw Convention 1929 as mandated by Hague Protocol 1955) to India. The sub section(1) thereof reads thus :-

“The Rules contained in the Second Schedule being the provisions of the amended Convention relating to the rights and

liabilities of carriers, passengers, consignors, consignees and other persons, shall subject to the provisions of this Act, have the force of law in India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage”.

14] Rule 11(1) provides that Airway bill is prima facie evidence of the conclusion of the contract of the receipt of the cargo and all the conditions of the carriage. As per Rule 30 of Schedule II of the Act, the claims for damages against the Airline, in relation to the acts of omission or commission on the part of Airline with regard to the cargo entrusted to it are to be governed by the Rules set out in the said Rules. :-

15] Chapter III of the second Schedule in the said Act deals with “Liability of the Carrier”. Rule 30(1) and (2) of the II Schedule to the Carriage by Air Act, 1972 reads as follows :-

“30. (1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the Court seized of the case”.

16] The perusal of these provisions of the Act make it clear that the rule making authority has made its intention clear that in

case of the claims under this Act, the provisions of this Act will prevail in respect of limitation and thereby excluded the application of the general law of limitation.

17] In the present case Airway bills, on which both parties have placed reliance and are produced on record also contain the same period of two years for filing such claim. Condition No.10 of the said Air way bill is material. It reads thus:-

“10. Receipt by the person entitled to delivery of the cargo without complaint shall be prima facie evidence that the cargo has been delivered in good condition and in accordance with the contract of carriage.

10.1 In the case of loss of, damage or delay to cargo a written complaint must be made to Carrier by the person entitled to delivery. Such complaint must be made.

10.1.1 In the case of damage to the cargo, immediately after discovery of the damage and at the latest within 14 days from the date of receipt of the cargo.

10.1.2 In the case of delay, within 21 days from the date on which the cargo was placed at the disposal of the person entitled to delivery.

10.1.3 in case the non delivery of the cargo, within 120 days from the date of issue of the air waybill, or if an air

waybill has not been issued, within 120 days from the date of receipt of the cargo for transportation by the Carrier.

10.2 Such complaint may be made to the Carrier whose air waybill was used, or to the first Carrier or to the last Carrier or to the Carrier which performed the carriage during which the loss, damage or delay took place.

10.3 Unless a written complaint is made within the time limits specified in 10.1 no action may be brought against Carrier.

10.4 Any right to damages against the Carrier shall be extinguished unless an action is brought within two years from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

(emphasis supplied)

18] This condition No.10.4 in the Airway Bill is in consonance with rule 30(1) of the Schedule II of the Act and according to it any right to damages against Carrier shall stand extinguished, unless an action is brought within two years from the date of arrival at destination or from the date on which aircraft ought to have arrived or from the date on which the carriage stopped.

19] In the instant case, it is not disputed that the claim arose

under the Airway Bill dated 4.1.2010 in respect of the Cargo sent from Mumbai to Canada which was to be delivered on 4.1.2010. The second claim was in respect of the Airway bill dated 2.7.2010 for carriage of goods from Mumbai to Canada which was to be delivered at Canada on 3.7.2010. Therefore, the suit in both Air Way bills was required to be filed prior to 3.7.2012. Admittedly, the suit is not filed on or before 3.7.2012, but it is filed on 6.9.2012 and therefore, it is not within the period of two years, as per Rule 30 (1) of Second Schedule of the Carriage by Air Act. This factual position is not disputed by learned counsel for respondent/plaintiff also.

20] However, according to learned counsel for respondent, the petitioner has, in the notice reply dated 28.10.2010, offered to settle the claim at 50% of the claim amount and therefore, there is acknowledgement of liability on the part of the petitioner. Hence as per Section 18 of the Limitation Act, the period of limitation is required to be computed from the time, when the acknowledgement was signed on 28.10.2010.

21] In this respect, learned counsel for respondent has placed reliance on Section 18 of the Limitation Act which reads as follows :-

“18. Effect of acknowledgement in writing - (1) Where,

before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2) Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

22] Thus, the first submission of learned counsel for respondent is that in view of section 18 of the Limitation Act, the suit is within the limitation as it is filed within two years from the date of acknowledgement of the claim, and the trial Court has rightly held it to be so.

23] However, in my considered opinion, having regard to the special provisions contained in Rule 30 of the Schedule II of the Carriage by Air Act, this submission cannot be accepted, as they exclude the application of the provisions of general enactment of the Limitation Act.

24] The provisions contained in Rule 30(1) of Schedule II of

the Carriage by Air Act 1972 are already a matter of interpretation in the judgment of Madras High Court, in case of **M.R.F Ltd-vs- M/s Singapore Airlines Ltd**, in **Second Appeal No.1151 of 2006**, in which three substantial questions were framed for consideration. First was, “Is the Carriage By Air Act of 1972, an International Law?” , second was, “Will a Special Enactment exclude the operation of Limitation Act in the absence of specific exclusion?” and the third was, “Is not a plaintiff/Insurer entitled to avail the benefit of provision of Limitation Act viz Section 14 and Section 29(2), particularly when they have initiated action against the respondent Air Carrier by filing a complaint against them within the time prescribed under the Special enactment namely Carriage by Air Act 1972 as well as Consumer Protection Act”.

25] While answering these questions of law, the provisions of Rule 30 of Schedule II of the Carriage by Air Act 1972, were discussed in detail and then by placing reliance on its earlier judgment in **M/s Air India Bombay Airport and another -vs- M/s Asia Tanning Co. and anr, [2003 (1)LW 622]**, it was categorically held that Rule 30 of the II Schedule being Special Rule of Limitation in respect of the carriage by air, it will prevail over the general law of limitation and therefore, exclusion from limitation, as sought under Section 14 of

the Limitation Act, will not be available.

26] In this respect, learned counsel for petitioner has also placed reliance on the judgment of Madras High Court in case of **Shipping Corporation of India, Bombay and anr -vs- Union of India, [air 2004 Madras 476]**, wherein suit was filed for damages for short landing of consignment under the Carriage of Goods by Sea Act 1924, according to which the suit was to be filed within a period of one year when the ship in which goods were contracted to be carried, had left the port at which delivery was to be made. However, suit was filed five years after the ship had left the port. Hence contention was advanced that it was barred by limitation. In the said suit also, like in the instant suit, plaintiff relied upon the fact that the defendant has acknowledged its liability and hence it was urged that under Section 18 of the Limitation Act, the period has to be calculated from the date of acknowledgement. However, the said contention was rejected by the Madras High Court, relying upon the judgment of Apex Court in the case of **East and West Steamship Company, Georgetown, Madras -vs- S.K. Ramalingam Chettiar [AIR 1960 SC 1058]**. It was held that,

“though in the case on hand the plaintiff was corresponding with the defendants from 27.11.1979

onwards by writing letters and reminders under Exh. A-3 to A-51 and the defendants have acknowledged the same, in view of the peculiar provision prescribed in the Act for calculating the period of limitation, the plaintiffs ought to have filed their suit within a period of one year when the ship by which the goods were contracted to be carried has left the port at which the delivery was to be made”.

. As it was not filed within period of one year, it was held that suit was barred by limitation.

27] The Carriage by Air Act, 1972 also contains the similar provision like the Carriage by Sea Act 1924. It is also a special enactment. Hence, its provisions are bound to prevail over the provisions of general law of Limitation. Accordingly, section 18 of the Limitation Act will have no application thereto as held by Delhi High Court, in the case of **Air India Ltd -vs- Tej Shoe Exporters P. Ltd and anr**, [2014 (1) ILR (Del) 484] also. In this judgment it was unequivocally held that the provisions of Schedule I Clause 29 and Schedule II Clause 30 are having overriding effect and they would exclude application of Limitation Act itself. It was further held that these provisions are under special statute and they are absolute in terms;, therefore, they would prevail over general provisions of the

Limitation Act. It was also held that the Carriage by Air Act, 1972 was enacted to give effect to the Warsaw Convention (of 1929) for unification of rules relating to international carriage, to which India is signatory, and further to give effect to the Hague Protocol of 1955. It was held that as the provisions of the Statute are clear and unambiguous, then they have to be implemented, without there being much scope for interpretation.

28] Learned counsel for the petitioner has also placed reliance on the judgment of Punjab and Haryana High Court in the case of **Gulf Air Company -vs- Nahar Spinning Mills Ltd and others**, [I.L.R. Punjab and Haryana 2000 (1), 238] wherein the issue of jurisdiction of the Court was considered and it was held in paragraph No.8 that:-

“As the Carriage by Air Act, 1972 is a special Act, its provisions will prevail over the provisions of the Code of Civil Procedure which is a general Act. Since the Act has stipulated the courts which have the jurisdiction to entertain an action for damages by a consignor/consignee against a carrier, the stipulation contained in Sections 16 to 20 of the Code of Civil Procedure would be ousted”.

29] To substantiate this proposition, reliance was placed on

the object and reasons of the Act and the provisions of Section 4(1) of the Act. It was held that;-

“In view of the above provisions of Act and the Rules framed thereunder and the provisions of Article 253 of the Constitution, the Courts are required to be careful not to attach to the words used in the said provisions anything more or less than their normal meaning consistent with the context in which they appear and consistent with the schedule of the legislation”.

30] Thus, consistent view taken by the Apex Court and also by various High Courts is that the Carriage by Air Act 1972, being a special statute, enacted to give effect to the international convention, the provisions thereof will have overriding effect. In view thereof, section 18 of the Limitation Act, which is a general enactment cannot have any application in the present case to extend the period of limitation, which is prescribed in Rule 30 of of Schedule II of the Act.

31] Learned counsel for respondent has, however, tried to place reliance on the judgment of the Apex Court, in the case of **Trans Mediterranean Airways -vs- M/s Universal Exports and anr (2011) 10 SCC 316**. However, in the said case, as per clause 12 of the Conditions of Contract printed on the reverse of Airway bill,

argument was advanced that if such complaint is not made within 120 days from the date of issue of the airway bill, then the claim extinguishes. In that respect, it was held that such condition cannot control the period of limitation provided under Rule 29(2) of the I schedule and Rule 30 of Schedule II of the Act. It was held that the claim will extinguish only if the action is not taken within two years. In the said case, as it was found that action was brought within two years, it was held that it is within time and will not extinguish the claim.

32] Much emphasis is led by learned counsel for respondent on the word, “action” used in clause 10.4 of the “Conditions of the Contract” printed on the Airway Bill in this case, by submitting that the “action” of lodging of the claim in the instant case was taken immediately within one month and therefore it cannot be said that the suit is barred by limitation.

33] However, this contention cannot be accepted because the “action” in the present case needs to be distinguished from the filing of the suit. Clause 10.1.1, 10.1.2, 10.2 and 10.3 of the “Conditions of Contract” deal with complaint about the loss of damage and it provides the period of 14 days, 21 days, 120 days, respectively, for

lodging of complaint; whereas clause 10.4 provides the period of two years for bringing “action” thereby clearly indicating that word used in clause 10.4 means “action” for filing any suit or action for approaching the Court, that is, how it needs to be interpreted in the light of the above clauses.

34] Therefore, as admittedly in this case, action of filing the suit in the Court was not taken within two years from the date on which cause of action arose and as provisions of Section 18 of the Limitation Act, cannot be made applicable, the suit apparently is barred by limitation.

35] The impugned order, therefore, passed by the trial Court cannot sustain. Hence stands set aside. The writ petition is accordingly allowed. The impugned order passed by the trial Court is quashed and set aside. As a result the suit is held to be barred by limitation and stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]