

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 01.08.2018

Judgment Pronounced on :29.10.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.1229 of 2004

Board of Trustees of Chennai
Port Trust represented by its
Chairman,
Rajaji Salai, Chennai. ... Appellant/2nd Defendant

Vs

1. Kirloskar Warner Swasey Limited
represented by Power Agent,
National Insurance Company Limited
having business at Tarihal Industrial Estate, Tarihal,
Hubli, Karnataka State-580 030.

2. National Insurance Company Limited
having its Head Office at Calcutta,
Divisional Office at Sujatha Complex,
Hubli, Karnataka, represented by its
Manager Sri.R.Sankaranarayanan.

3. Waterman Steamship Corporation,
Chicago, U.S.A.
Represented by (Affiliate of International
Shipholding Corporation) herein
Represented by their agent at Madras);
United Liner Agencies of India Pvt. Ltd.,
No.172, Thambu Chetty Street,
Madras-600 001.

... Respondents/1 and 2
Plaintiffs & 1st Defendant

WEB COPY

Prayer :- First Appeal filed under Section 96 of C.P.C., to set aside the judgment and decree dated 16.12.2002 made in O.S.No.13078 of 1996 on the file of the III Fast Track-cum-Additional District and Sessions Judge, City Civil Court, Chennai.

For Appellant : Mr.R.Karthikeyan

For Respondents: Mr.G.Guruswaminathan
for Mr.Nageswaran [R1 & R2]

R3 - Served [No appearance]

JUDGMENT

The 2nd defendant in O.S.No.13078 of 1996 on the file of the III Fast Track-cum-Additional District and Sessions Judge, City Civil Court, Chennai has come forward with this appeal. Parties would be referred to by their rank before the trial Court.

2. The brief facts are:

- The 1st plaintiff, a registered company under the Companies Act, had placed an order for certain electrical goods with Waterman Steamship Corporation, Chicago, U.S.A., and the cargo was placed in the custody of the 1st defendant for its transportation to its destination namely Chennai. The goods were shipped through the vessel MVLV Green Island Voy II, under a Bill of Lading dated 16-05-1994 for carriage from New York sea to Madras Port. The value of the consignment is US \$17,314.05. The consignment was insured with the second plaintiff.
- The consignment was packed in two crates. The consignment of two crates containing as between them 22 items of packed goods ordered by the first plaintiff had landed, not at the Madras Port, at Bombay Port. From there, the consignment was transshipped through the vessel Stonewall Jackson and it was delivered by the first defendant at the Madras Port on 04-10-1994. On receiving intimation of the landing of the consignment, the first plaintiff through its Clearing Agent M/s. Pioneer Service filed Bill of Entry on 20-10-1994, paid necessary duty payable for the entire consignment. However, the Madras Port Trust has delivered only one crate and the other crate containing items 1 to 8 and 14 to 22 was not delivered. The second crate which was later shown to the agent, contained few loose items and it did not contain the goods that the first plaintiff had ordered. Hence, it was rejected. Therefore, the aforesaid agent of the first plaintiff applied for a survey through M/s Jai Associates, and it was granted. The missing consignment could not be traced. As per the report

of the surveyor, the value of the undelivered goods was US \$16052.25 whose rupee equivalent was Rs. 5,29,112.67.

- The clearing agent of the first plaintiff preferred a claim with the first defendant, the shipping company Vide its letter dated 04-07-1995. This was responded to by the first respondent Vide its reply dated 13-07-1995, wherein it has stated that both the crates were delivered to the second defendant, Port Trust and that it was not liable for the claim.
- According to the second defendant, the missing crate was not received and accordingly the plaintiff was issued, what is known in commercial parlance as B- Certificate dated 05-04-1994.
- The second defendant was under a legal obligation to deliver the entire consignments covered by the Bill of Lading. The defendants have failed in their duty to deliver it and it had occasioned due to the negligence, want of due diligence and misconduct of their staff and agents. Left with little option, the first plaintiff issued a statutory notice under Sec.120 of the Major Port Trusts Act requiring the second defendant and also the first defendant to settle the claim.
- In the meantime, the first plaintiff invoked the contract of insurance and had its claim settled by its insurer, the second plaintiff, which settled the claim at Rs.5.0 lakhs, and got itself subrogated to the rights of the first plaintiff, and accordingly laid the suit for the said sum with interest at 12% p.a.

3.1 Denying the claim, the first defendant, the Shipping Company would contend in its written statement that the consignment containing the two crates of electrical components was left with its agent at the Port of New York sea for shipment to the Madras Port through the Vessel I.V.Green Island. Including the Master of the ship, none in the payroll of this defendant knew anything about the contents of the consignment. The Vessel reached the Madras Port on 17-06-1994, when it was found that the said consignment was over carried to Bombay and the same was brought back by yet another Vessel in the fleet of Vessels of this defendant named L.V. Stonewall Jackson, and was discharged at

the Madras Port on 04-10-1994, and the second defendant issued a tally sheet. It was left in the custody of the second defendant in the same order and condition as received at the Port of loading. Further, when the second defendant had made available the second (missing) crate and when the same was rejected by the agent of the first plaintiff on the ground that it contained only few loose items and not the goods ordered, then the second defendant ought to have issued 'C' certificate and not the B certificate. Apparently, the mischief had taken place when the second crate was in the custody of the second defendant and it had occasioned only due to the negligence of its staff at the Madras Port. It was to cover up its lapse, it has issued an out turn statement dated 15-03-1995 stating wherein that one package has excess landed at the Jawahar docks. These are absolute fraudulent acts of the second defendant.

3.2 In this connection, the first defendant had issued a notice dated 21-03-1995 to the second defendant, but the latter chose not to respond. Denying the liability sought to be fastened on it, it was alleged that the second defendant alone is liable for the claim. Secondly, since the claim is one for damages, there cannot be any claim for interest. At any rate, this defendant is not liable for anything more than US \$ 500 which is the maximum liability for package as per the law prevailing at the Port of shipment.

4. The second defendant, in its written statement alleged: Two crates of mechanical and electrical items were manifested against ex M.V. Green Island arrived on 17-06-1994. However, these crates were shown as over carried and brought back in the vessel Stonewall Jackson which arrived at the port on 02-10-1994. As per the receipt issued to the steamer agent, only one crate under mark of the first plaintiff was indicated as landed. This one crate was delivered to the agent of the first plaintiff on 24-10-1994. For the other crate which short landed, a B-Certificate was issued. So far as the other consignment which the agent of the first plaintiff had rejected is concerned, this consignment in fact was not manifested in the mark of the first plaintiff but some other company. So far as the surveyor report quantifying the loss is concerned, the same does not bind this defendant and hence it is not binding. And, so far as the notice dated 31-03-1995 goes, it was replied Vide reply dated 02-06-1995. The second defendant is not liable for the consignment not landed.

5. During trial, an official of the second plaintiff has examined himself as P.W.1. For the second defendant, one of its official adduced oral evidence as D.W.1. The first defendant chose to examine none. While the plaintiffs have produced

Exts.A-1 to A-19, the second defendant had produced Exts.B-1 and B-2. On appreciating the evidence before it, the trial Court has decreed the suit as against the second defendant alone. Challenging the said decree, the second defendant has approached this Court in this appeal.

6. The learned counsel for the appellant submitted that 50% of the decretal amount i.e., Rs.5,25,178/- has been deposited in the Court.

7. Points for consideration?

1. On whom does the liability to pay the suit claim lie?

8. Heard both sides. The learned counsel for the appellant/second defendant would argue that the shipping company attempts an exit route to the liability it faces through Ext.B-2 tally sheet, but the tally sheet itself is inconclusive. And, to the claim made by the first plaintiff's delivery agent dated 13-07-1995 (Ext.A-11) to the first defendant shipping company, the latter responded with Ext.A-12 reply dated 11-08-1995, wherein an insinuation was made that the second crate was tampered with or fabricated, which again finds a place in its written statement but it has not been proved, inasmuch as it chose not to adduce any evidence to prove its case.

9. So far as the shipping company is concerned, even though notice was served on it, it chose to remain exparte.

10. Defending the decree that the respondents 1 and 2 / plaintiffs had obtained before the Court below, their counsel argued that DW1 had admitted in his cross-examination that both the consignment indicated in the Bill of Lading (Ext.A3) have landed at the Chennai Port Trust. This statement goes against the very tenor of the context now to be forwarded by the appellant.

Discussion & Decision

11. The issue here is not whether the plaintiffs are entitled to the value of the consignment not delivered to it, but who among the two defendants is liable for it. The facts are: The based on the order placed by the first plaintiff, its foreign supplier had dispatched the consignment of goods ordered in two crates. This is admitted. It is also admitted that the consignment was shipped in the vessel Green Island. It was to reach the Madras Port on 17-06-1994, and it did reach on that day. The next fact not in dispute is that the consignment due to be delivered to

the first plaintiff had not been discharged at the Madras Port. It was then found that they were over carried/excess delivered at Bombay Port. Then they were stated to have been brought to the Madras Port through another Vessel Stonewall Jackson, not immediately, but at least after about four months on 04-10-1994. And upon landing of the cargo, only one crate was there for being delivered to the first plaintiff's agent. The other crate is said to contain some loose material and which the agent of the first plaintiff rejected.

12. The procedure adopted in the trade as per the Port Trust Manual is relevant. To state the procedure broadly, where a cargo is shipped, there will be prepared what is known as 'Import General Manifest' which contain the list of goods loaded in the ship. A copy of this would be forwarded to the customs authorities at the port of destination, and the customs authorities in turn will forward the same to the Port Trust. On delivery of the cargo, the authorities at the port of destination will prepare what is known as tally-sheet. As to this fact, the first respondent does admit in its written statement that the second respondent had indeed issued a tally-sheet dated 04-10-1994.

13. When the first defendant shipping company had wrongly discharged the cargo intended for the first plaintiff at Bombay Port when it was under a contractual obligation to deliver them at the Madras Port it is on the back foot in defending the plaintiff's claim. Having left the cargo in Bombay Port, the shipping company then let the consignment lie there for four months. Does not the shipping company, as bailee of the consignments of two crates of cargo, owe a duty to the consignee of the said goods to ensure that they were maintained in good order? And is it not the duty of the first defendant to satisfy this Court that it had actually delivered the two crates said to belonging to the consignee of the goods at the Madras Port. To prove the set of self serving statements that the first defendant had made in defence of the plaintiffs' claim in its written statement, it took the easy course of hiding behind the tally sheet dated 20-10-1994. This marked Ext.B-2.

14. The next point is to ascertain if Ext.B-2, conclusively prove that the first defendant - shipping company had actually and physically delivered two crates intended for the first plaintiff at the Madras Port Trust in good order, or at least preponderately establish that it might have delivered them? If it is perused, Ext.B-2 shows four items were discharged at the

Madras Port, and only as against the second item first plaintiff's name figures. In the cross examination of D.W.1, an official of the second defendant/appellant by the first defendant shipping company, the line of questioning on Ext.B-2 tally sheet was all about not denoting the marking of the consignment, but as to the actual number of crates actually discharged at the Madras Port. With the name of the first plaintiff figuring in only one crate, and with no effective cross examination as to its contents in terms of the number of crates actually delivered, there is an element of inconclusiveness attached to the effect of Ext.B-2. Secondly, if there is no marking indicated in the tally sheet, then the burden is all more on the shipping company that both the crates were actually delivered at the Madras Port. In this context, the alleged statement in the cross examination of D.W.1 that both the crates were delivered at the Madras Port appears as a stray sentence by an incompetent witness.

15. The next point is that in Ext.A-11 reply the agent of the first defendant assert that the Madras Port had fabricated the second crate, but again it chose not to prove the same. Courts do not look to the amplitude of an assertion of a party, but the quality of evidence that is made available in aid of its proof. Yet again the first defendant draws a blank on its efforts.

16. With the primary duty to ensure that the goods entrusted to it is delivered at the Port of destination on the first defendant shipping company, to re-emphasis, the primary burden of proof rests solely on it to establish that both the crates intended for the first plaintiff were discharged at the Madras Port is on it. The first defendant, not only had felt shy to speak to the facts that would aid in discharging its burden through its officials or agents, but also did not choose to examine any of the officials of the Bombay Port to prove that what was excess delivered there by the vessel Green Island, was well preserved at the Bombay Port, if there were any marking in the crates when they were loaded in the vessel Stonewall Jackson.

17. The evidence including the conduct of the shipping company preponderates the probability that only the first defendant shipping company is liable to the suit claim. Accordingly, the appeal is allowed, the decree of the trial Court dated 16.12.2002 in O.S.No.13078 of 1996 is modified and the first defendant / third respondent is liable to pay the plaintiffs the sum decreed by the trial Court, and the amount already deposited by the appellant is directed to be refunded. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To:

- 1.The III Fast Track-cum-Additional District and Sessions Judge,
City Civil Court, Chennai.
- 2.The Section Officer
VR Section
High Court, Madras.

+1cc to Mr.R.Karthikeyan, Advocate Sr.73856

+1cc to Mr.Nageswaran, Advocate Sr.73871

सत्यमेव जयते

A.S.No.1229 of 2004

ssi[col]
srg 09/04/2019

WEB COPY