

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 17.09.2018

DELIVERED ON: 19.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.1463 of 2002

S.Thangamuthu ... Appellant/Appellant/1st defendant

Vs.

1. United India Insurance Co. Ltd.
by its Divisional Manager, Namakkal
having Head Office at 24, Whites Road,
Madras 600 006.
2. Vaigai Traders,
29-B-1, Salem Road,
Namakkal
3. K.Durai Kasinathan
... Respondents/Respondent/Plaintiff and defendant 2 & 3

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 31.08.2001 passed in A.S.No.93 of 1998 on the file of the III Additional District Judge, Salem upholding the decree and judgment dated 31.08.1998 passed in O.S.No.401 of 1990 on the file of the Subordinate Judge, Namakkal.

For Appellant : Mr.Shivakumaran
For 1st Respondent : M/s Nageswaran Narchania
3rd respondent : Died

JUDGMENT

The first defendant in O.S.No.401 of 1990 on the file of the Sub Judge, Namakkal is the appellant herein.

2. The first respondent/plaintiff filed the above suit for recovery of a sum of Rs.41,085/- from the present appellant as well as Vaigai Traders (2nd respondent) together with interest. The suit was decreed as against which the present appellant filed first appeal in A.S.No.93 of 1998 before the III Additional District Judge, Salem. Both the courts below decreed the suit filed by the plaintiff.

3. The case of the first respondent/plaintiff in O.S.No.401 of 1990 on the file of the Sub Court, Namakkal is briefly as follows. M/s Vaigai Traders (2nd respondent) is doing business in selling of eggs with its registered office at Namakkal and has also taken a Marine Policy (Ex.A6) bearing No.170903/R3/1901/16/21/16/00013/89 with the plaintiff, the United India Insurance Company. It is an open policy covering risk upto Rs.10,00,000/- M/s Vaigai Traders despatched 1,10,000 eggs packed in plastic trays valued at Rs.53,900/- to M/s Lucky Traders, Villupuram through the carrier, the appellant/first defendant. The goods were sent by the appellant/first defendant through a lorry bearing registration No. TN27 X 1315 on 25.04.1990 and the lorry met with an accident on 25.04.1990 near Panruti, as a result of which, 85,000 eggs valued at Rs.39,095/- got damaged. The first respondent/plaintiff deputed Mr.Ayyappan (Pw2), a licensed surveyor to assess the value of loss. Accordingly, Pw2 assessed the value of loss at Rs.39,150/- and submitted his report dated 22.05.1990 (Ex.A9). Thereafter, a notice under Section 10 of Carriers Act was issued to the first defendant and since there was no response from him, the first respondent/ plaintiff settled the amount of Rs.39,150/- on 19.07.1990 to the second defendant and the second defendant executed a letter of subrogation and general power of attorney (Ex.A3) in favour of the first respondent/plaintiff, based on which the first respondent/plaintiff filed the suit against the defendants 1 to 3. The defendants 2 and 3, remained absent and were set exparte before the trial court.

4. The trial court framed the following Issues and Additional Issues.

1. Whether the suit is bad for non joinder of necessary parties?
2. Whether the interest rate claimed in the suit is usurious?
3. Whether the plaintiff is entitled to get the suit amount?
4. To what relief the plaintiff is entitled?

Additional Issue

1. Whether the suit is not maintainable?

5. The first defendant filed a written statement questioning the locus-standi of the plaintiff to file the suit. It is also contended by him that the accident took place only due to negligence on the part of the offending vehicle, which would be evident from the F.I.R (Ex.B1) and the extract of STC Register (Ex.B2) on the file of Judicial Magistrate No.1, Villupuram.

6. The trial court after full contest, decreed the suit directing the appellant/first defendant to pay a sum of

Rs.41,085/- together with interest at the rate of 18% p.a. on Rs.39,888/- from the date of plaint till the date of realisation. In the first appeal, the decree and judgment passed by the trial court in O.S.No.401 of 1990 on the file of the Sub Judge, Namakkal dated 31.08.1998 was upheld by the III Additional District Judge in A.S.No.93 of 1998 on 31.08.2001.

7. Now, the appellant/first defendant is before this court in the second appeal on the following substantial questions of law.

1. Even though the Honourable Supreme Court has held in the judgment reported in Union of India Vs. Sri Sarada Mills Limited (AIR 1973 Supreme Court 281) that the insurer is not entitled to sue in his own name on the principle of subrogation, are the courts below correct in law in holding that the suit filed by the insurance company alone is maintainable?

2. Are the courts below correct in law in holding that the letter of subrogation given by the insured is an assignment of a policy?

3. When the first defendant has produced materials to show that the damage and loss to the insured occurred only due to the negligence of a third party, who is not a party to the suit, are the courts below correct in law in making the first defendant liable just because he is the carrier?

8. Mr. Shivakumaran learned counsel for the appellant contended that since the accident took place due to the negligence on the part of the offending vehicle, the plaintiff/first respondent cannot proceed against him and claim the value of loss from him. He would further contend that the accident was beyond the control of the appellant and therefore, it is an act of God. Reliance was placed on the decisions in (i) Brakes India Ltd., Vs. M/s Bic Logistics Ltd reported in CDJ 2010 MHC 3413, (ii) The Glenmorgan Tea Estates Company a registered Partnership firm owner of Glenmorgan Tea Estates and another V. Philip Mathew reported in CDJ 2001 MHC 1002.

9. The position of law in respect of liability of common carrier for loss of damage to goods is well settled, that the liability of a carrier is more extensive and is also that of an insurer. It is relevant to extract Section 9 of the Carriers Act, which reads as follows-

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 container, 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.

This section clearly stipulates that it shall not be necessary for the plaintiff to prove that loss, damage or non delivery was owing to negligence or criminal act of the carrier, the servants or agents. The burden is upon the carrier to prove the loss, damage or non delivery was not due to negligence or criminal act of the carrier or the servant or agents. The learned counsel appearing for the appellant would contend that since the first defendant/appellant was able to establish that the negligence was not on his part by filing F.I.R. (Ex.B1) and the judgment in S.T.C.No.510 of 1990 (Ex.B2) on the file of Judicial Magistrate, Villupuram, the decree and judgment passed by the Sub Judge, Namakkal in O.S.No.401 of 1990 on 31.08.1998 has to be set aside.

10. The amendment in clause 17 of the Carriage by Road Act 2007 states that a common carrier shall be responsible for the loss, destruction, damage or deterioration in transit or non-delivery of any consignment entrusted to him for carriage, arising from any cause except the following, namely

- a] act of God
- b] act of war or public enemy
- c] riots and civil commotion
- d] arrest, restraint or seizure under legal process
- e] order or restriction or prohibition imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central Government or a a State Government authorised by it in this behalf.

11. The learned counsel for the appellant contended that the accident is purely a result of act of God. In Halsbury's Laws of England, Vol.8, 3rd Edition, Page 183 it is stated as under

"An act of God; in the legal sense of the term, may be defined as an extra ordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has

happened once, when it does not carry with it or import any probability of a recurrence (when, in other words, it does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental circumstance and it must not arise from the act of man".

What is urged by the learned counsel for the appellant is that all inevitable accidents must be taken as acts of God. According to him, since the appellant is not responsible for the accident, it has to be construed as act of God. I am unable to agree with him, because accidents may happen by reason of play of natural forces or by intervention of human agency or by both. It may be that in either of these cases, accidents may be inevitable. An act of God will be an extra-ordinary occurrence due to natural causes, which is not the result of any human intervention. Therefore, it cannot be held that even when the accidents are purely the result of acts of human agencies, it should be taken to be acts of God. The facts in the case in Brakes India Ltd. Vs. M/s Bic Logistics Ltd. reported in CDJ 2010 MHC 3413 (relied on by the counsel for the appellant) are that an unruly mob robbed the goods in the defendant's lorry and also murdered the driver and cleaner of the lorry. In such a situation, this court observed that if the acts of committing decoity and murder by the unruly mob, cannot be described as acts of 'Enemies of State' what else could be described so. In the instant case, it is a simple accident and it is also pertinent to point out merely based on the judgment passed by the criminal court, the civil court cannot hold that the carrier was not responsible for the accident. After all, the judgment passed by a criminal court is not binding on the civil court. Both the courts below have concurrently held that the non-delivery of goods to the consignee was owing to the negligence on the part of the carrier and this is a finding based on facts.

12. The learned counsel appearing for the appellant also relied on the decision in M/s Carborandum Universal Ltd. and another Vs. M/s M.G.International Transports GmbH, having their office at Germany, rep. by Local Agents, M/s Falcon Air Services (India) Pvt. Ltd. Teynampet, Chennai reported in CDJ 2014 MHC 5693, wherein it has been held thus.

It is also a settled proposition of law that if the insured has established that there was a damage of the consignment of goods, he would be entitled to claim damages, irrespective of the fact that at whose negligence, fault or carelessness, the damage had occurred. However, to exercise right of subrogation and claim damages, the insurance company should establish that the damage or loss was caused to the

consignment, only due to the negligence of the carrier, otherwise, the insurance company cannot claim damages from carrier of the consignment of goods."

In the instant case, the non delivery of goods was not disputed by the appellant. Further more, the facts in the cases referred to above are entirely different from the facts of present case. The loss of consignment by the assured and settlement of claim by the first respondent/plaintiff/ insurer by paying Rs.39,150/- is established by evidence. Since there is a presumption under Section 9 of the Carriers Act, it is not necessary for the plaintiff to prove further that the loss/damage was due to the negligence of the appellant or its driver in the instant case.

13. The 2nd respondent/2nd defendant had executed Special Power of attorney and a letter of subrogation in favour of the Insurance Company. The main intention was to enable the transferee to sue in his own name i.e. in the present case, the respondent/Insurance company, who is the transferee of the right under subrogation letter Ex.A3. Consequently, the first respondent/ plaintiff steps into shoes of the 2nd respondent/2nd defendant. Therefore, the suit filed by the first respondent/plaintiff is maintainable.

14. The first respondent/plaintiff in fact have included the 2nd respondent/2nd defendant as a party to the suit and they have further contended in the plaint that the 2nd defendant was impleaded as a party/defendant, as they were evading to join the plaintiff as co-plaintiff in filing the suit. It is fairly conceded by the learned counsel for the appellant that the appellant/first defendant is also a partner in the 2nd defendant company. Therefore, it is too much to expect the second respondent/second defendant to join plaintiff to file the suit.

15. The decision in M/s United India Insurance Company Limited by its Divisional Manager, Tuticorin Vs. 1.Muthulakshmi, 2.Radhakrishnan, 3.M/s Star Match Factory, a registered partnership firm by its partner, R.Selvaraj reported in 2003(1) L.W. 626 (D.B.) relied on by the learned counsel appearing for the first respondent/plaintiff would apply to the facts of the present case. It is relevant to extract para 8 of the aforesaid decision.

8. Though we are of the view that the learned Single Judge was correct in his view in the construction of the document Ex.A12, we hold that the learned Single Judge overlooked the fact that the plaintiff has included the third defendant in the array of parties to the suit and the plaintiff has also claimed in the plaint that the third defendant was impleaded as a party/defendant as it was evading to join the plaintiff as co-plaintiff in filing the suit colluding

with the defendants 1 and 2. The Kerala High Court, in a similar circumstance, in New India Assurance Co. Lt. V. Okay Transport Corporation (1991 ACJ 482) noticed the decision of the Supreme Court in Union of India V. SriSarada Mills Ltd. (AIR 1973 SC 281), particularly, the following passage to hold that such a suit is maintainable:-

" The defence of the Railway Administration was that the mill realised from the insurance company the damages and 'as such the plaintiff(meaning thereby the respondent mill) has no right to claim any such in this action'. If the specific plea of assignment had been taken in the written statement, the respondent mill would have impleaded the insurance company. The Court could have in those circumstances been in a position to afford full and complete relief to the parties".

We are in respectful agreement with the view expressed by the Kerala High Court. It is axiomatic that the Court has the power to afford full and complete relief to the parties when all parties are before the Court. Though the plaintiff should have impleaded the insured as a co-plaintiff, since the third defendant was not willing to join the insurance company as a co-plaintiff, the plaintiff will be taking a great risk if the third defendant was impleaded as a co-plaintiff or if the suit was instituted on the power of attorney executed in its favour by the third defendant. The third defendant also remained ex-parte in the suit as well as in the appeal before this court. We are therefore of the view that the court has the full power to do complete justice between the parties and the defence raised by the defendants 1 and 2 that the insured is not a co-plaintiff is hyper-technical as the insured is before the court though it figures as one of the defendants. We are of the view that when the court finds that all the parties, who are interested in the suit are before the courts, the court has the necessary power to mould and grant the necessary reliefs. The third defendant has not disputed that it had received the money from the plaintiff in settlement of its claim, but the act of the third defendant and its unwillingness to participate in the court proceedings show that it would not have joined the plaintiff as co-plaintiff. There can be no doubt that the court has the necessary power to grant a decree in favour of the third defendant and then direct the third defendant to pay the money realised out of execution of the decree to the plaintiff. Since the action of the third

defendant establishes that it was unwilling to participate in the court proceedings as a co-plaintiff, we are of the view that the interest of justice would be met by granting a decree in favour of the plaintiff against the defendants 1 and 2.

Thus, I hold that the suit filed by the first respondent/plaintiff is maintainable and there is no good ground to interfere with the concurrent findings rendered by the courts below.

15. In the result, the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mst

To

1. The III Additional District Judge, Salem.

2. The Subordinate Judge, Namakkal.

Copy to:

The Section Officer,
VR Section,
High Court, Madras.

+lcc to Mr.Shivakumaran, Advocate sr.no.65073

+lcc to M/s Nageswaran Narchania, Advocate sr.no.64789

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