

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

C.C.C.A. No.127 OF 2008

JUDGMENT:

Sole defendant in O.S. No.1351 of 1995 on the file of the I Senior Civil Judge, City Civil Court, Hyderabad, is the present appellant.

2. Aggrieved over the judgment and decree, dated 08.07.2003, whereby and where-under, the suit of respondents herein decreed with costs in favour of respondent No.1 - plaintiff No.1 and against the appellant - defendant for a sum of Rs.2,68,000/- with future interest at 18% per annum from the date of suit till the date of decree and at 6% per annum thereafter till realization, the present appeal is filed under Section 96 of the Code of Civil Procedure, 1908.

3. Heard Sri B. Vijaysen Reddy, learned counsel for the appellant - defendant. None appears for the respondents - plaintiffs though, service was completed on them.

4. The appellant herein is the defendant in the aforesaid suit, while respondent Nos.1 and 2 are plaintiffs.

5. For the sake of convenience, the parties herein are referred to as they were arrayed in the Original Suit.

6. Though, the plaintiffs were numbering two, but substantially, the claim was made by plaintiff No.1 - M/s. National

Insurance Company Limited since it paid the amount of Rs.2,68,000/- towards the value of two cases out of six cases of electronic goods sent through the consignment by plaintiff No.2 - M/s. Bharat Electronics Limited, entrusting the goods to the defendant - M/s. Patel Roadways Limited. Plaintiff No.1 since issued a marine policy to plaintiff No.2 for the consignments dispatched by it for the period from 01.04.1992 to 31.03.1993 covering the risk of the suit consignment, having found at the time of delivery of consignment by the defendant only four cases were delivered, whereas two cases were found missing during transit bearing Nos.1087 and 1089, under the insurance coverage paid the said amount to plaintiff No.2, and thereby intended to recover the same with interest at 18% per annum from the date of suit attributing negligence to the defendant for the loss of two cases.

7. Certain details are required to advert to, to adjudicate upon the controversy in the instant appeal.

a) Plaintiff No.2, in fact, consigned six cases of electronic goods of the value of Rs.7,50,000/- with the defendant on 31.10.1992 to transport them from Secunderabad to Bombay. The defendant was required to deliver them to the consignee - M/s. Controller of Warehousing Naval Stores Depot, Ghatkopar West Coast, Bombay. When the six cases were entrusted at the time of consignment on 31.10.1992 under lorry receipt No.218319 marked as Ex.A-2, the goods were in perfect condition. Out of six cases, two cases were

found missing during transit. Thus, shortage of the two cases occurred while consignment was in the custody of the defendant's carrier. The goods were landed on 30.10.1992.

i) In fact, according to the plaintiffs, the defendant carrier confirmed the short delivery of the goods by its letter, dated 28.12.1993 under Ex.A-3, which is termed as open delivery certificate. The other four cases were delivered on 25.11.1993.

ii) While the things stood thus, plaintiff No.2 - consignor laid a claim on 06.12.1993 against the defendant carrier. Since the defendant has not paid any amount, plaintiff No.2 made a claim with plaintiff No.1 - Insurer under the insurance coverage. Plaintiff No.1 having observed due formalities settled the claim of plaintiff No.2 for Rs.2,68,000/-.

iii) It is also averred by plaintiff No.1 that after payment to plaintiff No.2, it has also subrogated with the rights and remedies under Section 69 of the Indian Contract Act, 1872, and also under the deed of Special Power of Attorney - cum - Letter of Subrogation executed by plaintiff No.2 in its favour to enforce the claim against the defendant, claiming that the loss occurred subsequent to the entrustment of consignment to the defendant at Secunderabad for the safe delivery at Bombay, the defendant is liable for negligence and mismanagement and also mishandling by its employees. Despite

repeated demands, the defendant came forward to pay only 15% of the suit claim, which the plaintiff No.1 refused to receive and laid the suit.

iv) The plaintiffs also averred that the terms and conditions printed on the lorry receipt were not binding on them including the term “OWNERS RISK” as there is no special contract to that effect.

v) Plaintiff No.1 also claimed that plaintiff No.2 is made as a pro-forma party in view of the Special Power of Attorney - cum - letter of subrogation executed by plaintiff No.2 in its favour and sought to decree the suit.

b) The sole defendant filed written statement. It did not dispute the 2nd plaintiff booking the consignment under Ex.A-2, but raised the ground that the consignment was booked at ‘owners’ risk’ as printed on Ex.A-2. The other allegations made by the defendant are, that the consignment was not properly packed in accordance with the standard packing and, therefore, the consignment could not withstand the jolts and jerks, and that missing of two cases was neither willful nor wanton but due to the reason beyond its control; that the consignment in question has been insured by plaintiff No.1, who has to reimburse the loss of goods and, therefore, it is not liable to pay any amount.

i) The defendant’s main resistance is, that the Court at Bombay has jurisdiction to try the dispute as its head office is situated at Bombay and, thus, questioned the jurisdiction of a Civil Court at Hyderabad.

ii) Concerning its offer to pay 15% of the suit claim as alleged by plaintiff No.1, the defendant would state that though, it was not liable to pay, it offered to pay 15% of the suit claim, and the terms mentioned in Ex.A-2 are legal and binding on the plaintiffs and, therefore, sought to dismiss the suit.

iii) The defendant also disputed the cause of action to file the suit and also took the plea that the claim is barred by limitation and the plaintiffs are not entitled to principal amount or interest thereon and for costs and claim of interest at 18% per annum is arbitrary.

8. Basing on the aforesaid pleadings, the trial Court settled the following four issues:

“Whether the plaintiff is entitled for recovery of the suit amount?

Whether this court has got jurisdiction to try this case?

Whether the claim of interest by plaintiff is arbitrary and illegal?

To what relief? ”

9. During trial, Senior Assistant from the plaintiff No.1's company himself examined as PW.1 and exhibited Exs.A-1 to A-13. On behalf of the defendant, no evidence was let in either oral or documentary.

10. The learned trial Court has taken up the issue relating to the jurisdiction of Civil Court at Hyderabad in the first instance. It has referred to Ex.A-2, the lorry receipt, dated 31.10.1992. The learned

trial Court observed the expression occurring in Ex.A-2 on the top “Subject to Bombay Jurisdiction only”, in the light of which, the defendant taken the stand that Courts at Bombay alone vested with jurisdiction and plaintiff No.2, at the time of entrusting the consignment, agreed to the jurisdiction of the Courts at Bombay. The learned trial Court then referred to the ruling in **M/s. Patel Roadways Ltd., v. M/s. Prasad Trading Company Ltd.**¹, observing that in the instant case, the consignment was booked at Secunderabad, the office is at Secunderabad and entrusting the goods to the defendant at Secunderabad, all lead to that the cause of action arose at Secunderabad, and though, the principal office of the defendant was located at Bombay, no cause of action arose at Bombay, and since the ruling in **Patel Roadways Ltd.**¹ is to the effect that Court at such place where the cause of action arose would have jurisdiction and parties cannot confer jurisdiction on the court where the corporation has its principal office, recorded a finding that the Court at Hyderabad has got jurisdiction to entertain the suit, and thereby rejected the stand taken by the defendant. Thus, held the issue in favour of the plaintiffs.

i) On issue No.1, referring to the evidence of PW.1, the surveyor’s report under Ex.A-6, dated 26.11.1993, Ex.A-8 notice for settlement of claim got issued by plaintiff No.2, dated 20.09.1994 and the defendant not responding to it despite receipt of the same under

¹. AIR 1992 SC 1514

Ex.A-9 acknowledgment, that there was valid policy issued by plaintiff No.1 in favour of plaintiff No.2 for the value of Rs.26.00 Cores for the consignments during the period from 01.04.1992 to 31.03.1993 under Ex.A-10, that the payment was made by plaintiff No.1 to plaintiff No.2, the letter of subrogation and the Special Power of Attorney, dated 25.10.1990 and the notice got issued by plaintiff No.1 under Ex.A-11, dated 20.12.1994 to the defendant demanding him to pay the amount, and that the defendant by its reply under Ex.A-12, dated 21.12.1994 disowning its liability and finding that nothing is brought out in the cross-examination of PW.1 by the defendant and the suggestion made to PW.1 that there was no negligence on the part of the defendant in effecting the delivery of consignment was denied by PW.1 and Exs.A-1 to A-3 clearly prove the entrustment of six cases and Ex.A-3 showing that only four cases were delivered and Ex.A-10, policy, issued by plaintiff No.1 to plaintiff No.2 covers the entire suit consignment basing on Ex.A-13 and also finding that the defendant did not choose to lead evidence in rebuttal despite plaintiff No.1 proving the claim, held the issue in favour of the plaintiffs. Incidentally, the learned trial Court also drawn the presumption under Section 9 of the Carriers Act, 1865, in arriving at that due to negligence of the defendant, loss of the goods occurred and rejecting the stand of the defendant that the consignment was 'subject to owners risk' as printed on Ex.A-2, held the said issue in favour of the plaintiffs, recording a finding that the defendant is liable to pay the suit claim.

ii) On issue No.1 regarding the claim for interest made by plaintiff No.1, since the defendant did not specifically put forth any version as to the rate of interest between the parties and the interest at 18% per annum claimed by plaintiff No.1 was vaguely denied as arbitrary, illegal and untenable, held that the defendant is liable to pay interest at 18% per annum from the date of suit till passing of the decree and subsequent interest at 6% per annum till realization.

11. Aggrieved of the aforesaid judgment and decree, the defendant preferred the present appeal.

12. In the grounds of appeal, the defendant as appellant reiterated the defence taken in the written statement, agitating that the trial Court, somehow, overlooked to see that the consignment was not properly packed according to the standard package and, as such, the consignment could not withstand the jolts and jerks, and that missing of two cases was beyond the control of the defendant's carrier and consignment was booked 'at the owners risk' and that the Court at Bombay only has jurisdiction and the trial Court, somehow, sidelining all these important aspects, simply carried away by what has been stated by PW.1 and, therefore, sought to set aside the judgment and decree under challenge.

13. The submissions made by the learned counsel for the appellant - defendant, Sri B. Vijaysen Reddy, are in tune with the

grounds of appeal which contentions were even made before the trial Court, on which there has been adjudication by the trial Court.

14. In view of the submissions made by the learned counsel for the appellant, the following points would arise for determination:

- (i) Whether the Civil Court at Hyderabad has no jurisdiction to entertain the suit?
- (ii) Whether respondent No.1 - plaintiff No.1 is entitled to the suit claim?
- (iii) Whether the judgment and decree under challenge are unsustainable?
- (iv) To what other relief, if any, to which the appellant – defendant is entitled?

Point No.(i)

15. So far as the jurisdiction issue is concerned, it is no doubt true, Ex.A-2, lorry receipt contains the printed matter 'subject to Bombay jurisdiction only', but, when examined intrinsically, the fact-situation occurring in the instant case, the consignment was at Secunderabad and the goods were entrusted to the defendant at Secunderabad, where the branch office of the defendant is located and no part of cause of action did arise at Bombay. In fact, Ex.A-2 is only a lorry receipt and there is no special contract entered into by the parties as to the jurisdiction of a particular Court in case a dispute arises. In such an event, certainly, the stand taken by the defendant is unsustainable.

i) A similar situation arose in **M/s. East India Transport Agency, Hyderabad v. National Insurance Company Limited**².

When a similar question arose, it was referred to the Full Bench of this Court. The reference was answered holding that the Courts at Hyderabad have jurisdiction though, lorry receipt in that case stipulated a specific term that “Courts in Calcutta only have jurisdiction to entertain the suit” and since the said condition was not specifically brought to the notice of the consignee or insurer, a third party is not bound by it. What has been laid down by the Hon’ble Full Bench of this Court in paragraph No.21 is relevant for the present purpose. The Hon’ble Full Bench observed thus:

“21. From the above discussion, we approve of the decisions of Ramaswamy, J. in *M/s. Patel Roadways Pvt. Ltd. v. The Republic Forge Co. Ltd.* ((supra) and of Rama Rao, J. in *M/s. B. A. Transport Co. v. Bankatlal* (1982) 1 APLJ 288 (supra) that in the event of entrustment of goods to a carrier under a consignment note and a claim arising out of such a contract, the third party to the consignment note is not bound by the terms and conditions contained in the consignment note limiting the jurisdiction of the Court to decide the dispute unless it is shown that such a third party's attention is specifically drawn to such a clause contained in the consignment note and he is made aware of its implications. Such a term excluding the jurisdiction the Court cannot bind a third party unless it is shown that he acted upon the contract consciously knowing the effect and implications of such a contract. The decision in

². 1990 (3) A.L.T. 481 (F.B.)

Rajarao v. A. P. T. Company ((1969) 2 APLJ 151) (supra) is distinguishable on the facts of this case inasmuch as in that case, M/s, Dumex and Co., was held to be aware of the term of the contract with regard to the jurisdiction of the Court and that the plaintiff who has stepped into the shoes of M/s. Dumex and Co., is bound by such a term. In the instant case, inasmuch as a part of cause of action has arisen at Hyderabad, we hold that the decision of the learned Xth Assistant Judge holding that he has got jurisdiction to entertain the suit is perfectly correct and does not call for any interference.”

Therefore, so far as jurisdiction aspect is concerned, the stand taken by the appellant - defendant is unsustainable in view of the aforesaid decision.

Point No.(ii)

16. In fact, the Hon’ble Full Bench decision in **M/s. East India Transport Agency²**, would also answer the present point. When examined carefully, the defence offered by the defendant has been, firstly, the consignment was not packed in accordance with the standard package. Perhaps, the defendant intends to say that the packing is not as per instructions for standard packing, but the said ground is without any substance as it stood unsubstantiated. The further ground, that on account of improper package, due to jolts and jerks, two cases were missing cannot at all be countenanced. The goods supplied through the consignment were electronic goods. When four cases out of six cases were delivered safely, it is strange and un-understandable as to how the remaining two cases were found

missing. The said stand taken by the defendant, *ex facie* reflects that it is wholly artificial and unnatural and only to wriggle itself out of the liability, has come forward with such a stand. This apart, when the evidence of PW.1 is clinching to establish that at the time when entrustment was made under Ex.A-2 at Secunderabad, six cases were entrusted, and under Ex.A-3, open delivery certificate, only four cases were found and delivered to the consignee is sufficient to hold that there is no proper accounting for by the defendant. This apart, when plaintiff No.2 got issued a legal notice to the defendant, despite receipt of the same, the defendant did not answer to it. Thus, an inference adverse to its stand now taken has to be invariably drawn. Thus, the inescapable inference is that there was no proper explanation from the defendant for the loss of two cases as the defendant maintained silence.

i) Yet another circumstance that stands adverse to the case of the defendant is that the defendant came forward to pay 15% of the suit claim when plaintiff No.1 got issued notice to settle the claim, which, certainly, disfavours the defendant and exposes the falsity in the stand that though, the defendant is not liable to pay the suit claim, still, it came forward to pay 15% value of the goods in two cases. When the *lis* involves civil liability, it is unexpected of the defendant to come forward with such an offer out of gratis. Thus, the defence put forth by the defendant in resisting the suit claim is totally artificial without any substance. Therefore, the denial has to be viewed as a

vague denial and the defendant, therefore, cannot escape its liability.

In the present context, it would be apt to refer to a ruling in **Bond Food Products Pvt. Ltd. V. Planters Airways Ltd**³. A Division Bench of Hon'ble Madras High Court held that when carrier does not appoint its own surveyor and fails to prove that there was no negligence, the report of the Surveyor appointed by the Insurance Company is binding on the carrier and the carrier is liable for damages. In the present case, as observed in the above, the appellant - defendant did not at all let in any evidence either oral or documentary. It is also not its case that it has got appointed its own surveyor. The suit claim is based on the report of the surveyor appointed by plaintiff No.1. Further, no rebuttal evidence is occurring in the present case. Hence, the finding recorded by the trial Court does not suffer from any illegality warranting interference.

Point No.(iii)

17. Since point Nos.(i) and (ii) are held against the appellant – defendant, the judgment and decree passed by the trial Court is affirmed in all respects.

Point No.(iv)

18. The present appeal fails and, accordingly, dismissed. Both parties shall bear their own costs.

³. 2006 ACJ 24

As a sequel thereto, miscellaneous applications, if any pending in the appeal, stand closed.

A. SHANKAR NARAYANA, J

FEBRUARY 14, 2018.
GBS/Mgr

