**HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

**C.C.C.A.No.146 of 2001**

**JUDGMENT:**

The unsuccessful plaintiffs preferred this instant appeal aggrieved by the decree and judgment dated 29.12.2000 in O.S.No.868 of 1992 on the file of Senior Civil Judge, City Civil Court, Hyderabad whereby the learned Judge dismissed the suit for recovery of sum of Rs.86,213/-.

2) The parties in the appeal are referred as they were arrayed before the trial Court.

3) The factual matrix of the case is thus:

a) The 1st plaintiff is the Insurance Company. Apart from General Insurance it also deals with the insurance of goods in transit. In the said course of business, it issued Marine Policy in respect of suit consignment and the said consignment was entrusted to the defendant—common carrier at Bombay through the agents of 2nd plaintiff for safe carriage to Hyderabad. The suit consignment was delivered in a damaged condition. Therefore, the 2nd plaintiff preferred claim against defendant by way of letter dated 04.04.1990 towards value of damage caused to the consignment. Having acknowledged the same the defendant issued damage certificate dated 05.04.1990 and the factum of damage was also noted on the reverse of lorry receipts issued by the defendant. It is the case of plaintiffs that damage was caused while consignment was in the custody of defendant. Since the defendant failed to make the loss good, the 2nd plaintiff approached the 1st plaintiff—insurer for settlement of the claim which in turn after due enquiry and assessing the actual loss with the aid of independent surveyor paid a sum of Rs.86,213/- to the 2nd plaintiff subrogating its rights and remedies against the defendant-carrier. Thereafter, the 1st plaintiff made several reminders to the defendant regarding damage of suit consignment and its loss, but proved futile.

Hence, the suit.

b) The defendant filed written statement. While admitting entrustment of suit consignment it, however, denied damage due to defendant's negligence and its liability. It is the specific case of the defendant that goods were delivered subject to *owner's risk* and they are not liable for any loss and suit is not maintainable. He thus prayed to dismiss the suit.

c) Basing on the above pleadings, the trial Court framed the following issues.

*1. Whether the plaintiffs are entitled for suit amount?*

*2. Whether defendant is entitled for compensatory costs as claimed?*

*3. To what relief?*

d) During trial, PWs.1 and 2 were examined and Exs.A1 to A13 were marked on behalf of plaintiffs. DWs.1 and 2 were examined and no documents were adduced on behalf of defendant.

e) On appreciation of both oral and documentary evidence, the Trial Court observed that plaintiffs miserably failed to prove that the goods were damaged during the transit or when the goods were in the custody of the defendant and dismissed the suit.

Hence, the appeal by plaintiffs.

4) Heard argument of Sri Kota Subba Rao, learned counsel for appellants. Notice serviced on the respondent, but there is no representation on his behalf.

5) Fulminating the judgment of the trial Court, learned counsel for appellants would argue that the second plaintiff entrusted the goods to defendant in perfect condition for transportation from Bombay to Hyderabad and the goods were damaged in transit and Ex.A3—damage certificate is issued by the defendant to 2nd plaintiff. Further, the surveyor assessed the damages and submitted report. Thereafter, the 1st plaintiff being the insurer paid the suit amount to 2nd plaintiff—insured and obtained subrogation certificate and filed the suit against defendant after issuing claim notice. In spite of all these facts the trial Court dismissed the suit erroneously holding that the plaintiffs failed to prove the damage at the first instance and nextly, that the damage was occurred during the transit so as to fix the liability on the defendant. It further erroneously held that plaintiffs failed to prove that Ex.A3—damage certificate was issued by the defendant as defendant categorically denied issuance of said certificate. Learned counsel vehemently argued that when damage is established, there is no necessity to prove negligence on the part of common carrier as negligence can be presumed. He relied upon the following decisions.

1. ***Bond Food Products Private Limited vs. Planters Airways Limited***[1]
2. ***Transport Corporation of India vs. National Insurance Company Limited***[2]
3. ***M/s. Economic Roadways Corporation Limited, Hyderabad vs. National Insurance Company, Hyderabad***[3]

He thus prayed to allow the appeal and decree the suit.

6) The point for determination in this appeal is:

*"Whether plaintiffs could establish that consignment was damaged during the transit so as to presume negligence on the part of carrier and fix liability on the defendant?"*

7) **POINT**: Plaintiffs' case briefly is that suit consignment was delivered in a damaged condition by the defendant-carrier and as the damage to the consignment was occurred during transit, the defendant shall be liable to pay the suit amount to the 1st plaintiff who subrogated to the rights and remedies of the 2nd plaintiff. The claim of the defendant is that suit consignment was booked *at owner's risk* and therefore, even if that was damaged, the defendant cannot be held responsible on the footing of subrogation. Thus, as stated supra, the nub of the issue is whether the damage to the suit consignment was occurred during the transit or atleast during the period when the consignment was in the custody of the defendant. If the plaintiffs could able to establish this fact presumption of negligence can be drawn against defendant under Section 9 of Carriers Act, 1865. The admitted facts are that 1st plaintiff is the insurer and the 2nd plaintiff is insured in respect of suit consignment. The defendant is common carrier. Ex.A1 is Marine Insurance Policy in respect of suit consignment dated 22.01.1990 which was

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[1] 2006 ACJ 24 (MADRAS)
[2] 2013 (6) ALD 455
[3] 2002 (1) LS 128 (DB)

in force for one year covering the date of delivery of consignment in damaged condition. The 2nd plaintiff through its agents booked the consignment and entrusted it at Bombay to be transported to Hyderabad on 22.03.1990 and the consignment was delivered at Hyderabad on 24.03.1990 by the defendant. It is also an admitted fact the Customs Officials after loading the consignment into trucks put their seals and after reaching destination removed the seals. In this backdrop of admitted facts, it is to be seen whether the consignment was damaged even before it was loaded in the trucks at Bombay or was it damaged during the transit. It may be noted that the defendants repudiated its liability primarily on the ground that consignment was booked "*at owner's risk*". However, the trial Court rightly discarded this plea on the observation that defendant failed to produce the copy of lorry receipt to prove the existence of "*at owner's risk*" clause in the contract. The trial Court further observed that even if such clause is there, the common carrier cannot plead that goods were transported *at owner's risk* and any term or condition in the lorry receipt, delivery challan and invoice that the goods were transported *at owner's risk* is against the provisions of Carriers Act and do not bind the plaintiffs. This observation of the trial Court is perfectly right.

8) In similar circumstances, a Division Bench of the High Court of Madras in ***Assam Bengal Roadways (P) Limited vs. Hindustan Photo Films Manufacturing Company Limited***[4] has observed that though Exs.A7 and A3 in that case would disclose the condition that the consignment was booked at

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[4] 1988 (2) ACC 391 (Madras)

owner's risk, yet, it is well settled any contract exonerating the carrier from liability for negligence on his part or on the part of his servant is invalid since it is opposed to the provisions of Section 8 of the Carriers Act which lays down that every common carrier is liable to the owner for loss or damage to any property delivered to such carrier to be carried.

9) From the above precedential jurisprudence it is clear that defendant cannot repudiate its liability under the shelter of "*at owner's risk*" clause in view of provisions contained under Section 8 of Carriers Act. However, before invoking Section 8 and the presumption under Section 9, it must be established that the damage was caused during the transit or when the goods were in the custody of carrier. The presumption comes into play only upon proof of damage while the consignment was in the custody of carrier. As per the plaintiffs, the damage to some of the goods from out of the suit consignment was detected on 24.03.1990 and 26.03.1990 at the time of delivery. However, the 2nd plaintiff did not choose to obtain any damage certificate or open delivery certificate immediately at the time of delivery. Further, though it is the case of the plaintiffs that at the time of delivery Customs Authorities endorsed on the lorry receipts about the damage condition of certain goods, plaintiffs have not produced any lorry receipts to prove the endorsement said to have been made by the Customs Authorities regarding damaged condition of the goods. On the other hand, the facts would show that consignment was loaded at the dock yard and the Customs Authorities verified the consignments and sealed the lorries after covering

with tarpaulin and thereafter on arrival at Hyderabad, again the Customs Authorities verified the seals and opened them for unloading.

10) It is nobody's case that the damage was caused by any accident to the vehicle. Further, the plaintiffs did not examine the persons who were present at the time of loading and unloading to prove the condition of suit consignment at both ends. Of course, PW1 denied the suggestion that goods which were loaded at Bombay were unloaded in the same condition at Hyderabad. Though such a denial was made, from the facts noted supra, it will not give scope for a conclusion that damage to the part of the consignment was occurred only during the transit or while the consignment was in the custody of defendant/carrier. Therefore, as rightly contended by the defendant, absolutely there is no possibility to cause damage to the suit consignment during the transit unless an accident was occurred to the truck which is nobody's case.

11) Then, Ex.A3 is concerned, the defendant staunchly denied having issued the same. As rightly observed by the trial Court, Ex.A3 was dated 05.04.1990 which was said to be issued pursuant to Ex.A4—letter dated 04.04.1990 sent by 2nd plaintiff to the defendant's office at Bombay. Ex.A5 is the postal acknowledgement under which defendant received the original of Ex.A4—letter. Ex.A5 would show that original of A4 was delivered to defendant on 09.04.1990. That being the case, the defendant issuing the damage certificate under Ex.A3 even on a prior date i.e. 05.04.1990 appears to be highly improbable nay impossible. Therefore, there is some force in the contention of defendant that he did not issue Ex.A3 and plaintiffs could not

establish by acceptable evidence that Ex.A3 was indeed issued by the defendant. Even assuming for argument sake that Ex.A3 was issued by the defendant, it would not fasten liability on the defendant because damage certificate was issued only on the request of 2nd plaintiff to put-forth the claim against consignor or insurance authority and without holding any responsibility on the defendant. So, at the outset, the plaintiffs failed to establish that the damage was caused during the transit or when the consignment was in the custody of defendant. Therefore, 1st plaintiff cannot lay claim against defendant merely on the ground of subrogation. Learned counsel for appellants cited certain decisions. However, they do not advance the cause of appellants.

12) In ***Bond Food Products***' case (1 supra) the defendant/carrier has not disputed the factum of accident and consequent damage to the consignment but challenged the suit filed by the Insurance Company on other grounds such as jurisdiction of the Court, failure of plaintiff to prove the Insurance Policy, failure to prove quantum of compensation etc. Setting aside its contention the suit was decreed.

In the instant case, the facts are different and the main contention of the defendant is that no damage was occurred during the transit.

13) In ***Transport Corporation of India***'s case (2 supra) also the facts were different. The plaintiffs could establish that some of the packages of the soya milk which were transported were cut, broken, bursted, leaking and having

foul smell at the time of delivery and thus it was established by the plaintiffs that the damage was caused at the end of carrier.

14) ***M/s. Economic Roadways Corporation***'s case (3 supra) is also similar type of case where negligence was established.

Hence, the cited decisions can be distinguished on facts.

15) In the result, CCCA is dismissed by confirming the judgment of the trial Court in O.S.No.868 of 1992. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

**U. DURGA PRASAD RAO, J**

Date: 07.06.2018
Murthy