

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

**RSA No.3074 of 2015 (O&M)
Date of Decision.14.12.2018**

Union Roadways Ltd.

....Appellant

Vs

New India Assurance Co. Ltd. and another

...Respondents

2. RSA No.5102 of 2016 (O&M)

New India Assurance Co. Ltd.

....Appellant

Vs

Union Roadways Ltd. and another

...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. S.K. Guleria, Advocate
for the appellant in RSA No.3074 of 2015.

Mr. Vinod Gupta, Advocate
for the appellant in RSA No.5102 of 2016.

-.-

AMIT RAWAL J. (ORAL)

C.M. No.13257-C of 2016 in RSA No.5102 of 2016

For the reasons stated in the application, delay of 130
days in re-filing of the appeal is condoned.

Application is allowed.

Main cases

Notice of motion in both the appeals.

Mr. S.K. Guleria, Advocate accepts notice for respondent
No.1 in RSA No.5102 of 2016 and Mr. Vinod Gupta, Advocate
accepts notice for respondent No.1 in RSA No.3074 of 2015.

This order of mine shall dispose of two appeals bearing
No.3074 of 2015 and 5102 of 2016 arising out of decision of Civil

Suit No.2848 of 2009 titled as “New India Assurance Company limited and another Vs. Union Roadways Ltd.

In the aforementioned suit, the insurance company sought recovery of ₹3,35,750/- along with interest @18% per annum on the premise that plaintiff No.2, Associated Cement had placed an order consisting of certain engine parts like sealing set, cap gasket, retaining ring and progressive distributor etc., which was dispatched from Germany against Invoice No.851608 and thereafter, through carrier M/s Union Roadways Limited-defendant. The goods were stated to have received at the insured's premises on 18.03.1999. It was alleged that due to negligence of carrier and its employees, consignment was short. Since the insurance company had indemnified the consignment on appointment of the surveyor and discharged the liability by paying claim and in this regard, sought recovery of the aforementioned amount.

Defendants opposed the suit by raising the objection of non-compliance of provisions of Section 10 of the Carriers Act, much less, compliance of Section 3 of the aforesaid Act. Even objection qua authority of the insurance company in the absence of power of subrogation was raised. On merits, it was stated that consignment was delivered in packed condition to the consignee to which plaintiff No.2 did not raise any objection.

Since the parties were at variance, the trial Court framed the following issues:-

“1. Whether the plaintiffs are entitled for recovery of ₹3,35,750/- along with 18% interest per annum from the

date of filing of the suit till the payment is made? OPP

2. Whether the suit is bad for want of non-compliance of Section 10 of the Carriers Act 1865? OPD

3. Whether the present court has no territorial jurisdiction to try and decide the case as alleged? OPD

4. Whether the suit is bad for non-joinder of necessary parties as alleged? OPD

5. Whether the suit is bad for want of non compliance of Section 3 of the Carriers Act as alleged? OPD

6. Whether the present suit is bad for want of non-compliance of Section 41 of Indian Contract Act as alleged? OPD.

7. Whether the suit is time barred? OPD

8. Whether the plaintiffs are stopped by their act and conduct from filing the present suit as alleged? OPD.

9. Relief.”

The plaintiff-insurance company examined one R.S. Arora, Surveyor as PW2, Santosh Kumar, Divisional Manager as PW1 and tendered into evidence documents Ex.P1 to P13.

On the other hand, defendant examined their Branch Manager and closed the evidence.

The trial Court on the basis of the evidence brought on record as noticed above, decreed the suit but did not grant the custom duty. In these circumstances, two appeals were filed before the lower Appellate, which were dismissed.

Mr. S.K. Guleria, learned counsel appearing for the

appellant in RSA No.3074 of 2015 submitted that the judgments and decrees of the Courts below are not sustainable in the eyes of law, as the plaintiff failed to discharge onus as no witness from the consignee i.e. plaintiff No.2 has been examined. In these circumstances, defendants have been deprived right of cross-examination. The goods were opened after five days in the absence of the defendant. Surveyor did not associate the carrier, therefore, the report was not per se admissible. Ex.P7 showing shortage of 40 KG has not been proved as it was only tendered nor was signed by the carrier.

Per contra, Mr. Vinod Gupta, learned counsel appearing on behalf of the appellant-insurance company in RSA No.5102 of 2016 submitted that the documents were brought on record and therefore, objection qua their admissibility cannot be taken at the stage of second appeal. The surveyor report Ex.P8 has gone un rebutted as despite extensive cross-examination, nothing contrary surfaced. Letter of subrogation has also been proved on record. While settling claim of plaintiff No.2 the element of custom duty has erroneously been omitted by Courts below, thus, there is illegality. There was an intentional negligence on the part of the carrier, therefore, Courts below ought to have decreed the suit in toto instead of ₹1,96,097/- along with interest @6% per annum.

I have heard learned counsel for the appellant in both cases, appraised the paper book and of the view that there is force and merit in submission of Mr.Guleria and appeal filed by the appellant-defendant is liable to be allowed whereas appeal of the insurance company is liable to be dismissed on account of following reasons:-

(i) Mere exhibition of document does not dispense with its proof. Concededly, documents have been tendered into evidence but no witness of plaintiff No.2, consignee has been examined. Defendants have been deprived of right of cross-examine to discard negligence.

(ii) Surveyor did not examine the consignor. No explanation has come forward as to how the goods were opened five days after receipt to the consignee. It is not the case of the consignee that packing of the goods were broken or in damaged condition. The items as noticed above were original parts and could easily be whisked away by any of the persons in charge of the consignment lying in the premises of plaintiff No.2. Such loss remained unestablished and therefore, question of fastening liability upon the carrier did not arise.

(iii) Custom duty cannot be part of insurance company and rightly so discarded by the Courts below. In my view, plaintiff-insurance company has failed to prove negligence of the carrier.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918

would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the

Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

As an upshot of my finding, judgments and decrees of the Courts below suffer from illegality and perversity and the same are hereby set aside. Consequently, RSA No.3074 of 2015 is allowed and RSA No.5102 of 2016 is dismissed.

(AMIT RAWAL)
JUDGE

December 14, 2018

Pankaj*

Whether Reasoned/Speaking Yes

Whether Reportable No