

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :05.12.2018

Delivered on: 16.04.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

AS.No.1079 of 2007

Janatha Roadways Private Limited
250, Thambuchetty Street,
Chennai-600 001. ...Appellant / Defendant

Vs

1. Hindustan Motors Limited,
Chennai Car Plant, Adigathur,
Taluk & District Tiruvallur, T.N.

2. The Oriental Insurance Company Limited,
Regd. Office: Oriental House,
25-27 Asaf Ali Road,
New Delhi- 110 002. ...Respondents / Plaintiff

PRAYER:Appeal is filed under section 96 of the Civil Procedure Code praying to set aside the judgment and Decree dated 1.10.2004 in O.S.No.124 of 2001 passed by the Court of Additional District Judge, Fast Track Court No.V, Chengalpattu at Tiruvallur.

For Appellant : Mr. Rajendra Prasad Tayal

For Respondents : R1- No appearance
R2- M/s. Nageswaran and
Naricharia

JUDGMENT

The defendant is the appellant before this Court. The suit is filed for recovery of a sum of Rs.8,89,235/- together with interest @18% per annum from the date of Plaint till the date of realization. The parties are referred to in the same litigative status as in the suit.

2. Plaintiffs' Case:

2.1 It is the case of the plaintiffs that on 16.02.1999, the 1st plaintiff's Chennai Car Plant had entrusted to the defendant

at Adhigathir Village, two diesel cars and two petrol cars to be delivered to M/s.Cama Motors Limited at Ahmedabad. The said consignment was to be transported through a closed container lorry which belonged to the defendant bearing Registration No.HR 38C 4181. The terms of the despatch was that payment was to be on a delivery basis. The total value of the invoice was a sum of Rs.28,35,459.92p. The lorry had left Thiruvallur Car Plant on the very same day i.e., on 16.02.1999. The consignment was insured by the 2nd plaintiff under the Marine Cargo- Inland Risk cover. The sum assured was Rs.100 crores.

2.2. The plaintiffs would further submit that on 17.02.1999, when the lorry had neared Banawikralu Hoshali Police Station, it collided head on with the lorry traveling in the opposite direction and bearing Registration No.TN 38A 5616. The container lorry was extensively damaged and on account of the impact, the consignment, viz; the CARS were also extensively damaged and the 1st plaintiff was constrained to recall the consignment. The 1st plaintiff had reported the damage to the 2nd plaintiff on 31.07.1999 and ultimately, after inspection by the Surveyor, the damage was assessed at a sum of Rs.8,65,560/-.

2.3. The 2nd plaintiff settled the claim of the 1st plaintiff by paying a sum of Rs.8,65,560/- on 06.10.1999. The said sum was claimed from the defendant as the 1st plaintiff had subrogated the claim to the 2nd plaintiff vide a letter of subrogation and special power of attorney dated 08.12.1999. The plaintiffs would contend that the damage was only on account of negligence on the part of the defendant and the defendants were guilty of a breach of their duty to safely carry the consignment. The defendant was liable to pay the said sum. They therefore instituted the suit O.S.No.124 of 2001 on the file of the Subordinate Judge, Thiruvallur, later Additional District Judge, FTC V, Thiruvallur.

3. Written Statement of the defendants:

3.1. The defendant came forward with the following defence: The accident was not their fault. It was well open to the plaintiffs to claim damages from the Insurance Company and the Owner of the offending vehicle namely, the lorry bearing Registration No.TN 38A 5616 and that therefore the liability cannot be mulcted on the defendant. They further contended that no opportunity was given to them prior to the survey and while assessing the damage and therefore the sum arrived at as damages was incorrect. The defendant would further contend that the alleged subrogation of the claim by the 1st plaintiff to the 2nd plaintiff was invalid and unenforceable. The jurisdiction of the Court at Thiruvallur was also questioned since the cause of action arose at Karnataka where the accident took place and the

defendant had denied any negligence whatsoever on their part. It was the further case of the defendant that the defendant had complied with the legal requirement by informing the 1st plaintiff about the accident and the defendants cannot be made responsible for the damages by the 1st plaintiff. They would further contend that the 2nd plaintiff need not have to pay the said sum to the 1st plaintiff as it could be recovered from the owner of the lorry bearing Registration No.TN 38A 5616. They had also taken a stand that the goods were booked at the owner's risk.

3.2. The defendants have further pleaded that the suit is bad for non joinder of necessary parties since the owner and the insurance company of the lorry bearing Registration No.TN 38A 516 were not made parties to the suit. Therefore, they sought for dismissal of the suit.

4. Trial Court:

4.1. The parties advanced to trial on the following issues:

"(1)Whether the defendant is liable to pay damages to the plaintiffs?

(2)Whether the suit is bad for non joinder as the owner and the insurer of the vehicle bearing Registration No.TN 38A 5616 were not impleaded as parties to the suit?

(3)Whether this Court has territorial jurisdiction to try the suit?

(4)Whether the plaintiffs are entitled to a decree as prayed for?

4.2. During the trial, the 2nd plaintiff had examined one of its officials as P.W.1 and the Surveyor was examined as P.W.2. Ex.A.1 to Ex.A.12 were marked on the side of the plaintiffs. On the side of the defendant, D.W.1 was examined and Ex.B.1 and Ex.B2 were marked.

4.3. As regards Issue No.1, the learned Judge had returned a finding that the defendant was liable to compensate the plaintiffs. With regard to Issue No.2, the learned Judge, had held that the owner and the insurer of the lorry bearing Registration No.TN-38A-5616 was not a necessary party and therefore, the suit is not hit by non joinder of necessary parties. The Issue Nos. 3 and 4 were answered against the defendant and ultimately, the suit was decreed as prayed for. Challenging the said Judgment and decree, the defendant is before this Court.

5. Submissions:

5.1. Heard the arguments of Mr.Rajendra prasad Tayal, learned counsel for the defendant who had also reduced his oral submissions into written arguments. He would make the following submission:

a) The first contention that was raised was that the person who had represented the plaintiffs when the suit was instituted was not competent to file the suit. The learned counsel had argued that the plaint was signed and verified by an unauthorized person and therefore violative of the provisions of Order III Rules 1 and 2 of the Civil Procedure Code and Rules 16 and 17 of the Civil Rules of practise, He would rely upon the following judgments to buttress his arguments.

1. M/s. Nibro Limited Vs. National Insurance Company Limited [reported AIR 1991 DELHI 25]

2. State Bank of Travancore Vs. M/s. Kingston Computers (I) P.Ltd. [reported in 2011 AIR SCW 1948]

3. Mulammoottil Consumer Credit Ltd Vs. Sreenivasan [reported in [2007] 139 Com Cases 347] [Kerala High Court]

4. Lakshmi, M Vs. Shanmuga Priya Textiles (P) Ltd. [reported in 1999 (III) CTC 764]

5. Swadharma Swarajya Sangha, etc., Vs. Indian Commerce & Industrial Company Pvt., Ltd [1998-1-L.W. 203] [DB]

6. The Lakshmi Mills Co. Ltd. Vs. R. Ramajaam & Others [reported in 2010 (1) MWN (Civil) 454]

(b) The 2nd line of attack, was that the letter of Subrogation marked as Ex.A8 does not give a right to the 2nd Plaintiff to make a claim against the defendant. The document has not been properly sealed or signed and is bereft of details like the policy number, goods covered under the contract, etc. He would further argue that a right to sue cannot be transferred and further the right to sue vested only with the consignee, viz; Cama Motors, Ahmadabad. He would further contend that sections 46 and 48 of the Companies Act prescribes the form in which the contracts/deeds have to be executed and would rely on the Judgment Union of India Vs. Sri Sarada Mills Ltd. [reported in 1973 (2) SCR page 464 = AIR 1973 SC 281]

(c) The 3rd ground pleaded was that the mandatory notice under sec 10 of the Carriers Act had not been issued. He would submit that Ex.A3 issued by the plaintiff to the defendant does not conform to this requirement and would rely on the following

Judgements:

1. The Oriental Insurance Company Limited & another Vs. Bhoruka Roadlines Private Ltd. [reported in 2009-4-L.W.903] (DB)

2. P. Rama Rao Vs. Nirmala & Ors. [reported in 1997 (II) CTC 211] (Supreme Court)

He would also argue that the provisions of Order VI Rule 2 of the Civil Procedure Code clearly stipulates that there cannot be evidence without a pleading. Though notice was issued by the 1st plaintiff, none were examined on the side of the plaintiff. In support of the proposition that pleading should support evidence, the following judgments were relied upon:

1. Rajgopal Vs. Kishan Gopal & another [reported in AIR 2003 SC 4319]

2. Gulabrao Balwantrao Shinde and others Vs. Chhabubai Balwantrao Shinde and others [reported in AIR 2003 SC 160]

3. Bondar Singh and others Vs. Nihal Singh and others [reported in 2003 (2) TLNJ 39(SC)]

(d) He would further attack the Insurance Claim Form which is the basis of the claim on the ground that the documents referred to in the claim form had not been filed along with the claim form and further contained several blanks. Once again this document did not contain the insurance details. He would also challenge the Surveyors Report as the assessment had not taken place immediately after the defendant had reported the accident and further the assessment was done behind the back of the defendant. There was no proof of the loss for claiming compensation, The Shipping Corporation of India Ltd. Vs. Bharath Earth Movers Ltd, and other [reported in 2009-5- L.665]

(e) He would next contend that the policy in question being a Marine Policy did not cover a pure road carrier. He would rely on the Judgment of the Supreme Court Janaki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. [reported in 2005 (3) CTC 128]

(f) An argument was also advanced that the 2nd plaintiff being the Power Agent cannot adduce evidence on behalf of the 1st plaintiff and therefore the evidence of PW1 was inadmissible. In support of his defense, he would rely on the Judgments:

1. S. Natarajan Vs. V. Thirumavalavan [reported in 2009 (5) CTC 620]

2. Chellammal Vs. Krishnaveni Ammal [reported in 2006 -3- L.W. 713]

He would therefore pray that the Judgment and Decree of the Trial Court be set aside.

6. There was no appearance on the side of the 1st plaintiff/1st respondent and Mr. K. Senthil Kumar who appeared on behalf of M/s. Nageswaran & Narichania, learned counsel for the 2nd plaintiff/2nd respondent would make the following submissions:

(a) Ex.A10 Marine Cargo-Inland Transit Policy is issued based on the Marine Insurance Act and the validity of this policy to cover risks that happens only on land was considered in the judgment M/s. Ravichandran Transports Mettur Dam Vs. United India Insurance Company Limited [reported in 2000 (1) CTC 748] and held in favour of the insurer therein. After referring to the provisions of the Marine Insurance Act, learned counsel would submit that a conjoint reading of the definition of "Maritime perils" under Section 2(e), Sub-Section (2) and the explanation to section 4 of the Act together with the Judgments [Alliance Insurance Company Ltd. Vs. Union of India reported in 62 Cal W.N.539] and [AIR 1971 Cal 494] The Gaya Muzaffarpur Roadways Co. Vs. Fort Gloster Industries and others gives the Insurance Company the power to designate any other peril which it wants to cover under the Marine Insurance Policy.

(b) He would further argue that the claim made by the plaintiff against the defendant after the 1st plaintiff was indemnified by the 2nd plaintiff has been answered by a Division Bench of this Court in the Judgment Assam Bengal Roadways (P) Ltd., Vs. M/s. Hindustan Photo Films, Manufacturing Co., Ltd., [reported in 1988-1- L.W. 580]

(c) He would further submit that the claim made by the 2nd plaintiff on the basis of EX.A8 letter of subrogation is a valid claim as the doctrine of subrogation confers upon the Insurer the right to receive the benefit of such rights and remedies as the Assured has against 3rd parties to the extent the Insurer has indemnified the loss of the Assured, in the instant case the 1st plaintiff. He would urge the Court to consider the Judgment of the Division Bench of this Court in Bond Food Products Private Ltd. & another Vs. M/s. Planters Airways Ltd. [reported in 2004 -2- L.W. 663]

(d) The learned counsel would submit that the defendant has not produced any evidence to discredit that evidence of the Surveyor or the Surveyors report and in such a scenario relying upon the Judgment [reported in 1991 ACJ 811 Gwalior Transport Co. Ltd Vs. National Insurance Co. Ltd & others], the Surveyors Report marked as EX.A11 has to be accepted.

(e) The argument of the defendant that the mandatory notice under Section 10 of the Carriers Act had not been issued has been denied by the plaintiff. The learned counsel would contend that Ex.A3 is the notice sent by the 1st plaintiff informing the defendants about the damage to the consignment in transit. The said notice is in conformity to the ingredients of a notice contemplated under section 10 of the Carriers Act. This notice has been received by the defendant and therefore it does not now lie in the mouth of the defendant to contend that they have not received notice under Section 10 of the Carriers Act. Balurghat Transport Co. Vs. The Luxmi Tea Co. Ltd. [reported in AIR 1987 Cal 370]

(f) The next line of argument put forward by the counsel turned around that liability of the common carrier when the consignment is carried under the "Owner's Risk". The learned counsel would draw the attention of this Court to the definition of a Common Carrier under Section 2 of the Carriers Act and Section 9 of the said Act which would clearly hold the carrier liable for any loss, damage or non-delivery owing to the negligence or criminal act of the carrier, his servants or agents. He would rely on the following decisions in support of his arguments:

1. Balurghat Transport Co. Vs. The Luxmi Tea Co. Ltd. [AIR 1987 Cal 370]

2. Assam Bengal Roadways (P) Ltd., Vs. M/s. Hindustan Photo Films, Manufacturing Co., Ltd., [reported in 1988-1- L.W. 580] [DB]

3. Vasundhara Lorry Service Vs. D. Nagendas Foolchand Chinai & Co., and another reported in 1997 (1) CTC 393

4. Nath Bros. Exim International Ltd. Vs. best Roadways Ltd. [reported in 2001-1-L.W. 756][Supreme Court]

5. Bond Food Products Private Ltd. & another Vs. M/s. Planters Airways Ltd. [reported in 2004 -2- L.W. 663][D.B]

7. He would conclude by stating that the validity and scope of subrogation under section 79 of the Marine Insurance Act, 1963 and the basis of settlement of a claim under a Marine Transit Policy was upheld in the various decisions given below:

1. Assam Bengal Roadways (P) Ltd., Vs. M/s. Hindustan Photo Films, Manufacturing Co., Ltd., [reported in 1988-1- L.W. 580] [D.B]

2. M/s. Ravichandran Transports Mettur Dam Vs. United India Insurance Company Limited [reported in 2000 (1) CTC 748]

3. Bond Food Products Private Ltd. & another Vs. M/s. Planters Airways Ltd. [reported in 2004 -2- L.W. 663][DB]

The learned counsel would therefore submit that the Judgment and Decree of the Trial Court does not call for any interference by this Court.

After hearing the elaborate arguments of both the counsels and perusing the records, this Court is of the opinion that the Appeals involves the following points for consideration:

(a) Whether the person verifying and signing the pleadings had the authority to do so and whether there was compliance of the provisions of the Order III Rules 1 and 2 of Civil Procedure Code, read with Rules 16 and 17 of the Civil Rules of practise

(b) Whether the letter of subrogation Ex.A8 is valid.

(c) Whether the mandatory provisions under section 10 of the Carriers Act has been complied with.

(d) Whether the Policy is valid being a Marine Policy?

(e) Whether the defendant is liable to compensate the plaintiff as the consignment was accepted by them with the specific understanding that the same was being taken at the Owner's risk?

8.DISCUSSION

8.1.The first point for consideration has not been pleaded or argued by the appellant before the trial Court and the same is advanced for the first time before this Court. The first plaintiff/Hindustan Motors Limited has been represented by their Power of Attorney agent, the second plaintiff. The plaint has been verified and signed by the Division Manager of the second plaintiff/Insurance Company. Under Ex.A8, letter of subrogation a specific power of attorney has also been given by the first plaintiff to the second plaintiff. It is seen that specific clause which reads as follows, has been executed by the first plaintiff "We hereby appoint you who are officers and agents and their successors severally as our agents and attorneys in fact irrecoverable power to collect any and all such claims and to begin, prosecute, compromise, arbitrate or withdraw either in our name or in your name but at your expenses

any and all legal proceedings which you may deem necessary to enforce such name or claims in our name". Thus the second plaintiff can sign and verify the complaints, affidavits, applications, appoint advocates, file suit or suits on behalf of the 1st plaintiff. Therefore a clear authority has been granted by the first plaintiff to the second plaintiff to act for and on their behalf.

8.2. It is also seen that the power of attorney has been filed along with the complaint as the 16th document and therefore there is a compliance of the provisions of Order III Rules 1 and 2 of the Civil Procedure Code read with Rules 16 and 17 of the Civil Rules of practice.

8.3. It is further seen that what has been pleaded was only on the basis of documents and not anything within the personal knowledge of the first plaintiff. The evidence that has been adduced by PW1 is also based on the records which are all well within the provisions of the Order III Rules 1 and 2.

8.4. The Judgments relied upon by the defendant relates to cases where the Courts have dealt that the Power Agent cannot depose on behalf of the principle in respect of the matters that were not in the realm of his personal knowledge and was in the personal knowledge of the Principal. As already stated evidence in this case has been made only on the basis of the documents that have been filed into Court. Therefore the first point for consideration is answered against the defendant.

8.5. The 2nd point for consideration relates to the right and validity of the letter of subrogation. (Ex.A8). It is the case of defendant that Ex.A8 did not give any right to the second plaintiff/Insurance Company to make any claim against the defendant and that the document was not properly sealed or signed and was bereft of details like the policy number, goods covered etc.

8.6. The plaintiff on the other hand would argue that Ex.A8, letter of subrogation was a valid document as the doctrine of subrogation confers upon the insurer, the right to receive the benefit of such right and remedies which the Assured (in the instant case the plaintiff) would have against the 3rd parties. He would further argue that Insurance Company was liable to be indemnified to the extent of the loss sustained by the first plaintiff which had been paid by the second plaintiff to the first plaintiff. The defendant had relied upon the Judgment Union of India Vs. Sri Sarada Mills Ltd. [reported in 1973 (2) SCR page 464]. This is a case of subrogation where after the subrogation, in favour of the Insurance Company, the Assured had instituted the suit. Ultimately the matter was heard

by the three Judge Bench of the Hon'ble Supreme Court with the dissent of one, the majority opinion in the above case was that though there was subrogation the Insured continued to have its right to claim damages. He would also rely upon the Judgment M/s. Marwar Tenant Factory Vs. Union of India and others [reported in AIR 1990 Supreme Court 1953] where the suit moved by the seller was questioned on account of the fact that 95 per cent of the selling price had been paid by the buyer and therefore the seller could not sustain the suit. The Hon'ble Supreme Court upheld the said contention.

8.7. The learned counsel for the plaintiff relied upon the Judgment Assam Bengal Roadways (P) Ltd., Vs. M/s. Hindustan Photo Films, Manufacturing Co., Ltd., [reported in 1988-1- L.W. 580] where it was held that when the Assured and the Insured jointly filed the suit on the plea of subrogation, then such a suit was maintainable. On the production of proof regarding the assignment/subrogation and power of attorney, it would establish that the Assured has given the right to the second plaintiff to claim the money that the Insured had indemnified the Assured.

8.8. In a Judgment of this Court Vasudeva Mudaliar Vs. Caledonian Insurance Co. [reported in 77-L.W.511], while dealing with the case of subrogation in a Motor Accident case had held that the right of the insurer to subrogation does not flow from the terms of the insurance policy but is inherent and springs from the principle of indemnity. Finally, the Court had permitted the insurer to sue the defendant in their own name. In a more recent case of the Constitutional Bench of the Hon'ble Supreme Court Economic Transport Organization Vs. Charan SPG. Mills (P) Ltd. [reported in (2010) 4 SCC 114], the Hon'ble Bench was called upon to consider the following issues on a reference:

(i) The assured (the consignor) had insured the goods against transit risk with the insurer. The insurer had already settled the claim of the assured. As a consequence, the assured had no surviving claim that could be enforced against the carrier. At all events, as the assured had transferred all its interest in the claim to the insurer, it had no subsisting interest or enforceable right.

(ii) The insurer did not entrust the consignment to the carrier for transportation. The appellant did not agree to provide any service to the insurer. There was no privity of contract between the insurer and the appellant. As a result, the insurer was not a "consumer" as defined in

the Act and a complaint under the Act was not maintainable.

(iii) The letter of subrogation was executed by the assured (the consignor), after the goods were damaged. This amounted to a transfer of a mere right to sue by the assured in favour of the insurer, which was invalid and unenforceable.

(iv) there was no negligence on the part of its driver and the accident occurred due to circumstances beyond his control. The respondents did not place any evidence to prove any negligence, in spite of the appellant's denial of negligence. Having regard to Section 14(1)(d) of the Act, liability can be fastened on a carrier, for payment of compensation, only by establishing that the consumer had suffered loss or injury due to the negligence of the carrier as a service provider. In view of the special provision in Section 14(1)(d) of the Act, the complainants under the Act were not entitled to rely upon the statutory presumption of negligence available under Section 9 of the Carriers Act, 1865 which is available in civil suits brought against carriers. In the absence of proof of negligence, it was not liable to pay compensation for damage to the goods.

8.9. The Constitutional Bench was called upon to reconsider the decision in *Oberai Forwarding Agency Vs. New India Insurance Company* reported in (2000) 2 SCC 407]. This Judgment had held that even the Assured was the co-complainant, the insurer could not maintain the complaint before the Consumer Dispute Redressal Forum, if it was an assignee of the claim but if the same was a subrogation simpliciter in favour of the insurer on account of the payment of the loss and settlement of the claim of the Assured, the complaint was very much maintainable. The 3 Member Bench which referred the issue to the Constitutional Bench was of the opinion that "*Oberai*" required reconsideration as the view taken by the Bench in *Oberai* was that where there is an assignment in addition to subrogation, the complaint was not maintainable. Though the issue arose out of the consumer complaint before the consumer dispute Redressal Forum, the Constitutional Bench, in detail, discussed the terms subrogation and the law on the subject as also the distinction between assignment and subrogation. The Bench after discussing the various types of subrogation had broadly divided them into three categories namely:

- a) subrogation by equitable assignment
- b) subrogation by contract
- c) subrogation cum assignment.

Ultimately they summarized the principles relating to subrogation as follows:

"(i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrongdoer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrongdoer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a letter of subrogation, reducing the terms of subrogation, the rights of the insurer vis-a-vis the assured will be governed by the terms of the letter of subrogation.

(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insurer becomes entitled to the entire amount recovered from the wrongdoer, that is, not only the amount that the insurer had paid to the assured, but also any amount received in excess of what

was paid by it to the assured, if the instrument so provides."

8.10. The Bench also went on to hold that the presumption under section 9 of the Carrier Act that the Carrier would be responsible irrespective of the consignment being booked under 'Owner's Risk' would apply not only to suits filed before the Civil Court but also to other proceedings.

8.11. In the instant case, Ex.A8 letter of subrogation has been executed by the first plaintiff in favour of the second plaintiff though the letter of subrogation does not specifically mention the policy number or the details of the goods. However, the defendant was in no doubt about the subject matter in dispute and therefore Ex.A8 is not rendered invalid. Therefore in the light of the above, the 2nd point is answered in favour of the plaintiff.

8.12. The 3rd point of consideration relates to the contention of the defendant that the plaintiffs had not followed the mandatory provisions of section 10 of the Carriers Act as they had not issued notice as contemplated under section 10 of the Act. Section 10 of the Carriers Act reads as follows:

"10. Notice of loss or injury to be given within six months:-

No suit shall be instituted against a common carrier for the loss of, or injury to goods including container, pallets or similar article of transport used to consolidate goods entrusted him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff"

8.13. Therefore what is contemplated by these provisions is that there must be a notice intimating the Carrier about the damage and the claim and such a notice has to be issued within a period of six (6) months from the date of accident. Admittedly, the accident took place on 16.02.1999 and the first plaintiff has addressed the letter dated 18.03.1999 to the defendant which has been marked as Ex.A3. In the said letter, the first plaintiff had informed the defendant that they were making a claim of Rs. 22,90,498/- being the damage caused on account of the defendant's negligence when the car was under their custody. The first plaintiff called upon the defendant to settle the amount forthwith. The said letter confirms the section 10 notice

and has also been issued within a month of the accident. Therefore the contention of the appellant that they have not received the notice under section 10 fails.

8.14. The Judgment relied upon by the defendant namely The Oriental Insurance Company Limited & another Vs. Bhoruka Roadlines Private Limited [reported in 2009-4-L.W.903] and P. Rama Rao Vs. P. Nirmala & others [reported in 1997 2 CTC page 211] will not come to their rescue. These are the cases where the Sec 10 notice had not been sent at all and therefore the claim against the common carrier was not maintainable. Therefore, the 3rd point for consideration is also held against the defendant.

8.15. The 4th point for consideration is whether a Marine Policy will cover the risks other than Marine risks. The defendant has submitted that since the policy that had been entered into between the first plaintiff and the second plaintiff was a marine policy whereas the claim is made in respect of damages to goods while on transit upon land and therefore the same is not covered. Per contra, the learned counsel for the 2nd plaintiff would argued that the Marine Cargo transport policy is issued under the provisions of the Marine Insurance Act and the same has been answered in favour of the insurer in the Judgment M/s. Ravichandran Transports Mettur Dam Vs. United India Insurance Company Limited [reported in 2000 (1) CTC 748].

8.16. One of the issues for consideration in the above case was:

" Whether the risk of goods involved in the case on hand would be covered by a Marine Insurance Policy under the Provisions of the Marine Insurance Act, 1963?"

The learned Judge discussed the Insurance Act, 1938, which was the Act, in existence prior to the enactment of the Marine Insurance Act, 1963 where under Sec 2 (13 A) of the said Act " Marine Insurance Business" was defined to mean the business of effecting contracts of Insurance upon vessels of any description, including cargoes, freights, goods, wares merchandise and property of whatever description issued for any transit, by land or water or both.

8.17. The learned Judge discussed the definition of "Marine adventure" under Section 2 (d) of the Marine Insurance Act, 1953 which is extracted herein below and observed as follows:

Section 2(d) of the 1963 Act defines "marine adventure" as including any adventure where.

(i) any insurable property is exposed to maritime perils;

(ii) the earning or acquisition of any freight, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loans, or disbursements is endangered by the exposure of insurable property to maritime perils;

(iii) any liability to a third party may be incurred by the owner of or other person interested in or responsible for, insurable-property by reason of maritime perils;

For the purpose of our case the adventure covered under (I) of sub section (d) of section 2 of the 1963 Act alone is relevant. Section 2(e) of this Act defines " maritime perils" as "the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers thieves, captures, seizures, restraints and detentions of, princes and peoples, jettisons, barratry and any other perils which are either of the like kind or may be designated by the policy". A reading of section 2(e) of the 1963 Act shows that apart from the perils mentioned in that sub section, the "maritime perils" would also include any other perils which are either of the like kind (meaning thereby similar to the perils mentioned earlier) or may be designated by the policy. Therefore this section empowers an Insurance Company to designate any other peril in the policy not covered under the various types of perils mentioned in that sub-section"

8.18. Ultimately the learned Judge went on to hold as follows:-

"Therefore reading the definition of "maritime perils" as found in section 2(e) of the 1963 Act with sub section (2) and the Explanation to section 4 of the same Act in the light of the Judgment of the Calcutta High Court namely, 62 Cal. W.N. 539 and The Gaya Muzaffarpur Roadways Company & Others Vs. Fort Gloster Industries Limited & Another, A.I.R. 1971 Cal. 494. I am of the opinion that the Insurance Company has given

the power to designate any other peril which it wants to cover under the Marine Insurance Policy. Only in exercise of such power, the Insurance Company had designated the risk attached to the goods in question to be transported by road only and therefore the Insurance Company had validly covered the risk under the Marine Insurance Policy."

The facts of the instant case is similar to the facts of the above case and therefore I have no hesitation in holding that Ex.10 Policy covered the risks on land as well and point No.4 is answered in favour of the plaintiffs and against the defendant.

8.19. The 5th point of consideration emanates from the argument put forward by the defendant that the assignment was accepted by them on the undertaking that the goods were being consigned at the Owner's Risk and therefore the Carrier could not be made liable for the loss. The plaintiff would submit that the use of the word Owner's Risk would not absolve the Carrier from the liability in the light of the Judgment a Division Bench of this Court reported in 2004 (2) law weekly Bond Food products Pvt. Ltd. & others & others Vs. Planters Airways Ltd.

8.20. Further in yet another Judgment Vasundhar Lorry Service Vs. D.Nagendas Foolchand Chinai & Co & Others [reported in 1997 (1) CTC 94], this Court held that in the teeth of section 9 of the Carriers Act, the Carrier cannot merely contend that there was no negligence on their part, they have to prove the said statement and the burden of proof lies on them. The other Judgment Nath Bros. Exim International Ltd. Vs. best Roadways Ltd. [reported in 2001-1-L.W. 756] was a case where the Hon'ble Supreme Court had traced the history of how the liability of the common carrier involved from the Judgment of the Calcutta High Court in "The British and Foreign Marine Insurance Company Vs. The Indian General Navigation and Railway Company Limited [reported in CWN (15) page 226] right upto the Judgment in Kerala Transport Vs. Kunnath Textiles reported in [1983 KLT page 480]. Ultimately the Hon'ble Supreme Court held as follows:

" 28. From the above discussion, it would be seen that the liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in

the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants."

8.21.The argument regarding the contention that the goods were booked at Owner's Risk was also not countenanced by the Hon'ble Supreme Court by holding that unless there was a special agreement between the parties as contemplated under section 6 of the Carriers Act, the Carrier will not be absolved from its liability by simply pleading that the consignment was taken at Owner's Risk unless there is a proof to the contrary. A similar view has been taken by the Jabalpur Bench of the Madhya Pradesh High Court in Mama Roadways Vs. Oriental Inso. Co. Ltd]reported in 2007 (4) M.P.L.J. Page 33]. Therefore in the light of the above discussion, this point is also held against the defendant.

9. CONCLUSION

Considering the fact that the suit is filed both by the insured as well as insurer (first and second plaintiffs) and in the light of Ex.A8 letter of subrogation, the suit filed is valid and the suit for recovering money from the defendant was very much maintainable. Section 10 notice has been issued by the first plaintiff and therefore the mandatory requirement under section 10 of the Carriers Act has been complied with and further under section 9 of the Carriers Act, since there is no special agreement between the Carrier and the first plaintiff, the presumption that the negligence was on the carrier would apply. Therefore on a conspectus of the above discussion, it is clearly evident that the first plaintiff had subrogated its right to the second plaintiff under Ex.A8, letter of subrogation and the suit has been filed after issuing the mandatory notice under section 10 of the Carriers Act by the duly authorized/recognized agent and the contention of the defendant that the goods were carried at the Owner's Risk having been rejected, the plaintiffs are entitled to the suit claim and I do not find any infirmity in the Judgment and Decree of the learned Additional District Judge, Fast Track Court No.V Chenagalpattu in O.S.No.124 of 2001. Consequently, the First Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar (Insp.Cell)

//True Copy//

mrn

Sub Assistant Registrar

To

1. The Additional District Judge,
Fast Track Court No.V,
Chengalpattu at Tiruvallur
2. The Section Officer,
VR Section, High Court, Madras.

+1 cc to Mr.Rajendraprasad, Advocate, S.R.No.37480

+1 cc to Mr.Nageswaran & Naricharia, Advocate, S.R.No.37537

A.S.No.1079 of 2007

PM(CO)
SSM(13/06/2019)



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