

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2019

PRONOUNCED ON : 28.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1419 of 2005

National Insurance Co. Ltd.,
represented by its,
Senior Divisional Manager,
Divisional Office No.2,
No.16, State Bank Road, Coimbatore-18.

... Appellant/Appellant/2nd Defendant

Vs.

1. M/s.Balaji Transport,
Tirippur, represented by its,
Proprietor Parthiban.

...Ist Respondent/Ist Respondent/Ist Defendant

2. Eclat Garments,
represented by its,
Partner G.Saravanan.

3. The Oriental Insurance Co. Ltd.,
represented by its,
Divisional Manager.

...Respondents 2 & 3/

Respondents 2 & 3/Plaintiffs 1 & 2

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 29.09.2004 in A.S.No.15 of 2003 on the file of the I Additional District Court, Coimbatore, confirming the judgment and decree dated 25.06.2002 in O.S.No.270 of 1992 on the file of the Subordinate Court, Tiruppur.

For Appellant : Mr.N.Vijayaraghavan

For R1 : Mr.K.Goviganesan

For R3 : No appearance-set ex parte vide order
dated 28.02.2019

For R2 : Set ex parte in Lower Court

JUDGMENT

Challenge in the second appeal is made to the judgment and decree dated 29.09.2004 passed in A.S.No.15 of 2003 on the file of the I Additional District Court, Coimbatore, confirming the judgment and decree dated 25.06.2002 passed in O.S.No.270 of 1992 on the file of the Subordinate Court, Tiruppur.

2. The parties are referred to as per their rankings in the trial court for the sake of convenience.

3. The second appeal has been admitted on the following substantial questions of law:

"(a) Whether the Lower Appellate Court has grossly erred in confirming the decree of the Trial Court in fastening liability on the insurer in a case where the risk to the goods carried in the vehicle was neither required to be covered under Section 147 of the Motor Vehicles Act, 1988 nor was covered under Exs.B8 and B9 policies of insurance?

(b) Whether the Lower Appellate Court had grossly erred in construing the claim for damages to property as if belonging to a third party ignoring that contractual liability for goods carried in the vehicle was excluded from requirement of coverage under Section 147 of the Motor Vehicles Act, 1988 vide 1988 ACJ 503 (Mad)?"

4. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

5. Suit for damages.

6. Shorn of unnecessary details, it is seen that the first plaintiff has consigned its goods with the first defendant's vehicle bearing Registration No. TAP 6618 for transportation and it is also noted that the first plaintiff had insured the consignment with the second plaintiff's insurance company under marine policy and inasmuch as the consignment had been destroyed in fire during transit, it is seen that the second plaintiff/insurance company had indemnified the first plaintiff being the insurer of the goods under the marine policy and by way of subrogation from the first plaintiff, the second plaintiff along with the first plaintiff had instituted the suit against the carrier namely the first defendant claiming

compensation for the damage or loss caused to the goods consigned during transit in the carrier.

7. It is noted that at a later point of time, on finding that the first defendant's vehicle abovesaid had been insured with the second defendant/insurance company, on application, the second defendant had been impleaded in the suit proceedings and on that basis, the second plaintiff, in particular had put forth the claim that the second defendant being the insurer of the first defendant's vehicle is also liable along with the first defendant, the bailee, to pay the compensation for the damage to the goods occasioned during the transit as the insurer of the vehicle as well as the goods carried in the vehicle.

8. The first defendant disputed its liability in paying the damages to the plaintiffs particularly, the second plaintiff, as put forth in the written statement on various grounds. The second defendant/insurance company resisted the plaintiff's suit contending that it had not issued any policy to the first defendant as regards the goods carried in the carrier and destroyed during transit and therefore, according to the second defendant, as the policy issued by it in favour of the first defendant did not cover the goods carried in the vehicle in specific, it is not liable to pay any damages to the plaintiffs as claimed in the plaint.

9. On the abovesaid rival claims, the parties went for trial and based on the materials placed on record, both oral and documentary, the Trial Court was pleased to decree the suit in favour of the plaintiffs.

10. Therefore, as per the judgment and decree of the Trial Court, it is found that after fixing the liability on both the defendants to pay the damages to the plaintiffs as claimed in the plaint, the Trial Court has disposed of the suit. However, challenging the judgment and decree of the Trial Court, the first defendant has not preferred any appeal. It is only the second defendant who has challenged the judgment and decree of the Trial Court by way of an appeal and the first defendant has also not preferred any cross objection in the first appeal preferred by the second defendant.

11. The Appellate Court also on an appreciation of the materials placed on record and the submissions made, was pleased to confirm the judgment and decree of the Trial Court and thereby dismissed the appeal preferred by the second defendant. Impugning the same, the second defendant has preferred the present second appeal.

12. It is mainly contended by the second defendant's counsel that the Courts below had not properly understood the terms of the insurance policy taken by the first defendant with the second defendant's company and the policy held by the first defendant with the second defendant's insurance company is only a motor vehicle policy to satisfy the primary requirements of Section 146 r/w 147 of the Motor Vehicles Act, 1988 and the comprehensive policy would only cover the accidental loss or damage to the lorry to the extent of its market value only and without properly appreciating the abovesaid factors, according to the second defendant's counsel, the Court below had failed to appreciate the materials placed on record and erroneously fastened the liability on the second defendant directing it also to pay the damages to the plaintiffs as claimed in the suit and according to him, inasmuch as the policy in question did not cover the goods carried in the vehicle damaged during transit and when the policy in question has specifically excluded such goods from the coverage, the determination of the Courts below in holding that the second defendant is also liable to pay the damages to the plaintiffs is erroneous in law and liable to be set aside.

13. The policy coverage taken by the first defendant in respect of the vehicle belonging to him has been marked as Exs.B8 and B9. As rightly put forth by the second defendant's counsel, even in the written statement, the second defendant in specific has disputed its liability to pay the damages to the plaintiffs contending that by way of the policy issued by it to the first defendant's vehicle bearing Registration No. TAP 6618, it has no liability to pay any damages towards any loss or damage caused to the property belonging to the insured or held in trust or in the custody or control of the insured or to the property carried in the vehicle of the insured. Furthermore, as could be seen from the terms of the policy in Ex.B8 and the particular term having been marked as Ex.B9, it is found that it has been incorporated under the heading Section II - Liabilities to third parties, proviso (d) contained therein to sub-Section I (ii) of Section II and the same reads as follows: "The company shall not be liable in respect of damage to property belonging to or held in trust by or in the custody or control of the insured or a member of the insured's household or being conveyed by the motor vehicle". Therefore, on a reading of the abovesaid terms contained in the policy issued by the second defendant to the first defendant's vehicle, it is found that the second defendant has not rendered its liable to pay any damage to the property or goods carried in the first defendant's vehicle and destroyed during the course of transit. In addition to that the officer who had been examined on behalf of the second defendant as DW2 has adduced evidence that as per the terms of the policy

marked as Exs.B8 and B9, the second defendant's company is no way liable to compensate the loss or damage to the goods carried in the vehicle and also denied that the comprehensive policy issued by it would also encompass the liability with reference to the goods damaged during the course of transit carried in the first defendant's vehicle and on the other hand he had averred that the comprehensive policy would only cover the loss or damage occasioned to the vehicle to the extent of its market value. In such view of the matter, when the second defendant has been impleaded in the suit only on the fact that it had issued a motor vehicle policy in respect of the first defendant's vehicle in which the first plaintiff's goods were carried, on the footing that the goods carried in the first defendant's vehicle having been destroyed in fire during transit and thereby, on that basis, the plaintiffs had also sought for the relief of damages from the second defendant based on the policy issued by the second defendant marked as Ex.B8.

14. It is seen that the plaintiffs' case seems to be that insofar as the second defendant is concerned, the goods carried by the first defendant in the vehicle and lost during transit belonged to the first plaintiff and accordingly, the goods should be treated only as the goods of a third party and in such view of the matter, the second defendant would also be liable to the plaintiffs under the policy. The abovesaid contention put forth by the plaintiffs found acceptance with the Courts below.

15. As rightly put forth by the second defendant's counsel, when the risk to the consignment carried in the goods vehicle is neither required to be covered under Section 147 of the Motor Vehicles Act nor required to be covered under the Marine policy of insurance and furthermore, when the policy in question marked as Exs.B8 and B9 specifically excludes the liability of the second defendant in paying the damages to the loss or damage caused to the goods carried in the vehicle in question and in such view of the matter, when the goods consigned in the vehicle of the first defendant had been specifically excluded under the policy and also not required to be statutorily insured under the Motor Vehicles Act, the Courts below are found to have committed an error in fixing the liability on the second defendant also on the footing that the policy in question i.e., Ex.B8 also cover the damages occurred to the goods on the basis that as far as the second defendant is concerned, the goods belonging to the third party are damaged. However, as rightly put forth by the second defendant's counsel, on a reading of provisions contained in Section 147 of the Motor Vehicles Act, when the same would not include the goods carried in the vehicle and damaged during transit in a motor vehicle and when as per the materials placed on record, it is noted that the first plaintiff has entrusted the consignment to the first defendant

only by virtue of contract entered into between them and thereby, the first defendant's vehicle being a public carrier and accordingly, based on the contract entered into between the first defendant and the first plaintiff, the goods had been carried by the first defendant in its vehicle and merely because the first defendant had taken a motor policy of its vehicle with the second defendant and when the policy issued by the second defendant with reference to the same is found to have not covered the goods carried/consigned inside the vehicle and specifically excluded as above seen and furthermore, when the owner of the goods carried in the vehicle cannot by any stretch of imagination be said to be a third party vis-a-vis the insured/carrier and the first defendant said to have carried the goods of the first plaintiff only based on contractual liability and not on any other liability under the Motor Vehicles Act and as abovenoted, when the Motor Vehicles Act does not require to cover such risk statutorily, in such view of the matter, particularly, when the policy in question had excluded the goods carried/consigned in the vehicle in question, the Courts below are found to have erred in fastening the liability on the second defendant's insurance company.

16. In support of his contentions, the second defendant's counsel placed reliance upon the decision reported in 1988 ACJ 503 [United India Insurance Co. Ltd. and another Vs. K.A.R.N. Janarthanam and another], whereunder it has been clearly held that any property of a third party, when carried in a vehicle under a contractual liability, then the proviso to Section 95 (1) (b) can be applied and the loss occasioning in respect of such goods having been specifically excluded under the policy in question, the insurance company cannot be made liable to compensate for the loss alleged to have been sustained due to the damage caused to the goods during transit and the principles of granting compensation for the loss with reference to the abovesaid aspects had been detailed in the abovesaid decision as follows:

“Motor Vehicles Act, 1939, Section 110-
Claims Tribunal-Jurisdiction-Loss of goods
carried in goods vehicle-Claimant's cotton
bales being carried in a lorry were burnt
when the bales came in contact with electric
wires due to negligence of the driver-
Claimant filed claim before the Tribunal
against the owner and insurer of the lorry-
Whether Tribunal has jurisdiction to
entertain the claim-held: no; the goods are
not the properties of a third party;
Tribunal constituted under Section 110 could
only a adjudicate upon claims for

compensation in respect of damage to any property of a third party.

The goods belonging to the claimant having been carried by the owner in the vehicle under a contract and the relationship between them being one of bailor and bailee.

Motor Vehicles Act, 1939, Section 95-Motor insurance-Policy-Liability of insurance company-Claimant booked a consignment of cotton for carriage-While being carried in a lorry cotton bales came in contact with electric wire and the entire load was burnt-Claim petition filed against the owner and the insurance company of the lorry before the Tribunal-Insurance company contended that as per the terms of the policy that "insurance company shall not be liable in respect of damage to property belonging to or held in trust by or in the custody or control of the insured or a member of the insured's household or being conveyed by the motor vehicle"-Whether the condition is in violation of Section 95 of the Motor Vehicles Act and the insurance company is liable to pay compensation-Held: no.

The concept of 'third party' in Chapter VIII in Motor Vehicles Act is in respect of parties who are not inside the vehicle, unless they are carried for reward or hire. Therefore, any property of a third party, when carried in a vehicle under a contractual liability, then the proviso to Section 95 (1) (b) can be applied. The goods belonging to the petitioner having been carried in the vehicle of second respondent, under a contract, the relationship between them being one of bailor and bailee the goods were carried by second respondent for the benefit of the claimant. Hence the loss occasioning in respect of such goods having been specifically excluded respondent-insurance company cannot be made liable to compensate for loss alleged to have been suffered by the petitioner.

17. In Ahmed Ahaiyat Saiyed v. Ibrahim Bhachal Saah 1985 A.C.J. 83, the loss to the

goods i.e. goats and sheep, which died on the spot of the accident was disallowed because the Insurance Policy (Ex. 46 therein), did not cover the risk to the goods of hirer, and therefore, the Insurance Company was held not liable to compensate the said loss. Yet, what is contended by Mr. Gopal, learned Counsel for the petitioner is that the concept of "third party" cannot be narrowly understood and it should be given a wider meaning and a condition in a policy which is contrary to Section 95 or any of the other provisions of the Motor Vehicles Act cannot prevail, because the right of claimants to use having been conceived of statutorily under certain circumstances, any condition in the policy contrary to the provisions of the Motor Vehicles Act would be a nullity. He states that the policy under Ex. R1 cannot override the liability under Section 95(1)(b)(i) of the Act. He refers to the decision in Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co. , which dealt with a case of liability of a Master when a passenger is accompanying his Manager in the course of his employment in a vehicle driven by him and gets involved in an accident, and submits that when the trend of the law as pointed out by the Supreme Court is to make the Master liable for acts which do not strictly fall within the term "in the course of the employment" as ordinarily understood, equally the expression "damage to any property of a third party" should also receive a more liberal interpretation. The decision above referred to, does not permit such an approach to be made because, the concept of "third party" in Chapter VIH in Motor Vehicles Act is in respect of parties who are not inside the vehicle, unless they are carried for reward or hire. Therefore, any property of a third party, when carried in a vehicle under a contractual liability, then the proviso to Section 95(1)(b) can be applied. The goods belonging to the petitioner having been carried in the vehicle of second respondent, under a contract, the relationship between them being one of bailor and bailee, the goods

were carried by second respondent for the benefit of the claimant, and hence, under Ex. R1, the loss occasioned in respect of respondent-Insurance Company cannot be made, liable to compensate for the loss alleged to have been suffered by the petitioner. "

17. The abovesaid decision has been followed in the decision of this Court dated 31.12.2002 passed in C.M.A.Nos.612 of 1994 and 613 of 1994 & 1784/1996, wherein also it has been held that the Sections 165 and 166 of the Motor Vehicles Act, 1988 corresponding to Sections 95 (1) (b) (i) and 110-A of the Motor Vehicles Act, 1939, do not impute or fasten the liability on the insurance company with reference to the damage caused to the goods carried in the vehicle during transit and the principles of liability on the part of the insurance company as regards the abovesaid point had been discussed in the abovesaid decision as follows:

"8. In this regard learned counsel for the Insurance Company has relied on the earlier Division Bench decision of this Court in the case of United India Insurance Company Limited vs. K.A.R.N. Janarthanam reported in 1988 ACJ 503. The facts before the Division Bench are as follows: The claimant therein filed a petition under Section 110-A of the Motor Vehicles Act claiming compensation for damages caused to his goods at about 10.30 p.m. on 05.07.1977 for the lorry bearing registration No.MSL 771. He had booked a consignment of 42 bales of MCU 5 cotton worth Rs.70,000/- on 05.07.1979 from Jayam Ginning Factory at Theni by the second respondent's lorry to be carried to Rajapalyam. Freight was to be paid at the destination. The lorry was driven by second respondent's driver, who has been impleaded as first respondent. It left Theni at 7.00 p.m. and due to the rash and negligent driving by the first respondent, the load of cotton came into contact with the electric wire running east to west in the north south road, as a result of which the entire 42 bales of cotton were burnt. Hence, he claimed a compensation of Rs.70,000/- from the owner of the lorry, being the second respondent and the Insurance Company with which the lorry had

been insured, being the third respondent. On behalf of the Insurance Company it was submitted that when the policy issued contains a specific term in Clause (1) Sub-clause (d) of Section 11 that it shall not be liable in respect of damage to property belonging to or held in trust by or in the custody or control of the insured or a member of the insured's household or being conveyed by the motor vehicle, no liability could be fastened on it by the petitioner. It is further contended that when contractual liability had been excluded, the transaction entered into between P.Ws.1 and 4 and the consequent happening would not be binding upon it. On behalf of the second respondent it was contended that the petition filed under Section 110 -A of the Motor Vehicles Act itself is not maintainable on the finding that the goods damaged are not properties of a third party. The Division Bench after finding that the goods involved in the petition are not properties of a third party, coming within the scope of Section 95 (1) (b) (i), of Motor Vehicles Act 1939 and in view of Section 110 held that the claims Tribunal would have no jurisdiction to entertain such a claim. The Division Bench further held that, "the Tribunal constituted under Section 110 of Motor Vehicles Act, 1939 could only adjudicate upon claims for compensation in respect of damage to any property of a third party so arising. Therefore, the petition as filed was not maintainable before the Tribunal at Madurai."

After holding so, the Division Bench allowed the appeals filed by the Insurance Company.

.....

10. Sections 165 and 166 of 1988 Act are corresponding to Sections 95 (1) (b) (i) and 110-A of the 1939 Act. Accordingly, by applying the said principles laid down by the Division Bench and in view of the language used in Sections 165 and 166 of 1988 Act, we are of the view that Section 166 of the Act does not cover the liability

in question and damage to the property as envisaged under. The Section only relates to the property of a third party and does not cover the loss to the property carried in a "public carrier" held in trust by the carrier for the owners of the goods. Inasmuch as the claimant in O.P. No.227 of 1988 is not a third party, coming within the scope of Sections 165 and 166 of the Act, we are of the view that the Claims Tribunal would have no jurisdiction to entertain such a claim. It is a well settled law that the Tribunal constituted under Section 165 of 1988 Act could only adjudicate upon the claims for compensation in respect of the accident involving death or bodily injury to persons arising out of the use of motor vehicles or damages to any property of a third party, so arising. In the light of uncertain details furnished in Column 24 sub-para 4 and 6 in O.P.No.227 of 1988 by ARC, the said claim petition was not maintainable before the Tribunal. The Tribunal failed to consider the above material aspect and committed an error in adjudicating the issue by passing an award as claimed in favour of the claimant / ARC. Accordingly, we set aside the same."

18. In the light of the principles of law outlined in the abovesaid decisions and in particular, when the policy in question issued by the second defendant did not cover the goods carried/consigned inside the vehicle of the first defendant's vehicle and also not required to be covered under the Motor Vehicles Act statutorily, in such view of the matter, the Courts below without properly appreciating or understanding the terms contained in the policy, excluding such coverage, on a wrong notion, had determined that the goods covered in the first defendant's vehicle would be the goods belonging to a third party and thereby the second defendant is also responsible for the goods and the loss or damage caused to the same and the abovesaid determination of the Courts below is found to have been made on a wrong understanding of the position of law as above pointed out and determined in the decisions referred to supra.

19. In the light of the abovesaid discussions, the Courts below had erred in fastening the liability on the second defendant in the case, when the risk of the goods carried in the vehicle of the first defendant was neither required to be

covered under Section 147 of the Motor Vehicles Act nor was covered under the policy in question marked as Exs.B8 and B9 and the Courts below has erred in holding that the second defendant is also liable to pay the claim for damages on a wrong understanding that the goods lost in transit belonged to a third party failing to note that the first defendant had carried the goods only based on the contractual liability which liability is not required to be covered statutorily under the Motor Vehicles Act. The substantial questions of law formulated in the second appeal are accordingly answered in favour of the second defendant and against the plaintiffs and the first defendant.

For the reasons aforesaid, the judgment and decree dated 29.09.2004 passed in A.S.No.15 of 2003 on the file of the I Additional District Court, Coimbatore, confirming the judgment and decree dated 25.06.2002 passed in O.S.No.270 of 1992 on the file of the Subordinate Court, Tiruppur, are set aside only as against the second defendant/appellant and resultantly, the suit laid by the plaintiff in O.S.No.270 of 1992 is dismissed as against the second defendant alone. Accordingly, the second appeal is allowed with costs. Connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The I Additional District Judge,
Coimbatore.
2. The Subordinate Court,
Tiruppur.

Copy to
The Section Officer, V.R.Section,
High Court, Madras.

+1cc to Mr.N.Vijayaraghavan, Advocate Sr.31198

S.A.No.1419 of 2005

pp[co]
srg 02/03/2020