

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

RSA No.1853 of 2013 (O&M)
Date of decision : 14.02.2019

M/s Shiva Oil Carriers and another

...Appellants

Versus

ICICI Lombard General Insurance Company Ltd. and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Nandan Jindal, Advocate for the appellants.

Mr. Sandeep Suri, Advocate for respondent No.1.

ANIL KSHETARPAL, J. (ORAL)

CM No.4902-C of 2013

For the reasons stated in the application, which is duly supported by an affidavit, delay of 81 days in refiling the present appeal is condoned.

Application is allowed.

Main case

Defendants-appellants are in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below.

Plaintiff No.1, Insurance Company had claimed the amount

on the basis of subrogation as the goods sent through a transport vehicle owned by defendant No.1 got damaged. The Insurance Company after satisfying the claim of the Insured, has filed this suit.

Learned counsel for the appellants-defendants submitted that the appellant had also insured his vehicle with the National Insurance Company which was not impleaded as party. He further submitted that prior notice under Section 10 of the Carriers Act, 1865 (hereinafter to be referred as “the Act of 1865”) was not issued. He further drew attention of the Court to the invoice issued by the appellants where it has been written that the goods are being carried at the risk of the Insured.

This Court has considered the submissions.

As regards first argument, it may be noted that no issue was raised before the Courts below. Plea of non-joinder of the parties goes to root of the case and the defendants-appellants ought to have got an issue framed on the same or filed an application for impleading its Insurance Company as party defendant. Such argument cannot be permitted to be raised for the first time in the second appeal.

As regards second argument, service of a prior notice under Section 10 of the Act of 1865 has been proved as per the finding of the Courts below, which is on correct appreciation of the evidence requiring no interference.

As regards third argument, with reference to Clause in the invoice, it may be noted that it is the invoice which has been issued by the appellants. Such Clause in the invoice is unilateral and cannot be used

to absolve the appellants unless there is acceptance by the other party or there is any separate contract to that effect. As per the provisions of the Act of 1865, a common carrier is liable for damage to the goods during transportation caused by neglect.

Keeping in view the aforesaid facts, there is no ground to interfere with the concurrent findings of fact arrived at by both the Courts below.

Regular Second Appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of in view of the aforesaid judgment.

14.02.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No