

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 113/2019**

% **14th February, 2019**

DHL EXPRESS (P.) LTD.

..... Appellant

Through: Mr. Amit Kumar Singh and Mr. K.
Enatori Sema, Advocates (Mobile No.
9958540003).

versus

M/S ENCHANTE JEWELLERY PVT. LTD.

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 5667/2019 (for exemption)

1. Exemption allowed, subject to just exceptions.

C.M. stands disposed of.

C.M. Appl. Nos. 5666/2019 and 5668/2019 (for delays)

2. For the reasons stated in the applications the delays of
138 days in filing the appeal and 27 days in re-filing the appeal stand
condoned, subject to just exceptions.

C.Ms. stand disposed of.

RFA No. 113/2019

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the trial court dated 17.05.2018 by which the trial court has decreed the suit filed by the respondent/plaintiff for a sum of Rs. 2,72,014/- on account of damages caused to the machinery transported by the appellant/defendant/carrier. The suit was filed for damages of Rs. 35,42,119/- but the suit was only decreed for an amount of Rs. 2,72,014/-. It is noted that the respondent/plaintiff has filed an appeal against the self same impugned judgment, being **RFA No. 818/2018** and the same appeal seeking enhancement of the decretal amount has been admitted for hearing vide Order dated 28.09.2018, however, the pendency of **RFA No. 818/2018** will not have any bearing on the decision of this RFA inasmuch as in this RFA the issue is as to whether a suit could not have been decreed even for the sum of Rs. 2,72,014/- against the appellant/defendant.

4. The facts of the case are that the respondent/plaintiff filed the subject suit for recovery of Rs. 35,42,119/- by pleading that they had exported a consignment of nine wooden boxes containing rope chain assembly machine worth Rs. 1,00,00,000/- to Italy for repairs and service through the appellant/defendant, inasmuch as the machines had originally been imported from Italy in 1995. The machines were being used by the respondent/plaintiff for production of hollow gold chains and production was in full swing, and it is then that the machines had developed some technical problems, and because of which they were to be exported to Italy for immediate repairs. Respondent/plaintiff got the machinery insured for the transit with M/s Bajaj Alliance Limited for Rs. 1,00,00,000/- vide Policy dated 28.05.2008. The packages/ consignment of nine boxes was given for transportation to the appellant/defendant vide Voucher dated 27.05.2008. The consignee was M/s Ciemmeo SRL, via Dell Industria 22, Casoni di Mussolente SRL, 36065 (VI) Italy. The machinery which was exported by the respondent/plaintiff for repairs to Italy was an expensive and fragile machinery which needed careful handling, and this was therefore marked on the wooden boxes that the same

contained fragile items. This was marked by necessary signage on the right side up on each box. The consignment however was delivered by the appellant/defendant to the consignee/ M/s Ciemmeo in a damaged condition. The consignee accepted the consignment with reservation and communicated such facts to the respondent/plaintiff of receiving the consignment in damaged condition vide consignee's E-mails dated 05.06.2008 and 06.06.2008. The photographs containing the damaged boxes were also sent by the consignee to the respondent/plaintiff and these photos were filed with the suit. The appellant/defendant admitted in one of its e-mail that the goods were damaged in transit, but it was stated that the same be taken as an isolated incident. The appellant/defendant vide its Letter dated 18.06.2008 acknowledged the loss caused to the consignment during the transit for purpose of filing of claim with the insurance company. The respondent/plaintiff filed the subject suit claiming losses caused to it under different heads. The damage during transit is pleaded to be of Rs. 19,71,736/-. Extra custom duty claimed which was Rs. 7,70,148/- and which was on account of extra repairing done to the machinery. The excess customs duty which was paid was claimed of

Rs. 5,70,383/-, and thus totaling to a grand total sum of Rs. 25,42,119/-.

5. The appellant/defendant contested the suit and prayed for its dismissal. Firstly, it was contended that the Courts at Delhi had no territorial jurisdiction. It was then contended that there was nothing on record to show that machinery was actually damaged during transit. The claim of the respondent/plaintiff was pleaded to be highly exaggerated, exorbitant, unjustifiable and without logical basis. The appellant/defendant then relied upon Clause 8 of the agreed Terms whereby the appellant/defendant had pleaded that its liability in case of loss/damage would be limited to USD 100 only. With respect to admission of liability in terms of the appellant's/defendant's Letter dated 18.06.2008 it was contended by the appellant/defendant that this acknowledgement of liability was made only for the purpose of respondent/plaintiff to make the claim from the insurance company.

6. The following issues were framed in the trial court:-

- “1. Whether this Court has no territorial jurisdiction to try and entertain the present suit? OPD
2. Whether the suit is bad for mis-joinder of parties? OPD

3. Whether the defendant was negligent in handling the consignment sent by plaintiff through it? OPP
4. Whether the plaintiff is entitled to recover the suit amount? OPP
5. Relief.”

7. The evidence which was led by the parties and documents which were exhibited, are referred to in paras 5, 7 to 7.2 and 8 of the impugned judgment, and these paras read as under:-

“5. Admission and denial of documents took place while the matter was before Hon'ble High Court. Defendant did not file any documents, from the documents filed by plaintiff, 02 documents were admitted by defendant. The same are as under:

- (i) Airway bill dated 27.05.2008 is Ex. P1, admitted by plaintiff however there is a rider by defendant that same is incomplete.
- (ii) Letter dated 25.08.2008 addressed to Claims department by plaintiff Ex P2.

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7. To prove its case, the plaintiff examined Sh. Chand Mehra as PW1. He tendered his evidence and additional evidence by way affidavit Ex. PW1/X and relied upon documents:

- i. Board resolution Ex. PW1/1
- ii. Insurance policy Ex. PW1/2
- iii. Voucher bearing no.DMLAWB#1397066005 Ex. PW1/3
- iv. Quotation of the consignee in Italy Ex. PW1/4
- v. E-mail dated 05.06.2008 Ex. PW1/5
- vi. E-mail dated 06.06.2008 Ex. PW1/6
- vii. Photographs forwarded by consignee Ex. PW1/7 to Ex. PW1/15
- viii. Letter dated 18.06.2008 Ex. PW1/16
- ix. Copy of invoice dated 07.08.2008 Ex. PW1/17
- x. Copy of Bill of Entry Ex. PW1/18
- xi. Copy of pay orders for customs Ex. PW1/19 (de-exhibited and given mark A)
- xii. Copy of duty paid challan Ex. PW1/20
- xiii. Copy of letter dated 25.08.2008 Ex. PW1/21

xiv. Copy of the certified extract of job work register and salary paid Ex. PW1/22 and Ex. PW1/23

7.1 He further tendered his evidence and additional evidence by way affidavit Ex. PW1/X1 alongwith affidavit u/s 65B of Indian Evidence Act and relied upon documents

xv. E-mails dated 16.06.2008, 17.06.2008, 19.06.2008, 20.06.2008 and 23.06.2008 Ex. PW1/24

xvi. E-mail dated 13.06.2008 Ex. PW1/25

7.2 He was exhaustively cross examined on behalf of defendant, thereafter plaintiff evidence was closed.

8. On behalf of defendant Sh. Chandrasen Upadhyay, Legal Manager stepped in witness box as DW1. He tendered his evidence by way affidavit Ex. DW1/A and deposed that there was no delay on the part of defendant for the delivery of the consignment, the same was retained by the custom authorities at Italy. It was further deposed that it was duty of the consignor to provide all pre-requisite boxes for the clearance of consignment. He further stated that the insurance company with whom plaintiff had insured the property was not party to the present suit. He was extensively cross examined on behalf of plaintiff, thereafter defendant evidence was closed.”

8. Before turning to the issues requiring determination, it may be noted that this Appeal came up for admission for the first time on 08.02.2019 when the appeal was argued in detail on behalf of the appellant/defendant by Ms. K Enatori Sema. During the course of arguments, attention of the said counsel was drawn to the judgment passed by this Court in the case of *M/s Jet Airways India Ltd. v. M/s Dhanuka Laboratories Ltd., RSA 295/2016 decided on 30.09.2016* and the Ld. counsel Ms. K Enatori Sema took an adjournment to study

this judgment. In the judgment in the case of *M/s Jet Airways India Ltd. (supra)* passed by this Court, reference has been made to the relevant Rules 22 and 25 of the Schedule of the Carriage by Air Act, 1972 alongwith an earlier judgment of a Ld. Single Judge of this Court in the case of *Vij Sales Corporation v. Lufthansa, German Airlines, AIR 2000 Del 220; 87(2000) DLT 195* and also the often cited judgment of Hon'ble Supreme Court in the case of *Nath Bros. Exim International Ltd. v. BEST Roadways Ltd., (2000) 4 SCC 553* that liability of a carrier is a strict liability and that a carrier cannot by contract seek to limit its liability to a specific lesser amount although much larger amount of loss is caused to the consigner. It has been held in the judgment in the case of *M/s Jet Airways India Ltd (supra)* that willful misconduct is presumed on a carrier and the carrier thus cannot contract out of its liability unless it is strictly proved otherwise by the carrier.

9. The first issue is as to whether the courts at Delhi had territorial jurisdiction, and in this regard it could not be disputed on behalf of the appellant/defendant that in terms of the Airway Bill issued by it for the subject consignment, Ex.P-1/Ex.PW1/3, the place

of commencement of shipment is shown as Delhi. Once that is so, the contract is performed at Delhi because the shipment has commenced from Delhi, and consequently, the courts at Delhi have territorial jurisdiction. I reject the argument which was urged on behalf of the appellant/defendant on the last date of hearing that Delhi means NCR inasmuch as I fail to understand as to how if the Airways Bill specifically refers to origin/commencement of the journey from Delhi, then the same can become Gurgaon merely because Gurgaon is in the National Capital Region(NCR) of Delhi. The appellant/defendant being a carrier, the place of commencement of journey is the place of performance of the contract and the place where the contract is performed would have territorial jurisdiction vide *A.B.C. Laminart (P) Ltd. and Another v. A.P. Agencies, Salem, AIR 1989 SC 1239; (1989) 2 SCC 163*. This Court therefore rejects the argument that the courts at Delhi had no territorial jurisdiction.

10. The second argument urged on behalf of the appellant/defendant was that in terms of Clause 8 of the Airway Bill the liability of the appellant should be restricted to the contractual liability figure not exceeding USD 100. This clause 8 reads as under:-

“Clause 8 : extent of our liability:

Subject to conditions 11 and 13, in respect of any one shipment, our liability for any loss or damage however occasioned is limited to the lowest of these three amounts:

- a) U.S.\$ 100, or
- b) The actual amount of loss or damage suffered by you; or
- c) The actual value of the shipment. This does not include any commercial value or special value to you or to any other person.”

11. In my opinion, the issue in this case is squarely covered by the judgment in the case of *M/s Jet Airways India Ltd (supra)* and the earlier judgment of a Ld. Single Judge of this Court in the case of *Vij Sales Corporation (supra)* as also the judgment in the case of *Nath Bros. Exim International Ltd. (supra)*. It is now settled law that the liability of a carrier is equal to that of an insurer and even the principle of *force majeure*/act of God is strictly interpreted against the carrier. For example, there being a fire in the godown of a carrier has not been held to be an act of God, thus showing that liability of a carrier is strictly enforced. In the present case, there is no issue of any damage caused to the consignment on account of enemies of the State, and therefore for this other ground which can exempt liability of a carrier, it cannot be held that there can be an exemption of liability of the appellant/defendant. The relevant para of the judgment in the case

of *M/s Jet Airways India Ltd (supra)* stating the law is paras 10, and this para reads as under:-

10(i) The singular issue to be decided in this second appeal is as to whether the liability of the appellant/defendant is limited as per Rule 22 of the Rules under the Carriage by Air Act, 1972 or whether the appellant/defendant cannot get benefit of this Rule 22 of limited liability because the appellant/defendant is guilty of wilful misconduct as provided in Rule 25 of the said Rules and which provision overrides the provision of Rule 22. I further would like to note that reference in the issues framed will be to Rules 22(2) and 25, inasmuch as, the reference is wrongly made to Rule 22(2)(a).

(ii) For the sake of convenience, Rules 22 and 25 of Schedule of the Carriage by Air Act are reproduced as under:-

“Rule 22.

(1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and goods, the liability of the carrier is limited to a sum of 250 francs and kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that sum is greater than the value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of sixty-five and a half miligrammes gold of millesimal fineness nine hundred.

Rule 25.

(1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the court equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.”

(iii) It is settled law that benefit of the provision of the limited liability of a carrier such as the appellant/defendant under Rule 22 is subject to Rule 25 and which states that the benefit of limited liability cannot be given to a carrier in case the carrier is found guilty of wilful misconduct or conduct equivalent to wilful misconduct. A statement by respondent/plaintiff that goods have been misappropriated is not only a case of wilful misconduct but such act is even more than the case of wilful misconduct, and it is this case of the respondent/plaintiff which was proved that on account of the goods not having been traced and thus in fact the goods have been misappropriated. Obviously, misappropriation cannot be by a legal entity such as the appellant/defendant or its agent airline company, but by its employees or agents who have been dealing with the goods. There are judgments of various courts which hold that once goods are not traced and there is an averment of the same being misappropriated, the case then falls under Rule 25 that there is wilful misconduct or conduct equivalent to wilful misconduct. One such judgment of this Court is in the case of *Vij Sales Corporation Vs. Lufthansa, German Airlines AIR 2000 Del 220*. Of course, whether or not there is wilful misconduct would depend on facts of each case with, of course the onus being really on the carrier such as the appellant/defendant who is in control and possession of the goods to show that there is no wilful misconduct because a consignor such as the respondent/plaintiff can only step into the witness box and state so in the examination-in-chief. It is also required to be noted that similar principle with respect to strict liability of a carrier exists under the Carriers Act, 1865 and therefore onus is really upon the appellant/defendant/carrier to show that there is no wilful misconduct. The judgment under the Carriers Act holding strict liability of the carrier is the judgment of the Supreme Court in the case of *Nath Bros. Exim International Ltd. Vs.*

BEST Roadways Ltd. (2000) 4 SCC 553 and which specifies the strict liability of a carrier and how a carrier cannot take benefit of a clause of limited liability. The relevant paras of this judgment are paras 25 to 27. In these paras, the strict liability of a carrier has been equated to the liability of an insurer. These paras 25 to 27 read as under:-

“25. We have already reproduced the provisions of Sections 6, 8 and 9 above. Section 6 enables the common carrier to limit his liability by a special contract. But the special contract will not absolve the carrier if the damage or loss to the goods, entrusted to him, has been caused by his own negligence or criminal act or that of his agents or servants. In that situation, the carrier would be liable for the damage to or loss or non-delivery of goods. In this situation, if a suit is filed for recovery of damages, the burden of proof will not be on the owner or the plaintiff to show that the loss or damage was caused owing to the negligence or criminal act of the carrier as provided by Section 9. The carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State (or the enemies of the King, a phrase used by the Privy Council). The Calcutta decision in *British & Foreign Marine Insurance Co. v. The Indian General Navigation & Rly. Co. Ltd.*, the Assam decision in *River Steam Navigation Co. Ltd. v. Syam Sunder Tea Co. Ltd.*, the Rajasthan decision in *Vidya Ratan v. Kota Transport Co. Ltd.*, and the Kerala decision in *Kerala Transport Co. v. Kunnath Textiles*, which have already been referred to above, have considered the effect of special contract within the meaning of Sections 6 and 8 of the Carriers Act, 1865 and, in our opinion, they lay down the correct law.

26. In the Madras decision in *P.K. Kalasami Nadar v. K. Ponnuswami Mudaliar*, it was held that an act of God will be an extra-ordinary occurrence due to natural causes, which is not the result of any human intervention, but it was held that an accidental fire, though it might not have resulted from any act or omission of the common carrier, cannot be said to be an act of God. Similarly, in *Kerala Transport Co. v. Kunnath Textiles*, it was held that the absolute liability of the carrier was subject to two exceptions. One of them is a special contract that the carrier may choose to enter into with the customer and the other is the act of God. It was further held that an act of God does not take in any and every inevitable accident and that only those acts which can be traced to natural causes as opposed to human agency would be said to be an

act of God. In *Associated Traders & Engineers (P) Ltd. v. Delhi Cloth & General Mills Ltd.*, a fire which broke out in a pounded warehouse where the goods were kept was held not to be an act of God and, therefore, the carrier was held liable. This Delhi decision has been relied upon by the learned Counsel for the appellant on another question also to which we shall presently come, to show that the agreement by which the liability of the carrier is sought to be limited must be signed by the owner of the goods, entrusted to the carrier for carriage.

27. 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.” (Emphasis is mine)

12(i). In the present case, there cannot remain any issue of there not existing a willful negligence of the appellant/defendant inasmuch as the willful negligence of the appellant/defendant becomes clear from the E-mails of the consignee dated 05.06.2008 and 06.06.2008 which were proved by the respondent/plaintiff as Ex.PW1/5 and Ex.PW1/6. The photographs showing the damaged consignment were proved as Ex.PW1/7 to PW1/15.

12(ii) The copy of the Letter dated 18.06.2008 admitting the liability has been proved as Ex.PW1/16. In my opinion, merely because this Letter Ex.PW1/16 dated 18.06.2008 states that the same should not be constituted as an acknowledgment of a liability, yet the dichotomy in the Letter dated 18.06.2008 cannot be accepted, and the appellant/defendant cannot wish away its liability, and which otherwise was also proved in terms of the evidence led on behalf of the respondent/plaintiff, including documentary evidence referred to in paras 5, 7 and 7.1 of the impugned judgment, and which have been reproduced above.

13. The Ld. counsel for the appellant/defendant finally argued that this court should not observe with effect to the negligence of the appellant/defendant, inasmuch as the respondent/plaintiff has filed a case against the insurance company for recovery of damages, however I fail to understand this argument because even if the respondent/plaintiff recovers the claim from the insurance company, even then in that case, the liability of a carrier on account of negligence of carriage of the goods is not taken away and the insurance company after making payment of the amount to the insured

under the policy can recover the amount from the appellant/defendant/carrier on account of the insurance company being subrogated for the insured in accordance with law and from the moneys which will be paid by the appellant/defendant/carrier to the respondent/plaintiff/insured in terms of the present judgment.

14. The Ld. counsel for the appellant/defendant also cited the judgment of the Hon'ble Supreme court in the case of the appellant/defendant itself being a party, ***Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd., 1996 4 SCC 704***, and this judgment was cited with respect to the entitlement of appellant/defendant to succeed as per the limited liability clause, however it is noted that in the said judgment of the Hon'ble Supreme Court, no issue arose or was discussed with respect to the provisions of Rules 22 and 25 of the Schedule of the Carriage by Air Act, and which provision specifically fastens the liability upon the carrier. Therefore, the judgment in ***Bharathi Knitting Company (supra)*** has to be taken in the peculiar facts of the said case and will not in any manner help the appellant/defendant for holding that the appellant/defendant as a carrier is not liable as per the provisions of

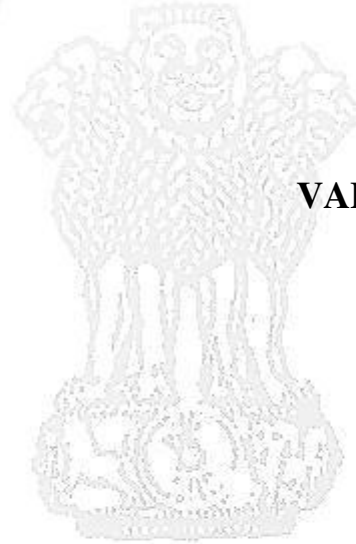
Carriage By Air Act, although, requisite negligence of the appellant/defendant/carrier has been proved with respect to the goods carried/ machinery.

15. In view of the aforesaid discussion, there is no merit in the appeal and the same is hereby dismissed.

FEBRUARY 14, 2019

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VALMIKI J. MEHTA, J



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