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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :04.03.2021

Pronounced on :11.03.2021

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

A.S.No.1036 of 2007

M/s KGL Transport
Represented by
Its Proprietor,
K.G.Loganathan,
664/1D Thiruvottiyur High Road,
Chennai 600 019.

.. Appellant/Defendent

/versus/

1.Indian Additives Limited,
Express Highway, Manali,
Chennai 600 068,
Rep.by its Power Agent,
M/s United India Insurance Co.Ltd.,

2.M/s United India Insurance Co.Ltd.,
No.24, Whites Road,
Chennai 600 014.
Divisional Office at
Dare House,
17, Rajaji Salai,
Chennai 600 001 rep by its
Divisional Manager Mr.Jayakumar

.. Respondents /Plaintiff

Prayer:- Appeal Suit has been filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 31.08.2006 made in O.S.No.4919 of 2002 on the file of VI Additional Judge, City Civil Court, Madras.

For Appellant :Mr.R.Thiagarajan

For Respondents :No appearance

J U D G M E N T

This appeal filed by the defendant, being aggrieved by the judgment and decree of the trial Court allowing the suit filed



for recovery of Rs.7,91,162/- with 18% interest from the date of the plaint till realisation.

2. For sake of clarity, parties are described as found in the plaint.

3. Background facts of the case:-

The first plaintiff is a Public Sector Company. The second plaintiff is the Insurance Company, which holds letter of subrogation given by the first plaintiff and also the power of attorney of the first plaintiff. The defendant is a common carrier for reward. On 17.08.1999, the first plaintiff entrusted 10.270 MT of LUBAD-484 lubricating oil worth Rs.8,09,395.44 to the defendant carrier at Chennai for safe carriage and delivery to M/s Bharat Shell Limited, Taloja. The consignment was not delivered to the consignee at Taloja due to the accident at Sathara Highways en route to Taloja on 21.08.1999. On receipt of the information, the second plaintiff with whom the consignment was insured, appointed M/s Martech Surveyors, to assess the loss. The surveyors assessed the loss at Rs.8,09,395.44 and filed a report indicating that on the earlier hours of 21.08.1999, the tanker carrying the suit consignment met with a road mishap and the tanker overturned. Consequently, the contents of the tanker leaked. The first plaintiff on 19.10.1999 through its letter made a claim on the defendant for the value of the material entrusted. The defendant received the same and acknowledged on 07.12.1999 for the loss of goods. Non-delivery of the consignment and consequent pecuniary loss sustained by the first plaintiff were due to the negligence on the part of the defendant. For breach the statutory duty, the defendant was called upon to disclose, how the suit consignment was handled during transit while they had exclusive custody. Also, complaint was given to the second plaintiff, which had insured the suit consignment for transit loss. The second plaintiff, as per the terms and conditions of the Insurance Policy, settled the first plaintiff a sum of Rs.7,91,162/- there upon obtained the letter of subrogation and special power of attorney dated 25th May 2001 from the first plaintiff. The liability of the common carrier is that of an insurer absolute and unconditional notwithstanding absence of negligence. Therefore, a sum of Rs.7,91,162/- was claimed from the defendant for the loss of consignment. After serving pre-suit notice to the defendant, the suit for recovery of money with interest laid before the City Civil Court, Chennai and taken on file as O.S.No.4919 of 2002.

4. The defendant contested the suit on the ground that the first plaintiff entrusted 10.270 Metric Tonnes of LUBAD-484 lubricating oil additives on 17.08.1999 to be carried for delivery at Taloja. The consignment was transported in the



vehicle bearing Reg.No.TN04Z-3899. The vehicle was insured with the Oriental Insurance Company Limited, having its office at Teynampet, Chennai. In the suit claiming damages for the loss of goods in transit, the said Insurance Company, which has agreed to indemnify the claimant, is a necessary party. For non-joinder of necessary party, the suit is bad and liable to be dismissed.

5.When the vehicle was proceeding in Sathara Highways, when tried to avoid collision with the vehicle coming ahead capsized at Siruval 40 km before Pune, due to heavy rain. The accident occurred at 3.30 hours on 21.08.1999, when the tanker lorry driver wanted to avert the disastrous accident i.e, the head on collision. As per the contract note dated 17.08.1999, it is the duty of the 1st plaintiff to insure their goods, that are being transported. The defendant never agreed acknowledge of its liability. Since the accident took place at Siruval in the state of Maharashtra, which is outside jurisdiction of TamilNadu. The Court in Tamil Nadu have no jurisdiction to try. The alleged letter of subrogation in favour of the second plaintiff is not known to the defendant. The accident occurred beyond the control of the defendant's driver. Due to torrential rain, the lorry slipped and capsized. It is an act of god. Therefore, the defendant is not liable to pay any compensation to the first plaintiff and no interest is payable. The suit is hopelessly barred by limitation, as the statutory notice contemplated under the Carriers Act, 1865 is not issued or served on the defendant.

6.The trial Court, considering the pleadings, has framed the following issues:-

(1)Whether the value of the consignment sent by the first plaintiff to the defendant's carriage was not properly valued?

(2)Whether the loss of plaintiff's consignment from the defendant's lorry was act of God?

(3)Whether the defendant is payable to the suit claim?

(4)Whether the suit is bad for non-joinder of necessary party?

(5)What other relief the plaintiff is entitled to?

7.On the side of the plaintiffs, one witness was examined as PW-1. 8 documents were marked as Ex.A1 to Ex.A8. On the side of the defendant, one witness was examined as DW-1. 5 documents were marked as Ex.B1 to B5.

8.The trial Court considering the surveyor report marked as Ex.A4 held that the accident has occurred not due to any act of God. The contention of the defendant that the goods transported is covered by special contract as per the consignment note was not accepted by the trial Court since there was no such pleadings in the written statement. In the goods carrier note



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Ex.A3, under which the consignment were booked, the following clauses found:-

Clause 1: No responsibility will be accepted by the Company for the changes in consignment being damaged due to rain, fire, theft, war or any other act of God or accidents of any nature.

Clause 2: Goods are sent at owner's risk.

Clause 11: The company does not accept any obligations or liabilities of common public carriers under the Carrier's Act.

Clause 12: The company is not liable to any type of dispute arising from the consignee or consignor.

But, it is not signed by the contracting parties. Hence, held that these clauses are not part of agreement. The contention of the defendant that the lorry driver has taken all precautionary measures for the safety of the consignment and it was done to the act of the God that the goods lost in the transit, rejected by the trial Court.

9.Regarding the non-joinder of necessary party, the trial Court held that the suit filed on the strength of the agreement with the defendant. Therefore, the plaintiff, who sought the relief against the defendant as a carrier for the loss of consignment need not implead the insurer of the defendant vehicle. For the above said reasons, the trial Court allowed the suit.

10.In the appeal, the trial Court judgment is challenged on the ground that the report of the surveyor, who assessed the loss in the absence of the vehicle owner is not a conclusive proof or not binding on the owner of the lorry. The trial Court erred in holding that the terms of contract found in the bill Ex.A3 is not a special contract between the first plaintiff and the defendant. The accident occurred when there was a heavy rain and when the driver of the tanker lorry tried to avert the head on collision. So, it was an act of God. However, the trial Court has erred in rejecting the said defence. When there is a specific contract between the parties namely, goods carrier and the lorry owner, the provisions of the Carriers Act is not applicable. The carrier has exercised reasonable care and caution to protect the goods entrusted to it. No negligence could be attributed on the lorry driver. While so, the conclusion reached by the trial Judge is perverse, unsound and unintelligible. The second plaintiff claims money from the defendant based on the letter of subrogation. PW-1 has admitted that he is not aware of the nature of the contract entered into the appellant and the first respondent. Therefore, the Court



below ought to have held that the suit is unsustainable and untenable.

11. Under Clauses 11 and 12 of the consignment note, it is made clear that the owner of the goods should ensure the insurance of the goods. There is a categorical admission in the evidence of PW-1 that the road leading to Sathar was flooded with rain water and slippery. Same is also evident from the surveyor report Ex.A4. Therefore, rejecting the defence that the accident had occurred due to act of God, is unsustainable and untenable.

12. In support of his submission, the learned counsel appearing for the appellant relied upon the judgment of this Court rendered by Division Bench in P.K.Kalasami Nadar v. K.Ponnuswami Mudaliar and others reported in 1962 Madras 44 (V49 C8) 1947 wherein the Court has explained what is act of God. In the said judgment, the Hon'ble Judges are observed that, under the common law of England, there were two categories of bailees on whom the law imposed a greater responsibility viz., common carrier and innkeepers. These were held liable for the safety of the goods entrusted to them in all events, except where the loss or injury to them was occasioned by an act of God, King's enemies or from defect in the goods (vide Indian Airlines Corporation, v. Jothaji Maniram, ILR (1959) Mad. 439 at p.446: (AIR 1959 Mad 285 at p.288). An act of God will be an extraordinary occurrence due to natural causes, which is not the result of any human intervention which could not be avoided by any amount of foresight and care e.g, a fire caused by lighting. But an accidental fire as in the present case though it might not have result from any act of or omission of the appellant, could not be said to be an act of God.

13. Before advertng to the other points, it is necessary to understand the provisions of Carriers Act, Section 5 of the act deals about the right of the owner of the goods recover the loss from the carrier owner. Section 6 of the said Act indicates, the effect of special contract between the parties and how the liability on the common carrier can be altered under the special contract. Section 9, the burden of proving negligence is not on the owner of the goods.

14. For easy understanding, the three Sections are extracted namely, 5, 6 and 9 of the Carriers Act, 1865 reads as below:-

Sections 5 , 6 and 9 of the Carriers Act, 1865 reads as below:

"5. The person entitled to recover in respect of property lost or damaged may also recover money paid for its carriage.—In case of the loss or damage to property exceeding in

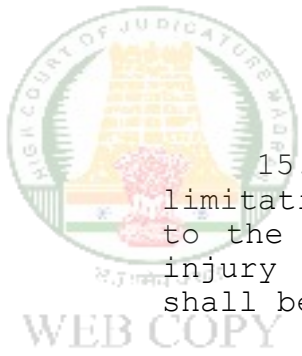


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value one hundred rupees and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid."

Section 6. In respect of what property liability of carrier not limited or affected by public notice. Carriers, with certain exceptions, may limit liability by special contract.—The liability of any common carrier for the loss of or damage to any property (including container, pallet or similar article of transport used to consolidate goods) delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act 22 of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same.

Section 9: Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.—In any suit brought against a common carrier for the loss, damage or non-delivery of goods (including containers, pallets or similar article of transport used to consolidate goods) entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents."



15. Section 10 of the Carriers Act, 1865 provides the limitation. Unless notice in writing of the loss or injury given to the carrier within six months of the time when the loss or injury first came to the knowledge of the plaintiff, no suit shall be instituted.

16. How these provisions to be understood is explained, in M/s M.G. Brothers Lorry Service v. M/s Prasad Textiles reported in [AIR 1984 Supreme Court 15] at below:-

"12. As we have noted before the liability of a common carrier can be limited by agreement under the provisions noted hereinbefore but that must be limitation of the liability. This position was highlighted by the Privy Council in the case of India General Navigation and Railway Co. Ltd., v. Dekhari Tea Company Ltd., AIR 1924 PC 40 where the Privy Council reiterated on the construction of Section 6 of the Carriers Act that what was required to limit the liability in the case of a person who answered the definition under the Indian Carriers Act viz., of transporting for hire goods from place to place for all persons indiscriminately was that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business from that of common carrier."

17. The learned counsel appearing for the appellant also relied upon the judgment of the Andhra Pradesh High Court reported in AIR 1994 Andhra Pradesh 24 [M/s Milap Carriers, Transport Contrs. And Commissions-Agents, Hyderabad v. National Insurance Company Ltd., Hyderabad and another] wherein it is held that when the goods are carried at the owners risk, the liability of the carrier is absolved.

18. Contrariwise, in Indian Drugs and Pharmaceutical v. Savani Transport (AIR 1979 Andh Para 41), the Court has held that:

"13. "Section 8 of the Carriers Act, to the extent it is relevant, provides that every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier



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or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property. Section 9 says that in any suit brought against a common carrier for the loss, damage or non-delivery it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. The burden of proving the absence of the negligence is on the carrier. The reason is that the liability of the common carrier is that of an insurer. Even if there is no negligence on the part of the common carrier, he is liable to compensate the owner of the goods for the loss of the goods that occurred during the transit." (emphasis added).

19. Similar view was taken by the Kerala High Court in R.R.N. Ramalinga v. V. Narayana reported in AIR 1971 Kerala 197, The Court expressed its will in the following words:-

"A common carrier is not a mere bailee of goods entrusted to him. He is an insurer of goods. He is answerable for the loss of goods even when such loss is caused not by either negligence or want of care on his part, act of God and of King's enemies excepted. This arises because responsibility attached to the public nature of the business is carried on by him. He holds out as a person who has the expertise and the facilities to conduct the business of transport; consequently he is treated as an insurer of the goods and is answerable for its loss. This concept as to the liability of a common carrier has been applied in India uniformly."

20. Point for consideration arising in this appeal is, whether the trial Court is right in holding the loss of goods in the road accident was not due to act of God and only due to the negligence of the carrier and whether the non-joinder of the insurer of the carrier will disentitle the plaintiffs to claim damages against the carrier?

21. The fact that on 17.08.1999, 10.270 MT of LUBAD-484 lubricating oil entrusted to the appellant herein by the respondents, is not in dispute. Likewise, the loss of goods, when the tanker lorry involved in a road accident on 21.08.1999



at Sathara Highway route to Taloja also not in dispute. Under the Carriers Act, unless there is a special contract, limiting the liability of the carrier under Section 6 of the Act, the carrier liability to compensate the entire value of the goods, which has not been delivered is absolute. The Carriers Act, 1865 found to be deficiency on several aspects and therefore, replaced by the Carriage by Roads Act, 2007, which received the Ascent of the President on 29.09.2007 and came into effect from that day. Whereas the cause of action in the case in hand arose under the New Act. Hence, the law prevailing on the date of accident alone has to be applied.

22.The combined reading of Sections 6, 8 and 9 of the Carriers Act, 1865 make manifestly clear that it is mandate for every common carrier to compensate the loss or damage of the property caused by the negligence or fraud of the carrier or his agent. The liability can be absolved by the carrier by special agreement and that agreement must be signed by both the parties. The liability of common carrier under the Carriers Act is that of insurer with regard to the goods entrusted to it. It is the burden on the carrier to prove absence of negligence. It is not necessary for the plaintiffs to prove negligence on the part of the carrier.

23.In this case, the report of the surveyor appointed by the second plaintiff is marked as Ex.A4. The surveyor has stated that when the tanker lorry was proceeding on the earlier hours of 21st August, 1999, near Siruval on Sathara Highway, Maharashtra, two lorries came in the opposite direction at a great speed, as if they may come in head on collision with tanker TN-04-Z-3899. So, the confused driver of Tanker TN-04-Z-3899 suddenly turned to his left resulting in to skidding and turn-turtling of tanker TN-04-Z-3899 on the road. As it rained very heavily and poor visibility was further responsible for skidding of tanker. Driver and cleaner sustained injuries. Thereafter, matter was reported to Saha Police Station, Pune District, Maharashtra. A copy of police report recorded in local language attached to the report.

24.Though the report is not a conclusive proof, it is the document relied by the plaintiffs. To that extent, the content in the document can be used against the plaintiffs as admission. The goods carrier note marked as Ex.A3 contains the terms and conditions in which the first four conditions are extracted as below:-

“(1)No responsibility with be accepted by the company for the changes in consignment being damaged due to rain, fire, theft war or any act of goods and accidents of any nature.

(2)No responsibility will be accepted by



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the Company goods for any claim from the consignor or consignee or Insurance Company by way of reimbursement to the insurance or any other company.

(3) Goods are sent at owner's risk.

(4) No responsibility will be accepted for Insurance of the consignment by the company and it is the responsibility of the customers to insure their consignment against all risks."

25. In most of the judgments cited above, the Court has taken a consistent view that the phrase 'at owner's risk' used in goods receipt or any other terms and conditions not signed by both the parties, will not save the liability and such terms will not get the protection of Section 6 of the Carriers Act. The trial Court also held the same view while allowing the suit.

26. The phrase 'at owner's risk' has been explained by the Hon'ble Division Bench of this Court in Patel Roadways Ltd (formerly Patel Roadways Private Ltd.,) No.100, Sherif Devji Street, Bombay 400 035 v. Seshasayee Industries Ltd., Vadalur-607 303 and another reported in 2004(4) CTC 273, in para 23, which reads as below:

"23. The submission of the learned counsel for the defendant/appellant, that the goods were carried at owner's risk also will not relieve the defendant, from paying the amount or extinguishing the liability. A common carrier is liable to the owner, for loss or damages, to any property, delivered to such carrier, to be carried, whether such loss or damage had arisen from the negligence of carrier or any of his servants. The term 'at owner's risk' used in the goods receipt only should mean, if damages caused to the goods, beyond the control of the carrier, such as vis major or act of alien country, giving relief, not otherwise. Thus, irrespective of the fact, that there is a clause in the document, that the goods are carried at owner's risk, will not disentitle the plaintiffs from claiming the damage, or will not relieve the common carrier, against Section 9 of the Act."

27. The suit is for recovery of money filed by the first



plaintiff, who is the owner of the goods represented by its Power Agent M/s United India Insurance Company Limited and by M/s United India Insurance Company Limited, who is the second plaintiff, based on the letter of subrogation and special power of attorney dated 25.05.2001. This letter of subrogation and special power of attorney is marked as Ex.A7. Before giving evidence, PW-1 has produced the letter of Authority issued by M/s United India Insurance Company. In the plaint, it is stated that the consignment was insured by the first plaintiff with the second plaintiff and immediately, after the information of the accident, the licensed surveyor assessed the loss on visiting the accident spot on 23.08.1999 and 24.08.1999. The first plaintiff has made claim on the defendant for the value of the material non-delivered and the said letter is dated 19.10.1999 and the same has been acknowledged by the defendant, who is the appellant herein vide letter dated 07.12.1999. These two communications are marked as Ex.A6 and Ex.A8 respectively. The said notice Ex.A6 is in compliance with the time limit prescribed under Section 10 of the Carriers Act, 1865. Thereafter, the suit for recovery of money is presented before the City Civil Court on 20.08.2002 though with deficit Court fee.

28.The accident occurred on 21.08.1999 earlier hours and the entire goods got lost in the said accident. The limitation period to file the suit is under Article 10 of the Limitation for filing the suit against the carrier for compensation for loss of goods is three years from the date of loss of goods as per the Article 10 of the Limitation Act, 1963. The plaint first presented on 20.08.2002 and represented on 09.09.2002 with additional Court fee of Rs.58,340/-. Therefore, the plea that the suit is barred by limitation is not factually correct

29.The perusal of Ex.A6 dated 19.10.1999 indicates that the owner of the consignment had made a claim for non-delivery of the material and called upon the appellant to reimburse the claim. In response to this notice, the appellant in his reply dated 07.12.1999 admitted that the truck met accident en-route to Sathara and the entire material got drained off and they are fully responsible for shortage. In this circumstances, the owner of the consignment, who insured with the first plaintiff's Insurance company had subrogated and had issued letter of subrogation and special power of attorney in favour of the second plaintiff on 25.05.2001, since the loss of goods has been reimbursed to the owner of the consignment by the insurer the 2nd plaintiff for recover the same from the carrier, suit is filed.

30.From the evidence, it is clear that the accident occurred not due to the act of god neither it was due to the negligence of the tanker lorry driver. From the surveyor report, we find



that to avoid head on collision with the lorry coming ahead, the tanker lorry driver has moved to left and slipped. The tanker lorry got damaged, the materials inside the tanker had leaked. In the written statement filed by the appellant, it has been specifically stated that the tanker lorry is totally insured with the Oriental Insurance Company Limited and therefore, the said Insurance Company is a necessary party. In spite of informing the plaintiffs that the suit is bad for non-joinder of necessary party, the plaintiffs not impleaded the insurer of the vehicle, who has collected premium and promised to indemnify the vehicle owner, who is the appellant herein. Under such circumstances, as contended by the learned counsel appearing for the appellant, since the lorry has been insured with the Oriental insurance Company under policy No.1099/51752, the carrier owner is indemnified. The Oriental Insurance Company is liable to indemnify the loss of goods. This was made known to the plaintiffs in the written statement at paragraph No.5. Despite the knowledge, the plaintiffs have not impleaded the Oriental Insurance Company, which is liable to indemnify the defendant as per the contract of his insurance.

31.This Court is convinced with the plea that the suit is bad for non-joinder of necessary party. This plea not duly considered by the trial Court. When the first plaintiff himself is the insurer and filed the suit based on the letter of subrogation, in all fairness, ought to have adhered the principle of insurance. They should have impleaded the insurance company, which has collected premium from the carrier and agreed to indemnify the carrier. Despite providing the details of the insurer and the policy number in the written statement, the plaintiff failed to implead the proper and necessary party. As a result, the defendant is now mulcted with the responsibility of paying the damages to the owner of the consignment. For the failure and omission of the plaintiffs, the defendant cannot suffer.

32.For the said reasons, the Appeal Suit is allowed. The judgment and decree dated 31.08.2006 passed by the trial Court viz., City Civil Court, Chennai made in O.S.No.4919 of 2002 is set aside. No order as to costs.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To:

1. The VI Additional Judge,
City Civil Court, Chennai.

2. The Section Officer,
V.R.Section High Court, Madras.

+1cc to Mr.R.Thiagarajan , Advocate, S.R.No.15783

A.S.No.1036 of 2007

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