IN THE HIGH COURT OF JUDICATURE AT MADRAS

14.09.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.1065 of 2007

Surana Corporation Ltd.,
No.16, Whites Road, II Floor,
Royapettah,
Chennai-14,
Rep. By their Director and Principal Officer,
Shanthilal Surana

... Appellant/Plaintiff

Vs.

1. Genshipping Pacific Lines Pvt., Ltd.,
   Rep. by their Local Agents,
   M/s.A.S.Shipping Agencies Pvt., Ltd.,
   New No.113, (Old No.55), Armenien Street,
   Chennai-1.

2. Zurich Insurance Company,
   Rep. By their claim Settling Agents,
   M/s.Wilson and Company Limited,
   TMB Mansion, III Floor, 739, Annasalai,
   Chennai.

... Respondents/Defendants

PRAYER: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 28.03.2006 made in O.S.No.2359 of 2002 on the file of the learned IV Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.Gowthaman

For Respondents : Mr.P.Giridharan

J U D G M E N T

The appeal arises in respect of a suit that has been filed by the plaintiff seeking recovery of money for short delivery against the shipper and their Insurance Company. The suit was dismissed after contest.

2. The factual matrix of the case is as follows:

i) Plaintiff's Case:

The plaintiff had purchased M.S. Equal Angles of Japanese origin weighing 1560.435 MTs. The cargo was shipped from Kashima through the ship on board the vessel 'Maribor' owned and/or chartered by the first defendant sea carrier. The cargo was bundled into 801 bundles. The delivery was to be effected at the Chennai Port. The first defendant, the Sea carrier had issued a bill of lading dated 20.11.2000 acknowledging the entrustment of the cargo in a good order and condition. The vessel had arrived at the Port of Chennai on 27.12.2000 and commenced her discharge operations on 27.12.2000. Though the first defendant received 801 bundles, they found out that 45 out of them was in a loose condition. The plaintiff had engaged the services of a license surveyor M/s.Metcalfe and Hodgkinson Private Limited, to supervise the discharge operations and they had submitted a survey report in which they had reported that though 801 bundles had been delivered, 45 were in a loose condition and that there was a short delivery of 81.025 Mts.

3. Immediately, the plaintiff had notified the local agent of the defendants about the short delivery by their letter dated 22.01.2001. The plaintiff would submit that this short delivery was only by reason of the failure on the part of the first defendant, the sea carrier, to take adequate safety measures to safely deliver the cargo in the same condition as it was received. The fact that 45 bundles were in loose condition proves the negligence and the mis-conduct on the part of the defendants. The 2nd defendant being the general insurer covering the said cargo was also liable. The plaintiff had lodged a claim with the agents of the 2nd defendant at Chennai which was disclaimed by the 2nd defendant on totally untenable grounds. Therefore, the plaintiff come forward with the suit. The recovery was sought for in respect of the value for the shortfall of 81.025 Mts. The plaintiff had calculated the value at U.S. Dollar 1 equivalent to Rs.48.25 to arrive at a compensation of Rs.6,45,060.52.

(ii) Written Statement of 1st Defendant:

4. The 1st defendant had filed a written statement inter alia denying the claim made by the plaintiff. They had contended that the 1st defendant was not aware about the weight of the cargo and that they had only been appraised of the number of bundles. The description of the cargo in the bill of lading was only as per the declaration made by the shipper. Therefore, there is no necessity for the defendants to weigh the

consignments. The bill of lading clearly contains a disclaimer wherein it is being made clear that the carrier would not be responsible for the weight, measure, marks, quality and other details.

5. The defendant would further submit that as per the records and the port tally, the vessel has discharged the entire quantity of 801 bundles and there was no complaint or demur, when the goods were discharged at the Port. Further, the 1st defendant would submit that the plaintiffs had not asked for any survey on discharge from the vessel and no notice had been given immediately. They would further submit that the survey report submitted by the plaintiff was not binding on them as it was a unilateral survey not conducted in their presence. They would further contend that as per Article 3 Rule 6 of the Carriage of Goods by Sea Act, the responsibility of the carrier comes to an end if no claim or appeal has been received within 3 days from the receipt of the cargo. They would contend that in the instant case, such a complaint/appeal had not been received within the stipulated time. The 1st defendant would further contend that once the plaintiff had noticed that 45 bundles were in a loose condition, they should have asked for a survey at the Wharf in the presence of the plaintiff and in case the survey indicated a shortage, then within the time permitted, the shipper ought to lodge their complaint. Since the same has not been done, the 1st defendant carrier cannot be mulcted with the liability.

6. The 2nd defendant had filed a written statement inter alia contending that they are not liable as per the provisions of Section 230 of the Indian Contract Act. The consignment had been transported in the 1st defendant vessel and the total quantity of 801 bundles which were loaded had been delivered at the Chennai Port. They would also state that the Port Trust had specifically stated that the cargo had been cleared without a protest. Further, the plaintiff had violated the policy condition by not informing the 3rd defendant's local agent about the arrival of the ship and the unloading of cargo within the time limit specified in the policy. They would therefore contend that they are an unnecessary party and the suit deserves to be dismissed.

(iii) Trial Court:

7. The learned IV Additional Judge, City Civil Court had framed the following issues for consideration:

> "1) Whether there was a short delivery of 81.025 MT? IF so whether the defendants are liable for the same?
>
> 2)Whether second defendant is not liable

as per Section 230 of the Indian Contracts Act?

3) To what relief the plaintiff is entitled?”

8. On these issues, the parties had gone to trial. The plaintiff examined one Vijayaraghavan as P.W.1 and Aadinarayanan as P.W.2. Exs. A-1 to A-20 were marked. The defendants had neither adduced oral evidence nor produced documentary evidence. The learned Judge, on considering the evidence on record, dismissed this suit. The learned Judge held that the loss of 81.052 MTs. was not proved by the plaintiff. The plaintiff had neither prove the shortage of weight nor had they proved that this shortage was on account of the negligence on the part of the carrier. Challenging the same, the appellant/plaintiff is before this Court.

The following points for consideration arises in this first appeal:

i) Whether the plaintiff is entitled to the decree as prayed for?

ii) Whether the appellant has proved the shortage of 81.025 MTs. of M.S. Angles?

iii) Whether the carrier who has received the goods in a good condition can shirk its liability to compensate the plaintiff for the short delivery?

(iv) Submissions:

9. Mr. Gautaman, learned counsel arguing on behalf of the plaintiff. would submit that at the very first instance, the negligence of the the carrier is evident from the fact that 45 bundles, all of which have been stacked into holds, had been delivered in a loose condition. The said bundles (801 Nos.) had been received by the 1st defendant in a good condition at the loading port Koshima, Japan. He would further argue that the bill of lading, Ex. A-5 clearly gives details about the number of bundles and the weight of the cargo, in these circumstances it is for the carrier to explain as to how their has been a short delivery at the delivery point. He would place reliance primarily on Exs. A-3 Invoice, A-4 certificate of weight issued by their suppliers, A-5 Bills of Lading all of which clearly prove that a total quantity of 1560.435 Mts. had been shipped. He would also draw the Court's attention to the report of the surveyor dated 08.01.2001 marked at Exb. A-7 to buttress his arguments that the shortfall had occurred between the port of loading and the port of unloading. He would therefore submit that these factors having not been considered by the learned Judge and this has resulted in the erroneous judgment which has to be set aside by this Court.

10. Mr. Giridhar, the learned counsel appearing on behalf of the 1st defendant would at the outset submit that the description of the cargo as provided in Ex. A-5, bill of lading is a description, which is given by the shipper and is not a description taken after the cargo is received and weighed by the shippers. He would point out to the fine print in the bill of lading Ex. A-5, where it has been clearly stated that the particulars above have been furnished by the shippers. From this endorsement, it is very clear that the details regarding the weight the number of bundles, the description of the cargo etc., are provided by the shipper and it is for this reason that the bill of lading clearly stipulates that the weight, measures, marks, numbers, quality, contents and value are unknown. In support of this argument, he would rely on the judgment of this Court in Application No.7066 of 2018 and C.S.No.385 of 2012, where a similar disclaimer clause was the subject matter. The learned Judge relying upon the judgment reported as Thakur Shipping Company Limited, Bombay Vs. Food Corporation of India reported in AIR 1983 Madras 105, held that the shipper was not liable. He would further submit that the Ex.A-7 Survey Report cannot be considered, since it is a unilateral survey and no prior intimation about the short delivery has been given to the shipper. He would submit that a perusal of the very details given in the Survey Report of the plaintiff regarding the discharge operation and the delivery operations would clearly show that total number of 801 bundles had been shipped and they have arrived and all of the 801 bundles had arrived safely. He would contend that if the shipper had noticed any loss/short delivery etc., he ought to have issued a notice as contemplated in Article III (6) of the schedule to the Carriage of Goods by Sea Act. He would submit that the notice of a loss or damage was to be given within a period of 3 days from the date of discharge before or at the time of removal of the goods into the custody of the person to whom the goods were intended to be delivered. He would submit that in the instant case, such a notice had not been issued by the plaintiffs to the defendants. The first letter that had been received from the plaintiff was Ex.A-8 dated 09.01.2001, wherein for the first time, the plaintiff had brought to the knowledge of the agent of the 1st defendant about the short delivery. He would submit that this is much beyond the 3 day period provided under Article 3(6) of the Act. The plaintiff was aware about the short delivery even as early as on 30.12.2005 when the bundles had been totally discharged from the ship. He would further submit that delivery at the wharf had been taken without a demur. He would also rely on the Judgment of Shipping Corporation of India Ltd., v. Bharat Earth Movers Ltd., reported in AIR 2008 SC page 728, in support of his contention that the plaintiff has not submitted any proof regarding the value of the goods and only if such value is provided, the quantum can be calculated. He would therefore

submit that the Judgment and Decree of the Court below does not require any reconsideration.

11. Heard the learned counsels and perused the records.

(v) Discussion:

12. Admittedly, 801 bundles of M.S. Angles had been loaded at the port at Koshima for on-ward journey to be delivered at the Chennai Port. The bill of lading had indicated a total weight of 1560.435 Mts. whereas it is the plaintiff's case that when the same had landed at the Port at Chennai, there was a short delivery of 81.025 Mts. According to the plaintiff, this shortfall delivery had to be compensated by the shipper. The shipper has received the goods and described the cargo in the bill of lading only as per the details supplied by the shipper. This is evident from a reading of the bill of lading where the same has been included in fine print as follows "particulars above furnished by shippers". This clearly indicates that the shipper has not weighed the consignment when the same was loaded on to the ship. The fact that the 1st defendant has not weighed the consignment cargo is further confirmed by the endorsement in the bill of lading that the weight, measures, marks, numbers, quality, contents and value as contained therein are unknown. Therefore, when the plaintiff pleads that there has been a short delivery, it is for them to prove that there has been a short delivery. To prove the same, they have relied on Exs. A-3, A-4 and A-5. The shipper is not a party to Exs. A-3 or A-4. Further, even when the surveyor of the plaintiff was on board at the time of the discharge of the cargo, they had not intimated the 1st defendant about the short delivery and the survey was done only in the absence of the representatives of the carrier. Therefore, the carrier cannot be held responsible for the short delivery. In Thakur Shipping Corporation (supra), the Division Bench of this Court had taken note of the disclaimer clause contained in the bill of lading to hold that in view of such a disclaimer the carrier cannot be held responsible for the same. It also appears that the plaintiff has not followed the dicta laid down under Article 3 Rules 6 of the schedule to the Carriage by Seas Act. Though the plaintiff had been aware of the shortfall on 30.12.2001, they had issued a notice for the first time to the 1st defendant only on 09.01.2001. As per the provisions stated (supra), notice has to be issued within a period of 3 days. Therefore, even on this score, the appellant/plaintiff cannot seek to claim compensation from the 1st defendant. That apart, the value of the goods has not been stated in the bill of lading and is stated only in the invoice which does not form part of the bill of lading. The Judgment of the Hon'ble Supreme Court reported in AIR 2008 SC 728 has dealt with the above and the learned Judges of the Hon'ble Supreme Court has held as follows:

> "5. In the written statement, the

respondents inter alia pleaded 'limited liability' on their part.

A learned Single Judge of the said Court held the appellant liable for payment of damages being responsible for causing damage and loss to the consignment which had occurred at a time when the cargo was in its charge.

... ...

9. Mr.C.A.Sundaram, learned senior counsel appearing on behalf of the appellant, placed before us the relevant provisions of the Indian Act, Japanese Act as also the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules) to contend that as the price of the cargo had not been disclosed in the Bill of Lading, the liability of the appellant must be held to be confined only to the amount specified therein. It was urged that the High Court committed a serious error in holding that the Indian Law would be applicable.”

13. Therefore, the claim as made is not supported by proof. The trial Court has rightly rejected the claim and consequently dismissed the suit. No exception can be taken to the same and consequently, the first appeal is dismissed. However there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

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

+1cc to Mr.P.Giridharan, Advocate, S.R.No.46356

A.S.No.1065 of 2007

SRA(CO)
SU(10/12/2021)