



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.01.2021

DATE OF DECISION : 26.04.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

AND

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

A.S.No.297 of 2018

1.M/s.D.H.L. Express (India) Private Limited,
Plot No.12-B, South Phase,
Guindy Industrial Estate,
Guindy, Chennai - 32.

2.M/s.D.H.L. Express (India) Private Limited,
8th floor, Dheeraj Arma,
A.K.Marg, Next to Bandra Court,
Bandra East, Mumbai - 400 051. .. Appellants/Defendants

Versus

M/s.Sri Manikandan Enterprises,
Rep. By its Proprietor S.Sarangapani,
5, Devarajamudali street,
Chennai - 3. .. Respondent/Plaintiff

Prayer: First Appeal has been filed under Section 96 of the Code of Civil Procedure, 1908, against the judgment and decree 16.08.2017 passed in O.S.No.11101 of 2010 by the XIX Additional Judge, City Civil Court, Chennai.

For Appellants : Mrs.Chitra Sampath, SC, for
Ms.Vinithra Srinivasan
for M/s.NVS & Associates

For Respondent : Mrs.Rita Chandrasekaran
for M/s.Aiyar & Dolia

JUDGMENT

(Judgment of the Court was delivered by T.RAJA, J.)

The defendants in the suit are the appellants and the plaintiff in the suit is the respondent. The defendants/appellants have filed this appeal challenging the



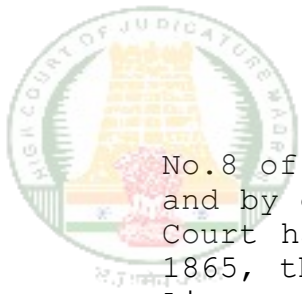
impugned judgment and decree passed by the learned trial Court directing to recover a sum of Rs.17,30,925/- from them with future interest at 9% per annum from the date of plaint till the date of realization with costs.

WEB COPY

2. For the sake of convenience, the parties will be referred to as arrayed in the original suit.

3. Mrs.Chitra Sampath, learned Senior counsel for the defendants/appellants, submitted that the plaintiff/respondent herein has been in the business of manufacturing Human Hair Remi Single Drawn and exporting the same to foreign countries for the past 25 years. The plaintiff company entrusted the shipment to the first defendant on 24.06.2009 and the said shipment was intended for M/s.Cabelo Natural Importacao E Exportacao, LDA, Travessa Engracia, Fragoso Predio No.22 3 Andar, Ingombota, Luanda, Angola. The shipment was delivered to the destination described in the Airway Bill by the first defendant/DHL and therefore, there was no negligence in handling the cargo by their agents or staff. Even if it is proved that any liability could be fastened on the defendant, the same is subject to the provisions of the Carriage by Air Act, 1972 (in short "the Act") and the plaintiff is bound by the terms and conditions mentioned in the Airway Bill. Moreover, the plaintiff has not impleaded the consignee, namely, plaintiff's customer/Cabelo Natural Importacao E Exportacao, in Ingombota, Luanda, Angola, and DHL, Angola, therefore, the suit itself suffers from non-joinder of necessary parties. Although this issue was taken up, it remained unanswered by the learned trial Court.

4. Arguing further, learned Senior counsel contended that the transaction between the consignor/plaintiff and the DHL/defendants is bound by the requirements of the Carriage by Air Act, 1972, as applicable for international carriage, read with Schedule II as per Section 4 of the Act, which contains the Rules as per Hague Protocol, which was an amendment to the Warsaw Convention. When the defendant is the carrier and the plaintiff is the consignor and both of them being signatory to the Hague protocol, they are bound by Schedule II as mentioned in Part 2 of the Annexure to the Act. When India adopted the Warsaw Convention, Hague Protocol and Montreal Convention fully, as per Rule 5 of Schedule II, every carrier has a right to require consignor to accept the Airway Bill. As per Rule 11 of Schedule II, the Airway Bill is prima facie evidence of conclusion of contract. Therefore, the Airway Bill has been signed and filed by the plaintiff and hence, they are bound by the contract. Whiles, any reliance on the Carriers Act, 1865, by the learned trial Court to determine the liability is inapplicable and erroneous, hence, the same is liable to be interfered with by this Court. Learned trial Court in paragraph



WEB

No.8 of the judgment held that the Airway Bill is not a contract and by disregarding Rules 5 and 11 of Schedule II, learned trial Court has wrongly placed reliance on Section 9 of Carriers Act, 1865, that has no application to the suit transaction. When the Airway Bill is valid and binding document/agreement on both parties, the plaintiff company cannot wriggle out of its responsibilities. Placing reliance on the Airway Bill and taking support of the judgment in the case of Bharathi Knitting Vs. DHL Worldwide Express Courier Division of Airfreight Limited [AIR 1996 SC 2508] holding that Airway Bill is a binding contract between the carrier and the consignor and therefore, the parties are bound to the limitation of liability mentioned in the terms and conditions of the Airway Bill, it is argued that any reference to invoice has no relevance in determining the dispute of the present suit.

5. Coming to the next issue that no evidence was led by the plaintiff to prove quantum of loss suffered, learned Senior counsel argued that the burden of proof is on the plaintiff to prove his case when the suit itself filed claiming compensation. When the plaintiff has to stand on his own leg, he cannot pick holes in the case of the defendants. In this regard, taking support of a decision of the Hon'ble Apex Court in the case of Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jumayath Palli Dharas Committee and Others [Manu/SC/0650/2004], learned Senior counsel argued that the plaintiff has to proceed or succeed on the strength of his case/her case, not on the weakness found in the case of the defendant. For the same proposition, referring to another decision in the case of Rangammal Vs. Kuppuswami and others [MANU/SC/0620/2011], learned Senior counsel argued that the plaintiff cannot proceed on the basis of weakness of the other party. Whiles, in the present case, when the first defendant/DHL has not received any correspondence from the plaintiff about the short delivery of goods as they have not produced any evidence except the alleged letters from DHL Angola who has not been made a party to the suit, and more particularly, no quantification has been made even in such alleged letters by DHL Angola, it is the bounden duty of the plaintiff to prove the actual loss and before the learned trial Court, the plaintiff has relied on a judgment of the Hon'ble Division Bench of this Court in the case of Singapore Airlines Cargo Private Limited Vs. M/s.HCL Info Systems Limited, New Delhi and others [(2017) 6 MLJ 211], wherein the plaintiff was the owner of the goods and there was a notice of short delivery and production of a certificate of short delivery to quantify its loss in the suit. But, in the present case, no such certificate of short delivery has been produced and the plaintiff has not proved the quantum of loss of 2 boxes under consignment bearing AWB Nos.1036375281 and loss of 2 boxes and partial loss in the third box bearing AWB



No.1036375270 respectively. When the plaintiff has not proved or substantiated the value of actual loss, the impugned judgment holding that the plaintiff is entitled to recover a sum of Rs.17,30,925/- from the DHL with future interest @ 9% per annum from the date of plaint till the date of realization with costs is untenable and unjustified.

6. Continuing further, learned Senior counsel argued that even if Airway Bill is taken as a contract between the parties, the plaintiff company cannot wriggle out of the contract and the Airway Bill is binding on the parties, inasmuch as Airway Bill is a standard form of contract as per Rule 8(c) and Rule 22(2) of Schedule II of the Carriage by Air Act, 1972. It is further argued that to claim the value of the goods, a special declaration is to be made in the Airway Bill, for which, supplementary charges are to be paid. But, in the present case, no such charge has been paid and this is against Rule 22(2) of the Act, therefore, the plaintiff is not entitled to recover the alleged value, as the alleged value is not equal to the actual value declared for carriage and it is only a customs value. When the declared value for carriage has been mentioned as NVD (No Value Declared), in view of such non-disclosure, the defendants liability are limited by Rule 22(2), hence, the liability of the defendants/DHL is limited to 250 Gold Francs or USD 20 per kilogram.

7. Concluding the arguments, learned Senior counsel relying on a decision of Hon'ble Delhi High Court in Air India Vs. Tej Shoe Exporters Private Limited and Others [2014 (1) Delhi 484], submitted that in the said decision, the plaintiff/Tej Shoe did not declare the value of the goods in the Airway Bill, but, rather, only the value of customs was declared and therefore, it is held that since the liability of carrier is limited by Rule 22, the scope of this Rule cannot be enlarged even by Courts as per legislative intent and that what is available in Rule 22 is the maximum liability. In this case, it is explicitly admitted by one S.Kandavel, proprietor of plaintiff company in his cross-examination that no insurance was obtained and no special value was declared and that no amount was paid towards the declared value of the cargo. It is further argued that against the decision in Tej shoe's case (cited supra), when SLP was preferred, the same was also dismissed by the Hon'ble Apex Court and this was reported in MANU/SCOR/20086/2014. Hence, based on the above said ratio, even if 117 kgs. is taken on record as given by the plaintiff, then the liability of the defendants will be 117 kgs x 20 USD x 64.17 (rate of INR) = Rs.1,50,157.80/-. However, ignoring this aspect, learned trial Court has wrongly awarded Rs.17,30,925/- with future interest @ 9% per annum from the date of plaint till the date of



realization with costs, which works out to Rs.30 lakhs, which is unjust enrichment and against the provisions of the Act. In the meanwhile, based on the orders passed by the Hon'ble Division Bench, the defendants/appellants deposited a sum of Rs.21,80,912/- and thereafter, the plaintiff has also withdrawn Rs.10 lakhs. When the liability of carrier is limited by Rule 22 and it is settled law that the scope of this Rule cannot be enlarged even by Courts as per legislative intent, the conclusion reached by the learned trial Court by holding that by virtue of Section 9 of the Carriers Act, 1865, no proof is required and thereby ordering of payment to the plaintiff, is erroneous, therefore, the same is liable to be set aside.

8. Per contra, Mrs.Rita Chandrasekaran, learned counsel for the plaintiff/respondent, submitted that the plaintiff is in the business of manufacturing Human Hair Remi Single Drawn and exporting the same to the foreign countries for the past 25 years. The plaintiff company is considered as one of the very reputed companies and it is known for its quality and prompt delivery of goods as per the contracted schedule. Whiles, the plaintiff had entrusted a shipment to the first defendant on 24.06.2009 under the consignment bearing Airway Bill No.1036375281 and the said shipment was intended for M/s.Cabelo Natural Importacao E Exportacao, LDA, Travessa Engracia, Fragoso Predio No.22 3 Andar, Ingombota, Luanda, Angola. As per the invoice, total value of the goods is USD 20250 @ USD 225.00 per kg. for total gross weight 97.200 kgs. and net weight 90 kgs. The goods were shipped in 4 boxes; 2 boxes containing 45 kgs. reached the destination mentioned in the Airway bill, but, the remaining 2 boxes containing 45 kgs. did not reach the destination. The consignee, to whom the goods were shipped, on coming to know about the status of partial shipment, sent a complaint to M/s.DHL Express, Angola, local DHL Customer Service Coordinator. Subsequently, vide letter dated 12.04.2009, the Customer Service Coordinator of DHL Express Angola acknowledged the inability to locate the shipment and thereby it has declared it as partial loss. In the said letter, it is further stated that any refund or credit will be done by DHL in India to the shipper, namely, the plaintiff. Based on the said letter dated 12.04.2009 acknowledging the inability to locate the shipment and also declaring partial loss, the plaintiff lodged a claim for USD 10125 being the compensation for the loss of 45 kgs. of Human Hair Remi Single Drawn product. However, no progress has taken place. Although they are duty bound to deliver the air shipment to the buyer at Angola intact, unfortunately, till date the defendants/DHL failed to discharge their obligation.

9. Continuing further, Mrs.Rita Chandrasekaran, learned counsel, submitted that again, the plaintiff sent another shipment for the same buyer, namely, M/s.Cabelo Natural



Importacao E Exportacao, LDA, Travessa Engracia, Fragoso Predio No.22 3 Andar, Ingombota, Luanda, Angola, under the consignment bearing Airway Bill No.1036375270, dated 26.06.2009, and as per the invoice dated 09.06.2009, the total value of the product is USD 31500 @ USD 350.00 per kg. and the goods were sent in 3 boxes, each box contains 30 kgs., but, box Nos.1 and 2 weighing 72 kgs. were missing. Therefore, on coming to know missing of two boxes, the plaintiff's buyer contacted the customer care coordinator of DHL Express, Angola, who, in turn, vide letter dated 12.07.2009, acknowledging the inability to locate the shipment, further stated that DHL India would settle the claim and refund will be credited to the shipper directly, namely, M/s.Sri Manikandan Enterprises, the plaintiff/respondent herein. Since the status of the shipment would not be tracked and the shipment has not been located till date, it shows reckless gross negligence and mishandling on the part of the defendants/DHL in not taking sufficient care to deliver the goods to the consignee and thus, it has resulted in breach of trust among the foreign buyers. Therefore, the limits of liability specified in Rule 22 of the Act shall not apply in the present case, even if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage.

10. Relying on a decision of this Court in Singapore Airlines Cargo Pvt. Ltd., Chennai, Vs. M/s.HCL Info Systems Limited and others [(2017) 6 MLJ 211], learned counsel for the plaintiff/respondent submitted that in the said decision, while dealing with similar argument that it is for the plaintiff/consignor to prove whether there is willful negligence on the part of the carrier, it is held that the burden of proving the absence of negligence and willful misconduct is only on the part of the carrier who has to prove the absence of misconduct by valid and satisfactory evidence, which the carrier has miserably failed to discharge. Applying the same ratio, if the case of the defendants/DHL is looked into, as could be seen in paragraph Nos.13 and 14 of the written statement and also in the letter dated 12.07.2009 of the DHL Express, Angola/Ex.A14, they have acknowledged their inability to locate the shipment, besides assuring to settle the claim by refunding the loss to the shipper directly, namely, the plaintiff, and therefore, the case of both parties is covered by Section 58 of the Evidence Act read with Order XII, Rule 6 of the Civil Procedure Code.

11. Explaining the legal position further, learned counsel for the plaintiff/respondent would submit that while Section 58 of the Evidence Act says that facts admitted need not be proved, Order XII, Rule 6 of CPC would further make it clear that where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may, at any



stage of the suit, either on the application of any party or of its own motion and without waiting for determination of any other question between the parties, make such order or give such judgment, having regard to such admissions. Therefore, by following the said provisions, learned trial Court has rightly decreed the suit, which is in conformity with the ratio laid down by this Court in Singapore Airline's case (cited supra). Therefore, the contention of the learned Senior counsel by relying on Rule 22 of the Act that even if there is any liability found on the part of the defendants/DHL the liability is only restricted, is inapplicable to the present case for the reason that letter dated 12.07.2009 issued by the DHL Express, Angola, clearly admits the case of both parties that there was a partial loss of goods and as per DHL terms and conditions of transport, the refund will be done by DHL in India directly to shipper, namely, the plaintiff, hence, it is not open to the defendants/DHL to wriggle out of its own responsibilities as they cannot play hot and cold. Therefore, impugned judgment and decree passed by the learned trial Court does not call for any interference.

12. Having perused Exs.A1 to A17 marked on the side of the plaintiff and Ex.B1 marked on the side of the defendant, and also having heard the learned Senior counsel for the appellants and the learned counsel for the respondent, the following issues arise for consideration in this appeal:-

- (i) Whether the direction of the learned trial Court directing the defendants to pay Rs.17,30,925/- with future interest @ 9% per annum is legally well founded?
- (ii) Whether the liability is restricted to as per Section 22(2) of the Carriage by Air Act, 1972?

13. Since Mrs.Rita Chandrasekaran, learned counsel for the plaintiff/respondent herein relying heavily on letter dated 12.07.2009/Ex.A14, has tried to bring their case under admitted liability, let us consider the same in the light of Section 58 of the Evidence Act read with Order XII, Rule 6 of CPC and they are extracted hereunder:-

"Section 58 - Facts admitted need not be proved - No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.



WEB COPY

"Order 12 Rule 6 - Judgment on admissions -

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

To find an answer to the above said legal issue, it is also relevant to extract the letter dated 12.07.2009 of the DHL Express, Angola/Ex.A14, which is quoted below:-

CABELO NATURAL IMPORTACAO E EXPORTACAO
TRAVESSA ENGRACIO FRAGOSO
PREDIO NO.22 3 andar

Imgombotas

LUANDA - REP. DE ANGOLA

Luanda, 12 July 2009

Following your complaint regarding your shipment sent on the 24 June 2009 from India to Luanda, with DHL airway bill No.1036375281.

Unfortunately, despite all the investigations done at the transit points of your shipment, we haven't been able to locate it, so we have to declare it partially lost.

We would like to inform you that, we have immediately sent the claim file to DHL in India. Please be informed that this consignment was not insured, as the shipper at the origin country paid under the DHL account No.530746263, therefore, according with DHL Terms & Conditions of Transport, any refund or credit will be done by DHL in India, directly to your shipper SRI MANIKANDAN INTERPRISES.

We deeply regret this incident and all the inconveniences that this may have caused you and we trust we can continue servicing your company in the future.

With our best regards,

Mirriam Afonso

Customer Service Coordinator

DHL EXPRESS ANGOLA

CS/2009/07/32/AA



14. It is not in dispute that the plaintiff entrusted the shipment to the first defendant/DHL on 24.06.2009 under the consignment bearing Airway Bill No.1036375281 for M/s.Cabelo Natural Importacao E Exportacao, LDA, Travessa Engracia, Fragoso Predio No.22 3 Andar, Ingombota, Luanda, Angola. As per the invoice, total value of the product is USD 20250 @ USD 225.00 per kg. for gross weight 97.200 kgs. and net weight 90 kgs. The goods were shipped in 4 boxes; two boxes containing 45 kgs. reached the destination, but, the remaining two boxes did not reach the destination. While so, again, the plaintiff entrusted another shipment for the same buyer on 26.06.2009 and as per the invoice, total value of the product is USD 31500 @ USD 350.00 per kg. and out of the goods despatched in 3 boxes, two boxes were missing weighing 72 kgs. Therefore, consignee, on coming to know about the status of goods, immediately sent a complaint to M/s.DHL Express, Angola, local DHL Customer Service Coordinator, who, in turn, vide letter dated 12.07.2009, expressing their inability to locate the shipment, further stated that as per DHL terms and conditions of transport, refund will be done by DHL in India directly to the shipper, namely, the plaintiff. Therefore, since the Customer Care Coordinator of DHL Express, Angola, vide letter dated 12.07.2009, has clearly acknowledged their inability to locate the shipment and thereby they have further agreed to refund the loss, they are bound by their own admission as per Section 58 of the Evidence Act read with Order XII, Rule 6 of CPC.

15. The Apex Court, in the case of Karam Kapahi and others Vs. Lal Chand Public Charitable Trust & another [2010 (4) SCC 753], considering the principles behind Order XII, Rule 6 of the Civil Procedure Code, ruled that the object of Order XII, Rule 6 is to give the plaintiff a right to speedy judgment, for the clear reason that once the controversy raised before the Court is admitted either partly or fully, there would be no point in delaying the judgment unnecessarily and therefore, the Court seeing the admission of fact made by the defendant by virtue of Order XV, Rule 1 read with Order XII, Rule 6 of the Civil Procedure Code shall at the first hearing of the suit pronounce its judgment, inasmuch as when Order XII, Rule 6 vividly makes the legal position clear that when the admission of facts is made on the pleadings or otherwise, whether oral or in writing, the Court may at any stage of the suit give its judgment having regard to such admission. A Division Bench of the Madhya Pradesh High Court also in the case of Shikharchand and others Vs. Bari Bai & Others [AIR 1974 MP 75] has held that the plaintiff is entitled to the relief asked for by him on the basis of defendant's own admissions, as there would be no point in delaying the judgment unnecessarily in deciding the



controversial points in the routine manner. In the case on hand as well, DHL Express, Angola/Customer Service Coordinator, vide letter dated 12.07.2009/Ex.A14, had explicitly declared the partial loss of shipment sent to the consignee/Cabelo Natural Importacao E Exportacao at Angola by the plaintiff's Company, besides stating that any refund or credit will be done by DHL, India, directly to the shipper, namely, the plaintiff. As such, considering the value of the product having been lost during the transit and also considering the rupee value against the USD at that point of time, learned trial Court has rightly decreed the suit holding that the plaintiff is entitled to recover a sum of Rs.17,30,925/- from the defendants/DHL with future interest @ 9% per annum from the date of plaint till the date of realization, therefore, in view of the well considered judgments cited supra, we do not find any reason to interfere with such a well-reasoned judgment and decree passed by the learned trial Court.

16. Secondly, in the light of the admission made by the DHL/defendants/appellants herein, it has to be seen whether their case can be brought under Section 22 of the Act. Since the damage has been caused due to the reckless conduct of the defendants/appellants, in the light of the ratio laid down by the Hon'ble Division Bench of this Court in Singapore Airline's case (cited supra), holding that when once carrier receives cargo, the obligation is on their part to safely deliver the same, and that the burden is on the carrier to show that they had followed proper procedure and inspite of their best efforts they could not prevent the loss or damage, we are of the considered view that the DHL/defendants/appellants herein are not entitled to claim the protection given under Section 22 of the Act so as to limit their liability, for, as highlighted above, they themselves admitted vide their letter dated 12.07.2009/Ex.A14 about the partial loss of the goods, besides stating that the refund will be done by DHL, India, directly into the shipper, namely, the plaintiff/respondent herein. For better appreciation, relevant portion of the judgment in Singapore Airline's (cited supra) is extracted hereunder:-

31. As regards the liability on the part of the first defendant/appellant, the rights and liability of an International Air Carrier is governed by Carriage by Air Act. Chapter III of II Schedule deals with liability of the carrier. It is contended by the first defendant/appellant that the maximum liability on their part is only Rs.43,579/- and their liability could be restricted only to the extent of USD 20 per kilogram. On the contrary, the learned



WEB COPY

counsel for the plaintiffs/respondents 1 and 2 would contend that Rule 22 (5) of Chapter III deals with conversion of francs to units of gold and to Indian Currency which provides for maximum liability of the air carrier for short landing of 33.30 kilograms of the cargo in terms of value of goods. According to the plaintiffs/respondents 1 and 2, the weight of the short landed cargo is 33.30 kilograms. The loss has to be calculated by taking note of the fact that the transaction in this case took place in the year 2007 and therefore, the amendment brought into the Third Schedule of the Act during the year 2009 prescribing different mode of calculation will have no application to the case on hand....."

"32..... The limits of liability specified in rule 22 shall not apply, if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

33. It is evident from the above provisions of the Act that the claim of the first defendant/appellant that their liability is limited to US Dollar 20 per kilogram is not sustainable when it is not disproved by the first defendant/appellant that because of their negligence or wilful misconduct, the loss or damage is caused to the consignment. In the absence of such proof to show that there was no misconduct on their part, the first defendant/appellant is not entitled to the protection given in Section 22 of the Act and consequently, they will fall within the scope and ambit of the provisions of Section 25 of the Act which deals with wilful misconduct. Though it is the submission of the counsel for the first defendant/appellant that it is for the plaintiffs to prove whether there is wilful negligence on the part of the first defendant/appellant, we find that the burden of proving absence of negligence and wilful misconduct is only on the part of the first



WEB COPY

defendant/appellant who has to prove the absence of misconduct by valid and satisfactory evidence, which the appellant has miserably failed to discharge in this case. Further, when once the carrier receives the cargo, it is their obligation to safely deliver the same and the burden is on the carrier to show that they followed proper procedure and inspite of their best efforts, they could not prevent loss or damage. Therefore, we are of the opinion that the burden of disproving the wilful misconduct is on the part of the first defendant/appellant which they miserably failed to discharge by letting in any oral or documentary evidence. In this context, it is useful to refer to the decision rendered by the Kerala High Court in the case of (M/s. Indian Airlines vs. Kurian Abraham and others) reported in AIR 2010 KERALA 85 relied on by the learned counsel for the plaintiffs/respondents 1 and 2 wherein it was held that when once carrier receives cargo, the obligation is on their part to safely deliver the same. The burden is on the carrier to show that they had followed proper procedure and inspite of their best efforts, they could not prevent loss or damage. In the instant case, the first defendant/appellant failed to show that they have taken all precaution and adopted proper procedure to safely deliver the goods. In such view of a matter, we do not find any reason to interfere with the Judgment and decree passed by the trial Court. Hence, the Appeal suit fails and it is liable to be dismissed.

34. With regard to the submissions made by the counsel for the appellant that the liability of the appellant is only limited as per Warsaw Convention 1929, we are of the opinion that when Rule 22 (5) of the Carriage by Goods Act clearly imposes the liability on the part of the Carrier and it is the Law of the Land, it has to be adopted to decree the suit filed by the plaintiffs. Further, Rule 23 (1) of The Carriage by Air Act, 1972 clearly stipulates that any provision tending to relieve the air carrier of liability or fix a lower liability than that which is laid down in these Rules shall be null and void. Therefore, the submission of the counsel for the appellant that a condition in the airway bill limits their liability to USD 20



WEB COPY

per kilogram is null and void. Moreover, the appellant has not filed the original airway bill containing the terms and conditions. In such circumstances, we are not inclined to accept such submissions made by the learned counsel for the appellant as regards the applicability of Warsaw Convention 1929 and Hague convention to this case."

17. Thirdly, it is not an isolated case where only once the goods despatched by the plaintiff was lost inadvertently. At the risk of repetition, it may be mentioned that after despatching the goods containing 4 boxes on 24.06.2009, 2 boxes containing 45 kgs. reached the destination, but, the remaining 2 boxes did not reach the destination. Therefore, when the plaintiff tracked the movement of the shipment using Airway bill number, they came to know about the partial delivery of the goods. Immediately, the consignee, after knowing partial delivery of the goods, sent a complaint to M/s.DHL Express, Angola, local DHL Customer Service Coordinator, who, in turn, acknowledging the loss of partial goods, stated that the refund will be done by DHL, India, directly to the shipper. However, in spite of assurance, nothing has been done by the defendants to settle the claim of the plaintiff in regard to the loss of 45 kgs. Again, it is to be noted that when plaintiff sent another shipment containing 3 boxes (each box contains 30 kgs.) intended for the same buyer, namely, M/s.Cabelo Natural Importacao E Exportacao, LDA, Travessa Engracia, Fragoso Predio No.22 3 Andar, Ingombota, Luanda, Angola, box Nos.1 and 2 weighing 72 kgs. were missing. Therefore, it is repeated recklessness shown by the defendants/DHL in delivering the goods to the consignee in the very same condition, hence, repeated loss of the goods indicate that the defendants/DHL are not entitled to get the protection under Section 22 of the Act, as it is a clear case of reckless and wilful misconduct falling within the scope and ambit of the provisions of Section 25 of the Act which deals with wilful misconduct. Therefore, in view of reckless and wilful misconduct of the defendants/DHL, which is falling within the scope of Section 25 of the Act, they cannot seek any protection given under Section 22 of the Act.

18. Thus, in the light of the above said legal position, since the similar factual issues involved in the present appeal has already been adjudicated and decided by the Hon'ble Division Bench of this Court in Singapore Airline's case, we, respectfully agreeing to this view, do not find any error or illegality in the impugned judgment and decree passed by the learned trial Court. Accordingly, for the reasons stated above,



WEB COPY

answering the issues against the appellants, the First Appeal is dismissed by confirming the impugned judgment and decree passed by the learned trial Court. No Costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

rkm
To

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

2.The Section Officer,
VR Section, High Court,
Madras-600 104.

+2cc to M/s.NVS Associates, Advocate Sr.25495
+1cc to M/s.Aiyar & Dolia, Advocate Sr.25553

A.S.No.297 of 2018

sj[col
srg 26/07/2021