



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 12.04.2022

Delivered on 20.04.2022

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CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

S.A.No.766/2017 & CMP.No.17866/2017

M/s.TCI Express Ltd.,  
rep. By Mr.Ajay Samwal  
Regional Office at 4<sup>th</sup> Floor  
Gee Gee Crystal, 92,  
RK Salai, Mylapore,  
Chennai 600 004.

..Appellant / Appellant / Defendant

Appellant substituted vide order dated  
16.03.2022 made in CMP.No.3262/2022

Versus

1. M/s.Lupin Limited by its  
Special Power of Attorney Agent  
M/s.ICICI Lombard General Insurance  
Company Limited, 159, CST Road  
Kalina, Santa Cruz [Post], Mumbai 600 098.
2. M/s.ICICI Lombard General Insurance  
Company Limited by its Legal Manager  
1095, Vigneswar Creastea  
Avinashi Road, Pappanaickenpalayam  
Coimbatore.

..Respondents / Respondents / Plaintiffs

Prayer:- Second Appeal filed under Section 100 of CPC against the judgment and decree dated 17.09.2013 by the learned III Additional District & Sessions Judge of Coimbatore, [Fast Track Court No.1] passed in AS.No.75/2010 confirming the judgment and decree dated 17.03.2010 passed in OS.No.714/2007 on the file of the learned III Additional Subordinate Judge, Coimbatore.

|                 |   |                       |
|-----------------|---|-----------------------|
| For Appellant   | : | Mr.J.R.K.Bhavanantham |
| For Respondents | : | Mr.S.S.Sajeew Kesan   |





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intimation was given to the 1<sup>st</sup> plaintiff immediately at Aurangabad. The 1<sup>st</sup> plaintiff, by a letter dated 05.10.2004, through their agent, demanded a sum of Rs.3,60,959/- for the loss and shortage of goods which was sent by the Regional Office of the 1<sup>st</sup> plaintiff at Aurangabad to the Branch Office of the plaintiff at Coimbatore. However, the defendant did not come forward to compensate the loss or shortage of goods of the 1<sup>st</sup> plaintiff.

- The 2<sup>nd</sup> plaintiff is the Insurance Company with whom the 1<sup>st</sup> plaintiff had insured the goods. Hence, the 1<sup>st</sup> plaintiff lodged a claim with the 2<sup>nd</sup> plaintiff for the loss of goods, since the defendant did not settle. A survey was conducted by an independent Surveyor who assessed the value of loss as per the Immediate Loss Advice dated 02.10.2004. As per the Final Report of the independent Surveyor, it was certified that out of 77 boxes, only 53 carton boxes were delivered and the shortage of delivery was by 24 boxes. The defendant also acknowledged the shortage and issued a Certificate of loss dated 28.10.2004.
- The 1<sup>st</sup> plaintiff had taken a policy vide Marine Open Policy for the period from 01.04.2004 to 31.03.2005 and that the claim of the 1<sup>st</sup> plaintiff regarding loss of goods was settled by the 2<sup>nd</sup> plaintiff and that the 2<sup>nd</sup> plaintiff stepped into the shoes of the 1<sup>st</sup> plaintiff for recovery of the amount which was actually reimbursed by the 2<sup>nd</sup> plaintiff by virtue of the Letter of Subrogation and Special Power of Attorney dated 21.08.2004. The defendant is vicariously liable for the act of their employees since the goods transported through the defendant was stolen during the course of transportation. The defendant, as a carrier, is responsible for the gross negligence, misconduct and deficiency of service as the shortage and loss to the 1<sup>st</sup> plaintiff Company is not due to the reasons stated under the Indian Carriers Act. In other words, the defendant should be treated as an insurer of goods till its delivery to the consignee. The plaintiffs are entitled to interest at the rate of 24% per annum as per their usage and customs.

- (4) The suit was resisted by the defendant by filing a written statement on the ground that the suit filed without issuing a notice in terms of Section 10 of the Carriers Act, is not maintainable and therefore, the suit is liable to be dismissed. It is also contended by the defendant that the consignment was booked on the basis of 'owner's risk' and not on the basis of 'carrier's risk' and



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therefore, the owner of the goods alone is responsible for the damages or loss if any, in transit. It is further contended by the defendant that if the goods were consigned under the 'carrier's risk', then the transport charges would be high so as to enable the defendant to insure the goods with the Insurance Company of their choice and in the absence of any specific undertaking by the defendant, the suit claim is not sustainable as against the carrier, namely the defendant. The 1<sup>st</sup> plaintiff has insured the goods for the loss with the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> plaintiff has also compensated the 1<sup>st</sup> plaintiff for the loss and damages sustained and hence, no amount is due and payable by the defendant either to the 1<sup>st</sup> plaintiff or to the 2<sup>nd</sup> plaintiff. The defendant also disputed the amount for which the suit is laid. Apart from the specific issues above referred to, the defendant also raised a point as to the territorial jurisdiction of the Sub Court, Coimbatore, on the ground that the goods were stolen at a place in the State of Karnataka and there is no cause of action for filing the suit before the Sub Court, Coimbatore. The defendant also raised a plea that the suit is barred by non-joinder of necessary party, namely M/s.Oriental Insurance Company, with whom the defendant has got contract to indemnify for the loss in transit. Since such contract is with M/s.Oriental Insurance Company Limited at Faridabad, the suit is bad for non-joinder of necessary party.

- (5) Before the Trial Court, the plaintiffs filed Exs.A1 to A4 and examined PW1. On behalf of the defendant, one Kailasam was examined as DW1. However, no document was marked.
- (6) The Trial Court, after framing necessary issues, rejected the contention that the consignments were booked by the 1<sup>st</sup> plaintiff by indicating that the consignments are transported on the basis of 'owner's risk'. Since it is admitted that the defendant has not disputed the booking of consignment by the 1<sup>st</sup> plaintiff Company at Aurangabad and the substantial portion of the goods were stolen during transit, the Trial Court held that the defendant cannot take shelter by pleading transportation of goods at owner's risk. It is also pointed out by the Trial Court that the defendant failed to prove that the consignment was booked at 'owner's risk'. Finding that no document was filed to prove the case of defendant and the document Ex.A3 does not refer to owner's risk, the Trial Court rejected the first contention of the defendant that the carrier is not liable to compensate the loss suffered by the 1<sup>st</sup> plaintiff.





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Section 10 of the Carriers Act. The Lower Appellate Court also held that though notice issued under Ex.A6 was by an Agent, relying upon the judgment of the Punjab and Haryana High Court in the case of M/s.The Jullundur Ex.Servicemen Motor Transport Cooperative Society Ltd Vs. The General Assurance Society Ltd reported in AIR 1978 Punjab & Haryana 336, the Lower Appellate Court held that the notice of an Agent is in proper compliance of Section 10 of the Carriers Act. It is admitted that a substantial portion of the goods transported from the 1<sup>st</sup> plaintiff's Office at Aurangabad to Coimbatore was stolen, when the goods were under the custody of the defendant transporting them from Aurangabad to Coimbatore for charges. Therefore, the Lower Appellate Court answered all the issues against the appellant and confirmed the judgment and decree of the Trial Court.

- (11) Aggrieved by the concurrent judgments and decrees of the Courts below, the appellant has preferred the present Second Appeal.
- (12) The appellant has raised the following substantial questions of law in the Memorandum of Grounds of Second Appeal:-
  - i. Whether the clearing and Forwarding Agency could substitute the plaintiff and issue notice to the appellant/Carrier?
  - ii. Whether the finding of facts is perverse?
  - iii. Whether Ex.A6 issued by the Insurance to the appellant constitute valid statutory notice under Section 10 of the Indian Carriers Act?
  - iv. Whether the Special Contract between the Consignor and the Carrier to the effect that the consignment was booked under owner's risk exonerates the appellant from liability to pay the loss for shortage of delivery of consignment?
- (13) The Second Appeal was admitted on 12.12.2017 on the following substantial questions of law:
  - (1) Whether the clearing and Forwarding Agency could substitute the plaintiff and issue notice to the appellant/Carrier?
  - (2) Whether Ex.A6 issued by the Insurance to the appellant





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got the value of goods from the 2<sup>nd</sup> respondent / 2<sup>nd</sup> plaintiff by coverage, by virtue of Letter of Subrogation and the Special Power of Attorney, the 2<sup>nd</sup> respondent / 2<sup>nd</sup> plaintiff's claim that they are entitled to get their amount from the appellant / defendant which they had indemnified the 1<sup>st</sup> respondent / 1<sup>st</sup> plaintiff, is justifiable. However, the question of law raised by the appellant/defendant that the suit without issuing notice as contemplated under Section 10 of the Indian Carriers Act has to be examined.

(18) Section 10 of the Indian Carriers Act reads as follows:-

'10. Notice of loss or injury to be given within six months:-No suit shall be instituted against a common carrier for the loss of, or injury to, goods (including container, pallet or similar article of transport used to consolidate goods) entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.'

(19) The scope and object of Section 10 of the Indian Carriers Act has been examined in several precedents.

(20) In Transport Corporation of India Ltd. Vs. Veljan Hydrair Ltd. reported in (2007) 3 SCC 142, the Hon'ble Supreme Court has considered the object of Section 10 and observed as follows:

'7....Section 10 requires a notice in the manner set out therein, for initiation of a proceedings against a common carrier for loss of goods or injury to goods entrusted for carriage. The notice need not say specifically that it is issued under Section 10 of Carriage Act, 1865. It is sufficient if the notice fulfills the requirement of Section 10, that is to inform the carrier about the loss or injury to the goods. Such notice under Section 10 will certainly be required where the common carrier delivers the goods in a damaged condition, or where the common carrier loses the goods entrusted for carriage and informs about such loss to the consignor/consignee/owner. The



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object of the Section is to put the carrier on notice about the claim in respect of the loss or damage to the consignment so that it can make good the loss occasioned....''

- (21) In a judgment by the High Court of Madhya Pradesh in Madhya Pradesh Rajya Beej Evam Farm Vikas Nigam Ltd. Vs. Shri Durga Transport Service, reported in 1996 MPLJ 497, it is held as follows:

''10....Section 10 does not provide for a particular form of notice. The word 'notice' according to me, would mean 'information'. According to Section 10, the plaintiff is obliged to inform the carrier in writing that the owner has suffered some loss or injury. Once it is proved that by some writing the carrier was informed of the loss or injury, then it is the information which is material and not the form. The carrier would not be allowed to play hide and seek nor would he be permitted to say that notice in a particular form was not given to him. If the facts floating on the surface prove that the plaintiff in the form of some writing informed the defendant about the loss or injury, then the requirements of Section 10 are fulfilled.''

- (22) In another decision rendered by High Court of Karnataka in Basavaraj Yellappa Pundi V. The National Insurance Company Limited and Others , reported in AIR 2005 Kant 369, similar objection was rejected in the following lines:-

''26.Under these circumstances it is very clear and definite that in order to absolve his liability the defendant tried to deny the very receipt of notice at Ex.P5. In this background if such claim is put forth by the consignor i.e., 2nd plaintiff, it is irrelevant whether such notice was also issued by Insurance Company i.e., the 1st plaintiff. A question came up before the High Court of Karnataka in the Oriental Insurance Company and Anr. v. Vaishali Transport Forwarding Agency (Supra) why mandatory notice as contemplated under Section 10 of the Carriers Act should be issued. In



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other words this Court had an occasion to deal with the purpose behind issuing such notice as contemplated under Section 10 of the said Act. The insistency to issue such notice before institution of the suit is with the object of bringing to the notice of the concerned person, the loss caused by its non-delivery, short delivery or loss of the consignment. When the mandatory requirement is not complied with it is within the Court's power to dismiss the suit or non-suit the plaintiff. However, this does not make it obligatory on the part of the plaintiff to mention the issuance of such notice in the plaint itself. It was held in the above case as under:

"Para 11: The insistence to issue a notice to common carrier before institution of the suit is to bring to his knowledge the loss occasioned by his non-delivery, short delivery or loss of the consignment. The Courts will get the jurisdiction to dismiss the suit, if it finds necessary, only if the common carrier make a grievance of it and a plea is raised in the written statement. The plaintiff is not obliged to state the fact of issue of notice under Section 10 in the plaint. It is implied under Order 6 Rule 6 of the Civil Procedure Code. This Section is intended to bring to the notice of the common carrier the total damage in the monetary terms, where the carrier is ignorant of this. There will be cases where after delivery of consignment, the damage will be noticed much later.

Para 12: But in this case, the respondent has not delivered the goods at all. So non-delivery of goods is within his knowledge. He exhibited such knowledge by giving a non-delivery certificate dated 7-8-1987. Hence the plea of non-issue of notice is only hyper-technical.



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Para 13: The Trial Court also committed illegality by presuming a jurisdiction which is not vested, when it proceeded to dismiss the suit on the ground of non-issue of notice without giving an opportunity to the petitioners to explain this aspect of the matter when they are duly represented by a learned advocate".

27.As already stated above it was the appellant-defendant who brought to the notice of the consignor and the consignee about the occurrence of the accident and the goods being gutted in the fire. This is at Ex.P10.''

- (23) In the present appeal, it is admitted that a notice was issued to the appellant by the Forwarding Agent of the 1<sup>st</sup> respondent and it is held by the Courts below that the said notice satisfies the requirement of Section 10 of the Carriers Act by referring to the sequence of events. It is admitted by appellant that the goods were stolen and the appellant has lodged a complaint and informed the 1<sup>st</sup> plaintiff. Hence, this Court is unable to sustain the plea of appellant that the suit is not maintainable for want of proper notice in compliance of Section 10 of the Indian Carriers Act.
- (24) Therefore, this Court finds no merits in this appeal. Accordingly this Second Appeal is dismissed with costs. Consequently, connected miscellaneous petition is closed.

Sd/-  
Assistant Registrar

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Sub Assistant Registrar

AP

To

1. The III Additional District & Sessions Judge,  
[Fast Track Court No.1], Coimbatore.



2. The III Additional Subordinate Judge  
Coimbatore.

3. The Section Officer  
VR Section, High Court  
Madras.

+1cc to Mr.J.R.K.Bhavanantham, Advocate, S.R.No.27373

+1cc to Mr.S.S.Sajeev Kesan, Advocate, S.R.No.26681

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NSK/26/05/2022