



A.S.(MD)No.283 of 2009

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

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1.M/s.Sundaram Textiles Ltd.,
Lakshmi Building, Usilampatti Road,
Kochadai, Madurai,
through its Power of Attorney,
United India Insurance Co.Ltd.

2.United India Insurance Co. Ltd.,
Divisional Office I,
7-A, West Veli Street, Madurai,
through it Senior Divisional Manager.

... Appellants / Plaintiffs

-Vs-

M/s.Savani Roadlines,
130, Munichalai Road, Madurai,
through one of its Partners,
Priyesh M.Savani

... Respondent / Defendant



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PRAYER: Appeal Suit is filed under Section 96 of the Code of Civil Procedure to set aside the decree and judgment made in O.S.No.194 of 2004 dated 20.07.2007 on the file of the Additional District Judge, Fast Track Court No.1, Madurai.

For Appellants : Mr.B.Rajesh Saravanan

For Respondent : No Appearance

JUDGMENT

For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

2.The brief facts of the plaint are as follows:-

(i)The first plaintiff is a manufacturer of cotton / polyester yarn and having one of its mills at Nambinagar, Nanguneri and its Sales Depot at Ichalkaranji, Maharashtra State. He entrusted the goods of 125 cartons of 62s Polyester yarn, valued at Rs.9,30,188/- with the defendant for safe carriage by road from their mills at Nanguneri to Ichalkaranji to be delivered at the godown of their Sales Depot. The defendant having accepted the entrustment issued a Consignment Note No.138450, dated 03.01.1996 and transported the consignment in Truck No.KL 11 A 8679. Subsequently, the said consignment was



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not delivered at the destination. Though the first plaintiff had reminded the defendant time and again about the non-delivery of the goods, there was no response. Therefore, the first plaintiff wrote two letters dated 03.08.1996, one for requesting to furnish non-delivery certificate and another one for making claim for the loss of goods. The defendant on 06.09.1996 sent a non-delivery certificate, issued by the Divisional Office of the defendant at Bangalore. However, the defendant did not choose to settle the claim of the first plaintiff.

(ii)The second plaintiff then settled the claim of the first plaintiff at Rs.9,30,188/- in pursuance of the contract of insurance. Thereafter, the first plaintiff executed a letter of subrogation and special power of attorney dated 23.10.1996 to the second plaintiff. Therefore, the plaintiffs jointly filed a complaint in O.P.No.78 / 1997 before the State Consumer Disputes Redressal Commission, Chennai. The State Forum had allowed the same on 16.12.1998, directing the defendant to pay the claim with interest. Aggrieved by the same, the defendant preferred an appeal in Appeal No.46 / 1999 before the National Consumer Disputes Redressal Commission, New Delhi and the same was dismissed, by an order dated 11.03.1999. Thereafter, the defendant preferred



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Civil Appeal No.7349 / 2000 before the Hon'ble Supreme Court of India and the same was allowed with liberty to the second plaintiff to approach the Civil Court to recover the amount. Therefore, the suit has been filed by the plaintiffs.

3.The brief facts of the written statement filed by the defendant are as follows:-

The suit is barred by limitation and also the plaintiffs have not issued statutory notice under Section 10 of the Carriers Act, 1865 (hereinafter referred to as 'the Act') and the proceedings pending in the Consumer Court will not give an exemption for limitation. Since the information about the non-delivery of goods had been given within 4 to 5 days of the despatch, the first plaintiff has not taken any steps, but waited till 03.09.1996 and voluntarily, got the certificate of non-delivery. Thereafter, taking advantage of the non-delivery certificate received from the Divisional Office of the defendant at Bangalore, the first plaintiff made claims, subsequently, got the claim from the Insurance Company / second plaintiff. In order to get claim from the Insurance Company, they got the certificate and therefore, there cannot be any knowledge of neither loss of goods nor damages to the first plaintiff. Though the Hon'ble Supreme Court of India,



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while allowing the appeal filed by the defendant, dismissed the claim of the plaintiffs with liberty to approach the Civil Court, has not given any exemption for limitation. Therefore, the suit is likely to be dismissed.

4. Based on the above said pleadings and also the documents annexed with the pleadings, the trial Court framed the following issues:-

“1. Whether the plaintiffs are entitled to get the suit claim from the defendant?

2. Whether the suit is barred by limitation?

3. Whether the suit is liable to be dismissed for non-joinder of necessary parties?

4. Whether the plaintiffs are entitled to take an advantage of the certificate received from the Divisional Office at Bangalore in the suit claim?

5. Whether the plaintiffs have got cause of action to file the suit?

6. whatever reliefs are the plaintiffs entitled?

Subsequently, on 12.06.2007, the following additional issue was framed:-

Whether the notice under Section 10 of the Carriers Act has been issued?”



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5. In order to substantiate the case of the parties, during the trial on the side of the plaintiffs, one witness was examined as P.W.1 and 13 documents were marked as Exs.A.1 to A.13. On the side of the defendant, one witness was examined as D.W.1, however, no documents have been marked.

6. On conclusion of the trial, after hearing the arguments advanced on either side, the trial Court, by judgment and decree dated 20.07.2007, dismissed the suit.

7. Challenging the same, the plaintiffs in the suit have filed the present Appeal Suit before this Court.

8. The learned counsel for the appellants would submit that the defendant has not denied the entrustment of 125 cartons of 62s Polyester yarn, valued at Rs.9,30,188/- and also he has not denied the non-delivery of the said goods at the destination. After receiving a request letter for furnishing non-delivery certificate, the defendant has issued non-delivery certificate on 06.09.1996. Based on that the first plaintiff made a claim with the second



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plaintiff and executed subrogation right and power of attorney to the second plaintiff. Subsequently, the plaintiffs jointly filed claim petition before the State Consumer Disputes Redressal Commission, Chennai, which was allowed. Aggrieved by the same, the defendant approached the National Consumer Disputes Redressal Commission, New Delhi and at last before the Hon'ble Supreme Court, the defendant succeeded and the Supreme Court has granted liberty to the plaintiffs to approach the Civil Court. Based on that the plaintiffs had filed the suit.

9.He would further submit that the learned trial Judge though accepted that the suit has been filed within time, he has given finding that on the ground of non-compliance of the statutory notice under Section 10 of the Act, the plaintiffs are not entitled for the relief. The transaction has not been denied and the non-delivery certificate issued on 06.09.1996 is not in dispute and from that date within 6 months, they issued notice and the same has not been received by the defendant. However, the learned trial Judge failed to consider the date of knowledge before non-compliance of the statutory provisions under Section 10 of the Act, which warrants interference.



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10. When the matter was listed on 13.06.2022, none appeared on behalf of the respondent, however, the learned counsel for the appellants was heard. In order to give one more opportunity to the respondent, the matter was directed to be listed today (21.06.2022) under the caption 'for Judgment'. Today also, there is no representation on behalf of the respondent. Therefore, after hearing the learned counsel for the appellants and perusing the records available before this Court, this *ex-parte* Judgment is passed.

11. It is not in dispute that the first plaintiff entrusted the goods with the defendant and also normal transit period is 4 to 6 days to deliver the goods at the destination, where the goods are to be delivered or handed over. The plaintiffs have not stated that the goods entrusted is nearly about Rs.10 lakhs and the normal transit period is 4 to 6 days. The plaintiffs have not stated either in the plaint or in the evidence as to why they have not taken any action within the reasonable time. The plaintiffs had stated that though the first plaintiff was reminding the defendant time and again about non-delivery of the consignment, there was no response and finally, the first plaintiff wrote a letter on 03.08.1996,



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requesting the defendant to furnish non-delivery certificate. Therefore, after the transit period of 4 to 6 days, when the goods were not delivered at the destination and the first plaintiff had reminded the defendant time and again about the non-delivery of goods and the defendant had not given any response, why the first plaintiff was waiting from the month of January to August. It shows that only for getting claim from the Insurance Company, the first plaintiff got certificate from the Divisional Office of the defendant, which does not mean the request for issuance of the certificate of non-delivery. Therefore, the contention of the appellants that they came to knowledge only at the time of getting non-delivery certificate and the cause of action for issuance of notice under Section 10 of the Act arose only in the month of August or in the month of January or prior to the month of August, cannot be accepted.

12.A reading of the entire materials and evidence would show that consignment letter was issued by the defendant on 03.01.1996 and the first plaintiff made request for getting non-delivery certificate on 03.08.1996 and obtained non-delivery certificate on 06.09.1996. Thereafter, the first plaintiff made claim before the second plaintiff and also executed the right of subrogation.



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Therefore, the contention of the learned counsel for the appellants regarding the date of the non-delivery certificate and loss of the goods or damages is not acceptable. Though the trial Court held that the suit is not barred by limitation, merely because the proceedings were pending before the Consumer Forum, it held that the plaintiffs have not established the date of knowledge about the non-delivery of goods.

13.It is pertinent to note that since the second plaintiff has got subrogation right, they ought to have approached the Civil Court immediately and the first plaintiff ought to have issued notice under Section 10 of the Act, within 6 months from the date of knowledge. The date of request for getting non-delivery certificate or the date of receiving non-delivery certificate cannot be treated as the date of knowledge of the loss of goods or damages. Though Section 10 of the Act shows only that no suit shall be instituted against a common carrier for the loss of, or injury 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, it does not say anything about non-delivery of the goods, it is only loss or injuries.



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Therefore, the non-delivery of goods obviously not falls under Section 10 of the Act. The knowledge of non-arrival of the goods at the destination is one thing and knowledge about the loss of goods is altogether different thing. Merely because the goods did not reach the destination, one cannot come to the conclusion that the goods were lost. Therefore, within normal transit period, if the goods are not delivered at the destination, one cannot come to the conclusion that the loss or damages caused. The plaint averments absolutely are kept silent about the period between 03.01.1996 and 03.08.1996. The only bald averment made in the plaint is that though the first plaintiff was reminding the defendant time and again about the non-delivery of consignment, there was no response. There is no date of communication and there is no specific date on what date the first plaintiff came to knowledge or suspect that the goods were not delivered and immediately, within reasonable time, what actions they have taken. The only documentary evidence is that the first plaintiff sent a letter dated 03.08.1996 under Ex.A.4, to the defendant, requesting to issue non-delivery certificate and through another communication dated 06.09.1996, the defendant sent non-delivery certificate.



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14.Ex.A.5 shows that on the same date, the first plaintiff sent another letter for claiming damages, for which the defendant sent a non-delivery certificate on 06.09.1996 and they have not settled the amount for the letter 03.08.1996 under Ex.A.5 and also Ex.A.7 shows that the first plaintiff sent a letter to issue valuation for the goods delivered to the defendant. The first plaintiff made claim from the second plaintiff in the voucher, which is marked as Ex.A.8. Therefore, from the communications Ex.A.4 to A.8, it is seen that the plaintiffs came to knowledge about the non-delivery, even much earlier on 03.08.1996 and only they sent a communication under Exs.A.4 and A.5 and got the certificate under Ex.A.6 in order to get claim from the second plaintiff.

15.A perusal of Exs.A.7 to A.9 shows that in order to get claim, the first plaintiff obtained Ex.A.6 non-delivery certificate and Ex.A.7 valuation certificate from the defendant and thereafter, made claim with the second plaintiff and as per Ex.A.9, the second plaintiff has got right of subrogation, which clearly shows that the first plaintiff came to knowledge about the non-delivery of goods much earlier to the communication letter Ex.A.4. All of a sudden, on 03.08.1996, the first



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communication letter was given from the first plaintiff to the defendant only to issue non-delivery certificate. Therefore, the trial Court has come to the conclusion that the plaintiffs have not followed the statutory provisions under Section 10 of the Act.

16.Since this Court is First Appellate Court as a fact finding Court, it has to re-appreciate the entire evidence independently and arrive at an independent conclusion. Therefore, this Court has carefully gone through the pleadings, oral and documentary evidence adduced on either side.

17.Though it is not a specific case of the plaintiffs and the defendant that the defendant lost the goods, the first plaintiff came to know about the loss of goods only on 03.08.1996. Therefore, the first plaintiff has not issued notice under Section 10 of the Act within 6 months.

18.A reading of the pleadings clearly shows that consignment was handed over on 03.01.1996 and as per normal course, the goods would have delivered within 4 to 6 days at the destination. However, the first communication



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from the first plaintiff is only on 03.08.1996 that to only requesting the defendant to send a non-delivery certificate. That means, the first plaintiff might have known about the non-delivery much earlier to that date and even though he has stated that he made several communications, however, there was no response, absolutely, there is no documentary evidence to show that on what date the first plaintiff has approached the defendant. Therefore, a perusal of entire records shows that in order to get claim from the second plaintiff, the first plaintiff started to gather records, subsequently, he got claim from the second plaintiff. Thereafter only, the second plaintiff having subrogation right, started to make claim before the Consumer Forum, stating that the cause of action arose for issuing notice under Section 10 of the Act only on 03.08.1996.

19. Therefore, this Court finds that the plaintiffs have not approached the Court with clean hands and they failed to establish that from the date of knowledge about non-delivery / loss / damages within 6 months, the first plaintiff issued a notice under Section 10 of the Act to the defendant. Therefore, in the absence of the same, for non-compliance of the statutory provisions under Section 10 of the Act, the plaintiffs are not entitled to get the decree and there is no reason



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to interfere with the judgment and decree of the trial Court. Hence, there is no merit in the appeal and the same is liable to be dismissed.

20. Accordingly, this Appeal Suit stands dismissed. However, considering the facts and circumstances of the case, there shall be no order as to costs.

21.06.2022

Index : Yes / No

Internet : Yes / No

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To

1. The Additional District Judge,
Fast Track Court No.1, Madurai.

2. The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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