THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.12.2023

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE N.SENTHILKUMAR

A.S.No.1068 of 2009
and
C.M.P.No.6704 of 2018

1.M/s.Wipro Ltd.,
Represented by P/A and
Subrogee having their office at
Survey Nos.76-P and 80-P,
Doddakkanahalli, Vartur Hobli,
Sarjapur Road, Carmelram P.O,
Bangalore – 560 035.

2.The Oriental Insurance Co.Ltd.,
Having their Bangalore Division at
No.5, Shankar House, No.I,
Raj Mahal Vilas Extention,
Mekhri Circle,
Bangalore – 560 080. ...Appellants

Vs.

The Airports Authority of India,
International Airports Division,
Chennai Airport,
Chennai – 600 027. ...Respondent

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 16.09.2008 in O.S.No.8 of 2004 on the file of the Additional District Judge/ Fast Track Court No.I, Chengalpattu.

For Appellants : Mr.Guruswaminathan
for M/s.Nageswaran & Narichania

For Respondent : Mr.S.Venkatesan

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J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.)**

The plaintiffs are the appellants. Challenge is to the dismissal of their suit for recovery of a sum of Rs.98,00,942/- with interest at 21% from the date of plaint till date of payment.

2. According to the plaintiffs, the 1st plaintiff had imported computer server accessories and peripherals, weighing about 962 kilograms from M/s.Sun Microsystems Private Ltd., Singapore under the invoice dated 30.01.2001. The value of the entire cargo was US$ 2,34,248.14. The Indian equivalent of which is Rs.1,09,15,963.32/-. It is claimed by the plaintiffs that the said cargo was securely packed in two palletised jumbo cardboard cartons and was air freighted from Singapore to Chennai through Singapore Airlines. The cargo arrived in Chennai on 07.02.2001. It was duly unloaded and transported to Chennai Air cargo complex, for completion of customs clearance formalities. The customs duty of Rs.45,13,913/- was paid and while attempting to clear the cargo, the agents of the 1st plaintiff noticed that there were external damages to carton No.1 of the two packages. Therefore the agents sought for a joint inspection, which was done on 12.02.2001. The said inspection was carried out in the presence of the representative of the plaintiffs, the defendant, the Air carriers, customs officials and the Carrying and Forwarding agents. Since there were visible damages to the main computer, the surveyors noted the damages and issued a report on 15.02.2001 recommending that the cargo be taken to the plaintiff's warehouse in Bangalore. Thereafter the expert surveyors conducted a complete survey of the system on 22.02.2001 and 06.03.2001 and a report was issued on 31.03.2001, wherein, it was found that the cargo was damaged and the exact assessment of damages can be done only by the manufacturer and therefore considering the sophisticated nature of the cargo, the surveyors recommended that the cargo be re-exported to the consignee to assess the damages. Therefore, the cargo was re-exported to the manufacturer and the manufacturer reported that the cargo has suffered complete damage and whatever that can be recovered is only the salvage value of 10%. After deducting the salvage value of 10% the 1st plaintiff made a claim with the 2nd plaintiff/ the Insurer. The Insurer made good the loss and upon such indemnification, the 1st plaintiff executed a letter of subrogation on 24.09.2002 subrogating the rights to recover the damages to the Insurance Company. Hence, the importer viz., the 1st plaintiff and the Insurance Company viz., the 2nd plaintiff joined together and filed a suit as aforesaid for recovery of a sum of Rs.98,00,942/-.

3. It was the contention of the plaintiffs that when the cargo was de-planed from the Singapore Airlines flight it was in a good condition and the damage occurred only when the cargo was in the custody of the Airport Authority of India , the defendant herein.

4. The suit was resisted by the defendants contending that the damage did not occur when the cargo was in the custody of the Airport Authority of India. It was pointed out that the cargo has been airlifted from Sanfrancisco and it has reached the Chennai Airport via Singapore. Contending that there were multiple handlers of the cargo en-route, the defendant claimed that the damages could not be attributed to the defendant alone. It was also contended that the survey was not done in their presence and therefore the entire loss cannot be mulcted on the defendant. It was their further contention that the packing of the cargo was of very poor quality, which was not up to the international standards and therefore the claim cannot be accepted. On the above pleadings the learned trial Judge framed the following issues:-

1.Whether the suit is barred by limitation?

2.Whether the suit cargo received by the defendant was visibly in tact as per their survey register?

3.Whether cargo found externally/ visibly damaged by the clearing and forwarding agents before clearance from the defendants custody?

4.In whose custody the damage took place?

5.Whether there was a joint survey in the defendant's premises before clearance?

6.Whether the damage to the cargo on account of insufficiency of packing as pleaded by the defendant?

7.Whether the extent of damage/ loss?

8.To what relief?

5. The following additional issue was also framed :-

1.Whether the suit is bad for non-joinder of parties?

6. At trial PW1 to PW5 were examined and Exs.A1 to A40 were marked on the side of the plaintiffs. Two witnesses were examined as DW1 and DW2 on the side of the defendant and Ex.B1 was marked.

7. The trial Judge took up the issue Nos.2 to 7 and additional issue No.1 together and came to the conclusion that the suit is bad for non-joinder of Airlines and the handlers of the Singapore Airlines viz., Air India at Chennai Airport. The learned trial Judge also came to the conclusion that the plaintiffs have not established that the damage occurred only when the cargo was in the custody of the defendant. The learned trial Judge took note of the fact that there were multiple handlers en-route, from San Francisco to Chennai via Singapore, to come to the conclusion that the plaintiffs have not established that the damage had occurred when the cargo was in the custody of the defendant. The learned trial Judge also faulted the plaintiffs for having the survey done at their end without any participation by the defendant. On the above conclusion, the learned trial Judge dismissed the suit though the learned trial Judge answered the first issue regarding limitation in favour of the plaintiffs. Aggrieved the plaintiffs are on appeal.

8. We have heard Mr.Guruswaminathan, learned counsel appearing for the appellants and Mr.S.Venkatesan, learned counsel appearing for the respondent.

9. Mr.Guruswaminathan, learned counsel appearing for the appellant would vehemently contend that the learned trial Judge has completely misunderstood the suit based on subrogation agreement. He would also submit that the learned trial Judge has overlooked the fact that once it is shown that the damages occurred when the goods were in the custody of the defendant, it is the defendant who would be liable to make good the loss.

10. The learned counsel would invite our attention to Ex.B1 which is the gate pass issued on 13.02.2001 after a preliminary survey was conducted in the Airport at the godown of the defendant, wherein, it shows that the number of DR packages (damaged packages) as per the evidence of DW1 is shown as Nil. He would also draw our attention to the general manifest of the defendant, which has been marked as Ex.A37, which shows that the package was in a good condition when it was delivered to the defendant. He would also draw our attention to Ex.A39 the letter dated 10th February 2001, wherein, the agent of the 1st plaintiff had sought for a joint inspection/ survey of the goods, since they found that there were external damages to the packaging. The learned counsel would draw our attention to the remark made on the said letter by the official of the defendant which shows that the goods were received in a good condition and at the time of survey it was found that out of two cartons one was damaged.

11. The learned counsel would also draw our attention to Exs.A36 and 38, the two notices produce, wherein the plaintiff called upon the defendants to produce the original import gate pass issued on 09.02.2001 and the survey register maintained by the defendant, which would go to show that the fact that ther damages to the cargo occurred when it was in the custody of the defendants. The learned counsel would contend that even though the letter dated 10.02.2001 and the goods manifest were produced, the original gate pass dated 09.02.2001 and survey register were not produced. The learned counsel would implore us to draw an adverse inference against the defendant for non-production of those two vital documents.

12. The learned counsel would also draw our attention to the original evidence of DW1 who in his cross-examination has specifically admitted that the representatives of the defendant were present when the survey was conducted in the godown of the defendant and that the survey register is been maintained by them. Though he would depose that if the survey register is available, he would produce it, he has not chosen to produce it. The learned counsel would also draw our attention to the admission of DW1 that the term DR package found in Ex.B1 indicates the damaged package. When he was cross-examined with reference to Ex.A40 the gate pass dated 21.09.2006 which shows that there were two damaged packages in comparison with Ex.B1, which shows that the number of DR packages were Nil, he would admit the fact that the usage in the business is to make entries regarding damaged packings on arrival. The learned counsel for the appellant would contend that this evidence by itself would be sufficient to demonstrate that the goods were in good condition when they were delivered to the defendant and the damages occurred when the goods were in the custody of the defendant.

13. The learned counsel would also draw our attention to the evidence of PW3, the representative of carrying and forwarding agent, who has specifically stated that he had made an endorsement in the gate pass dated 09.02.2001 to the effect that the goods were damaged and he had requested for an inspection. The learned counsel would further contend that the trial Court had overlooked all these material aspects in the evidence and had come to the conclusion that the plaintiffs have not established the damages.

14. The learned counsel would submit that in the suit for recovery of damages based on subrogation agreement, once it is shown that the goods were entrusted in a good condition and the damage occurred when the goods were in the custody of the defendant, it is presumed that the loss occasioned due to the mis-handling of the goods by the defendant and if the defendant wants to avoid liability, it is for the defendant to show that there is a possibility of the goods having been damaged before it reached the hands of the defendant. The learned counsel would submit that neither the evidence of DW1 nor DW2 would be sufficient for us to come to the conclusion that the goods were damaged before they reached the hands of the defendant.

15. Contending contra Mr.S.Venkatesan, learned counsel appearing for the respondent would submit that the goods having been transported from San Francisco to Chennai Via Singapore have been handled by several Authorities and several Airlines and therefore unless the plaintiffs are able to establish that the damage occurred when the goods were in the custody of the defendant, the defendant cannot be held liable. The learned counsel would also contend that the defendant did not participate in the second survey that was held at Bangalore and therefore the report of the said surveyor cannot be the basis for coming to the conclusion that the damage occurred when the goods were in the hands of the defendant. The learned counsel would also further point out that DW1 and DW2 have deposed that the packaging was not sufficient to protect a sophisticated equipment from damages.

16. An application in CMP.No.6704 of 2018 has been filed by the respondent seeking to produce certain documents. The first document that is sought to be produced is the last page of the manifest which has been produced as Ex.A37. The second document that is sought to be filed is the bill of entry that shows the payment of customs duty. The third document is the report on the joint inspection of the consignment. The fourth document that is sought to be filed is the import gate pass dated 13.02.2001 which has already been marked as Ex.B1 and the fifth document that is sought to be filed is the survey report dated 15.02.2001, which has already been marked as Ex.A7. Except the joint inspection report and the bill of entry the other documents have already been produced. In the affidavit filed in support of the application it is pleaded that these documents would be of use for this Court to decide the appeal. It is also stated that these documents could not be produced despite exercise of due diligence.

17. We have considered the contents of the documents and as we have already stated except documents 2 and 3, the other documents are already part of the record in the suit. As far as the document No.2 is concerned it is a bill of entry issued by the customs securing house and the same does not have any bearing on the controversy. As far as document No.3 is concerned, it is the internal communication within the office of the defendant and the same would not have any effect on the material dispute as to the time at which the damage occurred. We therefore do not see any reason to entertain this application and we find that these documents may not be of any use in deciding the appeal.

18. From the contentions of the learned counsel for the parties the following points arise for determination:

1) Whether the plaintiff has proved that the damages occurred when the goods were in the custody of the defendant.

2) Whether the defendant would be guilty of suppression of facts for not having produced the gate pass dated 09.02.2001 and the survey register, more so, when the issue No.2 in the suit was framed specifically with reference to the survey register.

3) Whether the suit is bad for non-joinder of necessary parties.

4) Whether the defendant is liable for the suit amount.

<u>Point No.1:-</u>

19. Ex.B1 is the gate pass dated 13.02.2001. As rightly contended by the learned counsel, the said document shows that there were no damaged packages in the consignment. DW1 in his cross-examination has specifically admitted that the term '***DR packages***' would mean only damaged packages. A similar consignment note dated 21.09.2006 has been produced by the plaintiffs as Ex.A40 to demonstrate that if there are any damaged packages, the number of damaged packages will be recorded against the phrase DR packages found in the document, this coupled with the admission of DW1 would demonstrate that there are no DR packages (damaged packages) for consignment that was subject matter of suit when the same was received by the defendant.

20. Ex.B1 the goods manifest of the air craft has been marked as Ex.A37. Wherever there is a damage to the packaging the same is recorded in the manifest and the said manifest is signed by Loganathan, Officer of the Airport Authority of India. The entry relating to the goods that are subject matter of the suit which are covered by the Airway bill No.618 9807 2660 are shown to be in a good condition, there is a tick mark with "OK" written in hand. The cumulative effect of these two documents would be that the goods were in a good condition when they reached the defendant.

21. Yet another aspect which would militate against the claim of the defendant is the non-production of the survey register and gate pass dated 09.02.2001. Despite the fact that two notices to produce have been given one under Ex.A30 and the other under Ex.A38 requiring the defendant to produce the gate pass and the survey register the defendant has not chosen to produce the same.

22. PW3, John Stephen who is the representative of the carrying and forwarding agent of the plaintiffs had specifically deposed that he had made an endorsement in the gate pass dated 09.02.2001 that the cargo was damaged and the same was also entered into the survey register. DW1 Mr.Selvakumar had also admitted the existence of this document, but he has not chosen to produce the same. Therefore we have to necessarily draw an adverse inference against the defendant for non-production of those two documents. It is also seen from Ex.A39 dated 10.02.2001, the letter by the Tristar Express International addressed to the Deputy Commissioner of Customs seeking survey of the goods since it was found in a damaged condition, and that the defendant had acknowledged the goods were in a good condition when they were delivered to the defendant and the fact that one of the cartons were found to have been damaged at the survey that was conducted on 12.02.2001 is also noted in the said document by the official of the defendant.

23. The trial Court has completely overlooked these un-impeachable evidence to conclude that the plaintiffs have not proved that the goods are damaged when they were in possession of the defendant. Once it is shown that the goods were received by the defendant in a good condition and they were found damaged when they were in the custody of the defendant. The defendant would be undoubtedly liable to make good the loss. We are therefore unable to sustain the findings of the trial Court that the plaintiffs have not established that the goods were damaged when they were in the custody of the defendant.

24. As we have already pointed out the failure on the part of the defendant to produce the vital documents, despite the notice having been served on it, would militate against the defendant. We therefore conclude that the plaintiffs have established that the goods were damaged when they were in the hands of the defendant. Therefore, point No.1 is answered against the respondent.

<u>Point No.2:</u>

25. As we have already pointed out that at least two notices to produce were given to the defendant in Ex.A36 and 38. Despite the same, the defendant has not chosen to produce the gate pass dated 09.02.2001 and the survey register. There is a tacit admission by DW1 regarding the existence of the survey register. The non-production of these two documents would definitely lead us to conclude that there was suppression on the part of the defendant.

Point No.3:

26. The trial Court has come to the conclusion that the suit is bad for non-joinder of necessary parties viz., Singapore Airlines and Air India. We find from the letter dated 28.02.2001 issued by Singapore Airlines which forms part of the survey report Ex.A7 that as per the records of the handling agents viz., Air India, the goods that were sent by the Airway Bill No. 618 9807 2660 were received in a good condition at the Chennai Airport, this coupled with the evidence that we had discussed while deciding point No.1 viz., Ex.B1, Ex.A37 and Ex.A39 would go long way to show that the goods were received by the defendant in a good condition and they were damaged when they were in the custody of the defendant. Therefore, neither the Singapore Airlines nor the Air India which were handlers for Singapore

Airlines can be said to be necessary parties to the suit. The trial Court assumed that the damage occurred in the custody of the Airlines and rendered a finding that they are necessary parties to the suit. We are unable to subscribe the said view of the trial Court.

Point No.4:

27. Adverting to the liability, the survey report shows that whatever was salvage value was only 10%. The total value of the goods imported is Rs.1,12,21,750/- and insured value of Rs.1,08,92,538/-. The salvage value has been deducted and the sum of Rs.98,94,000/- has been arrived at by the plaintiffs. There is no dispute regarding this valuation. The only contention of the defendant is that the quantum of loss has not been established. The report of authorized surveyor is entitled to credence, once the surveyor has also been examined. The cross-examination of the surveyor does not disclose any material discrepancy so as to render the evidence unbelievable.

28. In the case on hand the goods have been re-exported to the manufacturer and the manufacturer had found that only 10% salvage value could be redeemed. Therefore the fact that the loss was caused in the hands of the defendant having been proved the defendant would be liable to pay the suit amount.

29. The plaintiff has claimed interest at 21%. Though it is a commercial transaction we do not think we should grant 21% interest which in our opinion would be usurious. We therefore award interest at 9% from the date of suit till date of payment. The appeal is **allowed** and the suit in O.S.No.8 of 2004 is decreed for Rs.98,00,942/- with interest at 9% per annum from the date of the suit till date of payment. The appellant would be entitled to costs in this appeal.

(R.S.M.,J.) **(N.S.,J.)**
19.12.2023

dsa
Index :No
Internet :Yes
Neutral Citation :No
Speaking order

To

The Additional District Judge/

Fast Track Court No.I, Chengalpattu.

<u>R.SUBRAMANIAN, J.</u>
<u>and</u>
<u>N.SENTHILKUMAR, J.</u>

dsa

A.S.No.1068 of 2009
and
C.M.P.No.6704 of 2018

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