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S.A.No.68 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.68 of 2018

DRS Logistics Private Limited
21, 1st Floor, Shivaji Marg, Najafagr Road
New Delhi 110 015.

...Appellant

Vs.

1.Blue Star Limited
Kasturi Building, Mohan T.Advani Chowk
Jamshedhi Tata Road, Mumbai 400 020
Represented by its Power Agent/Subrogee
The Oriental Insurance Co., Ltd.,
Represented by their
Sr.Divisional Manager R.Viswanathan

2.The Oriental Insurance Company Limited
Oriental House, A25/27, Asaf Ali Road
New Delhi 110 002
Represented by their Sr. Divisional Manager
R.Viswanathan

... Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil
Procedure, against the judgment and decree dated 01.09.2017 passed in



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A.S.No.78 of 2017 by the XVIII Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 08.11.2016 passed in OS.No.4019 of 2012 passed by the I Assistant Judge City Civil Court, Chennai.

For Appellant : Mr.S.Sathish
For Respondents : Mr.G.Guruswaminathan
for M/s.Nageswara
Naricharia for R1 & R2

JUDGMENT

The unsuccessful defendant in the suit is the appellant. The respondents herein filed a suit seeking recovery of Rs.7,05,355/- with interest for the loss caused to the goods of the first respondent, during transit by the appellant/carrier from Chennai to New Delhi. The suit was decreed by the trial Court and the findings of the Trial Court were affirmed by the first Appellate Court. Aggrieved by the same, the unsuccessful defendant has come up with this Second Appeal.



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2. According to the respondents/plaintiffs, the first respondent

during the course of his business, entrusted 83 numbers of Chest Freezers with the appellant/carrier for transit from Chennai to New Delhi. It was the case of the respondents that as a common carrier it was the duty of the appellant to deliver the goods entrusted in a good condition to the consignee point. It was further pleaded by the respondents that the appellant delivered only 80 Chest Freezers out of 83 Chest Freezers in a highly damaged condition. The damage caused to consignment was intimated to the appellant by way of e-mail dated 22.04.2009 and issued a statutory notice for the loss on 24.04.2009 calling upon appellant to compensate the loss. The second respondent/insurer appointed a surveyor to assess the damages and based on his survey report the second respondent/second plaintiff paid a sum of Rs.7,05,355/- towards the value of the damaged consignment to the first respondent and indemnified it as per contract of Insurance. Hence, the first respondent executed a letter of subrogation in favour of the second respondent. It was specifically averred by the respondents that the damage to the consignment was due to the negligence and lack of care on the part of the appellant and hence, they sought for recovery of the above mentioned sum.



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3. The appellant/defendant filed a written statement denying the averment found in the plaint as if damage to the consignment was caused to due to the negligence and lack of care on the part of the appellant. It was the case of the appellant that they had taken proper measures to transit the goods in a good condition and the damage to the goods was caused due to the fire accident originated from the Engine of the vehicle. It was beyond the control of the appellant.

4. It was further averred that the accident had occurred due to the technical fault in the Engine which was properly maintained by them. It was also specifically averred by the appellant that the damaged consignment namely Chest Freezers were not the one covered under Insurance policy issued by the second respondent in favour of the first respondent. The second respondent paid suit amount to the first respondent in respect of the damaged goods which were not covered under the Insurance policy and therefore, the suit filed against the appellant for recovery of the amount paid by the second respondent to the first respondent was not at all maintainable. On these pleadings, the appellant sought for dismissal of the suit.



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5. Before the trial Court, the Assistant Manager of the second respondent was examined as PW1 and the Surveyor appointed by second respondent was examined as PW2. On behalf of the respondents/plaintiffs 14 documents were marked as Ex.A1 to Ex.A14. On behalf of the appellant/defendant no oral or documentary evidence was let in.

6. The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that the respondents proved the suit claim and decreed the suit as prayed for. Aggrieved by the same, the appellant/defendant preferred an appeal in A.S.No.78 of 2017 on the file of the XVIII Additional Judge, City Civil Court, Chennai. The First Appellate Court also concurred with the findings of the trial Court. Aggrieved by the same, the appellant has come up with this Second Appeal.

7. At the time of admission, this Court formulated the following substantial questions of law:

“1. Whether the Court can disregard the fact that the goods transported were not mentioned in the Insurance Policy document and therefore not covered by



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Insurance Contract and still proceed to decree the suit based on wrong finding and assumptions.

2. Whether the Court can disregard the evidence and admission of Surveyor (PW2) especially when he admits that the claim amount has been paid by the second plaintiff to the first plaintiff in respect of goods which were not insured. Further, when the witness concedes that the damage was due to accidental fire.

3. Whether the Courts below can have jurisdiction on the basis of a Letter of Subrogation and Special Power of Attorney when the defendant is not a party to the said documents.”

8. At the time of arguments, the learned counsel for the appellant mainly submitted his arguments only on 1st and 2nd substantial questions of law. It was his submission that the Chest Freezer was not included in the insurance policy issued by the second respondent in favour of the first respondent marked as Ex.A2. When the goods damaged were not covered by the insurance policy, the second respondent ought not to have indemnified the



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first respondent and as a consequence the suit claim for recovery of amount paid by the second respondent to indemnify the first respondent is not at all maintainable.

9. The learned counsel for the appellant further submitted that PW2 Surveyor clearly admitted the damages to the consignment was only due to the accidental loss and not because of any negligence on the part of the appellant. In such circumstances, both the Courts below wrongly came to the conclusion that the appellant was liable to pay the compensation amount to the respondents.

10. The learned counsel for the respondents submitted that in Ex.A2 insurance policy though the word Chest Freezer is not specifically included the words refrigerator, Deep freezer are specifically included with the suffix etc. Therefore, it should be presumed that Chest Freezer was also covered by the Policy. The learned counsel for the respondents further submitted that under Section 9 of the Carrier Act, there is a presumption in favour of the first respondent/owner of the goods. In a suit for recovery of damages for damaged goods by owner of goods against common carrier, the



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plaintiff need not lead any evidence regarding the negligence on the part of the common carrier and it is for the carrier to lead a positive evidence to the effect that the damage caused was not due to his fault. The learned counsel for the respondents further submitted that in the case on hand, the appellant/carrier failed to lead any evidence. Therefore, by virtue of presumption available under Section 9 of the Carriers Act, the plaintiff is entitled to succeed.

11. In support of his contention, the learned counsel for the appellant relied on the following judgments;

1) *Nath Bros. International Ltd., Vs. Best Roadways Ltd.*, reported in **2001-1-L.W.756**

2) *Bond Food Products Private Ltd., and another, Vs. M/s.Planters Airway Ltd.*, reported in **2004-2-L.W.663**.

12. The first question to be decided in this matter is whether Chest Freezers were included in the risk coverage clause under the Insurance policy marked as Ex.A2. The risk coverage clause in Ex.A2 reads as follows:

“AIR CONDITIONERS, TRANSIT OF SPLIT MINI



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SPLIT/ROOM ACS SALES RETURN MACHINES ANY EQUIPMENT RELATED TO AND WATER COOLERS BOTTLE COLLERS MINERAL DISPENSERS, DEEP FREEZERS REFRIGERATOR VOLTAGE STABILIZERS ETC.”

13. A perusal of this coverage clause in the insurance policy issued by the second respondent under Ex.A2 would make it clear that the Chest Freezers were not included in the risk coverage. However, the learned counsel for the appellant submitted that the word etc., used in risk coverage clause would bring Chest Freezer, which is similar to the goods which are specifically mentioned, within the risk clause. The evidence of respondents side witness PW2 assumes significance in this regard. PW2 is the Surveyor appointed by the second respondent/Insurance Company to survey the loss to the consignment. He deposed in his cross examination as follows:

“வா.சா.ஆவணம் 2, முதல் வாதிக்கும், இரண்டாவது வாதிக்கும் இடையே உள்ள இன்கூரன்ஸ் பாலிசியாகும். அதில் எந்தெந்த பொருட்கள் காப்பீடு செய்யப்பட்டுள்ளது என்ற விவரம் கூறப்பட்டுள்ளது. வா.சா.ஆவணம் 2ல் (chest freezer) இல்லை. Deep Freezers என்று கூறப்பட்டுள்ளது. வா.சா.ஆவணம் 3 இன் வாய்ஸ் காப்பி ஆகும் அதில் கூறப்பட்டுள்ளது. வா.சா.ஆவணம் 10 என்னுடைய அறிக்கையில் சேதமடைந்த பொருள் (chest freezer) என்று கூறியுள்ளேன். என்னுடைய அறிக்கையில் வா.சா.ஆவணம் 2யும் நான் எனது அறிக்கையில் குறிப்பிட்டுள்ளேன். ஆகவே காப்பீடு செய்யாத



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பொருளுக்கு காப்பீடு தொகை வாங்கியுள்ளார் என்றால் சரிதான்.

பொருட்களுக்கு சேதம் (accidental fire) காரணமாக ஏற்பட்டுள்ளது.”

14. PW2, in his evidence clearly mentioned that Chest Freezers were not included in Ex.A2 Insurance Policy. He also deposed that the second respondent paid compensation to the damaged goods which were not covered under the policy. In the light of the well pronounced admission by the second respondent's own Surveyor that Ex.A2 policy does not cover Chest Freezer, this Court is not inclined to accept the arguments of the learned counsel for the appellants that the expression “etc” employed in the risk coverage clause would enlarge the meaning of the same and include the Chest Freezer also. If the Chest Freezer is also a machine similar to the other goods covered under policy, the Surveyor of the respondents would have clarified in his evidence that Chest Freezer goods are similar to the other goods covered under the policy and therefore, the policy would cover Chest Freezer also. But on the contrary, it was clearly admitted that the policy does not cover Chest Freezer and the compensation was paid for the goods which were not covered by the policy.



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15. In view of the admission made by PW2 coupled with the absence of the words Chest Freezer in the risk coverage clause, this Court comes to the conclusion that damaged goods namely Chest Freezer was not covered by Ex.A2 Insurance Policy.

16. Both the Courts below while appreciating the evidence of PW2, misread his evidence and assumed as if Chest Freezer was included in Ex.A2 Insurance Policy. He only deposed Chest Freezer was mentioned in the Invoice Ex.A3 prepared by the first respondent and he never deposed that Chest Freezer was included in Insurance Policy Ex.A2. Therefore, the conclusion reached by the Courts below as if Chest Freezer was also included in Ex.A2 is a clear misreading of evidence and therefore, the findings of fact arrived at by the Courts below are vitiated by the perversity.

17. In view of the discussions made earlier, both the questions of law framed at the time of admission are answered in favour of the appellants and the judgment and decree passed by the Courts below are liable to be set aside.



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18. The learned counsel for the respondents by relying on Section

9 of the Carriers Act submitted that the first respondent is entitled to maintain an action against the defendants. He submitted that even assuming that the Insurance Policy does not cover the goods damaged a presumption is available under Section 9 of the Carriers Act that damage was caused by negligence or criminal act of carrier and therefore, the first respondent is entitled to maintain action for recovery of damages for the loss caused to the goods *dehors* insurance policy. Section 9 of the Carriers Act reads thus:

“9.Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act:- *In any suit brought against a common carrier for the loss, damage or non-delivery of [goods (including container pallet or similar article of transport used to consolidate goods) entrusted] to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.”*

19. Section 8 of Carriers Act, talks about the liability of common carrier to pay damages to the loss caused to the goods carried by him due to his negligence or fraud. The relevant provision reads as follows:



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“8.Common carrier liable for loss or damage caused by negligent or fraud of himself or his agent:- Notwithstanding anything herein before contained, every common carrier shall be liable to the owner for loss of or damage to any [property (including container, pallet or similar article of transport used to consolidate goods) delivered] to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants [and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of Section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants.]”

20. Close scrutiny of Sections 8 & 9 of the Carriers Act would make it clear, in case of damage to the goods during transit, the damage caused by the negligence or fraud of the carrier or his agents or servants, the common carrier is liable. Further in a suit filed by the owner of the damaged goods for recovery of damages against the common carrier, it is not necessary for the plaintiff to prove that the loss or damage was owing to the negligence or criminal Act of the carrier. Therefore, there is a general presumption in favour



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of the owner of the damaged goods that damage to goods was due to carrier's negligence or criminal act and it is for the common carrier to the rebut the presumption by leading evidence that the damages caused to the goods are not due to his negligence or criminal act.

21. In the case on hand, the respondents examined the Surveyor appointed by the second respondent as PW2. He in his evidence deposed that damage to the goods was caused due to the accidental fire. Therefore, it is clear the damage to the goods was not due to any negligence or criminal act on the part of the common carrier. When the respondent's witness himself admitted damage to the goods was due to the accidental fire, there is nothing on record to show that the damage to the goods was due to the negligence or criminal act on the part of the appellant/carrier. Of course, there is a presumption available under Section 9 of the Carriers Act in favour of the plaintiffs in a suit for recovery of damages for loss to the goods during transit by carrier. However, the statutory presumption under Section 9 of the Carriers Act was rebutted by the evidence of respondent's own witness, who admitted that the damage was caused due to the accidental fire. The said admission would suggest that there was no negligence or criminal act on the part of the appellant. Therefore,



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statutory presumption under Section 9 of the Carriers Act gets rebutted.

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22. In this regard, it would be appropriate to refer to the observation of the Hon'ble Division Bench of this Court in ***Bond Food Products Private Ltd., and another, Vs. M/s.Planters Airway Ltd.***, reported in ***2004-2-L.W.663***. The relevant observation reads as follows:

“14.5. When the defendant/carrier failed to employ a surveyor for the assessment of the damages on his own and also failed to prove that they have not committed any negligence, the evidence of the Surveyor (P.W.2) the report of the Surveyor (Ex.A4), and his assessment with respect to the quantum of damages have to be accepted.”

23. In the case on hand, though the appellant failed to lead any evidence the Surveyor of the second respondent was examined as PW2 and he in his evidence as well as Surveyor's report Ex.A10, clearly mentioned that accident had taken place at 12 noon and the damage was caused due to the accidental fire. In such circumstances, the presumption available under Section 9 of the Carriers Act is rebutted and the appellant is not liable to pay damages to the respondents in view of the admission made by respondent's own witness



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24. In *Nath Bros. Exim International Ltd., Vs. Best Roadways Ltd.*, reported in **2001-1-L.W.756**, while considering scope of liability of carrier with regard to consignment in his custody, the Hon'ble Apex Court observed as follows:

“28. From the above discussion, it would be seen that the liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants.”

25. As discussed earlier, in the case on hand, the evidence of respondent's witness as PW2 would suggest that there was no negligence or criminal act on the part of the appellant/carrier and the accident was only due to accidental fire and therefore, the first respondent is also not entitled to seek compensation from the carrier, when it is not due to carrier's negligence or



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criminal act.

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26. In view of the discussion made earlier, the second contention raised by the learned counsel for the respondents is also not acceptable to this Court. In view of the answer to questions of law 1 & 2, the Appeal is allowed by setting aside the judgment and decree passed by the Courts below. The suit filed by the respondents is dismissed.

27. a) In the result, the Second Appeal is allowed by setting aside the judgment and decree passed by the Courts below.

b) the suit filed by the respondent is dismissed.

c) In the facts and circumstances of the case, there shall be no order as to costs.

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Index : Yes
Internet : Yes
Neutral Citation Case : Yes
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S.SOUNTHAR, J.

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To

- 1.The XVIII Additional Judge, City Civil Court, Chennai.
- 2.The I Assistant Judge City Civil Court, Chennai.

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