IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2024

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

S.A.No.174 of 2011

Sankaranarayanan ... Appellant / Defendant

Vs.

1.Parry Confectionery Limited,
By its Power Agent and Subrogee
M/s.New India Assurance Co. Ltd.,
No.234, NSC Bose Road, Chennai 600 001.

2.New India Assurance Co., Ltd.,
Rep. by its Deputy Manager,
No.1, Bharathi Road,
Cuddalore - 607 001. ... Respondents / Plaintiffs

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 21.07.2009 passed in A.S.No.293 of 2008 on the file of the learned VII Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 06.11.2007 passed in O.S.No.5180 of 2004 by the learned V Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.Christopher Vijay

For Respondents : Mr.S.Dhakshnamoorthy

JUDGMENT

This Second Appeal has been filed to set aside the judgment and decree dated 21.07.2009 passed in A.S.No.293 of 2008 on the file of the learned VII Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 06.11.2007 passed in O.S.No.5180 of 2004 by the learned V Assistant Judge, City Civil Court, Chennai.

2. Heard Mr.Christopher Vijay, learned counsel for the appellant and Mr.S.Dhakshnamoorthy, learned counsel for the respondents and perused the materials available on record.

3. The appellant is the defendant against whom the plaintiffs have filed a suit for recovery of money. The Trial Court has decreed the suit and the First Appeal preferred by the defendant before the First Appellate Court has also confirmed the judgment and decree of the Trial Court by dismissing the First Appeal. Now the defendant has filed this Second Appeal.

4. The facts pleaded in the plaint are as under:

The first plaintiff is a limited liability Company incorporated under the Companies Act and having its Office at Chennai and it is being represented through its Power Agent M/s. New India Assurance Company

Limited. The second plaintiff is a limited liability Company incorporated under the Companies Act and he is the Power Agent for the first plaintiff and having his office at Cuddalore.

4.1. The defendant carrying on business as a sole proprietor in the name and style of M/s.Sakthi Cargo Movers. The first plaintiff is engaged in the manufacture of confectioneries and he has entrusted a consignment of confectionery items for a total value of Rs.4,64,221/- as per Stock Transfer Advise No.0603 dated 27.09.2001 to the defendant under Goods Consignment Note (SCM) No.3769 dated 27.09.2001 for safe carriage by road from its factory at Nellikuppam to its office at Kannade (PO), Palghat. The defendant failed to deliver the consignment as how it has been taken. At the time of delivery effected on 01.10.2001, the first plaintiff found that there was a shortage of 13 cartons of Coffy Bite and 12 bags Lacto King of total value of Rs.30,775/-. The consignee had endorsed the shortage on the reverse of the original Goods Consignment Note delivered to the defendant. While taking delivery, the defendant has also confirmed the shortage by its Open Delivery Certificate dated 27.12.2001. The first plaintiff became aware of the shortage on 01.10.2001 at the time of delivery.

4.2. The first plaintiff had taken Marine Cargo Special Declaration Policy No.711004/21/01/00010 with the second plaintiff covering various consignments under transit including the suit consignment. Accordingly, the first plaintiff had lodged a claim with the second plaintiff for the value of shortage which was settled for a sum of Rs.38,526/- in terms of the insurance policy. In consideration of the settlement of the claim, the first plaintiff executed a letter of subrogation cum special power of attorney subrogating its right of recovery in favour of the second plaintiff. As the shortage has occurred due to the negligence or misconduct on the part of the defendant, he is liable to make good the loss.

4.3. The first plaintiff had issued notice under Section 10 of the Carriers Act to the defendant on 18.03.2002 which was duly acknowledged. But the defendant did not choose to send any reply or make good the loss. Another notice was also sent by the plaintiffs on 16.08.2004 to the defendant, but that also did not evoke any positive response from the defendant. Hence, the plaintiffs have filed a suit for recovery of money by restricting their claim to Rs.30,764/- with interest at the rate of 12% per annum.

5. The short facts pleaded in the written statement of the defendant are as under:

The fact that the consignment was booked by the first plaintiff with the defendant on 27.09.2001 *vide* L.R.No.3769 for transportation is not denied or is admitted. The consignment was transported in a lorry bearing Registration No.TN 28 V2858. Unfortunately, there was a theft during transit, in which, 13 cartons of Coffy Bites and 12 bags of Lacto King Vitamin were lost. The defendant had lodged a complaint to the Police and an FIR was registered in this regard on 29.09.2001 in Crime No.1347 of 2001 in Sangagiri Police Station. Despite the best efforts, the lost materials could not be recovered.

5.1. The consignment was transported strictly "*at owners' risk*", the loss of materials was not at the part of the defendant. In fact, absolutely there was no negligence on the part of the defendant and the loss was purely due to theft in transit, which was beyond the control of the defendant. In such circumstances, the claim made by the plaintiffs are untenable and devoid of merits.

5.2. The defendant has not been served with a statutory notice under Section 10 of the Carriers Act within six months stipulated in the Act. The alleged notice dated 18.03.2002 under Section 10 of the Act was served by the first plaintiff on the defendant only on 30.06.2003. As the defendant is not liable to pay the suit amount, the suit should be dismissed.

6. On the basis of the above pleadings, the learned Trial Court has framed the following issues:

> "<u>எழுவினாக்கள்</u>
>
> 1. வாதிகள் கோரியபடி பிரதிவாதியிடமிருந்து தாவா தொகையான ரூ.30,764/– வழக்கு தாக்கல் செய்த நாளிலிருந்து தொகை வசூலாகும் நாள் வரை 12% வட்டி செலுத்த வேண்டுமென்று வாதிகள் கோரிய பரிகாரம் பெற தகுதியுடையவர்களா?
>
> 2. வேறு என்ன பரிகாரங்கள்?"

7. During the course of the trial, on the side of the plaintiffs, P.W.1 was examined and Exhibits A1 to A8 have been marked. On the side of the defendants, D.W.1 was examined and Exhibits B1 to B3 were marked.

8. At the conclusion of the trial, after considering the evidence available on record, the Trial Court has decreed the suit. The First Appeal preferred by the defendant was also dismissed by confirming the judgment of the Trial Court. Now, this Second Appeal has been filed by framing the following substantial questions of law:

> *"Whether the Lower Appellate Court is right in concluding that the respondents / plaintiffs had authority to institute the suit under the Letter of Subrogation, which was given for some other Policy Number?"*

9. The learned counsel for the appellant / defendant submitted that the letter of subrogation which was the basis for the claim would show the Policy Number as 712800/21/01/00030, but in the plaint of the plaintiffs, the policy pertaining to the first plaintiff has been given with the description 711004/21/01/00010. As the Policy Number mentioned in the letter of subrogation does not tally with the policy number alleged in the plaint, the plaintiffs are not entitled to make any claim against the defendant.

10. The learned counsel for the plaintiffs / respondents submitted that the discrepancy in the policy number was only because of the branch of the New India Assurance where the policy was taken, has been subsequently upgraded to divisional office and at the time when the letter of subrogation was executed, the policy number is changed in accordance with the code number of the office. He further submitted that there is no discrepancy in the policy amount found in the letter of subrogation and hence, the Courts below are right in construing Ex.A6 as relevant to the present claim.

11. The plaintiffs / respondents' explanation as to the discrepancy in the policy number does not form part of the pleadings made in the plaint. Even if it is presumed for the sake of argument that the policy number has been changed in view of the upgradation of the office of the New India Assurance Company, that would be only in respect of those digits which would represent the office. The whole six digits 711004 has been written as 712800.

12. It is learnt from the arguments of the learned counsel for the respondents that the last segment would represent the serial number of the policy. That also appears to be different from the description made in the plaint and the details shown in the letter of subrogation. While the plaint represents the serial number as 00010, it is mentioned in the letter of subrogation as 00030. Of course, there is no difference in the claim amount which has been stated as Rs.38,526/- in the letter of subrogation. When the specific policy represents a specific consignment, there should not be any difference in mentioning the policy number in the letter of subrogation.

13. In fact, in the written statement of the defendant, he has fairly admitted that the consignment is being sent through his carrier by the first plaintiff from his factory at Nellikuppam to his office at Palghat. The defendant did not deny the fact that there was loss of materials during the course of transit. He has stated that there was a theft in the transit for which, he cannot be held liable.

14. So far as the liability part is concerned, both the Courts have fixed the liability on the defendant, though he had pleaded that the loss was due to the theft. The only technical point on which this Appeal has been admitted was in view of the discrepancy in the number of policy as seen between the letter of subrogation and the plaint.

15. As stated already, the pleading supported by the learned counsel for the respondents now in this regard are matter of facts which ought to have been pleaded before the Trial Court in his written statement. Without pleadings and evidence, the above arguments cannot be sustained and the discrepancy in the policy number cannot be considered as a clerical error and it is a material discrepancy. Only with the help of the policy number which is described in the letter of subrogation, it can be found out whether the letter of subrogation represents a particular claim.

16. Though the defendant on his understanding had admitted that the claim is in respect of his engagement as a carrier for the consignment booked by the first plaintiff's office, the fact remains that the letter of subrogation given by the first plaintiff is lacking in the details to get tallied with the claim made in the plaint.

17. The term '***subrogation***' in law means '***getting into the shoes of the other***'. Through the letter of subrogation executed by the first plaintiff, the second plaintiff is presumed to have gone into the shoes of the first plaintiff. If the second plaintiff does not find himself fitting into his shoes (due to the discrepancy in the policy number), the second plaintiff cannot wear the shoes of the first plaintiff. In such case, the first plaintiff has to wear his shoes by himself and has to stand on his own legs and lay the claim by himself.

18. Once it is proved that the letter of subrogation is not proper and through which, the second plaintiff cannot maintain the suit on behalf of the first plaintiff, it goes without saying that the first plaintiff has to maintain the suit all by himself. The second plaintiff in his capacity as an insurer has settled the claim of the first plaintiff for the loss of goods. Hence, the second plaintiff has got the right to recover the claim in case the decree for the claim is passed in his favour.

19. Fortunately, the suit has been filed by both the first plaintiff and the second plaintiff. Though the decree cannot be granted in favour of the second plaintiff due to the above reasons, the fact remains that the defendant had admitted the loss of goods in transit and the liability against the second plaintiff also proved. Hence, the decree can be granted in favour of the first plaintiff.

20. The learned counsel for the appellant submitted that even the first plaintiff has been represented only through the second plaintiff as his power agent and hence, the first plaintiff also cannot have the *locus* to file a suit and get a decree.

21. The second plaintiff's capacity as a power agent and subrogee has to be seen individually. Even if the second plaintiff cannot have the status of the subrogee of the first plaintiff, he can very well act as a power agent for the first plaintiff. Hence, the defendant / appellant cannot claim that the first plaintiff cannot maintain the suit.

22. The course and end of the suit would have been different, had the second plaintiff alone filed the suit in his capacity as a subrogee of the first plaintiff. As the suit has been filed jointly by both the plaintiffs, the claim has been raised jointly by both the plaintiffs. Even if the second plaintiff might loose his *locus* as the subrogee of the first plaintiff, the first plaintiff can very well maintain the suit by having the second plaintiff as his power agent and get the decree in his favour. Thus, the substantial question of law is answered.

23. In the result, this Second Appeal is disposed and the judgment of the First Appellate Court is modified and the suit is decreed only in respect of the first plaintiff. No costs.

Speaking order **15.11.2024**
Index : Yes
Neutral Citation : Yes
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R.N.MANJULA, J.

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To

1.VII Additional Judge,
City Civil Court,
Chennai,

2.V Assistant Judge,
City Civil Court, Chennai.

3.Parry Confectionery Limited,
By its Power Agent and Subrogee
M/s.New India Assurance Co. Ltd.,
No.234, NSC Bose Road, Chennai 600 001.

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4.The Deputy Manager,
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No.1, Bharathi Road,
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