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A.S.Nos.360 & 361 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 16.04.2024	Delivered on 26.04.2024
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

A.S.Nos.360 & 361 of 2017

A.S.No.360 of 2017

M/s.Villavarayar & Son,
Partnership Firm,
Having Office at 39, Emperor Street,
Tuticorin - 628 001 and
Represented by one of its partners.

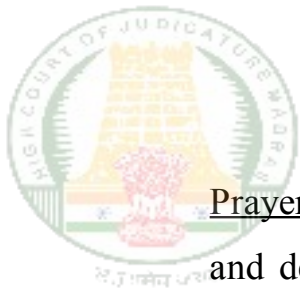
...Appellant

Vs.

1.M/s.United India Insurance Company Limited,
The first respondent is a Subsidiary of
General Insurance Corporation of India,
Incorporated under the insurance company
undertaking Act having their registered Office at
24, Whites Road, Chennai - 600 014.

2.M/s.Sree Narasimha Textiles Limited,
The 2nd respondent is a Public Limited Company
Incorporated under the Companies Act, 1956
Having its registered Office at
PB No.2, Sulur, Coimbatore - 641 402.

...Respondents



Prayer: First Appeal filed under Section 96 of C.P.C., against the judgment and decree dated 23.09.2016 passed in O.S.No.678 of 2004 on the file of the I-Additional District Judge, Coimbatore.

A.S.No.361 of 2017

1.M/s.Villavarayar & Son,
Partnership Firm,
Having Office at 39, Emperor Street,
Tuticorin - 628 001 and
Represented by one of its partners.

2.Mr.Joe Villavarayar and Son,
D.No.39, Emperor Street, Tuticorin - 628 001.

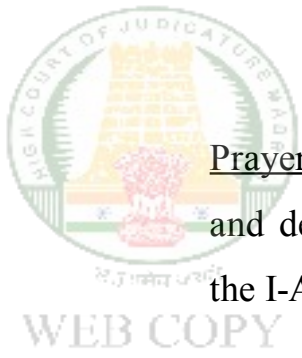
...Appellants

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Prayer: First Appeal filed under Section 96 of C.P.C., against the judgment and decree dated 23.09.2016 passed in O.S.No.805 of 2004 on the file of the I-Additional District Judge, Coimbatore.

For Appellants : Mr.J.Antony Jesus in both appeals
For Respondents : Mr.Swaminathan for
M/s.Nageswaran & Narichania for R1
in both cases
R2 - served - No appearance

COMMON JUDGMENT

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

The defendants in O.S.No.678 of 2004 and O.S.No.805 of 2004 are on appeal, aggrieved by a decree granted by the Trial Court, directing payment of a sum of Rs.9,93,631/- with interest at the rate of 9% per annum from the date of suit till date of realization in O.S.No.678 of 2004 and for a sum of Rs.13,94,200/- with interest at the rate of 9% per annum from the date of suit till date of realization in O.S.No.805 of 2004.

2.The suits came to be filed by the respondents namely, the Insurer and the Consignor of the goods namely, cotton yarn on the basis that loss



has occurred while the goods were in the custody of the carrier namely, the appellant herein. The Insurance Company, having indemnified the Consignor had obtained a letter of subrogation, authorizing it to claim the compensation from the appellants / carrier, had laid the suits along with the Consignor.

3.The parties will be referred as per their ranks in the suits for the shake of convenience. The plaintiffs claimed that the 2nd plaintiff which is a 100% export oriented unit engaged in manufacturing of cotton yarn had booked cotton yarn weighing 19008 kilograms for the purpose of transport from its factory at Suler in Coimbatore District to the Tuticorin Port for being transported by sea to M/s.CWC Textile AG, Hotzestrass 29, Postfach 155, CH-8042, Zurich (herein after referred as Consignee) through M/s.Norasia Lines, a liner agent at Tuticorin. Claiming that the consignee had informed the plaintiff that there was a shortage of 5999 kilograms of cotton yarn when the goods were delivered to the consignee at Zurich, the 2nd plaintiff / Consignor issued a notice demanding the payment of the value of the shortfall, amounting to Rs.11,11,709/-. Since the defendant did not honor the demand and refused to compensate, the 2nd plaintiff made a claim



that the 1st plaintiff, from whom it had taken a marine policy seeking indemnification of the loss. The 1st plaintiff accepted the claim and indemnified the 2nd plaintiff, upon which, the 2nd plaintiff executed a letter subrogation of the rights to recover the loss from the carrier namely, the defendant.

4.In O.S.No.805 of 2004, the plaintiff claimed that it had booked 8200 kilograms of cotton yarn and the Consignee namely, M/s.MANTAFIL SPA, VIA DON A RAVIZZA 24, 24060 CASTELLI CALEPIO (BG) ITALY, upon receipt of the cargo, intimated there was a shortfall of about 5600 kilograms of cotton yarn. Therefore, the Insured / the 2nd plaintiff claimed the loss of a sum of Rs.25,88,040/- from the carrier / defendant. Since the carrier by letter dated 12.05.1998 refused to compensate the 2nd plaintiff, the 2nd plaintiff made a claim that the 1st plaintiff who is the Insurer and the Insurer after following the necessary formalities admitted the claim and paid a sum of Rs.24,99,152/-, being the value of the missing cargo. Upon such payment, the 2nd plaintiff executed a letter of subrogation in favour of the Insurance Company, authorizing it to recover the loss from the carrier. Since the Insurance Company along with the 2nd plaintiff / Consignor /



Insured had filed a suit for recovery of the loss. Since the parties namely, Consignor, the Carrier and the Insurance Company were the same in both the suits. Both the suits were tried together and evidence was recorded in the earlier suit namely, O.S.No.678 of 2004.

5.The suits were resisted by the carrier contending that the loss did not occur when the goods were in its custody. According to the defendant/s, the loss might have occurred during shipping or at the Port. It is the further contention of the carrier that since no notice was issued under Section 10 of the Carriers Act, the suit itself is not maintainable. It was also pointed out that the money that was lying in Court deposit and the value of the recovered cotton yarn should be deducted from the total claim. Be it noted that the carrier did not deny the entrustment of the goods with it.

6.On the above contentions the learned Trial Judge framed the following issues in both the suits:-

"i) Whether the suit is bad for non joinder of the consignee ?

ii) Whether the notice U/s. 10 of Carrier's Act by the buyer is necessary ?



iii) *Whether the 2nd plaintiff has title over the goods lost or not ?*

iv) *Whether the suit is barred by limitation ?*

v) *Whether the letter of subrogation and special power of attorney dated 22.09.1998 is legally valid ?*

vi) *Whether the plaintiff is entitled for decree against the defendant for suit claim with interest at the rate of 24% per annum ?*

vii) *To what other relief ?"*

7. On the side of the plaintiffs, three witnesses were examined as P.W.1 to P.W.3 and Exs.A1 to A29 were marked. On the side of the defendants, Manager of the Carrier was examined as D.W.1 and no documents were produced. On the evidence that was placed before him, the learned I-Additional District Judge, Coimbatore concluded that the carrier having admitted the entrustment, its liability under Section 10 of the Carriers Act is absolute and therefore, it was not for the plaintiffs / Consignor and the Insurer to prove negligence on the part of the carrier. It also held that, if the loss is proved, Section 9 of the Carriers Act, 1865 imposes an obligation of the carrier to compensate the loss.



8.The learned District Judge also took note of the fact that the consignment is a whole container consignment where the container is loaded at the premises of the Consignor in the presence of the Officials of the Excise Department, as the goods are dutiable goods, and container has sealed in the presence of the Officials of the Excise Department and the same is loaded on the lorry and once it reaches the Port, it is the whole container that is shifted to the vessel for onward transport to the Consignee, which is at Zurich, Switzerland and Italy. It is only upon opening of the container, at the place of the Consignee, could the loss be deducted. Upon deduction of the loss, the Consignee intimates the Consignor who takes action for recovery of the loss. The learned District Judge also found that the documents produced, particularly, the First Information Report in Crime No.202 & 203 of 1998, copy of the final report and the survey report would conclusively establish that the goods were lost when they were in the custody of the Carrier / defendant. On the said conclusion, the learned Trial Judge decreed the suits, of course after deducting the value of the yarn that was seized from the driver and the cleaner of the lorries who were accused of stealing the yarn and cash that was recovered from them. Aggrieved, the carrier is on appeal.



9. We have heard Mr.J.Antony Jesus, learned counsel for the appellants and Mr.Guru Swaminathan, learned counsel for the respondents.

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10. Mr.J.Antony Jesus, learned counsel for the appellant would vehemently contend that though Section 9 absolves the plaintiff in a suit against a carrier from proving negligence, it is incumbent on the plaintiff to prove at least the loss. According to the learned counsel for the appellant, in the cases on hand, the plaintiffs have miserably failed to prove the loss. Pointing out the fact that the plaintiffs have not chosen to produce the communications that were received from the Consignee, claiming that there was a shortage in the goods delivered to them or the notice of demand said to have been made on 06.05.1998, the learned counsel would contend that in the absence of any evidence to show that there was a shortfall in the goods that were delivered to the Consignees in Switzerland and Italy, the Court cannot assume loss and mulct the Carrier with the liability. Arguing further, the learned counsel would contend that the suit filed by the Consignor is not maintainable, since the Consignor has no right over the goods upon shipping, since Bill of Lading shows that they were shipped free on Board. It was also contended that the suit is not barred by limitation, in view of



Rule 6(3) of the Schedule to the Carrier of Goods by Sea Act, 1925 and the suit is also barred under Section 16 of the Carriers Act, in as much as no notice under Section 10 was issued within six months of the loss.

11.Contending contra, Mr.Guru Swaminathan, learned counsel for the respondents would submit that upon notification of the loss, the 2nd plaintiff has lodged a police complaint on 04.06.1998 and a First Information Report has been filed against the driver and cleaner of the lorries in which, these goods were loaded. A final report has also been filed against them before the criminal Court. Recoveries have been effected from them. The qualified Surveyor appointed under Section 64-UM of the Insurance Act had conducted independent investigation and has found that a novel method of pilferage has been adopted by the driver and cleaner of the lorries belonging to the Carrier where the doors are removed and the goods were stolen while the seals were left intact.

12.The learned counsel for the respondents would also rely upon the Seizure Mahazars which have been marked as Exs. A28 and A29 to contend the fact that the goods were stolen when they were in the custody of the



carrier has been established beyond doubt. The learned counsel would also submit that a notice of demand was made on 06.05.1998 which has been referred to in Exs.A8 and A12, the replies made by the carrier. The carrier having not chosen to deny the entrustment is not entitled to contend that the loss has not been proved. Mr.J.Antony Jesus would also contend that as per Section 1 of the Bill of Lading Act, once Bill of Lading is issued, the Consignee gets the title to the goods and therefore, the Consignor cannot sue for the loss. We have considered the rival submissions.

13.The following points arise for determination in the appeal:-

- i) Whether the plaintiffs have proved the loss ?
- ii) Whether the suit is barred by limitation in view of the provisions of Clause 6 of Article 3 of Indian Carriage of Goods by Sea Act, 1925?
- iii) Whether the suit is barred for want of notice under Section 10 of the Carriers Act, 1865?
- iv) Whether the suit filed by the consignee is maintainable ?

14.**Point No.1:**



The main contention of the learned counsel for the appellant is that the plaintiffs have not established the loss. There was no notice under Section 10 of the Carriers Act claiming the loss therefore, there is no question of invoking Section 9 of the Carriers Act. Section 9 of the Carriers Act, 1865 reads as follows:-

"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."

15. Section 10 requires the Consignee to issue a notice in writing of the loss within six months from the knowledge of the loss and that notice is required to be issued before the suit. No doubt, the plaintiffs have not produced the notice but, the other evidence placed on record would show that such a notice in both the suits were, in fact, issued on 06.05.1998 i.e., within six months of knowledge of loss, since the invoice itself is dated 05.03.1998. There is no specific form for a notice under Section 10 from 12/20



Ex.A8 and A12 dated 12.05.1998. One can easily gather that there was a demand made by the 2nd plaintiff / Consignee on the carrier for the loss suffered by it on 06.05.1998. A reply has been issued to those notices under Exs.A5 and A12 on 12.05.1998 by the carrier. The reply does not deny the entrustment or the loss. It only states that the Consignee / 2nd plaintiff will be at liberty to move the Insurance Company for indemnification of the loss and the Carrier will support its cause. We could see that there is a tacit admission of the loss by the carrier in Exs.A8 and A12.

16.Apart from the above, the Consignee had lodged a criminal complaint and the Police, on investigation, have found that the manner in which the goods have been removed from the lorry and have filed a final report accusing the driver and cleaner of the lorry of theft, recovery of both goods and the cash have been effected from them. These factors would definitely demonstrate that the goods were lost in transit while they were in custody of the carrier. In addition to the above, there is a report of a qualified Surveyor, which depicts the events and the losses. Report of the Surveyor have been marked as Exs.A15 and A20. A perusal of the same, clearly demonstrates that the pilferage had taken place when the goods were



in the custody of the Carrier / defendant.

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17.Sub-section 4 of Section 64-UM of the Insurance Act makes it mandatory for the Insurer to take a report of an approved Surveyor or a loss assessor before settling a claim and under a Marine Insurance Policy. We find that the Surveyor has also been examined as P.W.2 and nothing has been brought about in his cross-examination to discredit the evidentiary value of his report or his parol evidence. In view of Section 9 of the Carriers Act, which we have already extracted, the plaintiff in a suit for recovery of loss against a Carrier is required to prove the entrustment and the loss. Once the entrustment and the loss is proved, the negligence becomes a matter for a presumption and it is for the carrier to dislodge the presumption.

18.As we have already point out, the evidence available in the form of the documents that have emanated from the Police or the survey report as well as the tacit admission contained in Exs.A8 and A12 sent by the carrier would be sufficient to prove the entrustment and the loss. If we have to look at the evidence of D.W.1, we find nothing which would rebut the statutory presumption that would arise in view of Section 9 of the Carriers Act. It



appears from his evidence of D.W.1 is ignorant of facts and he has put his hands up when inconvenient questions were addressed to him in cross-examination.

19.The learned counsel for the respondent would rely upon the judgment of the Hon'ble Supreme Court in ***Nath Bros. Exim International Ltd., Vs. Best Roadways Ltd.*** reported in ***2001 1 LW 756*** wherein, the Hon'ble Supreme Court had considered the scope of liability of the Carrier and after discussing the law relating to presumption created under Section 79 had 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 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."

20.In ***Bond Food Products Private Ltd. & Another Vs. M/s.Planters Airways Ltd.*** reported in ***2004 2 LW 663***, a Division Bench of this Court



had considered evidentiary value that is to be attached to the Surveyors report and the Division Bench, after referring to the judgment of the Madhya

Pradesh High Court in ***Gwalior Transport Co. Ltd. Vs. National Insurance Co. Ltd.*** reported in ***1991 ACJ 811*** observed 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."

21.In the light of the above pronouncements, we do not think, we can sustain the submissions of the learned counsel for the appellant / Carrier to the effect, the loss has not been proved and therefore, it cannot be made liable. Hence, Point No.1 is answered in favour of the respondents.

22.Point No.2:-

The learned counsel for the appellant would rely upon proviso to Clause - 6 of Article 3 of the Schedule to Indian Carrier of Goods by Sea Act, 1925 to contend that the suit has to be filed within a year. The said Act will not apply to the transaction on hand. It is a carrier which is governed



by the Carriers Act, 1925 and not the carrier of goods by Sea. Carriers Act, 1925 does not prescribe any special period of limitation for filing of the suit.

Section 10 of the Act only prescribes that a notice of loss must be given within a period of six months of the loss therefore, the law of limitation with reference to recovery of loss would apply to the suits, which is 3 years. The suits have been filed within the said period of three years and therefore, the contention of the learned counsel for the appellant that the suits are barred by limitation is rejected.

23.Point No.3:-

Next submission of the learned counsel for the appellant is that the suit is barred by Section 16 of the Carriers Act, since no notice has been issued. In fact, we find that the notice has been issued on 06.05.1998. Though the copy of the same has not been produced, there is enough and more evidence in support of the claim of the plaintiffs that a notice was, in fact, issued on 06.05.1998. Therefore, bar under Section 16 will not arise. Hence, Point No.3 is also answered against the appellant.

24.Point No.4:-

Adverting to the contention that once the Bill of Lading is issued, the Consignee becomes the owner, the said question will not arise in the cases



on hand. Mr.J.Antony Jesus, learned counsel for the appellant had contended that once a Bill of Lading is issued under Section 1 of the Bill of Lading Act, the consignee would become the owner of the goods and therefore, a suit is not maintainable at the instance of the consignor. Reliance is also placed on certain judgments by the learned counsel. We are stating the submission only to reject it.

25.In the case on hand, though a Bill of Lading was issued on 11.03.1998, the loss occurred even before that between 05.03.1998 and 11.03.1998 therefore, the question of the Consignee becoming the owner does not arise. Reliance that is placed upon the Bill of Lading Act and the provisions of Carrier of Goods by Sea Act is completely misplaced and therefore, we are unable to sustain the said contentions of the learned counsel for the appellant. We also find that the Trial Court has taken care to exclude or deduct the value of the goods that were either recovered or the cash that was recovered from the persons accused of theft.

26.We therefore, do not see any reason to interfere with the judgment of the Trial Court. This First Appeals therefore, fail and they are



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accordingly, **dismissed**. However, in the circumstances, the parties are directed to bear their own costs in the appeals. Consequently, connected miscellaneous petitions, if any, are closed.

(R.S.M., J.) (R.S.V., J.)
26.04.2024

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Internet:Yes

Index:Yes

Speaking

Nuetral Citation :Yes

To:-

The I- Additional District Court,
Coimbatore.

R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

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