

(2014) 02 MAD CK 0217

In the Madras High Court

Case No : O.S.A. No. 91 of 2009 and M.P. No. 1 of 2009

Air India

APPELLANT

Vs

M/s. Kody Tech Ltd. and The Oriental Insurance Co. Ltd.

RESPONDENT

Date of Decision : 19-02-2014

Acts Referred:

Citation : (2014) 02 MAD CK 0217

Hon'ble Judges : P. Devadass, J;N. Paul Vasanthakumar, J

Bench : Division Bench

Advocate : O.R. Santhanakrishnan, for the Appellant; Nageswaran, for the Respondent

Final Decision : Dismissed

Judgement

P. Devadass, J.—This Original Side Appeal has been preferred by the defendant (Air India) in C.S. No. 396 of 1997 as against the decree and judgment of the learned Single Judge directing the defendant to pay Rs. 12,22,166/- and Rs. 12,08,734/- respectively to the plaintiff (Consignor) and the second plaintiff (Insurer). The suit arose under the following circumstances:

(i) First respondent/first plaintiff is a seller of medical equipments. It ordered M/s. Sonotron Ultrasound Pvt. Ltd., Singapore to supply a colour Doppler machine for a medical conference in Chennai. The equipment was sent from Singapore to Chennai through the appellant's (defendant) flight under Airway Bill No. 098-6290 5625 dated 7.3.1995. The consignment was insured with the second respondent (2nd plaintiff). On 11.3.1995, the consignment was air freighted back to Singapore. On 13.3.1995, first respondent's agent namely, M/s. UTG Union Transport Pte. Ltd. took delivery of the consignment from appellants' agent, namely, SATS Cargo Terminal, Singapore. First respondent's agent gave clean receipt on external examination of the closed container.

(ii) In the meanwhile, first respondent got a purchaser in India. So, on 13.3.1995 itself, the consignment was re-booked to Chennai through the appellant under

House Airway Bill No. 098-6012 7745, dated 13.3.1995. First respondent's agent totally accepted 7 packages from the appellant's agent, also containing the aforesaid medical equipment. The packages were expected at Chennai on the same day. However, on 17.3.1995, the first respondent's agent was informed that since two packages were in a damaged condition they were not sent back to Chennai. They were found damaged. M/s. Surf Marine Surveyors Adjusters (Pte) Ltd. was engaged to survey them. On 27.3.1995, in the presence of first respondent's agent's representative, Mr. Rajesh Kumar of M/s. SATS Airport Service Pte. Ltd., Mr. Mahmood Bin Idros of appellant and Mr. Anders of M/s. Sonotron Ultrasound Pte. Ltd., Singapore, survey was conducted. Due to improper handling while the consignment was in the custody of the appellant, it got damaged.

(iii) The supplier reported that the entire equipment became useless and cannot be re-sold. It refused to take it back. It demanded \$.75,000/- (equivalent to Rs. 23,85,000/-) towards the cost of the equipment. On 7.4.1995, first respondent issued notice to the appellant claiming damages. On 21.4.1995, appellant disowned its responsibility stating that the first respondent had taken delivery of the equipment after giving clean receipt and the first respondent had referred to AW Bill No. 098-6290 5625 under which the cargo was sent from Chennai. On 18.4.1996, the first respondent sent letter mentioning both the airway bills. However, there was no reply. In the meanwhile, the first respondent's agent re-packed and shipped the said two packages to Chennai in two different flights on 2.3.1995 and 3.4.1995. The second respondent engaged the services of Mr. Raghunathan and Associates, a panel surveyor to assess the damage. To repair the damaged equipment \$.97,920/- was needed. It is more than the cost of the equipment itself.

(iv) First respondent paid \$.75,000/- (i.e. Rs. 23,85,000/-) to the supplier towards the cost of the equipment. Rs. 16,100/- and Rs. 29,800/- were paid towards packaging and freight charges respectively. Totally, first respondent had paid Rs. 24,30,900/-. As per the insurance policy, towards proportionate insured value of the damaged equipment, second respondent had paid Rs. 12,08,734/- to the first respondent. On 14.3.1997, the first respondent executed letter of subrogation and special Power of Attorney to the second respondent. Thus, the first and second respondents claimed Rs. 12,08,734/- and Rs. 12,22,166/- respectively.

2. The appellant resisted the suit by filing written statement contending that on 13.3.1995 the consignment was taken delivery by the first respondent's agent and clean receipt was also given. Thereafter the duty of the airline ended. On the same day, the first respondent's agent brought back the consignment to Singapore airport on the basis of the consolidated Airway Bill No. 098-6012 7745 dated 13.3.1995. Thus, there is no privity of contract as between the appellant and the first respondent. There is no proof that the first respondent had paid \$.75,000/- to the supplier. The damages claimed is also very high.

3. Based on the above divergent pleadings, five issues were framed. The suit was tried. Oral and documentary evidence were let in.

4. Appreciating the evidence and the submissions of either side, the learned Single Judge concluded that there was privity of contract as between the first respondent (first plaintiff) and the appellant (defendant), and the medical equipment got damaged, while it was in the custody of the appellant's agent and in such circumstances, Rule 27(2) of the Carriage by Air Act, 1972 stipulating lodging of a written complaint within 14 days of receipt of the damaged cargo is not applicable and ultimately, the learned Judge directed the appellant to pay to the second respondent Rs. 12,08,734/- being the insurance amount paid to the first respondent and also directed the appellant to pay the first respondent Rs. 12,22,166/- to cover the entire loss.

5. Aggrieved, the appellant (defendant) directed this appeal.

6. The learned counsel for the appellant contended that the consignment was sent under Ex. P1 Airway Bill, dated 7.3.1995 from Chennai to Singapore, it was re-booked under Ex. P4 House Airway Bill dated 13.3.1995 from Singapore to Chennai. The problem is with regard to the second Airway Bill only. However, in its letter the first respondent made claim for both the Airway bills. The learned counsel for the appellant further contended that the consignment was handed over to the first respondent's agent on 13.3.1995 at Singapore and the airlines duty came to an end. Thereafter the appellant is not liable for any damage to the equipment. The learned counsel further contended that the first respondent suo-motu appointed the surveyor. So also, the second respondent appointed another surveyor. The authors of the survey reports were not examined. Mere marking of the surveyor's reports Ex. P6 and Ex. P13 are not sufficient to prove the contents of the same. In this respect, the learned counsel cited S. Gopal Reddy Vs. State of Andhra Pradesh, , Kousalya Ammal Vs. Valliammai Ammal and Another, and Subhash Maruti Avasare Vs. State of Maharashtra, . The learned counsel for the appellant contended that proof for payment of surveyor charges has been produced. Further, first respondent is not entitled to freight charges.

7. The learned counsel for the appellant also contended that as per Rule 27(2) of Carriage by Air Act, 1972, within 14 days of receipt of the damaged Cargo a written complaint has to be made. This has also been mentioned as a condition on the rear side of Ex. D2 Airway Bill. However, no such written complaint was made in this case.

8. On the other hand, the learned counsel for the respondents contended that actually the problem arose only when the cargo was re-booked at Singapore to Chennai under the second Airway bill. However, in the claim letter, earlier Airway bill was also wrongly mentioned. The appellant cannot gain any mileage over such mistake. It has been established that two packages while in the custody of appellant's agent, were damaged. The principal viz., (appellant/defendant) is liable for the damage. The learned counsel further contended that steps have

been taken to assess the damage through surveyors. It was a joint survey conducted in the presence of representatives of both sides and at no point of time any objection was made by the appellant. As per the Commercial Documents Evidence Act, 1939 due weightage shall be given to survey reports. When the defendant fails to appoint any surveyor, necessarily the plaintiff has to appoint a surveyor to assess the damage. There is no wrong in appointing an independent second surveyor by the Insurer. In this respect, the learned counsel for the respondents cited Bond Food Products Private Ltd. and The Oriental Insurance Co. Ltd., (now changed and hitherto known as the Oriental Fire and General Insurance Co.) Vs. Planters Airways Ltd., . The learned counsel submitted that proof as to value of equipment, payment of surveyor charges have been produced, the appellant has shipped the damaged equipments to Chennai, so, the appellant is liable to pay the freight charges.

9. The learned counsel for the respondents further contended that in the absence of any proof to show that there was any negligence on the part of the servants of the airlines, it should be held that there was willful misconduct on the part of the carrier. In such circumstances, as per Rule 25 of Schedule II of the Carrier by Air Act, 1972, there will be no limit for liability. Under the second Air Way bill, the cargo has been delivered at Chennai after much delay. In such a case, as per Rule 27(2) of the Carriage by Air Act, 1972, the written complaint has to be made within 21 days of delivery of cargo. In this case, it was done so.

10. We have anxiously considered the rival submissions, perused the materials available on record, the impugned judgment and the decisions cited at the bar.

11. Under Ex. P1 Airway Bill No. 098 6290 5625 dated 7.3.1995 the first respondent imported Colour Doppler machine through appellant's Airlines for a medical conference in Chennai. Admittedly, it was sent back to Singapore through the appellant Airline. It was insured with the second respondent viz., Oriental Insurance Co. Ltd. Admittedly, on 13.3.1995, the consignment was received at Singapore by the first respondent's agent namely, M/s. UTG Union Transport Pte. Ltd. Again, on 13.3.1995 itself, 7 packages including the said Colour Doppler machine were re-booked to be delivered to the first respondent in Chennai.

12. It is also not in dispute that on 13.3.1995, the said 7 packages were received by SATS Cargo Terminal, Singapore, agent of the appellant for being sent to Chennai under Ex. P4 House Airway Bill dated 13.3.1995. Out of the 7 packages, 5 alone reached Chennai. Admittedly, two packages not reached Chennai. They were detained by the appellant's agent in Singapore itself.

13. The said two packages were part of 7 packages received by the appellant's agent at Singapore on 13.3.1995. Thereafter till their delivery, it is the responsibility of the appellant/Airline. The two packages containing the medical equipment were found damaged, while they were in the custody of the appellant's agent from 13.3.1995 to 22.3.1995 and they were also in the

custody of the appellant from 22.3.1995 to 27.3.1995. It is not the case of the appellant that when they were handed over to the custody of the appellant's agent on 13.3.1995, they were in a damaged condition. It is clear that the damage to the medical equipment packed in the consignment has taken place while they were in the custody of the appellant.

14. The claim is with respect to 2 packages concerning Ex. P4 House Airway bill. It is nothing to do with the first Airway bill Ex. P1 dated 7.3.1995. Of course, in first respondent's letter, both the Airway Bills viz., Ex. P1 and P4 were wrongly mentioned. Later, it was corrected by the first respondent's subsequent letter Ex. P8 dated 7.4.1995. Thus, the arguments of the appellant with reference to wrong mentioning of both the airway bills since contrary to the reality of the situation has no substance.

15. Admittedly, the appellant had not appointed any surveyor to assess the damage. In such circumstances, the first respondent had appointed M/s. Surf Marine Surveyors Adjusters (Pte) Ltd., Singapore to assess the damage. The surveyor gave notice to both sides. It is evident from Ex. P6 survey report that the survey was jointly carried out in the presence of representative from the first respondent's agent, Carrier's representative Mr. Rajesh Kumar, appellant's agent's representative Mr. Mahmood Bin Idros and the supplier (M/s. Sonotron Ultrasound Pte. Ltd., Singapore) agent Mr. Anders. It was found that the equipment was completely damaged. In his cross examination, D.W. 1 Subramanian, Assistant Manager of the appellant admitted that during the joint survey, their representatives were also present. He also admits that Ex. P6 survey report was accepted by their agent on their behalf. He also admits that they did not make any objection or protest to Ex. P6 survey report. He also says that they did not do it, because it was not necessary.

16. When the damaged packages were again sent back to Chennai, the second respondent/Insurer appointed M/s. Raghunathan & Associates, Chennai as Surveyor. They have also surveyed the damage caused to the Doppler equipment (see Ex. P13 report). It was found that the damage was caused due to rough and careless handling of the staff of the appellant's agent while they were in their custody.

17. It is relevant here to note the following observations of a Division Bench of this Court made in Bond Food Products Private Ltd. and The Oriental Insurance Co. Ltd., (now changed and hitherto known as the Oriental Fire and General Insurance Co.) Vs. Planters Airways Ltd., :

14.4. Of course, no notice was given by the second plaintiff to the defendant before appointing the surveyor (P.W. 2) to assess the damages; nor the surveyor (P.W. 2) gave any notice to the defendant before conducting the survey and submitting his report (Ex. A4) recommending for a payment of Rs. 66,368.83p. Even though serious objections are made by the learned counsel for the defendant as to the reliance placed on Ex. A4 on those grounds, we are unable to

appreciate the same in view of the decision of the Madhya Pradesh High Court in Gwalior Transport Co. Ltd. Vs. National Insurance Co. Ltd. and Another, , wherein Mr. R.C. Lahoti, J., as His Lordship then was, held as under:

The surveyor is an expert in the field of survey and unless there be something positive to discredit him, his assessment has to be accepted. It would have been better if he had assessed the quantum of damages in the presence of the appellant. However, the plaintiff would not be non suited and the survey conducted by C.P. Sarwahi would not be discarded solely for this reason. A civil case has to be decided on preponderance of probabilities. The goods were delivered from the custody of the carrier to the consignor who was also the consignee and there was nothing which prevented the carrier from employing a surveyor for assessment of damages specially when an open delivery was being insisted upon. The carrier could also have insisted on a survey being conducted in his presence which was not done. In the matter of assessment of partial loss to the goods, some guesswork has to be allowed. The price of the contents of bales is based on the invoices. Discount has been given for the value of the salvage. Primarily, the payment was to be made by the insurance company because the consignor was claiming from it. There is no reason to assume that any extra or unreasonable assessment would have been acceptable to the insurance company.

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.

18. In Sri Venkateswara Syndicate Vs. Oriental Insurance Company Ltd. and Another, , it was held that an insurer is not prohibited from appointing a second or another surveyor for fresh estimation of loss.

19. Further, as per section 2 and 3 and part II in the Schedule to Commercial Documents Evidence Act, 1939, the contents of a survey report in respect of cargo loaded, must be given due regard by the Court. It is upto the opposite party to rebut the presumption arising therefrom.

20. Thus, the surveyor report must be properly contradicted/objected by relevant details and materials. However, in this case, there was no objection by the appellant. In such circumstances, we are not inclined to brush aside the survey report merely on account of non examination of the surveyor.

21. In Sri Venkateswara Syndicate (supra), it was observed as under:

31. The assessment of loss, claim settlement and relevance of survey report depends on various factors. Whenever a loss is reported by the insured, a loss adjuster, popularly known as loss surveyor, is deputed who assesses the loss and issues report known as surveyor report which forms the basis for consideration

or otherwise of the claim. Surveyors are appointed under the statutory provisions and they are the link between the insurer and the insured when the question of settlement of loss or damage arises. The report of the surveyor could become the basis for settlement of a claim by the insurer in respect of the loss suffered by the insured.

22. Thus, the decisions cited by the learned counsel for the appellant are not applicable to the facts and circumstances of this case.

23. As we have already seen that the medical equipment was found damaged during transit, while they were in the custody of the appellant's agent, the appellant is responsible for the damage caused to the goods entrusted to it.

24. Once the Carrier/Airline receives the aircargo, the obligation is on it to deliver it safely to the consignee or its agent. In *Indian Airlines Vs. Kurian Abraham*, it was held that the burden is upon the Carrier to show that they had followed proper procedure and in spite of their best effort, they cannot prevent loss or damage to the consignment and in the absence of such evidence, it can be held that the Carrier is guilty of wilful misconduct.

25. It is pertinent here to note that as per Rule 22, 25 of Schedule II to Carriage by Air Act 1972, in case of such wilful misconduct, there is no limit on the liability of the Carrier.

26. In *Bond Food Products (P) Ltd. (supra)*, it was also held as under:

14.3. As per Section 9 of the Carriers Act, it is for the defendant to prove that there was no negligence on their part. The negligence on the part of the defendant is, therefore, presumed in law, as per Section 9 of the Carriers Act, unless the contrary is proved by the carrier by evidence and the burden of proof lies on the defendant/carrier to prove that they were not negligent, vide

(i) *Shanmuga Sundaram Pillai alias Somasundaram Pillai Vs. National Insurance Company Ltd. Madurai and another*, ;

(ii) *Patel Roadways Limited Vs. Birla Yamaha Limited*, ;

(iii) *M/s. Economic Transport Organization Vs. Dharwad Distt. Khadi Gramudyog Sangh*, ; and

(iv) *United India Insurance Co. Ltd. and Another Vs. Economic Roadways Corporation*, .

27. As per Rule 27(3) and 27(4) of Schedule II of Carriage by Air Act, 1972, for making any claim as against the Carrier, a written complaint has to be made within the time prescribed in the rule, and in default, no action will lie against the Carrier, except in case of fraud on its part.

28. Sub Rule 1 and 2 of the said Rule 27 runs as follows:

27. (1) Receipt by the person entitled to delivery of baggage or cargo without

complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty one days from the date on which the baggage or cargo have been placed at his disposal.

29. Thus, it is seen that if it is a case of damage caused to the air cargo, a written complaint must be made within 14 days of receipt of the cargo. If it is a case of delay, then it must be made within 21 days from the date on which the cargo has been placed at the disposal of the consignor or its agent.

30. In the case before us, under Ex. P4 House Airway bill, dated 13.3.1995, the two packages were handed over to the appellant's agent on 13.3.1995 itself at Singapore for reloading them on the same day to Chennai through the appellant's Airline. It is expected to be delivered at Chennai on 14.3.1995. But, it was not delivered. It was delivered only on 3.4.1995. Ex. P8 Written complaint dated 7.4.1995 was made by the first respondent to the appellant. So, the consignment was delivered much beyond the scheduled date. So, it is a case of delayed delivery. So, the written complaint has to be made within 21 days of delivery and not within 14 days of receipt of damaged goods as contended by the learned counsel for the appellant. In this case, as seen above, the written complaint has been made by the first respondent within 21 days of delivery. There is no flaw in it.

31. The total claim in the suit is Rs. 24,30,900/-. Its break-up figures are as under:

32. M/s. Sonotron Ultrasound Pte. Ltd., Singapore supplied the colour Doppler medical machine to the first respondent. Its value is US\$. 75,000/- (equivalent to Rs. 23,85,000/-) (also see Ex. P5 Invoice). It has been insured with the second respondent for Rs. 22,00,000/- (see Ex. P2). Under Ex. P13, Rs. 16,100/- has been paid towards surveyor charges. On 13.3.1995, the appellant undertook to deliver the equipment at Chennai. Needless to say that it must be in good condition. However, they were delivered long after, in damaged condition. They were found to be useless, beyond repair and cannot be re-sold (Ex. P7 supplier's report). For transporting consignment in such a condition from Singapore to Chennai, the first respondent cannot be asked to pay freight charges to the appellant. So, the first respondent is entitled to the refund of the freight charges. As per the terms and conditions of the insurance policy (see Ex. P2), under Ex. P17 the second respondent has paid the first respondent Rs. 12,08,734/- towards the proportionate insured value of the medical equipment. Insurer is entitled for reimbursement of the same. There is nothing to disregard the said measure of damages, viz., Rs. 24,30,900/-.

33. Thus, it is seen that the learned Single Judge has correctly assessed the evidence adduced and awarded damages. There is no reason to interfere with the findings recorded by the learned Judge. In view of the foregoings, this Original Side Appeal fails and it is dismissed with costs. Connected M.P. No. 1 of 2009 is closed.