
(1989) 01 KL CK 0038
In the High Court Of Kerala
Case No : A.S. No. 25 of 1981

Associated Transport Corporation (P.) Ltd.	APPELLANT
Vs	
National Insurance Company Ltd. and Another	RESPONDENT

Date of Decision : 28-01-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1(3), Order 41 Rule 5
Limitation Act, 1963 — Article 10

Citation : (1989) 66 CompCas 565 : (1989) 2 ILR (Ker) 181

Hon'ble Judges : P.C. Balakrishna Menon, J; P. Krishnamoorthy, J

Bench : Division Bench

Advocate : P.K. Ravindran, for the Appellant; P. Divakaran Poti, for the Respondent

Final Decision : Allowed

Judgement

Krishnamoorthy, J.—This appeal is by the defendant, a common carrier, in a suit for recovery of loss and damages to the extent of Rs. 9,511 with interest at 12% from December 27, 1975, the total amount claimed being Rs. 13,703. The 1st plaintiff is an insurance company (hereinafter called the insurer) and the 2nd plaintiff is the consignee of certain goods (hereinafter referred to as the insured), The suit is filed by the 1st plaintiff on its own behalf and as the power-of-attorney-holder of the 2nd plaintiff. The plaint allegations are the following: One Maya Agencies entrusted 80 bundles of raw rubber to the defendant, a common carrier, for carriage through its transport service by road from Cochin to Kanpur, under exhibits A1 and A2 invoices dated May 24, 1975. The goods had a total weight of 4,000 Kgs. and the consignee was the 2nd plaintiff. It was insured with the 1st plaintiff for Rs. 34,400 against road risk, theft, pilferage etc., by exhibit A4 policy dated May 26, 1975. According to the plaintiffs, the articles reached Kanpur on August 1, 1975. Forty bundles were taken delivery of on August 2, 1975 by the consignee. On August 19, 1975, they took delivery of 38 bundles. Two bundles were not delivered at all and the 78 bundles were found in a damaged condition on August 20, 1975. At the instance of the 2nd plaintiff, a

survey was conducted and the certificate is marked in the case as exhibit A7 dated September 12, 1975. The defendant also issued certificates exhibits A5 and A6 dated August 28, 1975 acknowledging liability in respect of the goods covered by the lorry receipts. The surveyor, under exhibit A-7, assessed the loss in respect of 38 bundles delivered at the rate of 25% which came to Rs. 4,060, The cost of two bundles short-delivered was fixed at Rs. 856. The loss on 40 bundles was assessed at 25% and the amount was fixed at Rs. 4,280. Though the total amount comes to only Rs. 9,196, it is stated in the plaint that the loss was estimated at Rs. 9,511 by the surveyor. The 2nd plaintiff-consignee by letter dated November 8, 1975 exhibit A8 claimed Rs. 9,250 from the defendant who sent a reply exhibit A9 on November 19, 1975 denying their liability. The 2nd plaintiff was paid the above amount of Rs. 9,511 by the 1st plaintiff-insurer. The loss and damage occurred due to the negligence and misconduct on the part of the defendant and its employees and the defendant is liable to make good the loss and damage. The 2nd plaintiff gave exhibit A10 dated November 28, 1975, a letter of subrogation to the 1st plaintiff, on the basis of which the 1st plaintiff has filed the suit to recover the loss and damage from the defendant with interest at 12% on the amount paid. from December 27, 1975 till the date of realisation. The plaintiffs further allege that in spite of notice, the defendant has not paid the amount and so the suit is filed for recovery of the above amount from the defendant.

2. The defendant filed a written statement, contending that the suit is not maintainable, that the Cochin court has no jurisdiction to try the suit and that the suit is bad for want of notice u/s 10 of the Carriers Act. They also contended that the suit is barred by limitation. The survey report, exhibit A-7, is not binding on the defendant as it was conducted without notice to them and the defendant is not liable to pay any amount to the plaintiffs. The claim made is exorbitant and the suit is liable to be dismissed.

3. After trial, the lower court found that the Cochin court has jurisdiction to try the suit, that the plaintiffs are competent to file the suit and that the suit is not barred by limitation; and on the basis of exhibit A7 report granted a decree to the plaintiffs for realisation of Rs. 9,202 with interest at 6% from the date of suit till recovery and costs. The appeal by the defendant is against the above decree.

4. In the appeal, Sri Mohan C. Menon who ably argued the case for the appellant raised the following points: 1. The 1st plaintiff-insurance company has filed the suit only on the basis of the letter of subrogation exhibit A10 and it being only a subrogee, cannot maintain a suit in its own name; 2, though the 2nd plaintiff also has been impleaded in the suit, the 2nd plaintiff being a proprietary concern, it cannot sue in its firm name and the suit should have been filed in the name of the proprietor and as such the addition of the 2nd plaintiff in the suit cannot be taken into account; 3, the suit is barred by limitation under article 10 of the Limitation Act; and 4, no evidence has been adduced by the plaintiffs to prove the quantum of damages and exhibit A7 report cannot be admitted in evidence

as the person who prepared exhibit A7 is not examined in the case nor has any independent evidence been adduced to prove the quantum of damages.

5. Before going into the merits of the case, we would like to deal with the preliminary objection raised by the counsel for the respondents on the question of maintainability of the appeal. The counsel for the respondents relied on the provision in Order XLI, Rule 1(3) which is to the following effect:

" Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit."

6. He contended that the appellant had filed C.M.P. No. 1475 of 1981 along with the appeal for stay of execution of the decree in which this court has passed an order dated January 23, 1981, granting interim stay on condition that the appellant furnish a bank guarantee in the court below for the decree amount within one month from that date. As the appellant did not comply with that condition, the stay was vacated on June 18, 1981. In view of the above, he contends that as there was already an order by this court to furnish a security for the decree amount which the appellant having not complied with, the appeal is not maintainable and that we should not entertain the appeal in view of the mandatory provision in Order XLI, Rule 1(3) of the Code of Civil Procedure. On the other hand, counsel for the appellant contended that the non-compliance with the provisions of Order XLI, Rule 1(3) will not entail dismissal of the appeal, as no consequence is provided in the CPC for non-compliance with the above order. The order in the stay petition will not affect the maintainability of the appeal as it is an order passed under Order XLI, Rule 5 and not one under Order XLI, Rule 1(3). After considering the rival contentions of the parties, we feel that the requirement of Order XLI, Rule 1(3) is not mandatory and that non-compliance with the above provision will not entail dismissal of the appeal. The provisions in Order XLI, Rule 1(3) were added to the CPC for the first time by the amending Act 104 of 1976 and the Legislature has not provided any consequential provision as to what should happen in case the appellant does not either deposit the amount or furnish security and the necessary inference from that is that the Legislature did not intend dismissal of the appeal for non-compliance with the above provision. In this connection, it will be relevant to refer to the Joint Committee Report which was concerned with the Amendment Bill of the CPC which was Bill No. 27 of 1974 and advertent to Clause 87 which read:

" The Committee note that under the proposed new Sub-rule (1A) of Rule 3 in Order XLI, if the appellant fails either to deposit the amount disputed in the appeal or to furnish security for such amount, the memorandum of appeal shall be rejected. The Committee feel that such a provision will deprive a judgment-debtor, having a good case, of his right to pursue the appeal on account of his inability to deposit the disputed amount or to furnish security for such amount.

The Committee is, therefore, of the opinion that in order to see that justice is done to both the parties, the proposed sub-rule might be amended in such a way that neither the judgment-debtor is deprived of his right to pursue the appeal nor is the decree-holder deprived of the remedy. Proposed Sub-rule (1A) has been amended to provide that stay of execution of the decree will not be granted unless the deposit is made or security is furnished and has been transposed as Sub-rule (3) of Rule 5. "

7. A reading of the report of the joint Committee and the omission of Rule (1A) from Order XLI, as proposed in the Bill, clearly indicate that Parliament never intended the deposit of the decretal amount or the furnishing of the security before filing of appeal against a money decree as a condition precedent for valid presentation of the appeal or entertainment of the appeal. It, therefore, follows that the provision in Order XLI, Rule 1(3) is not a condition precedent for filing of the appeal or a condition precedent for final adjudication of the appeal. The Andhra Pradesh High Court and the Bombay High Court, in the decisions reported in *J. Lakshmikantham Vs. Uppala Rajamma and Others*, and *Prabhakar Deshmukh Vs. Vinayakrao Kaushal*, have interpreted the above provision in the same manner as we have done and we are in respectful agreement with the dictum laid down in those decisions.

8. The matter can be looked at from another angle also. Order XLI, Rule 5(5) provides as follows :

"(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in Sub-rule (3) of Rule 1, the court shall not make an order staying the execution of the decree. "

9. From this it can be seen that the deposit or furnishing of security contemplated under Sub-rule (3) of Rule 1 is mandatory for the purpose of granting stay of execution of a money decree. If the provision contained in the above sub-rule was a mandatory requirement for the filing or entertaining of an appeal, the provision in Order XLI, Rule 5(5) was unnecessary. It, therefore, follows that the provision contained in Order XLI, Rule 1(3) is not mandatory nor is it a condition precedent for filing of an appeal or for final adjudication of an appeal against a money decree. We, therefore, overrule the preliminary objection raised by the respondents regarding the maintainability of the appeal.

10. Now coming to the merits of the appeal, the first point raised by the appellant is that the 1st plaintiff-insurance company is only in the position of a subrogee and that a suit by itself is not maintainable. For the above position, the counsel for the appellant relied on the decision in *Union of India v. Sri Sarada Mills Ltd.* [1973] 43 Comp Cas 431, and particularly to the following passage at page 442 :

" But subrogation does not ipso jure enable him to sue third parties in his own name. It will only entitle the insurer to sue in the name of the assured, it being

an obligation of the assured to lend his name and assistance to such an action. "

11. He further contended that the second plaintiff is a proprietary concern and that the description of the second plaintiff in its firm name is not proper and it should be taken as if there is no second plaintiff in the suit. As the second plaintiff cannot be treated as a party to the suit for not having been properly described, the suit by the first plaintiff alone is not maintainable as it is the insurer and the claim in the plaint is only on the basis of its being subrogated to the rights of the insured. From the above decision it is clear that an insurance company which is subrogated to the rights of the insured is entitled to file a suit in the name of the insured. The question of maintainability of the suit will depend upon the question as to whether the description of the second plaintiff in the plaint is proper or not. The second plaintiff is described in the plaint as New Modern Chemical Company represented by the Special Power of Attorney holder, Divisional Manager, National Insurance Company, Divisional Office, Cochin-16. The defendant had no case in the written statement that it is a proprietary concern. No ground was taken in the appeal memorandum to the above effect and both parties proceeded in the suit as if the second plaintiff is entitled to maintain a suit. Due to lack of pleadings on the above matter in the written statement, we are not inclined to allow the appellant to raise the contention as to the non-maintainability of the suit on the ground that the second plaintiff is a proprietary concern and that it should have sued in the name of its proprietor and not by the firm name. As the second plaintiff also is a party to the suit, the suit by the first plaintiff along with the second plaintiff is maintainable, in view of the decision of the Supreme Court mentioned above.

12. In the decision of the Supreme Court mentioned above, namely *Union of India v. Sri Sarada Mills* [1973] 43 Comp Cas 431, it has been categorically held by their Lordships in the majority judgment that a suit by the consignee even after its claim being paid by the insurance company is maintainable. Admittedly, the second plaintiff is the consignee and it has also joined the suit as a plaintiff. The suit by the consignee alone also being maintainable, we find no reason to hold that the suit is not maintainable and we confirm the finding of the lower court on the question regarding the maintainability of the suit.

13. The counsel for the respondents further contended that although exhibit A-10 is described as a letter of subrogation, it is in effect an assignment of the rights over the goods which the second plaintiff had and that the suit by the insurance company alone is maintainable as an assignee. He relied on the decision in *Vasudev Mudaliar Vs. Caledonian Insurance Co. and Another*, in support of the above proposition. In the plaint, the first plaintiff has claimed right only as a subrogee and no case of assignment is pleaded. There is no factual foundation made in the plaint regarding that contention and we are not prepared to entertain that plea at this stage and we express no opinion on the question whether the first plaintiff will be entitled to maintain the suit as an assignee of the insured's right.

14. The counsel for the appellant contended that the suit is barred by limitation and the article applicable is Article 10 of the Limitation Act wherein the time begins to run when the loss or injury occurs. Though the period begins to run when the loss or injury occurs, it is well-settled that the time will begin to run only when the plaintiff gets knowledge of the loss or injury. Admittedly, in this case, 40 bundles were taken delivery of on August 2, 1975 and 38 bundles were taken delivery of on August 19, 1975 and the second plaintiff alleges that it got knowledge of the damage only on August 20, 1975. The suit in this case was filed on August 19, 1978. As stated earlier, 40 bundles were taken delivery of by the consignee admittedly on August 2, 1975, and it should have got knowledge of the damage on that date itself. We are not prepared to accept the case of the second plaintiff that it came to know of the damage only on August 20, 1975, in respect of the 40 bundles it took delivery of on August 2, 1975. In these circumstances, we hold that the claim for damages regarding 40 bundles which were admittedly delivered on August 2, 1975, is barred by limitation. Regarding the damages for 38 bundles and for non-delivery of two bundles, admittedly, the former was taken delivery of only on August 19, 1975, and the second plaintiff could have had knowledge of the damage or non-delivery only on that date. The suit having been filed on August 19, 1978, the claim for the above two items is within time and the suit, so far as the claim in respect of those two items is concerned, is within time.

15. The counsel for the appellant lastly contended that in any view of the matter, the burden is on the plaintiffs to prove the quantum of damages and that they have not adduced any evidence to prove the quantum except producing exhibit A-7 certificate by a surveyor. He further contended that though in exhibits A-5 and A-6 the defendant has admitted damage to 78 bundles and short-delivery of two bundles, it has not admitted the quantum of damages which the second plaintiff is bound to prove. We feel that there is great force in the contention of the appellant. The only evidence on the basis of which a decree for damages has been granted by the lower court is exhibit A-7 dated September 12, 1979, issued by a surveyor. That report itself says that it was prepared in compliance with the instructions received from the first plaintiff. No notice is issued to the defendant before the survey is made. The surveyor who prepared exhibit A-7 has not been examined to prove the contents of exhibit A-7. Moreover, there is not even formal evidence adduced as to the quantum of damages, by the second plaintiff who alone is competent to prove the same. The only witness examined on the side of the plaintiffs is PW-1 who is an officer of the first plaintiff-insurance company. He cannot have any direct knowledge regarding these matters and his evidence is not sufficient to prove the quantum of damages. The mere fact that the first plaintiff paid the amount to the second plaintiff will not be sufficient evidence nor will it bind the defendant who is ultimately liable for damages. In these circumstances, we are constrained to hold that there is absolutely no evidence to prove the quantum of damages and the decree granted by the lower court fixing the damages at Rs. 9,202, is without any evidence and is liable to be

set aside. As the plaintiffs have not proved the quantum of damages, they are not entitled to a decree for damages and the decree is liable to be set aside.

16. We, therefore, allow the appeal, set aside the judgment and decree of the court below and dismiss the suit, but, in the circumstances, without any order as to costs.