

(2010) 03 MAD CK 0118

In the Madras High Court

Case No : Second Appeal No. 521 of 2003

Burlington Air Express India (P) Ltd., now changed as Bax
Global India Ltd., and now known as Schenker India Pvt. Ltd.

APPELLANT

Vs

M.R.F. Limited, The New India Assurance Co. Ltd. and
Burlington Air Express Limited., now changed as BAX Global
Limited

RESPONDENT

Date of Decision : 03-03-2010

Acts Referred:

Carriage by Air Act, 1972 — Section 26

Citation : (2010) 4 MLJ 72

Hon'ble Judges : M. Duraiswamy, J

Bench : Single Bench

Advocate : Ravikumar Paul, for Paul and Paul, for the Appellant; S. Manohar, for the Respondent

Final Decision : Allowed

Judgement

M. Duraiswamy, J.—The above Second Appeal arises against the judgment and decree made in A.S. No. 85 of 2001 on the file of IV

Additional City Civil Court, Chennai, reversing the Judgment and Decree made in O.S. No. 7996 of 1997 on the file of XIII Asst. City Civil

Court, Chennai.

2. The second defendant is the appellant in the above second appeal. Plaintiffs 1 and 2 are the respondents 1 and 2 and the first defendant is the

third respondent in the above second appeal.

3. The plaintiffs filed the suit in O.S. No. 7996 of 1997 on the file of XIII Asst. Judge, City Civil Court, Chennai, to direct the defendants jointly

and severally liable to pay a sum of Rs. 1,04,471/- together with the interest thereon at 24% per annum.

4. The brief case of the plaintiffs are as follows:

(i) According to the plaintiffs, the first defendant carrying on a business in India, through its Indian Unit (subsidiary), the second defendant. On or about 12.07.1995, M/s. Sunag Corporation (Europe) Ltd., England, entrusted the defendants in their capacity as air carriers a consignment of spare parts for BINKS automatic spray Gun to be transported by air from London to Chennai. The first defendant is the importer-consignee of the above consignment. The defendants accepted the consignment for safe carriage. The consignment did not reach the destination station and in the ordinary course of enquiry, the defendants sent a fax message stating that the consignment was sent by Flight No. KH 003/ETA on 18.07.1995. In spite of repeated enquires from the first plaintiff, the defendants did not deliver the consignment.

(ii) On the other hand, the defendants admitted that the consignment was missing while the same was in their custody. The value of the non delivered consignment is Rs. 1,04,471/-. The second plaintiff had insured the consignment against loss or damage and had on settlement of payment, to the first plaintiff, had been subrogated to the rights and remedies of the first plaintiff. In spite of repeated demands, the defendants failed and neglected to pay the sum of Rs. 1,04,471/-. The loss to the plaintiffs was solely due to the gross negligence, misconduct, gross dereliction of duty of air carriers. Therefore, the plaintiffs filed the suit.

5. The brief case of the second defendant is as follows:

(i) According to the second defendant, they are only an IATA agent and not a carrier and as such there is no question of the plaintiffs intending to carry the cargo from London to Chennai through them. The House Air Way Bill has been issued by the first defendant and not by the second defendant. The suit is not maintainable and is also barred by limitation, as per the provisions of the Carriage by Air Act, 1972.

(ii) The alleged transaction between the plaintiffs and the first defendant are not to the knowledge of the second defendant. The second defendant also denied that the first defendant is functioning through the Indian Unit. The second defendant also denied that they are subsidiary of the first defendant. Since the second defendant is a private limited company and a separate legal entity with no connection whatsoever with the first

defendant, the allegation that the consignment had been loaded in the Aircraft on or about 30.08.1995 is not to the knowledge of the second

defendant. In case of non-delivery of the consignment, a compliant has to be made at the latest within 14 days from the date of the knowledge, as

per Section 26 of the Carriage by Air Act. Therefore, the defendants prayed for dismissal of the suit.

6. Before the trial court, on the side the plaintiff, PW-1 was examined and 14 documents, Exs.A-1 to A-14 were marked and on the side of the

defendants, DW-1 was examined and Ex.B-1 was marked.

7. The trial court, after taking into consideration the oral and documentary evidences of both sides, dismissed the suit.

8. Aggrieved over the judgment and decree of the trial court, the plaintiffs preferred an appeal in A.S. No. 85 of 2001 on the file of the IV

Additional City Civil Court, Chennai, and the lower appellate court after taking into consideration the materials available on record reversed the

judgment and decree of the trial court and allowed the appeal.

9. Aggrieved over the judgment and decree of the lower appellate court, the second defendant has filed the above second appeal. The first

defendant did not file any appeal against the judgment and decree of the lower appellate Court.

10. Heard Mr. Ravikumar Paul, learned Counsel appearing for the appellant and Mr. S. Manohar, learned Counsel for the first and second

respondents.

11. At the time of admission of the above Second Appeal, the following substantial question of law arose for consideration:

Whether the finding of the lower appellate Court that D2 is a carrier in spite of the specific plea and without any specific evidence on this point that

D2 is only a recognised agent by the International Air Travel Association (IATA) is sustainable in law?

12. On a careful consideration of the materials available on record and the submissions made by both the counsels, it could be seen that the first

respondent/first plaintiff purchased spare parts in UK and handed over the consignment to the third respondent/first defendant for transporting the

consignment by air from London to Chennai. The third respondent accepted the consignment and issued Ex.A-3 Airway Bill, dated 12.07.1995.

In the said Airway Bill, though it is mentioned that the consignment was sent through Flight No. KH 003/ETA on 18.07.1995, the same was not delivered to the consignee at Chennai. From Exs.A-4 to A-7 and Ex.A-10-fax message copies, it is clear that the consignment sent from London was missing or lost. However, on a perusal of the documents produced by the parties it is also clear that the appellant did not receive the consignment from the third respondent. It is an admitted fact that the consignment was not entrusted to the appellant. Therefore, the question that has to be decided in this appeal is whether the appellant is liable to pay the amount to respondents 1 and 2, in spite of the fact that the consignment was not entrusted to them.

13. The learned Counsel appearing for the appellant relied upon Rule 1(i), the first schedule of the Carriage by Air Act 1972, which reads as follows:

These rules apply to all international carriage of persons, luggage or goods performed by aircraft for reward. They apply also to such carriage when performed gratuitously by an air transport undertaking.

Therefore, on a perusal of the said rule it could be seen that the rules applied to all international carriage of persons, luggage, goods by aircraft for reward. In the case on hand, there is nothing on record to show that the consignment was despatched from London by air.

14. Though Ex.A-4, House Airway Bill, mentions that the consignment was despatched by air by Flight No. MH003/ETA on 18.07.1995, respondents 1 and 2 did not produce any evidence to show that the appellant received the consignment at Chennai. The learned Counsel appearing for the appellant contended that since the goods were not entrusted to the appellant they are not liable to pay the amount to respondents 1 and 2.

15. Countering the submissions made by the learned Counsel for the appellant, the learned Counsel for respondents 1 and 2 submitted that under Rule 30(3) of the first schedule and Rule 31 of the second schedule of the Carriage by Air Act 1972, the appellant is liable to pay the amount to respondents 1 and 2. Rule 30(3) of the first schedule of the Carriage by Air Act 1972 reads as follows:

As regards luggage or goods, the passenger or consignor will have a right of

action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

16. The learned Counsel appearing for the respondents submitted that the appellant, being last carrier as mentioned in Rule 30(3) of the first schedule and Rule 31 of the second schedule of the Carriage by Air Act 1972, is liable to pay the amount to the respondents. However, on reading Rule 30(3) it could be seen that the said rule applies only to the cases where the consignment was entrusted to the carrier. In the present case, since the consignment was not entrusted to the appellant the said rule is not applicable to the facts and circumstances of the case. If the goods were entrusted to the appellant and if the goods were lost when the same were in the custody of the appellant then the appellant would be made liable.

17. Learned Counsel appearing for the respondents, in support of his contentions, relied upon the following judgments:

(i) 2007 ACJ 1308 (Transport Corporation of India Ltd. v. Veljan Hydrair Ltd.). The said judgment relates to the Carriers Act, 1865. The facts and circumstances of the case reported in the above judgment differs from the case on hand, therefore, the judgment is not applicable to the present case.

(ii) AIR 1984 Delhi 396 (Rajasthan Handicrafts Emporium, New Delhi and Anr. v. Pan American World Airways and Ors.), Wherein it is held that in the case of loss or non-delivery of goods liability for successive carriers is joint and several and the suit non-pleading of the first carrier and non-joinder of the forwarding/delivering carrier is not fatal to the suit. In the above judgment, it is a case where the goods were entrusted with the forwarding and delivering carriers. In the present case on hand, admittedly, the goods were not entrusted with the appellant. Therefore, the above judgment is not applicable to the present case.

(iii) AIR 1986 Delhi 312 (Anil & Co. v. Air India and Ors.). It is also a case where goods were entrusted with the airlines and it was held that the

airline is liable for the value of the goods, in the facts and circumstances of the case, it is not applicable to the present case.

18. As per the principles laid down in the above judgments and as per Rules 30(3) of the first schedule and Rule 31 of the second schedule of the

Act it could be seen that the carriers are jointly and severally liable for the damages. However, in the present case, since the goods were not

entrusted with the appellant, they cannot attribute any negligence on their part. They can be made liable, if the goods were entrusted with them.

Further the respondents 1 and 2 also failed to produce any document to show that respondents 1 and 2 acted negligently and caused damage to

them. The carrier is liable for all the losses which occurred to the goods entrusted to his charge in the course of business unless he can prove the

loss happened in consequence of the act of God.

19. The case of respondents 1 and 2 are based solely on the application of Rule 30(3) of the first schedule and Rule 31(3) of the second schedule

to the Carriage by Air Act. The said rules are applicable only to an international carriage performed by aircraft. In the present case, no international

carriage performed by aircraft had admittedly taken place, since the consignment had been admittedly lost while in the custody of the third

respondent in their warehouse prior to the commencement of the air carriage from London to Chennai. Consequently Malaysian Airlines, the

carrier, which would have carried the cargo was not made as a party in the suit. Admittedly, the term "carrier" is not defined under the Act. The

liability of the carrier is stated in Rule 18(1) of the first and second schedules of the Act. As per Rule 18(1), if the occurrence which caused the

damage took place only during the Carriage by Air, the carrier would be made liable. Article 18(2) of the first and second schedules to the Act

defines Carriage by Air Act, which read as follows:

The carriage by air within the meaning of Sub-rule (1) comprises the period during which the luggage or goods are in charge of the carrier, whether

in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

From Article 18(2) of the first and second schedules to the Act, it is clear that when the goods are actually in charge of the carrier in an aerodrome

or on board an Aircraft would constitute a carriage by Air.

20. Article 18(3) of the first and second schedules to the Act reads as follows:

The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a

carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery of transshipment, any damage is

presumed, subject to proof to contrary, to have been the result of an even which took place during the carriage by air.

From the reading of the above rule, it is clear that even if the consignment had been handed over to the third respondent and until actual carriage by

air commences, there can be no carriage by attracting the special provisions contained in the first and second schedules to the Act. Applying the

same to the present case, admittedly the consignment was lost in the custody of the third respondent before handing over same to the airlines for

carriage.

21. Therefore, as per the provisions stated above, there has been no international carriage to which the rules in the first and second schedules are

applicable. Therefore, the finding of the lower appellate Court that the appellant is a last carrier and the third respondent is the first carrier by

applying Rules 30(3) and 31 of the first and second schedules of the Act cannot be sustained and liable to be set-aside. That apart, respondents 1

and 2 in the plaint have taken a stand that the appellant is a carrier and subsequently they took an inconsistent stand that the appellant is an agent of

the third respondent. Therefore, once respondents 1 and 2 take the stand of relationship of principal and agent, their contention that the appellant

and the third respondent are carriers is not maintainable.

22. The lower appellate Court has come to the conclusion that the appellant is liable to pay the amount as per Rule 30(3) of the first schedule of the

Carriage by Air Act 1972. That apart, there is also nothing on record to show that atleast the goods were despatched from London to the

appellant. In the absence of any such document it could only be decided that the goods were lost only by the third respondent/first defendant and

not by the appellant. Respondents 1 and 2 also failed to prove that the appellant company is a subsidiary of the third respondent company. The

appellant had specifically stated that they are not a subsidiary of the third respondent company. Therefore, the appellant cannot be made liable to

pay the amount to respondents 1 and 2. The appellant is only a recognised agent of the International Air Travel Association (IATA). Therefore,

when the goods were not entrusted to the appellant, they cannot be held liable for the damages. In these circumstances, so far as the appellant is

concerned the judgment and decree of the lower appellate Court cannot be sustained and is liable to set-aside. Since the third respondent/first

defendant has not challenged the judgment and decree of the lower appellate court, the decree passed against the third respondent has become

final.

23. The substantial question of law is decided in favour of the appellant. Therefore, in so far as the appellant/second defendant is concerned the

judgment and decree of the lower appellate court are set-aside. So far as the appellant/second defendant is concerned, the judgment and decree of

the trial Court made in O.S. No. 7996 of 1997 are restored. The above second appeal is allowed. However, there shall be no order as to costs.