

(2014) 10 MAD CK 0320
In the Madras High Court
Case No : Second Appeal No. 6 of 2008

Carborandum Universal Ltd.	Vs	APPELLANT
M.G. International Transports GmbH		RESPONDENT

Date of Decision : 30-10-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 23, 230
Evidence Act, 1872 — Section 102
Marine Insurance Act, 1963 — Section 79
Multimodal Transportation of Goods Act, 1993 — Section 13, 24

Citation : (2014) 5 LW 712

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Judgement

S. Tamilvanan, J.—The Second Appeal has been preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 23.11.2005 made in A.S. No. 418 of 2004 on the file of the V Additional Fast Track Court, Chennai, confirming the Judgment and Decree, dated 28.10.2003 made in O.S. No. 6124 of 2000 on the file of the XVII Assistant Judge, City Civil Court, Chennai. The appellants herein were the plaintiffs in the suit, that was filed, seeking recovery of a sum of Rs. 1,85,875/- with interest at the rate of 18% p.a. from the date of filing of the suit till the date of realisation. After the trial, by Judgment and Decree, dated 28.10.2003, the suit was dismissed by the Trial Court. Aggrieved by the Judgment and Decree, the appellants herein preferred first appeal in A.S. No. 418 of 2004, before the V Additional Fast Track Court, Chennai, however, the appellate Court, confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal by its judgment dated 23.11.2005,, aggrieved by which, this Second Appeal has been preferred.

2. In this Second Appeal, the following substantial questions of law have been framed:

"1. Whether the respondent/defendant, could invoke the assistance of a Special

Enactment, Multi Model Transportation of Goods Act, 1993 without proving their status as a Registered Multi Model Transport Operator as defined under the said Enactment?

2. Whether Carriage by sea alone can be construed as a Multi Model Transportation when there is no other mode of transit is involved?"

3. The case of the appellants/plaintiffs is that the first appellant herein imported a consignment of "fused Aluminium oxide" weighing 4032 kgs, gross and net 4000 kgs, from Germany as per Shipper's Invoice, dated 11.05.1999. The said cargo was packed in 80 bags and palletized in four pallets and was shipped at Hamburg on vessel "Hyundai Highness", owned by the respondent/defendant Sea carrier for safe carriage and delivery at Chennai. The respondent/defendant issued clean Bill of Lading, acknowledging entrustment in good order and condition. The vessel Hyundai Highness presumably discharged the cargo in an intermediary port, which resulted in the cargo being carried by another vessel by name "Tiger Sea" and arrived at the Port of Chennai on 26.06.1999. The cargo of 4 pallets was de-stuffed from the container on 07.07.1999 in a highly damaged condition. The Madras Port Trust annotated the pallets as badly damaged. The first appellant/first plaintiffs local agents demanded survey on 12.07.1999.

4. It is the case of the appellants/plaintiffs that the respondent/defendant has failed to conduct the survey, resulting in removal of the cargo on 15.07.1999. The second appellant/second plaintiff arranged for survey of the damaged bags by a licensed independent surveyor, one M/s. Suvega Surveyors. The surveyor issued a detailed survey report, dated 29.09.1999 and established that the total loss, on account of damaged delivery was at Rs. 1,85,575/-. According to the appellant, the damage to the cargo and the consequential loss that had been taken place in the custody of the defendant sea carrier, hence, the suit is filed against the defendant, seeking damages from the respondent/defendant.

5. Learned counsel for the appellants/plaintiffs submits that the defendant/respondent could not invoke the assistance of a Special Enactment, viz., Multi Model Transportation of Goods Act, 1993, without proving their status as registered Multi Model Transport Operator as defined in the said Enactment. The Courts below have concurrently held that the suit filed by the appellants/plaintiffs was barred by limitation. It is not in dispute that the first appellant/first plaintiff imported the consignment of fused Aluminium Oxide weighing 4032 kgs gross and net weight 4000 kgs from Germany, as per shipper's invoice dated 11.05.1999 and the shipper's invoice was marked as Ex. A2. It is also not in dispute that the said cargo packed in 80 bags and palletized in four pallets was shipped at Hamburg and carried by sea owned by the respondent/defendant for safe carriage and delivery at Chennai. The defendant had issued Bill of Lading and that was marked as Ex. A3 acknowledging the entrustment of the goods in proper condition. On arrival at Chennai, yet another vessel discharged the suit cargo, the cargo having suffered transshipment en route.

6. It was argued by the learned counsel for the appellants/plaintiffs that the pallets stuffed in the a container was discharged in the custody of Chennai Port Trust who are statutory authority to take custody and effect delivery to the consignee. However, the said four pallets were damaged when they were de-stuffed on 07.07.1999. The Chennai Port Trust annotated the pallets as badly damaged CT and CFO thereby, given the meaning for CT as "Cover Torn" and CFO as "Contents Falling Out". Under Ex. A4, the first appellant's local agents demanded survey on 12.07.1999. The defendant failed to conduct the survey requested which resulted in removal of the cargo on 15.07.1999, that was confirmed by the plaintiff's agents and marked as Ex. A5. The landing remarks Certificate issued by the Port Trust was marked as Ex. A6. According to the learned counsel for the appellants/plaintiffs, an independent survey was conducted and Surveyor issued a detailed report Ex. A7. According to him, the loss on account of damage/shortage to the cargo was estimated at Rs. 1,85,575/-. The damage to the consignment and the loss had taken place on transit and while estimated in the custody of the defendant Sea carrier, hence the suit is filed against the defendant sea carrier represented by their local agent by the first plaintiff owner of the consignment and the second plaintiff, insurer of the consignment.

7. It is further argued by the learned counsel for the appellants/plaintiffs that after settling the claim in favour of the first appellant, the second appellant-Insurance Company is entitled to the right of subrogation by virtue of execution of Letter of Subrogation and Special Power of Attorney by the first appellant in favour of the second appellant, that was marked as Ex. A10. The second appellant having indemnified the loss of the first appellant, is entitled to recover the suit claim from the respondent/defendant by virtue of Section 79 of Marine Insurance Act. It is also argued by the learned counsel for the appellants that the loss was occurred on account of the failure on the part of the respondent in discharging their duties under the Bills of Lading Act and Carriage of Goods by Sea Act.

8. Per contra, learned counsel for the respondents submitted that (i) the suit itself was barred by limitation as such the same was not maintainable. (2) Without impleading M.G. International Transports GmbH, the suit filed against the agent of the said International Transports seeking damages, hence, the claim is not legally sustainable against the respondent. (3) As the respondent/defendant was only an agent of the said company at Chennai, not liable to pay any damages to the appellant. (4) the appellants have not established any negligence or breach of contract on the part of the respondent and therefore, the suit was rightly dismissed by the trial Court and confirmed by the judgment of the first Appellate Court.

9. It is also argued that as per Section 24 of the Multimodal Transport of Goods Act, 1993, and clause 17 of the conditions stipulated at the back of Ex. A3, dated 17.05.1999, the Multimodal Transport Operator is not liable for any claim, unless

the action is brought within nine months from the date of delivery of goods. According to the learned counsel for the respondent, the Courts below concurrently held that the suit was not filed within nine months from the date of delivery of goods and as such, the suit was barred by limitation. As per the plaint averments, it is stated that the cargo was discharged into the custody of the Madras Port Trust on 28.06.1999 and the cargo was removed by the first appellant from the Chennai Port premises after customs inspection on 15.07.1999. However, the plaint was presented before the trial Court only on 27.06.2000. Hence, it is seen that the suit was not filed within nine months either from 28.06.1999 or from 15.07.1999. Therefore, the trial Court found that the suit filed by the appellants/plaintiffs was barred by limitation and the view was confirmed by the first Appellate Court. In this regard, it is relevant to refer Section 24 of the Multimodal Transport of Goods Act, 1993, which reads as follows:

"24. Limitation on action - The multimodal transport operator shall not be liable under any of the provisions of this Act unless action against him is brought within nine months of -

- a) The date of delivery of the goods, or
- b) the date when the goods should have been delivered, or
- c) The date on and from which the party entitled to receive delivery of the goods has the right to treat the goods as lost under sub-section (2) of Section 13."

10. In this regard, learned counsel for the respondent also drew the attention of this Court to UNCTAD/ICC Rules for Multimodal Transport Documents, Rule 10 reads as follows:

"The MTO shall, unless otherwise expressly agreed, be discharged of all liability under these Rules unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with Rule 5.3, failure to deliver the goods would give the consignee the right to treat the goods as lost."

11. During the course of arguments, learned counsel appearing for the appellants has not disputed that for filing the suit under Multimodal Transport of Goods Act, 1993 and rules framed thereunder, the period of limitation is nine months after the delivery of the goods or the date when the goods should have been delivered under the consignment. In the instant case, as per the finding of the Courts below, the suit was not filed within nine months either considering the date 28.06.1999 on which the cargo was discharged into the custody of Madras Port Trust or on 15.07.1999 the date on which the cargo was removed by the first appellant from the port premises after customs inspection. The trial Court has stated both the relevant dates for deciding the date of delivery of goods and the date on which the goods should have been delivered. The customs inspection was over and the goods were delivered on 15.07.1999. It is not in dispute that

the suit was filed by the appellants/plaintiffs before the trial Court only on 27.06.2000. As per the finding of the Courts below the suit was not filed within nine months from the date of delivery of the consignment goods, for which, the arguments advanced by the learned counsel for the appellants is that the provisions of Multimodal Transport of Goods Act, 1993 and rules framed thereunder are not applicable to the facts and circumstances of the case, only Carriage of goods by Sea Act, is applicable.

12. Per contra, it was argued by the learned counsel for the respondent that as there was more than one mode of transport the Multimodal Transport of Goods Act is applicable. However, learned counsel for the appellants argued that the Multimodal Transport of Goods Act, is not applicable in the instant case. Admittedly, as per Ex. A3, Bill of Lading, it has stated as "Negotiable Fiata Multimodal Transport Bill of Lading" and further it was argued by the learned counsel for the respondent that the consignor is in Laufenburg/Germany and the delivery terms of the consignment, which refers to the place of delivery shown as "DEL. TERMS: FCA LAUFENBURG/GERMANY". The term FCA as per the INCOTERMS (International Commercial Terms) refers to "Free Carrier" and in the explanation given therein includes the place of delivery of the consignment of carriage which in this case is, Laufenburg. It is not in dispute that there is no port in Laufenburg and the nearest port is only Hamburg in where the consignment had to be carried by road other than by sea. Hence, it is evident to state that the carriage was multimodal and hence, the provisions as found in the Multimodal Transportation of Goods Act, 1993 is applicable. Learned counsel for the respondent submitted that there was no port in Laufenburg and therefore, the road transport was also used to carry the consignment, however the said factum is not in dispute. Therefore, the appellants cannot say that the Multimodal Transport Act is not applicable and Carriage of Goods by Sea Act is applicable, on account of the multimodal transportation.

13. Having considered the evidence available on record, it has been made clear that the consignment of goods could not be sent directly by sea from Hamburg to Chennai Port without availing road Transport, as there was no port in Laufenburg. Therefore, per se in Ex. A3, Bill of Lading, it is clearly stated, "Negotiable Fiata Multimodal Transport Bill of Lading". As per Ex. A3, Bill of Lading, the mode of transport is by sea as well as road ways and then by sea transport. On the aforesaid facts and circumstances, the appellants cannot say that for the dispute relating to the consignment of goods, the Carriage of Goods by Sea Act is applicable and not Multimodal Transport of Goods Act, 1993.

14. It has been made clear that as per Section 24 of the Multimodal Transportation of Goods Act, 1993 and rules framed thereunder, the period of limitation is nine months to file the suit after the delivery of the consignment goods. In the instant case, it is not in dispute that the suit was filed after nine months from the date of taking delivery of goods, hence the suit was barred by limitation, under the Multimodal Transportation of Goods Act. The appellants

being the plaintiffs in the suit are not entitled to raise a plea that the respondent/defendant could not invoke the assistance of the special Enactment, namely, the Multimodal Transportation of Goods Act, 1993, since the appellants as plaintiffs are the dominus litis and the burden is upon them to establish that the suit was not barred by limitation and the said burden cannot be shifted on the respondent/defendant, since the Bill of Lading describes the consignment as Multimodal Transport Bill of Lading. When the term is Multimodal Transportation legally it has to be presumed that the transportation is a multimodal Transportation, since the same was not by way of sea alone. In the instant case, admittedly, the suit consignment was transported in the vessel by way of sea and then roadways and again by way of sea, which shows only a multimodal transportation and that was availed for importing of the suit consignment to Chennai Port apart from the averments of the Bill of Lading which specifically says that it was "Negotiable Fiata Multimodal Transport Bill of Lading" and Section 24 of the Multimodal Transaction of Goods Act, 1993 and rules framed thereunder, limitation has been stipulated and accordingly the suit could have been filed only within nine months from the date of delivery, but admittedly, the present suit was not filed, within nine months from the date of delivery of goods under the consignment.

15. Next the vital point raised by the respondent/defendant is that the suit seeking damages filed against the agent of M/s. M.G. International Transports GmbH, is not legally sustainable on the ground that the respondent is not liable to pay any damages to the appellants. It is well settled that an act of an agent is binding on the Principal, however, the act of the principal is not binding on the Agent. This Court is of the considered view that multimodal transportation is applicable, since there are two modes of transportation, one by way of Sea then by road, again by Sea and as per Bill of Lading, which would make it clear that the suit consignment could be construed only as multimodal transportation. Hence, the said Act is applicable to the instant case. In this regard, the following decisions were relied on by the learned counsel for the respondent/defendant.

16. In the decision Marine Container Services South Pvt. Ltd. Vs. Go Go Garments, , the Hon''ble Apex Court has held as follows:

"5.....The National Forum, as aforesaid, took the contrary view on the applicability of Section 230 of the Contract Act on the mistaken basis referred to above as also by reliance on third clause of the presumptions to the contrary in Section 230, that is to say that an agent is bound by a contract entered into by his principal who, though disclosed cannot he sued. That the principal here "is some company in Taiwan situated far outside the jurisdiction of the consumer courts in India" does not mean that it could be inferred, for it had not been so found by the District or State Commission that it could not he sued."

As contemplated under Section 230 of the Indian Contract Act, 1872, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. The exception is when the Agent is not disclosed the name of

the principal, the agent be responsible. In the instant case it is clear that the respondent/defendant is an agent of a disclosed the principal, M/s. M.G. International GmbH. As the respondent is an agent of the disclosed the Principal, M/s. M.G. International Transport Private Limited, GmbH, represented by Local Agents, M/s. Falcon Air Services (India) Pvt. Ltd., at No. 12, Poes Road, 1st Street, Teynampet, Chennai-600 018, without impleading the Principal, the appellants/plaintiffs have sought damages from the Agent, who is the respondent herein. In this regard, the High Court of Bombay in *Midland Overseas Vs. m.v. "CMBT Tana"* and others, has held as follows:

"6. On these admitted facts which have been pleaded by the plaintiffs themselves in the plaint the question that arises for determination is whether any cause of action has accrued against the 3rd defendants who had only acted as agents for and on behalf of 2nd defendants The agent cannot personally enforce nor be bound by contracts on behalf of principal. Ordinarily an agent contracting in the name of his principal cannot be sued on such contracts."

17. In *Prem Nath Motors Ltd. Vs. Anurag Mittal*, , the Hon"ble Apex Court has held thus:

"4. Section 23 of the Contract Act categorically makes it clear that an agent is not liable for the acts of a disclosed principal subject to a contract of the contrary. No such contract to the contract has been pleaded. An identical issue was considered by this Court in the case of *Marine Container Services South Pvt. Ltd. Vs. Go Go Garments*, where a similar order passed under the Consumer Protection Act was set aside by this Court. It was held that by virtue of Section 230 the agent could not be sued when the principal had been disclosed."

18. The Division Bench of this Court (Srinivasan & AR. Lakshmanan, JJ.) *Union of India (UOI) and Another Vs. K. Abborvam (Deceased) and Others*, , has held that the appellant therein ought to have adopted proper procedure in filing the petitions before this Court. However, the appellants could not take advantage of their own wrong and seek condonation of delay. It is well settled that when the claim is barred by limitation, such delay could not be condoned by the Court. In the instant case, it has been clear that the Multimodal Transportation of Goods Act, 1993, is applicable to the facts and circumstances of the case, which stipulates the period of limitation as nine months for seeking damages from the date of delivery of goods and after expiry of the period of limitation, the party cannot seek an order to condone the delay. The claim has been made by the appellants/plaintiffs after the period of limitation. 2. The suit is filed only against the respondent-agent, a disclosed principal M/s. M.G. International Transport GmbH, having their office at Germany. Seeking damages from the agent is not legally sustainable in view of Section 230 of the Indian Contract. 3. The applicants/plaintiffs have not contended that the damage for the consignment was due to the negligence of the carrier. All these three aspects have not been established by the appellants.

19. It was argued by the learned counsel appearing for the appellants/plaintiffs that without getting the status as a Registered Multimodal Transport operator, the respondent/defendant could not invoke the assistance of the special Enactment. It cannot be disputed that the plaintiff is the "dominus litus" and as per Section 102 of the Indian Evidence Act, 1872, the burden of proof in the suit lies on the plaintiff, the person, who would fail, if no evidence at all were given on either side. In the instant case, there is no evidence on the side of the appellants/plaintiffs, to establish that the suit instituted by the plaintiffs has not been barred by limitation, as the respondent/defendant has raised a specific plea that the suit is barred by limitation, as per Multimodal Transportation of Goods Act, 1993.

20. It is an admitted fact that the cargo relating to the suit was loaded in the vessel at Hamburg seaport, then the same had to reach Chennai seaport. However, as there was no sea port at Hamburg, the consignment of goods were transported through roadways and again loaded in another vessel, in order to reach Chennai seaport. As the mode of transport of the consignment of goods was in seaways, roadways and again seaways, the Multimodal Transportation of Goods Act, 1993 is applicable. It is also pertinent to note that in the original Bill of Lading, Ex. 3, it is specifically stated thus :

"For delivery of goods please apply to Falcon Air Services (India) Pvt. Ltd."

Therefore, the first substantial question of law is answered in favour of the respondent and against the appellants herein.

21. The second substantial question of law has been raised stating, whether carriage by sea alone could be construed as multimodal transportation, when there is no other mode of transit was available. It is seen that the aforesaid substantial question has not been raised based on the evidence available on record, on the finding of the Courts below. As the evidence shows that the suit consignment of goods was transported through seaways and roadways, the aforesaid alleged substantial question of law could not be raised by the appellants/plaintiffs, stating that there was carriage by sea alone. Hence, this Court is of the view that the said second substantial question of law raised by the appellants is not based on evidence or finding of the Courts below, hence not a substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, to be answered and accordingly, the alleged substantial question of law is decided against the appellants and in favour of the respondent.

22. It is well settled that the appellants or other parties are not entitled to take advantage of their own wrong or default and seek an order to condone the delay. It is well settled that when the claim is barred by limitation, such delay could not be condoned by Court. In the instant case, it has been made clear that Multimodal Transportation of Goods Act, 1993 is applicable, as there was seaways and roadways and also as per the averments of the Bill of Lading. Hence, on the facts and circumstances of the case, the period of limitation is 9

months, as stipulated under Multimodal Transportation of Goods Act, 1993. However, the suit has not been filed by the appellants/plaintiffs within 90 days from the date of taking delivery of the goods from the Chennai Airport. Hence, the Court is of the view that the claim made by the appellants/plaintiffs is barred by limitation.

23. It is also seen that the appellants/plaintiffs have filed the suit only against M/s. M/G. International Transports GmbH, having its office in Germany, who is admittedly the principal for seeking damages. However, the appellants/plaintiffs filed the suit only against the agent of M/s. International Transports, GmbH, having its office at Chennai. It is well settled that as per Section 230 of the Indian Contract Act, when there is a disclosed principal, suit could not be maintainable, seeking damages against the agent, leaving the principal, as per the decision rendered by the Hon'ble Apex Court in *Premnath Motors Ltd., v. Anurag Mittal*, referred to above.

24. It is also a settled proposition of law that if the Insured has established that there was a damage of the consignment of goods, he would be entitled to claim damages, irrespective of the fact that at whose negligence, fault or carelessness, the damage had occurred. However, to exercise right of subrogation and claim damages, the insurance company should establish that the damage or loss was caused to the consignment, only due to the negligence of the carrier, otherwise, the insurance company cannot claim damages from carrier of the consignment of goods. Here in this case, there is no evidence to show that the alleged damage had occurred due to the negligence of the respondent herein. Unless the insurance company establishes the negligence or improper handling of the consignment, the insurance company would not be entitled to claim damages from the carrier. In other words, if the loss or damage occurred to the consignment, by way of any natural calamity, act of god or by any antisocial element, in the name of Bandh, the carrier would not be liable to pay any damages to the insurance company, the second respondent herein. As discussed in the earlier paragraph of the Judgment, the appellants/plaintiffs is not entitled to claim damages by filing a suit against the agent, leaving the disclosed principal, M/s. M.G. International Transports GmbH, having its office in Germany. On the aforesaid facts and circumstances, this Court find no error or infirmity in the concurrent judgment rendered by the Courts below, so as to warrant any interference, in view of the answer given for the substantial question of law. Therefore, the second appeal is liable to be dismissed.

In the result, the Second Appeal is dismissed. No order as to costs.