

(1963) 03 AP CK 0004

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 502 of 1960

D.P. Narasa Reddy

APPELLANT

Vs

Ellisetti China Venkata Subbayya and Another

RESPONDENT

Date of Decision : 14-03-1963

Acts Referred:

Carriers Act, 1865 — Section 2, 8
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 2
Provincial Small Cause Courts Act, 1887 — Section 25
Specific Relief Act, 1963 — Section 10

Citation : AIR 1964 AP 71

Hon'ble Judges : Satyanarayana Raju, J

Bench : Single Bench

Advocate : K. Jayachandra Reddy, for the Appellant; N. Ramamohana Rao, for the Respondent

Final Decision : Allowed

Judgement

Satyanarayana Raju, J.—This revision petition, arises out of a suit filed by the respondent, for recovery of a sum of Rs. 260/- towards damages for the loss of a consignment of beedies entrusted by him for transport from Proddatur to Tadipatri.

2. The 1st defendant was impleaded in the suit as he was the owner of the public carrier and was liable to make good the loss occasioned to the plaintiff by the non-delivery of the goods entrusted to the 2nd defendant, who was at the material time, his driver.

3. The facts which are material for the purpose of appreciating the points raised before me can be briefly stated. The plaintiff is the owner of a motor lorry and is a resident of Proddatur. The 1st defendant is also a resident of Proddatur and is the owner of the motor lorry A P D 625. The 2nd defendant was in the employ of the first defendant, at the material time as his driver. Messrs. Syed Trading Company are the manufacturers of a brand of beedies, known as "Gopuram

Beedies", having their place of business at Washemanpet, Madras.

4. A merchant of Proddatur, by name, Rangarao, placed an order with Messrs. Syed Trading Company for the supply of two bags of Gopuram Beedies. The Company entrusted the consignment of beedis, to Sri Subramanyam Lorry Service. This lorry service, in their turn, entrusted the goods to the plaintiff who transported them from Madras to Proddatur. There he entrusted them to the 2nd defendant for their transport to Tadipatri, where the consignee had his place of business. The goods were admittedly not delivered to the consignee.

5. On January 13, 1959, the plaintiff, gave two registered notices, one to the 1st defendant, and the other to the 2nd defendant, calling upon them to make good the loss occasioned by the non-delivery of the consignment. He instituted the suit on April 24, 1959, for recovery of the sum of Rs. 260/- being the value of the two bags of beedis.

6. The 2nd defendant remained *ex parte*.

7. The 1st defendant contested the suit on various grounds. It is not necessary, for the present purpose, to notice the several contentions raised by him. He denied the alleged entrustment of the goods by the plaintiff to the and defendant. He also denied having received any notice prior to the institution of the suit.

8. Two of the points which were raised by the trial Court for determination, are relevant and may be set out.

"I. Whether the first defendant is a common carrier within the meaning of the provisions of Carriers Act (III of 1865)?

x x x 5. Whether the notice u/s 10 of the Carriers Act was given to the defendants?"

9. On the first point, the trial Court held that the 1st defendant, was a common carrier; and on the 5th point, held that the notices, as required by Section 10 of the Act, were given to the defendants. The Court below also found that the entrustment of the consignment by the plaintiff to the and defendant was true and that the goods were lost in transit. As a result of the findings reached by him, the learned Munsif decreed the suit against both the defendants. The 1st defendant has preferred this revision petition against the said decree.

10. Mr. K. Jayachandra Reddi, learned counsel for the petitioner, while not disputing the correctness of the findings of fact reached by the trial Court on the question of entrustment of the goods and their loss in transit, has argued that the plaintiff was not entitled to maintain the suit by reason of the fact that he was not the owner of the goods, which is a necessary pre-requisite for the plaintiff sustaining the claim under the Carriers Act. He has also argued that there was no evidence that the notices, Exs. A-5 and A-6, were correctly addressed and that they were refused by the defendants.

11. From the facts narrated above, it is manifest that the plaintiff was not the owner of the consignment in question. Indeed, in his evidence as P. W. 1, he admitted that he was not the owner of the goods. While holding that for the plaintiff to sustain the claim u/s 8 of the Carriers Act, it was necessary that the plaintiff should be the owner of the goods, the lower Court nevertheless came to the conclusion that since the plaintiff had entrusted the goods to the 2nd defendant "on his own account", the provisions of Section 8 of the Act had been substantially complied with.

12. Section 8 of the Carriers Act reads as follows: -

"Notwithstanding anything herein before contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of Section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants."

13. The Carriers Act, while restricting the powers of a common carrier of exempting himself from his common law liability, by Section 8 creates a liability and gives the benefit of that liability to the owner. It is only the owner that is entitled to the benefit of that section. The plaintiff who is himself "common carrier", undertook to carry the goods belonging to Messrs. Syed Trading Company from Madras to Tadipatri and he engaged the 1st defendant, another "common carrier", to carry them from Proddatur to Tadipatri. The plaintiff, not being the owner of the goods, is not entitled to maintain a suit u/s 8 of the Carriers Act against the 1st defendant. Whether the plaintiff has employed the 1st defendant as carrier on his own account, is a question of fact. In this case, there being no doubt that the ownership of the goods vested in Syed Trading Company, there is no question of the plaintiff sustaining a claim against the 1st defendant for recovery of damages for the loss occasioned by the non-delivery of the consignment at Tadipatri. So much is clear enough, and in fairness, it may be stated that Mr. N. Ramamohan Rao, the learned counsel for the plaintiff, has not disputed this position.

14. But the learned counsel for the plaintiff has argued that the 1st defendant is not a "common carrier" within the meaning of the Carriers Act and that the liability of the 1st defendant arose not because of the statutory liability created by the Carriers Act but on the basis of a contract, express or implied, by reason of the entrustment made by the plaintiff to the 2nd defendant, who, in law, is the agent of his principal, the 1st defendant. He has also argued that on a proper interpretation of the provisions of Section 2 of the Act, which define the term "common carrier", the 1st defendant does not come within the ambit of that definition.

15. At the outset, it may be observed that the stand taken up by the learned counsel for the plaintiff appeared to me to be at complete variance with the case pleaded by the plaintiff in the lower Court and the issues on which the parties were in controversy. As already mentioned, points- (1) and (5), framed by the lower Court, for determination, raise the question as to whether the 1st defendant is not a common carrier within the meaning of the Carriers Act, and whether the defendants were served with notice as required by Section 10 of that Act. These points could have been raised and argued only on the ground that the plaintiff sought to make the 1st defendant liable on the basis of the statutory liability created by the Carriers Act.

16. Mr. Ramamohana Rao has called in aid the decision of the Rangoon High Court in *U Ba Tin v. U Tun On* AIR 1938 Rang 437 and has contended that under the provisions of Order 8, Rule 2 Civil Procedure Code, the 1st defendant not having specifically raised the question, he must be deemed to have waived the objection. I do not think that I can accede to this contention. There is no question of waiver in this case. The suit proceeded on the basis of the liability created by the Carriers Act. That the lower Court understood the position to be so, is plain from a reading of its judgment.

17. Mr. Ramamohana Rao, learned counsel for the plaintiff, has then argued that the 1st defendant is not a common carrier within the meaning of the Act. The expression "common carrier" has been defined in Section 2 as denoting "a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, "for all persons indiscriminately"." (Italics (here in " ") mine).

18. Considerable stress has been laid by the learned counsel for the plaintiff on the words "for all persons indiscriminately" used in the definition. These words were considered by their Lordships of the Privy Council in *The India General Navigation and Railway Co., Ltd. v. The Dekhari Tea Co., Ltd.* AIR 1924 PC 40. At page 42, their Lordships observed as follows: -

"So far as the words "for all persons indiscriminately" are concerned, these simply mean that persons so engaged in and catering for business satisfy the demands or applications at customers as they come and are not at liberty to refuse business. This arises from the public employment in which they are engaged. Apart from danger arising, say, from the nature of the goods received, the carrier is by his office bound to transport goods as clearly as if there had been a special contract which purported so to bind him, and he answerable to the owner for safe and sound delivery."

19. What is required in the case of a person who answers the definition of common carrier under the Carriers Act is that he must be ready to carry for hire as a business and not as a casual occupation. It is essential that he should hold himself out as being ready to carry goods for any person or to carry any passengers so matter who they may be. (Vide Halsbury's Laws of England, 3rd

Edition, Volume 4, pages 130 and 131).

(20-22) It is indeed strange that while in the lower Court the plaintiff, was at pains to make out that the 1st defendant was a common carrier and that the 1st defendant was attempting to evade responsibility on the ground of his not being one such, before me, the plaintiff has strenuously argued that the 1st defendant is not a common carrier. That apart, there is the fact that the 1st defendant, by reason of his occupation as carrier of goods by his lorry, which can by no means be called casual, does come within the am-bit of the definition of "common carrier". The Carriers Act, the provisions of which, were invoked by the plaintiff himself before the lower Court for making the 1st defendant liable, must be held to be applicable to the 1st defendant. As already held, by reason of the fact that the plain-tiff is not the owner of the goods, which is an essential pre-requisite for his making the 1st defendant liable for the loss of the consignment in transit, the plaintiff could not sue the 1st defendant.

23. Mr. Ramamohana Rao has then argued that even assuming that the Carriers Act would apply tie plaintiffs claim rested on an alternative ground, namely, that he, though not as the owner, as the person for the time being in possession of the goods, had entrusted them to the and defendant as the agent of the 1st defendant. It was in this context that he relied upon the provisions of Section 10 of the Specific Relief Act. His argument is that for recovery of the goods or for their value, it is not necessary that the plaintiff should be the owner and that it is enough if he is in legal custody of the goods at the time. It may be stated at once that this was not the basis of the claim in the plaint. A perusal of the plaint discloses that he sued for recovery of the suit amount as the owner of the goods and it was only during the course of his evidence that it was elicited from him that he was not the owner. There was no alternative basis on which the plaintiff sought to sustain the suit claim.

24. It remains only to notice a decision cited by the learned counsel for the plaintiff, which is Sukul Brothers v. H.K. Kavarana AIR 1958 Cal 730. There the facts were almost similar to the facts of the present case. The plaintiff entrusted the goods, of which he was the owner, to the defendant. The trial Court held that by reason of the provisions of Section 8 of the Carriers Act, the suit claim was not sustainable on the ground of the statutory liability of the 1st defendant under that Act, but by reason of a special contract which, on the facts, that Court found, the defendant was liable for making good the loss that was occasioned to the goods entrusted by the plaintiff to him. The learned Judges, Das Gupta and Bachawat, JJ., confirmed the decision of the trial Court so far as Section 8 of the Carriers Act was concerned. With regard to the alternative basis, on which a decree of the trial Court was rested, they held that the plain- tiff failed to prove such a special contract, either express or implied, and that he did not employ the defendant on his own account and prima facie the contract of employment was with the owner of the goods and that the plaintiff in engaging the carrier acted as his agent. In reaching that conclusion, the learned Judges held that a person,

other than the owner, may employ the carrier on his own account and then may sue the carrier on such contract, and that the special contract, if provided, supersedes the necessity of showing the ownership of the goods, but that the onus is upon the plaintiff who alleges that there is such a special contract. It is impossible to find that there is a special contract in the instant case. No such contract was pleaded and the plaintiff never attempted to prove the existence of such a contract, either express or implied.

25. Finally, the learned counsel for the plaintiff, relying upon the decision of Mr. Justice Seshachalapathi in *Rachamsetti Pedda Malliah Vs. Adigopala Brahmayya and Another*, , has argued that inasmuch as there is no manifest injustice, this Court need not, in the exercise of the jurisdiction vested in it u/s 25 of the Provincial Small Cause Courts Act, interfere with the decree passed by the trial Court. I do not agree, According to the case pleaded by the plaintiff, it was the and defendant who was entrusted with the custody of the goods and a decree was sought against the 1st defendant not on the basis of any contract with him but on the basis of a statutory liability created by Carriers Act. The essential requirement for making a person liable under the Carriers Act is that the plaintiff must be the owner of the goods. The plaintiff could not have therefore sustained the action for damages for the consignment. The principle of the decision cited before me does not therefore apply.

26. As a result of the above discussion, the decree of the lower Court must be set aside and this Revision Petition allowed with costs here and in the Court below.