

(2014) 09 MAD CK 0384

In the Madras High Court

Case No : Second Appeal No. 1287 of 2006

Friendly Transport Daily Parcel Service

APPELLANT

Vs

C and N Ganges Metallising Pvt. Ltd.

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Carriers Act, 1865 — Section 10, 3, 6
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2014) 4 LW 827

Hon'ble Judges : Pushpa Sathyanarayana, J

Bench : Single Bench

Judgement

Pushpa Sathyanarayana, J.—Not satisfied with the findings rendered by the Courts below in a suit for recovery of money, the defendant has filed the present Second Appeal.

2. From the materials available on record, it is seen that the first plaintiff is a factory manufacturing Metallised Polyester Films at SIPCOT Industrial Complex in Hosur and the second respondent is the Insurance Company. The defendant is a Parcel Service Transport Operator having its Head Office at Hosur with several branches at other places.

3. The case of the plaintiffs is that on 18.6.1992, the first plaintiff despatched a consignment of 88 Rolls of Metallised Polyester Film properly packed through the defendant at Hosur to be transported to New Delhi and to be delivered to their consignee M/s. Kuwer Fibres Private Limited at Delhi. It is stated that on payment of necessary charges, the defendant carried the goods to Delhi and during the transport, out of the said 88 Rolls of Films, 16 numbers of rolls of the films were badly damaged due to the heavy rain and the same were delivered to the consignee on 25.6.1992. According to the plaintiffs, the said damage to the goods was due to the negligence of the defendant carrier. It is stated that though the consignment note No. 2043 dated 18.6.1992 guaranteed entrustment of the goods consigned in good order and condition, contrary to the said undertaking,

the defendant carrier did not deliver the goods in good shape. It is also averred that as the defendant delivered the goods in a damaged condition, they are to make good the loss. The plaintiffs also through the help of an independent surveyor inspected and assessed the loss pertaining to the damaged goods on 01.7.1992 and 02.7.1992 and a report was submitted on 03.7.1992. The net loss after salvage was assessed at Rs. 1,57,998.49 plus Survey fee of Rs. 2388. The first plaintiff sent a letter on 26.8.1992 to the defendant demanding the above said sum for the loss of its goods. The same was received by the defendant on 28.8.1992 and the reply was sent on 02.9.1992 alleging that the goods were transported at the owner's risk. The first plaintiff had entered into a contract of insurance with respect to its consignment with the second plaintiff. In pursuance of the said contract of Insurance, the first plaintiff submitted the claim bill to the second plaintiff who settled the claim by paying a sum of Rs. 1,60,386/-. Thereafter, the second plaintiff was subrogated with the rights of recovery of the first plaintiff as per letter of subrogation and Special Power of Attorney dated 31.3.1993. Though the rights of the first plaintiff had already been subrogated, the first plaintiff has joined the second plaintiff in filing the suit to avoid any technical defects. The first plaintiff also did not have any objection for a decree being passed in favour of the second plaintiff. Hence, the plaintiff has filed the suit for recovery of money.

4. The defendant, who is a public carrier, filed written statement admitting the contract for transferring the goods from Hosur to Delhi. According to the defendant, the goods were well-protected during transit and it was a direct Hosur - Delhi transit without any trans-shipment on the way. It is also contended by the defendant that there was no brake down of the vehicle and the same vehicle which carried the goods from Hosur reached Delhi to deliver the goods. It is further claimed that the defendant was not aware of the contents inside the package and the same was transported at the risk of the owner. According to the defendant, at the time of delivery of goods, there was no complaint lodged or any certificate issued regarding the damage and if there was a damage to the goods due to the carelessness and negligence of the carrier, then the plaintiffs should have received them with an observation. As there was no endorsement, the defendant challenged the claim of damages. It was further contended that the report of the surveyor was in absence of the defendant and no such report was issued to at the time of survey. Hence, the defendant prayed for dismissal of the suit.

5. On the above pleadings, trial court framed four issues. On the side of Plaintiffs, one R. Krishnan was examined as P.W. 1 and one Venugopal was examined as P.W. 2 and Exs. A.1 to A.14 were marked. On the side of defendant, though no oral evidence was adduced, Ex. B.1 was marked.

6. The trial Court, upon consideration of oral and documentary evidence, held that the defendant is liable to pay a sum of Rs. 1,60,386/- as claimed by the plaintiffs with 6% interest thereon and accordingly, decreed the suit. Being

aggrieved by the finding of the trial Court, the defendant filed First Appeal before the Principal District Judge, Dharmapuri at Krishnagiri. The Lower Appellate Court, on consideration of the evidence adduced and the arguments advanced therein, finding that the goods transported through the lorry belonging to the defendant were damaged during transit and the plaintiffs are entitled to the damages recoverable from the defendant, dismissed the appeal upholding the judgment and decree of the trial Court. Feeling aggrieved by the concurrent findings of Courts below, the unsuccessful defendant has filed this Second Appeal.

7. Heard Mr. K.A. Ravindran, learned counsel appearing for the appellant/defendant as well as Mr. Guruswaminathan, learned counsel for the respondents/plaintiffs and perused the records.

8. From the materials available on record, it is seen that the present appeal is projected by the defendant on several grounds and particularly, regarding the applicability of Section 3 and the issuance of statutory notice as per Section 10 of the Carriers Act, 1865.

9. It is fairly conceded by Mr. K.A. Ravindran, learned counsel for the appellant with regard to the factual aspects regarding the date on which the goods were booked and delivered, survey done, etc. It was argued by the learned counsel for the appellant that the plaintiffs have failed to establish the fact that the goods were damaged only during the transit as against the allegations of the defendant that they were damaged in the godown of the consignee.

10. The Courts below had concurrently held that it was due to the negligence and carelessness of the defendant, while carrying the goods on road, who had exposed the same to rain rendering the goods useless for the purpose intended. It is seen that the defendant though denied that the damage was caused due to the rain, however, accepted that it could have happened because of jerk during transport. A perusal of the report filed by the surveyor engaged on the side of the plaintiffs to assess the damage, would categorically disclose that the damage caused to the films were only because of the rains and not due to the jerk on the way. However, it is the reason for the damage caused to the goods sent to the consignee, is the question to be decided.

11. As regards owner's risk, learned counsel pressed into service the decision of the Hon'ble Supreme Court in Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd., and more particularly, relied on paragraphs 36, 37 and 39 wherein it has been held as follows:-

Para 34: When the goods were entrusted to the carrier for delivery at Bombay to Messrs Jeena & Co., the Consignment Note which was issued to the appellant, mentioned that the goods were to be carried at "OWNER'S RISK". The appellant did not, at that stage, object to the words, "OWNER'S RISK" being mentioned in the Consignment Note. On 19th March, 1994, the respondent informed the appellant that the goods were destroyed by fire. In this letter, it was, inter alia, mentioned by the respondent as under:

"In the meantime, since the consignment was booked at Owners Risk basis, you are requested to please take up the matter with your Insurance Company."

Para 35: Although it was clearly mentioned that the goods were booked at "OWNER'S RISK" in the aforesaid letter, the appellant in his reply dated 26th March, 1994 did not repudiate the assertion of the respondent that the goods were booked at "OWNER'S RISK". Even in his earlier letter dated 21st March, 1994, the appellant did not say a word about "OWNER'S RISK". Thereafter, the appellant sent a notice dated 22nd April, 1994 to the respondent through Mr. S.K. Kaul, Advocate, but in that notice also the fact that the goods were booked at "OWNER'S RISK" was not repudiated. Even in the subsequent notice dated 30th May, 1994, sent through Shri R.C. Gupta, Advocate, the appellant did not say anything about "OWNER'S RISK". Even in the Claim Petition filed before the National Commission, the appellant did not say anything about "OWNER'S RISK". The respondent, however, in para 4 of the Written Statement filed before the Commission stated, inter alia, as under:

"4. That the Opposite party had carried the goods at the "Owner risk" as offer to the complainant to get the goods insured by them was declined. That the terms and conditions of the contract of the carriage as incorporated in the Goods Consignment No. 52330 dated 11th March, 1994 under which the complainant booked the goods with the opposite party for transportation provides:

1. The Company (opposite party) carriages the goods at owners risk, unless a special Insurance of Rs. 0.80 for every hundred rupees of value declared by the vender, having been charged and paid. Payment of such insurance charges, if made, should be mentioned on the goods consignment note at the space provided for the same.

2. The Company (opposite party) shall not be responsible for any lose or damage due to theft, fire explosion or accident, unless the special insurance charges, as stated in clause 1 above is charged and paid. An affidavit duly attested by Sukhbir Singh, the Booking Clerk of the opposite party, who had booked the goods of the complainant on behalf of the opposite party is annexed as Annexure A-1."

Para 39: In view of the above, there did arise a controversy between the parties whether there was any special agreement between them which would have the effect of restricting the liability of the respondent in carrying the goods in question to Bombay for delivery to Messrs Jeena & Co. This question has not been answered in clear terms by the National Commission and a positive finding, whether or not there existed a special contract between the parties within the meaning of Section 6 of the Act, has not been recorded. The Commission, after considering various provisions of the Act came to the conclusion that EVEN if the goods were carried at "OWNER'S RISK", the carrier would not be fully absolved of his liability to pay compensation if the loss was occasioned on account of his negligence or the negligence of his servants and agents. The Commission, to this

extent, is right and, therefore, a positive finding on the existence of a special contract is not insisted upon but what is now questioned is the finding of the Commission on the question of negligence.

12. Even applying the ratio laid down in the above decision, the liability of the carrier would not be absolved to pay damages, if the loss occurred account of the carrier's negligence. In the instant case, the damage caused is accepted excepting the cause for damage i.e., whether it is due to rain or jerk during transportation.

13. Insofar as applicability of Section 3 of the Carriers Act is concerned, for better appreciation of the law, the same is extracted hereunder:-

3. Carriers not to be liable for loss of certain goods above one hundred rupees in value, unless delivered as such.-- No common carrier shall be liable for the loss of or damage to the property delivered to him to be carried exceeding in value on hundred rupees and of the description contained in the Schedule to this Act, unless the person delivering such property to be carried, or some person duly authorised in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.

14. A mere reading of the Section 3 of the Carriers Act would go to show that the goods described under Schedule 3 alone will be covered by the above section. In the case on hand, the damage was caused to the Metallised Polyester Film Rolls which is not enlisted under Schedule 3 to Section 3. Therefore, Section 3 of the Carriers Act is not applicable and the defendant is liable for damages claimed.

15. The next question to be considered is regarding the statutory notice to be issued under Section 10 of the Act. Section 10 reads as follows:-

10. Notice of loss or injury to be given within six months.-- No suit shall be instituted against a common carrier for the loss of, or injury to, [goods (including container, pallet or similar article of transport used to consolidate goods) entrusted] to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

Therefore, it is clear that as per Section 10 of the Carriers Act, no suit shall be instituted against common carrier for the loss or injury to goods unless the notice in writing of the loss or injury has been given within six months from the time of loss or damages.

16. In the instant case, the goods were delivered on 25.6.1992 and the surveyor had given a report on 03.7.1992 in Ex. A.4 and the notice contemplated under Section 10 of the Carriers Act was issued by the plaintiffs on 26.8.1992 under Ex. A.5 and the suit was filed on 19.6.1995. The six months period is contemplated by Section 10 of the Carriers Act only to put the carrier on notice about the claim in respect of the loss or damage to the consignment so that it can make good the loss occasioned. Going by the dates given by the plaintiffs as accepted by the

defendant, the statutory notice also has been issued within time. The claim of damages after deducting the salvage value is not disputed by the defendant. Therefore, the findings of the Courts below decreeing the suit for a sum of Rs. 1,60,386/- is correct.

17. Insofar as the subrogation is concerned, the second plaintiff who is an insurer with whom the goods were insured, had indemnified the damages caused to the first plaintiff. Therefore, the first plaintiff had subrogated the claim of the second plaintiff who is to recover the same from the defendant. Even in the above said principle, there is no illegality or infirmity. As such, in my considered opinion, no question of law, much less substantial question of law, arises for consideration.

18. As per Section 100 of Civil Procedure Code, the High Court's scope for interference with concurrent findings of the Court while exercising jurisdiction is, indeed, very limited. As a rule, the High Court has no jurisdiction to entertain the Second Appeal on the ground of an erroneous finding on fact, however, gross or inexcusable the error may appear to be or as a rule, in Second Appeal, finding of fact should not be disturbed. However, if they are based on no evidence or in disregard of evidence or on inadmissible evidence or against the basic principles of law or on the face of it, there appears an error of law or procedure or when there is a vast divergence between the pleadings and proof, such findings can be interfered with, as opined by this Court.

19. In view of the aforesaid reasons and taking note of the fact that the appellant has not established to the satisfaction of this Court that the damage to the goods was not during transit and the loss was at the owner's risk and also taking an over all assessment of the facts and circumstances of the present case, this Court holds that both the Courts have rightly rendered a pure finding of fact and consequently, decreed the suit in a proper way and looking at from any point of view, since the judgments and decrees of the Courts below are based on pure concurrent findings of fact, they do not require any interference in the hands of this Court because of the fact that they do not suffer from any material irregularity or patent illegality.

In fine, the Second Appeal fails and the same stands dismissed confirming the concurrent findings of the Courts below. However, there shall be no order as to costs.