
(2009) 08 MAD CK 0453
In the Madras High Court
Case No : A.S. No. 443 of 1999

Hindustan Steel Work, Construction Limited by Mr. G.V.
Subramanyam Senior Manager and Resident Engineer, Officer
in Charge of Hindustan Steel Works Construction Ltd.

APPELLANT

Vs

Southern Central Roadways

RESPONDENT

Date of Decision : 25-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144(1)

Citation : (2010) 3 MLJ 58

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : P. Ranganatha Reddy, for King and Patridge, for the Appellant; No Appearance, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sasidharan, J.—This first appeal is directed against the judgment and decree dated 8.6.1994 in O.S. No. 165 of 1990 on the file of the learned Subordinate Judge, Thiruvallur.

2. The parties in this appeal would hereinafter be referred to as "plaintiff" and "defendants" .

3. The suit in O.S. No. 165 of 1990 was preferred by the plaintiff against the defendants praying for a decree directing them to pay a sum of Rs. 49,305.49 with interest at 18% per annum till the date of payment.

4. In the plaint in O.S. No. 165 of 1990 the plaintiff contended thus:

(a) The first defendant's office at Vizag contacted the plaintiff and sought the services of the plaintiff for transporting Coles crane weighing 13 to 14 tonnes approximately from Vizag to Madras. The plaintiff as per its letter dated 11.8.1989 quoted the rates for 13 to 14 tonnes crane on owner's risk basis, The first defendant gave its work order accepting the rate quoted by the plaintiff for

transportation as per letter dated 14.8.1989.

(b) The plaintiff arranged a trailer for carrying the consignment and agreed to transport the consignment as per the consignment note No. 3128 dated 24.8.1989. Unfortunately the trailer, which was carrying the crane met with an accident near Mylavaram in Andhra Pradesh as the trailer was toppled due to sudden gush of flood water on the road and the crane fell on the sand bed. The accident was due to bad weather, bad road condition and extra weight of the material. The accident was immediately reported to the first defendant by way of telegram on 2.9.1989 and it was followed by a letter sent by the plaintiff on 19.9.1989. The plaintiff made it specifically clear in the letter that in the event of their arrangement to reload the consignment and transport it to the destination, an additional expenditure should have to be incurred, as it involves lifting the materials with the help of two cranes, hired from third parties.

(c) The first defendant thereafter contacted the plaintiff by telephone and instructed them to arrange for reloading and transporting the same to the destination agreeing to reimburse the additional costs demanded and incurred by the plaintiff. The first defendant as per their communication dated 19.9.1989 called upon the plaintiff to make all out efforts to reload and despatch the crane to the destination immediately. This was confirmed further by the letter of the first defendant dated 29.9.1989 addressed to the plaintiff. The plaintiff thereafter arranged for lifting and re-loading the consignment by hiring the services of M/s. Coromandel Engineering Works at Ibrahimpatnam on payment of Rs. 25,000/- and accordingly the crane was duly transported by way of consignment to the destination.

(d) The accident spot was inspected by the surveyors deputed by M/s. New India Assurance Company, Vijayawada, Andhra Pradesh and a First Information Report was also lodged with the police authorities. The defendants also requested for arranging security and accordingly due security was given to the consignment.

(e) The plaintiff after transportation of the consignment presented their bill for payment to the first defendant for a sum of Rs. 43,441.00 which includes additional cost and expenses incurred by them for re-loading the consignment, for extra weight and incidental charges. However the first defendant, who was contacting the plaintiff at all times and issuing instructions by telephone as well as by letter regarding the reloading and transporting the consignment to the destination, was not agreeable for payment of the bill raised by the plaintiff. In fact the first defendant also stated that instruction was given to the second defendant by way of correspondence to honour the bill raised by the plaintiff. It was only as per the advise given by the first defendant the plaintiff presented their bill with their letter dated 5.2.1990 to the second defendant. However the second defendant as per their letter dated 15.2.1990 repudiated their liability to pay the claim for payment of additional costs and expenditure claimed by the plaintiff. In such circumstances, the plaintiff has laid the suit.

5. The first defendant in their written statement inter alia contended thus:

(a) The plaintiff offered and accepted to transport Coles crane and its accessories as per terms and conditions enclosed with the work order dated 19.8.1989. It was not at the risk of the owner as alleged in the plaint. The transaction was accepted by the plaintiff after viewing the equipment as called for in the defendant's enquiry on 8.8.1989 and lying in the stores of the first defendant at Visakhapatnam. The job description and freight charges were also specifically stated and accepted.

(b) The plaintiff was given seven days time for transporting the materials and it was also stipulated that the transporter shall be responsible for the safe delivery of the items at the destination. The conditions further provided that no transshipment en-route will be permitted. It is also stated that the first defendant shall be entitled to claim compensation from the transporter in case of any damages caused to the materials during transit. The plaintiff accepted the terms and conditions and agreed to transport the materials as per their consignment dated 24.8.1989.

(c) The first defendant denied the contention that the accident was caused on account of sudden gush of flood water. A representative of the first defendant visited the spot soon after the accident and found that the crane etc., were lying upside down submerged in four feet deep water on the road side with considerable damage to various parts of the Crane. The first defendant denied the alleged telephone message or instruction given to the plaintiff to re-load the crane at the risk and cost of the defendants. The defendants as per letter dated 19.9.1989 further stated that reasonable action would be taken after receipt of the crane in assessing the damages and loss in detail.

(d) The surveyor deputed by the plaintiff found that damage was caused to the crane. The defendants denied that the plaintiff had expended a sum of Rs. 25,000/- in connection with re-loading. According to the defendants, the plaintiff has agreed to transport the materials by fixing the tariff at Rs. 11,815/- and as such they are not liable to pay any amount by way of extra charges. In short, the first defendant denied the manner of accident as well as their liability to reimburse the plaintiff.

6. The learned trial Judge on the basis of pleadings framed the following issues:

(a) Whether the plaintiff is entitled to the relief claimed in the plaint?

(b) Whether the accident took place due to act of God. Whether the accident was caused partly due to the fault of the plaintiff or by the defendants or due to the negligence of the plaintiff?

(c) To what relief is the plaintiff entitled to?

7. During the course of trial, P.W.1 was examined on the side of the plaintiff and Exs.A.1 to A.21 were marked. The defendants also examined one witness on

their side and Exs.B.1 to B.7 were marked.

8. The trial court mainly relied on the surveyors report marked as Ex.A.9 to come to the conclusion that the accident was not on account of the rash and negligent driving of the driver employed by the plaintiff. According to the trial court, the accident was only on account of heavy rain., flood and bad weather for which the plaintiff cannot be found fault with. However the trial court found that the plaintiff was not entitled to collect additional cost by way of extra load and accordingly the plea for inclusion of Rs. 2, 832/- by way of such extra load was rejected

9. The learned trial Judge on the basis of the correspondences exchanged between the parties arrived at a factual finding that the defendants have agreed to reimburse the claim with respect to the additional re-loading charges and as such the defendants are legally liable to pay the said amount to the plaintiff. Accordingly the suit was decreed with interest at 18% per annum. It is the said judgment and decree which is impugned in the first appeal.

10. The point for consideration:

Whether the plaintiff is entitled to claim extra charges on account of re-loading and transportation of materials to the point of destination?

11. The learned Counsel appearing on behalf of the defendants contended that the plaintiff miserably failed in their attempt to prove that the accident was on account of the sudden rain and bad weather conditions coupled with the factum of poor road condition. According to the learned Counsel the best witness to speak about the accident and the absence of negligence was only the driver. However the driver of the vehicle was not examined as a witness on the side of the plaintiff and as such it cannot be said that the driver was not negligent. The learned Counsel also contended that the crane was entrusted to the plaintiff for safe transport by way of way bill and as such the provisions of the Carriers Act would come into operation. As per the said Act, the ultimate responsibility to deliver the material at the point of destination lies only with the carrier and as such it was not permissible for the carrier to maintain action against the owner of the product for the purpose of claiming damages or for claiming the extra amount spent by them for reloading the material. The learned Counsel also placed reliance on the judgments of this Court reported in Shanmuga Sundaram Pillai alias Somasundaram Pillai Vs. National Insurance Company Ltd. Madurai and another, in support of his contention.

12. This appeal was originally fixed for hearing on 14.8.2009 and the learned Counsel for the defendants argued the matter. However there was no representation on behalf of the plaintiff and as such without passing orders, I have posted the matter to 18.8.2009 so as to enable the respondent to submit their arguments. I have also directed the Registry to print the name of the plaintiff as well as his counsel in the cause list. Accordingly the name of the counsel for the plaintiff as well as the name of the plaintiff were printed in the

cause list. The matter was posted on 19.8.2009. Even on 19.8.2009 there was no representation on behalf of the plaintiff and as such the matter was reserved for judgment, after hearing the counsel for the defendants.

DISCUSSION:

13. The defendants approached the plaintiff to transport their Coles crane and its accessories and spare parts from Vizag to Madras and the said proposal was accepted by the plaintiff and accordingly the plaintiff agreed to transport the goods for a sum of Rs. 11,815/-. The consignment No. 3128 dated 24.8.1989 marked as Ex.A.4 shows the factum of such agreement for transportation. It was only in pursuance of the said agreement the plaintiff has undertaken the transportation of goods from Vizag to Madras. The vehicle met with an accident at Mylavaram in Andhara Pradesh on 2.9.1989. According to the plaintiff the accident was only on account of sudden gush of flood water and as a result, the crane fell on the sand bed.

14. The accident was on account of bad weather and bad road condition and extra load of materials. The plaintiff as per their telegram dated 2.9.1989 followed by the letter dated 19.9.1989 informed the first defendant about the accident. According to the plaintiff it was only as per the instruction received from the first defendant they have taken steps to reload the consignment for the purpose of transportation to Madras. In order to claim the additional freight charges and incidental charges for reloading, the plaintiff has contended that they have hired the services of M/s. Coromandal Engineering Works at Ibrahimpatnam and a sum of Rs. 25,000/- was paid on that account.

15. The plaintiff has relied on the letters sent by the first defendant dated 19.9.1989 marked as Exs.A.7 & A.8. It was their contention that the first defendant has agreed to reimburse the entire charges for reloading the consignment and transporting the same to the destination at Madras. It was only on the said undertaking they have transported the material and as such the first defendant was liable to reimburse the entire amount.

16. The primary issue which was framed by the learned trial Judge was regarding the cause of accident and as to whether the accident was due to the act of God. Admittedly the witness examined on the side of the plaintiff was not the driver of the vehicle. The said witness has no personal knowledge about the accident in question. When it was the case of the plaintiff that the accident was caused on account of poor weather as well as bad condition of road, the burden was clearly on them to prove that the accident was beyond their control and it was in fact, the act of God. However very strangely the driver of the vehicle was not examined. The learned trial Judge relied on the report filed by the surveyor which was marked as Ex.A.9 to come to the conclusion that the accident was not due to the rash and negligent driving by the driver.

17. The vehicle was inspected by the surveyor long after the incident and as such it was practically impossible for the surveyor to conclude that the accident was

not due to the negligence of the driver. The best person to depose about the nature of the accident was the driver of the vehicle which was involved in the accident. However for the reasons best known to the plaintiff they have not chosen to examine the said witness and as such the best evidence was not produced before the court to substantiate their contention that the accident was solely due to the act of God and poor weather condition, for which the plaintiff was no way responsible. Therefore the finding rendered by the learned trial Judge to the effect that the accident was not due to the negligence of the driver of the vehicle is necessarily to be set aside.

18. The next issue relates to the liability of the defendants to reimburse the plaintiff, the amount spent by them for the purpose of reloading the material and transporting the same to the place of destination.

19. The plaintiff is a public carrier and the transaction in question is covered by the provisions of the Carriers Act. The said Act enjoins the carrier to deliver the materials to the owner in good condition. Merely by printing that the transport was at owner's risk by way of affixing the seal, would not serve the purpose, as the endorsement would not absolve the carrier from its liability. The position of a carrier under the Carriers Act is that of an insurer with regard to the goods transported by the owner of the goods. Any loss to the goods has to be compensated only by the transporter. In fact, it was a transaction in good faith as the carrier was transporting the goods as an authorised agent of the owner. The carrier was having the responsibility to transport the materials in safe condition and to deliver the same to the owner.

THE LAW ON THE POINT:

20. In Shanmuga Sundaram Pillai alias Somasundaram Pillai v. National Insurance Co., Ltd. 2001 CTC 346 the issue before a learned Judge of this Court was as to whether the defendant as a common carrier can avoid their liability to the plaintiff based on the specific contract which contains a clause that the goods are carried at owner's risk. The learned Judge following the judgment of this Court in Thiruppathi Venkatachalapathy Lorry Service and Another Vs. The New India Assurance Company Limited and Others, negated the defence and observed thus:

7. ...As far as issue (a) is concerned it should not detain this Court even for a minute more than it is required. This issue is covered by two judgments of this Court in Thiruppathi Venkatachalapathy Lorry Service and Another Vs. The New India Assurance Company Limited and Others, & The Divisional Manager, The New India Assurance Company Ltd. v. Murugan 1996 TNLJ 127. In these cases a similar argument has been raised and this Court had repelled the argument of the common carrier and held that the liability of the common carrier is absolute. Therefore this issue goes against the defendant. As far as the issue (b) is concerned u/s 9 of the Carriers Goods Act, any suit brought against the common carrier for loss, damage etc., etc. entrusted to the carrier for carriage, it shall not

be necessary for the plaintiff to prove that such a loss or damage etc., was due to negligence or criminal act of the carrier his servant or agent. Therefore it is clear that the burden is on the carrier to prove that there was no negligence or any criminal act. u/s 8 of the Carrier Act the common carrier is made liable to the owner for loss or for damage to any property delivered to such a carrier to be carried when such loss or damage shall have arisen from the criminal act or negligence of the carrier or of his agent or servants. Reading Sections 8 and 9 of the Carriers Act together it is clear that the burden is on the carrier to prove that there was neither a criminal act nor any negligence committed by either the carrier or by his agent or his servant. In this case, the driver of the vehicle had not been examined at all and he would be the competent person to speak about the accident. The evidence of D.W.1 who was not in the vehicle at the time of the accident is no use. At best his evidence regarding the manner in which the accident took place would be only hear-say. Going by the materials available on record I am of the opinion that the carrier had not discharged the onus or proved that there was neither negligence nor any criminal act on his part or on the part of his servant or agent. The issue of negligence goes against the carrier....

21. The Supreme Court in Patel Roadways Limited Vs. Birla Yamaha Limited, on an evaluation of the judgments rendered by various High Courts as well as the earlier judgments of the Supreme Court, indicated the liability of a carrier thus:

47. From the conspectus of views taken in the decisions of different High Courts noted above it is clear that the liability of a common carrier under the Carriers Act is that of an insurer. This position is made further clear by the provision in Section 9, in which it is specifically laid down that in a case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence. Even assuming that the general principle in cases of tortious liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to a case covered under the Carriers Act. This is also the position notwithstanding a special contract between the parties. These principles have held the field over a considerable length of time and have been crystallised into an accepted position of law.

ON POINT:

22. As per Ex.A.2 dated 11.8.1989 and A.3 dated 14.8.1989 the liability of the first defendant was restricted to a sum of Rs. 11,815/- which was the transportation charges agreed to between the parties for the purpose of transporting the materials from Vizag to Madras. The trial Court has misinterpreted the document marked as Ex.A.8 as according to the trial Judge the defendants have agreed to reimburse the amount necessary for re-transportation of the materials on the basis of the said letter. It is true that the first defendant as per letter dated 19.9.1989 called upon the plaintiff to arrange for proper guarding of the crane and to take all out efforts to re-load and despatch the crane to the destination immediately. The said request was taken

as an agreement to pay the charges necessary for reloading the material and for transportation to the place of destination. However nothing was stated in the said letter that the defendants have agreed to re-imburse the plaintiff, any such expenses incurred by them. In fact the first defendant has stated that actual assessment of damage and loss to the crane will be done at the destination for further action, which was indicative of the fact that the first defendant has reserved their right to proceed against the plaintiff for damages. Therefore the document in Ex.A.8 would not come to the rescue of the plaintiff for the purpose of claiming the cost for reloading and transportation, from the first respondent.

23. It is true that the plaintiff as per their letter dated 19.9.1989 marked as Ex.A.7 wanted the defendants to pay a sum of Rs. 29,000/- by way of additional expenses to be incurred for the purpose of lifting the materials. However there was nothing to indicate that the defendants have agreed to pay the said amount to the plaintiff. The first defendant has only called upon the plaintiff to take steps for re-loading the crane and to despatch the same to the destination. As the owner of the goods, the defendants were eager to get the materials at the point of destination. Therefore it was quite natural on the part of the defendants to address letters to the plaintiff, being the carrier to take efforts for reloading the crane and despatching the same to Chennai. However there was nothing in the said letter indicative of the fact that the defendants have agreed to pay the charges necessary for such reloading and re-transportation, to the plaintiff. In the absence of any such undertaking on the part of the defendants it was not possible for the plaintiff to claim the amount.

24. The learned trial Judge was not correct in his finding that the defendants were liable to pay the amount incurred by the plaintiff on account of re-loading and despatching the crane to the place of destination. Therefore necessarily the finding on issue No. 2 framed by the trial Judge is liable to be set aside. The point is answered against the plaintiff.

25. The claim made by the plaintiff for a sum of Rs. 43,441/- was inclusive of a sum of Rs. 11,815/- fixed as the freight charges. Though the plaintiff is not entitled to the extra charges on account of re-loading and transportation, the defendants are liable to pay the agreed amount with interest.

26. In the result, the judgment and decree dated 8.6.1994 in O.S. No. 165 of 1990 is set aside in part and a decree for a sum of Rs. 11,815/- is granted to the plaintiff with interest at 12% from the date of presentation of plaint with proportionate cost.

27. The plaintiff has withdrawn the decree amount with interest and the application filed by the defendants in C.M.P. No. 20361 of 1999 for a direction to re-deposit the amount was dismissed by this Court as per order dated 8.12.1999 with liberty to the defendants to invoke Section 144(1) of the CPC in the event of their success in the appeal. Therefore it is open to the defendants to move the trial Court for restitution.

28. The appeal is allowed in part as indicated above. No costs.