

(1989) 10 KL CK 0063
In the High Court Of Kerala
Case No : A.S. No. 101 of 1981

Indian Roadways Corpn. and 4 Others	APPELLANT
Vs	
M/s. M. A. Unneerikutty and 2 Others	RESPONDENT

Date of Decision : 18-10-1989

Acts Referred:

Carriers Act, 1865 — Section 6

Citation : (1990) 1 KLJ 86

Hon'ble Judges : V. Sivaraman Nair, J;P.K. Shamsuddin, J

Bench : Division Bench

Advocate : V.O. John and Jimmy John, M. Ratna Singh and P.V. Madhavan, for the Appellant; Nambiar and V. Jayakumar, for the Respondent

Judgement

P.K. Shamsuddin, J.—Defendants 1 to 5 in O. S No. 164 of 1978 on the file of the Second Additional Subordinate Judge, Kozhikode are the appellants in this appeal. The 1st respondent herein is a firm dealing in coconut oil. 500 tins of coconut oil were entrusted by it under two consignments to defendants 1 to 5 to be transported to Patna to be delivered to two of its customers. Defendants 2 to 5 are the partners of the 1st defendant firm. The consignments did not reach the consignee at Patna. The plaintiff caused to send a registered notice to defendants 1 to 5 directing them to make good the loss of 500 tins of coconut oil, the value of which was estimated at Rs. 98,000/-. A second notice was also given. The 2nd defendant sent a reply stating that the goods were entrusted to a third party for onward transmission and the lorry driver, owner of the lorry and the lorry were found missing, but nothing was stated about their liability for the damages claimed by the plaintiff. However, he admitted that 500 tins of coconut oil were entrusted to them by the plaintiff and the goods did not reach the consignee. It is in these circumstances that the above suit was filed for recovery of an amount of Rs. 1, 01, 880. 50, which includes interest and expenses incurred by the plaintiff for taking out notices to defendants 1 to 5.

2. The 5th defendant filed a written statement on his behalf and on behalf of

defendants 1 to 4. He contended that the lower court has no jurisdiction to entertain the suit, that it was true that on 10-4-1978, the plaintiff delivered to the 1st defendant 250 tins of coconut oil and also another consignment of 250 tins on the same day to be carried to Patna to be delivered to two of its customers, that the plaintiff having discounted the consignment notes on the Syndicate Bank was not competent to file the suit, that the consignments were sent at the owner's risk, that as per the terms of the contract, any loss or damage by theft, pilferage or loss must be borne by the owner of the goods himself and that therefore the defendants 1 to 5 are not liable to pay the damages.

3. The lower court negated the contentions of defendants 1 to 5 and held that the lower court had jurisdiction, that the plaintiff was competent to file the suit and that the defendants 1 to 5 are liable to make good the loss sustained by the plaintiff.

4. In this appeal, the learned counsel for the appellants vehemently contended that only Calcutta courts have jurisdiction to try the suit and that the carrier was not liable to make good the loss sustained as a result of theft of goods.

5. Exts. A2 and A3 are the consignment notes in respect of the two consignments. It is admitted that the consignments were entrusted at Calicut for the purpose of transporting the same to Patna. The learned counsel admitted that no cause of action arose in Calcutta. He however relied on the note "Subject to Calcutta jurisdiction" at the bottom of Exts. A2 and A3 and contended that this would amount to a special contract between the parties so as to exclude the jurisdiction of the lower court and confer exclusive jurisdiction on the courts at Calcutta. The plaintiff--1st respondent has not signed Exts. A2 and A3. There is no written contract between the parties excluding the jurisdiction of courts at Calcutta.

6. Section 6 of the Carriers Act reads as follows:

6. In respect of what property liability of carrier not limited or affected by public notice. Carriers, with certain exceptions, may limit liability by special contract - The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act 22 of 1963 (to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same.

7. In *United India Insurance Co. Ltd. v. Associate Corporation Ltd.* (1987 (1) KLT 46), a Division Bench of this Court had occasion to consider whether printing of

words "subject to Bombay jurisdiction alone" in way bill would amount to a special contract. The Division Bench held that apart from the existence of these printed words, there was no evidence of meeting of minds between the consignor and the carrier and in the circumstances, the printed words "subject to Bombay jurisdiction alone" cannot be treated as a special contract conferring exclusive jurisdiction on Bombay Court. In this case also apart from printed words "subject to Calcutta jurisdiction" at the bottom of A1 and A2, there is no evidence of any special contract conferring exclusive jurisdiction on Calcutta Court. We are in respectful agreement with the view expressed by the Division Bench of this Court in the above ruling. It follows that the note relied on by the learned counsel for the appellant in support of his contention would not constitute a special contract "conferring exclusive jurisdiction on Calcutta Courts.

8. Another contention raised by the learned counsel for the appellants is that loss was caused as a result of pilferage and theft, that the consignments were carried at owner's risk and that therefore the defendants have no liability to make good the loss. In Exts. A2 and A3. the word "carrier's" is struck off and in that place the word "owner's" is substituted. On the basis of this, the learned counsel argued that the consignments were accepted to be delivered at the owner's risk, that this is a special contract and that the defendants are not liable to compensate the plaintiff for the loss.

9. A Division Bench of this Court to which one of us (Shamsuddin J.) is a party, considered a similar argument in *Orient Road Lines v. M. B Mohammed Hussan Sahib* (1988 (2) KLT 619). In that case Condition No. 3 on the reverse of consignment note stated that the Company shall not be liable for any loss or damage due to pilferage, theft, weather conditions, strikes, riots, disturbances fire or accident. Following the decision in *United India Insurance Company*, (supra) the Division Bench held that the printing of this condition on the reverse of the consignment note is not sufficient to constitute a special contract signed by the owner or an agent duly authorised within the meaning of Section 6 of the Carriers Act to protect the carrier from liability.

10. A common carrier is not a mere bailee of goods entrusted to him. He is answerable for the loss of goods even when such loss is not caused by negligence or want of care on his part. The only exceptions recognised by law are the acts of God and of State's enemies, or a special contract that the carrier may choose to enter into with the customer. This is the view expressed in the rulings in the decisions in *Kerala Transport Company v. Kunnath Textiles* (1983 KLT 480), and *Orient Road Lines v. M. B. Mohammad Hussain Sahib and Company* (1988 (2) KLT 619) also. The forgoing discussion would show that there is no merit in the contentions raised by the counsel for the appellants.

In the result, the appeal fails and it is accordingly dismissed with costs.

In the above appeal, we pronounced the judgment on 18th October, 1989. Since the cross-objection filed by the 1st respondent remained to be disposed of, we

got the appeal and cross objection posted for today for being spoken to. In the cross-objection, 1st respondent has claimed Rs. 1,450/- being interest on the compensation amount till the date of suit. We heard counsel on both sides. Lower court declined to grant a decree for interest" on the amount of compensation claimed till date of suit. We do not find sufficient reason to reject the claim of 1st respondent in this regard. We therefore allow the cross-objection and grant a decree for Rs. 1,450/- being interest till date of the suit on the compensation amount.

Cross objection is allowed, as above.