

**(2013) 08 KAR CK 0057**

**In the Karnataka High Court**

**Case No :** Regular First Appeal No. 841 of 2010

Lufthansa German Airlines

APPELLANT

Vs

M/s. United India Insurance Company Limited, M/s. Motor Industries Company Limited and M/s. Procargo Speditions

RESPONDENT

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**Date of Decision :** 14-08-2013

**Acts Referred:**

**Citation :** (2014) 1 ACC 450 : (2013) 4 AKR 769 : (2014) 1 KarLJ 259

**Hon'ble Judges :** Anand Byrareddy, J

**Bench :** Single Bench

**Advocate :** G.S. Bhat, for the Appellant; S. Prabhakar Rao, Advocate for Respondent Nos. 1 and 2, for the Respondent

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## **Judgement**

Anand Byrareddy, J.—This is a defendant's appeal. The parties are referred to by their rank before the trial court for the sake of convenience.

2. The first plaintiff was an insurance company, wholly owned by the Government of India and was engaged in the business of general insurance. It had issued a Marine Cargo Open Policy in respect of a consignment imported by the second plaintiff. The second plaintiff is said to have placed a purchase order for the supply of certain spare parts by M/s. AVL LIST GmbH, Graz, Austria

The consignment was to be shipped by air from Graz Airport to the Bangalore Airport. The present appellant (the first defendant) was the carrier. The second defendant, who was the first defendant's agent had taken delivery of the consignment for shipment on the first defendant's flight from Vienna to Bangalore and had issued the Airway Bill dated 17-6-2004. The consignment, weighing 2.1 Kilograms, was carried on flight LH 754 on 19.6.2004, destined for Bangalore.

However, it transpires the consignment was not delivered to the second plaintiff inspite of repeated enquiries and demands. It is only on 5-7-2004 that the first defendant had issued a short landing certificate, to the second plaintiff that the

said consignment never arrived in Bangalore. The second plaintiff is said to have immediately raised a provisional claim for Rs. 2,98,939/- vide letter dated 6-7-2004, on the first defendant.

The insurance policy issued by the first plaintiff in favour of the second plaintiff, in respect of the consignment, covered all risks involved in the transportation of the consignment. The second plaintiff is said to have preferred a claim with the first plaintiff, dated 13-8-2004, for Rs. 311444/-. The first plaintiff is said to have settled the claim on 31-8-2004. Thereafter, the second plaintiff is said to have executed a letter of subrogation and Special Power of Attorney, dated 22-8-2005, assigning all rights and interest against the defendants for the loss in transit of the aforesaid consignment and authorizing the first plaintiff to initiate legal action.

The first plaintiff lodged a claim against the first defendant, for reimbursement of the amount of Rs. 3,11,444/- paid by it to the second plaintiff. Since the first defendant did not comply with the demand, the suit was filed.

3. The first defendant entered appearance and contested the suit. It was primarily contended that under Rule 22(2)(a) of the Second Schedule to the Carriage by Air Act, 1972 (Hereinafter referred to as the "CBA Act", for brevity), the maximum liability of the first defendant was 250 francs per kilogram or US \$ 20 per kilogram. The consignment that was the subject matter of claim, weighed 2.1 KG and hence the liability was restricted to \$ 42 only. It was open to the consignor to claim any higher value, if the appropriate supplementary charges had been paid, which the consignor did not choose to do. It was pointed out that the consignor had not declared any value for the purpose of carriage. Under Rule 10 of the Second Schedule to the CBA Act, the plaintiffs were bound by the non-declaration of any value. The first defendant claimed that it had no liability other than as above, as a bailee under Common law.

4. The court below framed the following issues on the above pleadings:-

1. Whether plaintiff proves that defendants have failed to transport the suit consignment with prudence, care and caution and without negligence, as alleged?
2. Whether first defendant as bail under the common-law is not liable to pay the suit claim?
3. Whether the first defendant proves that its liability is limited to the maximum liability of the carrier under carriage by Air Act 1972 as contended?
4. Whether plaintiff prove the defendants jointly and severally liable to pay a sum of Rs. 4,14,220/- as claimed?
5. Whether plaintiff is entitled to pendente lite and future interest at the rate of Rs. 18% P.A.?
6. What order or decree?

The trial court answered Issue Nos. 1, 4 and 5 in the affirmative and Issues No.

2 and 3 in the negative and decreed the suit, holding that the first plaintiff was entitled to recover Rs. 4,14,220/- with interest on Rs. 3,11,444/-, at 6% per annum from the date of suit till realization, from the first defendant. It is this which is under challenge in this appeal.

5. The learned counsel for the appellant contends that the trial court was in error in holding that the first defendant could not claim the benefit of Rule 22(2)(a) of the Second Schedule to the CBA Act if there was willful misconduct on the part of the first defendant. In this regard, it is contended that the burden of proof that there was willful misconduct on the part of the first defendant, was on the first plaintiff. As such, the first plaintiff not having discharged the initial onus to prove negligence and willful misconduct on the part of the first defendant, the trial court was in error in having decreed the suit in favour of the first plaintiff.

It is pointed out that the following statements made by the first defendant's witness was not seriously challenged and therefore ought to have been taken into account in concluding whether the circumstance was one which indicated "willful misconduct":

6. In any given flight we carry a large tonnage of cargo. Once the cargo is received at an airport, it is manifested in our computer systems. A consignment of the size 2.1 kilograms, as in the present case, is very small. From the computer system, maintained by our company, it is manifested that the consignment had been airlifted from the Airport of origin, namely Vienna and transferred at the transit point at the Airport of Frankfurt. However, in the computer system at Bangalore, the consignment was not manifested in the arrival data and it is shown as missing cargo. Immediately, we initiated a tracing action by requesting the Airport of origin and Airport of transit to find out what has happened to the consignment. The Airport of Origin and the Airport of Transit have reported that the consignment is not traced in addition, we conducted an intensive warehouse check at Bangalore to try to locate the cargo. Thereafter, we undertook a worldwide tracing action by sending telex messages to all the airports in the World to which our flights fly. Even after undertaking such exercises, we have not been able to trace the consignment. I state that, under the circumstances, we have issued the Short Landing Certificate. Given the volume of cargo handled, the short landing of a small piece of 2.1 kilogram cannot be said as deficiency.

It is contended that the trial court was not justified in inferring that there was no contra material to prove that the loss has not arisen due to willful misconduct.

Further, it is contended that in order to constitute willful misconduct, the misconduct and not the conduct that must be willful. It is emphasized that the first defendant had taken all practical steps within its realm to trace the consignment and in spite of its best efforts the same could not be traced. It was hence manifest that such conduct could not be termed as willful misconduct. The learned counsel for the appellant places reliance on the following authorities:

1. Contship Container Lines Ltd. Vs. D.K. Lall and Others,  
2. Shipping Corporation of India Ltd. Vs. Bharat Earth Movers Ltd. and Another,  
6. On the other hand, the learned counsel for the plaintiffs seeks to justify the impugned judgment and places reliance on the following authorities in support of the same.

1. Air India Vs. S.V. International,
2. Indian Airlines Vs. Kurian Abraham,
3. Dilawari Exporters Vs. Alitalia Cargo and Others,
4. Mrs. Varsha Priya vs. Dr. Sushma Pandey and another, AIR 2009 (NOC) 2557 (NCC),
5. Rakesh Vaid vs. Air India Himalaya House and another, 1 (1995) CPJ 55 NCC,
6. Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd.,
7. Karnataka Transport Corporation Vs. National Insurance Bank Ltd.,
8. Economic Transport Organization Vs. Charan Spinning Mills (P) Ltd. and Another,

7. In the light of the above contenti and on an examination of the record, on facts there is no dispute of the sequence of events or the contractual terms. The dispute however, is with regard to the limit of liability which the first defendant seeks to press into service, in terms of the contract. In that, ordinarily if a consignment, the value of which is not declared, is carried by the first defendant the liability, in respect of loss or damage in transit, is restricted to \$ 20 for every kilogram of the consignment involved. However, if the loss or damage is on account of willful misconduct on the part of the carrier, the liability would extend to the actual value of the consignment lost or damaged.

In the instant case on hand, the value of the consignment was not declared for purposes of carriage or for customs, by the consignor, as evident from the airway bill. There was however, insurance coverage in respect of the consignment, under a contract of insurance, whereby the first plaintiff was the insurer who had undertaken to cover all risks involved in the transportation of the consignment. Notwithstanding, that there was no value declared for purposes of carriage, the loss of the consignment in transit not being disputed, the claim raised by the consignee in respect of the lost consignment having been settled, the suit was filed by the insurer under an assignment or subrogation of the right to claim damages for the loss, on the ground that the limit of liability specified in Rule 22 of the Second Schedule to the CBA Act would not apply on account of the loss having occurred as a result of an act or omission on the part of the carrier or its men, as provided under Rule 25 of the Second Schedule to the CBA Act.

The case law that is cited in support of the case of the plaintiffs, includes the

decision of a learned single judge of this court in the case of Air India Vs. S.V. International, The facts of that case were almost similar to the case on hand. It was held, while negating the contention that the burden of proving willful misconduct is on the plaintiff and that it is a burden difficult to discharge and that it is not enough for the plaintiff to show that the carrier is unable to account for the loss, held thus:-

10. When the plaintiff has come to Court, the burden must initially lie on him to prove the facts on the basis of which the argument that defendant-1 has committed willful misconduct so as to be liable to pay the full amount claimed by him. There can be no gainsaying of this position in law, but it is the initial burden that the plaintiff has to discharge. If he discharges the initial burden satisfactorily, the burden shifts on the defendant particularly in view of the provisions in Rules 22(2) and 25 of the Rules.

11. Rule 22(2) reads as follows.

In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the consignor at delivery.

Rule 25 of the Rules reads as follows.

(1) The carrier shall not be entitled to avail himself of the provisions of this Schedule, which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as is in the opinion of the Court equivalent to willful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

12. The least that was reasonably expected from defendant-1 was to carry the parcels by Air and deliver the same to the consignee in the very condition they were entrusted to defendant-1 for carriage to London. He has failed to do so. All the facts that were in the possession of the plaintiff and could, in fact have been possessed by the plaintiff have been placed by him before the Court. They have been satisfactorily proved also. Therefore, it logically takes me to only one conclusion, that is, that defendant-1 has committed misconduct. Now it is to be seen whether in the opinion of this Court, this misconduct is "equivalent to willful misconduct" within the meaning of Rule 25(1) of the Rules. It would be unreasonable to expect the plaintiff, under the facts and circumstances of the case, to prove to the hilt that defendant-1 willfully committed the misconduct. Therefore, the question is whether this misconduct can be, in the opinion of this

Court, held to be equivalent to willful misconduct. It is in this context that the stand taken by defendant 1 and the facts put and proved before the Court by defendant-1 are to be considered and weighed. Defendant-1 has nowhere set out how the loss of the parcels came to occur. That shows that defendant-1 was not in a position to place those facts before the Court. I wish to make it clear at this juncture that the question whether the element of intention of defendant-1 creeps in, in understanding the word "willful" used in the context under consideration may not arise. It was a contract entered into between the plaintiff and defendant-1. The main terms of the contract were that the plaintiff was to pay charges for the carriage and defendant was to carry the parcels safely and deliver them to the consignee at London. The plaintiff has paid the charges. Defendant-1 has failed to deliver the parcels to the consignee, but on the other hand, he has lost them. Whether defendant 1 intended to lose the parcels is out of question. The fact that he has lost is, by itself misconduct and under the facts and circumstances particularly in the absence of any material placed by defendant-1 to the contrary, the Court has to reach the conclusion that the loss has been caused by defendant-1 for no reason. In my considered opinion the further conclusion that follows is that the misconduct on the part of defendant-1 is equivalent to willful misconduct. When that is so, defendant-1 is not entitled to the protection afforded to him by Rule 22(2) of the Rules.

13 In view of the foregoing reasons, this appeal fails and is dismissed with costs.

In *Indian Airlines v. Kurian Abraham*, supra, the Kerala High court has dealt with the interpretation of the phrase "willful misconduct" in the context of carriage of goods by air and the question of burden of proof.

In answering the question as to what would be misconduct that is contemplated under Rule 25(1), the court has held thus:

16. One has to remember that all that the claimant could do was to prove that he had taken all the necessary steps to entrust the cargo in the proper form to the consignee. Once the carrier receives the same, the obligation is on him to safely deliver the same. Thereafter it follows that it is for the carrier to show that they have taken all the necessary care and precaution to ensure the safety of the article undertaken by them for delivery. Viewed from this angle, it follows that the burden is on the defendants to show that they had followed the proper procedure and in spite of their best efforts, they could not prevent loss or damage.

17. The word "willful" has been referred to in *American Jurisprudence* Vol. 2d page 451 as follows:

The elements necessary to characterize an injury as wantonly or willfully inflicted are (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous

to another.

It is further stated that to constitute willful misconduct, the law deems to be the equivalent of actual knowledge of the peril to be apprehended, coupled with a conscious failure to avert injury.

18. In *Corpus Juris Secundum*, Vol. 94, "willful" and "willfully" are seen referred to as follows:

The words "willful" and "willfully" are of familiar use in every branch of the law, being commonly employed in averring or describing an act, or in denoting the quality of an act, or in describing the intent with which an act is done; and when so used the terms imply the ability to do the act described

"Willful" and "willfully" have various meanings are susceptible of different shades of meaning or degrees of intensity and are used in different senses in different connections, and generally their signification will depend on the context in which they appear, the nature of the subject to which they refer, and the evident purpose of the writer." It is further stated in page 629 as follows:

The words "willful" and "willfully" are frequently used in the same sense to denote that what was done or omitted was without just cause or justifiable excuse, or that it was committed or omitted without lawful or legal justification, and with no legal or reasonable ground for believing the act to be lawful, and the terms are sometimes used to signify that what was done was without authority.

19. In *Words and Phrases* Vol. 46 Permanent Edition willful misconduct is seen referred to as follows:

Failure to exercise ordinary care to prevent injury to a person who is actually known to be, or reasonably expected to be within the range of a dangerous act being done is usually "willful misconduct".

In *Stroud's Judicial Dictionary of Words and Phrases* Vol. 3 at page 2916 "willful misconduct" is referred to as follows:

Wrong conduct, willful in the sense of being intended, but induced by mere honest forgetfulness or genuine mistake, does not amount to "willful misconduct" - What is meant by "willful misconduct" is misconduct to which the will is a party, it is something opposed to accidental or negligent; the "mis" part of it, not the conduct, must be willful.

The Book also refers to "willful misconduct" with reference to Carriage by Air Act 1932. It is seen mentioned as follows:

In order to establish willful misconduct a plaintiff had to satisfy the court that the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding, or alternatively, that he did it quite recklessly, not caring whether he did the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers

for which and for whom he was responsible.

It can thus be seen that the words "willful misconduct" are susceptible to different shades of meaning depending upon the context in which they occur.

21. The principle of resorting to contextual interpretation has received acceptance at the hands of the Apex Court as can be seen from the decisions reported in *Rai Vimal Krishna and Others Vs. State of Bihar and Others*, , *Commissioner of Income Tax, Trivandrum Vs. M/s. Anand Theatres*, and *State of Kerala and others Vs. Koliyat Estates*, Willful misconduct has also been understood as an intentional disregard of a duty known or which should have been known, necessary to ones safety. The word willful misconduct in the present case as occurring in Rule 25 takes its colour from the context. An identical issue was considered in the decision reported in *Air India Vs. S.V. International*, which is referred to by the court below also.

The other decisions cited on behalf of the plaintiffs may not be relevant to consider the above aspect of whether there was willful misconduct on the part of the carrier in the present case on hand.

The decision of this court in *Air India v. S.V. International*, *supra*, proceeds on the following reasoning:

It would be unreasonable to expect the plaintiff, under the facts and circumstances of the case, to prove to the hilt that defendant-1 willfully committed the misconduct. Therefore, the question is whether this misconduct can be, in the opinion of this Court, held to be equivalent to willful misconduct. It is in this context that the stand taken by defendant-1 and the facts put and proved before the Court by defendant-1 are to be considered and weighed. Defendant-1 has nowhere set out how the loss of the parcels came to occur. That shows defendant-1 was not in a position to place those facts before the court. I wish to make it clear at this juncture that the question whether the element of intention of defendant-1 creeps in, in understanding the word "willful" used in the context under consideration may not arise. It was a contract entered into between the plaintiff and defendant-1. The main terms of the contract were that the plaintiff was to pay charges for the carriage and defendant-1 was to carry the parcels safely and deliver them to the consignee at London. The plaintiff has paid the charges, Defendant-1 has failed to deliver the parcels to the consignee, but on the other hand, he has lost them. Whether defendant-1 intended to loose the parcels is out of question. The fact that he has lost is, by itself misconduct and under the facts and circumstances particularly in the absence of any material placed by defendant-1 to the contrary, the Court has to reach the conclusion that the loss has been caused by defendant-1 for no reason. In my considered opinion the further conclusion that follows is that the misconduct on the part of defendant-1 is equivalent to willful misconduct. When that is so, defendant-1 is not entitled to the protection afforded to him by Rule 22(2) of the Rules.

This view has been adopted in *Indian Airlines v. Kurian Abraham*, *supra*, while

referring to the meaning ascribed to the phrase "willful misconduct" by several authorities. The ultimate view of the court in the facts of that case was as follows:

24. Coming to the case on hand, it can be seen that all that the consignor could do was to prove that he had given evidence of all matters which he could. In fact, there was no dispute regarding those aspects at all. Thereafter it was for the carrier to show that they had taken all the necessary precautions and steps to ensure the safety of the cargo and its delivery. As noticed in the decision referred to by the lower court, it may not be possible for the plaintiff to show that there was willful misconduct on the part of the carrier for, those matters are within the exclusive knowledge of the carrier. They alone will be able to say the various steps taken by them for the safety and security of the cargo. They had to show that in spite of all care and caution taken by them, the loss had occurred. In the absence of that evidence the only conclusion possible is that the carrier is guilty if willful misconduct. The defendant concerned was bound to lead evidence to show that they had taken all precautions in the matter and in the absence of that, it cannot be presumed that they had taken care of the cargo. Viewed from this angle, the court below was perfectly justified in following the decision of the Karnataka High Court and to hold that the second defendant has failed to discharge the burden cast on them.

It is apparent that the carrier had not tendered any evidence to substantiate its defence, as observed by the court.

This bench is unable to subscribe to the view and opinion expressed in *Air India v. S.V. International* for the following reasons. The view that it would be unreasonable to expect the plaintiff, under the facts and circumstances of the case, to prove to the hilt that the carrier had willfully committed the misconduct, is clearly a one-sided view. For it would be equally unreasonable to the carrier to negate the contractual terms which are very plain. In that, the carrier does not shirk its liability if the value of the consignment is declared for purposes of carriage and a supplementary charge is paid towards the same. Logically, an airline company that is required to handle large volumes of cargo is not expected to work towards losing the goods along the way. In other words, all goods would be carried with a minimum degree of care. However, an additional charge paid towards particular consignments would obviously require the carrier to place the same under a different category from the consignments which are not otherwise declared to be of a particular value. Tracking of parcels on a computer, from origin to destination, even by the consignor or consignee, is routinely possible, and it was so on the date of suit. It would be unfair to expect an airline to provide any such additional services in respect of a consignment, the value of which was not declared, for which ordinary charges were paid.

Further, the view that it was not necessary to consider the element of intention on the part of the carrier, in addressing whether there was "willful misconduct", because the very fact that the consignment was lost was "misconduct" on the part of the Carrier and such misconduct, in context, was equivalent to willful

misconduct, in the absence of any material placed by the carrier to demonstrate that the same was lost inspite of due care, is certainly not fair to a Carrier. With the advances in technology and automation the volume of cargo that is normally handled by established airlines, on a daily basis, is phenomenal. There is minimal human intervention mainly on account of the sheer scale and in the swift movement that is required. To impute willful misconduct in the event of the loss of a consignment merely on the ground that it is lost, without anything more, when the contract of carriage places the consignee on notice that the limit of liability is restricted, the consignee was aware of the risk and hence had chosen to insure the consignment under an independent contract of insurance with the insurer. The insurer seeking to recover the sum paid against a claim for the loss of the consignment in transit, cannot proceed on the presumption that there was willful misconduct on the part of the Carrier, the initial burden of proof was entirely on the plaintiff. By virtue of the ruling in *Air India v. S.V. International*, the plaintiff is not required to plead or prove the alleged willful misconduct on the part of the Carrier.

The word "misconduct" though not capable of precise definition, its reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty. It may involve moral turpitude, it must be improper or wrong behavior; unlawful behavior, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in the performance of the duty; It is arduous to capture the concept of misconduct in the strait-jacket of a definition.

The phrase "willful misconduct" would therefore require a better interpretation than the one offered in *Air India v. S.V. International*.

The word "willful" when used in statutes, connotes different concepts. In certain cases "willful" may mean "wantonly". In certain other cases, it may mean "intentionally", or "deliberately" and in other cases, it may merely mean "consciously". (See: *Madras State Wakf Board Vs. Tajmul Hussain*, willful misconduct in the transaction of business or in the discharge of duty or omitting to do something either deliberately or by reckless disregard of the fact whether the act of omission was or was not a breach of duty (See: *Bhogilal M. Davay Vs. S.R. Subramania Iyer*, .

The term "willfully" cannot be applied to a company at all. (See: *The Public Prosecutor Vs. B.V.A. Lury Company and Another*, . Therefore, in my opinion, the loss of a consignment, the value of which was not declared for purposes of carriage and in respect of which the ordinary freight charges were paid, with notice that the Carrier was limiting its liability for loss in transit of such a consignment, cannot be enlarged on a presumption that the Carrier had committed willful misconduct as it was unable to explain the loss of a consignment weighing 2.1 Kg while in transit. The first defendant is only liable to pay a sum of \$ 42, in terms of the contract, to the plaintiffs. And as there is no

agreement for payment of interest on such amount payable as damages, the plaintiffs are held entitled to interest at the rate of 6% per annum, on the said amount from the date of suit till realization.

But in view of the decision in *Air India v. S.V. International*, it is appropriate that the contrary view expressed by me be considered by a larger bench of this court. The registry shall place the same before a larger bench after an appropriate order of the honourable Chief Justice.