

(2000) 09 DEL CK 0004
In the Delhi High Court
Case No : Suit No. 2696/95

M/s. Federal Chemical Works Ltd.	Vs	APPELLANT
M/s. Nutsco (NIGERIA) LTD. and Another		RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Citation : AIR 2001 Delhi 25 : (2000) 55 DRJ 494

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Sh. J.P. Gupta, for the Appellant; Sh. M. Wadhwani, for the Respondent

Judgement

K.S. Gupta, J.—Following preliminary issue was framed on 26th July 1999:-

"Whether the suit is instituted within time."

2. Suit was filed, inter alia, alleging that plaintiff company is engaged in the business of export of medicines. Sh. M.N. Khanchandani on behalf of defendant No.1 company approached the plaintiff for purchase of Hyoscine Butyl Bromide Tablets B.P (10 mg). In regard to this medicine on or about 29th September 1992 the plaintiff sent a perform invoice bearing No. 5/92- 93 of the value of US \$ 47250. Vide letter dated 2nd November, 1992 the defendant No.1 accepted said performa invoice and asked the plaintiff to draw documents through Canara Bank, Longbow House, 14-20, Chis well Street, London, ECIY, 4SR A/c Palm Investment Ltd. In pursuance of this letter the plaintiff dispatched consignments of the said medicine through defendant No. 2 vide their Master Airway Bill No. 05693122 comprising of 4 House Airway Bill Nos. 071-RTC 184, 185, 186 and 187, all dated 4th January 1993. aid Canara Bank, Longbow House, 14-20, Chiswell Street, London, ECIY 4SR A/c Palm Investment Ltd., was shown as consignee in all the said Airway bills. The plaintiff also paid freight to defendant No. 2. It is stated that said Airway bills and other documents were sent through Bank of India to said Canara Bank branch in London for collection of the amount

of consignments covered by them. In the letter dated 9th February 1993 sent by defendant No.1 to the plaintiff although it admitted the receipt of consignments in question but it raised some frivolous objections. It is further alleged that on receipt of the letter dated 20th April 1993 from said Canara Bank by Bank of India on 3rd May 1993, it was revealed that defendant No.1 had refused to honour the documents sent for collection of amount to the former bank. Thereafter on matter being taken up by Bank of India with Reliable Cargo and Travel Pvt. Ltd, agent of defendant No. 2 in Delhi, the latter advised the former by a letter dated 28th September 1993 to lodge the claim with defendant No. 2. It is further pleaded that defendant No.2 by the letter dated 16th September 1993 informed said Reliable Cargo & Travel Pvt. Ltd that the consignments had been wrongly delivered to defendant No.1. It is claimed that defendant No. 2 in collusion with defendant No.1 unauthorisedly delivered the consignments covered by said Airway bill(s) to defendant No.1 and both of them are, Therefore, liable to pay US \$ 47250 being the value of consignments in question together with interest @ 24% p.a. It was prayed that a decree for US \$ 47300 equivalent to Rs. 15 lakhs be passed in favor of the plaintiff and against defendants Along with pendent lite and future interest @ 24% p.a.

3. Defendant No.2 contested the suit by filing written statement. It is not disputed that the plaintiff dispatched the consignments in question vide Master Airway bill No. 05693122 comprising of 4 House Airway bill Nos.071-RTC 184, 185, 186 and 187, all dated 4th January 1993 and it paid the freight as alleged. However, it is denied that consignee of the said Airway bills was Canara Bank. It is claimed that the plaintiff had modified the names of consignees as (i) Afro Drug (NIGERIA) Ltd and (ii) Nuts co (NIG) Limited, 11, Cufin Road, P.O. Box 5268 Lagos (NIGERIA) as the bank named as consignee, was in a country different from that of the country of destination. Answering defendant as such delivered the consignments to defendant No.1. It is denied that consignments were delivered by the answering defendant in collusion with defendant No.1 as alleged. It is alleged that in the letter dated 6th February 1993 the defendant No.1 confirmed that it was the consignee instead of the said bank. Answering defendant was never informed about negotiating the documents through Canara Bank, London. Liability to pay the suit amount is denied. Suit is also alleged to be barred by limitation.

4. It was contended by Sh. M. Wadhwani appearing for defendant No.2 that Rule 30 of Schedule II in Carriage by Air Act 1972 (for short "the Act") is attracted in this case and as the suit was filed beyond two years of 9th February 1993 on which date delivery of consignments in question was taken by defendant No.2, this suit filed on 14th November 1995 is barred by limitation. In support of the submission strong reliance was placed on the decision in *The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar*, . On the other hand while controverting the said submission it was contended by Sh. J.P. Gupta for plaintiff that it being a case not of destruction/ loss/damage but of unauthorised delivery of consignments in question by defendant No.2 to

defendant No.1 said Rule 30 has no applicability and question of limitation for the purpose of filing suit is to be decided with reference to the provisions of Limitation Act, 1963. Reliance was placed on the decision in M/s.Vii Sales Corporation Vs. Lufthansa German Airlines (1981) 2 Del 749.

Said Rule 30 which is material, provides as under:-

"(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court seized of the case."

Rule 18 which deals with the liability of carrier and is material, runs as under:-

"(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding subrule comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."

Identical rules are contained in Rules 29 and 18 of the first Schedule attached to the said Act.

5. It will be advantageous also to refer here the decision in East & West Stream Ship Co's case (supra) relied on behalf of defendant No.2. In that case, scope of the word "loss" in the 3rd clause of 6th paragraph of Article III in the Schedule attached to Carriage of Goods by Sea Act, 1925 came to be considered by the Supreme Court while deciding the plea of limitation taken on behalf of one of the parties to the suits. Said 3rd clause in Para 6 which is relevant, provides as follows:-

"In any event the carrier and the shipper shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered."

6. Para 17 on page 1063 of the report which is relevant, is reproduced below:-

"17. It has to be noticed that before providing in the 6th paragraph n immunity

to the carrier from "all liability in respect of loss or damage" in certain circumstances the Legislature had in the earlier paragraphs laid on the carrier the duty of making the ships seaworthy, properly manning, equipping and supplying the ship, and making the holds and all other parts of ship fit and safe for the reception, carriage and preservation of the goods; properly and carefully loading, handling, stowing, carrying, keeping and caring for and discharging the goods carried and provided that ordinarily the bill of lading should show the quantity or weight of the goods or the number of packages or pieces "Loss or damage" which paragraph 6 speaks of should, Therefore, reasonably be taken to have reference to such loss or damage which may result from the carrier not performing some or all of the duties which had been mentioned earlier. One of these duties is to discharge the goods carried in accordance with the quantity or weight or the number of packages or pieces as mentioned in the bill of lading. The shipper and the consignee of goods are more concerned with the duty of the carrier to discharge the goods in proper order and condition and in full than anything else. Indeed the other duties cast on the carriers so far as the owners of the goods are concerned, are really incidental to this duty of discharging the goods in full and in good order and condition. When in the context of the previous paragraphs of Article III the 6th paragraph seeks to provide an immunity to the carrier "from all liability in respect of loss or damage" after a certain time, it is reasonable to think that it is loss or damage to the owner of the goods, be he shipper or the consignee, which is also meant, in addition to the "loss to the goods". When the goods themselves are lost, e.g., by being jettisoned or by being destroyed by fire or by theft, there will be failure to discharge the goods in full and loss to the owner of the goods will occur. Even where the goods are not lost the carrier may fail to discharge the goods in full or not in proper order and there also loss will occur to the owner of the goods. In such a case, even though there may not have been "loss of the goods" the goods are lost to the owner. The word "loss" as used in paragraph 6 is in our opinion intended to mean and include every kind of loss to the owner of the goods - whether it is the whole of the consignment which is not delivered or part of the consignment which is not delivered and whether such non-delivery of the whole or part is due to the goods being totally lost or merely lost to the owner by such fact of non-delivery there is in our opinion "loss" within the meaning of the word as used in paragraph 6."

7. The "damage" right to claim whereof would extinguish if the suit is not brought within two years contemplated by aforesaid Rule 30, is referable to "damage" as defined in aforementioned Rule 18. Under that Rule 18 liability can be fastened on the carrier only in the event of destruction, loss of or damage to any registered luggage or goods if the occurrence which caused such damage, had taken place during carriage by air. Copy of Airway bill No. 05693122 dated 4th January 1993 referred to in para 6 of the plaint, is placed on record. Name of Canara Bank branch at 14-20, Chiswell Street, London is shown as consignee therein. Needless to repeat that according to the plaintiff consignments covered

by said Airway bill were to be delivered to defendant No.1 only on release order from the said consignee bank. Such a release order could be obtained by defendant No.1 on payment to the said bank of US \$ 47250, being the value of consignments plus other charges. It is not in dispute that delivery of consignments in question was made by defendant No.2 to defendant No.1 on 9th March 1993 without bank release order from said Canara Bank branch in London. Such an unauthorised delivery by no stretch of imagination can be termed as "damage" during the carriage by air within the meaning of aforesaid Rule 18. 8. In M/s. Vij Sales Corporation's case (supra) the plea of limitation taken by defendant in somewhat identical circumstances was negated by a learned single Judge of this court after referring to said Rule 29 in the First Schedule and Rule 30 in the Second Schedule and also Rule 18 in each of the Schedule as also the decision in East & West Steamship Co's case (supra). In para 19 of the decision on Page 757 of the report it was held:-

"Now in the present case rule 18 to the schedules to the Carriage by Air Act 1972 is not all embracing when it speaks of "destruction or loss of, or of damage to". They have been made referable to "any registered luggage or any cargo. In other words destruction, loss or damage must be to the goods and not to the air carrier or the consignee. This circumstances alone distinguishes the provisions under the Carriage by air Act 1972 from those contained in the Carriage of Goods by Sea Act 1925. As already observed above, the distinction was taken note of in para 18 of the Supreme Court decision in the case of East and West Steamship Co. (supra)."

9. It may be noticed that in Carriage of Goods by Sea Act 1925 there exists no rule similar to aforesaid Rule 18. Further, from the discussions made in Para 17, extracted above, in East & West Steamship Co's case (supra) it is manifest that it was rendered with reference to the provisions contained in Article III of the Schedule attached to that Act. For both these reasons, no help can be sought by defendant No.2 from the interpretation put to the word "loss"/"damage" occurring in said 3rd clause of 6th paragraph of Article III in East & West Steamship Co's case. I fully agree with the view taken in said para No.19 in M/s. Vij Sales Corporation's case (supra) that words "destruction or loss of or of damage to" have been made referable to "any registered luggage or any cargo" only. Thus, unauthorised delivery made by defendant No. 2 to defendant No.1 without bank release order would not be a "damage" either during the carriage by air or "destruction or loss of or of damage to" the consignments in question within the meaning of said Rules 18 and 30 so as to render this suit being barred by time as having been instituted beyond two years of said 9th February 1993. Provisions contained in Limitation Act, 1963 would be applicable and the suit filed on 14th November 1995, is thus well within limitation period. Issue is, Therefore, answered in favor of the plaintiff.