(1994) 06 KL CK 0002

In the High Court Of Kerala

Case No : A.S. No. 184 of 1987

M/s. United India Insurance Co. Ltd. — APPELLANT

Vs

Cochin Port Trust and another — RESPONDENT

Date of Decision : 27-06-1994

Acts Referred:

Contract Act, 1872 — Section 151, 152, 161
Evidence Act, 1872 — Section 106, 121
Limitation Act, 1963 — Section 10, 11, 12, 13, 14
Major Port Trusts Act, 1963 — Section 120, 121, 42, 43

Citation : (1994) 2 KLJ 882

Hon'ble Judges : K.P. Balanarayana Marar, J;K.K. Usha, J

Bench : Division Bench

Advocate : P.N. Krishnankutty Achan, for the Appellant; J.B. Koshy and M. Nazurudeea, for the Respondent

Judgement

K.K. Usha, J.—Second plaintiff in O. S. 163/82 on the file of the court of Subordinate Judge, Cochin is the appellant. The first respondent was the first plaintiff in the suit and the 2nd respondent was the defendant therein. The suit was instituted by the 1st respondent for recovery of a sum of Rs. 36,258.79 as damages from the 2nd respondent with interest and costs of the suit. The goods dispatched by the 1st respondent from Alleppey to Cochin for shipment from Cochin Port on board the Ship S. S. President Roosevelt due to arrive at Cochin on 16-11-1981 and stored in Q5 shed by the 2nd respondent, were lost in the fire that broke out in the shed on 20 11-1981. The appellant, who was originally impleaded as 2nd defendant was transposed as 2nd plaintiff on payment of the value of goods to the 1st plaintiff and obtaining assignment of the rights of the first plaintiff under letter of subrogation and power of attorney. The court below dismissed the suit on the ground that it is not maintainable in view of the provisions contained u/s. 121 of the Major Port Trusts Act and Regulation 134 of the Cochin Port and Dock Regulations, 1975. It also held that the first respondent herein suffered loss not on account of the negligence on the part of the 2nd respondent. We do not think that the provisions of Sec. 121 of the Major Port Trusts Act have any direct application in the present case. When the goods are entrusted with the Port Trust, their duty is certainly in the nature of a bailee and they are expected to take reasonable care. The 2nd respondent herein cannot claim a total exemption from the standard of care to be taken by a bailee by taking recourse to the provisions contained u/s. 121. A Division Bench of this Court had occasion to consider in Cochin Port Trust v. Associated Cotton Traders Ltd. & Others, 1983 KLT 562, the nature of the duty of the Cochin Port Trust towards the owner of the goods entrusted with the Port Trust. In the above case also, goods were destroyed in a fire which broke out in the go down of the Port Trust in which the goods were stored. After elaborately considering the principles to be applied in such circumstances to assess the liability of the Port Trust, this Court held that the Port Trust which is in the position of a bailee has a duty to take all proper measures for protection of the goods. When goods entrusted to a bailee are lost or damaged, there is initial presumption of negligence or failure to take reasonable care of the goods on the part of the bailee. Onus of proof is on the bailee that he had taken necessary precaution and care required under law. When fire breaks out in the premises under the control of the bailee, as between the parties to the case, bailee alone will be in a position to explain the cause of the fire. It is a fact specially within his knowledge and therefore u/s. 106 of the Evidence Act, burden of proving that fact will be upon him. We are in full agreement with the above view taken by the learned Judges regarding the nature of the responsibility of the 2nd respondent towards the goods entrusted with it by the 1st respondent. Of course, no reliance was placed in the above case on the provisions contained u/s. 121 of the Major Port Trusts Act which reads as follows :

121, Protection of acts done in good faith:- No suit or other legal proceeding shall lie against a Board or any member or employees thereof in respect of anything which is in good faith done or intended to be done under this Act or any rule or regulation made thereunder, or for any damage sustained by any vessel in consequence of any defect in any of the moorings, hawsers or other things belonging to or under the control of the Board.

The present suit is for claiming compensation for the damage sustained by the plaintiff when goods entrusted with the Port were destroyed in fire. The damage is sustained due to the fire which broke out in Q5 shed and not due to any action by the Board, its member or employee taken in good faith etc. Therefore, Sec. 121 has no application in the present case. On the other hand if the damage had occurred while attempting to protect the goods from fire, the situation may be covered by Sec. 121 if other conditions are satisfied.

2. The only evidence adduced on the side of the 2nd respondent in support of its case is the oral testimony of DW 1, Deputy Warf Superintendent. The trial court itself has noted that DW 1 has no direct knowledge about the fire incident. In this context, it is advantageous to refer to another decision of a Division Bench of this

Court in A. S. 1/85 which arose from a suit filed claiming damages due to the very same fire incident, namely, the one which happened on 20-11-81. A Division Bench of this Court, after considering the evidence in that case, which is more or less the same that is available in the present case, came to the conclusion that the Port Trust had not discharged its burden in proving that it had taken reasonable care and caution expected of a bailee of the goods. The fact that no officer who has direct knowledge about the fire, was not examined in the case, has been specifically noted and remarked upon by this Court. The very same position is available in the present case also. The evidence adduced by the 2nd respondent in this case, namely, oral evidence of DW1, who has no direct knowledge about the fire incident, does not place the 2nd respondent in a better position than what it had in the above mentioned judgment.

3. On a consideration of the evidence in this case, we are satisfied that the 2nd respondent had not discharged its burden to prove that it had taken reasonable precautions to obviate the damage sustained to the goods entrusted to it by the 1st respondent.

4. Next question to be considered is whether the provisions contained under Regulation 134 of Cochin Port and Dock Regulations, 1975 would protect the 2nd respondent from any liability caused by the fire in the light of the provisions contained under Sec. 43 of the Major Port Trusts Act. Sec. 43 of the Major Port Trusts Act reads as follows:

43. Responsibility of Board for loss of goods:

(1) Subject to the provisions of this Act the responsibility of any Board for the loss destruction or deterioration of goods of which it has taken charge shall:

(i) in the case of goods received for carriage by railway, be governed by the provisions of the Indian Railways Act 1890; and

(ii) in other cases, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 omitting the words "in the absence of any special contract" in Section 152 of the Act. Provided that no responsibility under this Section shall attach to the Board (a) until a receipt mentioned in sub-section (2) of Section 42 is given by the Board and (b) after the expiry of such period as may be prescribed by regulations from the date of taking charge of such goods by the Board.

(2). A Board shall not be in any way responsible for the loss; destruction or deterioration of or damage to, goods of which it has taken charge unless notice of such loss or damage has been given within such period as may be prescribed by regulations made in this behalf from the date of taking charge of such goods by the Board under sub-section (2) of Section 42.

The contention raised is that since no receipt as mentioned in sub section (2) of Sec. 42 was given by the 2nd respondent, no liability accrued on the 2nd respondent as a bailee of the goods when the goods were destroyed in the fire on 20-11-1981. We find no merit in this contention also. Sub-sec. (2) of Sec. 42 provides that a Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify. In the present case, the 2nd respondent has admitted that it has taken charge of the goods from the first respondent for the purpose of shipping. DWI had admitted that the plaintiff''s goods were stored in Q5 shed which is under the control of the defendant. In the written statement filed by the first defendant, there is no contention taken that it had not issued a receipt as contemplated by ss. (2) of Sec. 42. The only contention is that the claim put forward by the plaintiff was barred u/s. 43 of the Major Port Trusts Act and as per the provisions of the Dock Regulations, 1975. Ext. A2 is the document produced by the plaintiff as the receipt issued by the defendant as contemplated by ss. (2) of Sec. 42. The above document which has a title ''export application'' contains a seal of the traffic department of Cochin Port Trust dt. 10-11-1981 with the endorsement "received". The 2nd respondent has no case that receipt contemplated under ss. (2) of Sec. 42 has to be issued in a different form. Therefore, it has to be taken that the 2nd respondent had taken charge of the goods for the purpose of performing export by shipping through s.s. ''President Roosevelt'' it had given a receipt regarding entrustment of the goods and thus all the conditions contemplated u/s. 43 of the Major Port Trusts Act are satisfied in this case. We are also of the view that even in the absence of a receipt in the prescribed form, if entrustment is admitted by the 2nd respondent, it cannot escape from the liability of a bailee under the general law.

5. Regulation 134 of the Port Trust and Dock Regulations, 1975 reads as follows:

134. Board not responsible for loss or damage to goods under certain circumstances:- The Board shall not be responsible for loss or damage to goods caused by fire, water used in extinguishing fire, vermin, other unavoidable causes or circumstances beyond their control.

We are not persuaded to hold that under the umbrella of the provisions contained in the above Regulation, the 2nd respondent can escape from the liability of a bailee in case it has not taken reasonable care and caution expected of a bailee. Another Division Bench of this Court which decided A S 1/85 relating to the same fire accident has also taken the view that Regulation 134 would not, by itself, discharge the Port Trust from its liability as a bailee. It was held that the above Regulation can be pressed into service. Only if the Port trust can establish that its officers and servants exercised adequate care and attention in relation to the safety of the goods entrusted to them. Since we have already found that the 2nd respondent has failed to establish that it has taken reasonable care and caution in protecting the goods entrusted with it, we find that it cannot escape liability relying on the provisions contained under Regulation 134.

6. The only other question to be considered is whether the suit is barred by limitation in view of the provisions contained u/s. 120 of the Major Port Trusts

Act, which reads as follows:

120. Limitation of proceedings in respect of things done under the Act. No suit, or other proceeding shall be commenced against a Board or any member or employee thereof for anything done, or purporting to have been done, in pursuance of this Act until the expiration of one month after notice in writing has been given to the Board or him stating the cause of action, or after six months after the accrual of the cause of action.

The trial court has held that the first plaintiff had issued a notice and the suit was filed within the period of seven months and therefore the suit is not barred as against the first plaintiff. Even though a contention was put forward by the 2nd respondent in this Court that the suit is barred even against the first plaintiff, since it was filed beyond the six months and that the period of one month''s notice cannot be taken into consideration for computing the period of limitation, it was submitted at the Bar that the above point is covered against the 2nd respondent in the judgment reported in 1983 KLT 562 supra. A Bench of this Court has held in the above mentioned judgment that since there is no provision expressly excluding the applicability of Sections 4 to 24 of the Limitation Act, 1963 in computing the period of six months limitation provided under Sec.120 of the Major Port Trusts Act, the period of notice has to be excluded. We are in agreement with the above view taken by the teamed Judges. We find that the trial court has committed an error in coming to the conclusion that as against the 2nd plaintiff, the claim is barred by limitation. The 2nd plaintiff on the basis of a letter of subrogation and power of attorney executed by 1st plaintiff, stepped into the shoes of the first plaintiff and is entitled to continue the suit which was already filed within the period of limitation. Since the trial court had dismissed the suit on the ground of limitation and maintainability in view of Sec. 121 and Regulation 134 and also on the ground of lack of negligence on the part of the defendant, it had not assessed the compensation entitled by the plaintiff for the loss sustained and also the claim for interest. We hold that the suit is not barred by limitation both against the first and second plaintiffs. It is maintainable as being not hit by the provisions contained under Sections 43 and 121 of Major Port Trusts Act or Regulation 134 of Cochin Port and Dock Regulations, 1975 and that the 2nd respondent is liable for the loss sustained by the first respondent in the fire which broke out on 20-11-1981.

In the result, the judgment of the trial court in set aside and the appeal stands allowed with costs. The case is remanded to the principal Subordinate Judge''s Court, Cochin for assessing the quantum of compensation due to the plaintiff''s from the defendant and also the interest liable to be paid by the defendant. Since the suit is of the year 1982, the trial court is directed to dispose of the same within a period of three months from the date of receipt of the records from this Court. Parties are directed to appear before the court below on 20th July 1994.

