

(2012) 01 MAD CK 0014
In the Madras High Court
Case No : A.S. NO. 230 of 2009

M/s. VRL Logistics Ltd.

APPELLANT

Vs

M/s. Glenmark Pharmaceuticals Ltd., Mumbai and Another

RESPONDENT

Date of Decision : 09-01-2012

Acts Referred:

Carriers Act, 1865 — Section 9

Citation : AIR 2012 Mad 160

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : L. Rajasekar, for the Appellant; N. Venkataraman for M/s. Nageswaran and Narchania, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This appeal is focused at the instance of the defendant as against the judgment and decree dated 31-8-2005 passed in

O.S. No. 4198 of 2001 by the learned VI Additional Judge, City Civil Court, Chennai, which was filed by the plaintiffs for recovery of money.

For convenience sake, the parties are referred to here under according to their litigative status and ranking before the trial Court. Broadly but

briefly, narratively but precisely, the relevant facts, which are absolutely necessary and germane for the disposal of this appeal would run thus :

(a) The respondents/plaintiffs herein filed the suit seeking the following reliefs:

To pass a decree and judgment against the defendants holding them liable and to direct them to pay the second plaintiff herein.

(a) a sum of Rs. 6,97,026/- with interest at the rate of 18% per annum from the date herein until payment in full, being a commercial cause.

(b) for costs of the suit;

(extracted as such)

setting out the facts to the effect that the first plaintiff entrusted pharmaceutical goods to the defendants, who is a common carrier governed by the

Carriers Act, 1865. While so, there was admittedly short delivery of the goods, which was explained by the defendant as though due to theft, such

shortage ensued. The first plaintiff claimed the insurance amount from the second plaintiff, who happened to be the insurer of first plaintiff the

insured relating to the said goods. P2 got stepped into the position of P1 on the strength of the Letter of Subrogation and Special Power of

Attorney executed by P1 in favour of P2. Both the plaintiffs to avoid technical objections filed the suit seeking the aforesaid reliefs.

(b) The defendants filed the written statement resisting the suit on the main ground that the defendant was not guilty of negligence as the shortage

resulted due to pilferage and to that effect, First Information Report was lodged with the police; but after investigation, the matter was referred as

"not traceable". The driver of the vehicle, while the said lorry carrying the goods was in stationary condition, deputed one Ramesh to see that the

lorry was guarded. However, beyond the control of the defendant, there was pilferage of part of the goods.

(c) The trial Court framed the relevant issues.

(d) During trial, on the side of the plaintiffs, one Jotheeswaran was examined as P. W. 1 and Exs. A1 to A27 were got marked. On the side of the

defendant, one N. Sethu was examined as DW1 and Exs. B1 to B3 were marked.

(e) Ultimately, the trial Court decreed the suit.

2. Being aggrieved by and dissatisfied with the same, the defendant has preferred. this appeal on various grounds, inter alia thus :

(i) The lower Court failed to take into consideration that there was no negligence on the part of the defendant.

(ii) Exs. B1 and B3 were not challenged by the plaintiffs.

(iii) The Certificate issued by the defendant relating to shortage was one without prejudice and it cannot be used as against the defendant.

3. The Learned Counsel for the defendant, placing reliance on the grounds of appeal would pilot his arguments thus :

(i) Even though law enjoins the defendant to prove that there was no negligence on its part, yet, Exs. B1 and B3 were not challenged by the

plaintiffs. It is therefore a clear case, where the defendant was helpless and the defendant has not dished out any false theory for the purpose of wriggling out of its alleged liability.

(ii) The lorry was in stationary position and the goods therein were kept under lock and key. There was one Ramesh, in-charge of the lorry in the absence of the driver and in such a case, the defendant cannot be mulcted with liability by pointing out that there was negligence.

Accordingly, the appellant/defendant would pray for setting aside the judgment and decree of the trial Court and for dismissing the original suit.

4. Per contra, in a bid to torpedo and pulverise, shoot down and mincemeat the arguments as put forth and set forth by the Learned Counsel for

the appellant /defendant, the Learned Counsel for the respondent/plaintiffs would develop his arguments thus :

(a) The defendant, indubitably and indisputably, as a common carrier was bound to deliver the goods properly to the consignee; but, in this case,

there was admittedly shortage of delivery for which the defendant's plea that it was not responsible, cannot be countenanced and upheld because a

common carrier should see that the goods entrusted to it are not pilfered or thieved by miscreants.

(b) It is not the case of dacoity or robbery; but it is a case of theft. While so. the Court below appropriately and appositely, legally and properly

analysed the evidence and decreed the suit, warranting no interference in this appeal.

5. The points for consideration are as under :

1. Whether the trial Court was justified in holding that there was negligence on the part of the defendant in carrying the goods" and allowing a part

of it to be thieved away en route to the destination?

(ii) Whether there is any perversity or illegality in the judgment of the trial Court?

6. I would like to fumigate my mind to the decision of this Court reported in 2004(4) CTC 273 (Patel Roadways Ltd. (formerly Patel Roadways

Private Ltd.) No. 100, Sherif Devji Street, Bombay 400 35 v. Seshasayee Industries Ltd., Vadalur 607 303 and another) cited on the side of the

plaintiff. An excerpt from it would run thus :

15. Section 9 of the Act reads, ""In any suit brought against a common carrier for the loss, damage or non-delivery of goods including container,

pallets or similar article of transport used to consolidate goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that

such loss, damage or non-delivery was owing to the negligence or criminal Act of the carrier, his servants or agents,

thereby indicating that the plaintiffs are relieved from proving that such damage had occurred, owing to the negligence or criminal act of the Carrier,

provided the defendants Roadways comes within the meaning of ""common carrier"", attracting the provisions of the Carriers Act, 1865. If the

defendant/appellant is not a common carrier, then the benefit and protection given to the plaintiffs u/s 9 of the Act, may not be applicable. In this

view alone, a defence had been raised, that the defendant /appellant is not a common carrier and in the absence of proof of negligence or criminal

act of the carrier, the claim is not sustainable.

23. The submission of the Learned Counsel for the defendant/appellant, that the goods were carried at owner's risk also will not relieve the

defendant, from paying the amount or extinguishing the liability. A common carrier is liable to the owner, for loss or damages, to any property,

delivered to such carrier, to be carried, whether such loss or damage had arisen from the negligence of carrier or any of his servants. The term "at

owner's risk" used in the goods receipt only should mean, if damages caused to the goods, beyond the control of the carrier, such as vis major or

act of alien country, giving relief, not otherwise. Thus, irrespective of the fact, that there is a clause in the document, that the goods are carried at

owner's risk, will not disentitle the plaintiffs from claiming the damage, or will not relieve the common carrier, against Section 9 of the Act. Useful

reference may be made to the following decisions as pointed out by the Learned Counsel for the plaintiffs.

24. In Hussainbhai Mulla Fida Hussain Vs. Motilal Nathulal and Another, a Division Bench of the Bombay High Court has held :

The liability of a common carrier arises from the public employment in which he is engaged and the determination of common, carrier depends

upon whether the transaction, was a casual nature or as a result of public employment. The test to determine whether, a person is a common

carrier or not is what, he publicly professes. The public profession may be made apparent by a public notification or by actually indiscriminately

carrying all goods. Such profession may be limited to transport of particular kinds of goods and/or may be limited to one particular route and/ or to

particular places. The liability to carry the goods arises by virtue of his profession as a public carrier under the common law.

In the above cited case, considering the provisions of the Motor Vehicles Act also, the Division Bench has come to the conclusion, that the liability

of the common carrier arises from the public employment, in which it is engaged. In this case, the defendant/appellant, publicly professes to

undertake, for hire, transport of all such goods as are entrusted to it, even as admitted by DW1. It is not the case of DW1 that the company had

limited class of goods or certain kind of persons. In fact, it agreed to carry for whosoever wants to engage the Roadways, though it may choose its

customer and would dictate the terms, under which it would enter into contract with them. In the absence of any such contract in this case, the

defendant Roadways being the common carrier, engaged in road transport, is liable for loss of goods damaged at the time of the transport or at the

time of the accident, as the case may be. Though a feeble attempt was made to say, that the accident occurred through the act of God, it cannot be

so. The driver of the vehicle, while parking the same by roadside, had not taken proper care and the result was the over turn of the vehicle causing

damage. The careless act of the servant of the appellant, cannot be termed as an act of God, so as to give relief, to the appellant.

A mere poring over and perusal of the aforesaid decision would unambiguously and unequivocally, highlight and spotlight, display and demonstrate

that the defendant, who is a public carrier entrusted with the goods should necessarily deliver the goods in proper shape and size without any short

delivery. It cannot also take shelter by contending that there was pilferage etc.

7. The First Information Report would read that one Ramesh was in-charge of the vehicle and that the vehicle was not kept unattended at any

point of time; while so, the burden of proof was on the defendant to examine the said Ramesh or the driver concerned. Neither the Investigating

Officer nor the driver or the Ramesh was examined so as to buttress and fortify the contention of the defendant.

8. I harp back to the maxims--

(i) Affirmations est probate (He who affirms must prove)

(ii) Affirmanti non neganti incumbit probatio :

The burden of proof lies upon him who asserts and not upon him who denies.

When the burden of proof is on the defendant as per law to prove that there was no negligence on its part, then it ought to have examined all the

three persons, viz., the Investigating Officer, the driver and the said Ramesh; but, it had not chosen to do so. Hence, the Court cannot assume or

presume anything in favour of the defendant. Mere marking of a document is different from proving the contents of the document and no more

explanation in this regard is required.

9. My mind is reminiscent and redolent of the following decisions of the Hon'ble Apex Court. Certain excerpts from those precedents would run

thus :

(i) Shalimar Chemical Works Ltd. Vs. Surendra Oil and Dal Mills (Refineries) and Others,). Certain excerpts from it would run thus :

10....."An objection to the admissibility of the document can be raised before such endorsement is made and the Court is obliged to form its

opinion would depend, the document being endorsed, admitted or not admitted in evidence. In support of the submission he relied upon a decision

of this Court in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, where it was observed as follows :

(SCC p. 764, para 20)

20.....The objections as to admissibility of documents in evidence may be classified into two classes : (i) an objection that the document which is

sought to be proved is itself is inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence

but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been

marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or

revision. In the latter case, the objection should be taken, when the evidence is tendered and once the document has been admitted in evidence

and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is

irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair

play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior Court.

(Emphasis in original).

15. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial Court should not have ""marked"" as exhibits the xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.

2. AIR 1971 Supreme Court 1865 (Sait Tarajee Khimchand and others v. Yelamarti Satyam and others).

15. The plaintiffs wanted to rely on Exhibits A-12 and A-13. the day book and the ledger respectively. The plaintiffs did not prove these books.

There is no reference to these books in the judgments. The mere marking of an exhibit does not dispense with the proof of documents. It is

common place to say that the negative cannot be proved. The proof of the plaintiffs' books of account became important because the plaintiffs'

accounts were impeached and falsified by the defendants' case of larger payments than those admitted by the plaintiffs. The irresistible inference

arises that the plaintiffs books would not have supported the plaintiffs.

3. P.C. Purushothama Reddiar Vs. S. Perumal,

19. It was next urged that even if the reports in question are admissible we cannot look into the contents of those documents. This contention is

unacceptable. Once a document is properly admitted, the contents, of that document are also admitted in evidence though those contents may not

be conclusive evidence.

(Emphasis supplied)

As such, it is clear that the appellant/defendant cannot try to gain any advantage by contending that Exs. B1 and B3 were marked without any

objection and that the plaintiffs cannot now challenge them. No doubt, Exs. B1 and B3 may be documents worthy of being marked without any

objection but that it does not mean that the contents should be taken as one proved by the defendant. Hence, in that view of the matter, it is clear

that the defendant's liability subsists and it cannot try to wriggle out of its liability by taking one plea or other. The trial Court *au fait* with law and

au courant with facts dealt with the matter and decided the *lis*, warranting no interference in this appeal.

10. Accordingly, substantial question of law No. 1 is answered to the effect that the trial court was justified in holding that there was negligence on

the part of the defendant in carrying the goods and allowing a part of it to be thieved away en route to the destination.

11. The substantial question of law No. 2 is answered to the effect that there is no perversity or illegality in the judgment of the trial Court. In the

result, this appeal shall stand dismissed. However, there shall be no order as to costs.