
(2010) 11 DEL CK 0105
In the Delhi High Court
Case No : CS (OS) No. 1468 of 2001

National Insurance Co. Ltd. and Another	APPELLANT
Vs	
Mukesh Tempo Service (Carrier)	RESPONDENT

Date of Decision : 23-11-2010

Acts Referred:

Carriers Act, 1865 — Section 10, 3, 8, 9
Evidence Act, 1872 — Section 57, 85

Citation : (2011) 1 AD 294 : (2011) 1 ILR Delhi 801 : (2011) 161 PLR 36

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : L.G. Tyagi, for the Appellant; Ajit Warriar and Sandeep Grover, for the Respondent

Final Decision : Allowed

Judgement

V.K. Jain, J.—This is a suit for recovery of Rs. 31,06,425/-. Plaintiff No. 1 is an Insurance Company registered under Companies Act. The suit has been instituted and the plaint is signed and verified by its Manager Mr D.P. Ghosh, who is alleged to be holding a Power of Attorney from plaintiff No. 1 in this regard. Plaintiff No. 2 is also a company and it is alleged that it has authorized plaintiff No. 1 to file the suit on its behalf. Plaintiff No. 2 booked 13 packets containing 30,000 pieces of I Cs and 42 packets containing 1134000 capacitors with the defendant for transportation from IGI Airport, New Delhi to the factory premises of plaintiff No. 2. The consignment however was not delivered by the defendant to plaintiff No. 2. Since the consignment was insured with plaintiff No. 1, investigators were appointed to carry out investigation and they reported loss of the consignment. Plaintiff No. 1 settled the claim of plaintiff No. 2 on payment of Rs. 31,06,425/-. A Letter of Subrogation was executed by plaintiff No. 2 in favour of plaintiff No. 1 whereby plaintiff No. 1 became entitled to recover the aforesaid amount from the defendant. The plaintiffs have accordingly claimed the amount of Rs. 31,06,425/- from the defendant.

2. The defendant has contested this suit and has taken a preliminary objection that the suit is barred for non-compliance of Section 10 of Carriers Act, 1865. It has also been alleged in the written statement that the subrogation by plaintiff No. 2 in favour of plaintiff No. 1 is not valid and legally enforceable. It has also been alleged that the suit is not properly valued for the purpose of Court fee and jurisdiction. It has further been alleged that in view of the provisions contained in Section 3 of Carriers Act, the suit against the defendant is not maintainable since value of the goods were not disclosed by plaintiff No. 2 to the defendant while booking the goods for transportation. On merits, it has been alleged that when the goods of the plaintiffs were being transported in tempo No. DL-1L-B-0994 on 1st July 1998, some robbers travelling in a car stopped the tempo near Gopinath Bazar, New Delhi, represented themselves to be police officials and took the keys of the vehicle from the driver on the pretext that they wanted to take the tempo to the Police Station. The robbers, however, took the tempo to some unknown place and abandoned it there after taking away all the goods. FIR No. 242/1998 in this regard was lodged at Police Station, Delhi Cantt on 1st July 1998. It has also been claimed that there was no negligence on the part of the defendant and the acts of robbery being beyond its control, it cannot be made liable for the loss.

3. The following issues were framed on the pleadings of the parties:

(i) Whether the suit is barred for non- compliance of Section 10 of the Carriers Act, 1865? OPD

(ii) Whether the purported subrogation by the plaintiff No. 2 in favour of plaintiff No. 1 is a valid and legally enforceable subrogation? OPP

(iii) Whether the suit is correctly valued for the purposes of court fees and jurisdiction? OPP

(iv) Whether the present suit is maintainable against the defendant? OPP

(v) Whether the plaintiff is entitled to any relief? OPP

4. The plaintiffs have examined only one witness Mr A.K. Goel in support of their case. No witness has been examined by the defendant.

ISSUE No. 3

5. This is a suit for recovery of money and ad valorem Court fee has been paid by the plaintiffs on the amount claimed by them. The issue is decided against the defendant and in favour of the plaintiff.

ISSUE No. 1

6. Section 10 of Carriers Act, provides that no suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

7. The goods in question were admittedly booked by plaintiff No. 2 with the defendant on 1st July 1998. Ex. PW 1/3 is the letter written by plaintiff No. 2 to the defendant on 3rd July 1998. Vide this letter a claim was lodged with the defendant for Rs1Lac in respect of loss of 1,40,000 pieces of Ceramic Capacitors. The letter also refers to tempo No. DL-1L-B-0994. It also contains reference to Airway Bill No. 618103565222. Ex. PW 1/4 is the letter dated 3rd July 1998 sent by plaintiff No. 2 to the defendant lodging claim for Rs30Lacs on account of loss of 30,000 pieces of I Cs and 11,34,000 pieces of Electrolitic Capacitors. There is reference to tempo No. DL-1L-B-0994 and Airway Bill No. 6180040284 and 21728833803H in this letter. Ex. P-2 is the letter dated 29th July 1998 written by the defendant to plaintiff No. 2. This is an admitted document, the same having been admitted on 16th October 2003. Vide this letter, the defendant acknowledged receipt of the letters in which plaintiff No. 2 had claimed Rs. 1Lac and Rs. 30,000/-, respectively for the loss of the goods, which were transported in vehicle No. DL-1L-B-0994. Obviously, the reference is to the letters of plaintiff No. 2 Ex. PW1/3 and PW1/4. The notice envisaged in Section 10 of Carriers Act is a notice whereby the carrier is informed of the loss or injury to the goods and the object of the notice is to give an opportunity to the carrier to make amendments for the occurrence of the loss and settle the claim of the consigner or owner of the goods. There is no particular form of notice prescribed in the Act and, therefore, it would be sufficient compliance of the requirement of the Section if the carrier is informed about the loss or injury to the goods. In any case, Ex. PW1/3 and PW1/4 meet the requirement of law in this regard. The issue is decided against the defendant and in favour of the plaintiffs.

ISSUE No. 4

8. During the course of arguments, it was contended by the learned Counsel for the defendant that in view of the provisions contained in Section 3 of the Carriers Act, the liability of the carrier is limited to Rs. 100/- since the value and description of the goods were not disclosed to the defendant, at the time the goods were sent for transportation. Section 3 of the Act provides as under:

Carriers not to be liable for loss of certain goods above one hundred rupees in value unless delivered as such.- No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the Schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.

9. A bare perusal of this Section would show that it applies to those goods which are described in the schedule to the Act. I have perused the schedule to Carriers Act, 1865. Neither the Capacitors nor the I Cs are included amongst the goods described in the schedule. The learned Counsel for the defendant could not point out any entry in the schedule which covers either Capacitors or I Cs. Therefore, Section 3 of the Act has no application to the consignments which were booked

by plaintiff No. 2 with the defendant.

10. The main plea taken by the defendant is that since the goods were stolen while they were being transported in a tempo, there was no negligence on its part and consequently, it is not liable to compensate the plaintiffs for the loss of the goods.

In *Patel Roadways Limited v. Birla Yamaha Ltd.* AIR 2000 SC 1461, Supreme Court held that the liability of a carrier in India is like that of an insurer and is an absolute liability subject to an Act of God and a special contract which the carrier may choose to enter with a customer. In this regard, the Court referred to the provisions of Section 9 of the Act, which specifically provides that in case of claim of damage or loss to or deterioration of goods entrusted to a carrier, it is not necessary for the plaintiff to establish negligence. It was further held that even assuming that the general principle in cases of tortious liability is that of the party who alleges negligence against the other must prove the same, the said principle has no application to cover the case under the Carriers Act.

11. In the case before this Court no special contract between plaintiff No. 2 and the defendant has even been alleged. Assuming that the goods entrusted to the defendant for transportation were stolen while being transported to the premises of plaintiff No. 2, a loss to the plaintiffs on account of theft of the goods cannot be considered as an Act of God. In *South Eastern Carriers (P) Ltd. Vs. The Oriental Fire and General Insurance Co. Ltd. and Another*, , the plaintiffs had chartered a truck for carrier of goods. The truck met with an accident. It was claimed by the carrier that there was no negligence or carelessness on the part of the driver and that the accident had occurred only due to unforeseen and inevitable reasons. Noticing that u/s 8 of Carriers Act the liability of a common carrier is absolute except for Act of God and no evidence had been produced by the carrier to show that the accident had occurred due to Act of God, it was held that the carrier was answerable for the loss of goods even when the loss is not caused by negligence or for want of care on its part. It was held that the only exceptions recognized by the Act are the Act of God and of States enemies or a special contract that the carrier may choose to enter into with the customer. In *Oriental Insurance Co. Vs. Mukesh and Co. and Another*, , the goods entrusted to the carrier were gutted by fire during transport. The cause of fire was attributed to sparks emitted at the time of tightening of consignment by nylon ropes at the octroi post. It was held by a Division Bench of High Court that if the fire broke out due to some unknown cause or due to the negligence of coolies, the transporter as the common carrier u/s 8 of the Carrier Act, was liable to pay for the loss of the damage to the consignee. In any case, driver of the vehicle in which the goods booked by plaintiff No. 2 were neither being transported nor any other witness has been produced to prove the alleged theft. Hence, even the alleged theft of the goods does not stand established. The issue is decided against the defendant.

Issues No. 2 and 5

12. These issues are inter-connected and can be conveniently decided together. "Exhibits PW-1/6 and PW-1/7? are the Letters of Subrogation purporting to be executed by plaintiff No. 2, Calcom Electronics Ltd. in favour of plaintiff No. 1 National Insurance Company Ltd. Vide these documents, plaintiff No. 2, on receipt of Rs. 12,50,000/- from plaintiff No. 1 in respect of loss/damage to it under Policy No. 420602/175152/31.03.98 assigned, transferred and abandoned all its rights, title and interest in respect of the above mentioned policy. It also granted full power to plaintiff No. 1 to use all lawful ways and means to recover the damages. Plaintiff No. 1 was also authorized to sue in the name of plaintiff No. 2 in any action or proceedings that it might bring in its own name or in the name of plaintiff No. 2 in relation to the matter assigned, transferred and abandoned under these documents. It also agreed that any money collected from any person shall be the property of plaintiff No. 1 and if the same is received by plaintiff No. 2, it will be made over to plaintiff No. 1. These documents have been proved by PW-1, Shri A.K. Goel, Assistant Manager of plaintiff No. 1. The authenticity of these documents which have otherwise been attested by a Notary Public in New Delhi has been assailed by the defendant on the ground that the policy number mentioned in these documents is different from the policy number mentioned in the receipt "Exhibit PW-1/11 and also on the ground that according to PW-1 the Letter of Subrogation was executed in Rohtak, whereas they have been attested at New Delhi. I, however, find no merit in the contention. PW-1 did not have any personal knowledge as to the place where these documents were executed. He stated that he presumed that it must have been executed in the office of the plaintiff-Company in Rohtak, from where the policy had been taken. However, this presumption on the part of PW-1 cannot be preferred to the documents themselves. Plaintiff No. 2 is a Company based in Delhi. The stamp papers on which the documents have been prepared were purchased from a stamp vendor in Delhi, as is evident from the stamp of the stamp vendor on the back side of the documents. The documents have been attested by a witness Mr. A.K. Dixit, who has given his address as B-23, Wazirpur Industrial Area, Delhi. They have been attested by a Notary Public at New Delhi. There is no indication in the documents that they were executed at Rohtak, though they are addressed to Rohtak Branch of National Insurance Company Ltd. Hence, there is no merit in the contention that the documents were executed at Rohtak and attested at New Delhi.

"Exhibits PW-1/8 and PW-1/9? are the other two Letters of Subrogation purporting to be executed by plaintiff No. 2 in favour of plaintiff No. 1 in respect of Policy No. 420602/21/99/96/00020/11-06-96. These documents also have been attested by a Notary Public at New Delhi. They also have been signed by Mr. A.K. Dixit who has signed `Exhibit PW-1/6 and PW-1/7? as a witness. The stamp paper for these documents have also been purchased from a stamp vendor in Delhi as is evident from the stamp of the stamp vendor on the back side of these documents.

As regards the alleged discrepancy in the policy number, a bare perusal of the

receipt `Exhibit PW -1/11 would show that the number 420602/21/99/0005/98 mentioned in this document is claim number and not the policy number. Therefore, there is no contradiction in the receipt and the Letters of Subrogation as regards the number of the policy to which these documents pertain.

13. In view of the Letters of Subrogation "Exhibits PW-1/6 to PW-1/9?", executed by plaintiff No. 2 in favour of plaintiff No. 1, it was competent for plaintiff No. 1 to file this suit in the joint name of National Insurance Company Ltd. and Calcom Electronics Ltd.

14. "Exhibit PW-1/10" is the Power of Attorney purporting to be executed by plaintiff No. 2, Calcom Electronics Ltd. in favour of plaintiff No. 1, National Insurance Company Ltd. Vide this document, plaintiff No. 1, was authorized to present any application before any authority or any person concerned for the claim arising under the policy mentioned in the document. Plaintiff No. 1 was also authorized to file suit in Court of law against any concerned person for recovery of money for the claim on behalf of plaintiff No. 2 and give a valid discharge and an effectual receipt. This document has been attested by a Notary Public at New Delhi on 6th March, 1999.

15. Since the Power of Attorney Ex. PW-1/10, purporting to be executed by plaintiff No. 2 in favour of plaintiff No. 1 has been attested by a Public Notary, there is a statutory presumption u/s 85 of Evidence Act that the Power of Attorney was executed by the person by whom it purports to have been executed and the person who executed the power of attorney was fully competent in this regard. In *Jugraj Singh and Another Vs. Jaswant Singh and Others*, , the Power of Attorney attested by a Public Notary was disputed on the ground that it did not show on its face that the Notary had satisfied himself about the identity of the executant. Supreme Court held that there was a presumption of regularity of official acts and that the Notary must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. In *Rajesh Wadhwa v. Sushma Govil*, AIR 1989, Delhi 144, it was contended before this Court that till it is proved that the person who signed the said power of attorney was duly appointed attorney, the court cannot draw a presumption u/s 57 and 85 of the Evidence Act. Repelling the contention, it was held by this Court that the very purpose of drawing presumption under Sections 57 and 85 of the Evidence Act would be nullified if proof is to be had from the foreign country whether a particular person who had attested the document as a Notary Public of that country is in fact a duly appointed Notary or not. When a seal of the Notary is put on the document, Section 57 of the Evidence Act comes into play and a presumption can be raised regarding the genuineness of the seal of the said Notary, meaning thereby that the said document is presumed to have been attested by a competent Notary of that country. In *Punjab National Bank Vs. Khazan Singh and Others*, , the Power of Attorney in favour of a bank, which had been duly attested, was rejected by the learned District Judge on the ground that the presumption u/s 85 of Evidence Act was available to a particular class of

Power of Attorneys described in the section, which was confined to its execution and authenticity alone. The High Court, however, rejected the view taken by the learned District Judge holding that absence of proof of resolution authorizing the executant to execute the Power of Attorney could not be sustained and a presumption in favour of the attorney would arise u/s 85 Act. Hence, in this case also the Court is required to draw the requisite statutory presumption that the power of attorney Ex. PW-1/10 was executed by plaintiff No. 2 in favour of plaintiff No. 1 and that the person who executed the Power of Attorney on behalf of plaintiff No. 2 was duly authorized in this behalf.

16. The authenticity of the Power of Attorney Ex. PW-1/10 has been disputed by the defendant on the ground that it has been executed at Rohtak, but attested at New Delhi. I, however, find no merit in the objection. The Stamp Paper for this document was purchased from Delhi as is evident from the stamp of the stamp vendor Reeta Kashyap on the back side of the stamp paper. Plaintiff No. 2 has an office in New Delhi and not in Rohtak. There is a statutory presumption of a valid execution of this document. Therefore, it appears that though at the time this document was typed, the intention could be to get it executed at Rohtak, it was in fact executed at New Delhi as is evident from attestation by Notary Public at New Delhi on 06th March, 1999.

Another important aspect in this regard is that plaintiff No. 2 has not come forward to file any suit against the defendant for recovery of compensation for the loss of the goods which it had booked with the defendant. Letters of Subrogation have also been executed by plaintiff No. 2 in favour of plaintiff No. 1. The claim of plaintiff No. 2 has been settled by plaintiff No. 1 by paying a sum of Rs 3106425/- to it. Therefore, there can be no genuine dispute with respect to the authenticity of the Power of Attorney Ex. PW-1/10.

17. The learned Counsel for the defendant has referred to the decision of the Supreme Court in *Oberai Forwarding Agency Vs. New India Assurance Co. Ltd. and Another*, where the Court referred to the following statement in the standard text book on Insurance Law by Mac. Gillivray Parkington (Seventh Edition).

1131. Difference between subrogation and assignment permit one party to enjoy the rights of another, but it is well-established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, an assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured's rights rather than rely upon his rights of subrogation. If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to

recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.

1132. Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under statute should proceed in his own name.

18. The learned Counsel has also referred to *Gujrath Andhra Road Carriers Transport Contractors and Others Vs. United India Insurance Company Ltd.*, where the aforesaid statement in the book by Mac Gillivray Parkington was extracted.

These judgments are of no help to the defendant since the insured has also been joined as plaintiff No. 2 in the suit, though the Letters of Subrogation executed by plaintiff No. 2 in favour of plaintiff No. 1 also stipulate assignment and transfer of the actionable rights, title and interest of plaintiff No. 2 to plaintiff No. 1. However, the legal proposition in this regard has recently been settled as under by a Constitution Bench of Supreme Court in *Economic Transport Organization Vs. Charan Spinning Mills (P) Ltd. and Another*,

(a) The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider. The insurer may also request the assured to sue the wrong doer (service provider).

(b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.

(c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.

(d) *Oberai* is not good law insofar as it construes a Letter of Subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct.

19. The learned Counsel for the defendant has also referred to the decision of Supreme Court in *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, where it was held that if the litigants withhold vital documents relevant to the litigation, it amounts to fraud on the Court since one who comes to the Court must come with clean hands. This judgment does not advance the case of the defendant for the simple reason that the plaintiffs have not withheld any vital document from the Court, and no forged document is shown to have been filed by them.

20. Though no officer/official of plaintiff No. 2 has been produced in the witness box to prove the value of the goods which were booked by plaintiff No. 2 with the defendant, that, to my mind, would not be material in the facts and circumstances of this case. In the written statement, the defendant did not dispute the amount of Rs 3106425/- alleged to have been paid by plaintiff No. 1 to Plaintiff No. 2 though there was a specific averment in this regard in para 8 of the plaint. This is not the case of the defendant, anywhere in the written statement, that plaintiff No. 1 did not pay any amount to plaintiff No. 2 or that it had paid an amount less than Rs3106425/- to it. This was also not the case of the defendant in the written statement that the value of the goods booked with it was less than Rs 3106425/- and that plaintiff No. 1 had made excess payment to plaintiff No. 2. That appears to be the reason why no issue was framed by the Court on this aspect of the matter. The plaintiffs have placed on record the receipt executed by plaintiff No. 2 in favour of plaintiff No. 1 while receiving the aforesaid amount. In para 9 of his affidavit, Shri A.K. Goel specifically stated that plaintiff No. 2 has suffered a loss of Rs 3106425/- on account of loss of consignment. During his cross-examination, it was not suggested to him that this loss suffered by plaintiff No. 2, on account of loss of the consignment, was less than the aforesaid amount. Mr. A.K. Goel also stated in para 10 of his affidavit that on claim being preferred with it by plaintiff No. 2, it had deputed M/s Investigators Legal Advisors and Surveyors to investigate in the matter and after investigation, the surveyors had confirmed the loss vide report Ex. PW-1/5. This is not the case of the defendant that no surveyor was appointed by plaintiff No. 1, to assess the loss sustained by plaintiff No. 2. Mr Mukesh Kumar, who came in the witness box as DW-1, also did not claim that the value of the goods lost by the defendant was less than the amount paid by plaintiff No. 1 to plaintiff No. 2. In these circumstances, I hold that the plaintiff No. 1 is entitled to recover the amount of Rs 3106425/- from the defendant. The issues are decided against the defendant.

21. In view of my findings on the issues, a decree of Rs 3106425/- with costs is passed in favour of plaintiff No. 1 and against the defendant. Plaintiff No. 1 shall also be entitled to pendent lite and future interest at the rate of 9% per annum. Decree sheet be prepared accordingly.