

(1992) 02 CAL CK 0021
In the Calcutta High Court
Case No : Suit No. 283 of 1984

National Insurance Co. Ltd. and another	APPELLANT
Vs	
Om Prakash Poddar	RESPONDENT

Date of Decision : 25-02-1992

Acts Referred:

Carriers Act, 1865 — Section 10, 8, 9
Evidence Act, 1872 — Section 106

Citation : (1993) 2 ACC 561 : (1993) ACJ 616 : AIR 1993 Cal 26

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : Mr. Sunrit Deb, for the Appellant;

Judgement

1. In this Suit, the first plaintiff claims upon a subrogation from the second plaintiff who is stated to have lost goods (being tea in chests) by reason of the doings of the servants or agents of the defendant, a common carrier.

2. Learned Counsel for the defendant has already prayed for leave to retire for lack of communication with the defendant and such leave has been granted. However, the written statement of the defendant is on record. Notwithstanding such retirement of counsel, in my opinion a judgment can be passed in favour of the 1st plaintiff upon the admissions contained in the written statement. As the first plaintiff was not in a position to call any witness or formally prove any documents, it is somewhat fortunate for the plaintiff that several noteworthy admissions are contained in the written statement. In paragraph 13 of the written statement, there is admission about delivery of the goods to the defendant and the said delivery being made in regard to the business of the defendant as a common carrier. Paragraph 12 of the written statement also contains no denial of the statements contained in paragraphs 3, 4, 5 and 6 of the plaint. This part of the plaint also relates to the consignment of the goods and mentions the Truck number in which the goods were carried.

3. There is admission in the 14th paragraph of the written statement as to the

occurrence of the accident involving the said goods. The 15th paragraph of the written statement specifically admits that the goods were insured with the first plaintiff.

4. There is no denial contained in paragraph 17 of the written statement with regard to the statements contained in paragraphs 15, 16 and 17 of the plaint. These are important paragraphs, especially paragraph 16, which states that Rs. 68,240.40 was duly paid to the plaintiff No. 2 for settlement of its claim in respect of the loss and damage to goods. Accordingly, a combined reading of the 16th paragraph of the plaint and the 17th paragraph of the written statement shows an admission on the part of the defendant with regard to the money value of the damage that was suffered.

5. The accident occurred admittedly in 1977 and the suit is of 1983. Though there is a gap of 6 years, yet the point of limitation would not arise in so far as the 1st plaintiff is concerned by reason of the West Bengal Amendment mentioned in paragraph 22 of the plaint making applicable the increased 30 year period of limitation for suits to Govt. companies apart from the Govt. itself.

6. In the written statement there is a point that the suit is bad for non averment of any notice under S. 10 of the Carriers Act being duly served. This is contained in paragraph 9 of the written statement. There is indeed no such averment in the plaint and it is not possible in the absence of any evidence of the first plaintiff to prove such a notice. S. 10 of the Carriers Act is set out below:--

"10. Notice of Loss or Injury to be given within six months.

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. It will be seen from the aforesaid section that a suit as against a common carrier is barred for the loss of, or injury to goods without giving him a notice as prescribed. The present suit, however is not a suit directly for loss of, or injury to goods, but is a suit by an insurer which has arisen by reason of such loss or injury. Significantly the words of S. 10 do not cover suits which are only in relation to the loss of, or injury to goods, but the express words of the section only cover those direct primary suits which are themselves for the loss of, or injury to the goods.

8. The loss or injury to the goods was made up for, at least partially, to the 2nd plaintiff, by the 1st plaintiff. It is the 2nd plaintiff who suffered the loss or injury and no decree is being passed in favour of the 2nd plaintiff in this suit. A suit by the 2nd plaintiff would be subject to and limited by S. 10 of the Carriers Act. The 1st plaintiff is in the peculiar position that it gains the presumption of negligence made against a common carrier by reason of the admissions contained in the written statement and the principles contained in the provisions of Ss. 8 and 9 of

the Carriers Act, though not by the express words of those sections.

9. In terms the S. 9 would not apply to this case for the same reason as S. 10 not applying. But in any suit against a common carrier, it is the carrier who must prove absence of negligence, because all the facts relating thereto are in his special knowledge. S. 106 of the Evidence Act would clearly apply here.

10. As the defendant has admitted delivery of goods to him in his business as a common carrier and has further admitted the loss of goods by reason of the accident, it would no longer be necessary for any plaintiff further to prove the liability of the carrier; the damage to the goods would be taken as proof of such liability unless the same is disproved by evidence to be called by the carrier showing due care taken by it.

11. Thus the loss suffered by the 2nd defendant is proved by reason of the principles of Ss. 8 and 9 of the Carriers Act read with S. 106 of the Evidence Act.

12. The due payment of Rs. 68,240.42 in respect of the value of the goods is admitted in the written statement. S. 10 of the Carriers Act does not bar a suit by an insurer for the reasons stated above. The 1st plaintiff accordingly succeeds against the defendant.

13. There shall be a decree in terms of claim (a) of the plaint in favour of the 1st plaintiff alone as against the defendant. The 1st plaintiff shall be entitled to the costs of this suit assessed at Rs. 6,000/- as against the defendant.

14. Order accordingly.