

**(1998) 08 DEL CK 0067**

**In the Delhi High Court**

**Case No : Suit No. 754/83**

New India Assurance Co. Ltd.

APPELLANT

Vs

Chinar Goods Carriers (Regd.) and Others

RESPONDENT

**Date of Decision : 07-08-1998**

**Acts Referred:**

Carriers Act, 1865 — Section 8  
Civil Procedure Code, 1908 (CPC) — Section 34

**Citation : AIR 1998 Delhi 394 : (1998) 47 DRJ 557 : (1998) 4 RCR(Civil) 286**

**Hon'ble Judges : Kripa Shankar Gupta, J**

**Bench : Single Bench**

**Advocate : S.K. Paul and Salil Paul, for the Appellant; B.P. Aggarwal, for Respondent 1 and Jasmeet Singh, for Respondent 3, for the Respondent**

## Judgement

K.S. Gupta, J.—plaintiff filed suit, inter alia, alleging that it is a company registered under the Companies Act, 1913 having its registered office at Mahatma Gandhi Road, Fort, Bombay and one of the branch offices at Gulab Bhawan, 6, Bahadurshah Zafar Marg, New Delhi. M. J. S. Khurana being the constituted attorney and principal officer of the company is competent to sign and verify the plaint and to institute the suit. On 19th May, 1980 defendant No. 3 as consignor and for and on behalf of defendant No. 2, consignee and the owner for valuable consideration of two consignments comprising of Amul Cheese, Amul Powder, Amul Butter and Sagar Butter etc. having invoice value of Rs. 97,465.08 and Rs. 26/408.81, entrusted them to defendant No. 1, the common carrier for transporting ex-Delhi to Srinagar (J. & K.). Defendant No. 1 issued G.Rs. No. 85318 and 85319 both dated 19th May, 1980. Due to negligence on the part of defendant No. 1 and its employees, said consignments during transit got damaged and became non-consumable in an accident on 27th May, 1980. Defendant No. 1 issued damage/loss/short delivery certificate dated 30th May, 1980 to defendant No. 2. It is further alleged that the aforesaid consignments were insured by defendant No. 2 with the plaintiff under an Open Marine Policy No. 2540400297 for transit risk etc. On loss/shortage/damage caused to the

consignments defendant No. 2 lodged a claim of Rs. 1,29,358.39 on 20th June, 1980 with the plaintiff-company. After verifying the facts the plaintiff settled and paid Rs. 93,058/- to defendant No. 2. It is stated that on receipt of the said amount defendant No. 2 subrogated, assigned, abandoned and transferred all its rights, interests, title and remedy in respect of both the consignments including right to recover and realise the amount thereof from defendant No. 1 to the plaintiff-company. Defendant No. 2 executed letter of subrogation-cum-assignment and power of attorney both dated 1st December, 1981 in favor of the plaintiff-company. Even otherwise the plaintiff on making payment of the said amount to defendant No. 2 gets rights under the Statute to claim the aforesaid amount from defendant No. 1. Notice of claim dated 27th May, 1980 under the Carriers Act was sent by defendant No. 2 to defendant No. 1 which was received by it. It is stated that the plaintiff is entitled to recover the aforesaid amount of Rs. 93,058/- with interest @ 12% per annum w.e.f. 1st December, 1981 till the date of filing of the suit amounting to Rs. 27,465/-. It was prayed that a decree for Rs. 1,20,523/- with interest pendente lite @ 12% per annum be passed in favor of the plaintiff and against defendant No. 1.

2. Defendant No. 1 contested the suit by filing written statement. By any of preliminary objections, it is alleged that the suit is not legally maintainable as no notice u/s 10 of the Carriers Act was served on defendant No. 1. Suit is barred by time and has not been filed by a duly authorised person on behalf of the plaintiff-company. plaintiff has no locus standi to file the suit and the plaint does not disclose any cause of action. Court has also no territorial jurisdiction to entertain the suit. On merits, it is not disputed that the two consignments for transporting ex-Delhi to Srinagar were booked by defendant No. 3 with defendant No. 1 vide G. Rs. No. 85318 and 85319 both dated 19th May, 1980 as alleged. It is, however, denied that the total value of the consignments was Rs. 1,23,873.89. Consignments were booked at owner's risk and, Therefore, there was no responsibility of defendant No. 1 for loss/ damage caused to them in the accident during transit. It is denied that the consignments got damaged due to the negligence on the part of defendant No. 1 or its employees, as alleged. Liability to pay interest is denied. It is further denied that the plaintiff is entitled to recover the suit amount from defendant No. 1.

3. In their separate written statements defendants 2 and 3 have supported the claim of the plaintiff.

4. On the pleadings of the parties, following issues were framed on 6th November, 1987 :--

1. Whether the plaint is signed, verified and instituted by a duly authorised person?
2. Whether notice u/s 10 of the Carriers Act was not served upon defendant No. 1?
3. Whether the suit is time barred?

4. Whether the suit does not disclose any cause of action?
5. Whether the plaintiff has no locus standi to file the suit?
6. Whether this Court has no territorial jurisdiction?
7. Whether the goods were booked for transportation at owner's risk? If so, to what effect?
8. Whether defendant No. 1 is not negligent in causing the loss/damage to the suit goods? If so, to what effect?
9. Whether the plaintiff is entitled to any interest? If so, at what rate?
10. To what amount the plaintiff is entitled?
11. Relief. ISSUE NO. 1

5. Ganga Bishan Sharma PW 3 deposed that he has been working in the legal department of the plaintiff-company and he knew late M. J. S. Khurana who was the head of the legal department. He had worked under him. He identifies his signature on the" plaint at point encircled "A". Sh. Khurana was holding power of attorney to act on behalf of the plaintiff-company and Ex. PW 3/1 is the copy thereof. In the absence of cross-examination on behalf of defendant No. 1, the testimony of this witness goes unchallenged. In terms of Clause (m) of the power of attorney Ex. PW 3/1, M. J. S. Khurana was competent to sign and verify the plaint. In terms of Clause (1) of Ex. PW 3/1 he was further competent to institute the present suit on behalf of the plaintiff-company. Even otherwise also by virtue of the provision contained in Rule 1 of Order 29, C.P.C. said Sh. Khurana being the Principal Officer was competent to sign and verify the plaint on behalf of the plaintiff-company. Issue is answered in affirmative.

#### ISSUE NO. 2

6. It is in the deposition of Raj Kumar Rahan PW 1 that Ex. PW 1/2 is the office copy of the letter sent by defendant No. 2 to defendant No. 1. He has identified the signature of Mahinderpal Sethi, one of the partners of defendant No. 2 on Ex. PW 1/2 at point encircled "B". In fact, this letter dated 27th May, 1980 is the notice u/s 10 of the Carriers Act claiming payment of Rs. 1,23,873.39 from defendant No. 1 by way of compensation for the loss caused to both the consignments in an accident during transit. Said Ex. PW 1/2 is stated to have been sent by registered AD post to defendant No. 1. Along with Ex. PW 1/2 plaintiff also filed postal receipt and the AD on which stamp of defendant No. 1 together with signature and date as 5th June, 1980 appear. During the course of admission/denial this AD was put to Darshan Singh, one of the partners of defendant No. 1 who although had admitted the correctness of address of defendant No. 1 thereon but denied the receipt of the notice. Onus of proof of the issue as it stands is on defendant No. 1. As is manifest from the order dated 17th October, 1997 defendant No. 1 neither took any steps for summoning the witnesses nor any witness was even present and in view of the undertaking given

by Sh. B. P. Aggarwal appearing for defendant No. 1 that defendant No. 1 will bring the entire evidence at its responsibility on the next date of hearing failing which its evidence be treated as closed, the case was postponed for defendant No. 1's evidence to 5th and 6th January, 1998. On 6th January, 1998 request for further adjournment made by Sh. Aggarwal was declined and taking note of the said undertaking defendant No. 1's evidence was closed. By that time defendant No. 1 had not led any evidence. In the absence of evidence that the said notice dated 27th May, 1980 was not received by defendant No. 1, the issue is decided against it. ISSUE NO. 3

7. Indisputably present suit was filed on 19th May, 1983 while both the consignments in question were booked with defendant No. 1 on 19th May, 1980. Suit was thus filed well within three years period.

#### ISSUE NO. 6

8. Admittedly both the consignments in question were booked with defendant No. 1 vide G. Rs. Exs. P-1 and P-2 at Delhi where it is having the registered office. By virtue of the booking of the consignments and defendant No. 1 having its registered office at Delhi, this Court has the territorial jurisdiction to try the suit. Issue is answered against defendant No. 1. ISSUES NOS. 4, 5, 7 & 8

9. All these issues are inter-connected and can be conveniently taken up together for discussion. Raj Kumar Rahan PW 1 deposed that he is the licensed surveyor for all the lines of general insurance since 1956 and the survey report Ex. PW 1/1 was prepared by him. Before submitting it he had surveyed the goods which were the subject-matter of the insurance policy. Survey was conducted at Sri Nagar as the goods had been taken there. When cross-examined, he stated that the survey of the goods was done on 1st, 3rd and 5th June, 1980 and the goods were lying at the residence/go down of defendant No. 2. Malik Chand Khurana PW 2 deposed that he has been working with the plaintiff-company since 1960 and is presently working as Administrative Officer at its regional office in New Delhi. Claim preferred by defendant No. 2 on the basis of policy Ex. PW 2/2 was processed and a sum of Rs. 93,058/- was paid. After the payment was made, defendant No. 2 gave letter of subrogation Ex. PW 2/4 and the power of attorney Ex. P-8 in favor of the plaintiff-company. Both the consignments in question were covered under the said insurance cover Ex. PW 2/2. When cross-examined, he stated that he cannot say whether the goods were booked at owner's risk. After looking at the G.Rs. Exs. P-1 and P-2 he admitted that on both of them it is printed that the goods were booked at owner's risk. Lorry carrying both the consignments met with an accident near Batote. Loss on account of the accident to the consignments was approximately to the tune of Rs. 1,30,000/-. Loss was assessed on the basis of the certificate issued by defendant No. 1 and the survey report Ex. PW 1/1. He emphatically denied that the claim was wrongly paid by the plaintiff to defendant No. 2 or that there was no negligence on the part of defendant No. 1. Evidently, Ex. PW 2/4 and Ex. P-8 entitle the plaintiff-company to recover the amount paid to

defendant No. 2 under the policy Ex. PW 2/2.

10. Relying on the decisions in Road Transport Corporation and Others Vs. Kirloskar Brothers Ltd. and Others, and Northern India Goods Transport Co. (P.) Ltd. v. Guru Hosiery Factory Ludhiana AIR 1964 Pun 318 submission advanced by Sh. S. K. Paul, appearing for the plaintiff was that once the loss/damage to or non-delivery of the booked goods is proved, presumption of negligence or criminal act arises on the part of the carrier and it becomes the duty of the carrier to rebut that presumption u/s 9 of the Carriers Act. As a part of the submission it was further argued by him that the term "at owner's risk" as used in G.Rs. Exs. P-1 and P-2 only means that the owner would be liable for any loss or damage to the goods if such loss or damage was not caused by any negligence on the part of the carrier. Both the aforesaid decisions fully support Sh. Paul on the said legal position pointed out by him. Turning to the facts of the case, damage to both the consignments in question in an accident is not disputed even by defendant No. 1. However, the stand taken by it is that the damage was not caused due to the negligence on its part or its employees. However, in the absence of evidence the defendant No. 1 has failed to rebut presumption under said Section 9 of the Carriers Act Defendant No. 1 is thus liable to pay Rs. 93,058/- which the plaintiff-company had to pay to defendant No. 2 towards loss/damage caused to the consignments in question in the accident and for recovery of which it had obtained aforesaid letter of subrogation Ex. PW 2/4 and the power of attorney Ex. P-8 from defendant No. 2. Issues are answered accordingly. ISSUE NO. 9

11. plaintiff claimed Rs. 27,465/- towards interest @ 12% per annum w.e.f. 1st December, 1981 till the date of filing of the suit. Interest can be awarded either under Statute or under an agreement between the parties or as per the usage and custom. Since the claim for interest does not fall in either of these categories, the plaintiff is not entitled to recover it from defendant No. 1.

ISSUE NO. 10

12. In view of findings on the aforesaid issues, the plaintiff is entitled to recover Rs. 93,058/- from defendant No. 1.

ISSUE NO. 11

13. Consequently, the suit is decreed for Rs. 93,058/- against defendant No. 1 with proportionate costs and interest pendente lite and future @ 12% per annum.