(2010) 10 DEL CK 0132

In the Delhi High Court

Case No : CS (OS) No. 2637 of 1998

New India Assurance Co. Ltd. APPELLANT

Vs

Raman Roadways and Others RESPONDENT

Date of Decision : 27-10-2010

Acts Referred:

Carriers Act, 1865 — Section 10, 2, 8, 9
Civil Procedure Code, 1908 (CPC) — Section 20(b)

Citation : (2011) 176 DLT 381

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Salil Paul, for the Appellant;

Judgement

Rajiv Shakdher, J.—This is a suit filed for recovery of a sum of Rs. 23,57,465/- with pendente lite and future interest at the rate of 18% per annum from the date of filing of the suit till realization of the decretal amount. The plaintiff before me is: The New India Assurance Company, which is, involved in the business of general insurance throughout India. The plaintiff has instituted the present suit for recovery, in its capacity as an assignee of interest, of the original owner of the goods in issue, that is the insured, in respect of its claim for damages. The damage was caused to the goods in issue which were in transit between Delhi and Jaipur. The owner of the goods (i.e., the insured) is impleaded as defendant No. 3. The transporter is defendant No. 1; which is a proprietorship concern of defendant No. 2. The plaintiff''s case is briefly as follows:

1.1. It appears that a company by the name of M/s. Machine Tools (India) Ltd in an around December, 1994 had imported a sophisticated state of the art machinery, which is broadly referred to as, 3-D Co-ordinate Measuring System (hereinafter referred to in short as the ''equipment'') in connection with an exhibition held in Delhi. The original manufacturer of the said equipment evidently is an entity which is situate in Derby, United Kingdom.

1.2. It is the case of the plaintiff that once the exhibition was over defendant No.

3 negotiated the purchase of the equipment. Accordingly, a work order dated 25.2.1995 for purchase of the equipment was placed on the manufacturer. Defendant No. 3 having purchased the equipment essentially for the purposes of manufacturing its goods (i.e., Auto head lamps) decided to transport the said equipment from Delhi to Jaipur. For this purpose, defendant No. 3 did two things. Firstly, it engaged the services of the plaintiff for insuring the equipment during the course of its transit from Delhi to Jaipur, by road. Consequently, a marine insurance policy dated 15.12.1995 was drawn up in favour of defendant No. 3. The equipment was insured for a sum of Rs. 27,76,767/-. Secondly, having secured insurance cover, defendant No. 3 engaged the services of defendant Nos. 1 and 2 for transportation of the equipment. Resultantly, G.R. No. 35246 and consignment note of even date i.e., 16.12.1995 was issued in favour of defendant No. 3.

1.3. The equipment, however, reached its destination (i.e., Jaipur) on 16-17.12.1995 in a damaged condition. This fact, according to the plaintiff is exemplified, on perusal of the endorsement on the reverse side of the G.R. and challan purportedly made by the driver of the vehicle in which equipment was transported. The endorsement of the driver seems to convey that the equipment was loaded on to the vehicle in good condition; while it was found damaged, on being unloaded at the destination.

1.4. It may only be noted that it is the plaintiff''s case that prior to the transportation of the goods and issuance of the insurance policy referred to hereinabove, the equipment in issue was subjected to a pre-shipment inspection. The pre-shipment inspection was carried out by M/s. Srishti Services (Regd.), Delhi on 16.12.1995. The pre-shipment inspection revealed, according to the plaintiff, that the equipment was in good condition and properly packed.

1.5. Continuing with the narrative, on receipt of equipment by defendant No. 3 in a damaged condition, intimation with regard to its condition was sent to the plaintiff. Since this necessitated a preliminary survey the plaintiff appointed Anupam Comtech Services Pvt. Ltd, Jaipur to do the needful. The survey team included, not only technical experts but also representative of the suppliers, its local agent, as also the representatives of defendant No. 3. The preliminary survey report, according to the plaintiff, revealed that the equipment was badly damaged. The considered opinion of the preliminary survey team was that the equipment in issue could be rectified only by the original manufacturer/supplier. Consequently, on 5.8.1996 the equipment was sent to United Kingdom, where the manufacturer/supplier was situated.

1.6. In the interregnum, on receipt of the preliminary survey report dated 6.5.1995, defendant No. 3, issued a legal notice dated 5.1.1996 to defendant Nos. 1 and 2. The said legal notice was sent by registered AD. Defendant Nos. 1 and 2 chose not to respond to the said legal notice which, propelled the plaintiff to issue a second legal notice on 2.4.1996. The second notice was also sent by registered AD. There was no response to even this notice by defendant Nos. 1

and 2.

1.7 Consequent upon the equipment having been repaired, defendant No. 3 lodged a final claim with the plaintiff, which included the cost of repairs and claims under various other heads. A breakup of the details is provided in paragraph 16 of the plaint. The sum total of the claims was a figure of Rs. 26,82,583/-. The plaintiff, in turn appointed a surveyor to examine the sustain ability of the final claim lodged by defendant No. 3. The surveyor issued a report dated 12.5.1997, and an addendum dated 15.9.1997. The sum and substance of the analysis made by the surveyor i.e., one Wg. Cdr. G.R. Sharda, was that even though the claim lodged by defendant No. 3 was valid and genuine; the assessed loss was only a sum of Rs. 15,92,867. It is averred in the plaint that defendant No. 3 accepted a payment of Rs. 15,45,879; albeit provisionally, against its final claim of Rs. 26,82,583. A receipt for the payment received by defendant No. 3 i.e., Rs. 15,45,879 dated 27.11.1997 was issued in favour of the plaintiff. Defendant No. 3 in order to facilitate the recovery of the sums paid by the plaintiff executed three documents in favour of the plaintiff. These being: a Letter of Authority; a Letter of Subrogation and a Special Power of Attorney. All three documents are dated 26.11.1997.

2. Based on the aforesaid circumstances, the plaintiff instituted the present suit in this Court, on 19.11.1998. In its claim, for a sum of Rs. 23,57,465 is included, a principal amount of Rs. 15,45,879, and interest in the sum of Rs. 8,11,586; which is calculated at the rate of 18% p.a. on the principal sum for the period 17.12.1995 to 19.11.1998.

3. At this stage it may be pertinent to note that while defendant Nos. 1 and 2 filed their defence, defendant No. 3 chose not to file a written statement. Defendant Nos. 1 and 2 in their written statement have broadly raised the following preliminary objections:

(i) there is no privity of contract between them and the plaintiff;

(ii) the suit is bad for non-joinder of the driver of the vehicle;

(iii) they are neither directly nor indirectly or even vicariously liable for the alleged acts of omission and commission, since they were neither the owner of the vehicle in issue nor the driver of the vehicle in issue (the last part is obviously relatable to defendant No. 2);

(iv) the instant suit is a collusive action; filed at the behest of defendant No. 3;

(v) the suit is barred by limitation.

3.1. Apart from the above, defendant Nos. 1 and 2 have also averred that the purported endorsement of the driver on the reverse side of the G.R. and/or challan is fabricated and concocted. It is further averred by the said defendants that the labourers engaged both at the time of loading and unloading were hired by defendant No. 3. It was stated that the driver engaged was not in the employment and/or control of the said defendants. There being no incident of mishap at the time when the equipment was in transit, the driver was not responsible for any breakage or damage. It is further averred that at the time of loading, the goods were packed in opaque boxes and hence, the defendants were unaware of the condition of the equipment.

3.2. In the replication, the plaintiff has reiterated its claim while, refuting the averments made in the written statement.

4. After the completion of pleadings, the matter was set down for admission/ denial. Since defendant Nos. 1 and 2 did not appear at the stage of admission/ denial, the learned Joint Registrar by an order dated 3.5.2000 directed that all original documents filed by the plaintiff concerning defendant Nos. 1 and 2 will be deemed as having been admitted by them under the provisions of Order 12 Rule 1A of the Code of Civil Procedure, 1908 (in short "CPC"). It may be pertinent to note at this stage that since defendant No. 3 was situate outside the territorial jurisdiction of this Court, an application was moved u/s 20(b) of the CPC by the plaintiff, seeking permission of the Court to prosecute defendant No. 3. The Court allowed this application of the plaintiff vide order dated 6.12.2000. Accordingly, following issues in the matter were framed by the Court vide its order dated 12.3.2001:

(i) Whether there is any privity of contract between the plaintiff and Defendant Nos. 1 and 2?

--OPP

(ii) Whether the Plaintiff is entitled to recover the suit amount from Defendant Nos. 1 and 2 as the attorney of Defendant No. 3?

--OPP

(iii) Whether the suit is bad for non-joinder of the driver of the vehicle?

--OPD

(iv) Whether Defendant No. 1 and 2 were the owners of the truck bearing registration No. HR47-2350? If not, to what effect?

--OPD

(v) Whether the goods as described in the plaint were in a good condition at the time of loading the same?

--OPP

(vi) Whether the goods arrived at the destination in a proper condition? If not, to what effect?

--OPP

(vii) Whether the Plaintiff has suffered any damage and if so, to what extent?

--OPP

(viii) Relief.

5. In support of its case the Plaintiff cited three witnesses these being: PW-1, Wg. Cdr. G.R. Sharda who had issued the final survey reports dated 12.5.1997 (Ex P-13) and 15.9.1997 (Ex. P-13A); PW-2 Sh Rajeev K. Agarwal who proved the preliminary survey report dated 6.5.1996 (Ex. P-12) and lastly, PW-3 Mr. Rajesh Kalra, its own Deputy Manager. On the other hand, even though the defendant Nos. 1 and 2 had filed evidence by way of affidavit of one Sh Sher Bahadur Yadav, who was evidently the Manager of defendant No. 1; he was eventually not produced and hence, could not be cross-examined by the plaintiff.

6. As indicated above, PW-1 proved his final survey reports dated 12.5.1997 (Ex. P-13) and 15.9.1997 (Ex. P-13A), while PW-3 proved the preliminary survey report dated 6.5.1996 (Ex. P-12). In the cross-examination the testimony of aforementioned witness stood firm. PW-3 in his cross-examination reiterated what he had opined in his report that the equipment was damaged and could be repaired only by the original manufacturer/supplier. Similarly, PW-1 has also supported the case of the plaintiff that the equipment was damaged. However, he opined in his reports that the assessed loss was a sum of Rs. 15,45,879.

7. This brings me to the testimony of PW-3 i.e., Sh Rajesh Kalra. In his examination-in-chief the said witness has replicated the stand taken in the plaint. More importantly, PW-3 has proved the Certificate of Incorporation of the plaintiff (Ex. P-1), and the power of attorney issued in favour of Mr. A.K. Mehta who at the relevant point of time was the Manager of the plaintiff. PW-3 has also proved the signatures of Mr. A.K. Mehta on the plaint. The witness has testified that defendant No. 1 is a common carrier, which is, in the business of transporting the goods from one place to another on payment of consideration. The witness has also proved the challan dated 15.12.1995 (Ex. P-9), as also communication dated 18.12.1995 (Ex. P-11) issued by defendant No. 3 informing the plaintiff about the damage to the equipment, and its request for deputing a surveyor to assess the damage. The witness has also testified to the effect that Anupam Comtech Services Pvt. Ltd. was appointed as a surveyor, and that they had it issued the preliminary survey report dated 6.5.1996 (Ex. P-12). The witness has also adverted to the fact that the final reports dated 12.5.1997 (Ex. P-13) and 15.9.1997 (Ex. P-13A) were issued by Wg. Cdr. G.R. Sharda. PW-3 also testified to the effect that legal notice dated 5.1.1996 (Ex. P-14) and 2.4.1996 (Ex. P-15) were issued by defendant No. 3 to defendant No. 1 by registered AD covers. The said documents have been marked as Exs. P-14, P-14A, P-15 and P-15A. The witness has also adverted to the fact that defendant No. 3 had submitted a final claim bill dated 16.8.1997 (Ex. P-16). PW-3 also asserted that defendant no. 3 had executed a Letters of Authority, a Letters of Subrogation cum assignment and a Special Power of Attorney; all dated 26.11.1997 in plaintiff''s favour. The said documents are marked as Exs. P-19, P-20 and P-21.

7.1. In his cross-examination, PW-3 has candidly stated that he had no personal knowledge of the case and that he was not present at the time of loading and unloading of the equipment. The witness went on to say that he was also hot aware of the fact as who had engaged the labour for the purposes of loading or unloading the equipment. The witness also accepted the fact that he did not know whether Narayan Singh (i.e., the driver) was the employee of defendant No. 1. It was accepted by the witness that the testimony was based on the records of the case available with the plaintiff. The witness, however, alluded to the fact that the plaintiff had received information with regard to the damage of the equipment in January, 1996 at their office in Delhi. The witness refuted the suggestion made to him that the manager?s letter dated 12.6.1997 (Ex. P-10) had been fabricated by the plaintiff. The witness admitted that he was unaware as to the person who had signed the said document i.e., Ex. P-10 and further more he was unable to identify the signatures on the said document; though on the face of it the signatures appeared to be of a person who purportedly was the Manager of defendant No. 1.

7.2 To a question as to whether the equipment in question was shown to defendants prior to it being packed, the witness testified that he could not say as to whether such an exercise was conducted. The witness however voluntarily stated that since second report was available nothing was hidden from defendant Nos. 1 and 2. The witness categorically refuted the suggestion that no damage was caused to the goods during transportation, as also the suggestion that the plaintiff had not informed defendant Nos. 1 and 2 to settle the claim of defendant No. 3.

8. Mr. Paul who appears for the plaintiff has largely based his submissions on the case set up in the plaint. In support of the averments made in the plaint, he has argued that the equipment was in the custody of defendant Nos. 1 and 2 right from the day it was loaded on to the vehicle and till it reached its destination. In view of this position obtaining, he has argued that the liability of the defendant Nos. 1 and 2 to ensure that the goods reach their destination, in sound condition, was that of defendant Nos. 1 being a common carrier. It was argued that this liability, was absolute in nature. In support of his submissions, reliance was placed on Sections 8 and 9 of the Carriers Act, 1865 (in short the ''Carriers Act'').

8.1 Mr. Paul submitted that since the plaintiff had after assessing the damages to the equipment paid to defendant No. 3 a sum of Rs. 15,45,879, the plaintiff was entitled to a reimbursement of the said amount along with interest as prayed for in the plaint.

8.2 Mr. Paul further submitted that since defendant No. 3''s interest stood assigned in favour of the plaintiff on execution of the relevant documents in its favour (i.e., the Letter of Subrogation, Letter of Authority and Special Power of Attorney), it is entitled to a decree in the sum claimed from defendant Nos. 1 and 2. Mr. Paul further submitted that notwithstanding the fact that the GR bore the endorsement that the equipment was being transported at the owner''s risk, the liability on account of damage to the equipment would be that of defendant No. 1 being a common carrier. It was contended that the liability of a common carrier for loss during transit was absolute, which could not be avoided by a contractual provision. In support of his submissions Mr. Paul relied upon the following judgments:

Northern India Goods Transport Co., (Pr) Ltd. Vs. Guru Hosiery Factory, ; Tugun Ram Vs. Dominion of India and Others, ; The Gaya Muzaffurpur Roadways Co. and Others Vs. Fort Gloster Industries Ltd. and Another, ; and Union of India Vs. United India Insurance Co. Ltd., .

9. To be noted on behalf of the defendants there has been no representation.

10. I have heard the learned Counsel for the plaintiff and also perused the pleadings and the evidence on record. On perusal of the evidence on record there is no doubt in my mind that defendant Nos. 1 and 2 had entered into a contract with defendant No. 3 for transportation of the equipment from Delhi to Jaipur. The plaintiff has also been able to prove that the equipment in issue had been insured vide insurance policy dated 15.12.1995 (Ex. P-6). The said insurance policy has been proved by PW-3. There is also a proof on record that the equipment was subjected to a pre-shipment inspection. The report in that regard dated 16.12.1995 (Ex. P-7) was issued by M/s. Srishti Services (Regd.). Therefore, defendant Nos. 1 and 2 were well within their right to peruse the pre-shipment inspection report or the equipment in issue before it was boarded on to the vehicle. The defendant Nos. 1 and 2 at their own risk chose to do neither.

10.1 In the plaint there is a specific averment to the effect that defendant Nos. 1 and 2 are in the business of carrying goods on payment of consideration from one place to another. In support of this averment PW-3 has made necessary assertion in his examination-in-chief. This aspect of the matter has not been seriously disputed by defendant Nos. 1 and 2. In these circumstances, defendant Nos. 1 and 2 fall within the definition of a "common carrier" as defined in Section 2 of the Carriers Act, which inter alia provides that a common carrier denotes a person (other than the Government) engaged in the business of transporting property under multimodal transport document or of transporting for hire property from place to place, by land or inland navigation for all persons "indiscriminately". The term person has been defined to include any association or body of persons, whether incorporated or not.

Therefore, in my opinion there is no doubt that defendant No. 1 is a common carrier within the meaning of Section 2 of the Carriers Act. In view of this, position, it is quite clear that defendant No. 1 falls within the ambit and scope of the provisions of the Carriers Act. In the instant case, since the rights in respect of the claim of defendant No. 3 as against defendant Nos. 1 and 2 had been assigned by virtue of execution of the Letter of Authority (Ex. P-19), Letter of Subrogation (Ex. P-20) and Special Power of Attorney (Ex. P-21); the plaintiff is entitled to sustain an action against defendant Nos. 1 and 2. In consonance with the provisions of the ''Carriers Act, before the institution of the present suit a notice u/s 10 was issued to defendant Nos. 1 and 3. As indicated hereinabove, the said notices were issued on 5.1.1996 (Ex. P-14) and 2.4.1996 (Ex. P-15). These notices were issued by registered AD post.

The receipts in that regard are marked as Ex. P-14A and Ex. P-15A, respectively. Even though PW-3 would have no knowledge of issuance of notices, there is a reference to the said notices in paragraph 18 of the plaint. Noticeably, PW-3 has not been cross-examined on this aspect despite his assertion that such legal notices were issued. In my view, even though the onus of proof is on the plaintiff, the burden shifted once the original receipts were produced. The defendants at their own peril chose not to confront the witness on this aspect of the matter.

10.2. In view of the position in law that the common carriers liability law is absolute and is akin to that of an insurer---the fact that at the destination the equipment was found in a damaged condition would undeniably require defendant Nos. 1 and 2 to compensate the owner or his assignee-in-interest. As indicated hereinabove, the plaintiff has already settled the claim of the owner/ insurer i.e., defendant No. 3. Therefore, the plaintiff is entitled to seek recompense from defendant Nos. 1 and 2, having stepped into the shoes of defendant No. 3. The plaintiff having been assigned rights by defendant No. 3 to pursue its claim against defendant Nos. 1 and 2, in law, is entitled to sustain the present action. The stand taken by defendant Nos. 1 and 2 that there is no privity of contract between the plaintiff and defendant Nos. 1 and 2; thus, has to be rejected at the very threshold.

10.3 The other objection of defendant Nos. 1 and 2 that the claim is barred by limitation is also not sustainable. Firstly, there is no articulation as to how and why the claim is barred by limitation. If one were to take into account the date on which the damage occurred which was 16.12.1995 then the claim for recovery was required to be filed within a period of three years. Since the suit was instituted in November, 1998 therefore, even this objection of the defendant is untenable.

10.4 The other argument advanced in the written statement that the suit is bad on account of non-joinder of parties, according to me, is completely untenable. There is no denial of the fact that the contract with regard to transportation of equipment was executed between defendant No. 3 and defendant Nos. 1 and 2. Therefore, in my view, the driver for the purposes of a civil action was neither a proper nor a necessary party. The suit as framed is maintainable in the eyes of law. The objection being without merit is rejected.

10.5 The stand taken by defendant Nos. 1 and 2 that since the vehicle by which the equipment was transported was not owned by defendant Nos. 1 and 2 nor was defendant No. 2 the driver of the vehicle at the relevant point of time, is also without merit. There is on record no proof of the said averment insofar as defendant No. 3 was concerned. There is nothing on record to show that defendant No. 3 was aware of this circumstance. In any event, it is not even the case of defendant Nos. 1 and 2 that they were not engaged in the transportation of the equipment from Delhi to Jaipur. Their liability being absolute, they cannot wriggle out of it, on such specious plea.

10.6 The other argument of defendant Nos. 1 and 2 that they were unaware of the state of the equipment at the time of loading and unloading is also without merit. As indicated above, the liability of the carrier i.e., defendant No. 1 is absolute. Nothing prevented Defendant Nos. 1 and 2 from exercising their right, to insist on the examination of the condition of the equipment, at the stage of loading. Having not done so, once the goods were loaded the liability for their safe custody was on defendant Nos. 1 and 2. The objection being without merit, is also rejected.

10.7 Similarly, the submission that the labourers who were hired were engaged by defendant No. 3, is also untenable, for the reason that apart from a bald averment, there is no evidence led by defendant Nos. 1 and 2 to establish this fact.

11. In view of the above, the answers to issues framed in the suit is as follows.

Issue Nos. 1 & 2:

Issue Nos. 1 and 2 are answered in favour of the plaintiff and against the defendants. The plaintiff, having stepped into the shoes of defendant No. 3, was entitled to sustain an action based on the contract obtaining between defendant No. 3 and defendant No. 1. The plaintiff is entitled to recover the amount claimed from defendant Nos. 1 and 2 which was due in law to defendant No. 3.

Issue No. 3:

Issue No. 3 is also answered in favour of the plaintiff and against defendant Nos. 1 and 2. Since, in my opinion the driver was neither a proper nor a necessary party to the instant action, the suit, as framed, is maintainable. The issue is answered accordingly.

Issue No. 4:

The onus of proof in respect of Issue No. 4 was on the defendants. The defendants have led no evidence in support of the issue. The issue is accordingly answered against the defendants.

Issue No. 5:

Issue No. 5 is answered in favour of the plaintiff and against the defendants. As discussed above, the plaintiff had subjected the equipment in issue, to a pre-shipment inspection. A report generated in that connection was proved by PW-2 and PW-3. The defendants made no attempt whatsoever to inspect the equipment at the stage of loading and, therefore, in my opinion, could not have made it an issue after it was damaged. Being a common carrier, the liability of the defendants is absolute and similar to that of an insurer. The issue is accordingly answered in favour of the plaintiff.

Issue No. 6:

This issue is answered in favour of the plaintiff in view of the fact that the survey report bears out that the equipment was damaged. It is not disputed that between 16-17.12.1995 the equipment was handed over to defendant Nos. 1 and 2. On appraisal of the evidence on record, the preponderance of probability is that the equipment was damaged while, in the custody of defendant Nos. 1 and 2. The issue is accordingly answered in favour of the plaintiff.

Issue No. 7:

The said issue is also answered in favour of the plaintiff. The final report of the surveyor dated 12.5.1997 (Ex. P-13) and the addendum dated 15.9.1997 (Ex. P-13A), which was proved by PW-1, clearly establish that the goods had been damaged and a loss had been suffered to the extent of Rs. 15,45,879. The said amount has been reimbursed by the plaintiff, as is evidenced by receipt dated 27.11.1997 (Ex. P-18). It is therefore clear that the plaintiff has suffered damage in the sum of Rs. 15,45,879.

Issue No. 8:

In view of the findings returned by me on the issues referred to above, plaintiff is entitled to a sum of Rs. 15,45,879. The only issue left is what should be the rate of interest and the period for which the plaintiff should be paid interest. The plaintiff has prayed for interest at the rate of 18% p.a. from 17.12.1995 till filing of the present suit, as also interest during the pendency of the suit and till the realization of the decretal amount. Considering the fact that the suit was filed in 1998 and since then, the banking rate of interest has fallen, in my view, it would sub-serve the interest of justice if interest is paid at the rate of 9% p.a. from 5.1.1996, that is, the date of issuance of the first legal notice till its realization.

The suit is decreed in the above terms, as indicated hereinabove. A decree sheet be prepared accordingly. The suit be consigned to record.

