

**(2017) 05 DEL CK 0195**

**In the Delhi High Court**

**Case No : 82 of 2017**

OM LOGISTICS LIMITED

APPELLANT

Vs

NATIONAL INSURANCE COMPANY LIMITED, & ANR.

RESPONDENT

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**Date of Decision :** 30-05-2017

**Acts Referred:**

[Code of Civil Procedure, 1908](#), [Section 100](#) - Second appeal  
[Order 29 Rule 1](#) - Second appeal  
[Evidence Act, 1872](#), [Section 23](#) - Admissions in civil cases, wh

**Citation :** (2017) 05 DEL CK 0195

**Hon'ble Judges :** Valmiki J.Mehta

**Bench :** SINGLE BENCH

**Advocate :** Arun Aggarwal

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## Judgement

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the concurrent judgments of the courts below; of the Trial Court dated 12.4.2016 and the First Appellate Court dated 11.1.2017; by which the suit for recovery of Rs.1,44,547/- has been decreed along with interest at 9% per annum simple. The subject suit was filed by the respondents/plaintiffs for recovery of amount on account of loss caused by the appellant/defendant/transporter by short delivery of the goods transported by the appellant/defendant for the respondent no.2 herein, and who was the plaintiff no.2 in the trial court.

2. The facts of the case are that the National Insurance Company Limited as plaintiff no.1 and M/s Synthite Industrial Chemicals Limited as plaintiff no.2 (respondent nos.1 and 2 herein respectively) filed the subject suit pleading that the appellant/defendant is the common carrier of goods and which company was entrusted for transportation by the respondent no.2/plaintiff no.2, a consignment of 142 cartons with an insured value of Rs.16,91,305/-. The consignment in question was booked by the appellant/defendant vide its consignment note no. 948802 dated 1.10.2003. The consignment was ex-Kochi to New Delhi.

Transportation was to be by road. During the course of transportation four cartons having value of Rs.1,44,547/- were lost by the appellant/defendant because out of the 142 cartons given to the appellant/defendant for transportation only 138 cartons were finally delivered. The appellant/defendant confirmed the short delivery of goods/cartons by issuing its short certificate delivery bearing serial no.1949 dated 11.11.2003. The respondent no.2/plaintiff no.2 had insured the consignment with the respondent no.1/plaintiff no.1, and accordingly because of the loss having occasioned which was covered under the Marine Policy no.570802/21/03/4400001, respondent no.1/plaintiff no.1 paid and settled the claim of Rs.1,44,547/- to the respondent no.2/plaintiff no.2. After settlement of the claim, the respondent no.2/plaintiff no.2 executed a letter of subrogation dated 23.8.2004 in favour of the

respondent no.1/plaintiff no.1. The loss notice under Section 10 of the Carriers Act (the Carriers Act, 1865, the statute as then applicable) dated 19.12.2003 was served upon the appellant/defendant by the respondent no.2/plaintiff no.2 with respect to the loss of Rs.1,44,547/-. The subject suit hence came to be filed on behalf of the two respondents/plaintiffs with the respondent no.2/plaintiff no.2 being the owner of goods who had transported its goods through the appellant/defendant, and the respondent no.1/plaintiff no.1/insurance company which had settled and paid the claim to the respondent no.2/plaintiff no.2 and taken the letter of subrogation dated 23.8.2004 in its favour.

3. The appellant/defendant contested the suit and denied its liability. It was pleaded by the appellant/defendant that the loss notice dated 19.12.2003 was not served upon the appellant/defendant. Locus standi of the respondent no.1/plaintiff no.1 to file the suit was denied. The appellant/defendant also denied that any cause of action had accrued in favour of the respondents/plaintiffs. It was accordingly prayed that the suit be dismissed.

4. After the pleadings were complete, the trial court framed the following issues:-

"1. Whether the suit of the Plaintiff is barred by limitation? OPD

2. Whether the suit of the Plaintiff is not maintainable as Plaintiff had not complied with the provisions of Section 10 of Carriers Act? OPD

3. Whether the Plaintiff is entitled for a recovery of Rs.1,44,547/- from the Defendant as claimed for? OPP

4. Whether the Plaintiff is entitled for any interest if so at what rate and for which period? OPP

5. Relief, if any."

5. Evidence was thereafter led by both the parties and the documents which are proved through the deposition of witnesses of the respondents/plaintiffs and the appellant/defendant are referred to in paras 16 to 18 of the judgment of the trial court and these paras read as under:-

"16. Plaintiff in order to prove his case, has examined Sh. Sharat Kashyap as Administrative Officer, National Insurance Company Limited at Delhi Regional Office-I, Jeevan Bharti Building, Cannaught Place, Parliament Street, New Delhi 110001, as PW1 by way of his affidavit Ex.PW1/A. He relied upon the following documents:

1. Ex.PW1/1 was de-exhibited and marked as Mark-PW1/1 being a photocopy of power of attorney in favour of all the Manager.
2. Ex.PW1/2 Marine Insurance Certificate.
3. Ex.PW1/3 was de-exhibited and marked as Mark-PW1/3 being photocopy of invoice No.L/8322003-2004.
4. Ex.PW1/4 was de-exhibited and marked as Mark-PW1/4 being photocopy of consignment note.
5. Ex.PW1/5 certificate of facts dated 11.11.2003.
6. Ex.PW1/6 was de-exhibited and marked as Mark-PW1/6 being photocopy of letter of Ministry of Finance.
7. Ex.PW1/7 legal notice dated 19.12.2003 along with original AD card.
8. Ex.PW1/8 submission of claim dated 20.12.2003.
9. Ex.PW1/9 cost of missing cargo.
10. Ex.PW1/10 Section 64 VB Compliance Format.
11. Ex.PW1/11 is claim discharge voucher.
12. Ex.PW1/12 is letter of subrogation.

17. On the other hand, Defendant company has examined Sh. Anubhav Chaturvedi, Officer (Legal and Liaison), Om Logistics Limited as DW1 by way of his affidavit Ex.DW1/A. He has relied on the following documents:

1. Ex.DW1/1 resolution in favour of previous AR Sh. Vivek Kalia.
2. Ex.DW1/2 resolution in favour of DW1.

18. Defendant company has also examined Sh. Anil Kumar, Booking Clerk, Om Logistics Limited as DW2 by way of his affidavit Ex.DW2/A. He has relied on the documents Ex.DW2/1 which is authority letter."

6. The trial court decreed the suit holding that the suit is within limitation and also that the requirement of Section 10 of the Carriers Act of serving of notice dated 19.12.2003 was complied with. The loss in question was proved in terms of the short delivery certificate dated 11.11.2003 issued by the appellant/defendant itself. The suit was accordingly decreed on account of the loss of a sum of Rs. 1,44,547/- caused by the appellant/defendant as a transporter, being for the short delivery/non-delivery of four cartons, and the fact that the

respondent no.1/plaintiff no.1/insurance company had paid the amount under the subject policy to the respondent no.2/plaintiff no.2 and taken the letter of subrogation thus entitling it to recover the loss amount.

7. On behalf of the appellant/defendant it is argued that the judgments of the courts below are liable to be set aside and that there is perversity in the findings and conclusions of the courts below on account of the following reasons:- (i) The subject suit was filed on 11.10.2006 and which is after three years and one day of arising of the cause of action because cause of action had accrued on 10.10.2003 when the consignment was short delivered to the extent of four cartons. The suit was thus time-barred.

(ii) That the loss notice under Section 10 of the Carriers Act dated 19.12.2003 has been wrongly held to be proved by the courts below to have been served upon the appellant/defendant.

(iii) The short delivery certificate dated 11.11.2003 could not have been looked into because it was a short delivery certificate issued "without prejudice" and hence the same could not be looked into in view of Section 23 of the Indian Evidence Act, 1872.

(iv) The letter of subrogation dated 23.8.2004 is a forged and fabricated document and which is clear from the fact that whereas the date of said letter of subrogation is 23.8.2004, however its attestation is of prior date of 17.6.2004. The letter of subrogation is also pleaded to be forged because the same was attested on 17.6.2004 whereas the purchase of the stamp paper is of a later viz. 7.7.2004.

(v) There was no valid authority on behalf of the respondent no.1/plaintiff no.1/insurance company for filing of the suit by the person who filed the suit namely Sh. N.S. Dhillow, Manager.

8. In my opinion, all the arguments urged on behalf of the appellant/defendant are without substance and are liable to be rejected. No substantial question of law arises. Reasons are given hereinafter.

9. (i) Taking the first issue as to the suit was barred by limitation because it is not filed within three years but it was filed on the first date after the expiry of three years, it is seen that the subject suit was admittedly filed on 11.10.2006. It is not disputed that cause of action in this case accrued on 10.10.2003 when there was short delivery of four cartons. The period of three years therefore has to be reckoned w.e.f 11.10.2003 and three years of which then would therefore expire on 10.10.2006. The suit has been however filed on 11.10.2006. The issue is that whether the suit is barred being beyond the period of limitation by one day. (ii) In my opinion, the suit is not barred by time by one day inasmuch as the answer to this issue is found in Section 15(2) of the Limitation Act, 1963 and which provides that where a legal notice has to be given for filing of a suit then the period with respect to notice has to be added to the period of limitation.

Section 15(2) of the Limitation Act reads as under:-

"Section 15. Exclusion of time in certain other cases.- XXXXX

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation.-In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted."

(iii) In this case if the loss notice dated 19.12.2003, and sending of which is a sine qua non in view of the Section 10 of the Carriers Act, was duly served upon the appellant/defendant, then, the period with respect to

this notice is liable to be excluded i.e added to the period of limitation of three years.

10. This aspect and argument of service of loss notice dated 19.12.2003 is also related to the second argument urged on behalf of the appellant/defendant because the appellant/defendant pleads that the loss notice dated 19.12.2003 was never served upon the appellant/defendant. Let us examine the first two arguments urged by the appellant/defendant.

11. The loss notice dated 19.12.2003 has been proved and exhibited as Ex.PW1/7. Along with the loss notice there is also an AD card of the postal department. This AD card bears the stamp of the appellant/defendant showing receipt of the letter dated 19.12.2003 on 3.1.2004. In my opinion therefore it is proved by the respondent no.2/plaintiff no.2 that the loss notice Ex.PW1/7 dated 19.12.2003 has been duly served upon the appellant/defendant in view of the filing and proving of the AD card of the postal department which is also exhibited as Ex.PW1/7 along with the loss notice dated 19.12.2003 also as Ex.PW1/7.

12. Learned counsel for the appellant/defendant sought to argue that the loss notice dated 19.12.2003/Ex.PW1/7 should not be held to be proved inasmuch as the sending of the legal notice can only be proved by a postal receipt, and not because of an AD card, however, this argument is completely misconceived because not only the acknowledgment card is a printed card of the department of posts, the same also contains the postal registration number of the postal cover as no.1653. Once the respondents/plaintiffs have proved and exhibited the loss notice and AD card as Ex.PW1/7, then, if the case of the appellant/defendant was that AD card is forged and fabricated, then the onus shifted upon the appellant/defendant to summon the official from the postal department that the AD card is not the AD card which is issued by the department of posts. Admittedly the appellant/defendant did not summon the witness from postal department to

prove that the AD card is not with respect to a letter issued vide registration no.1653, and therefore, in my opinion, on preponderance of probabilities the courts below have rightly held that the loss notice dated 19.12.2003 along with its AD card have been rightly proved as Ex.PW1/7. The first two arguments urged on behalf of the appellant/defendant are therefore rejected because not only the loss notice dated 19.12.2003 has been proved to be served but also the fact that once the period of service of the loss notice dated 19.12.2003 has to be taken as excluded, and which period will be at least of one day because it takes at least one day to issue the letter and sending it to the addressee, and therefore if one day is added to the limitation period of three years, then, the subject suit having been filed after three years and one day of arising of the cause of action would be within limitation by application of

provision of Section 15(2) of the Limitation Act. In fact the period to be added to the period of three years would be from 19.12.2003 to 3.1.2004 when the loss notice was served upon the appellant/defendant. The first two arguments of the appellant/defendant thus have no merit and are accordingly rejected.

13. (i) The third argument urged on behalf of the appellant/defendant was that the short delivery certificate dated 11.11.2003/Ex.PW1/5 cannot be looked into as it was issued without prejudice and hence taking the same as evidence is barred under Section 23 of the Indian Evidence Act. In this regard, firstly it is seen that no objection was raised to the exhibition of this document Ex.PW1/5 when this document was tendered and exhibited in evidence in the statement of PW1 Sh. Sharat Kashyap on 7.10.2014. Once there is no objection to the exhibition of this document, any right which the appellant/defendant may have had under Section 23 of the Indian Evidence Act would stand waived. I may also note that there is no defence laid down in the written statement of the appellant/defendant that this loss notice Ex.PW1/7 dated 19.12.2003 cannot be looked into in view of the bar contained in Section 23 of the Indian Evidence Act and no such defence in the written statement could be pointed out to this Court during the course of arguments on behalf of the appellant/defendant. (ii) There is another reason why the argument on behalf of the appellant/defendant that short delivery certificate Ex.PW1/5 cannot in law be looked into because it is issued without prejudice, inasmuch as, this certificate besides showing that it is without prejudice, it is stated in the same that that it is without prejudice to the rights of the appellant/defendant as a carrier i.e the rights of the appellant/defendant as a carrier under the Carriers Act are saved. The right of a carrier under the Carriers Act is only if the loss notice was not served upon the appellant/defendant/carrier as per Section 10 of the Carriers Act. As already discussed above, the loss notice dated 19.12.2003 Ex. PW1/7 has been duly proved to have been served upon the appellant/defendant, and therefore, the language of the short delivery certificate Ex.PW1/5 dated 11.11.2003 in fact goes against the appellant/defendant. Therefore in my opinion, nothing in fact turns upon the expression "strictly without prejudice" as stated in the short delivery certificate Ex.PW1/5 dated 11.11.2003. This argument of the appellant/defendant is also therefore rejected.

14. (i) The next argument urged on behalf of the appellant/defendant was that the letter of subrogation Ex.PW1/12 dated 23.8.2004 should be held to be a forged and fabricated document. Two arguments in this regard have been urged. Firstly, it is argued that if the document bears the date of 23.8.2004 then how can the same be attested by a Notary of an earlier date of 17.6.2004. Also, it is argued that the stamp paper in question with respect to letter of subrogation Ex.PW1/12 is dated 7.7.2004, and therefore, there could not have been attestation of an earlier date on 17.6.2004. (ii) Both the arguments urged on behalf of the appellant/defendant to argue that the letter of subrogation Ex.PW1/12 is a forged and fabricated document are without any basis whatsoever. Firstly, it is seen that there is no locus standi in the appellant/defendant to question the issue of letter of subrogation because the questioning of letter of subrogation issued by the respondent no.2/plaintiff no.2 in favour of the respondent no.1/plaintiff no.1/insurance company would only be of the respondent no.2/plaintiff no.2. Once the respondents/plaintiffs filed and proved the letter of subrogation then if the contention of the appellant/defendant was that the same was not duly executed by the respondent no.2/plaintiff no.2 in favour of the respondent no.1/plaintiff no.1, then, the appellant/defendant could have summoned any officer of the respondent no.2/plaintiff no.2 that the letter of subrogation was not issued by the respondent no.2/plaintiff no.2. That however has not been done. Also it is noted that the date of purchase of the stamp paper is not 7.7.2004 as is argued on behalf of the appellant/defendant but the date of the purchase of the stamp paper of the letter of subrogation is 7.7.2002 i.e much prior to execution of the letter of subrogation on 23.8.2004. The date of 7.7.2002 is also the date prior to the date of the attestation by the Notary on 17.6.2004. Accordingly, it cannot be argued on behalf of the appellant/defendant that the notarization dated 17.6.2004 is earlier than the date of purchase of the stamp paper which is alleged to be dated 7.7.2004 because in fact the purchase of the stamp paper of the letter of subrogation is not 7.7.2004 but is 7.7.2002 and which becomes clear from the back side of the stamp paper of the letter of subrogation and which has been examined by this Court.

(iii) Also the issue of notarization being of an earlier date of 17.6.2004 does not impress this Court for various reasons. Firstly it is seen that the Notary in his own hands by writing three lines has given endorsement of the notarization being of 23.8.2004, and this is found in green coloured pen lines written on the second page of the letter of subrogation. In any case at best this argument of the appellant/defendant will result in letter of subrogation being a non-notarized document, but non-notarization is not the same thing as non-execution and accordingly once the letter of subrogation has been proved and exhibited as Ex.PW1/12 by the respondents/plaintiffs, and unless the appellant/defendant had summoned any officer from the respondent no.2/plaintiff no.2 to prove the nonexecution of the letter of subrogation Ex.PW1/12, the courts below have therefore committed no illegality in holding that the letter of subrogation Ex.PW1/12 stands duly proved. The fourth argument urged on behalf of the

appellant/defendant that the letter of subrogation Ex.PW1/12 is a forged and fabricated document is therefore rejected.

15. (i) The last argument urged on behalf of the appellant/defendant is that the suit cannot be said to have been validly filed through Sh. N.S. Dhillow on behalf of the respondent no.1/plaintiff no.1 inasmuch as the power of attorney filed in favour of Sh. N.S. Dhillow was de-exhibited as from Ex.PW1/1 to Mark PW1/1.

(ii) This argument is misconceived as it is settled law after the judgment of the Supreme Court in the case of United Bank of India Vs. Naresh Kumar and Others (1996) 6 SCC 660 that if on behalf of a company a litigation is pursued to the hilt then on technicality such a suit/litigation could not be dismissed that the suit was not properly instituted.

(iii) I would also like to add another reason and which is that a suit by a company by virtue of Order XXIX CPC can always be instituted by a Principal Officer of the company. In the plaint, it is stated that Sh. N.S. Dhillow is the Manager of the respondent no.1/plaintiff no.1/insurance company and in the written statement it is only the authority of Sh. N.S. Dhillow to file a suit which has been denied and it is not disputed that Sh. N.S. Dhillow is not the Administrative Officer of the respondent no.1/plaintiff no.1. Once Sh. N.S. Dhillow is a Principal Officer, then by virtue of Order XXIX Rule 1 CPC, the suit has to have been taken as validly filed on behalf of the respondent no.1/plaintiff no.1/insurance company by its Principal Officer being Sh. N.S. Dhillow and who was the Administrative Officer of the respondent no.1/plaintiff no.1. This argument of the appellant/defendant is also therefore rejected.

16. In view of the above, no substantial question of law arises. Dismissed.