
(1988) 06 KL CK 0039
In the High Court Of Kerala
Case No : A S. No. 345 of 1980

Orient Road Lines

APPELLANT

Vs

M. B. Mohammed Hassan Sahib and Co. and others

RESPONDENT

Date of Decision : 07-06-1988

Acts Referred:

Carriers Act, 1865 — Section 2, 6, 9

Citation : (1988) 2 KLJ 349

Hon'ble Judges : P.K. Shamsuddin, J;P.C. Balakrishna Menon, J

Bench : Division Bench

Advocate : V. Sankara Menon and C.K. Aravindaksha Menon, for the Appellant;
S.K. Brahmanandar and Itiyerah Kalliath, for the Respondent

Final Decision : Dismissed

Judgement

Shamsuddin, J.—The defendant in O S. No, 6 of 1979 on the files of the Court of Additional Subordinate Judge, Cochin is the appellant. The appellant was entrusted with a consignment of 530 tins of Torch Branch Coconut Oil each tin weighing 15.900 kgs, to be delivered to the 2nd respondent at Bombay. As per the goods consignment note dated 7-6-1977, evidenced by Ext. A2 the value of the consignment was Rs. 93,000/-. The lorry in which the consignment was transported was involved in an accident. According to the respondents, the accident took place as a result of the negligence and carelessness of the driver of the lorry. The accident took place on 8-6-1977 A crime was registered at the Payyannur Police Station as Crime No. 121/77 in respect of the accident. The 1st respondent went to the scene of accident, The damages were got assessed through an independent Surveyor and Ext. A1 dated 11-6-1977 is the report of the Surveyor. The loss was calculated at Rs. 26,910/-. On 29-6-1977 a claim was preferred by the 1st respondent with the appellant. To this, the appellant sent a reply stating that the accident occurred as a result of act of God and directing the 1st respondent to prefer the claim with the 3rd respondent, the Insurance Company. Thereafter, the third respondent Insurance Company settled the clam

for Rs. 27.540/- and addressed the appellant to pay the amount since it had settled the claim with the 2nd respondent. The appellant repudiated the claim alleging that, the goods were carried at "Owner's risk". It is in these circumstances that the above suit was filed.

2. In the written statement, the appellant contended that the suit is not maintainable since the damage to the consignment was occasioned in an accident which is an act of God and therefore the appellant is not liable to pay the damages. The entrustment of the consignment with the appellant was admitted by the appellant. It was further contended that the appellant was only an agent for transport of goods engaging various lorries owned by different people. It was also contended that the claim was settled by the 3rd respondent and the 3rd respondent has no cause of action to prefer the suit.

3. In support of the respondent's case, P. Ws. 1 to 3 were examined and Exts. A1 to A9 were marked. On behalf of the appellant, D. W. 1 was examined.

4. After consideration of the oral and documentary evidence, the lower court held that the respondents have not established that the accident took place as a result of an act of God. The lower court also rejected the plea of the appellant that the goods were transported at "owner's risk" and passed a decree as prayed for with costs and future interest at the rate of 6% per annum till the date of recovery.

5. The learned counsel for the appellant raised three contentions in the appeal: (1) Condition No.3 on the reverse of Edit. A2 consignment note to the effect that the Company shall not be liable for any loss or damage due to pilferage, theft, weather, conditions, strikes, riots, disturbances, fire explosion or accident is a special contract and since the damage was caused as a result of accident the appellant is not liable to pay any damage; (2) Since the accident took place as a result of an act of God, the appellant is not liable to pay damages for the loss; and (3) the lorry in which goods were transported did not belong to appellant and therefore he is not a common carrier and no liability is fastened on him under the Carriers Act.

6. Learned counsel heavily relied on condition No.3 on the reverse of Ext. A1 consignment note and contended that this condition absolved the appellant of any liability to pay damages caused in an accident. To appreciate the tenability of this contention, it is relevant to notice the provisions in Section 6 of the Carriers Act, Section 6 of the Act reads as follows:

6. The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice but any such carrier, not being the owner of a railroad Or tramroad constructed under the provisions of Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of ways on land so taken) may, by special

contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same.

It is clear from this provision that in the absence of a Special contract, signed by the owner of the property or by sane person duly authorised by such owner limiting the liability a common carrier cannot escape the liability. Admittedly, neither the owner of the property nor any agent duly authorised by him had entered into any special contract signed by the owner or by some person duly authorised in that behalf by such owner, limiting the liability. In the circumstances, Condition No.3 contained on the reverse of Ext. A2 will not be of any help to the appellant.

7. In *United India Insurance Co. Ltd. v. Associate Corporation Ltd.* (1987 (1) KLT Short Notes 46), a Division Bench of this court had occasion to consider whether printing of words "subject to Bombay jurisdiction alone" in way bill will amount to a special contract. The court held, apart from the existence of these printed words, respondent has no case that there was a meeting of minds between the consignor and the carrier and there was a specific agreement in that behalf. In those circumstances, the Division Bench refused to treat the printed words as a special contract conferring exclusive jurisdiction to Bombay Court. Here also, apart from condition No. 3 printed on the reverse of consignment note, there is nothing to show that there was a meeting of mind between the parties and resultant agreement absolving of the carrier of all liability for the loss of goods entrusted to the carrier.

8. The next contention raised by the counsel for the appellant is that the accident occurred as a result of act of God and therefore the appellant is not liable to compensate for the loss. Section 9 of the Carriers Act provides that in any suit Brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. Therefore, the burden is on the appellant to prove that the accident occurred as a result of an act of God. There is absolutely no evidence in the case to substantiate the case of the appellant that the accident took place as a result of act of God and not as a result of negligence or misconduct in the carriage of goods or to show that reasonable care, skill and diligence had been used and despite that accident took place. There is no factual foundation to support the contention of the appellant on this aspect. The only circumstance pointed out is that Ext. A1 report shows that another bus came in the opposite direction at a high speed and hit against the lorry. P. W. 2 who prepared Ext. A1 did not question the drivers of the lorry or the bus. The report also does not indicate whether the bus came along the wrong side. DW.1 had no direct information about these facts. Further these circumstances 1 are insufficient to treat the accident as being an act of God.

9. A common carrier is not a mere bailee of goods entrusted to him. He is an

insurer of goods. He is answerable for the loss of goods even when such loss is not caused by negligence or want of care on his part. The, only exception recognised by law is acts of God and of State's enemies.

10. In *R.R.N. Ramalinga Nadar Vs. V. Narayana Reddiar*, , P. Subramonian Poti J. (as he then was) had to consider the question whether the carrier is liable for the loss find damage caused on the way by unruly mob. Rejecting the plea that it is an act of God, the Court observed as follows:-

15. Act of God is one arising from natural causes. Some of the well-known instances of acts of God are the storms, the tides and the volcanic eruptions. They are, in a sense, inevitable accidents beyond the control of man. What is urged in this case is that all inevitable accidents must be taken as acts of God. Matters which are not within the power of any party to prevent, is, according to learned counsel, inevitable accidents so far as he is concerned and consequently it is to be considered as acts of God. I cannot agree. Accidents may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases accidents may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be acts of God. Cockburn C. J., in the leading case in *Nugent v. Smith*, (1876 1 CPD 423) said.

It is at once obvious, as was pointed out by Lord Mansfield in *Forward v. Pittard*, that all causes of inevitable accident-- "fortuitous" be divided into two classes - those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous, to apply the term "act of God" to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to Which the term "act of God" is properly applicable.

In *Halsbury's Laws of England*, Vol. 8, 3rd Edition, page 183, this question is dealt with as under:

An act of God, in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when in other words, it does not imply any law

from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God, It must, however, be something overwhelming and not merely an ordinary accidental circumstance, and it must not arise from the act of man.

I see nothing in the decision in *Chidambara Krishna Iyer Natarja Iyer v. South Indian Rly. Co.* (21 Tra v. LJ. I) to which my attention has been drawn by learned counsel for the defendant to warrant the view that even when the accidents are purely the result of acts of human agency, it should be taken to be acts of God.

11. In *General Traders Ltd. and Another Vs. Pierce Leslie (India) Ltd. and Others*, a Full Bench of this Court had occasion to consider the plea of defence of act of God, in a suit for damages due to shortage of property carried by ship. A defence of act of God was raised on the ground that goods had to be jettisoned due to sudden deterioration of weather. It was not made out that the tempest or gale in the sea was so heavy or so unprecedented that the sailors could not have taken precautionary measures with reasonable foresight and in those circumstances the court held that it was not established that loss was caused as a result of "act of God".

12. In *Kerala Transport Company v. Kunnath Textiles* (1983 KLT 480), a Division Bench of this Court again considered the extent of liability of the carrier in respect of goods lost. The Division Bench quoted with approval the ruling in *R.R.N. Ramalinga Nadar Vs. V. Narayana Reddiar*, and extensively quoted paragraphs 11 to 15 of that judgment. The court finally held that the absolute liability of the carrier is subject to only two exceptions, one of them is any special contract that the carrier may choose to enter into with the customer and the other is act of God. It was further held that act of God does not take in any a and every inevitable accident. It is only those acts which can be traced to natural causes as opposed to human agency that can be said to be acts of God. In this view of the matter, the Division Bench rejected the plea of "act of God" raised by the defendant.

13. Foregoing discussion would show that there is no merit in the contention of the appellant that the accident is the result of act of God and that therefore the appellant is not liable for damages. Lastly, the learned counsel for the, appellant argued that the appellant is not the owner of the lorry in which the goods were carried and is not a Common carrier. Section 2 of the Carriers Act defines common carrier as a person other than the Government, engaged in the business of transporting for hire property from place to place, by land, or inland navigation, for all persons indiscriminately. In view of this definition, it is not possible to accept the contention that the appellant was not carrier even assuming that the lorry used by the appellant for transporting the goods did not belong to him. Further Ext. A2 consignment note clearly indicates, that the appellant is a common carrier and there is no substance in this contention of the appellant also. There is no merit in the appeal and it is accordingly dismissed with costs.