

(1990) 12 KL CK 0011
In the High Court Of Kerala

Raj Kamal Transport

APPELLANT

Vs

New India Assurance Co. and Others

RESPONDENT

Date of Decision : 10-12-1990

Acts Referred:

Citation : (1991) 1 ACC 660

Hon'ble Judges : P.K. Shamsuddin, J

Bench : Single Bench

Judgement

P.K. Shamsuddin, J.—1st defendant in O.S. No. 217 of 1982 on the file of the Sub Court, Ernakulam, is the appellant Suit is for money for damages.

2. The facts that led to the filing of the suit are as follows:

M/s. Kwaliti Food Products, the predecessor-in-interest of the 2nd defendant was doing business of manufacture, marketing, sale and distribution of food products like biscuits under the name and style "Kwaliti Biscuits". It is the plaintiff's case that in the course of business, M/s. Kwaliti Food Products despatched 1110 tins of Kwaliti biscuits to M/s. Ceylon Fancy House, Market Road, Ernakulam. The goods were entrusted for transport to 1st defendant from the branch office of M/s. Kwaliti Food Products in Palghat and were transported by the 1st defendant. On reaching the goods at the destination it was found that there was shortage. A certificate of damage and shortage of goods was also issued by the 1st defendant. It is the plaintiffs case that it was on account of the negligence on the part of the 1st defendant that the short occurred and therefore the 1st defendant was liable to compensate the plaintiff for the loss sustained by them. M/s. Kwaliti Food Products lodged a claim for compensation, but the 1st defendant refused to settle the claim. M/s. Kwaliti Food Products had taken a marine policy of insurance with the plaintiff in respect of the consignment in question. Therefore, M/s. Kwaliti Food Products lodged a claim with the plaintiff for compensation for the loss which was estimated to Rs. 27, 482.70. The plaintiff settled the claim and therefore the plaintiff is entitled to recover the amount from the defendants. The plaintiff called upon the 1st defendant to effect the

payment but the 1st defendant refused to do so. 1st defendant sent a reply disowning the liability. Hence the suit.

3. In the written statement filed by the 1st defendant, it is admitted that the 1st defendant is a common carrier and that it has its branch at Ernakulam. 1st defendant averred that the consignment was transported by it in perfect condition and delivered at Palghat to the consignee on surrender of the consignment note, and by delivering the goods at Palghat the contract of carriage was performed by the 1st defendant. It was also averred that the transport from Palghat to Ernakulam was not on the terms and conditions of the contract of carriage. The allegation of negligence was also denied. In the circumstances, according to the 1st defendant the plaintiff was not entitled to any relief in the suit.

4. On a consideration of the evidence in the case, the Court below held that the 1st defendant is liable to pay Rs. 27,482.70 Ps. to the plaintiff as damages and in that view of the matter, a decree was passed in favour of the plaintiff for recovery of Rs. 27,482.70 Ps. with future interest at 6% from the date of suit till realisation.

5. In this appeal, learned Counsel for the appellant vehemently challenged the finding of the Court below. learned Counsel submitted that there was no entrustment of goods by M/s. Kwaliti Food Products to the 1st defendant to be delivered at Ernakulam. According to the counsel, the entrustment was at Bangalore and the destination was Palghat. Leflmed counsel submitted that since the damage occurred in the course of transport from Palghat to Ernakulam, the 1st defendant was not liable to any damage claimed by the plaintiff. learned Counsel invited my attention to Ext. B1 consignment note issued to M/s. Kwaliti Food Products which shows that it was entrusted at Bangalore and the place of destination was Palghat. It further shows that it was in Lorry No. MIM 3369 that the goods were transported. The contention of the learned Counsel is that the contract entered into by the 1st defendant with M/s. Kwaliti Food Products was to deliver the goods at Palghat and if any damage occurred subsequently to the delivery at Palghat they are not responsible for the same. On the other hand, learned Counsel for the respondent submitted that though Ext. B1 shows the place of destination as Palghat, there is no evidence whatsoever to show that the goods were delivered at Palghat. Ext. A2 is a short-delivery certificate issued by the 1st defendant and that would show that the goods were transported in Lorry No. MIM 3369 and the accident took place at Koratti. He also submitted that if the destination is Palghat and further transport from Palghat to Ernakulam was not pursuant to a contract between M/s. Kwaliti Food Products and the 1st defendant, there is no reason for issue of a short-delivery certificate by the 1st defendant learned Counsel for the appellant wanted to challenge Ext. A2 by contending that there is no seal, but I am unable to accept the contention of the learned Counsel since the genuineness of Ext. A2 has not been challenged by adducing any evidence by the 1st defendant. Therefore I will assume that Ext.

A2 was really issued by the 1st defendant. However, I do not understand the statement therein that the accident took place at Koratti near Palghat. Koratti is not near Palghat and it is not clear, under what circumstances such a certificate was issued. It may also be pointed out that in Ext. A2 which is a reply sent by the 1st defendant to the notice issued by M/s. Kwaliti Food Products, it is not disputed that the goods were transported in the same lorry No. MIM 3369 in which the goods were despatched from Bangalore to Palghat. The contention raised in the reply notice is that the goods had been allotted to the consignor directly in truck No. MIM 3369 and unloaded by the consignee directly from the same truck. It is also the case of the counsel for the appellant that the said truck did not belong to them, that it was hired by the 1st defendant for transport of goods from Bangalore to Palghat and that after the delivery at Palghat, if the Kwaliti Food Products had engaged the truck for further transport from Palghat to Ernakulam, they are not responsible for the same.

6. The main controversy between the parties is whether the goods were entrusted by M/s. Kwaliti Food Products to the 1st defendant, to transport from Palghat to Ernakulam. If there is such an entrustment, the 1st defendant cannot escape the liability for the short delivery of the goods. But on the other hand, if it was an independent entrustment made by M/s. Kwaliti Food Products directly to the owners of lorry No. MIM 3369 it cannot be said that the 1st defendant was liable to pay compensation on the ground that there was short delivery at Ernakulam as a result of the accident which took place at Koratti. The Court below has not addressed itself to this vital question. In the evidence also no attention has been focused on this vital aspect on the basis of which alone the liability can be determined. In the circumstances, I have no option but to set aside the judgment and decree of the Court below and remand the matter back to the Court below for fresh disposal in accordance with law and in the light of the observations contained in this judgment and I do so. The Court below will frame an issue whether there was an entrustment by M/s. Kwaliti Food Products to the 1st defendant to transport goods from Palghat to Ernakulam. If the Court finds that there was such an entrustment, it follows that the 1st defendant will be liable to compensate the loss sustained by M/s. Kwaliti Food Products. Since this is the vital question to be decided in the case and there is no issue or finding on this aspect, the parties will be at liberty to adduce evidence on this aspect.

7. The appeal is disposed of as above. There will be no order as to costs. Court-fee paid on the Memorandum of Appeal will be refunded to counsel for the appellant. Parties will appear before the Court below on 22-2-1991.