
(2017) 08 MAD CK 0071
In the Madras High Court
Case No : 765 of 2002

R.Anbukkarasan

APPELLANT

Vs

M/s.Sakthi Trading Company, & Ors.

RESPONDENT

Date of Decision : 11-08-2017

Acts Referred:

[Carriers Act, 1865](#), [Section 10](#) - Notice of loss or injury to be given within six months

Citation : (2017) 08 MAD CK 0071

Hon'ble Judges : T.Ravindran

Bench : SINGLE BENCH

Advocate : T.Ravindran

Final Decision : Dismissed

Judgement

1. The first appeal is directed against the Judgment and Decree, dated 19.06.2001, made in O.S.No.93 of 1999, on the file of the Sub Court, Sivakasi.
2. The suit in O.S.No.93 of 1999 has been laid by the respondents 1 and 2 / plaintiffs against the appellant / first defendant and the respondents 3 and 4/ defendants 2 and 3 for recovery of money.
3. For the sake of convenience, the parties are referred to as per the nomenclature in the suit.
4. The case of the plaintiffs in brief is as follows: 4.1. The first plaintiff purchased a total number of 2337 bundles of safety matches from Sri Abirami Agency, Kovilpatti, through its agent at Kovilpatti. The total value of the match bundles was Rs.2,94,293/- and the vendor entrusted the match bundles to the first defendant for safe carriage by road from Kovilpatti to Bagalpur to be delivered to the first plaintiff. The first defendant accepted the said entrustment and issued three lorry receipts bearing Nos.8689, 8690 and 8691, all dated 04.07.1994 for the above mentioned bundles of safety matches and the first plaintiff duly insured the above consignments with the second plaintiff under a marine open

policy, dated 04.07.1994, to be compensated and indemnified against any loss or damage that may be caused to the consignments during transit. The first defendant having accepted the consignments had transported the same in truck bearing registration No.TN67 6021 and the said truck met with the fire accident on 05.07.1994 near Saralpatti on Trichy - Dindigul Main Road and except 120 bundles, all the other bundles were destroyed including the truck. On a reference of the matter by the first plaintiff to the second plaintiff, the second plaintiff deputed a licenced surveyor-cum-loss assessor of Trichy to survey the damages and he inspected the consignments at the accident spot and submitted a report, dated 09.09.1994 assessing the loss. The damage caused to the consignments was only due to the carelessness, negligence and wilful misconduct on the part of the first defendant, his men and agents and consequently the first defendant is liable to compensate the loss. The first plaintiff sent a claim letter, dated 28.07.1994, demanding the first defendant to make good the loss. The first defendant having acknowledged the same had not chosen to settle the claim nor sent any reply. The first plaintiff, then referred the claim to the second plaintiff to settle his claim in pursuance of the contract of insurance at Rs.3,14,541/- and in consideration of the payment made, the first plaintiff executed a letter of subrogation-cum-special power of attorney, dated 04.10.1995, in favour of the second plaintiff. On payment of the said amount, the first plaintiff has statutorily subrogated its rights to the second plaintiff and now the entire claim is due only to the second plaintiff. For avoiding possible objections that may be raised in future, the first plaintiff has been added as a party / first plaintiff in the suit. The damage caused to the consignments is only due to the failure on the part of the first defendant / common carrier to discharge his statutory obligations by virtue of their public employment for gain and the damage caused during transit ought to have been only as a result of malfeasance, misfeasance and / or non-feasance on the part of the first defendant / common carrier. The first defendant is liable for the damage under the law of tort. The second defendant is the owner of the truck and the third defendant is the insurer of the truck, who had issued carrier's legal liability policy for the truck. The first defendant, who has issued the lorry receipts for the transportation of the consignments, is primarily liable to compensate the loss caused to the plaintiffs. Hence, the suit.

5. The case of the first defendant in brief is as follows: 5.1. The suit is not maintainable either in law or on facts. The consignor in all those three consignments is Shri Abirami Agency, Kovilpatti and it is not known as to how the first plaintiff has insured the goods and the first plaintiff has no insurable interest in the goods and it is false to state that the first plaintiff took a marine open policy from the second plaintiff on 04.07.1994. The accident occurred on 05.07.1994 resulting in the total loss of the lorry and the goods loaded therein due to the negligence on the part of the workers in that lorry. After coming to know of the accident, an open policy was fabricated as if it was issued on 04.07.1994. There is no valid contract of insurance between the plaintiffs 1 and 2 and hence, the second plaintiff has no liability to make good the loss and

subrogate to the rights of the first plaintiff. So, the suit based on the subrogation is not maintainable in law. The first plaintiff had no insurable interest on the date of the alleged open policy. It is incorrect to state that the goods were carried by the lorry bearing registration No.TN67 Z6021. The lorry, which carried the goods as seen from G.C.Notes, was bearing the registration No.TN67 Z6021, which belonging to N.Raju Reddiar, Thillai Nagar, Sattur and he had insured the said lorry with National Insurance Company Ltd., under the carrier's legal liability policy for the period from 02.09.1993 to 02.09.1994 for a sum not exceeding Rs.3,50,000/- against the actual physical loss or damage to the goods carried in that lorry. So for the loss, if any, caused to the goods of the first plaintiff, only the National Insurance Company Limited is liable to make good the loss. The above said owner of the lorry and insurer are necessary parties to the suit and therefore, on the ground of non-impleadment of them, the suit is liable to be dismissed. The first defendant is not liable to make good the loss claimed by the plaintiff. The first defendant is not liable to pay any interest as the suit itself is for damages. There is no contract to pay interest and hence, the suit is liable to be dismissed.

6. The case of the second defendant in brief is as follows: 6.1. The suit is not maintainable either in law or on facts. It is not known how the first plaintiff has insurable interest in the goods when the consignor is Shri Abirami Agency, Kovilpatti. It is false to state that the first plaintiff took an open policy from the second plaintiff on 04.07.1994, on the other hand, only after coming to know of the accident the marine open policy was fabricated as if it was issued on 04.07.1994. There is no valid contract of insurance between the plaintiffs 1 and 2 and hence, the second plaintiff has no liability to make good the loss and subrogate to the rights of the first plaintiff and the suit based on the subrogation is not maintainable in law. The lorry, which carried the goods, belonged to the second defendant and he had insured the same with the third defendant under the carrier's legal liability policy for the period from 02.09.1993 to 02.09.1994 and in such circumstances, only the National Insurance Company Limited / third defendant is liable to make good the loss. Neither the first defendant nor the second defendant is liable for the same. The second defendant is not liable to pay interest as claimed and the suit is bad for non-sending of the statutory notice contemplated under Section 10 of the Carriers Act to the second defendant and hence, the suit is liable to be dismissed.

7. The case of the third defendant in brief is as follows: 7.1. The suit is not maintainable either in law or on facts. The plaintiffs are put to strict proof of the averments contained in Paragraph Nos.3 to 9 of the plaint and it is admitted that the second defendant is the owner of the vehicle, which carried the goods and the same had been insured with the third defendant under the carrier's legal liability policy for the period from 02.09.1993 to 01.09.1994. Under the policy, the insurer is liable to indemnify the insured only and not third parties. Therefore, the plaintiffs are not entitled to claim damages from the third defendant. Moreover, the second defendant is not a common carrier as defined

under the Carriers Act, 1865 as regards the suit claim and the impugned accident did not occur due to the negligence either of the second defendant or of his servants and the second defendant is not liable for the accident in question and not a necessary or property to the suit and hence, the third defendant is also neither a necessary nor a proper party and hence, the suit, without cause of action, is liable to be dismissed.

8. On the basis of the pleadings set out above, the following issues were framed by the Trial Court for determination: i. Whether there is a valid contract of insurance?

ii. Whether the suit is bad for non-joinder of necessary parties?

iii. Whether the plaintiffs are not entitled to receive any interest?

iv. Whether the second plaintiff or both the plaintiffs is / are entitled to the reliefs as prayed for in the plaint? and

v. To what relief if any?

9. The following additional issues were framed on 19.12.2000 for determination:

i. Whether the case of the second defendant that only the third defendant is liable to pay the damages for the damaged goods is correct?

ii. Whether the suit is liable to be dismissed for nonissuance of a statutory notice to the second defendant as contemplated under Section 10 of the Carriers Act?

and

iii. Whether the claim that the third defendant is not liable to pay the damages is correct?

10. In support of the plaintiffs' case, P.Ws.1 and 2 were examined and Exs.A1 to A17 were marked and on the side of the defendants", D.Ws.1 to 3 were examined and Ex.B1 was marked.

11. On a consideration of the oral and documentary evidence adduced by the respective parties, the Court below was pleased to decree the suit in favour of the second plaintiff as against the first defendant for the suit amount of Rs.3,14,541/- with interest at the rate of 6% per annum from the date of the plaint till the date of realization with costs and dismissed the suit as against the defendants 2 and 3.

12. Aggrieved over the Judgment and Decree of the Court below, the first appeal has been preferred by the first defendant.

13. The following points arise for consideration in this appeal: i. Whether the second plaintiff is entitled to get the suit amount from the first defendant on the basis of the letter of subrogation-cum-special power of attorney executed in its favour by the first plaintiff on 04.10.1995 as put forth in the plaint?

- ii. Whether the third defendant as the insurer of the vehicle, belonging to the second defendant, which had carried the goods in question as such, is liable to pay the damages to the second plaintiff as put forth by the first defendant? and
- iii. To what relief the appellant / first defendant is entitled to?

POINT NOS.I & II:

14. It is not in dispute that the first plaintiff had purchased a total number of 2337 bundles of safety matches from Sri Abirami Agency, Kovilpatti. The said fact has been substantiated by the invoices marked on behalf of the plaintiffs as Exs.A1 to A3. A perusal of the same would go to disclose that as put forth by the plaintiffs, the first plaintiff had placed orders for the above said bundles of safety matches from the consignor, namely, Sri Abirami Agency, Kovilpatti and accordingly, the said consignor had also dispatched the goods to the first plaintiff stationed at Bagalpur, through the above said invoices. It is the further case of the plaintiffs that the first plaintiff had purchased the above said consignments through its agent at Kovilpatti and accordingly, it is found that the first plaintiff being stationed at Bagalpur, as put forth in the plaint and also during the course of evidence, would have purchased the above said consignments only through its agent located at Kovilpatti. The Manager of the forwarding agency concerned has been examined as P.W.1, who deposed clearly that at the behest of the first plaintiff, the goods were purchased from Sri Abirami Agency, Kovilpatti and forwarded them to the first plaintiff stationed at Bagalpur through the lorry bearing registration No.TN67 Z6021 and from the evidence adduced and also as per the pleadings set out in the matter, it is found that the said lorry belonged to the second defendant. Be that as it may, it is further found that the consignments had been entrusted only to the first defendant and it is further found that the first defendant had accepted the said entrustment for transporting the same in the above mentioned truck from Kovilpatti to Bagalpur and also accordingly, issued necessary lorry receipts marked as Exs.A4 to A6. A perusal of the same would go to show that it is only the first defendant, as the common carrier to whom the consignments had been entrusted, had agreed to transport the same to the first plaintiff stationed at Bagalpur from Kovilpatti and accordingly, issued necessary lorry receipts with reference to the same, which had come to be marked as Exs.A4 to A6. It is, therefore, found that if any damage is occurred to the goods enroute or in transit, it is seen that only the first defendant being the common carrier would be primarily liable for compensating the loss caused to the first plaintiff.

15. It is not in dispute that the said truck through which the consignments were transmitted met with the fire accident on 05.07.1994 near Saralpatti on Trichy - Dindigul Main Road and excepting 120 bundles, all the other bundles of the consignments were completely destroyed including the truck. The said fact as such was not controverted. It is further seen that the first plaintiff having purchased the consignments from Sri Abirami Agency, Kovilpatti and decided to get it delivered through the truck above mentioned is also found to have insured

the consignments with the second plaintiff under the marine open policy, dated 04.07.1994, for compensation and indemnification against any loss or damage that may be caused to the consignments during transit. The above said fact is also found to be substantiated by the Insurance Certificate with reference to the same marked as Exs.A7 to A9. The fact that the consignments had been insured with the second plaintiff by the first plaintiff under Exs.A7 to A9 is also admitted by the second plaintiff.

16. Further, according to the first plaintiff, the goods during transit having sustained damages as above stated, according to the first plaintiff, the said fact was intimated to the second plaintiff and further according to the first plaintiff, the second plaintiff deputed its surveyor to assess the loss and submit his report and it is seen that the surveyor concerned had inspected the consignments and accordingly, submitted his report, which has come to be marked as Ex.A10. The surveyor is also paid necessary fees for his work and the same could also be evidenced from the receipt issued by him for the fees marked as Ex.A11. Therefore, claiming damages from the first defendant, being the common carrier to whom the consignments had been entrusted for transporting it to Bagalpur from Kovilpatti and as the consignments got damaged enroute, it is found that the first plaintiff sent a letter of claim to the first defendant on 28.07.1994, which has been marked as Ex.A12. The receipt of the same is not disputed by the first defendant. Therefore, it is found that as put forth by the plaintiffs, the first defendant being the common carrier to whom the consignments had been entrusted for transmitting it to Bagalpur from Kovilpatti, the goods having been destroyed enroute, the first plaintiff as such had made a claim for the recovery of the damages from the first defendant being the common carrier for the transportation of the consignments in question. The receipt of Ex.A12 is not in issue and the same has been accepted by the first defendant. Further, the same could also be evidenced by the fact that in response to Ex.A12, the first defendant has also sent a damage certificate to the first plaintiff admitting that the goods got destroyed enroute and accordingly, it is found that the first defendant, being the common carrier to whom the consignments had been entrusted, also agreed that the goods got damaged by issuing a damage certificate, which had come to be marked as Ex.A14.

17. The further case of the first plaintiff is that inasmuch as the consignments were insured with the second plaintiff under Exs.A7 to A9, accordingly, it had made a claim to the second plaintiff in pursuance of the contract of insurance and it is seen that the second plaintiff has settled the damages to the first plaintiff pursuant to the contract of insurance in a sum of Rs.3,14,541/- and the same is not disputed by the second plaintiff. The same could also be seen from the documents marked as Exs.A16 and A17 cumulatively. Accordingly, it is the case of the first plaintiff that in consideration of the payment effected by the second plaintiff in its favour pursuant to the contract of insurance, it had executed a letter of subrogationcum- special power of attorney, dated 04.10.1995, in favour of the second plaintiff and thus, according to the plaintiffs

put together, the second plaintiff has got statutorily subrogated to the rights of the first plaintiff and entitled to seek for the suit amount from the first defendant. Accordingly, it is found that by way of abundant caution, the first plaintiff was also added as a party / first plaintiff in the suit along with the second plaintiff and the suit has come to be laid for the recovery of the amount towards the damages caused as above mentioned from the first defendant. The letter of subrogation-cum-special power of attorney, dated 04.10.1995, has been marked as Ex.A15.

18. As seen above, the first defendant has not seriously contested the case of the first plaintiff that the goods had been entrusted to it for transportation from Kovilpatti to Bagalpur. The said fact could also not be controverted by the first defendant as it is found from Ex.A4 to A6 that only the first defendant being the common carrier, which had issued lorry receipts in favour of the first plaintiff for transporting the same from Kovilpatti to Bagalpur.

19. However, it is found that the first defendant had taken certain pleas to thwart the case of the plaintiffs as such and thus, firstly according to the first defendant, the first plaintiff not being the owner of the goods and the owner of the goods being the consignor, namely, Sri Abirami Agency, Kovilpatti, it is the case of the first defendant that the first plaintiff has no insurable interest in the goods as such and therefore, the first plaintiff would not be competent to take the insurance of the consignments from the second plaintiff as the owner of the goods and thereafter, on settlement of the claim made by the second plaintiff, the first plaintiff would not be entitled to subrogate its right to the second plaintiff and therefore, according to the first defendant, the letter of subrogation marked as Ex.A15 is not valid in the eyes of law and as such, the plaintiffs are not entitled to maintain the suit on the basis of the contract of insurance pleaded by them.

20. However, as seen from the materials placed in the matter, it is found that when it is not in dispute that the first plaintiff has purchased the consignments from Sri Abirami Agency, Kovilpatti and when it is also found that as seen from the evidence of P.W.1, the first plaintiff has purchased the goods through its forwarding agent and when it is further found through the evidence of P.W.1 that as the forwarding agent of the first plaintiff, they had taken the delivery of the goods from Sri Abirami Agency, Kovilpatti and sent the same to the first plaintiff through the common carrier i.e., the first defendant, it is found that the first plaintiff has title to the goods concerned and accordingly, it has insurable interest in the goods concerned. Further, it is found that as seen from the invoices in question marked as Exs.A1 to 3, Sri Abirami Agency, Kovilpatti, has forwarded the goods from Kovilpatti to Bagalpur only at the risk of the first plaintiff and thus seen it is found that it is only the first plaintiff, who had purchased the goods from the consignor Sri Abirami Agency, Kovilpatti and agreed to get it delivered through the truck belonging to the second defendant and accordingly, to ensure that it should not sustain any damage on account of the destruction of

the goods enroute found to have taken a marine open policy in respect of the goods purchased with the second plaintiff and thus, it is cumulatively seen that the first plaintiff having become the owner of the goods as such immediately on the purchase of the same from the consignor and accordingly, agreed to get it transported from Kovilpatti to Bagalpur, at its own risk and had taken all the precautionary measures above stated to ensure the safe transit of the consignments in question. When the facts are as such, the contention of the first defendant that only after the goods or the consignments had been delivered to the first plaintiff, it would become the owner of the goods and as such before the delivery it would not be entitled to claim ownership to the goods as such cannot be countenanced. The consignments have not been transmitted by the consignor, namely, Sri Abirami Agency, Kovilpatti, at its risk from Kovilpatti to Bagalpur. On the other hand, as pointed out above, the goods had come to be transported by the first plaintiff having purchased the goods from the above mentioned consignor, had agreed to get it transported at its own risk and accordingly, the invoices marked as Exs.A1 to A3 also reflect the above position and such being the factual scenario, the contention of the first defendant that the first plaintiff would be entitled to lay any claim over the consignments in question only after they are delivered to it and not before the same, as such cannot be accepted in the light of the facts and circumstances of the case above detailed. Accordingly, it is found that the first plaintiff, as discussed above, insured the consignments through a marine open policy with the second plaintiff for the safe transport of the goods through the common carrier. Therefore, it is found that the first plaintiff is having insurable interest over the consignments in question and accordingly, based upon the contract of insurance with the second plaintiff marked as Exs.A7 to A9, made a claim to the second plaintiff and eventually, the second plaintiff also accepted the demand of the first plaintiff and settled the claim in favour of the first plaintiff and thereby got to it the subrogation rights from the first plaintiff under Ex.A15 and thus, it is seen that the second plaintiff is entitled to seek for the suit amount from the common carrier i.e., the first defendant. Therefore, it is seen that the suit laid by the plaintiffs as stated in the plaint is maintainable and therefore, the contention of the defendants that the first plaintiff not having any insurable interest in the goods and therefore, the second plaintiff, as such, or both together are not entitled to maintain the suit is not acceptable and the same is rejected.

21. The factum of the execution of the letter of subrogation-cum-special power of attorney in favour of the second plaintiff by the first plaintiff is not seriously controverted and the same is found to be established through Ex.A15. Therefore, the second plaintiff having settled the claim in favour of the first plaintiff as evidenced from Exs.A15 to A17 put together, it is found that the second plaintiff is entitled to step into the shoes of the first plaintiff and thereby lay the suit along with the first plaintiff for the recovery of the damages sustained in respect of the consignments from the common carrier i.e., first defendant.

22. The first defendant has also taken the second plea that the truck in which the

goods were transported from Kovilpatti to Bagalpur admittedly belonging to the second defendant and the second defendant having taken the carrier's legal liability policy in respect of the truck as well as the goods transported through it with the third defendant - Insurance Company, according to the first defendant, only the third defendant as such is liable to compensate the second plaintiff if any and therefore, the suit is liable to be dismissed as against the first defendant.

23. The defendants 1 and 2 were not originally arrayed as party defendants in the suit. Inasmuch as the first defendant has taken up a plea that they are also proper and necessary parties for the effective adjudication of the suit claim, it is found that they have come to be impleaded as party defendants in the suit. Even after they have been impleaded as party defendants, as per the case of the plaintiffs, they have maintained that it is only the first defendant, who had issued the lorry receipts for transporting the consignments, is primarily liable to compensate the loss caused to the plaintiffs. Therefore, even after the impleadment of the defendants 2 and 3, it is the specific case of the plaintiffs that only the first defendant to whom the goods had been entrusted for transit, is primarily liable to compensate the loss sustained to the plaintiffs. It is not the case of the first defendant that there is a privity of contract between the plaintiffs and the second defendant as the case may be with reference to the transportation of the consignments in question. On the other hand, from Exs.A4 to A6, it is found that only the first defendant has issued the lorry receipts for the safe transmit of the consignments in question and accordingly, it is found that the first defendant being the common carrier is liable to compensate the loss sustained by the plaintiffs as prayed for. When there is no privity of contract between the plaintiffs and the second defendant as such, as regards the transportation of the consignments in question and when it is not even the case of the first defendant that the lorry receipts marked as Exs.A4 to A6, they had been issued by it on behalf of the second defendant also and when as seen from Ex.A4 to A6 had come to be issued only by the first defendant as the common carrier for the transportation of the goods in question and when the goods had come to be destroyed enroute, which fact is not in dispute and when further the first plaintiff has made a claim for the damages only from the first defendant under Ex.A12 and following the same, it is only the first defendant, who had issued the damage certificate also to the first plaintiff marked as Ex.A14 and when there is no agreement or contract as such between the first plaintiff and the second defendant in any manner for the transportation of the consignments in question, it is seen that the first defendant being the common carrier to whom the goods had been entrusted for transit is primarily liable to compensate the loss to the plaintiffs and the first defendant cannot shirk its responsibility by shifting the buck to the second defendant or the third defendant as the case may be. The plaintiffs as such are in noway concerned with the contract / agreement entered into between the defendants 1 and 2 for the transportation of the consignments in question and the plaintiffs having transported the consignments through the common carrier i.e., the first defendant would be entitled to

maintain the suit against the first defendant alone and accordingly, it is found that the first defendant is responsible for compensating the loss to the plaintiffs as prayed for. The mere fact that the second defendant is also a common carrier and he had insured the truck along with the goods transported through it with the third defendant by itself would not exonerate the liability put on the first defendant to compensate the loss caused to the plaintiffs and if at all the first defendant has got any legal claim as against the second defendant or the third defendant as the case may be, it is entitled to pursue its course of action as permitted under law. In such view of the matter, the first defendant cannot be allowed to contend that it is not in any way responsible for the loss caused to the plaintiffs and the second defendant as the owner of the truck and the third defendant as the insurer of the truck would be liable to compensate the loss sustained by the plaintiffs.

24. In support of his contentions, the learned counsel for the appellant / first defendant placed reliance upon the decisions reported in 1958-65 A.C.J. 602 [Union of India vs. West Punjab Factories Ltd. and another], 1981 A.C.J.98 [Savani Transport Pvt. Ltd. vs. C.Ahmed Sharif Saheb], AIR 1982 Andhra Pradesh 203 [K.Venkat Rao vs. Commercial Goods Transport Firm, Vizianagaram], AIR 1984 Calcutta 230 [Umarani Sen and others vs. Sudhir Kumar Datta and others], (1999) 8 SCC 226 [A.Robert vs. United Insurance Co. Ltd.,] and 2002-4-L.W.598 [M/s.New India Assurance Co. Ltd., vs. Sugandha Balakrishna Rode and others]. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

25. In the light of the above discussions, I hold that the second plaintiff is entitled to get the suit amount from the first defendant on the basis of the letter of subrogation-cum-special power of attorney executed in its favour by the first plaintiff on 04.10.1995 as determined by the Court below and the third defendant as the insurer of the vehicle, belonging to the second defendant, which had carried the goods in question, as such is not liable to pay the damages to the second plaintiff as put forth by the first defendant. Accordingly, Point Nos.I and II are answered. POINT NO.III:

26. In the light of the answers given to Point Nos.I and II, I hold that the Court below has considered all the facets of the case in the right perspective both factually as well as legally and therefore, the impugned Judgment and Decree of the Court below do not warrant any interference from this Court.

27. Resultantly, the Judgment and Decree, dated 19.06.2001, made in O.S.No.93 of 1999, on the file of the Sub Court, Sivakasi, are confirmed and the first appeal is dismissed. No costs.