(2001) 01 DEL CK 0020

In the Delhi High Court

Case No : Suit No. 107 of 1999

Rolta India Limited and Another — APPELLANT

Vs

ELBEE Services Limited — RESPONDENT

Date of Decision : 04-01-2001

Acts Referred:

Citation : (2001) 3 AD 444 : AIR 2001 Delhi 353 : (2001) 92 DLT 232 : (2001) 58 DRJ 330

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Mr. Valmiki Mehta, for the Appellant;

Judgement

J.D. Kapoor, J.—plaintiff No.1, a company incorporated under the companies Act, 1956 is engaged in the business of manufacture, import, supply & erection/ commission of the sophisticated and advanced computer equipment system. plaintiff No.2 is a subsidiary of General Insurance Corporation of India and is mainly engaged in the business of general insurance. Defendant is a company registered under the Companies Act and is engaged in the business of transporting for hire and/or reward property or goods from place to place, inter alia, by land for all persons and, Therefore, comes within the expression "Common Carrier" as per Carriers Act 1865.

2. This is a suit for recovery of Rs.1,42,46,127/- claimed from the defendant on account of the damages caused to the packages delivered to the defendant for transportation and consequential loss to the plaintiff.

3. Put briefly the facts are as under:

plaintiff No.1 was awarded a contract by the Forest Survey of India, Dehradun (hereinafter referred to as the "FSOI"), a Government of India undertaking for supply of installation and erection. As many as 28 packages containing electronic, computer equipment upon arrival at New Delhi Air Port were cleared by them from the Customs after paying customs duty and stored at their godown at premises No. M-76, Greater Kailash-II, New Delhi. They had also brought 29 packages of indigenous equipment for Bombay for supply and transportation to FSOI and handed over to the defendant in its capacity as common carrier vide way Bill No. 1069508777 dated 17.1.1996 (Exhibit PW1/1). The Defendant undertook the consignment by road from Delhi to Dehradun and agreed to accept the consignment from the plaintiff, consignor for consideration and also undertook to carry the deliver the complete consignment safely and it original from without any exception at the office of FSOI. For the period of transportation the entire consignment was got insured by the plaintiff No.1 with plaintiff No.2 under Marine Policy (Cargo) for a total sum of Rs. 3,83,00,000/- to cover risk. Prior to the commencement of the transportation, plaintiff No.2 deputed its surveyor Sh. Rajesh Kumar Met to conduct a pre-dispatch survey. The survey was conducted vide survey reports dated 25.12.1995, 1.1.1996 and 14.1.1996 to the effect that the consignments were in good, sound and original condition. All the equipments were loaded in four trucks owned and/or chartered and under power and control of the defendant at 11.oo p.m. on 17.1.1996. on 18.1.1996 the plaintiff No.1 was informed that there was a collision of one of the truck of the defendant bearing registration No. DL IL B 3104 with another truck bearing registration No. DDL 1715 coming from opposite direction. The truck in question was carrying six packages (hereinafter referred to as subject packages) of the consignment that contained imported goods supplied by M/s Intergraph Corporation USA. The collision took place as a result of unroadworthiness of the truck in question and due to fault, negligence and rash driving of the driver of the defendant company. As a result of the collision and improper stowage and lashing of the packages the truck lost its balance and overturned on its left side causing substantial damage to the subject packages and contents therein.

4. The plaintiff No.1 immediately informed the fact of the collision through defendant to the plaintiff No.2 who directed its local office to depute a surveyor to make a site report. Mr. Anil Kumar Aggarwal visited the spot as surveyor and submitted that survey report dated 6.3.1996 mentioning therein that substantial damage was caused to the subject packages. Since the subject packages were in packed condition and could not be surveyed in detail it was advised to conduct a detailed survey at the destination after opening the subject packages. The subject packages were transferred into another vehicle provided by the defendant and sent to its destination FSOI. At Dehradun Mr. Rajesh Kumar Mer carried out detailed survey and submitted a preliminary survey report dated 29.2.1996 and thereafter prepared the complete survey report after survey conducted on various dates on account of highly precision and sophisticated nature of equipment. The statutory claim on plaintiff No.1 under the policy of insurance of Rs.2,75,63,310/- was served on 13.5.1996. However, the claim was refused and the final claim bill for Rs.1,87,70,167/- was submitted to the plaintiff No.2. The consignment thereafter was jointly surveyed by M/s Dynamic Industrial Enterprises Along with the engineers of plaintiff No.1 and their joint survey report is dated 13.8.1996 whereas the final assessment survey report

after discussion with the official of the plaintiffs was prepared on 8.7.1997. The final survey report had confirmed a loss of Rs.1,43,51, 481/-. The final survey report related to the value of the packages and the equipments packed therein, import duty thereon, cost of restitution of the parts/equipment and the loss caused thereon. Since the defendant failed and neglected to respond to the statutory claim notice dated 19.3.1996, plaintiff No.2 made an initial payment of Rs. 45,00,000/- on 24.9.1996 and further payment of Rs.97,46,172/- in full and final settlement after receipt of the final survey report. Consequently a letter of subrogation and special power of attorney dated 13.10.1997 was executed in favor of plaintiff No.2 by plaintiff No.1 whereby under the provisions of Marine Insurance Act and the letter of subrogation, plaintiff no.2 were assigned and were subrogated to the rights and remedies of plaintiff no.1 in respect of the said consignments and as such plaintiff no.2 are entitled to prefer and prosecute the suit in their own names, though out of abundant caution the plaintiff no.1 is also joined as a co-plaintiff.

5. It is averred that the said way Bill is merely a receipt signed by the defendant acknowledging the receipt of the consignment and Therefore does not constitute a contract between the first plaintiff and the defendant and as such the terms. stipulations, clauses, covenants and conditions put forth in the said Way Bill issued by the defendant restricting, reducing or relieving their liability were neither assented to in writing nor signed by or on behalf of the plaintiff no.1 or their authorised agents and are, Therefore, not binding on the plaintiffs nor they negate, lessen or relieve the defendants of their liability of safe and secure carriage of the consignments. Even otherwise the reduction of the liability of the defendant as to the damage and loss caused to the consignment and contents of the subject packages is contrary to law and, Therefore, defendants committed breach of contract of carriage in its capacity as common carrier under the Carriers Act and thereby not taking care of said consignment as value and thereby caused loss to the plaintiffs. The damage of the subject consignment due to collision of the truck is res-ipsa-loquitur. According to the plaintiffs, the cause of action last arose on 11.9.1997 when the last payment of Rs.97,46,127/- was made by the plaintiff no.2 in full and final settlement of claim of plaintiff no.1.

6. Summons of the suit were duly served upon the defendant as these were received by the Secretarial Executive of the Company. Since there was no appearance on behalf of the defendant it was proceeded ex parte and the plaintiff was called upon to file the affidavit in support of averments by way of evidence. All the above averments had been duly supported by the said affidavit.

7. plaintiff has proved the following documents in support of the handing over of consignments to the defendant, transportation to Dehradun, its pre-dispatch survey and post-dispatch survey, its claim preferred with plaintiff no.2

1. Way Bill (Exhibit PW1/1)

2. consignments containing details of articles (PW-1/2)

3. Insurance policy with plaintiff no.2 (PW-1/3).

4. Damage certificate (PW-1/4).

5. Statutory claim preferred with the defendants (PW-1/5).

6. Receipt of Regd. documents (PW-1/6).

7. Provisional claim bill (PW-1/7).

8. Joint survey reports (PW-1/8 to PW-1/10).

8. The onus to prove the liability of the defendant was on the plaintiffs. The plaintiffs have staked claim mainly on the strength of the provisions of Carriers Act and fastened liability of the defendant as Common Carriers equivalent to that of an insurer though plaintiff No.1 has set up a plea that the terms and conditions contained in the Way Bill were not assented to in writing either by or on behalf of the plaintiff or their authorised agent and as such neither are they binding nor do they negate, lesson or relieve the defendant of their liability as a Common Carrier. I am afraid the plea that terms and conditions of transportation were not assented to in writing holds water like a sieve as the agent of the plaintiff i.e. plaintiff shipper signed the Way Bill and agreed to the terms and conditions set forth on its reverse. The covenant in this regard reads as under:-

"I hereby agree to the terms and conditions set forth on the reverse of this (Shippers) copy of this non-negotiable Way Bill and warrant that the information contained on this Way Bill is true and correct liability limited to Rs.100/-"

9. The relevant terms and conditions are extracted below:-

"This shipment is accepted by ELBEE SERVICES LTD. (its employees and/or its agents and hereinafter referred to collectively as "ELBEE") for carriage on behalf of "THE SHIPPER" subject to terms and conditions hereinafter set out. "ELBEE" reserves the right to carry "THE SHIPPER''s goods by any route and procedure and by successive carriers and according to its own handling, storage and transportation methods.

1. THE DOMESTIC WAYBILL

a. The ELBEE waybill is non-negotiable and the SHIPPER acknowledges that it has been prepared by the SHIPPER acknowledges that it has been prepared by the SHIPPER or by "ELBEE" on behalf of "THE SHIPPER".

b. The shipment under this waybill is carried at "THE SHIPPER''s " risk.

2. OBLIGATIONS AND RESPONSIBILITY OF THE SHIPPER

a. "ELBEE" will only carry goods which are the property of "THE SHIPPER" and "THE SHIPPER" warrants that it is authorised to accept and is accepting these conditions not only on behalf of itself but also agents for or on behalf of all persons whoa re or may thereafter become interested in the goods. "THE

SHIPPER" hereby undertakes to indemnify "ELBEE" against any damages, cost and expenses resulting from breach of this warranty.

6. LIMITATIONS OF LIABILITY

a. The liability of "ELBEE" for any loss or damage to the shipment will be strictly limited to Rs.100/- for each shipment (which terms includes all documents and articles consigned through "ELBEE" by "THE SHIPPER").

7. CONSEQUENTIAL DAMAGES EXCLUDED

"ELBEE" shall not be liable in any event for any consequential or special damages or other direct or indirect loss. However arising whether or not "ELBEE" had knowledge that such damages might be incurred including but not limited to loss of income profits interest utility or loss of markets.

8. LIABILITIES NOT ASSUMED

(a) In particular "ELBEE" will not be liable for any loss or damage to the shipment or delay in picking or delivering the shipment if it is due to acts of God force majeure occurrence of any cause reasonably beyond the control of "ELBEE" or loss of damage caused through strikes, riots, political and other disturbances such as fire, accident of the vehicle carrying the goods, explosions beyond our control for the goods that are carried by us.

(b) Caused by

The act, the fault or omission of "THE SHIPPER", the consignee or any other party who claims an interest in the shipment including violation of any terms and conditions hereof or any other person. Government officials in discharge of their official duties such as Customs, Taxation, Octroi inspection etc. The nature of the shipment or any defect characteristics or inherent vice thereof. Electrical or magnetic injury erasure or other such damages to photographic image or recording in any term.

10. The main gravamen of the contention of the learned counsel for the plaintiff is that Section 9 of the Carriers Act postulates that the liability of a carrier is that of an insurer and that in case of loss or damage to goods to the carrier, the plaintiff need not prove negligence. Section 9 reads as under:

"9. plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act- 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.

11. In support of his contention the learned counsel has relied upon Patel Roadways Ltd. vs. Birla Yamaha Ltd. AIR 2000 SC 1461. In the said case the core question was whether Section 9 of the Carriers Act 1865 is applicable to a proceeding under the Consumer Protection Act 1986 or not. The respondent M/s

Birla Yamaha Ltd. booked 32 consignments containing 276 generator sets at Ghaziabad in the State of Uttar Pradesh with M/s Patel Roadways Limited for transportation. The freight charges were duly paid by the consignor to the carrier and were duly paid by the consignor to the carrier and necessary lorry receipt was issued by the latter in favor of the former. The goods booked by the respondent were destroyed in a fire which took place in the godown of appellant shortly after booking of the consignments. The respondent made a claim for the value of the goods, for refund of freight charged and compensation for the loss. Since no satisfactory solution was arrived at between them, the respondent filed a petition before the National Consumers Disputes Redressal Commission claiming Rs. 56,00,799/- along with the interest. While referring to several provisions of the Carrier Act, namely, sections 3,4,6 and 8, the Supreme Court observed that the Carriers Act is intended not only to enable common carriers to limit their liability for loss of a damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts or themselves, their servants or agents. Therefore, the Act is not only protective of the interest of the common carriers but also enhances the credibility of the business with general public.

12. After referring to various provisions of the Consumer Protection Act, Supreme Court further observed that the consumer disputes redressal agencies are vested with powers of adjudication of all types of consumer disputes. No exception is made in case of consumer disputes in which the allegations made in the complaint regarding deficiency of service causing damage to or loss of the goods are contested.

13. As to the liability of common carrier for loss of or damage to the goods it was observed that the position of law is well-settled that the liability of a common carrier in India, as in England is, more extensive and liability is that of insurer though the absolute liability of the carrier is subject to two exceptions viz an act of God and special contract which the carrier may choose to enter with the customer. The questions whether it is necessary for the plaintiff to establish negligence for making the carrier under the Carriers Act liable was answered as under:

"Form the conspectus of views taken in the decisions of different High Courts noted above it is clear that the liability of a common carrier under the Carriers Act is that of an insurer. This position is made further clear by the provision in S.9, in which is specifically laid down that in a case of claim of damage for loss to or deterioration of goods entrusted to a carrier it is not necessary for the plaintiff to establish negligence. Even assuming that the general principle in cases of tortuous liability is that the party who alleges negligence against the other must prove the same, the said principle has no application to a case covered under the Carriers Act. This is also the position notwithstanding a special contract between the parties. These principles have held the field over a considerable length of time and have been crystallized into accepted position of law. No god reason has been brought to our notice to persuade us to make a departure from the accepted position. Therefore we reiterate the position of law noticed above. The consequential position that follows is that the contention of Shri Ashok Desai learned senior counsel, that the respondents herein having failed to establish negligence on the part of the appellant, their claim for damages should be rejected, cannot be accepted."

14. This being the position of law, it is immaterial whether there was a special contract between the parties the terms and conditions of which have been enumerated above as to the liability on account of loss or damage caused by fire or accident due to the negligence on the part of the carrier as the common carrier has been placed on the same pedestal as the insurer. In any even the common carrier is liable to pay the loss of or the damage caused to the goods accepted as carrier. The only defense available to the common carrier is that the loss or damage was not caused due to its negligence which even otherwise is assumed. In the instant case the defendant did not come forward to contest the claim of the plaintiffs and as such failed to abjure its liability. The scale of proving the negligence is tilted against the defendant as in the opinion of the Supreme Court negligence of the carrier is assumed. The plaintiffs have thus succeeded in proving the claim as set up in the suit and are thus entitled for a decree. Accordingly the suit is decreed in favor of the plaintiffs and against the defendant. A decree sheet be prepared accordingly.

