
(2009) 10 J&K CK 0017
In the Jammu And Kashmir High Court

Sawhney Roadways	Vs	APPELLANT
United India Insurance Co. and Another		RESPONDENT

Date of Decision : 12-10-2009

Acts Referred:

Carriers Act, 1865 — Section 10
Ranbir Penal Code, 1989 — Section 381

Citation : (2010) 1 JKJ 268

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mansoor Ahmad Mir, J.—This Civil 1st Appeal is directed against the judgment and decree dated 25.1.2005 passed by Principal District

Judge, Jammu in a civil suit, titled, United India Insurance Co. and Anr. v. Sawhney Roadways (for short hereinafter, impugned judgment), on the grounds taken in the memo of appeal.

2. Respondents-plaintiffs have filed a suit for recovery of Rs. 1,46,107.50 along with pendente lite and future interest against the

appellant/defendant before this Court on 23.8.1995 and came to be transferred to the Court of Principal District Judge, Jammu. It is averred in the

plaint that respondent/plaintiff No. 1 is conducting the business of general insurance and Sh. H. K. Dhar, Assistant Divisional Manager is one of the

principal officers and attorney holder of it and is fully authorized and empowered to institute the suit. Respondent/plaintiff No. 2 is a private

concern and is dealing with the business of commission and forwarding agent, dispatched 110 bags of sugar weighing 11000 kgs in proper packed

condition vide Challan/invoice No. 9208 dated 18.12.1993 to its consignee,

namely, M/S Abdul Rehman Mir & Co., Shivpura, through appellant/defendant-transport company. The value of the said consignment was Rs. 1,34,711.50 and it was insured with respondent/plaintiff No. 1 under open general policy No. 110600/22/1/377/93 valid from 19.5.1993 to -18.5.1994. The said consignment of sugar was loaded in a truck bearing registration No. JK02B/1159 on 18.12.1993 at Jammu and left on the Same day for Srinagar and stayed at Batote for night. The said consignment was not delivered to the consignee at Srinagar. The representatives of the insurance company-respondent/plaintiff No. 1 on receiving the information about the non-delivery of consignment made a search of the said vehicle and also approached its owner. The owner of the vehicle lodged a report with Police Station Batote on 20.12.1993 about the missing of truck along with the consignment. FIR No. 116/93 came to be registered at Police Station Batote u/s 381 RPC. During investigation the Conductor of the vehicle was arrested and the vehicle was recovered from Awantipura without the said consignment. The investigating officer came to the conclusion that the conductor and driver had sold the entire consignment at Batote and the Conductor was convicted by the Court of competent jurisdiction. Respondent/plaintiff No. 1 got the investigation conducted by M/S Dogra Placement and Security, an independent investigating agency, who confirmed the theft of 105 bags of sugar by the driver and conductor of the vehicle. Sh. Kuldeep Kumar Sharma of M/S Sharma Surveyor, Shalamar Road, Jammu assessed the loss suffered by respondent/plaintiff No. 2 to the tune of Rs. 1,27,757.50. Respondent/plaintiff No. 2 made a claim with the appellant/defendant regarding the loss suffered by it, but the appellant-defendant failed to make the payment, constrained respondent/plaintiff No. 1 to indemnify the insured-respondent/plaintiff No. 2 and made payment of total amount of Rs. 1,46,107.50 to respondent/plaintiff No. 2. Respondent/plaintiff No. 2 executed a Letter of Subrogation-cum-Power of Attorney in favour of respondent/plaintiff No. 1 authorizing it to file a suit on behalf of respondent/plaintiff No. 2 for the recovery of said amount.

3. The appellant-defendant contested the suit by the medium of written statement. The following issues came to be framed:

1. Whether the suit is time barred? OPD

2. Whether the plaintiff has no locus standi to file the present suit against the defendant for want of privity of contract? OPD

3. Whether plaintiff No. 1 is entitled to recover the amount of Rs. 1,47,107.50 from the defendant on account of damages for loss suffered due to non-delivery of sugar. OPP

4. Whether the plaintiff is entitled to interest @ 12% p.a.? OPP

5. Relief?

4. Respondent/plaintiff No. 1 was directed to lead the evidence. It examined PW1 H. K. Dhar, PW2 Jaswant Singh, PW3 Kuldeep Sharma and

PW4 Raj Kumar Gupta, partner of respondent/plaintiff No. 2 in support of its case. The appellant-defendant has not examined any witness in

defence. The trial court has given the brief resume of evidence of respondent/plaintiff No. 1. I deem it proper not to discuss the gist of witnesses,

but it is profitable to discuss brief resume of the statement of Raj Kumar Gupta, the partner of respondent/plaintiff No. 2.

5. He has stated that he is the partner of respondent/plaintiff No. 2. On 18.12.1993 they dispatched the consignment of 110 bags of sugar to

Srinagar through appellant-defendant in the name of Haji Abdul Rehman Mir vide Challan/invoice, the value of which was Rs. 1,34,000/-. The said

consignment was insured through respondent/plaintiff No. 1. The same did not reach at Srinagar. On 21.12.1993 they came to know that the

consignment was stolen away in the way and accordingly he informed the insurance company-respondent/plaintiff No. 1 and lodged a claim with it.

The insurance company-respondent/plaintiff No. 1 discharged its liability by making the payment to respondent/plaintiff No. 2. He has also stated

that the Letter of Subrogation-cum-Power of Attorney bears his signatures which he had given to respondent/plaintiff No. 1. He has also admitted

the contents of said documents as true and correct. In cross-examination he has stated that he signed the Letter of Subrogation at the time when

respondent/plaintiff No. 1 handed over the cheque of claim amount on 28.3.1995 to respondent/plaintiff No. 1 and his signatures were obtained on

printed form. He further stated that he does not know when his signatures were obtained and whether the column of the printed form had been

filled at that time or not. Further he does not know what powers he had given to respondent/plaintiff No. 1 by virtue of said printed form.

Issue-wise Findings

Issue No. 1.

6. The trial court has rightly recorded the findings while deciding this issue. The case in hand squarely falls within the scope and ambit of Article 86-

B of Schedule 1 of J&K Limitation Act. It is apt to reproduce the said Article herein.

Description Period of limitation Time from which period
of suit begins to run

86B Against a carrier for Three years when the goods
compensation for non ought to be delivered.
delivery of, or delay in
delivering goods.

7. In terms of this Article three years period is provided for claiming compensation for non-delivery of goods from the date of cause of action. The suit came to be filed on 23.8.1995 and the cause of action accrued to the plaintiff in terms of the averments contained in the plaint and is proved by the plaintiff on 18.12.93. Thus the suit is not time barred. Accordingly the findings returned by the trial court are upheld.

Issue No. 2.

8. This issue will decide the fate of respondent/plaintiff No. 1. The moot question for consideration is whether respondent/plaintiff No. 1 has locus-standi to file the suit? Mr. Jain, learned Counsel for appellant-defendant while addressing the arguments argued that respondent/plaintiff No. 1 has no power and competence to file the suit not to speak of locus-standi. While developing arguments he contended that respondent/plaintiff No. 1 has laid the foundation of suit on the basis of so called Letter of Subrogation-cum-Power of Attorney (Annexure ""L"" to the suit). The appellant-defendant has specifically averred in the written statement that he has no knowledge of Letter of Subrogation-cum-Power of Attorney. He has specifically denied para-15 of the plaint. Thus, it was for the respondents/plaintiffs to prove the Letter of Subrogation-cum-Power of Attorney. It was mandatory to prove what right respondent/plaintiff No. 2 has given to respondent/plaintiff No. 1 and for what relief respondent/plaintiff No. 1 had to file the suit. The respondents/plaintiffs have failed to prove the said

factum and respondent/plaintiff No. 1 has no locus-standi to file the suit

and the suit was liable to be dismissed. But, the trial court has fallen in error in decreeing the suit.

9. Mr. Gupta, learned Counsel for respondents/plaintiffs argued that the appellant-defendant has admitted all the facts, so respondent/plaintiff No.

1 was not required to prove its competence and the Letter of Subrogation.

10. Respondents/plaintiffs have annexed photostat copy of Letter of Subrogation-cum-Power of Attorney with the plaint and have not produced

the original copy of same not to speak of proving the contents of said document. It was for the respondents/plaintiffs to prove what were the

contents of Letter of Subrogation and what rights were given to respondent/plaintiff No. 1 and what were its rights.

11. The doctrine of Subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as of insured as against third

party(ies) in regard to the loss to the extent the insurer had indemnified the loss and made it good. It is entitled to exercise whatever rights the

insured possesses to recover to that extent the compensation for loss. Virtually the Letter of Subrogation is the substitution of one person for

another. The contents of Letter of Subrogation are required to be proved in order to hold what rights have been given to the insurer. As discussed

hereinabove, the original copy of Letter of Subrogation is not on the file, the photostat copy is not legible, so it cannot be said what rights have

been given to respondent/plaintiff No. 1 by respondent/plaintiff No. 2.

12. It is also worthwhile to mention here that Sh. Raj Kumar Gupta has deposed that he is a partner of respondent/plaintiff No. 2 and as a partner

he has signed the printed form (Annexure ""L""), but he has categorically stated that he does not know what he had signed. It is also not proved that

whether the witness-partner was competent, empowered and within his powers to execute the said document. It is also not proved whether the

said firm was registered one or otherwise. What is contained in Annexure ""L"" is also not known. Annexure ""L"" is a photostat copy and is not

proved. It cannot be looked into since it is not put in evidence. So the very foundation of the case of respondent/plaintiff No. 1 fails.

13. The trial court has held that the admission of appellant-defendant that the Letter of Subrogation was executed by respondent/plaintiff No. 2 in

favour of respondent/plaintiff No. 1 is wrong. No such admission has been made by appellant-defendant in his written statement.

14. Keeping in view the above discussion, the trial court has fallen in error while deciding Issue No. 2 in favour of respondents/plaintiffs and against

appellant-defendant. It is held that the suit is not maintainable and respondent/plaintiff No. 1 has no locus-standi to file the suit and, accordingly, the

findings are returned in favour of appellant-defendant and against the respondents/plaintiffs.

Issue No. 3.

15. Respondent/plaintiff No. 1 has failed to prove the Letter of Subrogation and its right. Thus issue No. 3 is also decided in favour of appellant-

defendant and against the respondents-plaintiffs.

16. Accordingly, Issue No. 4 is also decided.

17. The argument of learned Counsel for appellant-defendant that respondents/plaintiffs have not complied with the provisions of Section 10 of

Carriers Act, 1865 is devoid of any force for the following reasons:

Section 10 of the said Act mandates that the plaintiff has to give and serve a notice in writing to the defendant for the loss or injury before the

institution of the suit and within six months from the date cause of action accrues.

The respondents/plaintiffs have specifically averred in para-13 of the plaint that the appellant-defendant was asked to make the payment but he has

failed to do so and the defendant has accepted the same in the written statement while replying the said para.

18. In the given circumstances, the appeal merits to be allowed and the impugned judgment and decree merits to be set aside and the suit of the

respondents/plaintiffs merits to be dismissed for want of proof. Ordered accordingly.

19. Registry is directed to prepare the decree sheet accordingly.

20. Send down the record along with a copy of the judgment and decree sheet.