

(1995) 10 AP CK 0059
In the Andhra Pradesh High Court
Case No : C.C.C.A. No. 81 of 1984

South Eastern Carriers Private Limited	APPELLANT
Vs	
Mohd. Sarvar	RESPONDENT

Date of Decision : 16-10-1995

Acts Referred:

Contract Act, 1872 — Section 182, 226, 233

Citation : (1995) 3 ALD 780 : (1995) 3 ALT 658

Hon'ble Judges : S.R. Nayak, J

Bench : Single Bench

Advocate : S. Balchand, for the Appellant;

Final Decision : Allowed

Judgement

S.R. Nayak, J.—Appellant is the plaintiff. The appellant/ plaintiff filed O.S. 1337/1980 on the file of the Court of the 1st Additional Judge, City Civil Court, Hyderabad for recovery of Rs. 17,310/- with interest at 18% per annum from the defendants 1 to 3.

2. The learned trial Judge by his judgment and decree dt.3-11-1983 decreed the suit only against the defendants 1 and 2 and dismissed the suit as against the defendant No. 3. The defendants 1 and 2 remained ex parte before the trial Court. The judgment and decree of the trial Court in so far it decreed the suit as against the defendants 1 and 2 became final in the absence of any challenge by the defendant Nos. 1 and 2. Hence, this appeal is by the plaintiff against the judgment and decree, referred to above, passed by the trial Court only in so far it dismissed the suit as against the defendant No. 3. The defendant No. 3 is the respondent in this appeal.

3. The plaintiff's case is as follows:- The plaintiff is a company registered under the provisions of the Indian Companies Act and has its registered office at Calcutta. The plaintiff is a carrier. It is pleaded that the plaintiff in its own right and in its own account, on 28-12-1979 entrusted to the defendants 1 and 2, 153

packages which was a full lorry load. The plaintiff claimed that the defendants 1 and 2 were thus employed by it in its own account and there was a special contract between the plaintiff and the defendants 1 and 2. Under the contract, it is claimed that, it was agreed that the lorry load consignments would be carried by the defendants from Hyderabad and delivered at Kamalapuram which is the destination and hire charges were fixed at Rs. 650/-. In pursuance of the contract, the articles were entrusted to the defendants and a sum of Rs. 350/- was paid as advance out of the agreed transportation charges of Rs. 650/-. The articles were accordingly loaded by the plaintiff's office at Diwan Devdi, Hyderabad in the presence of the representatives of the defendants in sound condition and lorry manifest and challan dt.28~12-1979 were prepared and the same were signed by the representative. The defendants carried the materials to Kamalapuram and at the time of delivery it was noticed that they short delivered two pipes, the value of which is Rs. 15,000/-. It is claimed mat at the time of unloading of the materials at Kamalapuram in the presence of the agent and representative of the defendants, a goods receipt was prepared and the same was signed by the representative of the defendants. The plaintiff also claimed that the driver of the vehicle, namely, the 2nd defendant is the authorized agent and representative of the defendants thereby meaning, the third defendant for all practical purposes. It is also claimed that the representative of the defendants assured the plaintiff that he would trace out the remaining two pipes and deliver them to the plaintiff but in spite of demand the two pipes were never delivered. The plaintiff ultimately caused service of lawyer's notice dt. 10-4-1980 demanding the delivery of the two pipes or to pay the price of the pipes in a sum of Rs. 15,000/-. Since there was no response from the defendants, the suit was instituted.

4. As already pointed out, the defendants 1 and 2 remained ex parte. Only the third defendant put in appearance and he filed his written statement. In the written statement the third defendant claimed that the goods were entrusted for transportation to the plaintiff at Bombay at the owner's risk and neither he nor the 2nd defendant/driver has any privity of contract as they did not enter into agreement or contract with the plaintiff on 28-12-1979. The third defendant, however, admitted that he is the owner of the lorry and the 2nd defendant was his driver but claimed that the 2nd defendant did not acknowledge number of packages on the lorry "challan" or vehicle. He also claimed that all the goods which were loaded in the lorry on that day were delivered to the consignee at Kamalapuram and obtained the signature and acknowledgement from the consignee regarding the delivery of the goods. At this stage itself it is significant and relevant to note that the categorical assertion of the plaintiff that the 2nd defendant is an authorized agent and representative of the third defendant is not at all denied by the third defendant in his written statement.

5. On the basis of these pleadings the learned trial Judge framed the following issues for trial:-

1. Whether the defendant No. 2's name has been wrongly described?
2. Whether there is any privity of contract between the plaintiff and defendants 2 and 3?
3. Whether goods have been short delivered? If so of what value?
4. Whether the plaintiff is entitled to suit claim? If so from which defendants?
5. To what relief?
6. During the trial the plaintiff examined its officer as P.W.I and marked Exs. A-1 to A-18. The third defendant did not adduce any oral or documentary evidence.
7. The learned Trial Judge on appreciation of the oral and documentary evidence recorded the finding that there was short delivery of two pipes of the value of Rs. 15,000/- and held that only the defendants 1 and 2 are responsible for short delivery of two pipes. In that view of the finding, the learned trial Judge decreed the suit as against the first and second defendants. Dealing with the case of the plaintiff put forth against the third defendant, the learned trial Judge came to the conclusion that though the third defendant is the owner of the lorry in question, there was no entrustment of the goods to the third defendant and there was no privity of contract between the plaintiff and the defendant No. 3. In that view of the matter, the suit in so far as it sought relief against the third defendant is concerned, was rejected by the learned trial Judge. Hence this appeal seeking a decree even against the third defendant along with the defendants 1 and 2.
8. Sri S. Balchand, the learned Counsel appearing for the appellant would contend that the pleading of the parties and the evidence on record clearly go to show that the 2nd defendant was an agent of the third defendant and in fact, he acted as an agent in the course of transportation of goods from Hyderabad to Kamalapuram. Sri Balchand, elaborating his submission, firstly drew the attention of the Court to specific plaint averments that the 2nd defendant was the authorized agent and representative of the defendants, thereby meaning, the agent of the third defendant for all practical purposes and this specific assertion in the plaint is not at all denied by the third defendant in his written statement. Even the 2nd defendant remained ex parte and did not contest the matter. Therefore, the lower Court ought to have proceeded on the basis that the 2nd defendant is the authorized agent of the third defendant and if the trial Court were to proceed on the said basis, there is sufficient material and evidence to fix liability on the third defendant also.
9. Sri Balchand would further submit that having regard to the nature of the employment of the 2nd defendant and nature of the business carried on by the 2nd and third defendants, it should be held that there is atleast an implied existing agency between the 2nd and third defendants at the time when the carriage owned by the third defendant was contracted through the 2nd defendant through the mediation of the first defendant to transport the goods from Hyderabad to Kamalapuram.

10. Sri Balchand would also point out that the written statement of the third defendant and the evidence on record clearly go to show that the 2nd defendant transported the goods from Hyderabad to Kamalapuram in the carriage owned by the third defendant with the consent and permission of the latter. For all these reasons and in view of the provisions of Secs.226 and 233 of the Indian Contract Act, the third defendant, being the principal, is accountable for the acts of his agent, namely the 2nd defendant, the Counsel would thus contend and maintain that the suit was entitled to be decreed against the defendant No. 3 also.

11. In view of the what is stated above, the only point for consideration is whether the judgment and decree under appeal in so far the trial Court dismissed the suit as against the third defendant/respondent herein, are justified and legal and are in accordance with law.

12. It is relevant to note that the suit claim against the third defendant is based on the relationship of the principal and the agent between the third defendant and the 2nd defendant. In that regard the plaintiff in para 4 has specifically pleaded that the 2nd defendant is an authorized agent and representative of the defendants for all practical purposes. Although in the plaint the plural of the term "the defendant" is used in that sentence, in the context of the case it should be understood that what the plaintiff has stated is that the 2nd defendant is the authorized agent and representative of the third defendant for all practical purposes. This specific averment touching the question of fact is not at all traversed by the third defendant in his written statement. On the other hand, the third defendant in his written statement in para 5 states thus:-

"It is true that this defendant is the owner of the vehicle No. APO 5574 but this defendant submits that the plaintiff did not entrust any of his goods to this defendant or his driver, therefore there is no privity of contract between the plaintiff and this defendant or his driver. The allegation that the 2nd defendant was entering into contract for transportation work is vague allegation and has got no relevance to the suit claim. This defendant specifically denies the allegation that there is some secret arrangement between defendant No. 2 and this defendant for plying the vehicle. In the absence of any privity of contract between the plaintiff and this defendant or his driver, this defendant is not at all liable to pay the suit claim amount. It is denied that the plaintiff is the bailor and this defendant and his driver are the bailees. Therefore the plaintiff is not entitled to recover any part of the suit claim amount from this defendant in any capacity."

13. The extracted portion from the written statement in para 5 makes it very clear that the carriage owned by the third defendant was contracted to carry the goods from Hyderabad to Kamalapuram and the 2nd defendant acted as his agent in the course of transaction. The third defendant has claimed that the plaintiff did not entrust any of his goods to him or his driver and therefore, there was no privity of contract between the plaintiff and himself or the 2nd defendant. This say of the third defendant is totally falsified by the evidence on record.

14. Ex.A-3 is lorry manifest dt.28-12-1979.Ex.A-4 is lorry challan of the same date. Both these documents were signed by the defendant No. 1's representative as well as the 2nd defendant. Apart from this, Exs. A-16 and A-17, the tally sheets of the plaintiff also show the entrustment of the articles. Ex. A-18 which is lorry receipt issued by the plaintiff-company shows the short delivery and this document contains the signatures of the driver attested by the officer of the consignee. P.W.I, the officer of the plaintiff-company in his evidence has referred to all these facts. Therefore, the plea taken by the third defendant in his written statement stands falsified by the documentary and oral evidence on record. It is also relevant to note that the third defendant did not examine himself as a witness nor examined any one else in support of his plea. Therefore, taking into account the evidence on record and the facts and circumstances of the case cumulatively, it should be held that the 2nd defendant is the agent of the third defendant and if it is so held, the next question to be considered would be whether the third defendant is accountable for the acts committed by the 2nd defendant. This question need not detain the Court for long.

15. Section 182 of the Indian Contract Act, for short, the Act, defines the terms "agent" and "principal". According to this Section, an "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal". Therefore, agency in law connotes an authority or capacity in one person to create legal obligations between a person occupying the position of "principal" and the third parties.

16. Section 226 of the Act provides that contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person. This Section assumes that the contract or act of the agent is one which, as between the principal and third persons, is binding on the principal. If the contract is entered into or act done professedly on behalf of the principal, and is within the scope of the actual authority of the agent, the principal is accountable for the acts done by the agent. Section 233 provides that in cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

17. In the present case, it is nobody's case that the 2nd defendant is not liable. Even the 2nd defendant has not said it and in fact, he has not contested the suit at all. If that is so and in view of the finding recorded supra that the 2nd defendant is the agent of the third defendant, then it goes without saying that the plaintiff is entitled to hold either the 2nd defendant or his principal, the third defendant, or both of them, liable.

18. In the text book Bowstead on Agency, 14th edition, under Article 97, dealing with liability of principal for torts committed by the agent, it is stated as under:-

"(1) If an agent is the servant of his principal, the principal is liable for loss or injury caused by the wrongful act of the agent when acting in the course of his employment.

(2) A principal is liable for loss or injury caused by the wrongful act of his agent whether or not his servant, in the following cases:

(a) if the wrongful act was authorised or ratified by the principal;

(b) if the wrongful act amounts to a breach by the principal of a duty personal to himself, liability for non-performance or non-observance of which cannot be avoided by delegation to another;

(c) if the act done is done in the course of representing the principal in connection with a transaction with a third party and is one of a class of acts within the actual or apparent authority of the agent; and for such act the principal may be liable notwithstanding that it was done for the benefit of the agent alone and not for that of the principal.

(3) Where principal and agent are both liable for a wrongful act committed by the agent, their liability is joint and several.

(4) In this Article, save where the context requires otherwise, "act" includes "omission", and phrases which include the word "act" are capable of any necessary consequential modification."

According to the learned author, if an agent is the servant of his principal, the principal is liable for loss or injury caused by the wrongful act of the agent when acting in the course of his employment. In this case there is sufficient evidence on record to hold that the loss was caused to the plaintiff by the 2nd defendant in the course of his employment under the third defendant. The 2nd defendant was not only a servant of the third defendant but at the same time he also acted as an agent of the third defendant.

19. Therefore, the reasons assigned by the learned trial Judge not to fix the liability on the third defendant, in my considered opinion, are not tenable. In fact, the learned trial Judge has not adverted his mind to the plea taken by the plaintiff that the 2nd defendant was the authorized agent of the third defendant-owner of the carriage. Even assuming that there is no direct privity of contract between the plaintiff and the third defendant, the facts and circumstances of the case and the evidence on record amply prove the fact that the 2nd defendant all through the transaction acted as an agent of the third defendant and therefore, in common law, the third defendant is accountable for the acts committed by his/servant/agent, the 2nd defendant.

20. In the result, and for the foregoing reasons, I allow this appeal with costs. The judgment and decree under appeal are set aside in so far they dismiss the suit as against the third defendant/respondent herein and the suit is decreed with costs for Rs. 14,659-27 ps. against the defendants 1, 2 and 3 with future

interest at 12% per annum.