(2011) 12 DEL CK 0318

In the Delhi High Court

Case No : Regular First Appeal No''s. 518 of 2010

Syal Auto Carriers (P) Ltd. APPELLANT

Vs

National Insurance Co. Ltd. and Anr RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Carriers Act, 1865 — Section 10, 8
Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2011) 12 DEL CK 0318

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Sukhbir Singh, for the Appellant;

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—These two Regular First Appeals u/s 96 of Code of Civil Procedure, 1908 (CPC) are being disposed of by this common judgment as they involve similar issues and facts. For the sake of convenience, reference is being made to the facts in RFA No. 518/2010.

2. The facts of the case are that the appellant/defendant is a transporter/carrier. Plaintiff No. 2 booked a consignment of 55 numbers of Passion Plus motor cycles vide invoice No. 2515003357 dated 6.5.2005 with the appellant/defendant for being transported from Gurgaon to Pune. The appellant/defendant accepted the contract of transportation and issued consignment receipt dated 6.5.2005. The consignment which was being carried from Gurgaon to Pune in truck No. HR-38L-6577 met with an accident whereby the consignment was extensively damaged. An FIR was lodged in the police station Thana Cantt, District Guna, M.P. on 8.5.2005. The plaintiff No. 2/respondent No. 2 issued a notice u/s 10 of the Carriers Act, 1865 upon the appellant/defendant on 21.6.2005 calling upon the appellant/defendant to reimburse the loss caused to the plaintiff No. 2/ respondent No. 2 of Rs. 6,66,744.93/-. The appellant/defendant acknowledged the loss being caused and the accident by issuing the damage certificate dated

10.7.2005. Respondent No. 1/insurance company had insured the consignment and after making the payment of the claim of the respondent No. 2/plaintiff No. 2, it got issued in its favour a power of attorney and a letter of subrogation, and thereafter filed the subject suit for recovery against the appellant/defendant/ transporter/carrier.

3. The appellant/defendant contested the suit and denied its liability. It was pleaded that there was no privity of contract with the respondent No. 1/plaintiff No. 1 and that the suit was bad in terms of Sections 8 and 10 of the Carriers Act, 1865. Authority to file the suit and the territorial jurisdiction of the Court was also challenged.

4. The trial Court has decreed the suit by holding that the loss was caused by the accident and which was proved by the damage certificate, Ex.PW1/10. The notice under the Carriers Act, 1865 was found to be served which was Ex.PW1/8 and the postal receipt with respect to which is Ex.PW1/9. The invoice by which the transportation was booked is Ex.PW1/5. The police complaint and FIR was proved as Ex.PW1/7. The letter of subrogation and the power of attorney in favour of the respondent No. 1/plaintiff No. 1 were proved as Ex.PW1/4 and Ex.PW1/3 respectively. The respondent No. 1/plaintiff No. 1 proved a total of 13 documents which were exhibited as Ex.PW1/1 to Ex.PW1/13. The survey report with respect to the loss was proved and exhibited as Ex.PW2/1 through the officer of the Surveyors Sh. Rajiv Pal Singh Khurana, Director of the Surveyor Company M/s. G.P.S. Miglani Surveyors Pvt. Ltd.

In view of the aforesaid facts, the trial Court came to the conclusion that the appellant/defendant was guilty of causing loss as a carrier and therefore the respondent No. 1/plaintiff No. 1 was entitled to reimburse the loss caused as the same was paid by the plaintiff No. 1/respondent No. 1 to the plaintiff no.2, the insured.

5. Learned counsel for the appellant/defendant argued before this Court the following points:-

(i) Plaintiff No. 2, the insured company, did not appear in the trial Court and since the suit was only contested by the respondent No. 1/plaintiff No. 1, the suit was liable to be dismissed inasmuch as the letter of subrogation and the power of attorney were not proved and wrongly exhibited. It was argued that the appellant/defendant had taken objection to exhibition of the letter of subrogation and power of attorney which were exhibited as Ex.PW1/4 and Ex.PW1/3 and therefore it should be held that the suit was not validly instituted.

(ii) With respect to the amount of loss caused, it was argued that the survey report did not properly prove the amount of loss inasmuch as the survey report contained as annexures the details of the bills, which details mentioned were not of the plaintiff No. 2/respondent No. 2 but were of the dealer of plaintiff No. 2/ respondent No. 2.

(iii) It was also argued that the company which gave the survey report was not duly licenced to conduct the survey.

6. I am afraid none of the arguments as advanced on behalf of the appellant has any substance. Firstly, the special power of attorney and the letter of subrogation were exhibited in the evidence by way of affidavit of PW1 as Ex.PW1/3 and Ex.PW1/4, however, before commencement of the cross-examination, this objection of incorrect exhibition of the power of attorney and the letter of subrogation was not raised. It is necessary for such objection to be raised at an appropriate time, because if such objection is raised, as to the mode of proof of documents, the affected person can take necessary steps to get the documents proved in a proper manner. Once there is no objection to the exhibition of documents, then, subsequently the exhibition of such documents cannot be challenged vide R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, . In the present case, if the appellant/defendant had before the commencement of the cross-examination raised this objection, then, the respondent No. 1/plaintiff No. 1 would not have closed the affirmative evidence but would have led other evidence to ensure proper exhibition of the documents, however, since the appellant/defendant did not object before the commencement of cross-examination, the respondent No. 1/plaintiff No. 1 allowed cross-examination to begin without seeking to lead any further evidence for exhibition of the special power of attorney and the letter of subrogation.

In any case, this argument that the power of attorney and the letter of subrogation are not proved and the subrogation is therefore not valid is completely answered by a recent Constitution Bench judgment of the Supreme Court in the case of Economic Transport Organization Vs. Charan Spinning Mills (P) Ltd. and Another, . In this Constitution Bench judgment of Economic Transport Organization (supra), the Supreme Court has held that the right of subrogation is an equitable right of subrogation and it arises automatically by operation of law without any need for evidence in writing once the insurer settles the claim of the insured. On such settlement, the insurer, then, steps into the shoes of the insured and can exercise rights against the transporter/wrong-doer/carrier. The rights of subrogation have been equated basically to the right of restitution. Once an insurer pays the amount of loss to the insured under the insurance policy, then, the insurance company is entitled to the rights and remedies of the insured against the third party who causes the loss, and which rights of the insured against the third party stand transferred and vested in the insurer/plaintiff No. 1/respondent No. 1.

I therefore hold that it cannot be held that the suit was not validly instituted in the absence of alleged proof of power of attorney and the letter of subrogation executed by the plaintiff No. 2/respondent No. 2 in favour of plaintiff No. 1/respondent No. 1.

7. So far as the argument that the survey report does not properly assess the loss as the details of the bills with respect to the damages are not of plaintiff No.

2 but are said to be of the dealer of the plaintiff No. 2/respondent No. 2 viz. M/s. Sehgal Autoriders Pvt. Ltd., Pune, this argument is without substance inasmuch as the survey report in detail attaches the photographs with respect to the damages to the motor cycles and also is based on the actual spot inspection of the damaged motor cycles. So far as the damage is concerned, it cannot be disputed that damage was caused by the accident of the truck of the appellant/ defendant inasmuch as the appellant/defendant itself had issued the damage certificate dated 10.7.2005, Ex.PW1/10. On the aspect of value of the loss, it is not open to the appellant/defendant to argue with respect to alleged incorrect assessment because a mere denial and dispute with regard to valuation of the damages, cannot take the appellant/defendant any further because it was incumbent upon the appellant/defendant to state if the loss were not caused as stated in the survey report, then, what were the actual losses. After all, the loss was caused when the consignment was in the custody and control of the appellant/defendant, and therefore the appellant/defendant could very well have got assessed the loss itself. A negative defence of a simple denial cannot be a defence/denial in the eyes of law. The survey report therefore rightly assessed the loss.

I also do not find any strength in the argument raised on behalf of the appellant that the Surveyors were not properly licenced inasmuch as the licence number is duly given in each page of the survey report which is on the letter head of the surveyor. Once again, a mere denial or a suggestion of there not existing a licence, is in fact a defence/stand of desperation and futility, which cannot be positively looked at.

8. In view of the above, there is no merit in the appeals, which are accordingly dismissed, leaving the parties to bear their own costs.

