

(1974) 01 DEL CK 0020

In the Delhi High Court

Case No : Regular First Appeal No. 71D of 1963

The Associated Traders and Engineers Pvt. Ltd.

APPELLANT

Vs

Delhi Cloth and General Mills Ltd. and Others

RESPONDENT

Date of Decision : 29-01-1974

Acts Referred:

Citation : (1974) ILR Delhi 790

Hon'ble Judges : Narain Andley, C.J;P.N. Khanna, J

Bench : Division Bench

Advocate : Y. Dayal, Maehswar Dayal and K.S. Bindra, for the Appellant;

Judgement

S.N. Andley, C.J.

(1) The appellants. Associated Traders and Engineers (Private) Limited are carriers. They used to carry goods consigned by Delhi Cloth and General Mills Company Limited (respondent No. 1) to themselves or to their consignees in various parts of the country. The goods of respondent No. 1 which were consigned were covered by insurance policies issued by London and Lancashire Insurance Company Limited (respondent No. 2) and Concord of India Insurance Company Limited (respondent No. 3).

(2) Shortly stated, the facts are that on March 24, 1961, 28 bales containing towels and cloth were consigned by respondent No. 1 to self at Nagpur through the appellants. After the goods reached Nagpur, they were stored in the bonded warehouse maintained by the Nagpur Corporation as the octroi duty payable thereon was not paid by respondent No. 1 or by appellants or by M/s, Janta Garage in whose truck they were carried. There was a fire in the bonded warehouse on March 28, 1961 during riots and the goods were destroyed.

(3) The respondents as co-plaintiffs filed a suit against the appellants for recovery of Rs. 23,779.96 alleged to be the compensation in respect of the aforesaid goods. By its judgment dated March 19, 1963, under appeal, the Subordinate Judge 1st Class who dealt with the suit granted a decree for Rs.

23,087.35 with proportionate costs in favor of the respondents. The respondents' claim for interest was disallowed.

(4) The case of the respondents as stated in the plaint was that the aforesaid 28 bales were entrusted to the appellants for carriage to Nagpur under goods receipts Nos. R. 68468, R. 68471, R. 68472, R. 68473 and R. 68474 (Exhibits P. I to P. 5) issued by the appellants; that the appellants had failed to deliver the goods comprised in the said consignment at destination and the former were, Therefore, entitled to compensation of Rs. 23,779.96. Alternatively, it was pleaded that the respondents were entitled to the said amount as and by way of damages suffered by them due to the misconduct and/or negligence of the appellants particulars of which were not given for want of knowledge and, in the further alternative, a claim was made on the ground that the appellants had converter and/or detained the said goods for their own use and benefit.

(5) In their written statement, the appellants took various pleas including the plea of limitation, proper presentation, signature and verification of the plaint and the locus standi of respondents Nos. 2 and 3, the two Insurance Companies. It was further pleaded that the respondents had failed to prefer their claims in respect of the goods in question within fifteen days of the date of delivery and within one month from the date of the goods receipt rendering the claim null and void and not entertainable and that the damage to the goods by fire was as a result of an act of God over which the appellants had no control. On the merits, the appellants pleaded that the goods had been booked subject to the terms and conditions printed at the back of the goods receipts, that they took care of the goods as is required of a bailee, that the Municipal Corporation of Nagpur had taken custody and possession of the goods pursuant to their policy, rules and regulations and it was during such custody that the goods caught fire due to a riot. It was further pleaded that the invoices relating to the goods had not been given to the appellants at the time of delivery of goods to them and it was for this reasons that the Municipal Corporation of Nagpur had taken custody and possession of the goods which had been stored in its bonded warehouse and that in the absence of particulars, the appellants were obliged to give the goods over into the custody and possession of the Nagpur Corporation.

(6) The respondents filed their replication traversing the various pleas raised in the written statement. It was in the replication that it was pleaded that respondents Nos. 2 and 3, the Insurance Companies, stood subrogated to the rights of respondent No. 1. It was denied that the fire was an act of God and it was asserted that the appellants as common carriers were liable to the respondents for reasons stated in the plaint and/or in accordance with the agreement between the parties and/or for breach of their obligations. It was denied that the goods had been delivered to the appellants subject to the terms and conditions printed on the goods receipts (Exhibit P. 1 to Exhibit P. 5) as there was a special agreement between the parties by which the said terms were made inapplicable. It was further denied that the appellants were bailees and it was

asserted that their liability was of common carriers. Facts relating to the handing over of the goods to the Nagpur Corporation stated in the written statement were denied.

(7) On these pleadings, the following Issues were framed by the trial Court:-

1. Whether the suit has been properly presented, signed and verified by a duly authorised person? 2. Whether the plaint does not disclose a cause of action regarding the right of plaintiffs 2 and 3 to file the suit? 3. Whether plaintiffs 2 and 3 are the insurer of the goods in question and thus. have a right to file the present suit? 4. Whether the Municipal Corporation of Nagpur is a necessary party to the case? 5. Whether the plaintiffs were obliged to file a claim within 15 days of the delivery and within one month from the date of the receipt of the goods? 6. If Issue No. 5 is proved, whether the plaintiffs preferred any such claim. If not, to what effect? 7. Whether the plaintiffs were consigners and consignees of the goods in question? 8. Whether the plaintiffs are not bound by the terms and the conditions printed on the reverse of the goods receipt? 9. Whether the goods in question were lost due to fire and as such the defendants are not liable to pay compensation to the plaintiff ? 10. What is the price of the goods in question ? 11. Relief.

(8) Mr. Yogeshwar Dayal, learned counsel for the appellants, has raised four contentions before us. Firstly, that the appellants are not liable as carriers under the Carriers Act of 1865 as the goods were lost because of the default of respondent No. 1 in not furnishing the invoices and in not paying the octroi duty which was livable by the Nagpur Corporation and that the loss of goods was due to the act of a local authority, namely, the Nagpur Corporation. Secondly, that there was no subrogation of the rights of respondent No. 1 to respondents Nos. 2 and 3, the two insurers. Thirdly, that under the terms of the goods receipts (Exhibits P. 1 to P. 5), a claim has to be made by the consignor within one month of the non-delivery failing which no liability can be fastened on the appellants and according to the terms there could be no liability in case of the loss of the goods by fire. Fourthly, that respondent No. 1 had received payment from the two insurers and had not incurred any loss.

(9) We will first deal with the contention as to the liability of the appellants as carriers. In paragraph 3 of the plaint, the respondents have stated that respondent No. 1 had, on March 24, 1961, entrusted 28 bales of towels and cloth to the appellants for carriage to Nagpur under goods receipts Nos R. 68468, R. 68471, R. 68472, R. 68473 and R. 68474, all bearing the said date and "in the premises" the appellants agreed to carry for reward the said goods from Delhi to Nagpur and to deliver the same in terms of the said goods receipts at the said destination. These goods receipts were admittedly issued by the appellants to respondent No. 1 and they are Exhibits P. I to P. 5. In paragraph 6 of the plaint, it is stated that the appellants failed to deliver at the destination the said goods comprised in the said consignments. Therefore, the liability of the appellants was alleged to be that of a common carrier for non-delivery of the goods at

destination. In the written statement, the appellants have stated that the bales in questions were booked as alleged subject to the terms and conditions printed at the back of the goods receipts in questions. It is averred that the liability of the appellants was that of a bailee and as such the appellants had taken necessary care and exercised caution in respect of the goods as was required of a bailee. It is further averred that the Municipal Corporation of Nagpur took the goods into its custody and possession pursuant to its policy and rules and regulations for non-payment of octroi duty and the appellants had no alternative but to give custody and control of the goods to the said Municipal Corporation and it was during such custody and control that the goods caught fire due to riots. The appellants further stated that for want of particulars from respondent No. 1 as to the quantity and quality of the goods, the octroi duty could not be calculated or paid. In the replication, the respondents denied that the goods were delivered to the appellants subject to the terms-and conditions printed on the back of the goods receipts in question. It was averred that there was a special agreement between the parties by which the said terms and conditions were made inapplicable between them. The status of the appellants as bailees was denied and it was asserted that the appellants were liable as common carriers. The allegations with regard to the handing over of the goods to the Nagpur Municipal Corporation were denied.

(10) The relevant term printed on the goods receipt on which reliance is placed for this part of the case is clause 14. It provides that the company, meaning the appellants, does not take responsibility for loss or damage in respect of fire, theft, pilferage and non-delivery if the goods are not insured. The special agreement referred to in the replication filed by the respondents making clause 14 inapplicable is dated February 3, 1961 (Exhibit P. 37). This is a letter from respondent No. 1 to the appellants accepting the quotation of freight rates for the year ending December 31, 1961 for carriage of goods to destinations mentioned in this letter. The destinations mentioned in this letter do not include Nagpur. It is true, that when the appellants gave their quotation of freight rates, they had included the freight rates for carriage of goods to Nagpur also. But the fact remains that the quotation was not accepted in its totality and it was accepted only for the destinations mentioned in Exhibit P. 37 which, as stated earlier did not include Nagpur. Therefore, we cannot accept the contention of the respondents that Exhibit P. 37 was the special contract between the appellants and respondent No. 1 with respect to carriage of goods from Delhi to Nagpur.

(11) The question then. arises as to whether the terms and. conditions printed on the goods receipts amounted to a contract between the parties so as to avoid the liability which is in law imposed upon a common carrier. is common law, the liability of a common carrier is equivalent to that of an insurer. In Halsbury (Lord Simonds Third Edition, Volume 4, note 382), the law as to the liability of a common carrier for loss and damage is stated thus:-

"A common carrier is responsible for the safety of the goods entrusted to him in

all events, except when loss or injury arises solely from act of God or the Queen's enemies or from the fault of the consignor, or inherent vice in the goods themselves. He is Therefore liable even when he is overwhelmed and robbed by an irresistible number of persons. He is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the Queen's enemies..... This responsibility as an insurer is imposed upon a common carrier by the custom of realm, and it is not necessary to prove a contract between him and the owner of the goods in order to establish liability."

So, under the common law, a carrier can escape liability only when loss or injury arises solely from act of God or the Queen's enemies or from the fault of the consignor or inherent vice in the goods themselves.

(12) The fire in the present case occurred in the bonded warehouse of the Nagpur Corporation as a result of riots on March 28, 1961. The loss or injury cannot, Therefore, be said to arise by an act of God or the enemies of the State. Nor can it be said that the loss or injury arose on account of an inherent vice in the goods themselves. It is contended by the appellants that the loss or injury arose because of the fault of the consignor, in not giving copies of the invoices pertaining to the goods of the appellants with the result that the value of the goods could not be determined for the payment of octroi duty before entering the Municipal limits of Nagpur and, Therefore, the goods had to be taken to the bonded warehouse of the Nagpur Corporation because of the laws of that Corporation. It is established on the record that the bills or invoices, (Exhibits P-25 to P. 29) were prepared on March 28, 1961, March 30, 1961 and April 3, 1961 and could not have been handed over to the appellants when the goods were given to them for carriage on March 24, 1961. But we do not think it is such a default on the part of the consignor, respondent No. 1, as to absolve the appellants of their liability as a common carrier. It was open to the appellants not to have taken delivery of the goods unless the bills or invoices relative thereto were handed over to them. They had taken the goods for carriage without insisting upon the bills or invoices relative thereto being given to them. The appellants cannot turn round and say that the consignor committed a default so as to absolve them from their liability. Reliance is placed by the appellants on the following note on the goods receipts:-

"BEOPARI is responsible for illegal goods and, payment of octroi, terminal tax and other enroute taxes, unless specified otherwise on the GR."

In our opinion, this note cannot help the appellants because all that it says with respect to octroi is that the responsibility for its payment is of the consignor. If the carrier pays the octroi, it would be entitled to recover the amount of octroi paid from the consignor but that is all. In the very nature of things, the consignor is not to accompany the carrier throughout the journey for payment of octroi, terminal tax and other enroute taxes and, Therefore, non-payment of octroi cannot be said to be a default on the part of the consignor such as is

contemplated to absolve the carrier from liability as a common carrier.

(13) The next contention of the appellants is that the goods were seized by the Municipal Corporation of Nagpur for non-payment of octroi duty and were taken in its custody and control by storing them in its bonded warehouse and, Therefore, the loss of goods was due to the act of the local authority, namely, the Nagpur Corporation which absolves the appellants from liability of a common carrier as at common law. It is urged that an act of local authority should be added as a further exception to the liability of a common carrier at common law and that this has been done in the United States of America. In American Jurisprudence, Second Edition, Volume 14 at page 63, the following statement appears:-

"UNDER the stringent earlier rule of the common law relative to a common carrier's liability for the loss of or injury to property entrusted to its keeping, the carrier would have been liable to the shipper or owner of the property even if the property were taken from its possession by process of law, since this would be neither the act of God nor the act of the public enemy. However, this severe rule has been modified so as to excuse a carrier from liability if property is taken from its possession by legal process against the owner..... One reason given for this exception is that in such cases the carrier is deprived of the possession of the property by a superior power, the power of the state-the vis major of the civil law-which in all things is as potent and overpowering, so far as the carrier is concerned, as if it were the act of God or the public enemy."

This statement has not, so far as we are aware, been accepted by any Court in this country. The principle underlying this statement is attractive but we would not like to opine upon this matter in the present case as there is evidence on the record that the act of the appellants in giving over the custody and control of the goods to the Nagpur Corporation was a voluntary act. As we have stated earlier, the appellants took delivery of the goods from respondent No. 1 without insisting upon the relative invoices. The Octroi Superintendent, Nagpur Corporation, S. S. Sarohi (CW. 3) has stated that the goods were voluntarily deposited in the warehouse and were not. detained. This statement completely demolishes the appellants' case of the goods having been lost due to the act of a local authority, namely, the Nagpur Corporation. The appellants cannot, Therefore, escape their liability under the common law as common carrier.

(14) The question then is whether the goods receipts constitute a contract between the appellants and respondent No. 1 such as will absolve the appellants of their liability for loss of the-goods on account of fire. There is good authority for the proposition that the liability of a common carrier is unaffected by the provisions of the Indian Contract Act. In Moothora Kant Shaw and others v. The Indian General Steam Navigation Co. : ILR 10 Cal 166 it was held that the liability of a common carrier is not in contract but in tort and that the common law of England regulating the responsibility of common carriers, was at the time "of the passing of the Carriers Act, 1865, and is still, in force in this country, and

is unaffected by the provisions of the Indian Contract Act. The view to the contrary in *Kuverji Tulsidas v. C.I.P. Railway Company* : ILR 3 Bom 109 was dissented from. The view expressed by the Calcutta High Court was accepted by the Privy Council in the *Irrawaddy Flotilla Company v. Bugwandas* : ILR 18 Calc 620 and it was observed that the responsibility of the carrier to the owner does not originate in contract but is cast upon him by reason of his exercising this public employment for reward. Therefore, even if the goods receipt amounts to a contract, clause 14 would not absolve the appellants of their liability as common carriers.

(15) A special contract limiting the- liability of a common carrier is recognised by the Carriers Act, 1865. Section 6 of this Act, inter alia, provides that any carrier may, by special contract, signed by the owner of the property delivered to him limit his liability in respect of the same. Assuming that clause 14 of the goods receipt is a clause limiting the liability of the appellants, they cannot take recourse to it because the goods receipt is not signed by respondent No. 1. Section 6 of the Carriers Act, 1865, would not, Therefore, apply. Mr. Yogeshwar Dayal, learned counsel for the appellants, has urged that the plaint filed by the respondents proceeds on the assumption that there was a contract between the parties as evidenced by the goods receipt and, Therefore, the appellants did not care to prove any signed contract. He further contends that if a signed contract is a pre-requisite for the application of section 6 of the Carriers Act, 1865, the case should be remanded to the trial Court to take evidence on the question whether such a signed contract exists. We are not prepared to accept any of these contentions. The law as laid down in section 6 of the Carriers Act, 1865, is clear. It requires a signed contract- and no other- for limiting the liability of the carrier. The appellants should have been aware of the law and it was their fault in not producing a signed contract, if one existed, to bring their case within section 6 of the Carriers Act, 1865. They did not do so, and we do not see any reason to remand the case.

(16) We, Therefore, hold that the appellants are liable as common carriers and neither clause 14 in the goods receipt nor the action of the Nagpur Corporation in taking custody and control of the goods would absolve them from their liability as such.

(17) The second contention is that there is no contract between respondent No. 1 on the one hand and respondents Nos. 2 and 3 on the other hand, whereunder the latter stand subrogated to the rights of the former. The statement of law as to subrogation is contained in *Mac Gillivray on Insurance Law*, Fifth Edition, Volume 2 at page 937 in these words:-

"WHERE the owner of the goods is insured, the insurers are subrogated to his remedy against carriers, warehousemen, and other bailees responsible for the safety of the goods The insurers who have paid the owner are entitled to recover the whole loss from the carrier or wharfinger who is liable to the owner."

It is evidence that respondent No. 2 paid Rs. 11,889.99 to respondent No. 1 vide receipt dated December 15, 1961 (Exhibit P. 14) and a like amount was paid by respondent No. 3 to respondent No. 1 vide receipt dated January 25, 1962 (Exhibit P. 15). Both the insurers, respondents Nos. 2 and 3 herein, having paid respondent No. 1, stand subrogated to the rights of the latter. This principle received statutory recognition in this country first by section 135-A of the Transfer of Property Act, 1882 and, on its repeal, by section 79 of the Marine Insurance Act, 1963, Sub-section (2) of section 135-A of the Transfer of Property Act and sub-section (2) of section 79 of the Marine Insurance Act, provide, *inter alia*, that where the insurer pays for a total loss, he is thereby subrogated to all the rights and remedies in and in respect of that subject matter as from the time of the casualty causing the loss. It is, Therefore, clear that on payment to respondent No. 1, respondents Nos. 2 and 3 are entitled to sue for the amount in suit.

(18) The third contention is that clauses 7 and 12 on the goods receipt have absolved the appellants from liability because the respondents did not make a claim within the time stated in these clauses. Clause 7 provides:-

"If there is any claim on account of the Goods Receipt, the same shall have to be made within 15 days from the date of delivery or within one month of the date of the issue of the Goods Receipt, failing which the same will be considered null and void."

Clause 12 provides :-

"If the goods of any G.R. do not arrive at the destination within one month, the sender should serve the company with a registered notice as otherwise the company will not be responsible for claim thereafter on any account."

It has been held in *The British India Steam Navigation Company, Limited v. Hajee Mahomed Esack and Company* : ILR 3 Madras 107, *The Ruby General Insurance Co. Ltd. v. The Bharat Bank, Ltd. and others* : Air 1950 East Pun 352, *Dawood Tar Mahomed Brothers and others v. Queensland Insurance Co., Ltd*: AIR 1949 Calc 390, *Western India Prospecting Syndicate Ltd. v. The Bombay Steam Navigation Co. Ltd.* : Air 1951 Sau 83, *Haji Shakoor Gany v. H. E. Hinde and Co., Ltd.* : AIR 1932 Bom 330 and *Pt. Prithvi Nath Malla v. Union of India* : Air 1962 J & K 15, that terms such as these are not unreasonable and are not hit by section 28 of the Indian Contract Act. But in the case before us we are concerned with the liability of the appellants as a common carrier which, as stated earlier, can be limited only by a contract signed by the consignor or owner of the goods. In the absence of such a contract, the plea is not open to the appellants,

(19) The last contention is that respondent No. 1 had received payment from the other respondents, the two insurers, and having not incurred any loss were not entitled to sue. It may have been necessary to deal with this question if respondents Nos. 2 and 3 had no *locus standi* to file the suit. But as we have already held, they have the *locus standi* as they stand subrogated to the rights

of respondent No. 1.

(20) In the end it was faintly argued on behalf of the appellants that the amount decreed by the trial Court represents the invoiced value of the goods and not the cost of the goods to respondent No. 1. It is contended that it was only the cost of the goods to respondent No. 1 to which they would be entitled. We see no substance in this argument. Respondent No. 1 is suing for compensation for loss. The loss is represented by the value of the goods as shown in the invoices. The trial Court was, Therefore, justified in granting a decree in accordance with the value of the goods as shown in the invoices.

(21) The result, Therefore, is that the appeal fails and is dismissed with costs.