
(1996) 02 MAD CK 0129
In the Madras High Court
Case No : Appeal No. 172 of 1984

The Divisional Manager, New India Assurance Co. Ltd.	APPELLANT
Vs	
Murugan, Proprietor, Murugan Transports	RESPONDENT

Date of Decision : 23-02-1996

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103, 104
Public Carriers Act — Section 9

Citation : (1997) 1 CTC 654

Hon'ble Judges : Govardhan, J

Bench : Single Bench

Advocate : Joseph and Rao, for the Appellant; K. Govindarajan and V. Venkataswamy, for the Respondent

Final Decision : Allowed

Judgement

Govardhan, J.—Plaintiff is the appellant.

2. The National Paper Caps Company have sent 216 bundles of caps and Roll caps in the lorry TMA 8955 belonging to the defendant from Sivakasi to Raipur and Nagpur. The consignment was insured with the plaintiff. On 25.9.1978, the entire consignment was destroyed in a fire - accident due to the negligence of the defendant. The lorry driver gave an information to the consignor. They made a claim with the plaintiff and the defendant. The plaintiff has settled the claim of the consignor by making payment of the suit amount. But, the defendant has not sent any reply to the notice issued by the consignor. The consignor has given a power of attorney and letter of subrogation to the plaintiff. Hence the plaintiff has come forward with the suit.

3. The defendant has resisted the suit by contending that he was only a lorry broker at Sivakasi who is engaged in booking and loading consignments of the various consignors at Sivakasi to other places in the lorries that come to Sivakasi and he is not the owner of TMA 8955. According to the defendant, he was only a broker who carries on business on commission basis and he is not the owner of a

public carrier and therefore he has no contract with the consignor. The defendant has also resisted the suit by contending that the suit is bad for non-joinder of the owner of the lorry and the driver.

4. On the above pleadings, the learned Subordinate Judge, Srivilliputhur has held that the defendant was not the owner of the common carrier and therefore, he is not bound to pay the suit claim and the plaintiff has no right to make a claim against the defendant on the basis of the power of attorney and letter of subrogation given by the consignor and dismissed the suit.

5. Aggrieved over the same, the plaintiff has come forward with this appeal.

6. 216 bundles of caps and Roll caps were sent to Nagpur and Raipur in the lorry bearing No. TMA 8955 from Sivakasi is not in dispute. It is also not in dispute that the defendant had issued receipts to the consignor under Exs. A-3 to A-8. The entire Consignment was destroyed in the fire accident en route is also not in dispute.

7. The consignor has made a claim for the value of the goods entrusted for safe carriage of the delivery with the Insurance Company with whom they have insured the consignment and also with the defendant. The defendant resisted the suit by contending that he is not the owner of the lorry bearing No. TMA 8955 and he is not a common carrier, and this version of the defendant has been accepted by the trial court. The defendant claimed that he is only a broker engaged in booking lorries for consignments to be sent from Sivakasi to other places on commission basis. The lorry receipts under Exs. A-3 to A-8 were issued by the defendant. But, yet, the defendant contends that he is only a broker and he is not liable for the suit claim. The trial court has observed that evidence of the plaintiff is not establishing that the consignment was entrusted to the defendant for safe carriage and delivery. The trial court has also observed that it is for the plaintiff to prove that the consignment was entrusted to the defendant as a common carrier and the consignment was destroyed on account of the negligence of the defendant. But, when the defendant has issued five receipts, it cannot be stated that the Consignment was not entrusted to the defendant for safe carriage and delivery at the destination. Further, Ex. A-21 is a letter in the Letter pad of the defendant in which, the defendant has stated that while 216 bundles were carried on in their lorry bearing registration No. TMA 8955 as per the invoice dated 23.9.1978, fire accident took place at Bagalur in between Bangalore and Hyderabad and it was informed to them by their lorry driver Veerappan and that on account of the fire accident, the entire consignment in the lorry has been destroyed and they are communicating the said information to the consignor viz., National Paper Caps Factory. This letter is dated 25.9.1978 the next day after the accident. The defendant would contend that the consignor has requested him to give such a letter in order to made an insurance claim and nothing would happen to them. This version of the defendant cannot be given any credence since in this letter, it has been specifically stated that the lorry bearing registration No. TMA 8955 belonged to them. If the defendant had acted

as a broker and loaded the consignment in a lorry belong to a third party, one would expect him to state in this letter that the consignment loaded by him in the lorry belonging to such and such person, instead of saying that the consignment was carried in their lorry. Not only the receipts have been issued by the defendant under Exs. A-3 to A-8, but also in Ex. A-21, the defendant has made a categorical admission that the lorry belonged to them and the consignment was destroyed in the fire accident at Bagalur. Further, Ex. A-1 is the notice issued by the consignor in which it is stated by them that "we have entrusted the following consignment to you to be sent to different places as per your lorry receipt Nos..... dated 23.9.1978". This letter has been addressed to Sri Murugan Transports, Proprietor, M. Murugan. This has been sent by registered post. It is not the case of the defendant that he has received, this letter of claim made by the consignor. In this letter, it is stated in paragraph 2, that, "you have also issued a certificate dated 25.9.1978" thereby meaning that the defendant has issued a certificate dated 25.9.1978 which we have discussed above viz., Ex. A-21. In this letter, the consignor has stated that the defendant is responsible for the loss. In spite of specifically stating that the consignment has been entrusted to the defendant to be sent to different places, as per the lorry receipts of the defendant and that the defendant has also issued certificate dated 25.9.1978, the defendant has not sent any reply stating that the consignment was not entrusted to him to be sent to different places and that he had issued the certificate only at the instigation of the consignor as he now claims as D.W.1. From this, we can hold that in order to escape the liability, the defendant has taken the stand that he was only a broker and not a common carrier, when the suit has been filed against him. The observation of the trial court that the plaintiff has not proved the entrustment of consignment to the defendant therefore cannot be sustained.

8. The lorry receipts under Exs. A.3 to A-8 shows that the defendant has agreed to transport the goods as a public carrier. It has been held in the decision reported in *Thiruppathi Venkatachalapathy Lorry Service v. New India Assurance Company Limited*, 1988 (I) M.L.J. 64 that is a well established principle of law that whoever agrees to transport the goods to the public is a public carrier and is liable to pay damages while an accident took place in the course of the said contract. Therefore, the defendant who had agreed to transport the goods has to be considered as a public carrier and has to be made liable for the damages.

9. The trial court has also held that the lorry receipt has a clause to the effect that the consignment is carried at the owner's risk and therefore, carrier cannot be made liable. In the decision reported in *Thiruppathi Venkatachalapathy Lorry Service v. New India Assurance Company Limited*, 1988 (I) M.L.J. 64 this question has also been considered by the learned Judges and they have held as follows:

"Under the law of public carriers, the public carrier is not entitled to say that he is carrying the goods at the owner's risk. It is very specifically stated that the

goods transported through public carrier is only at the risk of the lorry owner and not at the risk of the owner of the goods."

Therefore, the finding of the trial court that the defendant cannot be made liable in view of the cause in the lorry receipt that the goods are carried only at the risk of the consignor is not tenable.

10. The trial court has held that the burden is on the plaintiff to prove that the Consignment was entrusted to the defendant, that the defendant is a common carrier and the damage was caused due to the negligence of the defendant etc., and the trial court has put the entire burden of proof only on the plaintiff. We have already seen that the evidence of the defendant itself shows that the consignment was entrusted to him for safe carriage and the defendant is a common carrier and the damage was caused due to the negligence of the defendant. Further, in the same decision, which I have referred above, it is held that the question of burden of proof is not of much practical importance when mass of evidence is before the court and that a common carrier's liability is that of an insurer and that such liability can be limited only by a special contract. In the present case, in view of the evidence placed by both sides, the suit cannot be dismissed holding that the burden of proof was on the plaintiff and the plaintiff has not established the same. The evidence has actually established the case of the plaintiff. There is no evidence that there is a special contract between the consignor and the defendant, in which, the liability of the common carrier is limited. The plaintiff is only exercising their right in pursuance of the special power given to them by the consignor and the letter of subrogation, given by the consignor in view of the fact that the claim of the consignor has been satisfied by the plaintiff. Therefore, the observation of the trial court that the plaintiff on whom the burden of proof rests, has not discharged the same is not a tenable one. In this connection it will not be out of context to observe that the question whether the defendant was negligent or not will not arise and the defendant will always be held liable for the loss or damage as a common carrier, the liability is that of an insurer. Section 9 of the Carriers Act is to that effect. Therefore, it is not open for the defendant to contend that there was no negligence on the part of the defendant.

11. The plaintiff having satisfied the claim of the consignor, is therefore entitled to a decree in their favour in view of the special power given to them by the consignor and the letter of subrogation given to them and the judgment and decree of the trial court have therefore to be set aside and the suit has to be decreed in favour of the plaintiff.

12. In the result, the appeal is allowed setting aside the judgment and decree of the trial court and the suit is decreed with costs throughout.