

(2009) 10 MAD CK 0095

In the Madras High Court

Case No : Appeal Suit No. 118 of 2004 and CMP. No. 2676 of 2004

The Shipping Corporation of India Ltd.

APPELLANT

Vs

Bharath Earth Movers Ltd.

RESPONDENT

Date of Decision : 24-10-2009

Acts Referred:

Citation : (2009) 5 LW 665 : (2010) 1 MLJ 946

Hon'ble Judges : C. Nagappan, J

Bench : Single Bench

Advocate : K. Bijai Sundar, for the Appellant; G. Guruswaminathan, for Nageswaran and Narchania, for R1 and R2, for the Respondent

Final Decision : Allowed

Judgement

C. Nagappan, J.—The defendant has preferred the appeal challenging the judgment and decree dated 18.12.2002 made in O.S. No. 158

of 1996 on the file of VII Additional Judge, City Civil Court, Madras.

2. The case of the plaintiffs is that a consignment of 18 packages containing sub-assemblies for D 65 Dozers was entrusted to the defendant at

Kobe Sea Port, Japan, for safe carriage by sea and delivery in good order and condition at Madras by its vessel under Bill of Lading No. 23

dated 6.12.1994 and the vessel arrived at Madras Port on 3.1.1995 and after discharging some cargo, sailed away. It is further stated in the plaint

that the first plaintiff approached the Port Trust for taking delivery of the consignment and the consignment was found in a damaged condition and it

was notified to the defendant and a Steamer Survey was held, which revealed damage to the consignment. It is further stated in the plaint that the

first plaintiff has suffered a loss of Rs. 5,79,006/- on account of the damage to

the consignment and the damage has occurred only due to the negligence and misconduct on the part of the defendant, its men and agents, and it is liable to pay the first plaintiff the value of the loss and further the defendant had committed breach of contract of safe carriage of cargo and therefore, liable for compensation to the first plaintiff for its loss of Rs. 5,79,006/-. It is further stated that the second plaintiff as Insurer of the consignment is subrogated to the right of the first plaintiff and the suit is filed by both the plaintiffs in order to avoid any technical defence and the suit claim is restricted to a sum of Rs. 4,00,000/-. The plaintiffs have sought for a decree against the defendant for a sum of Rs. 4,00,000/- together with interest at 18% per annum from the date of suit till the date of payment since it is a commercial transaction and for costs of the suit.

3. The defendant in its written statement has stated that a consignment said to contain 18 packages of sub-assembly for D 65 Dozers was entrusted to the defendant at the Port of Kobe, Japan, for carriage to the Port of Madras by its vessel and the defendant was not aware of the exact quantity, weight or the condition of the consignment and the Bill of Lading was issued on the basis of the declaration made by the Shippers and the defendant had no opportunity of verifying the said declaration. According to the defendant, the cargo was carried by the vessel diligently and discharged to the custody of the Madras Port Trust. The defendant has denied that the consignment was landed in a damaged condition, however, on the application made by the plaintiffs, the defendant arranged for the survey after a long delay of one month after the discharge of the cargo from the vessel and the survey was held without prejudice and liability of the carrier as the survey was not conducted at the time of discharge or immediately thereafter and the survey cannot bind the defendant. It is further stated by the defendant that the alleged loss/damage has occurred only subsequent to the discharge of the cargo from the vessel for which the defendant cannot be held liable and the plaintiffs' remedy, if any, is only against the Madras Port Trust in whose custody the alleged loss occurred and the suit is liable to be dismissed for non-joinder of necessary party, namely, the Madras Port Trust. It is further stated in the written statement that under the policy of Insurance, the second defendant has conducted yet another survey without notice to the defendant and the said survey would

also indicate that the loss/damage to the cargo had occurred due to the rough handling at the time of unloading/shifting of the cargo for which the defendant cannot be held liable. It is specifically stated by the defendant that the plaintiffs have not quantified the loss and the basis of the ascertainment of the loss and the entire claim is excessive and arbitrary. It is further stated by the defendant that it is not liable to compensate the plaintiffs a sum of Rs. 5,79,006/- or any other sum and the plaintiffs are not entitled to the suit claim and in any event, the liability of the defendant is restricted to the rupee equivalent of 1,00,000 Japanese Yen per package which is maximum liability of the carrier under the contract of carriage as per the Law of the Port of Shipment.

4. The trial court framed four issues and the plaintiffs examined P.W.1 and marked Exs.A1 to A8 on their side and the defendant did not let in any oral or documentary evidence on its side. The trial court held that the plaintiffs have proved the suit claim as against the defendant and granted the decree as prayed for. Challenging the the judgment and decree, the defendant has preferred the present appeal. For the sake of convenience, in this judgment, the parties are referred to as arrayed in the suit.

5. The Points for determination in this appeal are:

1) Whether the plaintiffs have established that they have suffered loss of Rs. 5,79,006/- on account of damage to the consignment.

2) Whether the plaintiffs are entitled to the suit claim.

6. Mr. Bijai Sundar, learned Counsel for the appellant/defendant, submits that the author of Ex.A2 Survey Report has not been examined by the

plaintiffs and hence it cannot be relied upon to assess the damage or loss and further the Surveyor has not quantified the loss alleged to have been

suffered by the first plaintiff in the said report and the plaintiffs have not chosen to file the invoice to ascertain the value of the case/crate alleged to

have been damaged and the Packing list, Bill of entry have also not been produced in the case to indicate the exchange rate prevailing at the

relevant point of time and the only witness examined on the side of the plaintiffs has admitted in the cross-examination that he does not know the

value of the damaged cargo and in the absence of any positive evidence on the part of the plaintiffs, even assuming that the loss had occurred, the

plaintiffs have failed to prove, quantify and assess the value of the damaged

cargo and have failed to discharge the burden and hence they are not entitled to the suit claim and the trial Court failed to appreciate the evidence in proper perspective and had erroneously come to the conclusion that the suit claim is proved and the judgment and decree of the trial Court are liable to be set aside.

7. Per contra, the learned Counsel appearing for the respondents/plaintiffs submits that the plaintiffs have produced Ex.A1 Bill of lading which mentions the Invoice number, Letter of Credit number and Purchase order number and the defendant was aware of the same and the defendant had conducted independent survey and the damage to Case No. 0002 is found mentioned in Ex.A3 Steamer Survey Report and in Ex.A2 Survey Report also, the damage noticed in Case No. 0002 is mentioned and the plaintiffs have substantiated their claim for loss on account of damage to the consignment due to the negligence on the part of the defendant and the conclusion of the trial Court is sustainable.

POINT Nos. 1 AND 2.

8. It is not in dispute that a consignment of 18 packages containing sub assemblies for D 65 Dozers was entrusted by the first plaintiff to the defendant at Kobe Seaport, Japan for safe carriage and delivery at Madras Port. Ex.A1 is the Bill of Lading dated 6.12.1994. The case of the plaintiffs is that the consignment was found in damaged condition at Madras Port Trust and it notified the same to the defendant and Steamer Survey was held which revealed the damage to the consignment and the first plaintiff had suffered a loss of Rs. 5,79,006/- on account of damage to the consignment, occurred due to the negligence on the part of the defendant. The defendant, though denied that the consignment was landed in damaged condition has stated in the written statement that the plaintiffs applied for a survey after a long delay of one month after the discharge of the cargo from the vessel and the defendant arranged for the survey. Ex.A3 is the Steamer Survey Report. The second plaintiff viz., the Insurer, conducted a survey in respect of the consignment and Ex.A2 is the xerox copy of the Survey Report. As per Exs.A2 and A3 Survey Reports, damage was noticed in Case/Crate No. 0002 of the Consignment.

9. The contention of the learned Counsel for the appellant/defendant is that the author of Ex.A2 Survey Report viz., the Surveyor was not

examined by the plaintiffs and in any event, in Ex.A2 Survey Report, the cause attributed to damage is rough handling at the time of

unloading/shifting and the theory of damage occurring due to transit is ruled out and the carrier could not be held liable and in support of his

submission, the learned Counsel relies on the decision of the Apex Court in New India Assurance Co. Ltd. Vs. Economic Transport Corporation,

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10. It is true that the plaintiffs have not examined the Surveyor, who submitted Ex.A2 Survey Report and no reason is stated for his non-

examination. PW.1 Seetharaman is the Supervisor employed in the first plaintiff Company and he has admitted in his cross-examination that he had

no personal knowledge and had only come to place Ex.A2 Survey Report on record without holding any personal opinion about the possibility of

how the damage could have been caused. The defendant thus could not avail the opportunity to cross-examine the Surveyor who prepared Ex.A2

Survey Report. Moreover, as per Ex.A2 Surveyor Report, the cause attributed to the damage is rough handling at the time of unloading/shifting.

11. The Supreme Court, in the decision in New India Assurance Co. Ltd., referred above, dealt with the case in which the surveyor was not

examined and the survey report was suggestive of the fact that the damage had occurred while the goods were being loaded or unloaded and held

as follows:

4. ...The carriers, thus, could not avail of the opportunity to cross-examine the surveyor who prepared the survey report, because, reportedly he

had by then died....

5. ...It appears that the Insurance Company is chasing a mirage. There is no occasion for holding the carrier liable when delivery of consignments

had taken place without any complaint or reported damage at that juncture by the owners. The survey report too, was suggestive of the fact that

the damage possibly had occurred while the goods were being loaded or unloaded, at the instance of the owners. That obviously could have been

done when the lorries were stationary. The theory of damage occurring during transit was thus completely ruled out.

In the present case also, the opinion expressed by the Surveyor in Ex.A2 Survey Report rules out the theory of damage occurring during transit.

12. The next contention of the learned Counsel for the appellant /defendant is that Exs.A2 and A3 Survey Reports do not quantify the loss alleged

to have been suffered by the first plaintiff and the plaintiffs have not chosen to mark the invoice to ascertain the value of the case alleged to have

been damaged and in the absence of any evidence with regard to value of the alleged loss, the plaintiffs are not entitled to any claim and in support

of his submission, the learned Counsel for the appellant relies on the decision of this Court in Union of India (UOI) and Another Vs. Tiruchi Metal

Works, .

13. In the plaint averments, it is only stated that the first plaintiff has suffered a loss of Rs. 5,79,006/- on account of damage to the consignment.

No detail as to loss has been mentioned in the plaint. The plaintiffs have not produced the invoice to ascertain the value of the Case/Crate No.

0002. They have also not filed the Packing list, Bill of entry to show the exchange rate prevailing at the relevant point of time. The testimony of

PW.1 Seetharaman is also not of any use to the plaintiffs in this regard. In fact, PW.1 Seetharaman in the cross-examination had admitted that he

does not know the value of each case/crate and also does not know the value of the damaged case/crate.

14. The learned Counsel for the respondents/plaintiffs contends that Ex.A1 Bill of lading refers to the invoice and the defendant had knowledge

about the value of the goods. This contention is devoid of merit and in fact such a contention was raised before the Supreme Court in the case in

Shipping Corporation of India Ltd. Vs. Bharat Earth Movers Ltd. and Another, and the Apex Court repelled the contention and held as follows.

19. A contention has been raised before us for the first time that the value of the goods had been declared in the Bill of Lading. It is based on the

premise that Bill of Lading refers to the invoice. We cannot accept the said contention. Invoice is not a part of the Bill of Lading. The value of the

goods is required to be stated on the Bill of Lading so as to enable the shipping concern to calculate the quantum of freight. It cannot, in absence of

any statutory provisions, be held to be incorporated therein by necessary implication or otherwise.

15. It is settled law that where a consignee makes a claim for compensation for loss on account of damage to the goods due to negligence on the

part of the carrier, it is necessary that he should establish by evidence that he had sustained actual loss by reason of such damage, and the mere

circumstance that the carrier admitted that the damage had been occasioned, cannot entitle the consignee to obtain a decree for compensation

without proof of actual loss. As already seen, in the present case, though Ex.A3 Steamer Survey Report shows that the damage had been

occasioned to Case/Crate No. 0002, it cannot entitle the plaintiffs to obtain a decree for compensation for loss on account of damage to the goods

without proof of actual loss.

16. The plaintiffs have not substantiated as to how a loss of Rs. 5,79,006/- was caused to them on account of damage to the consignment. No

reason is stated as to why the suit claim was restricted to Rs. 4,00,000/-. The fact remains that the plaintiffs have not proved that the damage to

the consignment had occurred during the transit or during the period in which the consignment remained in the custody of the carrier and hence they

are not entitled to the suit claim. The Point Nos. 1 and 2 are answered accordingly.

17. The trial Court has failed to appreciate the evidence in proper perspective and the conclusion reached, cannot be sustained and the judgment

and decree of the trial Court are liable to be set aside.

18. The Appeal is allowed and the judgment and decree of the trial Court are set aside and the suit is dismissed. However, considering the facts

and circumstances of the case, there shall be no order as to costs. Connected CMP. No. 2676 of 2004 is closed.