

(1990) 02 KL CK 0023
In the High Court Of Kerala
Case No : A.S. No. 430 of 1982

The South Eastern Roadways

APPELLANT

Vs

The United India Insurance Co. Ltd.

RESPONDENT

Date of Decision : 01-02-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Contract Act, 1872 — Section 10, 23, 28

Citation : (1991) ACJ 115 : AIR 1991 Ker 41 : (1991) 72 CompCas 131

Hon'ble Judges : P.K. Shamsuddin, J

Bench : Single Bench

Advocate : V.O. John and Jimmy John, for the Appellant; Siby Mathew and P. Vijayabhanu, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Shamsuddin, J.—Defendant in O. S. No. 119 of 1978 on the file of the Court of Subordinate Judge, Kozhikode, is the appellant. Suit was for damages.

2. Defendant, a public carrier was entrusted by the 2nd plaintiff for transport of three consignments of copra by invoices Exts. A4 to A6 dated 31-4-1975 and 22-4-1975. While in transit, the consignment caught fire at Sinwar and part of the goods was damaged. A Surveyor deputed by the 1st plaintiff the United India Fire and General Insurance Company Ltd., surveyed the goods with notice to the defendant and Ext. A2 dated 23-8-1975 is the survey report. 2nd plaintiff who was the owner of the consignment issued a notice claiming damages for the loss sustained. Defendant sent a reply denying the liability mainly contending that the goods were booked at the owner's risk. On the basis of the survey report, the 1st plaintiff settled the claim of the 2nd plaintiff for a sum of Rs. 35,000/- and the 2nd plaintiff subrogated the same as per letter dated 27-7-1976. Ext. A1 is the letter of subrogation. Though the survey report indicated that the total damage amounted to Rs. 36,679.60 the claim of the 2nd plaintiff was settled for Rs. 35,000/-. As the defendant refused to pay the damages claimed, the suit was

filed.

3. In the written statement filed by the defendant, the defendant contended that the lower court had no jurisdiction to try the suit inasmuch as the consignor 2nd plaintiff had agreed that all disputes arising out of the contract shall be subject to the exclusive jurisdiction of the courts in Calcutta City alone, that it was mentioned in the consignment note that the carrier would not be liable for any loss or damage caused to the goods due to fire or by any other similar accident, that defendant had taken all measures for the safe transport of the goods, that when the goods reached at Tndore, they were entrusted for further transport to Jodhpur by another vehicle, that while the goods were thus being carried, the lorry caught fire at a place known as Sinwar resulting in the destruction of a portion of goods, that it was an act of God and that therefore the plaintiffs were not entitled to any relief.

4. The court below found that no part of the cause of action arose within the jurisdiction of the Courts at Calcutta and that as admittedly a part of the cause of action arose at Calicut, within the jurisdiction of the lower court, the court below had jurisdiction. The Court further found that it could not be said that the accident of fire was an act of God and that in view of Section 6 of the Carriers Act, it was not open to the defendant to contend that the goods were carried at the owner's risk.

5. In this appeal, learned counsel for the appellant has challenged the findings of the court below.

6. In *Orient Road Lines v. M. B. Mohammad Hassan Sahib & Co.* (1988 (2) KLT 619), a Division Bench of this Court to which I am a party, had occasion to consider the nature of the liability of a common carrier Section 6 of the Carriers Act. In that case also on the reverse of the consignment note there was a condition to the effect that the Company shall not be liable for any loss or damage due to pilferage, theft, weather conditions, strikes, riots disturbances, fire, explosion or accident and based on this clause, learned counsel for the appellant argued that the goods were carried at the owner's risk and that the defendant was not liable for any in view of Condition No. 3. The Division Bench pointed out that in the absence of any special contract signed by the owner of the property, or by some person duly authorised by such owner limiting the liability a common carrier cannot escape the liability. Admittedly, neither the owner of the property nor any agent duly authorised by him had entered into any special contract signed by the owner or by some person duly authorised in that behalf by such owner, limiting the liability. In the instant case, also, the position is the same. Therefore, there is no substance in the contention that in view of the condition in the consignment note that the goods were carried at the owner's risk, the defendant was not liable to any compensation.

7. Learned counsel next contended that in view of Condition No. 17 that the Calcutta High Court alone had jurisdiction to try the case. Learned counsel also

strongly relied on Clause (12) of the Conditions on the consignment note to the effect that the consignor shall be primarily liable to pay the transport charges and all other incidental charges if any at the Head Office of the Company in Calcutta or at any other agreed place. On the basis of this, learned counsel argued that since the consignor was primarily liable to pay transport charges and other expenses if any of the Head office or the Company at Calcutta or at any other agreed place, part of the casuse of action aroses in Calcutta. In *Economic Transport Organisation v. United India Insurance Co. Ltd.* 1986 KLT 220 this Court had occasion to consider a similar contention raised by the counsel. Bhat, J. observed in that case (at page225, 1986 KLT):--

"17. When there is choice of forum, it is certainly open to the parties to agree on an exclusive forum for settlement of disputes. But such an agreement must be clearly spelled out either by express words or by necessary implication. Ouster of jurisdiction of Courts cannot be lightly assumed or presumed. If there is such a concluded agreement, it will certainly operate as estoppel against the parties to the contract. If it is merely a unilateral affirmation or statement made by one of the parties, as long as it is not shown that the statement has been accepted by the other party as a term or condition of the agreement, it cannot be held that there is an agreement to confer exclusive jurisdiction on any Court. Paticular caution is necessary in regard to such a clause contained in a printed form, as in this case. Where the printed form is signed by both the parties or where a form printed by one party is signed by the other party and forwarded by the latter to the former and the printed form contains clear words conferring exclusive jurisdiction on a Court at any particular place or ousting jurisdiction of the Court at any other place, it may not be difficult to hold that the parties have agreed on such a term. Even in such cases, courts must remember that people often sign order forms containing a good deal of printed matter without caring to read what is printed. It cannot always be said that everything which is printed may be deemed to form part of the contract. Where a form printed by one party is signed only by that party and delivered to the other party, without anything more it will be difficult for the Court to hold that there has been consensus ad idem in regard to the particular clause. Of course, if there is some other material to indicate acceptance or consent of the party who received the printed form, then the Court is free to infer that the clause formed part of the agreement.

The above ruling was followed by a Division Bench of this Court to which Bhat, J. also was a party in *United India Insurance Co. Ltd. v. Associated Transport Corporation Pvt. Ltd.* 1987 (1) KLT 46. It was held in both the above decisions that since the consignor or any person duly authorised by him had not signed the consignment note, it cannot be assumed that there is an agreement which would constitute an estoppel creating a bar in maintaining a suit in any other Court than the Court mentioned in the consignment note. In the decision in *Orient Road Lines"* case 1988 (2) KLT 619 also this decision has been noted and it was held that the mere printing on the consignment note the condition would not constitute a contract absolving the carrier of the liability to the damages caused

to the goods entrusted to the public carrier. In view of the above decisions I have no hesitation to hold that the condition restricting the jurisdiction to the Calcutta Court alone would not in any way create a bar to the filing of the suit in the lower Court. However, learned counsel for the appellant heavily relied on the decision of the Supreme Court in A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem,). Learned counsel particularly invited my attention to paragraphs 12 and 15 of the judgment. The Supreme Court at page AIR 1989 SC 1243 .

"12. A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some Act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but include all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action.

XX XX XX XX In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made."

In my view this decision has no application to the facts of the instant case. The question that has to be considered in this case is whether there is a special contract absolving the carrier of the liability to pay compensation for damages to the consignor for shortage or loss of goods entrusted to the former creating a bar to the filing of the suit in courts other than in Calcutta. In view of the decisions of this Court which I have referred to earlier, the mere printing on the consignment note will not constitute an agreement. Clause (12) deals with only the primary liability of a consignor to pay transport charges and other incidental charges at the Head Office or in any other agreed place. In the instant case, transport charges were paid by the consignor at Calicut as evidenced by the consignment note evidenced by Exts. B1 to B3. Apart from the mere printing of the condition in consignment notes there is nothing to show that the 2nd party had agreed to those conditions by signing the notes so as to constitute a special contract.

No other point arises in the case. The appeal is devoid of merit and it is accordingly dismissed. No costs.