
(1987) 11 MAD CK 0060
In the Madras High Court

Thiruppathi Venkatachalapathy Lorry Service and Another	APPELLANT
Vs	
The New India Assurance Company Limited and Others	RESPONDENT

Date of Decision : 09-11-1987

Acts Referred:

Citation : (1988) 2 ACC 102 : (1988) 1 LW 327 : (1988) 1 MLJ 64

Hon'ble Judges : Swamikkannu, J

Bench : Division Bench

Judgement

Swamikkannu, J.—A.S. No. 511 of 1981 is an appeal preferred by the first defendant Thiruppathi Venkatachalapathy Lorry Service, through partner N. Rathinasami Nadar against the judgment and decree dated 24.1.1981 in O.S. No. 91 of 1978 on the file of the Sub Court, Ramanathapuram at Madurai, decreeing the suit for damages as prayed for with costs. A.S. No. 659 of 1982 is an appeal by the third defendant Mama Roadways through its partner Javerchand, Dana Bazaar, Jalgaon, Maharashtra, against the judgment and decree in the very same O.S. No. 91 of 1978. The New India Assurance Company Limited, Madurai; M/s Sundaraj Match Industries Private Limited, through its Managing Director, Sivakasi; Plaintiffs 1 and 2, Shri Radha Shyam Sharma, Mama Roadways, Jalgaon, defendants 2 and 3 are respondents 1 to 4 in Appeal No. 511 of 1981. In A.S. No. 659 of 1982 the first plaintiff New India Assurance Company Limited, second plaintiff Sundaravel Match, Industries Private Limited, the first defendant Thiruppathi Venkatachalapathy Lorry Service and second defendant Shri Radha Shyam are respondents.

2. The case of the plaintiffs New India Assurance Company Limited and M/s Sundaravel Match Industries Private Limited, Sivakasi, before the lower court is that the second plaintiff/M/s. Sundaravel Match Industries Private Limited is a manufacturer of safety matches and they transported 1000 bundles of safety matches through the first defendant from Sivakasi to Indore under the lorry receipt dated 23.3.1975 issued by the first defendant to the second plaintiff M/s. Sundaravel Match Industries Private Limited. At the time of the consignment, the

second plaintiff also insured the goods with the first plaintiff under the insurance policy dated 28.3.1975. As per the lorry receipt issued by the first defendant, they agreed to tranship the goods to the third defendant after the first defendant's lorry reached Jalgaon at the first defendant's risk. The goods were transported from Sivakasi to Jalgaon in the first defendant's lorry Myp 3639. After reaching Jalgaon, the first defendant transferred the goods on 1.4.1975 to the third defendant viz. Mama Roadways for transportment from Jalgaon to Indore. So, the third defendant was carrying the goods from Jalgaon to Indore in truck No. Mpo 2832 which belongs to the second defendant Shri Radha Shyam Sharma.

3. One Diwakar Jain, the power agent of the second defendant wrote a letter to the second plaintiff stating that they had transported 1000 bundles of safety matches belonged to him through lorry No. Mpo 2832 and near Rustampur Village at Kumti the said lorry met with an accident on 2.4.1975 at 3.00 a.m. in which the consignment of 1000 bundles of safety matches were burnt to ashes. The said Diwakar Jain had written a letter to the second plaintiff on 16.4.1975 in respect of the accident said to have occurred on 2.4.1975 at 3.00 a.m. The said accident took place due to negligence on the part of the third defendant's driver for which the defendants as common carriers are vicariously liable. The second plaintiff M/s. Sundaravel Match Industries, Sivakasi, made a claim with the first plaintiff New India Assurance Company, Madurai, for payment of a sum of Rs. 62,064 and also with the defendants. The first defendant Thiruppathi Venkatachalapathy Lorry Service sent a reply notice on 30.5.1975 stating that he had agreed to transfer the consignment only from Sivakasi to Jalgaon and a separate contract was entered into subsequently with the third defendant. It is further contended in the reply notice that the goods were carried at the owner's risk. Since the defendants are public carriers, they cannot say that the goods were carried at the owner's risk. No reply was received from the defendants 2 and 3. The lorry receipt issued by the first defendant is for transportment from Sivakasi to Indore, the destination point. The second plaintiff was not known to the third defendant. Since the first defendant's lorry permit was upto Jalgaon, he requested the second plaintiff to give a letter to transport the goods at Jalgaon through the third defendant upto Indore. So, the letter given by the second plaintiff will not absolve the liability of the first defendant. The first plaintiff agreed to make payment of Rs. 62,064, and Rs. 400 towards charges for Surveyor's report and Rs. 2,600 as transport charges since the goods had been insured with the first plaintiff, the second plaintiff subrogated his rights to the first plaintiff. Accordingly, the second plaintiff executed necessary documents on 6.9.75. Thereafter, the payment of the aforesaid amount of Rs. 64,464 was made by the first plaintiff to the second defendant. The receipt issued by the first plaintiff to the second plaintiff for payment of the said sum of Rs. 64,464 was by means of a cheque. So, the first plaintiff is entitled to get back the said amount from the defendants by way of subrogation. The first plaintiff sent a lawyer's notice on 17.2.1976 to the defendants for which the defendants 1 and 3 had sent

replies on 10.4.1976 and 19.5.1976 respectively. The contentions raised in the reply notices are untenable. So, the suit is filed for recovery of Rs. 62,464 as damages with subsequent interest at 12% per annum from the date of plaint till the date of realisation from the defendants with costs.

(Facts omitted-Ed.)

4. Aggrieved by the xxxx decision of the lower Court, Thiruppathi Venkatachalapathy Lorry Service, the first defendant and Mama Roadways; the third defendant have preferred the appeals as mentioned above. It is contended on behalf of the appellants in both the appeals by Mr. G. Subramaniam that the lower Court has failed to see that Ex. B2 is under the signature of first defendant and itself clearly shows that the appellant was to transfer the goods to Mama Roadways, Jalgaon, and there after the liability, if any, arising due to the accident, was only to be fastened on the third defendant and thereby the first defendant appellant has to be exonerated.

5. In support of his contention Mr. G. Subramaniam, learned Counsel for the appellants referred to the provisions of Section 194 of the Indian Contract Act, which reads as follows:

Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

The illustrations to this section read as follows:

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose, B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorises B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co., for the recovery of the money. D is not a Sub-agent, but is solicitor for A.

6. The decision in Union of India (UOI) Vs. Amar Singh, , is relied on by Mr. G. Subramaniam, learned Counsel for the appellants in support of his contention. In the said decision:

The respondent booked certain goods on September 4, 1947, with the N.W. Railway at Quetta in Pakistan to New Delhi. The Wagon containing the goods was received at the Indian border station of Khem Karan on November 1, 1947, duly sealed and labelled indicating its destination as New Delhi. It reached New Delhi on February 13, 1948, and was unloaded on February 20, 1948, but no immediate information was sent to the respondent. On June 7, 1948, the respondent was asked by the E.P. Railway to take delivery of the goods lying at New Delhi station but when the respondent went there the goods were not traceable. Again, on July 24, 1948, the respondent was asked to take delivery of

the goods when only a small portion of the goods were offered to him subject to the payment of Rs. 1,067.8.0 as freight but the respondent refused to take delivery. On August 4, 1949, the respondent filed a suit for Rs. 1,62,123 with interest as compensation for nondelivery of goods against the Dominion of India. The trial Court found that the E.P. Railway was guilty of negligence in handling the goods and decreed the suit for Rs. 80,000 and on appeal the High Court confirmed the decree. The appellant contended that there was no privity of contract between the respondent and the E.P. Railway and he could only have a claim against the N.W. Railway in Pakistan, and that the suit was barred by limitation.

It was held:

that there was an implied contract of bailment between the respondent and the E.P. Railway and that Railway was liable for the loss. The conduct of the parties indicated that the respondent delivered the goods to the N.W. Railway with an authority to create the E.P. Railway as his immediate bailee from the point the wagon was put on its rails. The N.W. Railway must be deemed to have had implied authority to appoint the E.P. Railway to act for the consignor during the journey of goods by the E.P. Railway and by force of Section 194 of the Indian Contract Act, the E.P. Railway became an agent of the consignor. The N.W. Railway left the wagon with the E.P. Railway and the latter consciously took over the responsibility of the bailee, carried the wagon to New Delhi and offered to deliver the goods to the respondent. The respondent also accepted this relationship. From these facts, even if an agency could not be implied, a tacit agreement between the two Railways to carry the respondent's goods to New Delhi could be implied resulting in a contract of bailment between the E.P. Railway and respondent.

In the decision in *P.K. Kalasami Nadar v. Alwar Chettiar and Ors.* ILR (1961) Mad. 1091 : AIR 1962 Mad. 44:

Where some cotton bales were entrusted to the appellant, who run a lorry service for transport of goods as a common carrier for being carried from Kovilpatti to Coimbatore and during such transit some of the cotton bales caught fire, the origin and cause of which was not ascertainable and the consignors filed a suit for damages for the loss of the goods,

Held, the common carrier was liable.

In the same decision it was held as follows:

A common carrier, to whom goods are entrusted for transport, should provide a reasonably fit and proper vehicle for carriage of the goods entrusted, carry them safely, load and unload them properly and deliver the same at destination. A common carrier being under an obligation to deliver the goods safely, would be liable to what happens to them during the time when he is in custody. His liability, therefore, is said to be that of an insurer. Under the Common Law of

England, there were two categories of bailees on whom the law imposed a greater responsibility, viz., common carriers and inn-keepers. These were held liable for the safety of the goods entrusted to them in all events, except where the loss or injury to them was occasioned by an Act of God, King's, enemies or from the fault of the consignor or due to the inherent defect in the goods. An Act of God will be an extraordinary circumstance due to natural causes, which is not the result of any human intervention which could not be avoided by any amount of foresight and care, e.g. fire caused by lightning. But an accidental fire, even though it might not have resulted from any act or omission of the carrier, could not be said to be an Act of God.

Where there is a contractual obligation to deliver the goods at a particular place, an undertaking can be implied having regard to the context in which the contract is made, namely, with a common carrier who has such an obligation, viz., to deliver the goods safely at the destination. In that case there could be a personal obligation. An independent obligation would also exist by reason of the duty which the carrier owes by reason of his calling. The mere existence of an independent ground of liability in tort cannot take away the right of the party to the contract to sue for breach. But such a person will not be bound to sue on the contract; he may rest his claim on the alternative basis of tort. This option exists only to a party to the contract, Where, however, the action is laid against the carrier by the consignee, for example, who is not a party to the contract, the liability sought to be enforced would be independent of the contract, though proof of the contract might be necessary to show that the defendant was acting as a carrier and as such liable as insurer. In such a case the liability for breach of duty to deliver the goods safely would be independent of the terms of the contract entered into between the consignor and the common carrier.

7. In *Indian Airlines Corporation v. Jothaji Maniram* (1959) 2 M.L.J. 373 : ILR (1959) Mad. 439 : AIR 1959 Mad. 285, it was held:

Under general law a common carrier is liable practically as an insurer of the goods. That liability can be regulated by a contract entered into between the parties. It is invariably the practice for common carriers to enter into a contract, defining and limiting their liability. That practice is so universal that in the normal course of things one would expect any consignor of goods to look into conditions which are found in consignment notes. To say that in every case the carrier should prove that he drew the attention of the consignor to the clause in the consignment note regarding limitation of its liability is extending the rule beyond its limits.

This decision is also relied on for the following proposition:

A common carrier is a person who professes himself ready to carry goods for everybody. Any carrier, which is not a common carrier is called a private carrier. Such a private carrier, will, where goods are entrusted to him for carriage, be liable as bailee of the goods, and this liability can be limited or excluded by the

contract between the parties.

In the case of a common carrier the liability under similar circumstances is higher. Common carriers are considered to be in the position of insurers with regard to the goods entrusted to them. But where it is expressly stipulated between the parties that the carrier is not a common carrier, that conclusively shows that the carrier cannot be made liable as a common carrier and if the carrier is not a common carrier but only a private carrier, there is no doubt that its liability being that of a bailee, Sections 151 and 152 of the Contract Act will apply under which it is open to the parties to enter into contract reducing the liability of private carrier.

Even assuming that the carrier can be deemed to be a common carrier or held liable as such, it is open to such a carrier to contract himself out of liability as common carrier, or fix the limit of his liability.

Goods valued at Rs. 1600 sent by air were lost in transit. This loss was on account of the negligence of the carrier in respect of which a contract had been entered into limiting the liability of the carrier to a sum of Rs. 300.

Held that the contract in the present case would be a valid one whether the carrier was regarded as a common carrier or a private carrier and that the contract limiting the liability of the carrier was valid and enforceable.

8. The decision in *The River Steam Navigation Co. Ltd. Vs. Shyam Sundar Tea Co. Ltd.*, is relied on for the proposition:

The question whether a carrier is a common carrier or not has to be decided on its public profession and such profession may be either by public notice or by conduct. It is immaterial if the carrying is limited to particular goods or particular routes or between specified points.

9. Consequently, where, as in the instant case, the steamer companies, which were by public profession common carriers in the main stream and invariably agreed, when requested, to arrange for carriage of goods by boats from stations situated on its tributary to the steamer station, accepting goods as indiscriminately as in the tributary and the High Court, while reversing the finding of the trial Court as to the negligence of the companies, affirmed its decree against them on the ground that they were common carriers.

Held, that the decision of the High Court was correct and must be affirmed.

There could be no doubt that the service in the tributary was in the nature of a feeder service to the main route and the public profession made in respect of the latter attached to it.

Held further, that it was of no consequence that the feeder service yielded no profits.

Nor was regularity or otherwise of the feeder service a relevant consideration.

Law does not require that a common carrier must have a fixed rate for carriage of all goods and the absence of such a fixed rate in the feeder service was wholly immaterial".

The decision in *Oriental Fire and General Insurance Co. Ltd. and Another Vs. New Suraj Transport Co. (P) Ltd.*, is relied on for the following proposition:

Normally what happens in the event of booking consignment is that the consignor offers his goods at the office of the transporter and on an enquiry as to the fare that would be charged, agrees to book the consignment and then the transporter issues the goods receipt/consignment note to the consignor. In this background the contract is initially arrived at orally in pursuance of which the consignment note is issued. It seems beyond controversy that to each and every customer the transporter reads out the terms and conditions of booking as printed overleaf the consignment note before the goods are agreed upon to be booked for carriage. It can be said that if the terms and conditions printed overleaf the consignment note are to be binding on the parties they must be brought to the notice of the consignor (Customer) for the contract of carriage is completed. In other words, these terms and conditions must be specifically and categorically brought to the notice of the consignor before he agrees to book the consignment. Since it is not practical or feasible that such terms and conditions could be read out to the individual consignors it is expected that such steps be taken by the transporter to exhibit those terms and conditions outside or inside their office premises in sufficiently legible and bold letters so as to attract the attention of the incoming customer and afford him sufficient warning beforehand that the transaction of booking the consignment will be subject to the said terms and conditions. If the transport company has acted in that way or in any other mode sufficient to bring to the notice of the customer those terms and conditions and the contract of carriage entered into would be integral part of the contract. Case law discussed.

In the instant case, there is no material on the record to suggest that the terms and conditions overleaf the goods receipts/consignment notes were exhibited by way of notice outside or inside the working premises of the defendant-transport company or in any way brought to the notice or knowledge of plaintiff before the goods were booked for carriage by the defendant transport company. The material on record simply shows that the consignments were booked for carriage against the agreed fare to be paid at the destination and in token thereof the goods receipts/consignment notes were issued by the defendant transport company to plaintiff. The contract of carriage seems to have been completed at this stage. Of course, the conditions including the arbitration clause were printed on the reverse. In the circumstances, it must be held that an oral contract of carriage of goods was concluded before the goods receipts/consignment notes in question were issued containing the so-called terms and conditions. This would be nothing but adding to the terms on which the oral contract of consignment was concluded. Such a course is not open to the defendant transport company.

Such unilateral terms and conditions cannot subsequently be incorporated in the contract already concluded by the defendant transport company by handing over the goods receipts/consignment notes containing said terms. Since such terms and conditions were not brought to the notice of plaintiff specifically and adequately, the consignor/consignee would not be bound by such terms. Thus it cannot be said that the parties to the contract of carriage were AD Idem or intended to make submission to any arbitration. It was therefore, open to the plaintiff to file the suits ignoring the arbitration clause. Section 34 of the Act is not applicable and the suits are not liable to be stayed.

The decision in *State Trading Corporation of India Ltd. v. K.P.V. Shaik Mohammed Rowther and Co.* and Anr. AIR 1978 Mad. 224, is relied on for the following proposition:

(A) Contract Act (9 of 1872), Section 182-Agency-Privity of contract between principal and agent.

Although only A consignee appointed B as agent for the charterer relationship as principal and agent springs up between A and B by such appointment by A,

(B) Civil P.C. (5 of 1908), Order 1, Rule 3-Necessary party-who is-B filed a suit against A, a consignee on the strength of a letter by A appointing B as agent for the charterer. The Charterer is not a necessary party as there is no privity of contract between B, the plaintiff and the charterer.

10. Mr. T. Dhanyakumar and Mr. Nandagopal Rao, learned Counsel for the respondents have submitted that the lower Court is correct in having come to the conclusion that the suit has to be decreed as prayed for.

11. The points that arise for consideration in these two appeals are:

(i) Whether the first defendant Thiruppathi Venkatachalapathy Lorry Service is liable for the suit claim made by the plaintiffs for the accident caused by the driver of the third defendant Mama Roadways, Jalgaon, in driving the Lorry in a rash and negligent manner?

(ii) Whether the liability of the first defendant Thirupathi Venkatachalapathy Lorry Service as carriers of the second plaintiff's goods is not from Sivakasi to Jalgaon and continues there after also as contended by the plaintiffs?

(iii) Whether the plaint-mentioned claim amount is just, proper and correct?

(iv) And to what reliefs, if any, are the plaintiffs entitled to?

12. Points (i) to (iv): The case of the plaintiffs is that the second plaintiff transported one thousand bundles of safety matches through the first defendant's lorry from Sivakasi to Indore through lorry No. MYP 3639 and the first defendant issued a lorry receipt under Ex. A1, which contains the following particulars:

Thirupathi Venkatachalapathi Lorry Service, 82, Thattumettu Street, Sattur Road,

Sivakasi

Q.C. No. 0063 Date : 28.3.1985

Consignor: Consignee: M/s. Sundaravel M/s. Kela Agency Kas Ganj Match Industries through Best Matches Agency P. Ltd. 99, Jail Road, Indore.

To be transported through Mama Transport, Jalgaon.

No. of Articles Description of Goods Freight

1000 One thousand bundles of 50" 27" brand safety matches Rs. 2,600.00

1 One gunny bundle advertisement board paid here Rs. 1,000.00 ----

----- 1001 To pay balance Rs. 1,600.00

To pay Rs. One thousand six hundred only.

Sd. (Illegible) For Thiruppathi Venkatachalapathi Lorry Service.

The said safety matches were insured with the first plaintiff by the second plaintiff on 28.3.1975. It is the case of the of the plaintiff that at the request of the first defendant, he gave a letter under Ex. B1 agreeing to transport the said goods from Jalgaon to Indore through the third defendant's lorry viz. Mama Roadways, Jalgaon. Now, it is contended on behalf of the first defendant that there is no privity of contract between the second plaintiff and the first defendant beyond Jalgaon. His main contention is that the contract to transport the safety matches was upto the point Jalgaon from Sivakasi and not beyond that. But this contention of the first defendant's counsel is belied by the lorry receipt issued to the second plaintiff under Ex. A1. Ex. A1 is the lorry receipt belonging to the first defendant issued to the second plaintiff agreeing to transport 1000 bundles of safety matches from Sivakasi to Indore. The freight charges are mentioned as Rs. 2,600 and Rs. 1,000 was paid at Sivakasi. It is further stated in Ex. A1 lorry receipt that the goods to be transhipped through Mama Roadways, viz., the third defendant at Jalgaon.

13. So, we find that it is futile to contend that the agreement was only upto Jalgaon as contended by the first defendant. Their own document under Ex. A1 lorry receipt extracted above will falsify his case that the agreement was only to transport the goods from Sivakasi to Jalgaon. The destination is Indore. So, as per Ex. A1 agreement, the first defendant is liable to carry goods from Sivakasi to Indore, i.e., the point of destination. The argument advanced on behalf of the appellants by Mr. G. Subramaniam that the agreement ceases beyond Jalgaon is unfounded and is not supported by any documentary evidence. In this regard, the contents of Ex. B2 are relied on by the learned Counsel for the appellants which reads as follows:.

Sundaravel Match M/s. Thiruppathi Venkata Chalapathy Industries (P) Ltd. Lorry Sivakasi - 626 123 Service Sivakasi. Ref. N Dated : 28.3.1975. Dear Sirs, Today we have despatched 1,000 bundles of 27 brand safety matches through your

lorry No. MYP 3639-vide your, G.C. No. 0063, dt. 28.3.1975 to M/s. Kela Agencies, Soron Gate, Kasganj. Please hand over the above consignment at Jalgaon to Mama Roadways for onward transshipment. The relative documents are enclosed herewith. Your faithfully, for Match Ind. p. Ltd. (Marketing Division)

D.W. 1 states in his evidence as follows:

In this regard, the provisions of Section 92 of the Indian Evidence Act are brought to the notice of this Court. It is also relevant in this connection to note that D.W.2 Jeverchand has stated in his evidence that he did not receive any money in this transaction and that for every transaction he used to receive commission. In this regard it is also relevant to note that Thillai Natarajan, D.W. 1 has stated in his evidence as follows:

It is also stated by P.W. 2 Amjath Ussain in his cross-examination as follows:

He has denied the suggestion that only up to Jalgaon the agreement was entered into by first defendant. The most important portion of the evidence of P.W. 2 that is to be borne in mind in deciding these appeals runs as follows:

14. In Ex. A1 as already seen, it is stated that the goods are to be transhipped through Mama Roadways, viz., the third defendant on record, both oral and documentary, we find that it is futile to contend that the agreement was only up to Jalgaon as contended by the appellants. Their own document Ex. A1 lorry receipt will falsify their case that the agreement was only to transport the goods from Sivakasi to Jalgaon. So, as per Ex. A1 agreement the first defendant is liable to carry the goods from Sivakasi to Indore.

15. It is contended on behalf of the appellants that the agreement ceases beyond Jalgaon. This contention is not supported by any documentary evidence. Ex. A2 has been written only at the instance of the appellant by the second plaintiff. The lorry receipt issued by the third defendant under Ex. A4 will go to show that the third defendant never entered into any separate agreement with second plaintiff under Ex. A4. In Ex. A4 it is clearly stated that it is only a crossing from the first defendant's lorry service at Jalgaon to Indore. If really there was a separate contract between the second plaintiff and the third defendant at Jalgaon, then there is no necessity to note as "crossing" from MYP 3639, and freight rate is mentioned as Rs. 675. It is the contention of the second plaintiff that a sum of Rs. 1,600 shown as "To pay" in the last column was subsequently inserted by the third defendant. Ex. A4 reads as follows:

Mama Roadways Jalgaon Dated: 1.4.1975 Owner's name: Radhasyam & Company Transport Jalgaon Truck No. 2832/MPO From Jalgaon to Indore Consignor Consignee Description No. of Total Freight To pay of Goods Articles Sundervel The Best Matches Matches Matches Company Agency Bundles 1000 675/- 1600/- Pvt Ltd. Indore Sivakasi

MYP/3639 Grossing MYP 3639 Weight 925/-

So, the receipt Ex. A4 issued by the third defendant will go to show that it is not a separate contract and he agreed to transport the goods on an agreement entered into by him with the first defendant. It is an admitted fact that the first defendant's lorry permit is valid only upto the point Jalgaon and he had no valid lorry permit from Jalgaon to Indore. So, the evidence of the third defendant was utilised by the first defendant to carry the said 1000 bundles of safety matches.

16. The accident was informed by the third defendant on 1.4.1975 under Ex. A5 addressed to the second plaintiff. In Ex. A5 the third defendant has clearly stated that the said truck viz., M.P.O. 2832 met with an accident and caught fire to the matches and the entire 1000 bundles of safety matches were burnt to ashes. Now it is stated in the written statement of the third defendant that the fire to truck M.P.O. 2832 in transit was caused by the spontaneous combustion of the dangerous or highly inflammable nature of safety matches and not due to the accident as alleged in para 6 of the statement. So it is further stated that the accident was not due to the accident of the lorry; but due to the nature of the goods viz., safety matches which is liable to get friction or heat due to its normal conditions. It is true that Rule 401 of Chapter IV of the Railways Rate Tariff Rules prescribes the mode of packing conditions for transporting safety matches. The packing condition of the suit safety matches is spoken to by the plaintiff's witnesses. They were not cross-examined either by the first defendant or by the third defendant to the effect that the packing was not in proper condition. So, the first and third defendants are not entitled to agitate that there was no proper packing of the safety matches. They are also not entitled to say that the accident took place as an act of God due to normal nature condition. If it is so, the third defendant must have stated in his letter under Ex. A5 that the accident was caused by act of God and not due to the lorry accident. But the admission of third defendant in Ex. A5 that the matches were burnt to ashes only due to the lorry accident will belie the contentions raised in his written statement. Ex. A6 is a letter written by the second defendant's power agent informing the accident. Ex. A15 is the letter written by the first defendant to the second plaintiff. It is stated in these letters that the entire goods were burnt to ashes. So, the entrustment of the goods with the defendants is admitted by both parties. It is also admitted that the vehicle met with an accident and the entire goods were damaged.

17. It is pointed out on behalf of the appellants that the third defendant in his written statement stated that he is only a broker and not a carrier. Even his own lorry receipt issued under Ex. A4 dated 1.4.1975 will go to show that he never acted as a broker. D.W. 2 the third defendant has stated in his evidence that he is only a broker and has not received any remuneration for transporting the goods. But the receipt issued under Ex. A4 will show that he has charged Rs. 675 and received the same. Even though the lorry truck Mpo 2832 belongs to the second defendant and was driven by his driver, the third defendant is also liable since he alone issued the lorry receipt as public carrier under Ex. A4 agreeing to transport the goods. He has clearly stated that it is a crossing from the first

defendant's lorry Myp 2832. So, the first defendant is bound to deliver the goods at Indore and his liability does not cease at Jalgaon as contended by him. In Ex. A1 the place of destination is clearly mentioned as "Indore", Ex. B4 is only a translation copy of Ex. B3. But it is not a complete translation. Hence, Ex. B7 is filed as a complete translation of Ex. B3.

18. On behalf of the respondents, the decision in R.R.N. Ramalinga Nadar Vs. V. Narayana Reddiar, , is relied on for the following proposition:

The question whether a person is a common carrier would depend upon what he professes to be. If he publicly professes to undertake for reward or hire transport of all such goods as are entrusted to him he is making a public avowal of the profession of a carrier. He may limit the class of goods which he undertakes to transport or he may limit the routes or areas over which he is to operate. But these do not detract from his character as common carrier. What is important is whether he agrees to carry for whomsoever wants to engage him or whether he holds out only as a person who is free to choose his customers and would dictate the terms under which he would enter into contract with them. He need not declare his profession by a public notice but it is sufficient if his conduct discloses that he is holding out publicly as one who is undertaking to serve the public by transporting goods from place to place for hire or reward.

It is a well established principle of law that whoever agrees to transport 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.

19. The next contention raised on behalf of the appellants is that in Ex. A1 lorry receipt, there is a clause that the goods were transported at "owner's risk" and that since the second plaintiff agreed to transport the goods through the first defendant's lorry at owner's risk, he is not entitled to claim any damages. 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. No signature of the second plaintiff was obtained in Ex. A1 receipt to prove that he agreed to transport the goods at the owner's risk. D.W. 1 the first defendant's agent has stated that everything was negotiated through the Managing Director of the second plaintiff's company. So, there is no record produced that the second plaintiff agreed to transport the goods at owner's risk. So, the entry in Ex. A1 receipt that the goods were transported at owner's risk is against the provisions of the Public Carriers Act, and it will not bind the plaintiffs. Ex. A16 is the reply notice sent by the first defendant to the second plaintiff's notice. In Ex. A16 it is only stated that a separate contract was entered into by the second plaintiff with Mama Roadways at Jalgaon. We have already held that the said allegation is disproved by the lorry receipt under Ex. A1.

20. The decision is Assam Roadways Vs. National Insurance Co. and Others, , is

relied on behalf of the respondents herein:

Section 9 of the Carriers Act very clearly states that "in any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the carrier, his servants or Agents.

It is well established principle of law that the question of burden of proof is not of much practical importance when mass of evidence is before the Court. The question whether the defendant was negligent or not will not arise and the defendant will always be held liable for loss or damage as a common carrier's liability is that of an insurer. But such liability can be limited by a special contract.

21. It is specifically stated that u/s 9 of the Carriers Act, when all the goods transported by the common carrier met with an accident, the owner of the lorry is not entitled to say that the accident took place due to the negligence of the owner of the goods. The negligence is always attributed to the owner of the lorry as contemplated u/s 9 of the Carriers Act.

22. It is contended on behalf of the first defendant appellant that since the accident took place only by the second and third defendants' lorry and the entire goods were damaged during the said period, he is not entitled to any damages. We have already stated that the first defendant's liability was up to the point of destination to Indore as agreed under Ex. A1. So, all the defendants are personally and jointly liable to pay the damages to the plaintiffs. The second plaintiff obtained compensation from the first plaintiff Insurance Company and executed a letter of subrogation under Ex. A17 and the said payment is supported by Ex. A18 receipt. Now, it is contended that the actual damages sustained by the lorry is not proved due to the non-examination of the surveyor. The first plaintiff company is a statutory body. There is no necessity to create a false receipt under Ex. A18 in favour of the second plaintiff. Even though the surveyor is not examined, the compensation amount paid by the first plaintiff to the second plaintiff is sufficiently proved as per Ex. A18 receipt. It is not stated that the compensation paid to the second plaintiff is excessive. The Insurance Company has only filed the suit on the basis of the subrogation deed obtained from the second plaintiff. The subrogation arrangement entered into between the plaintiffs is binding on the first defendant. The amount claimed in the suit seems to be just, proper and correct. The first plaintiff is entitled to the decree amount as claimed in the plaint. The second defendant is added as a party to the suit so as to avoid multiplicity of proceedings.

23. To sum up, it is seen that Ex. A1, lorry receipt, is not binding on the plaintiffs since it is not signed by second plaintiff. Ex. B2 came to be written to inform the first defendant to perform the contract because the first defendant had no permit to go to Indore. In this regard we have extracted the evidence of P.W. 2 himself which is to the effect that only at the instance of the first defendant Ex. B2 came

to be written. Though in the written statement it is averred that it is because the plaintiff wanted the goods to be delivered to the third defendant, third defendant's men at Jalgaon had done so, there is no evidence to substantiate this contention. A careful reading of the contents of Ex. A1 shows that it is a contract to carry the goods from Sivakasi to Indore and the goods have to be delivered at Indore. It is for the delivery of the goods at Indore, a freight of, Rs. 2,600 had been stipulated as per Ex. A1. So, the first defendant is responsible for carrying, the goods from Sivakasi to Indore. Simply because Ex. B2 had not been adverted to by the lower Court, we cannot come to a different conclusion than the one that was arrived at by the lower Court as we find that the entire documentary as well as the oral evidence in this case support the judgment and decree of the lower Court, which we hereby confirm. Both the appeals are dismissed with costs.