

(1988) 12 MAD CK 0036
In the Madras High Court

Union of India (UOI)

APPELLANT

Vs

Tiruchi Metal Works

RESPONDENT

Date of Decision : 09-12-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1990) 1 ACC 288

Hon'ble Judges : Ratnam, J

Bench : Single Bench

Judgement

Ratnam, J.—Defendants 1 and 2 in O.S. 407 of 1982, Sub-Court, Tiruchi, are the appellants in this second appeal. That suit was laid by the respondent herein for the recovery of a sum of Rs. 10,941-34, together with interest thereon at 18 per cent per annum from 11.9.1980 to 11.9.1981, amounting to Rs. 1,969-38 totalling to Rs. 12,910-72 from the appellants for damage caused to the goods consigned to the appellants.

2. Briefly stated, the facts are as follows : The respondent is a firm carrying on business in aluminium utensils and for the purpose of carrying on their business, it used to place orders for the supply of raw materials, viz., aluminium coils and circles with the Indian Aluminium Co. Ltd., Calcutta. The respondent placed orders with the said company for the supply of raw materials and the company at Calcutta despatched the goods under three despatch notes dated 25.7.1980. The goods were properly packed and accepted for consignment by the appellants at Shalimar Goods station to be carried to Tiruchi Goods Yard for delivery to the respondent at Tiruchi. However, the consignments were not received at Tiruchi Goods Yard within the usual and normal time of about 16 days from the date of booking, but the goods arrived at the last week of August, 1980. When the respondent came to know that the goods were not in tact, it demanded open delivery, which was given and at that time, it was found that part of the goods was damaged. A damage certificate was issued to the respondent assessing the damage at 30 percent on goods of the weight of 1369 kgs. and 15% on the

goods of the weight of 244 kgs. Thereupon, the respondent issued a notice calling upon the appellants to pay damages, which was repudiated. The case of the respondent was that there was gross negligence on the part of the Railway administration and their servants in dealing with the goods consigned and the damage was caused owing to such negligence entitling the respondent to recover damages from the railway administration. The value of the goods damaged was sought to be estimated at Rs. 10,941.34 and the suit was laid for the recovery of that amount with interest as stated earlier.

3. In the written statement, filed by the appellants they contended that the respondent is not a registered firm and that it is not entitled to claim any damages. It was also the further plea of the appellants that the respondent should prove the actual loss suffered by it by producing the account books as well as the other documents. An objection that there was no valid notice u/s 78B of the Indian Railways Act, and u/s 80 , C.P.C., was also raised.

4. Before the trial court, on behalf of the respondents, Ex.A1 to A21 were filed and PW 1 gave evidence, while, on behalf of the appellants, Ex.B1 was marked and no oral evidence was let in. On a consideration of the oral as well as the documentary evidence, the trial Court found that the respondent is entitled to maintain the suit, that it had not been established that damage occurred to the consignment owing to the negligence of the appellants, that the notice issued by the respondent was valid and that the respondent had not established the actual loss suffered by it and therefore it was not entitled to claim any amount from the appellants by way of damages. On those conclusions, the suit was dismissed. Aggrieved by that, the respondent herein preferred an appeal in Appeal No. 276 of 1983, District Court, Tiruchi. The lower appellate Court also found that the respondent is entitled to maintain the suit that the damage to the consignment had occurred not due to defective packing and that the view taken by the trial Court that the respondent was not entitled to claim damage in the absence of proof of actual loss was not correct and therefore, the respondent was entitled to a decree as prayed for. In that view, the appeal was allowed and the suit was decreed as prayed for by the respondent. It is the correctness of this that is questioned in this second appeal.

5. Learned Counsel for the appellants restricted his argument in the second appeal to the only point that the respondent had not established the sustaining of any loss by it, as, even according to the evidence of P.W.I, the damaged portion of the consignment was taken delivery of, melted, moulded and converted into sheets and finally converted into aluminium utensils and disposed of in the absence of any material to show the sustaining of damage by establishing loss on the resale of the aluminium utensils, the respondent ought not to have been granted a decree for recovery of damages. In support of this contention, learned Counsel strongly relied upon the decisions in Pugalagiri Nadar & Sons v. Union of India, v. Saligram Kantilal. On the other hand, learned Counsel for the respondent submitted that the damage having been accepted by

the issue of certificate by the railway administration, it was no longer open to them to dispute their liability in respect of the claim for damages based on that certificate.

6. Having regard to the very limited scope of the arguments in the second appeal, it is not necessary to advert to all the facts. Suffice it to say that the goods consigned from Calcutta were at the time of delivery to the respondent herein at Tiruchi, were found partly damaged and the railway administration had also issued a certificate under Ex. A-14 to the effect that 30 per cent of the goods on the weight of 1369 kgs. and 15 per cent of the goods on the weight of 244 kgs. had been damaged. Even so, the question remains whether the respondents entitled to claim damages from the appellants in the absence of proof of having sustained loss as a result of the delivery of damaged goods by the railway administration to it. It is in this connection that the evidence of P.W. 1, a partner of the respondent firm is relevant. In the course of his chief examination, he stated that if the goods had been delivered in an undamaged condition, he would have earned a profit of 20 per cent and that he had sustained loss. However, in the course of his cross examination, P.W. 1 admitted that the damaged part of the consignment was melted, cleaned and handed over to another company for remoulding and after purification it was converted into sheets and those sheets were later converted into utensils. Thus, if even according to the evidence of P.W. 1, the damaged part of the consignment had been utilised for the manufacture of vessels, then, it becomes necessary for the respondent to establish the actual loss sustained by it before it can claim damages from the appellants. It is one of the fundamental principles of the law relating to damages that a party claiming damages ought to mitigate the same. That exactly had been done by the respondent by converting the damaged part of the consignment into vessels and subsequently disposing of the vessels. With reference to the sale of those vessels, the respondent ought to have had accounts to show the amounts realised by the sale of the vessels. P.W. 1 stated that the account books were in the custody of the Income Tax authorities for 2-1/2 years and that he did not have the account books with him. In the course of his cross-examination, he admitted that at the time when the suit was filed, the account books were available and that a receipt had been given by the Income Tax authorities for having taken custody of the books, but that receipt had not been produced. The further evidence of P.W. 1 is to the effect that he had not taken any steps for summoning the production of the account books before Court by the Income Tax authorities. From the aforesaid evidence of P.W. 1, it is clear that though the accounts were available to show the conversion of the damaged portion of the consignment into vessels, they have not been produced. From the non-production of the account books, the Court will be in order, in drawing an adverse inference that if they had been produced, they would have established that the respondent had not in fact sustained any loss as a result of the damage caused during the course of the carriage of the goods by the appellants. 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 railway administration, it is very necessary that he should establish by evidence that he had sustained actual loss by reason of such damage, and the mere circumstance that the railway administration admitted that the damage had been occasioned, cannot entitle the consignee to obtain a decree for compensation without proof of actual loss. It is this principle that has been laid down in *Pugalagiri Nadar & Sons. v. Union of India*. Where it has been pointed out that in a case where the damaged goods were admittedly sold and it was not established that it was sold for a lesser value, no question of compensation at all could arise. Indeed, as pointed out in that decision, it may well be that the consignee had been able to realise by the sale of the damaged goods, more than what it had cost him to secure those goods, in which case there is absolutely no justification whatever for enabling the consignee to recover the amount again from the railway administration. To similar effect is the decision in *Union of India v. Saligram Kantilal*. There also a claim for damages was made by the consignee against the railway administration on the strength of a damage certificate and the railway administration contended that there was no proof of the actual damage suffered by the consignee and therefore, he was not entitled to claim damages. That contention was upheld and it was pointed out that a consignee can claim damages only if it is proved that actual damage had been sustained and in the absence of such evidence, there could be no award of damages. In so holding, the principle laid down in the decision in *Pugalagiri Nadar and Son's* case was followed. In the face of the evidence of P. W. 1, already referred to, that the damaged part of the consignment was converted into vessels, it was necessary for the respondent to have established before court the actual loss sustained by it after deducting the amounts realised by it by the conversion of the damaged part of the consignment into vessels, as admitted by P.W.1, by the production of the relevant account books, invoices and other relevant documents. Since the account books have not been made available and the respondent has also not established how much loss was sustained by it, despite the utilisation of the damaged part of the consignment, it follows that the claim of the respondent for the recovery of damages cannot be countenanced at all. Consequently, the second appeal is allowed and the judgment and decree of the lower appellate court are set aside and those of the trial court will stand restored with costs throughout.