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(1993) 02 MAD CK 0060

In the Madras High Court

Case No : A. No. 436 of 1981

United India Fire and General Insurance Company Ltd. APPELLANT

Vs

M/s. Agro Cargo Transport Ltd. and 5 others RESPONDENT

Date of Decision : 02-02-1993

Acts Referred:

Citation : (1993) 02 MAD CK 0060

Hon'ble Judges : Bellie, J

Bench : Single Bench

Advocate : R. Vedantham and S. Ramalingam, for the Appellant; K.P. Gopalakrishnan N.S. Nandakumar, M.R. Prabhu and Prakash Gorklaney, T.S. Ramaswamy and N. Balasubramanian, K.R. Krishnamurthi and K.S. Ramakrishnan, for the Respondent

Final Decision : Allowed

Judgement

Bellie, J.—Of the six defendants the fourth defendant Insurance company alone has filed this appeal. The plaintiff Agro Cargo Transport co.

has filed the suit on the following allegations :-The plaintiff is an authorised Transport contractor of the fifth defendant-Southern Petro-chemical

Industries Corporation Limited. The plaintiff used to transport fertilizers from the fifth defendant''s plant at Tuticorin to various places through their

own lorries or through other lorries engaged by them for hire. On 19.2.1978 the plaintiff as transport contractor of the fifth defendant entrusted

200 bags of Urea weighing 10 Metric Tonnes to the second defendant''s lorry Registration No. TNP 6297 for transport from Tuticorin to

Acharapackam. On 20.2.1979 the lorry with the said load of Urea capsized at a place near Uthankudi due to the rash and negligent driving of the

vehicle by the first defendant driver and the entire fertilizer fell into a tank and

got damaged. On coming to know of this the fifth defendant,

informing the plaintiff that they would be liable to make good the loss, debited from the bills of the plaintiff a sum of Rs. 15,952.40 as the value of

the urea damaged. Third defendant has been impleaded as the person in full control of the lorry at that time, and the fourth defendant as the Insurer

of the lorry. On these grounds the plaintiff has filed the suit for recovery of a sum of Rs. 16,000/- as the value of the goods damaged.

2. The second defendant in his written statement contended that it is the driver the first defendant without the knowledge of the second defendant

had loaded the goods in question and therefore the second defendant is not liable. He further contended that the accident occurred due to the

sudden bursting of the left front tyre. It was an act of God and this being the case the owner of the lorry cannot be held liable. He also contended

that even if it is held that the second defendant is liable the amount can be claimed from the fourth defendant which is the insurer of the vehicle. He

also contended that the quantum claimed by the plaintiff is exaggerated.

3. The third defendant contended that he is not a necessary party to the suit. Fourth defendant Insurance company filed a written statement

contending that the motor vehicle Insurance policy does not cover the loss caused to the goods loaded in the vehicle which is insured, and hence

this defendant is not liable.

4. The fifth defendant, and also the sixth defendant-consignee who has been impleaded as a necessary party, contended that they are not

necessary parties to the suit.

5. The trial court on consideration of the evidence held that the accident occurred due to the rash and negligent driving of the first defendant-driver

and not due to an act of God as contended by the defendants. Third defendant and sixth defendant are not necessary parties to the suit. It further

held that the Insurance Policy covers the goods damaged, and it then held that the 4th defendant alone is liable to pay the damages caused to the

goods, It further held that the plaintiff having paid a sum of Rs. 15,152-40 to the fifth defendant as the value of the goods damaged it is entitled to

only that amount and not Rs. 16,000/-. Accordingly, the trial court passed a decree for Rs. 15,152.40 against the 4th defendant insurance

company alone. Against this judgment the 4th defendant has filed the appeal.

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6. Mr. S. Ramalingam, learned counsel appearing for the appellant 4th defendant Insurance company contends that the insurance policy of which

Ex. B1 is a copy does not cover the goods being carried in the vehicle, and since the damage has occurred due to the accident while the lorry was

transporting the goods the 4th defendant insurance company is not liable.

7. On a perusal of Ex. B1, I find that there is much force in this contention. In the insurance policy, under S. II Liability to third parties'', in sub-S. 1

thereof, it is stated.

Subject to the Limits of Liability the company will indemnify the Insured against all sums including claimant''s cost and expenses which the Insured

shall become legally liable to pay in respect of

i) death of or bodily injury to any person caused by or arising out of the use (Including the loading and / or unloading of the Motor Vehicle.

ii) Damage to properly caused by the use (including the

loading and / or unloading) of the Motor Vehicle.

But this is subject to the provisions enumerated thereunder as clauses (a) to (g) Clause (d) reads:

(d) The Company shall not be liable in respect of damage to property belonging to or held in trust by or in the custody or control of the Insured or

a member of the Insurances household or being conveyed by the Motor Vehicle. (underlining by me).

8. Now, it is argued that as per the proviso (d), it is clear that in respect of the goods being conveyed by the motor vehicle the insurance company

is not liable. The trial Court held the view that this proviso runs contra to sub-S. (1987)II M.LJ.45 clause (ii), and therefore, the Insurance

company cannot claim shelter under the said proviso. But I am of the view that clearly the trial court is in error in holding so. The provisos are

exceptions to clauses (i) and (ii) in Sub-S. 1, and therefore it is not correct to say that proviso (d) runs counter to clause (i) of sub-S. 1. There is

no doubt that the damage occurred to the property while they were being conveyed by the lorry. It is therefore, manifest that the fourth defendant-

Insurance company cannot be held liable. This view of mine is supported by a Division Bench decision in United India Insurance Company Ltd.

and Another Vs. K.A.R.N. Janarthanam and Another, Hence the decree passed against the fourth defendant has to be set aside.

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9. The learned counsel for the Plaintiff-first respondent would contend that the plaintiff should have a decree at least against the second defendant-

owner of the lorry, and the trial court is in grave error in not passing a decree against him. The learned counsel is absolutely right in this contention

of his. A reading of the judgment of the trial court will clearly show that according to it the second defendant-owner of the vehicle also is liable, but

however, it has passed a decree only against the insurance company. There is no reason whatsoever to absolve the second defendant-owner of the

lorry by not passing a decree against him.

Now, the second defendant who has been impleaded as the third respondent is being represented by a counsel. His counsel also was heard. He

only argued that the plaint allegation is that the consignment was entrusted to one Anbalagan who according to the plaintiff is the driver of the lorry,

but there is no person by name Anbalagan as a driver of the second defendant and that Anbalagan has neither been impleaded nor has been

examined, and therefore, the second defendant cannot be held to be liable. But I find no issue for decision has been raised in this regard. As stated

by the trial court it is not in dispute that the damaged goods were being carried in the second defendant''s lorry, and it was being driven by its

driver-the first defendant. This being the case I find no merit in the argument submitted by the learned counsel for the second defendant. In this

view of the matter there shall be a decree against the second defendant. Accordingly the appeal is allowed, and the decree against the 4th

defendant is set aside, and instead there will be a decree against the and defendant for a sum of Rs. 15,152-40. Considering the circumstances

there will be no order as to costs.

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