
(1998) 07 KL CK 0026
In the High Court Of Kerala
Case No : A.S. No. 260 of 1991

United India Insurance Co. Ltd. and Another APPELLANT
Vs
Bengal Roadways and Another RESPONDENT

Date of Decision : 15-07-1998

Acts Referred:

Carriers Act, 1865 — Section 10, 9

Citation : AIR 1999 Ker 270

Hon'ble Judges : S. Marimuthu, J

Bench : Single Bench

Advocate : M.P. Ashok Kumar, for the Appellant; P. Radhakrishnan and V.K. Parekh, for the Respondent

Judgement

S. Marimuthu, J.—This appeal is directed questioning the judgment delivered by the Additional Sub Judge, Parur in O.S. No. 70 of 1988. The plaintiffs are the appellants and the defendants are the respondents. The first appellant/first plaintiff is the insurer and 2nd appellant is the insured, consignor. The first respondent is the carrier of the goods and the 2nd respondent is the agent of the first respondent.

2. The suit was filed for damages on the following grounds : Second appellant entrusted the consignment for the purpose of transporting the same from Cochin to the regional office of the 2nd appellant (consignee) at Calcutta. The vehicle on transit met with an accident in Andhra Pradesh and thereby sustained heavy damage and the goods were also got spoiled. When the goods were delivered at Calcutta, there was short delivery and some of the goods were not in the condition when they were consigned to the respondent for transport. A surveyor was appointed by the first appellant to assess the value of the loss, who prepared Ext. A8 survey report and Ext. 49 schedule of the joint survey. As per Exts. A8 and A9, the damage caused to the second appellant was assessed at Rs. 38,397/-. The goods were already insured with the first appellant. Therefore, the first appellant made good of the loss by paying the amount to the 2nd appellant,

for which the second appellant gave Ext. A1 letter of subrogation to the first appellant. After issue of notice, the suit was filed before the lower Court seeking a decree in favour of the first appellant, insurer. The contention of Mr. Madhu Radhakrishnan, learned counsel for the respondents/defendants on the first fold would be that in view of the decision reported *General Traders Ltd. and Another Vs. Pierce Leslie (India) Ltd. and Others*, there shall be specific plea with reference to subrogation in the plaint and in the absence of such plea, a decree cannot be granted in favour of the insurer, first appellant. The second limb of the contention is that as per the requirement in Section 10 of the Carriers Act, 1865, a notice before the institution of the suit ought to have been sent to the carrier and there also must be a specific pleading with reference to the notice sent in the plaint. Thirdly, the witnesses, particularly, the surveyor, who conducted the survey ought to have been brought to the witness box to depose of the exact quantum of damages. Normally, the claimant is not expected to prove the negligence or any act on account of which, the accident occurred as provided in Section 9 of the Act. However, when a specific plea is averred in the plaint, that needs a positive proof by the claimant. The trial Court, on examining the evidence adduced on both sides, dismissed the suit mainly on the ground that the appellants have not established as to the exact quantum of damages to which they are entitled to. And it has rightly done and hence that judgment of the Court below does not call for any interference by this Court.

3. Mr. N. Gangadharan, learned counsel appearing for the appellants on the other hand submitted that there is proper subrogation under Ext. A1, proper statutory notice was issued, the negligence need not be established as enjoined in Section 9 of the Act, that however, negligence had been proved by the appellants, that to fix the quantum, Exts. A8 and A9 do suffice and that therefore, the verdict of the Court below in dismissing the suit is erroneous,

4. His alternative submission would be that in case this Court finds that some more addition is required for fixing the exact quantum of damages, the matter can be remitted back to the Court below giving an opportunity to the appellants to examine the surveyor and the witnesses to Exts. A8 and A9 in order to further brighten quantum of damages.

5. I will take up the above points raised by the learned counsel. It is the contention of Mr. Madhu Radhakrishnan that in view of the principle laid down by this Court in *General Traders Ltd.'s case* ATR 1987 Ker 62 (FB), a specific pleading is required in respect of subrogation in a-suit where decree is sought for in favour of the insurer, here, the first appellant. In this case on hand, no such pleading is available in the plaint and therefore, the decree demanded by the appellants in favour of the first appellant cannot be granted. On account of this contention of the learned counsel, it is essential to have a look at the averments of the plaint. It is averred in paragraph 7 of the plaint that in terms of the insurance policy, the first appellant paid an amount of Rs. 38,397/- to the 2nd appellant and the 2nd appellant executed a letter of subrogation. The relief

sought for is that the decree can be passed directing the respondents defendants to pay the amount to the first appellant plaintiff. Ext. A1 is a letter of subrogation and Ext. A14 is the discharge voucher issued by the 2nd appellant in favour of the first appellant to evince that the 2nd appellant received the amount from the first appellant. Therefore, I am of the view that there is sufficient pleading in respect of subrogation and it has also been established that the amount of damages has been paid by the first appellant to the 2nd appellant by which, the first appellant is clothed with the right of seeking a decree in their favour.

6. The next contention of the learned counsel for the respondents would be that with regard to the statutory notice contemplated u/s 10 of the Act, there must be a pleading in the plaint. In support of this contention, learned counsel drew my attention to the ratio of the judgment of the Gauhati High Court reported *Bafna Brothers Vs. Savani Transport Pvt. Ltd. and Another*. There the learned Judge has ruled that a claim under the Carrier Act requires a statutory notice u/s 10 of the Act and with reference to the issue of notice, a specific plea ought to have been put in the plaint, for, the notice u/s 10 of that Act is as important as that of one issue under Section 80 of Code of Civil Procedure. In the particular case before the learned Judge, there was no specific pleading in respect of sending the notice u/s 10 of the Act and therefore, learned Judge remanded the matter to the Court below for fresh trial after amending the plaint in that regard. In the instant case before me, in paragraph 7 of the plaint, it has been stated that though the 2nd plaintiff demanded the defendants to make good of the loss, it was not heeded to. In paragraph 8, it is stated that the first plaintiff demanded the defendants to pay the amount of Rs. 38,397/- paid by them. Now whether the above said averments in paragraphs 7 and 8 of the plaint would square the principle laid down by the Gauhati High Court or not is to be decided. It is well settled proposition of law that the plaint need not comply with the letters of law, however, it must contain the substance of the claim consistent with law. A broad outlook of para Nos. 7 and 8 would signify that a demand was made by the plaintiff for damages. Copy of the notice has also been marked as Ext. A11, the original of which had been received by the defendants/respondents as is seen in Ext. A15 postal acknowledgment. In this situation, I am satisfied to hold that there is sufficient pleading with reference to the statutory notice, in the plaint squaring the principle of law laid down by Gauhati High Court.

7. Yet another point raised by the learned counsel for the respondents will be that the negligence on the part of the carrier normally need not be established by the consignor as provided in Section 9 of the Act. However, when a specific plea with reference to the negligence is stated in the plaint, it has to be proved by preponderance of probability. In support of this submission, learned counsel relies upon the proposition of law laid down by the Mysore High Court reported in (1969) 1 MLJ 316 (*Hercules Insurance Co. v. Sri Ganesh Transport Co.*). In para 21 of that judgment, the Honourable Judges have laid that normally, there is no necessity of putting the plea of negligence in the plaint or of proving the same and anyhow when such a plea of negligence is set forth in the plaint, it has to be

established by the plaintiff concerned. This view has been later on followed by the Karnataka High Court in a decision reported in 1989 ACJ 1160 (Oriental Fire & Genl. Ins. Co. Ltd. v. Sathyanarayana Transport). In the present case before me, in para 6 of the plaint, it has been specifically alleged by the appellants that due to the negligence and carelessness of the defendants and their agents and employees, the consignment reached the destination in damaged condition. In the same paragraph, it is also averred that the loss to the 2nd plaintiff was due to the rash and negligent handling of the goods by the defendants learned counsel for the respondents in this context would advance an argument that it is the definite plea of the appellants that the negligence was only on account of the mishandling of the goods. But there is practically, no evidence that the goods were not properly handled by the respondents in the course of transit from Cochin to Calcutta. In the absence of any proof in that regard, as settled in the above decision, the appellants have to fail. But the contention of the appellants is that a close examination of the entire para No. 6, would satisfy one and all that the accident occasioned only on account of the negligent act of the employee/servant, etc. of the defendant in the course of transit and therefore, yet another or a different meaning cannot be drawn by the word "handling" found in the same para. I examined the above submission of both the counsel and carefully went through the para No. 6. Para No. 6 reflects that the loss was caused due to the negligent act of the employee of the respondents. In support of para No. 6, the appellants have got Ext. A8 and para No. 18 of Ext. A8 remarks column read as follows :

"18. Remarks : After getting appointment from M/s. United India Insurance Co. Ltd., Divisional Office No. II, Calcutta-700071 on 26-12-86, I contacted Consignees and Carriers also. Survey was held on 30-12-1986 and 31-12-1987 jointly with Carriers in the Consignees" godown. It was reported that Lorry No. KRP-5144 got overturned with four wheels in upward condition suddenly on road N.H.-5, near Kondrupadu village under Prathipadu P.S. on 14-12-1986 at about 2-30 p.m. The lorry was fully damaged and materials were scattered on the road and partly damaged. The matter was reported to Prathipadu P.S. & P.S. lodged a Case No. 107/86, u/s 337, IPC. Then carriers loaded all the goods to another truck No. OSC-5488 and delivered to Consignees" Calcutta godown on 22-12-86. I also checked up than as report & photo of the damaged truck, signed with seal on the backside of the photos. Those are to be submitted to Insurers in support of the claim."

The above para is thus so clear that there was an accident on account of the negligent driving of the driver of the vehicle, for which a case was registered u/s 337, IPC. Ext. A3 is a certificate issued by the Sub Inspector of Police, Prathipadu, Andhra Pradesh which indicates that there was an accident on 14-12-1986 within the limits of his police station and for the said accident, a case was registered in Crime No. 107 of 1986 u/s 337, IPC. So on my examination of Exts. A8, A3 and also the plaint averment noted supra, I am of the view that the appellants have established that there was an accident due to

the negligent act of the driver of the vehicle. Yet another submission of the learned counsel for the respondents would be that the appellants have not established the exact quantum of damages. When there is no reliable evidence for that aspect, the appellants could not triumph in the arena. In support of this contention, learned counsel placed reliance on a decision of this Court in Associated Transport Corporation (P) Ltd. v. National Insurance Co. Ltd. (1989) 1 KLT 386. There, the principle ruled by this Court is that to grant a decree for damages, the surveyor who prepared the survey report ought to have been examined to fix the correct quantum of damages. In the absence of the examination of the surveyor, no conclusion can be arrived at that the contents of the survey report can be acted upon. In the instant case before me, Exts. A8 and A9, survey report and statement of damages, have been signed by the surveyor and 3 other persons. The submission of the learned counsel for the appellants here would be that since Exts. A8 and A9 have been marked without any objection in the Court below, it can be well deduced that the contents thereon in respect of the quantum claimed as damages stand established. On the other hand, the learned counsel appearing for the respondents submitted that though there is no objection in marking the document in the Court below, no finding can be recorded that the contents of those documents have been established as required by law. The above submission of the learned counsel for the respondents, no doubt, does sound to reason. For, law mandates, that mere marking the document in the Court without express consent of the opposite party would not satisfy the requirements of proof of the contents of the document, unless the author of the document or the witnesses thereon have been examined. In the instant case, on account of the above factual and legal aspects, I have no hesitation to conclude that the exact quantum has not been established by the appellants as rightly held by the Court below. However, when Exts. A8 and A9 are so clear with detailed particulars because of the non-examination of the surveyor or any of the witnesses thereon in Exts. A8 and A9, appellants need not be put into loss. Therefore, for that purpose, I feel that the matter can be remitted back to the lower Court for fresh trial and disposal. While remanding the matter, I will make it clear, I concur with the rule of law laid down by my learned brothers in Associated Transport Corporation (P) Ltd.'s case 1989 (1) KLT 386. Even when the claimant does not examine the surveyor due to inadvertence or bona fide omission or intended evasion, the Court shall call and examine the surveyor so as to fix the correct quantum of damages, to shorten the duration of the litigation and also to preserve the valuable time of Court from squandering.

8. In the result, the judgment and decree of the Court below are set aside and the matter is remanded back to the lower Court and the lower Court is directed to dispose of the matter in the light of the observation made above giving opportunities to both sides, to let in evidence, within a period of three months from the date of receipt of records from this Court. Parties are directed to appear before the lower Court on 5-8-1998.