
(2002) 09 SHI CK 0009

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 128 of 1999

United India Insurance Co. Ltd.

APPELLANT

Vs

Gulab Singh Chauhan and Others

RESPONDENT

Date of Decision : 18-09-2002

Acts Referred:

Citation : (2004) ACJ 1851 : AIR 2003 HP 102 : (2002) 3 ShimLC 262

Hon'ble Judges : M.R. Verma, J

Bench : Single Bench

Advocate : Lalit Sharma, for the Appellant; Bhupender Ahuja, for Respondent 1 and Romesh Verma, for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Verma, J.—This appeal u/s 100 of the CPC (hereafter referred to as the "Code") has been preferred by the appellant-defendant (hereafter referred to as "the appellant1) against the judgment and decree dated 31-12-1988, passed by the learned District Judge, Kinnaur Division at Rampur, whereby he had modified the judgment and decree dated 28-11-1996 passed by the learned Sub-Judge, Rampur.

2. Brief facts leading to the presentation of the present appeal are that respondent No. 1 (hereafter referred to as R-1) Instituted a suit against the appellant, respondents 2 and 3 (hereafter referred to as "R-2" and "R-3") and one M/s. Jindal Roadways, now represented by respondents 4 to 8 (hereafter referred to as "R-4 to R-8") for Rs. 54,500/-. Case of R-1 as made out in the plaint, is that he owns and possesses an apple orchard from which he supplies apple boxes for marketing to Delhi and other places in India. The apple boxes are sent in trucks to the marketing places through forwarding agents to the commission agents and are insured with the Public Undertaking Insurance Companies. On 3-9-1988, R-1 approached R-2 for forwarding his 350 apple boxes and the latter approached the predecessor in Interest of R-4 to R-8 for arrangement of truck and consequently R-3 agreed to take the consignment from

Dalash to Delhi vide Bilty Nos. 007691 and 007692 which were signed by R-2 as forwarding agent and the consignment was taken by R-3. It was agreed between R-1 and R-2 that the consignment be insured with the appellant and was so insured by R-2. The consignment of apple boxes which was sent to SFC, Delhi never reached the consignee. It was learnt that the consignment was unloaded by the predecessor in interest of R-4 to R-8 at Kalka and was then loaded in truck owned by R-3 and the truck met with an accident near Shahbad on 5-9-1988, whereby all the apple boxes were completely damaged. R-1 rushed to the spot and was informed of the total destruction of the apple. R-1 then served predecessor-in-interest of R-4 to R-8 with a legal notice through counsel, but of no avail and copy of the notice was endorsed to R-2, who sent a legal notice to the appellant but the claim of R-1 had not been settled, despite R-2 having approached the appellant on several occasions. It is claimed that the total loss suffered because of the destruction of the apple boxes is Rs. 52,500/- and in addition to it, R-1 incurred expenses in the sum of Rs. 2,000/- on account of frequent travels from Dalash to the offices of the appellant and respondents R-2 to R-8 for settlement of claim. It is averred that the appellant and R-2 to R-8 are jointly and severally liable to make good the aforesaid losses suffered by the R-1. Hence the suit for a decree in the sum of Rs. 54,500/-.

3. The appellant, R-2, R-3 and predecessor-in-interest of R-4 to R-8 contested the suit. The appellant in its written statement, raised the preliminary objections that the apple boxes were not insured by it or its agent and R-1 never approached it for insurance of the apple boxes and, thus, there was no contract between R-1 and the appellant, that Civil Court has no jurisdiction to entertain the suit; that the claim is barred by limitation and is defective for want of particulars of insurance policy. On merits, it was averred that R-2 was not the agent of the appellant nor he was competent to act on behalf of it and no policy was issued in favour of R-1. It has further been claimed that only the owner of goods could procure insurance policy and not the forwarding agent and that the suit had in fact been filed in collusion with R-2, who procured endorsement on the policy of insurance. The occurrence of the truck carrying the apple boxes with accident has been denied. However, it is admitted that R-2 sent an application dated 5-9-1988 to the Senior Manager of the appellant intimating that the truck had met with an accident and the apple boxes had been damaged. On receipt of the application, Girish Sharma, Surveyor was deputed to assess the loss, which he assessed in the sum of Rs. 18,950/-, subject to the terms and conditions of the policy, which fact was admitted by R-2 to whom the coverage of risk was granted. It has further been claimed that the marine road risk was entered in respect of individual goods of R-2 and the appellant is ready to settle the claim of R-2 on the basis of the merits of the claim provided that he is able to prove that the apple boxes belonged to him. Hence the appellant denied the claim of R. 1.

4. R-2, R-3 and the predecessor-in-interest of R-4 to R-8 in their joint written statement, averred that, the truck met with an accident without any fault on their part, as a stray buffalo came in front of the truck and while saving the

buffalo, the driver caused the accident. It has further been claimed that the appellant was approached for settling the claim qua the loss of insured boxes but with no fruitful result. These defendants have also, thus, denied their liability.

5. R-1 filed replications wherein he denied the grounds of defence as taken in the written statements and reiterated the claim as made out in the plaint.

6. On the pleadings of the parties, the following issues were framed :

1. Whether defendant No. 2 is liable to pay Rs. 54,500/-? OPP.
2. Whether there is insurance agreement between defendants Nos. 1 and 2, if so, what is its effect? OPD-2.
3. Whether suit is not maintainable against defendant No. 1? OPD-1.
4. Whether defendant No. 3 is liable and if so to what extent? OPP.
5. Whether suit is within time? OPP.
6. Whether this Court has no jurisdiction? OPD,
7. Relief.

7. On the basis of the evidence adduced by the parties, the learned trial Judge, vide his judgment dated 28-11-1996, decided issue Nos. 1 and 5 in favour of R-1 whereas issue No. 4 was decided against him. Issue No. 2 was decided in favour of R-2, subject to the rider that R-1 could not take benefit of it and issue No. 3 was decided in favour of the appellant. Issue No. 6 was decided against R-2 to R-8. As a consequence, the suit was decreed for Rs. 52,500/- against R-2 only.

8. Being aggrieved, R-2 preferred an appeal in the Court of the learned District Judge. Kinnaur at Rampur, who, by the impugned judgment and decree, modified the decree to the extent that he "decreed the suit of R-1 for a sum of Rs. 54,500/- jointly and severally against the appellant and R-2 to R-8 and costs of appeal were also awarded to R-1 and were made payable by the appellant. Hence this appeal.

9. It may be pointed out here that the appeal was admitted vide order dated 8-3-2000, but without formulating any substantial question of law or without indicating whether it was admitted for hearing on substantial questions of law as were proposed by the appellant along with the memorandum of appeal. Therefore, the learned counsel for the parties were heard in this regard and the appeal was treated to have been admitted on the following substantial questions of law :

1. Whether the judgment and decree of the learned First Appellate Court are sustainable in view of the clear misinterpretation and misreading of the documentary evidence on the record especially the cover note number 39165 and policy number 83/ 1/99/88?

2. Whether in the circumstances on the record, it could be legally inferred that the consignment in question was covered by the appellant?

10. I have heard the learned counsel for the parties on merits and have also gone through the records.

Substantial Questions No. 1 and 2 :

11. Since both these questions are interconnected and can be conveniently considered together, therefore, are taken up together for discussion.

12. It was contended by the learned counsel for the appellant that Cover note Ext. DA shows that the Insured is R-2 and there is nothing to indicate that R-1 is a beneficiary under Ext. DA. Thus, there is no privity of contract between the appellant and R-1 and, therefore, suit by R-1 against the appellant is not maintainable.

13. There is no dispute that the truck carrying the consignment in question met with an accident near Shahbad (Haryana) on 5th September, 1988 in which the apple boxes of R-1 were damaged. Policy No. 83/ 1/99/88 Ext. P-3 issued under cover Note No. 144-0 of 10-10-1988 was operative with effect from 16-9-1988 as is evident from the perusal of Ext. P-3. The consignment in question was insured vide Marine Cargo Cover Note No. 39165 dated 29-8-1988 two copies whereof are available on the record as Ext. DA and Ext. DW-1/A which is not relatable to Ext. PB (This document hereafter will be referred to only as Ext. DA to avoid any confusion). The policy Ext. P-3 issued on the basis of cover Note No. 1440 and which was effective with effect from 16-9-1988 is evidently not relevant to the consignments in question and has wrongly been relied upon by the learned District Judge as the Insurance Policy relevant to the consignment in question by observing that the loss pertaining to apple boxes of different growers was covered under this policy.

14. The next question for determination is whether the consignment in question is covered by cover Note No. 39165 Ext. DA in the name of R-2--the forwarding agent and if so whether R-1--the owner of the consignment, could lay a claim against the appellant-the Insurance Company to recover compensation for the damages suffered by him on account of the damage caused to the apple boxes in the road accident.

15. There is no dispute that Marine Cover Note Ext. DA has been issued for and on behalf of the appellant on 29-8-1988 in favour of R-2. Ext. DA covers consignment of apple boxes of all variety by truck regarding road risk worth Rs. 2,39,600/- while in transit from Tehsil Anni to anywhere in India. The sum insured is Rs. 2,39,600/- and the paid premium is Rs. 600/-. The note apparently has no reference to R-1 as insured. It is also not in dispute that R-2 is only the forwarding agent and thus evidently his insurable interest in the consignment will be only to the extent which he had in the consignment as a forwarding agent whereas admittedly the sum insured covers the value of the apple boxes to the

extent already indicated. It has been claimed by R-1 that his apple boxes were consigned vide Bitty Nos. 007691 and 007692. It is evident from the Marine Report Ext. DA/1 read with statement of Vinay Singh, Assistant Administrative Officer of the appellant (DW-1) produced in evidence by the appellant that the apple boxes sent through the aforesaid consignments were also damaged. Thus, on the basis of the material on record what can be indisputably concluded is that R-2--a forwarding agent was the insured but the property damaged in the accident the road risk whereof was covered vide Ext. DA was owned by R-1. Therefore, R-1 has Insurable interest in the consignments. Evidently the very purpose of the insurance was to make good the loss which might be caused to the apple boxes while in transit, Thus, the policy for all Intents and purposes was to cover road risk to the apple boxes being transported in the truck. Even if the claim is settled at the behest of R-2 such settlement will definitely be for the benefit of R-1 also.

16. It is admitted by DW-1 clearly and unambiguously in his cross-examination that "Is Damage Report Ke Mutabik Jin Jin GR Numbers Ka Hawala De Rakha Hai Woh Claim Lene Ke Hakdaar Hai". He has further admitted that as per the report Ext. DA/ 1 prepared by Girish Chander Sharma -- a Surveyor of the appellant, the GR Numbers of the damaged consignments of apple are given in the damage report Ext. DA/A and the GRs against which the apple boxes of R-1 were consigned are given in this report. Thus, even as per the admission of DW-1 the owner of the damaged apple, as per the GRs, would be entitled to claim the damages.

17. There is another aspect of the matter. It is pleaded case of R-1 that it was agreed between him and R-2 that the consignment was to be insured with the appellant. It is stated by R-1 (PW-1) that the apple boxes were insured with the appellant and the amount of insurance (premium) was deducted by R-2 @ 40 paise per box and thus the insurance was got done through R-2. He has further clarified in his cross examination that the amount of premium deposited by Santosh Kumar was to be deducted from the sale proceeds of his apples and was to be retained by R-2. Thus, according to R-1, the apple boxes were insured against the road risk at the instance of R-1 by R-2 who was to deduct the paid premium from the sale proceeds of the apple boxes. In this regard statement of R-1 is fully corroborated by Santosh Kumar (R-2) who has stated that he had issued Bilties Exts. P-1 and P-2 regarding consignment of the apple boxes of R-1 which were insured with the appellant on payment of premium of Rs. 600/- by him which premium was to be recovered from the sale proceeds of the apple boxes of R-1. It is evident from a perusal of Bilties Exts. P-1 and P-2 that the apple boxes thereby consigned were insured and on account of insurance a sum of Rs. 15.20 is shown as payable vide Ext. P-2 and a sum of Rs. 124.80 vide Ext. P-1. This clearly indicates that the amount of premium, as would have been payable on account of the apple boxes consigned by R-1, was payable by him to R-2.

18. In these circumstances, keeping in view the fact that the apple boxes insured were of R-1 and he was to pay the amount of premium for insurance of such goods to R-2 (sic) what can be said is that R-2 is the trustee for R-1 and R-1 is the beneficiary and as a beneficiary R-1 can sue to enforce the trust created in his favour and implead the insurer (the appellant) as a party. The plea that there is no privity of contract between the appellant and R-1, therefore, R-1 cannot maintain the suit against the appellant is not sustainable.

19. In *Snow White Food Product Pvt. Ltd. Vs. Sohanlal Bagla and Others*, plaintiff Snow White Food Product Pvt. Ltd. entrusted two consignments to defendant Hanuman Transport Company which received and accepted the consignments for reward with a view to reaching them to their destination. The defendant-transport company insured the goods covered by the consignments against loss and damage with defendant New Insurance Co. Ltd. The consignments were not delivered at the destination, hence, Snow White Food Product Pvt. Ltd. instituted a suit against the aforesaid defendants and a question arose whether the consignments were insured by the defendant-transport company on account of and for the benefit of the plaintiff therein. Dealing with the question, the High Court held as under (at page 216-217):

"30. By parity of reasoning the *London and North-Western Railway Company v. Glyn* (1859) 28 LJ QB 188, which really *Waters*" case (1856) 25 JL QB 102 just reviewed governs negatives the defence that the suing common carriers only insured their own risk as carriers and holds that they (the common carriers) insured the whole value of any goods sent to them to be carried, just as the Transport Company before me has done. Indeed, the words employed in the policy appear to be significant to a decree : 15,000 I was declared to be on "goods their (the suing common carriers) own and in trust as carriers". These are words the like of which is not to be found in the policy before me. sendings are declared for amounts not exceeding their net invoice value which comes to, going by the Invoices dated April 20, 1960, in the supplementary brief of documents, part of exhibit A P. dd. 2 and 1 :

Rs. 15.757.54

Rs. 852.63

Rs. 16.610.17

To say so, however, is not to say that the actual contract in law is on account of Snow White. It is by and for, the Transport Company. If the whole of the sendings be destroyed or lost in transit, the Transport Company will have to make good the loss to Snow White. Because of the insurance, it will do so not out of its own pocket, but from the amount it receives from the Insurance Company.

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32. Again, in both these cases, the plaintiffs are the assured between whom and

the insurance companies sued against there is a privity of contract. What is upheld is "the right of the assured to recover the whole value from the insurers," the apportionment of what is recovered so being left to be settled between the bailors and the bailees. In the case in hand, the plaintiffs the absolute owner (Snow White) between whom and the defendant Insurance Company there is no manner of privity of contract; and still the bailor Snow White is out to recover the whole value from the Insurance Company. (More of which hereafter). I am therefore unable to see a contract in law between Snow White and the Insurance Company. My finding must accordingly be that the insurance the Transport Company goes in for with the Insurance Company is not on account of Snow White. It is on account of itself. It contracts for itself, and nobody else, as a common carrier limiting its liability for an amount representing its liability to the owner, Snow White, and therefore for the benefit of Snow White too.

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36. To whom? To the Transport Company by the terms of the policy. But how it is misbehaving has been noticed. It has misappropriated Rs. 11,556.54 np. So contended it is with that, that it does nothing to get the residue from the insurance company. But Snow White is a stranger to the contract of Insurance. Still the contract of insurance between the Transport Company and the Insurance Company is so framed and in such circumstances as to make the former a trustee for Snow White. I accept Mr. Dutt's contention to that end. A considerable body of decision cluster round the subject : Waters" case (1856) 25 LJ QB 102 supra where Lord Campbell, C. J. says :

"They (the warehousemen, the assured) will be entitled to keep for their own indemnity (not provided for in the policy in hand) as much as will cover their interest in the goods, and they will be trustees for the residue of the money for the absolute owners"

(here the whole of the money for Snow White) :

(1859) 28 LJ QB 188 (supra), Harmer v. Armstrong, (1934) 1 Ch 65, Vandepita v. Preferred Accident Insurance Co. of New York, 1933 AC 70, where Lord Wright delivering the opinion of the Privy Council observes :

"It cannot be questioned that abstractly such a trusteeship (the father Berry, the insured, creating a trust of that chose in action for her daughter Berry as beneficiary whom the insurance company should indemnify) is competent... .. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant"

Just as Snow White, the beneficiary has done, suing the Transport company as a defendant; also Jnan Chandra Mukherjee Vs. Manoranjan Mitra and Others, where Mukherjee, J. (as his lordship then was) cites a number of authorities, English and Indian, reiterates the principle I have governed myself by, but on

facts obtaining there finds no trust. It therefore matters little that Snow White is a stranger to the contract of Insurance. Still it can sue upon the contract to enforce the trust created in its favour impleading, as it has done, the recalcitrant trustee, the Transport Company. I therefore find that the Insurance Company's liability to Snow White to be Rs. 5,053.63 np., the figure I have arrived at in the concluding portion of paragraph 35 ante a figure from which the Insurance Company cannot escape in any event, as Mr. Dutt rightly stresses."

In view of the above ratio, the view I have already taken hereinabove, is fully supportable.

20. In view of the above discussion, it cannot be said that the lower appellate Court has mis-interpreted and mis-read the cover note Ext. DA and other evidence on record except the policy Ext. P-3 and that the consignment in question was not covered by the said note or that the suit by R-1 against the appellant is not maintainable for want of privity of contract between them.

21. No other point was urged before me.

22. As a result, the present appeal merits dismissal and is accordingly dismissed. However, in the facts and circumstances of the case, the parties are left to bear their own costs.