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(2016) 04 DEL CK 0091

DELHI HIGH COURT

Case No: RFA No. 729 of 2005.

M/s Transway Cargo Lifters Pvt. Ltd.		APPELLANT
	Vs	
National Insurance Co. Ltd. and another.		RESPONDENT

Date of Decision: April 19, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 96
- Evidence Act, 1873 - Section 114, 3

Citation: (2016) 5 ADDelhi 149 : (2016) 233 DLT 7

Hon'ble Judges: Rajiv Sahai Endlaw, J.

Bench: Single Bench

Advocate: Rajiv Talwar, Sanjay Sarin, Gagandeep Kaur and Nipu Patiri, Advocates, for the Appellant; Hetu Arora Sethi and Shravan Sahny, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J. - This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 30th July, 2005 of the Court of the Additional District Judge (ADJ), Delhi decreeing Suit No.331/03 filed by the respondents for recovery of Rs.19,81,280 with costs and interest at 9% per annum from 29th March, 2000 till realisation against the appellant.

2. Notice of the appeal was issued and subject to the appellant depositing 50% of the decretal amount execution was stayed. The appeal on 6th October, 2006 was admitted for hearing and the maturity value of the fixed deposited created of the amount deposited by the appellant ordered to be released in favour of the respondent no.1/plaintiff subject to ultimate result of the appeal. The appeal, on 5th November, 2009 was dismissed in default of appearance of the appellant but notice of the application made by the appellant for restoration of the appeal was issued

and remained pending for service of the respondent no.2 M/s. BPL Display Devices Ltd. till 15th December, 2014 when the application was dismissed in default. Again restoration was applied for and vide order dated 10th August, 2015, observing that the respondent no.2 was reported to have been wound up and none had appeared for the Official Liquidator in spite of notice, the appeal restored to its original position and Trial Court record requisitioned. The counsels were heard on 17th September, 2015 and judgment reserved.

3. The two respondents instituted the suit from which this appeal arises pleading (i) that the respondent no.2/plaintiff had entrusted 28 pallets containing 560 colour picture tubes to the appellant/defendant, a common carrier/transporter, for transportation Ex-Sahibabad to Bangalore and the appellant/defendant issued a goods receipt dated 21st March, 2000 on collection of Rs.20,000/- as freight charges and the goods were loaded in truck No.HR-38-0495 on 21st March, 2000; (ii) the said consignment was insured by the respondent no.2/plaintiff with the respondent no.1/plaintiff against all transit risks; (iii) that due to culpable negligence and misconduct on the part of the appellant/its employees, the vehicle never reached its booked destination (Bangalore) and disappeared enroute; (iv) the appellant/defendant informed the respondent No.2/plaintiff of having lodged FIR No.218 dated 11th April, 2000 of PS Faridabad with respect to disappearance of the truck and that the Faridabad Police had on 12th June, 2000 reported that neither the goods were recovered nor accused arrested and case filed as untraced; (v) however according to detailed investigations conducted by the surveyor appointed by the respondent no.1/plaintiff, the truck was being driven by driver-cum-owner of the truck Mr. Jasbir Singh who disappeared near Kishangarh, Rajasthan on 24th March, 2000 and till then neither the vehicle nor consignment had been traced and that the truck was last seen near Nepal border; (vi) that the respondent no.2/plaintiff within six months of the date of booking served notice under Section 10 of the Carriers Act claiming compensation of Rs.19,81,280/- from the appellant/defendant for the goods lost and in response thereto the appellant/defendant issued Certificate dated 31st August, 2000 confirming that the consignment had been lost in transit; (vii) that the respondent no.2/plaintiff preferred a claim against the respondent no.1/plaintiff under the policy and the respondent no.1/plaintiff after processing the claim for damages settled the claim of the respondent no.2/plaintiff for Rs.19,81,280/- and paid the said amount to the respondent no.2/plaintiff and the respondent no.2/plaintiff in consideration thereof executed the Letter of Subrogation (LoS) in favour of the respondent no.1/plaintiff; (viii) that the respondent no.2/plaintiff through the LoS and Special Power of Attorney (SPA) assigned, transferred and abandoned their claim in favour of the respondent no.1/plaintiff including all accountable rights, titles and interests in the said goods and proceeds thereof; (ix) that the respondent no.2/plaintiff also assigned and transferred all rights and remedies against the carrier in favour of the respondent no.1/plaintiff; and, (x) that the appellant/defendant had failed to make payment of the said amount to the

respondent no.1/plaintiff despite admission.

4. The appellant/defendant contested the suit by filing a written statement pleading (i) that the Court at Delhi had no territorial jurisdiction as no part of cause of action had arisen within the territorial jurisdiction of the Court at Delhi; (ii) that no notice under Section 10 of "Carriers Act" had been served on the appellant; (iii) that there is no privity of contract between the respondent no.1/plaintiff and the appellant/defendant and the respondent no.1/plaintiff has no right or claim against the appellant/defendant; (iv) that there was no negligence on the part of the appellant/defendant in transporting the goods; some unknown persons looted the goods and abducted the driver along with the truck near Kishangarh, Rajasthan; (v) that the suit claim was barred by limitation; and, (vi) that the authorised representative of the respondent no.1/plaintiff had no authority to institute the suit on behalf of the respondent no.2/plaintiff.

5. The respondents/plaintiffs filed replication but need to refer thereto is not felt.

6. On the pleadings of the parties the following issues were framed on 2nd March, 2005:-

"1. Whether this court has no jurisdiction to try and entertain the present suit? OPD

2. Whether this suit is not maintainable as no notice under Section 10 of Carriers Act has been served on the defendant? OPD

3. Whether the suit is bad for mis-joinder of the necessary parties? OPD

4. Whether the suit is barred by limitation? OPD

5. Whether there is no privity of contract between the plaintiff and defendant? OPD

6. Whether the plaintiff is entitled to a decree for a sum of Rs.19,81,280/- against the defendant? OPP

7. Whether the plaintiff is entitled to any interest?

If yes, at what rate and for which period? OPP

8. Relief".

7. The respondents/plaintiffs examined two witnesses i.e. Administrative Officer of respondent No.1 as PW1 and the Surveyor appointed by respondent No.1 as PW2 and the appellant/defendant examined one witness i.e. the Managing Director of appellant/defendant as DW1.

8. The learned ADJ has decreed the suit as aforesaid finding/observing/holding:-

(a) that the registered office of the appellant/defendant being at Delhi and the regional office of the respondent no.1/plaintiff which claims to be entitled to money, being at Delhi, the cause of action in favour of the respondent no.1/plaintiff and

against the appellant/defendant had accrued at Delhi and the Courts at Delhi had territorial jurisdiction - accordingly Issue No.1 was decided in favour of the respondents/plaintiffs and against the appellant/defendant;

(b) that though the appellant/defendant had denied receipt of notice dated 21st August, 2000 under Section 10 of the "Carriers Act" but from the perusal of AD card returned thereof to the respondent no.1/plaintiff it was borne out that the said notice was received by the appellant; that though the appellant had suggested to the witnesses of the respondents/plaintiffs that the same was not a notice under Section 10 and the said suggestion was denied by the witnesses but the appellant/defendant had failed to prove that notice under Section 10 had not been served; moreover the appellant/defendant had issued certificate dated 31st August, 2000 of theft/loss - thus Issue no.2 was decided in favour of the respondents/plaintiffs and against the appellant/defendant;

(c) the appellant/defendant had failed to prove as to how the respondent no.1/plaintiff was not a necessary party when the respondent no.1/plaintiff had proved having made payment to the respondent no.2/plaintiff for the loss suffered and had proved the LoS - thus Issue no.3 was decided in favour of the respondents/plaintiffs and against the appellant/defendant;

(d) though the appellant/defendant had taken the plea of the suit claim being barred by time but had not disclosed how; the consignment was booked on 21st March, 2000 and the suit was filed on 15th March, 2003 and the suit was thus within time - accordingly Issue No.4 was decided in favour of the respondents/plaintiffs and against the appellant/defendant;

(e) that the appellant/defendant had not examined the driver of the truck as well as Shri Chander Bhan Sharma who lodged the FIR and who alone could have thrown light about the facts and incident of the alleged hijacking and disappearance of the truck along with the consignment; nothing had been placed on record to show any collusion between the two plaintiffs; in the absence of such evidence it could be said that the respondent no.2 /plaintiff made a fake claim or the respondent no.1/plaintiff settled a fake claim without verification and investigation;

(f) the arguments of the counsel for the appellant/defendant that the goods were put at the risk of the consignor is not tenable as the appellant/defendant as a carrier was bound to take reasonable care of the goods and the appellant/defendant had failed to prove that he had taken all reasonable care;

(g) that there was no merit in the plea of the appellant/defendant of the suit having not been instituted by a competent person on behalf of the respondent no.2/plaintiff in view of Union Bank of India v. Naresh Kumar, AIR 1997 SC 3; even otherwise the Manager of the respondent no.1/plaintiff had been authorised by the respondent no.2/plaintiff to sue and prosecute; and,

(h) though the respondents/plaintiffs had claimed interest at 18% per annum but because the Nationalized Banks were advancing loans at a much lower rate, interest at 9% per annum was awarded.

9. The counsel for the appellant/defendant before me also argued on the aspect of the Courts at Delhi having no territorial jurisdiction and the claim of the respondent no.1/plaintiff being on the basis of letter of subrogation and no valid subrogation having been proved, and

(i) drew attention to the LoS proved by the respondents/plaintiffs and contended:-

(a) that it was without date;

(b) that the authority of signatory thereof was not disclosed;

(c) that no details of goods, payment or Power of Attorney were contained therein;

(d) that the signatures thereon were also not identified by the witness of the respondents/plaintiffs;

(e) that the Insurance Company cannot sue the transporter merely on the basis of the LoS; and,

(f) that there was no mention of the respondent no.2/plaintiff in the LoS.

(ii) contended that payment by the respondent no.1/plaintiff to respondent no.2/plaintiff had also not been proved;

(iii) contended that no witness from the respondent no.2/plaintiff was examined;

(iv) contended no Power of Attorney on behalf of the respondent no.2 to institute the suit had been proved; and,

(v) placed reliance on Economic Transport Organization, Delhi v. Charan Spinning Mills Private Limited, (2010) 4 SCC 114.

10. Per contra the counsel for the respondents/plaintiffs contended that (i) Courts at Delhi had territorial jurisdiction owing to the registered office of the appellant/defendant being at Delhi and owing to the appellant/defendant carrying on business at Delhi; (ii) the LoS itself referred to Insurance Company and which finds mention in the report of the surveyor; and, (iii) no such pleas regarding subrogation were taken in the written statement and no Issue thereon was sought before the Trial Court.

11. I have considered the controversy in the light of the testimony of the witnesses of the parties. The Administrative Officer of the respondent no.1 /plaintiff in his affidavit by way of examination-in-chief, besides other documents proved the LoS-cum-Special Power of Attorney as Ex.PW1/14. No objection to admission thereof into evidence was taken by the counsel for the appellant/defendant at the time when the said affidavit by way of examination-in-chief along with other documents

referred to therein were tendered into evidence. In his cross examination, the counsel for the appellant/defendant asked whether the witness could identify the signature on the LoS and in response whereto the witness replied in the negative and otherwise only a suggestion was given to the effect that the same was forged. The Managing Director of the appellant/defendant who was its sole witness in his examination-in-chief did not advert to the aspect of subrogation claimed by the respondent no.2/plaintiff in favour of the respondent no.1/plaintiff. It is not the case of the appellant/defendant that the respondent no.2/plaintiff made any claim with respect to the subject goods against the appellant/defendant or that the respondent no.2/plaintiff on enquiry by the appellant/defendant controverted the subrogation. It is not in dispute that the appellant/defendant issued Theft/Loss Certificate dated 31st August, 2000 to the respondent No.2/plaintiff certifying that the consignment subject matter of suit valued at Rs.19,81,280/- had been lost in transit and that related documents had been handed over to the respondent No.2/plaintiff. Though the appellant/defendant denies receipt of notice dated 21st August, 2010 got sent by respondent No.2/plaintiff claiming Rs.19,81,280/- from appellant /defendant but A/D card thereof returned to the respondent No.2/plaintiff bears the stamp of authorised signatory of appellant/defendant. The sole witness of appellant/defendant though generally denied receipt of notice but did not depose that the stamp on the A/D card was not of the appellant /defendant or that the address at which notice had been sent and from which A/D card had been returned was not the correct address of appellant /defendant. Clearly, a case for drawing presumption under Section 27 of the General Clauses Act, 1897 read with Section 114 of Indian Evidence Act, 1872 of presumption of service of notice is made out. The proof of the LoS has to be considered in the said light. Though undoubtedly the witness of the respondents/plaintiffs in reply to the specific question in cross examination stated that he could not identify the signatures on the LoS but the same signatures appear also on the receipt, proved by the witness, issued by the respondent No.2/plaintiff of receipt of Rs.19,81,280/- from the respondent No.1/plaintiff and which is not challenged in cross examination. The two documents appear to have been signed at the same time. The Evidence Act in Section 3 thereof defines "proved" as when after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It cannot be lost sight of that the respondent No.1/plaintiff is a Govt. owned company and the decretal amounts are to go to the account of respondent No.1/plaintiff and none of its officials personally benefit therefrom and have performed the tasks of settling the insurance claim of respondent No.2/plaintiff by making payment against receipt and LoS and of pursuing the legal proceedings in the course of their official duties and not guided by personal profit or entrepreneurial motive. It is perhaps because of this that the lacunas as of not producing the official who dealt, in the witness box remain. I am on a conspectus of pleadings, admitted facts and evidence led satisfied that the respondent

No.1/plaintiff as insurer settled the claim of the respondent No.2/plaintiff of the loss admittedly suffered of goods entrusted to appellant/defendant for carriage.

12. Supreme Court, in Economic Transport Organisation, Delhi supra so summarised the principles relating to subrogation as follows:

(i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrongdoer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a Letter of Subrogation, reducing the terms of subrogation, the rights of the insurer vis-a-vis the assured will be governed by the terms of the Letter of Subrogation.

(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insured becomes entitled to the entire amount recovered from the wrongdoer, that is, not only the amount that the insured had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides.

Applying the aforesaid law, the arguments of counsel for appellant /defendant of the respondents/plaintiff having not proved LoS, the respondent No.1/plaintiff being not entitled to sue in its own name, no power of attorney on behalf of respondent No.2/plaintiff to institute the suit having been proved, no witness of respondent No.2/plaintiff having been examined, are of no avail.

13. This Court, in National Insurance Co. Ltd. v. Mukesh Tempo Service (Carrier) held (i) that there is no particular form of notice prescribed in the Carriers Act, 1865 and it is sufficient if carrier is informed about the loss of the goods; (ii) that Section 3 of the Act where the liability of carrier is limited, applies only to carriage of goods specified

in Schedule to the Act (it is not the plea of the appellant/defendant here that the goods were scheduled goods); (iii) that as per law laid down in Patel Roadways Limited v. Birla Yomana Ltd., AIR 2000 SC 1461 the liability of a carrier is absolute and referring to Section 9 of the Act it was held that it is not necessary for the plaintiff to establish negligence; (iv) reliance was placed on South Eastern Carriers (P) Ltd. v. Oriental F and G Insurance Co. Ltd. where it was held that a carrier is answerable for the loss even when not caused by negligence or for want of care on its part; (v) that the Insurance Co. is competent to sue in the name of insured also; (vi) that notwithstanding the impersonal nature of testimony of witnesses of Insurance Co. and discrepancy in documents, their genuineness is established from the consignor of the carrier having not preferred any claim against the carrier for recovery of compensation for the loss of the goods. To the same effect is the another recent judgment of this Court in Road Transport Corporation Pvt. Ltd. v. National Insurance Co. Ltd. where qua objection of authority to sue having not been proved, relying on United Bank of India v. Naresh Kumar supra it was held that once a company such as a banking company or even an insurance company has pursued a suit to the hilt, the suit cannot be thrown out on technicalities.

14. Reference in this regard may also be made to (a) New India Assurance Co. Ltd. v. Okay Transport Corporation where a Division Bench of Kerala High Court held that when all the parties including the party entitled to recover damages are before the Court, the Court would be reluctant to take a hypertechnical view and dismiss the suit only because insured is made a defendant instead of being made a co-plaintiff along with insurer; and, (b) United India Insurance Company Ltd. v. Muthulakshmi, Radhakrishnan and Star Match Factory, SLP(C) No.20140/2003 where against was dismissed on 6th December, 2004) where a Division Bench of Madras High Court held that the Court has power to mould and grant necessary reliefs to the parties, when all parties who are interested in the suit are before the Court.

15. The paragraphs of Economic Transport Organization, Delhi supra on which counsel for appellant/defendant placed reliance, are in the context of maintainability of a complaint by the insured before the consumer fora and of no relevance to a suit.

16. I may record that the Carriers Act, 1865 during the pendency of this appeal was repealed by the Carriage By Road Act, 2007 but the same is of no significance to the issues for adjudication therein.

17. Qua territorial jurisdiction also, in the light of registered office of appellant/defendant being admittedly within the jurisdiction of this Court, no error is found in conclusion drawn by learned ADJ.

18. There is thus no merit in the appeal; dismissed with costs throughout.

19. Decree sheet be prepared.