(2004) 09 JH CK 0004

Jharkhand High Court

Case No: AFOD No. 108 of 1995 (R)

New India Assurance Company Ltd.		APPELLANT
	Vs	
Pawan Transport Corporation and Another		RESPONDENT

Date of Decision: Sept. 21, 2004

Acts Referred:

- Carriers Act, 1865 - Section 6

Citation: AIR 2005 Jhar 44 : (2006) ACJ 828 : (2005) 1 ACC 631 : (2005) 1 JCR 107 : (2005) 2 RCR(Civil) 522

Hon'ble Judges: Hari Shankar Prasad, J

Bench: Single Bench

Advocate: Alok Lal and D.C. Ghosh, for the Appellant; S.N. Lal and Rajiv Anand, for the Respondent

Final Decision: Allowed

Judgement

Hari Shankar Prasad, J.

This appeal, at the instance of the appellants, is directed against the judgment and decree dated 12.1.1995 and 28.1.1995 respectively passed in Money Suit No. 45/91. whereby and whereunder the learned Subordinate Judge 5th, Ranchi dismissed the suit of the plaintiff-appellant.

2. Case of the plaintiff-appellant in brief is that plaintiff- appellant is the insurer of M/s. Usha Martine Industries Ltd., which is respondent No. 2 in this appeal. The plaintiff No. 2 is the respondent No. 2 in this appeal and defendant is respondent No. 1. Plaintiff No. 2 is the manufacturer of steel wires including copper coated wires under Policy No. 2357100217. The copper coated steel wire of plaintiff No. 2 was insured by plaintiff No. 1-appellant. On 25.6.1988 one consignment consisting of 527 coils weighing 12608 MT of copper coated wires were entrusted to the

defendant-respondent No. 1 for transportation from Tati Silway, Ranchi to M/s. Arkey Industries, Calcutta under consignment No. RU 235, dated 25.6.1988 for safe and timely delivery at the destination place. The consignment of goods booked under Challan No. 0411132388 by truck No. 6486 was fully packed with the packing materials and the value of consignment of goods was Rs. 2,77,044/-, which was duly insured with plaintiff No. 1-appellant under Policy No. 2357100217. The allegation is that defendant-respondent No. 1 transported the consignment in such a careless and negligent manner that consignment was damaged by the rain water and all the packed materials reached the destination in a wet condition, Since the consignment was not of any use for the building purposes, the consignee did not accept the same. Thereafter plaintiff-respondent No. 2 raised a claim with defendant-respondent No. 1 by letter dated 1.7.1988 stating that the consignment reached the destination in a damaged condition for which the defendant-respondent No. 1 was responsible and by another letter dated 25.7.1988 the plaintiff-respondent No. 2 called upon the defendant- respondent No. 1 to issue a damage certificate and the defendant-respondent No. 1 issued a damaged certificate dated 18.7.1988 confirming the damage of consignment during transportation. It is further alleged that since the consignment was insured with the plaintiff No. 1-appellant and after proper inspection and survey by the surveyor of defendant-respondent No. 1 it was found that the goods were not useful and, therefore, the plaintiff-respondent No. 2 made a claim of Rs. 2,77,044/- being the total amount of loss and damages caused due to negligence of the defendant-respondent No. 1 and its employees and requested him to settle the matter but the defendant-respondent No. 1 always evaded to do so.

3. Defendant-respondent No. 1 appeared in the suit and filed written statement and asserted that consignment of goods was transported at the owner''s risk and there was no negligence on the part of the defendant-respondent No. 1 or his employees in transportation of consignment of goods. The goods were carried out from Tati Silway to Calcutta and on the same day there was torrential rain and the goods were not properly packed and the plaintiff-respondent No. 2 did not take care to cover the goods to protect the goods from being damaged. Ultimately the plaintiff No. 1-appellant had to make payment to the plaintiff-respondent No. 2.

4. Written statement has been filed on behalf of the defendant-respondent No. 1 and he has taken a plea that the consignment of goods was transported by him at the owner''s risk and there was no negligence on his part or on the part of his employees in transportation of consignment of goods. It has been asserted that there has been no negligence on his part and there was no proper packing and also the materials were not properly packed.

5. On the pleadings of the parties, the learned Court below framed the following issues for their determination in the suit:

(i) Is the suit as framed maintainable?

(ii) Has the plaintiff a valid cause of action for the suit?

(iii) Is the suit barred by the law of limitation?

(iv) Whether the alleged consignment of goods was entrusted to the defendant to be transported to Calcutta from Tatisilve on the owner''s risk?

(v) Whether the consignment of goods was damaged due to negligence or carelessness of the defendant or its employees entitling the plaintiffs to claim compensation from the defendant?

(vi) whether damage was caused to the consignment of goods due to heavy rain beyond the control of the defendant?

(vii) Whether the plaintiffs are entitled to get a decree against the defendant as claimed for in this suit?

(viii) To what other relief or reliefs, if any, the plaintiffs are entitled for?

6. Issue Nos. 4, 5 and 6 were decided against the plaintiffs and issue Nos. 1, 2, 3 and 7 were also decided against the plaintiff.

7. Appellant was plaintiff in the learned Court below and plaintiff has filed the suit for realization of Rs. 3,60,000/-and odd on the ground that due to negligence on the part of the defendant-respondent No. 1 the materials were damaged and became unfit for use, as a result of which, since goods were insured with the appellant the appellant had to pay the amount to the plaintiff-respondent No. 2. On the other hand, a plea has been taken on behalf of the defendant-respondent No. 1 that defendant-respondent No. 1 is not liable for the damages caused to the plaintiff No. 1appellant and the learned Court below after hearing the parties and recording their evidence oral and documentary, came to a finding that defendant-respondent No. 1 is not responsible for the loss sustained by the plaintiff No. 1-appellant and, therefore, refused to pass an order in favour of the plaintiff No. 1-appellant.

8. Assailing the judgment, learned counsel for the appellant submitted that the learned Court below was not justified in dismissing the suit as the plaintiff-appellant was entitled to the claim advanced on behalf of the claimant. It is true that goods were insured with the appellant and in pursuance of that insurance, the plaintiff-appellant paid the amount to the plaintiff No. 2-respondent No. 2 as the goods were insured, but the liability of the carrier was to reach consignment in proper condition but the plea is that it was not properly packed is not available to the carrier, the defendant-respondent No. 1. It was also submitted that documentary evidence filed on behalf of the appellant was not taken into consideration and ignoring those documents, issue has been decided. Learned counsel further pointed out that Ext-1 which is consignment note arid Ext-5 which is damage certificate issued by the transporter confirming damage of the consignment during transit were not properly considered which caused miscarriage

of justice. Learned counsel further submitted that in any view of the matter, the defendant-respondent No. 1 is liable for the damage caused to the consignment. In this connection, he placed reliance on number of case laws. The first case law cited is AIR 1981 Bombay 299 wherein it has been held that loss of goods caused by neglect of defendant common carrier, defendant is liable notwithstanding anything contained in terms and conditions in consignment note. Learned counsel further submitted that plaintiff-appellant is free from burden of proving short delivery or non-delivery or damage caused In consequence thereof were owing to any neglect or criminal act on the part of the defendant. All that the plaintiff has to prove in a case is short delivery or non-delivery. The presumption of negligence on the part of the defendant being rebuttable presumption, it is for the common carrier-defendant to rebut such a presumption and if that is not done satisfactorily, the suit has to be decreed. Para-9 of the judgment is quoted herein-below:

"Once these facts are admitted, certain consequences follow and they may briefly be stated here. One of the terms in the consignment note (Ex. 49) was that the goods were transported subject to the terms and conditions mentioned on the overleaf and therefore a vain attempt was made both in the trial Court and in this Court that the defendants were not liable as carriers for the payment of compensation for the short delivery of goods. The trial Court has rightly come to the conclusion that under the mandatory provisions of Section 8 of the Carriers (Act III) of 1965, every common carrier shall be liable to the owner for loss or defame to any property caused by the negligence or fraud of defendants or their agents. Notwithstanding anything contained in the terms and conditions in Ex. 49. The lower Court was also right in holding that such condition would not exonerated defendants from liability for short delivery of goods and further finding of the trial Court that admission given by Shri Gole, the plaintiffs witness that the suit consignment to defendants for being transported from Calcutta to Kirloskarwadi was subject to the terms and conditions printed overleaf of the consignment note would also not assist the defendants to escape from their liability, is also unassailable. In fact the provisions of Section 9 of the said Act are too unambiguous to be emphasized here and under these provisions the plaintiff No. 1 is absolutely free from the burden of proving that short delivery or non-delivery or damages caused in consequence thereof were owing to any negligence or criminal act on the part of the defendants. All that the plaintiffs has to prove in such a case of short delivery or non-delivery is the factum of loss by way of short delivery or non-delivery. The presumption of negligence on the part of the defendants being rebuttable presumption. It is for the common carriers defendants in this case to rebut such a presumption and if that is not done satisfactorily the suit has to be decreed. The liability of carriers is not that of a mere bailee. It has been held that such a liability is on the part of the defendants and the liability of an insurer is that of risk. Therefore, the best of the efforts on the part of the defendants will not assist them in their defence in the case if there is a short delivery or non-delivery of the consignment in question."

9. He further placed reliance upon AIR 1986 Gujarat 88 wherein it has been held that goods burnt in transit and there is no such contract u/s 6 of the Carriers Act that any damage incurred in transit on account of goods carrier, the carrier is liable. Here in the instant case, consignment was packed and loaded in the truck and torrential rain somehow or the other caused loss to such an extent that articles became useless and, therefore, in the facts and circumstances, carrier is liable because it was an act of negligence on the part of respondent No. 1, consignment could not have been properly carried. Learned counsel further placed reliance upon M.G. Brothers Lorry Service Vs. Prasad Textiles, , wherein it has been held that liability of the carrier can be limited by an agreement. But in the instant case, there appears to be no such terms. Reliance was further placed upon AIR 1989 NOC 126 (Mad), wherein it has been held that terms in consignment note exonerated carrier from liability from negligence on his part or on the part of his servant, still carrier will be liable because terms is invalid since it is opposed to the provisions of Section-8.

10. On the other hand, learned counsel appearing for the respondents defendant submitted that goods were sent at owners risk at the time of loading of consignment of goods on the truck at Tatisilve on 25.6.1981 and the contract was entered between two and consignor that any breakage, leakage and accidental risk, the respondent-defendant transporter will not be liable and responsible and inclusion of terms in consignment note which says that consignment was sent at the owners risk from Tatisilve to Calcutta and the goods were carried by respondent-defendant transporter on the risk of the owners and, therefore, the defendant-respondent will not be liable for the loss or damage caused to the goods in transit due torrential rain. Ext.-l which i consignment note was referred to.

11. In forgoing paragraphs, it has been discussed that consignment carried by the carrier will be responsible even if there is term to the extent that carrier will not be liable as it will be opposed to Section 6 of the Carriers Act and, therefore, when the consignment of goods was loaded on the truck by transport defendant-respondent and it is submitted that when rain started taking place, then consignment was covered by torpline to protect it from water. Still, somehow or the other, inspite of best efforts made by the plaintiff No. 2-consignor, water entered into the inner part of the packing and caused damage to such an extent that goods became useless for use and consignee did not accept the goods and the appellant-plaintiff being the insurer have to pay insured amount to the consignor in view of fact that goods were insured. But since goods were insured, the defendant-respondent-transporter is not exonerated from the liability of taking goods in a safe condition and it is evident from the fact that goods were carried in such a way that when goods were not found to be worth for use, the same were found to be useless and consignee did not accept the goods, as a result of which, the appellant-plaintiff had to pay insured amount to the consignor for the loss sustained by consignor and liability in transit will be that of the defendant-respondent-transporter because all the negligence on the part of defendant-respondent-carrier, the consignor sustained loss which was

indemnified since goods were insured. But liability of the respondent-defendant-transporter is there and the suit has properly been filed on behalf of the appellant-plaintiff for realization of the amount.

12. In that view of the matter, this appeal is allowed and the judgment and decree dated 12.1.1995 and 28.1.1995 respectively, are hereby set aside.