West Bengal Essential Commodities Supply Corporation Ltd. Vs Koren Foreign Transportation Corporation and Another

Court: Calcutta High Court

Date of Decision: April 16, 2001

Acts Referred: Carriage of Goods by Sea Act, 1925 â€" Article 3, 2
Carriage of Goods by Sea Rules â€" Rule 6
Contract Act, 1872 â€" Section 230

Citation: AIR 2002 Cal 211

Hon'ble Judges: Sengupta, J

Bench: Single Bench

Judgement

Sengupta, J.
Both the plaintiffs brought the suit for recovery of a sum of Rs. 1,29,476.33 being the amount of the alleged damages suffered

by the plaintiff No. 1. Now the plaintiff No. 2 is the subrogee of the claim of the plaintiff No. 1.

2. The short facts which are admitted is that the defendant No. 1 undertook for carriage of 1,90,000 bags of cement from a port of foreign origin

namely Korea and for delivery thereof at Haldia Dock partly and partly at Calcutta Port. It is the case of short landing of 4,114 bags at Calcutta

port. This alleged shortage was detected as alleged in the plaint, before 9th August, 1980, and this has been certified by the Short Landing

Certificate No. 420/HGRH. The plaintiff No. 1 was the transferee consignee by virtue of purchase of the goods on high seas and these goods

were admittedly Insured by the plaintiff No. 2. It appears that on payment of the insured value, the right, title and claim of lost goods has been

assigned and/or subrogated by the plaintiff No. 1 in favour of the plaintiff No. 2. Thus, the plaintiff No. 2 is interested to obtain the decree as

prayed for. Joint written statement has been filed by defendants. The defendant No. 1 is a carrier, and the defendant No. 2 is an agent of the

defendant No. 1 at Calcutta. The defence is, apart from general denial, maintainability of the suit and sustainability of the claim itself on the ground

of non-service of notice under the Carriage of Goods by Sea Act. This suit was once heard by Ronojit Kumar Mitra, J. and His Lordship framed

following issues

1. Did the plaintiff serve notice on the defendants before or at the time of removal by the plaintiff of the said cargo or within three days thereafter?

2. Is the short landing certificate dated 9-8-1980 referred to in paragraph 8 of the amended plaint correct and can be relied upon?

3. Did the Vessel discharge all the cargo at the ports of Haldia and Calcutta which are the subject-matter of the suit?

3. The plaintiff No. 2 has examined only one witness in order to prove the case on behalf of the plaintiffs. The defendants have examined four

witnesses, out of them three are third party witnesses. Mr. Bose learned Advocate appearing for the defendants, submits that the plaintiff has not

been able to prove its case of short landing, rather the defendants have been able to prove by documentary evidence beyond doubt, that there

could not be any question of short landing rather the entire goods were discharged and delivered at Haldia and Calcutta Port. He has drawn my

attention to Exhibit Nos. 2 and 3 particularly and also other exhibits namely Exhibit Nos. 1 and 4 which show that a part of the cargo was

discharged at Haldia point by port authority themselves and, discharge of rest of the goods was accomplished by the stevedore under usual

practice at Calcutta point. The stevedoring agents was appointed by the plaintiff No. 1. It will appear from the documents themselves that there is

no scope for short landing.

4. He further contends that there is no document to show that on 9th August, 1980 any certificate of short landing was issued or could be issued

so, as it was absurd such certificate could be issued on 9th August, 1980 when admittedly the cargos were discharged finally on 10th August,

1980. The Exhibit-C, purported to be short landing certificate is of dated 19th September, 1983 and is of no value. Therefore, there is a

discrepancy between the pleadings and evidence. Moreover, Exhibit-C, particularly on question of short landing as regard correctness of the

contents thereof has not been proved by the appropriate authority. The only witness of the plaintiff has been able to prove the payment of

compensation, but not the case of short delivery. He has also drawn my attention to the relevant questions and answers of the sole witness of the

plaintiffs i.e., question Nos. 54, 56, 57 and 58 and contends he has not been able to explain existence of short landing certificate of 9th August,

1983 as alleged in the plaint. He could not say about the correctness of the certificate being Exhibit-C, Mr. Bose further contends that even the

quantification of alleged damage could not be proved. Therefore, the suit is bound to be dismissed. In support of the proposition, Mr. Bose has

relied on a decision reported in Vinod Kumar Arora Vs. Surjit Kaur, .

5. Mr. Bose contends further that this suit against both the defendants simultaneously is not. maintainable. In this context he has relied on two

decisions of this Court reported in AIR 1951 Cal 859 (sic) and Steel Authority of India Ltd. Vs. Transworld Marine Ltd. and Another, .

6. It is appropriate to record that admittedly the plaintiff No. 1 who was the original plaintiff had gone out of the picture presumably, on receipt of

the amount of the insured value on account of alleged loss of goods. So the plaintiff No. 1 has not come forward, obviously it is not interested to

prove the case of short delivery of the goods.

7. Mr. H. Dutta, learned Senior Advocate appearing on behalf of the plaintiff No. 2, Insurance Company, contends that the plaintiff No. 2 being

the insurer having satisfied with claim for loss of the goods has paid off the entire insured value. Upon payment, the plaintiff No. 1 during pendency

of the suit by letter of subrogation has assigned and transferred all its claims arising out of the short delivery in favour of the plaintiff No. 2. The

letter of subrogation has been exhibited as Exhibit-F. This fact of subrogation has been brought in the plaint by amendment. No additional written

statement has been filed controverting the claim and contention of the plaintiff No. 2. It has been able to prove, according to Mr. Dutt, by the third

party"s document that there was a short landing, in other words short delivery of the goods. He has drawn my attention to Exhibits C and D and

also evidence of one Lalit Mohan Dutta being P.W. 1. In his answers to question Nos. 84 to 122 he contends that Exhibits C and G have been

issued by the port authority. He contends that the goods were always identified in terms of the number of bags, not in terms of the weight. It is the

initial onus of the carrier to prove that all the goods were delivered and there was no shortage at all. The documents being Exhibits 1 and 4

submitted by the defendant are of private character and correctness of contents thereof has not been proved, so the same cannot be accepted by

the Court. Moreover, the goods are identified in those documents in terms of the weight, not in terms of the bags. The witness of the defendant

admitted that goods were not weighed at the time of discharge. According to Mr. Dutt, Exhibits C and G are the clinching material on this matter.

White explaining, Mr. Dutt fairly admits that there is question in paragraph 8 as to the date of the short landing certificate. He has drawn my

attention, to Exhibit C showing the number of the certificate which tallies with number mentioned in paragraph 8, unfortunately the dates are

differently mentioned. He contends that this is a mere mistake and I should look into the substance of the matter. Here it is a case of short landing

in substance and the Court is to see whether by any documentary evidence this has been proved or not. Exhibits C, D and G are the documents to

prove the case of short landing. He has relied on the same decision of the Supreme Court that has also been relied on by Mr. Bose. He has drawn

my attention to a particular paragraph of the aforesaid judgment of the Supreme Court and urges that I should not see the technicality rather I

should look into substance, so I should pass a decree as prayed for.

8. Having heard the learned counsel for the parties and having considered the issues, facts and law involved in the suit, it appears to me one of the

points of law raised by Mr. Supriya Bose appearing for the defendants at the argument stage is not in issue framed by the Court, none-the-less as

both the parties went on for trial on this point of law also additional issues can be framed. There cannot be dispute that this is permissible under

law. Such additional issues are as follows :--

(i) Is the suit maintainable as against both the defendants alternatively?

(ii) Is the defendant No. 2 liable to be struck out from the party defendant?

9. Before I decide this new issue, I should take up the issue No. 1 as to maintainability of the suit on the ground of alleged non-service of notice on

the defendants under Indian Carriage of Goods by Sea Act, 1925. No notice under Rule 6 contained in Article III of the Indian Carriage of Goods

by Sea Act, 1925 of loss or damage has been served upon the defendants. Therefore, the suit must fail.

10. Mr. Hiranmoy Dutta, learned senior Counsel contends and says that the aforesaid Act has no manner of application and I accept submission of

Mr. Dutta and it is clear from Section 2 of the Indian Carriage of Goods by Sea Act, 1925. Section 2 of the same is quoted below :--

2. Application of Rules.-- Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as ""the Rules"") shall have

effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in (India) to any other port whether in

or outside (India).

11. In this case, the goods were loaded and carried from the port outside India and discharged at a port within India. The afore said Act does not

cover any goods which has been loaded and carried by sea from a port outside India and discharged at a port in India. The intention of the

Legislature of the aforesaid Act is very clear. The carrier of the goods by sea is given protection for carriage of goods from India in the manner as

fixing a time-limit within which claim is to be notified. In case of failure to notify, the carrier will be discharged from liability.

12. Therefore, the preliminary point raised by Mr. Bose fails and this issue is decided against his client.

13. The next question remains as to maintainability of the suit against both the defendants. It has been pleaded in paragraph 3 in the plaint that the

defendant No. 2 gives out by conduct an implication as liable and responsible for the acts of the defendant No. 1 and is accordingly made a party

to the suit. In order to see the maintainability, the Court is to look into the averment of the plaint only as to how the suit has been framed.

Defendant No. 1 has been described as the Foreign Corporation and has been carrying on Us business through Indian agent namely, the defendant

No. 2. Therefore, it is clear from the aforesaid statement and averment of the plaint that defendant No. 2 has been really described as an Indian

agent of the foreign principal. u/s 230 of the Contract Act normally the agent is not liable for civil action nor the agent is entitled to enforce a claim

on behalf of the principal unless there is express agreement to the contrary. However, there is an exception to the aforesaid averment and the agent

can sue in its own name and be sued on behalf of the foreign principal and/or undisclosed principal.

14. In this suit the foreign principal has been made a defendant. Therefore, when the plaintiff has chosen to sue the foreign principal, the agent is

automatically relieved of its liability so far as it relates to dealings and transaction between the plaintiff and the principal. It was open for the plaintiff

to sue the defendant No. 2 alone leaving out the defendant No. 1. Both the principal and the defendant, in these circumstances, cannot be sued.

There must be an election by the plaintiff of the party against whom the plaintiff wants to recover its claim. Ordinarily, against the principal the

action lies. In support of my aforesaid view, Mr. Bose has supplied an authority to AIR 1951 Cal 859 (sic). In paragraph 8 of the aforesaid

Judgment, Justice P.B. Mukherjee (as His Lordship then was) held amongst others that on a contract both principal and agent cannot be sued in

the same suit. Similar view Was taken in another decision of this Court reported in Steel Authority of India Ltd. Vs. Transworld Marine Ltd. and

Another, cited by Mr. Bose. In paragraph 9 thereof, it is held that the plaintiff cannot maintain a suit against foreign principal as well as the Indian

agent. In the case reported, a foreign carrier as well as the Indian agent were sued for recovery of damages for the loss of the goods. On a

demurrer action Justice Dipak Kumar Sen (as His Lordship then was) upheld the contention of the defendant No. 2 by striking it out from the

party defendant holding that the suit was not maintainable as against it, since foreign principal has been made a party. The decision cited by Union

of India (UOI) and Another Vs. Chinoy Chablani and Co., is not applicable in this case and the same is distinguishable on the fact. Therefore. I

hold that the suit cannot be maintained as against the defendant No. 2 and it is dismissed as against it.

15. Therefore, the suit has to be decided on merit as against the defendant No. 1 alone. Joint written statement has been filed. So the evidence has

also been adduced in support of the defence jointly. The original plaintiff has gone out from the suit as it has received compensation for the alleged

loss and damages. The plaintiff No. 2 has come into picture to maintain the suit of subrogation and/or assignment of actionable right, by the plaintiff

No. 1. In the merit the defence plea is that all the goods have been discharged. There cannot be any short landing. It appears that there is no

dispute as to quantity of the goods being discharged at Haldia Port but the disputes had arisen as to the quantity of the goods being discharged at

Calcutta.

16. In order to prove the case of the plaintiff, the plaintiff has produced a Short Landing Certificate and also document of recording of short

landing being Exhibits C and G. Exhibit G being the xerox copy of the outturn report of the vessel in question. This document was actually

disclosed by the defendants and it was marked as Exhibit. It appears from Exhibit G that there is clear recording of 4,114 bags of cement being

short landed. I do not find from the cross-examination of the plaintiffs only witness any suggestion having been put questioning correctness of the

contents of Exhibit G. That apart the plaintiff has proved by producing a duplicate document recording short landing of the aforesaid number of

bags of cement at Calcutta (being Exhibit C). Both the documents have been issued by the statutory authorities. The correctness of the contents of

these documents is presumed under Evidence Act, unless rebutted by the defendants. Moreover, no challenge has been thrown as to correctness

and genuineness of the aforesaid documents. The Central Inland Water Transport Corporation Limited by a letter dated 3rd October, 1980 duly

intimated to the defendant No. 2 of the aforesaid short landing enclosing the short landing certificate being Exhibit G. There is no dispute as to the

receipt of the aforesaid letter as the xerox copy of the short landing certificate was disclosed by the defendant No. 2 itself. I do not find any reply

to the aforesaid letter dated 3rd October, 1980 being Exhibit D. In fact Exhibit D was shown to the witness of the defendant being D.W.L.M.

Dutta and series of questions being Nos. 110 to 122 were put by Mr. H. M. Dutt on this subject and further as to whether any reply was given.

He could not show any document whether any reply was given to the aforesaid letter. The said Exhibits C. D and G are contemporaneous

documents. I do not find any suggestion from the defendants questioning correctness of the contents of the letter dated 3rd October, 1980 or of

Exhibit G. Under those circumstances, 1 am of the view that the plaintiffs have been able to prove that there was short landing of 4,114 bags of

cement. There is no dispute to assignment or subrogation. So the plaintiff No. 2 is obviously entitled to the claim for damages for the alleged loss of

the aforesaid bags of cement.

17. As against the aforesaid documents, the defendants have tried to prove the case that the entire goods were discharged at Calcutta. In support

of the case the defendants of course have produced the documents being Exhibits 2, 3 and of course Exhibit 1.

18. The Exhibit 2 relates to the discharge and/or unloading of the cargo at Haldla. As I have already held that case of discharge at Haldia is not the

issue. So it will not have any relevancy or bearing excepting to prove that a portion of cargo was discharged thereat.

19. Next document being Exhibit 3 purports to establish that 7,473 tons being the balance quantity of the cement remaining in vessel at Haldia was

discharged at Calcutta. It appears from the Exhibit 2 that at Haldia point an aggregate quantity of 9,500 tons was brought and a quantity of 2,027

tons was discharged at Haldia and thus a balance quantity of 7,473 tons was left on board vessel for discharge at Calcutta.

20. The Exhibit 3 was prepared pursuant to the system of discharge prevailing at Calcutta Port by stevedoring agent, viz., Chowdhury and Co.

(Pvt.) Ltd. and signed jointly by its staff, the Chief Officer of the vessel was also counter-signed by the clearing agent of the Receiver/consignee.

Admittedly this document was not signed by the Port authority and it did not have any hand in preparation of this document. M.K. Shipping and

Chartering Co. being the protecting and/or clearing agent of the Receiver was not called as a witness. None was called as witness to prove this

document sent by M. K. Shipping and Chartering Co. There was no eye-witness to prove the fact that all the goods were discharged and there

was no short landing. Therefore, I am of the view that the contents of the Exhibit 3 has not been proved at all. This document is private document

and there cannot be any presumption of correctness under law. Moreover, as I have already recorded that there was no reply to the demand for

compensation for loss of goods made by the Central Inland Water Transport Corporation Ltd. Had there been a true case of complete and full

discharge and/or unloading of the entire goods then both the defendants should have given a reply refuting the claim and contention of the aforesaid

letter being Exhibit C.

21. The Exhibit 1 does not prove that the entire goods were discharged and/or unloaded. Moreover, the short landing certificate is the conclusive

document to overlap any other records or documents. As the contents of Exhibit 1 has not been proved. I hold that defendants have not been able

to prove the case of full and complete discharge of the materials from the vessel.

22. Mr. Suprio Bose learned Counsel has also raised an objection of variation between the pleading and proof. He has drawn my attention to

paragraph 8 of the plaint wherein short landing certificate is mentioned as of dated 9th August, 1980. But in evidence the date of the short landing

certificate is different. He contends since there cannot be any short landing certificate on 9th August, 1980 as the goods continued to be discharged

on 10th August, 1980. The very foundation of the case is absolutely frivolous. So the suit must fail on the ground as above.

23. Mr. Dutt of course has replied to the aforesaid contention of Mr. Bose saying that this is an inadvertent mistake and the Court should ignore

the same and will look into the substance of the matter. Factually Short Landing Certificate was issued on 18th September, 1980 and it will appear

from Exhibit G as well as Exhibit C, and the date has been mentioned in the plaint mistakenly as 9th August, 1980, as the number of the Certificate

is the same both in pleading as well as in the document. He also contends that relying on the Supreme Court judgment reported in Ram Sarup

Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, as cited by Mr. Bose the Court should accept the case in substance and ignore

all these technicalities.

24. I accept the argument of Mr. Dutt that the date mentioned in paragraph 8 of the plaint, of the short landing certificate is a sheer mistake and it

will appear from the Exhibits G and C as the number of the certificate mentioned in the document tallies with the pleading. I do not find in

paragraph 9 of the written statement where the aforesaid averment of paragraph 8 of the plaint has been dealt with, such point has been taken. This

is sheer technicality and the Supreme Court in the judgment reported in Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and

Others, has held amongst other as follows :--

It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no

party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the

case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it

is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings, however,

should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes pleadings

are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the

Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis in form, instead the

substance of the pleadings should be considered. Whenever the question about the lack of pleading is raised the enquiry should not be so much

about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to

trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing

evidence in that event it would not be open to a party to raise the question of substance of pleadings in appeal.

25. In this case actually there is pleading. Only discrepancy is regarding date of the short landing certificate between the pleading and the proof.

Therefore, this case stands on a better footing than that of the case mentioned in the aforesaid Supreme Court judgment. So, without any hesitation

I overrule the objection of Mr. Bose as being wholly irrelevant if not frivolous one as no specific case being made out in the written statement in this

direction.

26. Therefore, the suit succeeds as against the defendant No. 1. Accordingly, I answer the issue No. 2 in the affirmative, however, the date of

Short Landing Certificate should be read as 19th September, 1980 in place of 9th August, 1980. I answer the issue No. 3 in the negative as

against the defendants.

27. Therefore, there will be a decree as against the defendant No. 1 in terms of prayer (b). There will be a decree in terms of prayer (c), the rate

of interest at 12% per annum and the plaintiff is entitled to costs.

28. Mr. Bose, learned counsel, prays for stay of operation of the decree and the stay is granted for a period of fortnight from date.