

(2011) 11 DEL CK 0387

Delhi High Court

Case No: Regular First Appeal No. 771 of 2002

Road Transport
Corporation Pvt. Ltd.

APPELLANT

Vs

National Insurance Co.
Ltd. and Another

RESPONDENT

Date of Decision: Nov. 29, 2011

Acts Referred:

Carriers Act, 1865 â€” Section 10, 3#Civil Procedure Code, 1908 (CPC) â€” Order 8 Rule 5,
96#Limitation Act, 1963 â€” Article 10, 113

Citation: (2011) 11 DEL CK 0387

Hon'ble Judges: Valmiki J Mehta, J

Bench: Single Bench

Advocate: Anil K. Kher, with Mr. Ankur Bansal, for the Appellant; L.K. Tyagi, Advocate for R-1,
for the Respondent

Final Decision: Dismissed

Judgement

Valmiki J Mehta, J.

The challenge by means of this Regular First Appeal (RFA) filed u/s 96 of the Code of
Civil Procedure, 1908 (CPC)

is to the impugned judgment of the trial Court dated 1.10.2002. By the impugned
judgment, the trial Court decreed the suit filed by the

plaintiff/insurance company against the defendant No. 1/transporter on account of
loss/damage caused to the goods which were transported by the

appellant/defendant No. 1 for the owner/respondent No. 2/defendant No. 2. Essentially,
the insurance company subrogated itself to the rights of

the owner/respondent No. 2/defendant No. 2 after paying the amount of loss to respondent No. 2/defendant No. 2 under the insurance policy and

thus filed the subject suit for recovery which has been decreed.

2. The facts of the case are that the appellant/defendant No. 1 entered into a contract for transportation of the goods/milk products of the

respondent No. 2/defendant No. 2 vide goods receipt/lorry receipt Nos. 9556 and 9552 dated 22.7.1986. The goods were to be transported

from Ghaziabad, U.P. to Bangalore (Karnataka). The truck which was carrying the milk food products of the transporter/appellant met with an

accident en route at Jhalra Patan in Rajasthan. On account of damage to the goods which were being transported, the owner/respondent No. 2

gave a notice dated 17.12.1986 making a claim upon the appellant/transporter for Rs.2,92,572/-. This letter was acknowledged by the

appellant/transporter on 17.12.1986 itself, however, it was defended that the accident was beyond the control of the driver and therefore the claim

may be raised on the underwriters/insurance company, as the appellant was said not to be liable for the loss. The respondent No. 1/plaintiff

appointed its surveyor who gave the survey report dated 5.9.1986 recommending payment for the loss caused to the owner/respondent No. 2.

The plaintiff/respondent No. 1/insurance company paid the amount to the owner/respondent No. 2 and obtained the letter of subrogation and

power of attorney from the respondent No. 2 and then filed the subject suit for recovery.

3. The appellant/defendant No. 1 took up various defences to the suit. The first defence was that the suit was barred u/s 3 of the Carriers Act,

1865. Secondly, it was pleaded that no notice was served u/s 10 of the Carriers Act, 1865. It was also pleaded that the accident was a result of

an act of God and, therefore, the appellant/transporter was not liable. It was denied for want of knowledge that respondent No. 2 had received

any amount from respondent No. 1/plaintiff towards full and final settlement of the claim. Authority to institute the suit was also questioned. After

the pleadings were completed, the trial Court framed the following issues:-

1. Whether the plaint has been filed and instituted by duly authorized person? OPP

2. Whether the plaintiff is entitled to recover the amount claimed in the suit from the defendant No. 1? OPP

3. Whether the plaintiff is entitled to recover the interest from defendant No. 1? If so, at what rate, on what amount and for what period? OPP

4. Whether the claim of the plaintiff is barred by the provisions of the Carriers Act against defendant No. 1? OPD

5. Whether the defendant No. 2 had suffered the loss for the negligence and carelessness of defendant No. 1? OPD

6. Whether the accident took place because of the act of the God and natural calamity and beyond the control of the defendant? OPD 7. Whether

this Court has no territorial jurisdiction to decide this suit? OPD

8. Relief

4. Learned counsel for the appellant argued the following points before this Court:-

1. The suit was barred by Section 10 of the Carriers Act, 1865 as it has not been proved that any notice was served by respondent No. 2/owner

on the appellant/defendant No. 1/transporter.

2. It was also argued that the suit was liable to be dismissed as the owner/respondent No. 2 had failed to comply with the provision of Section 3 of

the Carriers Act, 1865.

3. The next point argued was that the suit was barred by limitation.

4. The final point which had been argued was that the suit was not properly instituted on behalf of respondent No. 1/plaintiff.

5. So far as the argument that no notice was served u/s 10 of the Carriers Act, I find that though in the pleadings the appellant disputed having

received any notice, however, when the witness on behalf of respondent No. 1-Sh. Bodh Raj Punj, PW1, deposed of having sent the notice dated

17.12.86, the appellant did not cross-examine the witness on this part of his deposition, and therefore, the objection/defence with respect to not

giving of the notice u/s 10 of Carriers Act, 1865 was apparently given up. It is for this reason that, no other evidence was led on behalf of

respondent No. 1/plaintiff to show the service of this notice. In any case, there is no doubt that this notice dated 17.12.86 was infact served upon

the appellant/transporter/defendant No. 1 inasmuch as the appellant itself on that very day i.e. 17.12.86 replied to the notice of damages dated

17.12.86 given by respondent No. 2/owner. This reply/certificate dated 17.12.86 has been filed and proved before the trial Court and has been

given an exhibit mark as Ex.PW1/10. I, therefore, hold that the notice u/s 10 of the Carriers Act, 1865 was duly given by respondent No. 2/owner

to the appellant/transporter/defendant No. 1.

6. The next argument urged on behalf of the appellant of the suit being barred u/s 3 of the Carriers Act 1865, is an argument again without any

substance inasmuch as Section 3 of the Carriers Act, 1865 applies only to the goods which are mentioned in the Schedule of this Act. A reference

to the Schedule shows that they pertain to very precious and costly goods like jewellery, gold, Government bonds, etc. This Section, therefore, will

not apply with respect to the goods in question which were transported namely, milk food products. I, therefore, reject this argument raised on

behalf of the appellant.

7. So far as the issue of the suit being time barred, I find that no such plea was taken up in the written statement and nor was any issue framed. I,

therefore, disallow the appellant/defendant No. 1 to raise this issue for the first time in this appeal. I may, however, observe that the suit in this case

may not be governed by Article 10 of the Limitation Act, 1963 because such a suit is basically a suit by an owner against a carrier, whereas the

present suit is a suit by an insurance company against the owner, and with respect to such a suit the cause of action will arise only when an

insurance company makes payment of the value of the goods to the insured under the policy. It is not disputed that the suit in the present case has

been filed within three years as per Article 113 of the Limitation Act, 1963 from the date when the insurance company/respondent No. 1/plaintiff

paid the amount to the respondent No. 2/defendant No. 2/owner.

8. The final argument that the suit has not been validly instituted, is once again an argument which I would reject inasmuch as it is now settled law

that once a company, such as a banking company, or even an insurance company has pursued/contested the suit to the hilt, then the suit cannot be

thrown out on technicalities. In such circumstances, the Supreme Court in the case of United Bank of India v. Sh. Naresh Kumar & Ors., AIR

1997 SCC 3 has held that it must be held that the suit has been validly instituted in terms of Order 29 CPC.

Another aspect that was noted by the trial Court was that in the relevant portion of the written statement, in reply to the portion of the plaint which

deals with filing of the suit, there is only a general or simple denial and therefore the contents of the plaint under Order 8 Rule 5 CPC are deemed

to be admitted. I, therefore, hold that the suit was validly instituted for and on behalf of respondent No. 1/plaintiff.

9. A civil case is decided on the balance of probabilities. The balance of probabilities shows that loss was caused. The appellant/defendant No. 1

was a carrier under the Carriers Act, 1865 who was served with the requisite notice dated 17.12.86. The insurance company/defendant No.

1/plaintiff paid the amount to respondent No. 2/owner under the insurance policy and on obtaining the letter of subrogation and a power of

attorney filed the subject suit for recovery. The suit of the respondent No. 1/plaintiff has thus been rightly decreed by the court below.

10. No other point was urged or argued.

11. In view of the above, I do not find any merit in the appeal and the same is dismissed, leaving the parties to bear their own costs. Trial Court

record be sent back.