**ANDHRA PRADESH HIGH COURT**

Milap Carriers, Transport Contrs

Vs.

National Insurance Company Ltd

C.C.C. Appeal No.295 of 1982

(D.J. Jagannadha Raju, J.)

26.08.1993

**JUDGMENT**

**D.J. Jagannadha Raju, J.**

1. This is an appeal by the defendant against the judgment and decree in O.S. No. 401 of 1981 on the file of the V Additional Judge, City Civil Court, Hyderabad. The suit filed by the first plaintiff, National Insurance Company Ltd., was decreed as prayed for. Aggrieved by the same, the defendant, the Transport Company, which acted as a common carrier, has come forward with this appeal.

2. The second plaintiff booked a consignment of biscuit tins to M/s Roy Brothers at Burdwan, West Bengal. The defendant, a common carrier, undertook to transport the consignment. The defendant issued Ex.A.3 lorry receipt on 25-9-1978 and sent the goods by Lorry B.H.N. 6889. The lorry receipt is signed both by the consignor as well as the representative of the defendant. The lorry receipt indicates that the goods were being carried at owner's risk and there was also a rubber stamp to indicate 'not responsible for leakage and breakage'. The consignment die not reach the destination. It was not delivered to M/s Roy Brothers at Purdwan. On 27-10 1978, the defendant issued non-delivery certificate stating that the whole consignment has been looted near Kolaghat, West Bengal. A can be seen from Ex. A.2 delivery memo, 125 tins of biscuits, each tin weighing 4.5 K.Gs and 50 tins sent free were carried as the consignment. The value of the consignment was indicated as Rs. 43087-50. Lorry freight was indicated out of it as Rs. 1,500/-. Ex.A.3 indicates that out of the total freight Rs. 2,750/-, Rs. 1,250/- was already paid when the consignment was booked. The lorry receipt had certain terms and conditions printed on the reverse of it. It is the claim of the plaintiffs that the goods were insured under Open Policy No. 690/ 4400638 and declaration was accordingly issued under Ex.A.4. The defendant issued non-delivery certificate on 27-10-1978. On the basis of it, the second plaintiff made a claim and the first plaintiff, the Insurance Company paid the amount of Rs. 41,587.50 towards the value of the lost consignment in full and final settlement of the claim. The first plaintiff obtained a letter of subrogation and special power of attorney from plaintiff No. 2 to institute legal proceedings and realise the amount from the defendant. The second plaintiff issued Ex.A.6 notice on 27-10-1978. The defendant received it under Ex.A.7 and gave Ex.A.8 reply on 30-10-1978. The defendant

pleaded that the consignment was looted by flood affected people and the transport company will not be able to pay any damages as claimed in Ex.A.6. By reason of the letter of subrogation and special power of attorney Ex.A.11, the first plaintiff issued Ex. A. 12 notice to the defendant. The defendant received it under Ex. A. 13, but did not give a reply. Hence the suit.

3. The defendant resisted the suit on various grounds. It is claimed that the defendant is not the carrier and that it is not a transport company and that the defendant is only a broker who arranges vehicles for the parties and collects commission and brokerage. It is claimed that the defendant never took delivery of the consignment and that he did not load the consignment into the lorry and that the factum of the goods being insured is also false. It is claimed that the consignment did not reach the destination, because there were heavy rains and floods in Bihar and West Bengal at the relevant time and that the flood victims, who were without any food, looted the entire consignment and that this fact has been reported in the newspapers and a report was also given to the police station regarding the looting of the consignment. The defendant even denied issuing the non-delivery certificate. It is claimed that there is no negligence or want of proper care in transporting the consignment. It is further claimed that the defendant is not liable for the claim of the plaintiff in view of the terms and conditions printed on the reverse of the lorry receipt which are binding on the consignor-second plaintiff and as the consignment is carried entirely at owner's risk. Under the special terms and conditions, the defendant is not at all liable for any loss or damage to the goods. It is claimed that the plaintiff did not pay the amount of Rs. 41,587-50 towards the full and final settlement of the claim of the second plaintiff and that the suit claim made by the first plaintiff is a bogus and untenable "claim. It is further claimed that plaintiff No. 2 always represented that the documents have been fabricated to make the claim and receive the amount from the Insurance Company. Under any circumstances, the defendant has no liability in this suit. It is asserted that the defendant is only a broker.

4. The trial Court framed seven issues as indicated below :

(1) Whether the suit amount is correct ?
(2) Whether the defendant is not liable to pay the suit amount ?
(3) Whether the consignment was carried at owner's risk ?
(4) Whether the suit is barred by time ?
(5) Whether the defendant did not act as carriers in respect of the suit consignment ?
(6) Whether the first plaintiff is subrogated to the rights of the 2nd plaintiff?
(7) To what relief?

5. The learned judge in paragraph 7 of the judgment remarked as follows :

> "Issues 3 and 4 are not seriously pressed before me and as such, the same do not arise for consideration herein."

However much I may search the record, I do not find any material on the basis of which the trial Court made this remark found in paragraph 7 of its judgment. It should be remembered that Issue No. 3 relates to the owner's risk and Issue No. 4 relates to limitation for the filing of the suit. It passed my comprehension as to how these two issues are not material issues. Dealing with Issue

Nos. 1, 2, 5 and 6 in one bunch, the trial Court recorded the following findings.

6. The suit amount is correct. The defendant is liable to pay the suit amount. The defendant acted as a carrier of the suit consignment and that plaintiff No. 1 is subrogated to the rights of the second plaintiff, the consignor. Accordingly, he decreed the suit with costs.

7. In this appeal Sri K. L. N. Rao, appearing for the defendant-appellant, contends that in the judgment, none of the documents filed by the defendant were referred to and the arguments advanced for the defendant are neither referred to nor discussed. Though the defendant completely denied the various allegations in the plaint, the plaintiffs have not established their case. No worthwhile evidence has been adduced to establish the suit claim. He contends that the defendant is not a carrier and it is only a broker and commission agent. Even if the defendant is found to be a carrier, still he is not liable for the loss of the consignment as the goods were looted. The special terms and conditions clearly come to the rescue of the defendant in this case, because the consignor and the representative of the defendant signed in the lorry receipt, and the special terms and conditions exclude the liability of the defendant. He places reliance upon the provisions of the Carriers Act, 1865 and a few decisions. He contends that there need be no special proof regarding the special conditions of the contract entered into with the common carrier.

8. On behalf of the contesting respondent-first plaintiff, Sri S. Hanumaiah contends that the defendant is a common carrier and it is not a broker. There is ample evidence to establish this. The defendant cannot claim that it has no liability simply because the goods were looted. It must establish that there was no negligence on its part and that it took precautions to safeguard the goods. Mr. Hanumaiah points out that under Section 9 of the Carriers Act, plaintiff need not prove negligence on the part of the carrier. It is for the carrier to prove that there was no negligence on his part. Only under two circumstances, namely, where the consignment is lost by an act of God or due to King's enemies, the defendant is absolved of its liability. Where the consignment is lost due to intervention of human agencies, namely, looting, the liability of the defendant is not absolved. Here as the goods were insured under an open policy, declarations are given every time a consignment is sent. Mr. Hanumaiah strongly contends that it is open to the defendant to avoid liability by pleading a special contract. But unfortunately in this case no special contract was pleaded. No issue was framed about it and no evidence was adduced to prove the existence of a special contract. Mr. Hanumaiah places strong reliance upon the judgment of Justice P. Subramonian Poti in *R. R. N. Ramalinga v. V. Narayana*[1], Though the goods are being carried at owner's risk, the liability of the carrier is that of an insurer and he is certainly liable for the loss of the consignment. In a case of this nature, the carrier is absolved of his liability only when he takes what is called, the Carrier's Legal Liability Policy. The mere fact that the goods carried are insured goods does not absolve the carrier of any liability. The carrier's liability to the consigner is always there. He places reliance upon *Indian Drugs and Pharmaceuticals v. Savani Transport*[2], and *Madura Co. Ltd., Alleppy v. Xavier*[3], in support of his arguments.

[1] AIR 1971 Ker197

[2] AIR 1979 And Pra 41

[3] AIR 1931 Mad 115

9. A reading of the record reveals that the suit was conducted very badly in the trial Court and the judgment is written in a most slipshod manner. I find from the judgment that there are several statements made by the Judge which are not borne out by record. For instance in paragraph 8 of

the judgment, the Judge wrote as follows :

> "Ex.A.8 letter shows that the defendant's Head Office at Calcutta asked the second plaintiff to reconsider the matter and receive damages at a lesser rate".

Similarly at the end of paragraph 8 of the judgment, the same statement was repeated. If we see Ex.A.8, we find there is no such statement and the defendant only stated that its vehicle has also been damaged and the defendant suffered heavy loss and that the transport company will not be able to pay the damages as claimed in the consignor's letter. The last sentence in the letter is to the following effect:

> "Please reconsider the issue and let us know"

No where did the defendant say in Ex.A.8 that the plaintiff should accept lesser damages. Through out the judgment, there is no reference to any of the provisions of the Carriers Act under which the matter had to be decided. While referring to *R.R.N. Ramalinga v. V. Narayana, (AIR 1971 Kerala 197)* (supra), simply passages from the judgment were extracted, but no provision of the Act is referred to. It is interesting to see that the trial Court did not frame any issue regarding the special terms of the contract and special contract between the parties though a special plea was raised to that effect in the written statement. In paragraph 4 of the written statement the plea taken is as follows:

> "Even otherwise, it is submitted that on the terms and conditions printed on the reverse of the lorry receipt, which are binding on the plaintiffs, the consignment is carried entirely at owner's risk."

In paragraph 5 of the written statement, the plea is taken to the following effect:

> "Even otherwise, it is submitted that under the special terms, this defendant is not liable for any loss or damage to the goods."

On the basis that no separate issue has been raised regarding the special contract, the respondent's counsel urged in this Court that no special contract was pleaded and no issue was raised and no evidence was adduced on that aspect. Obviously the trial Court did not bestow much attention to the pleas raised in the written statement while framing the issues. I am rather surprised to see that the defendant's advocate did not raise any special argument on the basis of the special contract. Suffice it to say that the parties as well as the Court were at fault in the conduct of the trial. The ultimate result is that the judgment is a very slipshod judgment.

10. The two questions that arise for determination in this appeal are :

> (1) On the facts and circumstances of this case, whether the defendant comes within the definition of 'common carrier' as per Act 3 of 1865?
> (2) Whether in this particular case, the defendant has no liability for the loss of the consignment on the basis of the terms of the contract and the terms of the special contract.

POINT NO. 1 :

11. A reading of the written statement indicates that at the stage of the written statement, the defendant took the attitude of denying everything including incontrovertible facts. The defendant goes to the extent of denying issue of Ex. A. 3 lorry receipt and it also goes to the extent of denying the goods being the insured goods. It further claims that the defendant was never entrusted with the goods for transport and that it did not load into the lorry B.H.N. 6889. The defendant also denied issuing the non-delivery receipt. One look at the documents clearly shows that the defendant Milap Carriers is a common carrier. Ex. A.3 issued by it clearly shows that it is Transport Contractors and Commission Agents with offices at Hyderabad and at Calcutta. It proclaims that it has daily service to various places like Cuttack, Bhuwaneswar, Calcutta, Ranchi, Patna, Guwahati, Jorhat etc. To claim that it is not a common carrier and that it did not issue Ex. A.3 lorry receipt is too much to be believed. Ex. A.5 non-delivery certificate clearly indicates that Milap Carriers is Transport Contractors and Commission Agents and it certified that the goods had been looted near Kolaghat and hence delivery could not be effected. It also mentions that the goods were sent on 25-9-1978 vide Delivery Memo No. 96 i.e., Ex.A.2. When D.W. 1 gave evidence, he claimed that he is the sole proprietor of the defendant-firm and that he simply printed letter-heads and lorry receipt books and gave them to plaintiff No. 2. Though he claims that he is only a lorry broker and commission agent and that he received only a commission of Rs. 15 / -, in the cross-examination, he admits that he has no document to show that he received commission from the driver of the vehicle and he admits that he has L.Rs. and letter-heads for the purpose of correspondence. Considering the overwhelming documentary evidence, it is well established that the defendant is a common carrier as defined under the Carriers Act. He himself admits in his evidence as, D.W. 1 that he has licence to carry on this business and that he has branches at Hyderabad and Calcutta and that he arranges transport vehicles to Bengal, Assam, Orissa and Andhra. The trial Court rightly held that Ex.A.3 and Exs. A.5 to A.8 and Ex.A. 12 positively show that the defendant is a common carrier. I hold point No. 1 against the appellant.

POINT NO. 2 :

12. A combined reading of Sections 6 and 8 of the Carriers Act indicates that the liability of a common carrier for loss or damage to any consignment can be limited by a special contract signed by the owner of such property or by some person duly authorised in that behalf. Section 8 stipulates that a common carrier is liable for loss or damage caused by neglect or fraud by himself or his agent. It also stipulates that where the damage is caused by a criminal act of his agents or servants, he would be liable. Section 9 of the Carriers Act reads as follows :

> "In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents." This Section clearly stipulates that it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to negligence or criminal act of the carrier, his servants or agents. The burden is upon the carrier to prove that the loss, damage or non-delivery was not due to negligence or criminal act of the carrier or his servants or agents. Section 10 stipulates that no suit can be instituted

against a common carrier for the loss of a consignment unless a notice is issued within six months from the time when the loss or injury came to the knowledge of the plaintiff. Bearing in mind the provisions of the Carriers Act, we have to judge the facts of the present case to find out whether the carrier has liability for the loss of the consignment.

13. Ex. A. 1 invoice clearly shows that the second plaintiff sent the invoice to the consignee M/s. Roy Brothers, Burdwan. Ex. A. 2 delivery memo clearly shows that under Delivery Memo No. 96 dated 25-9-1978, 1250 tins valued at Rs. 43087-50 were sent. Deducting the lorry freight charges of Rs. 1,500/-, the value of the goods comes to Rs. 41,585-50. Ex. A.3, the most important document, which is signed both by the consignor as well as the defendant's representative clearly shows that 1300 tins of biscuits were booked by lorry No. BHN 6889. The goods were booked at owner's risk., The terms and conditions printed on the reverse of this document are very important. Considering the fact that the consignor signed the lorry receipt, the special terms and conditions would certainly be binding on the consignor. The conditions indicate the following things.

> "All consignment are carried entirely at owner's risk.". In view of the fact that this condition is contrary to the provisions of the Carriers Act, it is not a valid condition. The second condition is that the consignor should take out their own insurance to protect themselves against any or all risks. The most important condition for purposes of our case is the third condition which reads as follows:
> "The company is not responsible for loss or damage to goods by breakage, explosions, theft, road and weather conditions, strikes, lock-outs, riots, civil or political disturbances, explosions and fire to godowns where goods are stored."

It is interesting to see that Condition No. 3 covers cases of theft and also loss or damage due to weather conditions and civil riots and political disturbances. It is the claim of the parties that due to heavy floods, when the lorries were stranded, the flood victims looted this lorry and several other lorries carrying food-stuffs. A perusal of Exs. B. 20 and B. 21 clearly shows that this lorry was looted, a report was given to the police and a charge-sheet was also filed. The goods are insured goods which were being carried at owner's risk. Obviously the insurance policy covers the owner's risk regarding the value of the consignments. It is true that according to the judicial authorities, the liability of the carrier is that of an insurer. *Indian Drugs and Pharmaceutical v. Savani Transport (AIR 1979 Andhra Pradesh 41)* (supra) lays down the law as follows in paragraph 11 at page 44:

> "Section 8 of the Carriers Act, to the extent it is relevant, provides that every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property. Section 9 says that in any suit brought against a common carrier for the loss, damage or non-delivery it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. Therefore, Section 9 relieves the plaintiff from the

> burden of showing that the loss or damage or non-delivery was owing to any negligence or criminal act of the the carrier, his servants or agents. The burden of proving the absence of the negligence is on the carrier. The reason is that the liability of the common carrier is that of an insurer. Even if there is no negligence on the part of the common carrier, he is liable to compensate the owner of the goods for the loss of the goods that occurred during the transit."

(emphasis added)

14. The most important decision that is relied upon by both the parties is the one reported in *R.R.N. Ramalinga v. V. Narayana (AIR 1971 Kerala 197)* (supra). In that decision the court had to consider the case of a consignment of 18 bags of green-gram booked by the lorry service from a point in the Madras State to be delivered at Quilon, a place in the erstwhile Travancore State to which the Carriers Act did not apply and the consignement was looted by a Jatha at a place 11/2 miles from Quilon. That is also a case where there was no special contract between the parties. Dealing with such a situation, the learned Judge in a very exhaustive and erudite judgment observed in paragraph 11 as follows:

> "A common carrier is not a mere bailee of goods entrusted to him. He is an insurer of goods. He is answerable for the loss of goods even when such loss is caused not by either negligence or want of care on his part, act of God and of King's enemies excepted. This arises because responsibility attached to the public nature of the business is carried on by him. He holds out as a person who has the expertise and the facilities to conduct the business of transport; consequently he is treated as an insurer of the goods and is answerable for its loss. This concept as to the liability of a common carrier has been applied in India uniformly."

The court pointed out in paragraph 12 as follows:

> "Section 6 of the Carriers Act, 1865, enables common carriers to enter into special contracts so as to limit or restrict their liability. But this cannot be so restricted or limited as to avoid liability to answer even when the loss is caused by negligence or criminal acts of the common carrier or its agencies. This is the purport of Section 8 of the Act. Therefore, it is open to any common carrier to keep himself out of the scope of absolute liability with regard to any particular contract of carriage by entering into special contracts with regard to the particular carriage with his customer. But no such contract would avail against gross negligence and criminal acts."

In paragraph 14, the court pointed out as follows:

> "There is no case that the defendant entered into any special contract with the plaintiff negativing liability in the event of loss being caused due to causes occasioned by events beyond his control. The only exception to such absolute liability is the event of loss

> caused by act of God or King's enemies. It is finally urged before me by learned counsel for the defendant, that the exception applies to the case before me as, according to counsel, any event beyond the control of the defendant, any circumstances not of his creation, must be taken to be an inevitable accident, and that according to him, is synonymous with what is generally understood as vis major or act of God."

After dealing with the principles of English law on this particular aspect, the court observed in paragraph 16 as follows:

> "The criminal activities of the unruly mob which robbed the goods transported in the defendant's lorry cannot certainly be an act of God so as to absolve the defendant from the rule of absolute liability as a common carrier. Hence the defendant will be answerable for the loss of the goods."

15. It is true that on the facts of that particular case, the common crier was made liable, because there is no special contract, There is no doubt about the fact that the liability of the common carrier is in the nature of an insurer. In the present case on hand, the loss has been occasioned by circumstances beyond the control of the common carrier. The common carrier never anticipated or expected the heavy floods in Bihar and Bengal nor could, he by any stretch of imagination, anticipate that the hungry flood victims would loot the lorry carrying biscuit tins. If there was no special contract between the parties, certainly the common carrier would have been liable in this case. In the present case on hand, Ex. A.3 was signed by the consignor and the common carrier's representative and hence the special contract, which is found printed on the reverse of the lorry receipt springs into action. Clause (3) of the special conditions, which covers theft, civil- and political riots and disturbances, certainly comes to the rescue of the defendant and exonerates the common carrier from liability.

16. *Road Transport Corpn. v. Kirloskar Brothers Ltd*[4]*.,* lays down the principle that "in order that terms of conditions on the overleaf of a consignment note passed by common carrier be binding on the consignor or consignee and in order that it should operate as special contract between the consignor or consignee on the one hand and the carrier on the other hand, the consignment note must be signed by the consignor and consignee and constitute a contractual document or at least must be identified as an integral part of the contractual document." In that particular case, the consignor did not sign the consignment note. In such a situation, the court held that "the plaintiff is free from the burden of proving that short delivery or non-delivery is caused in consequence of any negligence or criminal act on the part of the defendant. The only fact that will have to be established is that there is a short delivery or non-delivery and the factum of loss. 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 principle of that decision is not applicable to the facts of our case, because there the special conditions are not binding on the consignor, as the consignor did not sign the consignment note. In our case, the consignor signed the lorry receipt and hence he is bound by the special conditions.

17. *M. P. Highway Organisation v. New India Assurance Co. Ltd.,*

[4] AIR 1981 Bom 299 [5]1991 ACC CJ 330(MP)

is an instance of a case where the consignor did not sign in the lorry receipt. The lorry agency carrying the goods, namely, 504 tins of Sikka brand mustard oil, was found lying capsized at a particular place. There was no material to show that the accident was a deliberate mishap or that there was any negligence or default of the driver for which the owner of the truck was vicariously liable. In such circumstances, the insurer settled the claim of the consignor and then filed the suit for recovering the amount from the common carrier. In such a background, the court observed that the suit filed by the insurer has to be dismissed. In that case also, the consignment was being carried at owner's risk and it was an insured consignment. There was a special contract and Condition No. 1 printed on Ex. P.2 reads as follows: "All consignments are carried entirely at owner's risk. Consignors should take out their own insurance to protect themselves against any or all risks." In paragraph 5, the court observed that in view of this particular condition, it is not open to the consignor to contend that the goods were not to be carried at his risk or that the goods were not to be insured the risk not to be covered by the insurer. Dealing with Sections 151 and 152 of the Contract Act in paragraph 6, the court observed as follows:

> "Even if the defendant's liability could be determined in terms of Sections 151 and 152 of the Contract Act on the footing that he was a deemed bailee for the goods entrusted to him for carriage, that was a 'special contract' envisaged under Section 152. Indeed, in due fulfilment of that contract, in the instant case, duly insured goods were delivered for carriage and the bailee's liability and responsibilities were thereby limited. In any case, the bailee is required to take care of the goods as a man of ordinary prudence. How can it be suggested that the defendant could anticipate the accident? Nothing has come on record to suggest that the accident was deliberate mishap or there was any negligence or default of the driver for which the owner of the truck was vicariously liable. If the driver was convicted and his negligence proved, that evidence should have come."

The court refused to follow the earlier decision reported in *Gwalior Transport Co. (P) Ltd. v. National Insurance Co. Ltd*[6]*.,*

18. *N.I.G. Transport Co. v. M/s. G. H. Factory*[7]*,* lays down that, "A common carrier is liable to the owner for loss or damage to any property delivered to such carrier to be carried whether such loss or damage has arisen from the negligence of the carrier or any of his agents or servants. The term "at the owner's risk" used in the goods receipt only means that the owner would be liable for any loss or damage to the goods, which are lying with the Company if such loss or damage was not caused by any negligence on the part of the carrier." There goods were consigned to Delhi at owner's risk. On the consignee not being found at Delhi, instructions were given to rebook the goods to the place of despatch. After intimation was sent to the consignor, the consignors went to take delivery from the godowns of the common carrier and then they found that instead of hosiery goods that were booked, they found that the goods were pilfered and waste papersand card-boards were found in the packages. In such circumstances, the court held that the common carrier is certainly liable, because the loss was occasioned due to the negligence of the agents and servants of the common carrier. The principle laid down in that decision is not applicable to the facts of our case.

[6]1984 ACC L J 81 (MP)

[7] AIR 1964 Pun 318

19. Mr. Hanumaiah relied upon *Madura Co. Ltd., Alleppy v. Kavier (AIR 1931 Madras 115)* (supra) and pointed out that if there are any stipulations which are against the provisions of the Carriers Act, they are not valid. The court pointed out at page 117 as follows:

> "Under the Carriers Act, negligence is presumed by the loss of goods, and no question of misconduct arises and unless the defendant rebuts the presumption with which every case starts, by showing that they are not guilty of such negligence as would make them liable decree should stand."

The court pointed out that the law of common carriers must be regulated under the Carriers Act and they cannot claim to have their liability determined on the basis of a risk note in Form-H.

20. The principle of that decision is not applicable to the facts of our case. That decision is clearly distinguishable.

21. In the present case on hand, the following are the main facts which are not in controversy. The goods are insured goods and they were carried at "owner's risk." While booking the goods, the consignor signed the lorry receipt Ex. A. 3 and so he is naturally bound by the special conditions printed on the reverse of EX. A. 3. The third condition, which cannot be said to be against the provisions of the Carriers Act, clearly stipulates that the company will not be liable for loss or damage due to theft, riots, civil or political disturbances and weather conditions. The paper publications Exs. B.1 to B.14 clearly show that there were extraordinary floods at the relevant time. Exs. B.20 and B.21 clearly show that the lorry BHN 6889 was looted by flood victims. The criminal case was investigated and a charge-sheet was filed. The loss was occasioned due to circumstances beyond the control of the common carrier. They are not situations which can be visualised by the common carrier. In effect, they should be equated to an act of God or vis major though strictly speaking, the looting is through the intervention of a human agency.

22. In my considered opinion, the special contract in Ex. A.3 absolves the liability of the common carrier. Though a specific plea regarding the special contract was raised in the written statement, the court failed to frame a proper issue on it and it did not address itself to this particular fact. To a certain extent, the defendant's advocate in the trial court was responsible for not bringing to the notice of the court this particular aspect. In a cavalier manner, Issue No. 3 which reads as follows, "whether the consignment was carried at owner's risk" partly covers the defence raised. Unfortunately the Judge, without any material on record, simply disregarded Issues Nos. 3 and 4 on the pretext that they are not seriously pressed before him. I am unable to agree with the view taken by the trial judge. The consignor sent insured goods. For a loss occasioned in peculiar circumstances, the Insurance Company settled the claim of the consignor. Under the insurance policy, it is bound to pay it. In such circumstances, by merely taking the letter of subrogation and the special power of attorney, the Insurance Company cannot seek to recover the money paid to the consignor by filing the suit. Considering the fact that the common carrier, the defendant, was in no way responsible for the loss or damage occasioned in this case, I hold that the suit of the plaintiff has to be dismissed.

23. Considering the unsatisfactory manner in which the defendant conducted the matter in the

trial court, it would be proper to disallow the costs of the defendant.

24. In the result, the appeal is allowed. The judgment and decree of the trial court are set aside. Both the parties are directed to bear their own costs in the trial court as well as in appeal.

Appeal allowed.