CALCUTTA HIGH COURT

Assam Roadways

Vs.

National Insurance Co

A.F.O.D. No. 151 of 1977

(N.C. Mukherji and Sudhindra Mohan Guha, JJ.)

05.04.1979

JUDGEMENT

N.C. Mukherji, J.

1.This is an appeal against the judgment and decree passed by Shri M. Roy, Judge, 5th Bench, City Civil Court, Calcutta dated 11th January, 1977 in Money Suit No. 360 of 1971. The defendant is the appellant in this Court.

2. The plaintiffs brought a suit for recovery of Rs. 18,091.14 from the defendant-carriers by way of compensation or reimbursement for damage or shortage caused to the consignment in suit. The case of the plaintiffs is that the plaintiff No. 2 M/s. Aidaupukhuri Tea Estates (Pr.) Ltd., a private Limited Company having its registered office at Shibssgar in the State of Assam is the owner of a Tea Garden as mentioned above. On 13-8-68 the above Company entrusted with the defendant carrier M/s. Assam Roadways 160 chests of tea in sound and well packed condition for carriage by road from Shibsagar to Calcutta for delivery at G. Patel's godown at premises No. P-4/4, Watgung Siding. The above consignment was covered by three garden invoices and in acknowledgment of acceptance of the above consignment, the defendant carrier issued the relevant consignment note being No. 18 dated 13-8-68 in which the plaintiff No. 2's manager was named as the consignor and the United Bank of India as the consignee. Neither the consignor nor the consignee as named in the consignment note had any title to the consignment which was at all relevant time plaintiff No. 2's property and the plaintiff No. 2 was the owner thereof. The United Bank of India being plaintiff No. 2's banker at Calcutta was named as the consignee merely for facilitating delivery at Calcutta. The consignment was purportedly delivered by the defendant to the said warehouse partly on 22-8-68 and partly on 26-8-68. It was found that there was shortage of 2.04 Kg. out of 35 tea chests carried by the defendant carriers' Motor Lorry being No. ASK 3963. The defendant carriers also gave delivery of only 112 tea chests and 10 bags out of 125 tea chests carried in their lorry bearing No. ASK 2178. Out of the said 112 tea chests, three chests were completely empty. The condition of delivery was all duly endorsed on the delivery receipt of the defendant. All the aforesaid receipts were usual provisional receipts pending certificate about the condition and the weights to be granted by the plaintiff No. 2's authorized tea brokers, who, after examination and verification reported that out of tea chests

covered by the Invoice No. D/30, 8 chests were badly broken and renailed condition and short of contents and the total shortage was found to be 159.4 Kg. and 71 chests were found damaged by water and one chest was found damaged by kerosene oil and 32 chests totally damaged and unfit for human consumption. The above shortage and damage took place while the consignment was in the custody of the defendant carriers. The repacked contents suffered deterioration in quality due to having come in contact with the damaged stuff and fetched a lower price at the auction sale. The authorized brokers duly granted their sale and account certificates. The price of the quantity of tea short delivered and the quantity declared completely waste and unfit for human consumption was valued at Rs. 18,210.14 P as per account given in the Schedule to the plaint. The plaintiff No. 2 duly lodged their claim with the plaintiff No. 1 and after, a due enquiry into the alleged loss under the relevant Insurance Policy allowed a claim of Rs. 18,091.14 P in favor of the plaintiff No. 1. On receipt of such payment, the plaintiff No. 2 issued a letter of subrogation in favor of the above insurer plaintiff No. 1 so that a decree by way of compensation or loss may be passed in favor of the insurer. The plaintiff No. 2 duly preferred their claim under Section 15 of the Carriers Act. But the same was not entertained in due course.

3. The defendant carriers contend that the suit is not maintainable because of non-joinder of the consignee M/s. United Bank of India. It is also contended that the claim is excessive and that the consignment is involved in an accident during transit over which the defendant carriers had no control. The defendant took a special plea of exemption on account of such accident as incorporated in condition No. 4 recorded on the reverse of the above consignment note. Besides, the defense also took the plea that the plaintiff No. 2 failed to explain how they dealt with the damaged stuff and for which doubts remained and it appeared that they otherwise misappropriated the same in collusion with the insurer so as to profit at the expenses of the defendant carriers. The learned Judge found that the consignment was delivered in damaged condition and the defendant carriers were liable to pay compensation for damage to the plaintiffs. The learned Judge found that the suit was maintainable. It was also found that the plaintiff No. 2 had *locus standi* to bring the suit. With regard to the quantum of damage, the learned Judge held that there was no substance in the defense plea that the plaintiffs' claim was exaggerated and as such, the plaintiffs' suit was decreed in full. Being aggrieved, the defendant has come up in appeal.

4. Mr. Saktipada Chatterji, learned Advocate appearing on behalf of the appellant, raises several points of law in this appeal. In the first place, Mr. Chatterji contends that the learned Judge should have held that the defendant was protected under the terms and conditions embodied on the reverse of the consignment note and as such, he ought to have dismissed the suit. In this connection, Mr. Chatterji further submits that the learned Judge misconstrued the principle of law embodied in Sections 6 and 9 of the Carriers Act are failed to note that the special contract did not extend in the present case. The learned Judge also failed to consider that the defendant has satisfactorily discharged the onus that there was no negligence or carelessness on the part of the defendant and as such, the parties were found by the terms of the contract, mentioned on the reverse of the consignment note (Ext. 3). The next branch of Mr. Chatterji's argument is that the plaintiff No. 2 has been paid by the Insurance Company and as such, the plaintiff No. 2 has no *locus standi* to file the suit. Lastly, Mr. Chatterji contends that there is no evidence on record how the damaged quantity was appropriated and as such, the assessment made by the plaintiffs regarding damage has no basis at all. If Mr. Chatterji succeeds on the first point, namely, that in this case the defendant is not liable as the defendant has satisfactorily proved that there was no

negligence or carelessness on the part of the defendant and that the parties were bound by a special contract mentioned in condition No. 4 of Ext. 3, the consignment note, we will not he required to deal with other points raised by Mr. Chatterji. In support of the first contention Mr. Chatterji, contends that the plaintiffs have not stated a word about negligence or criminal act on the part of the defendant in the plaint and that being so, it is not open to the plaintiff to urge before the court that the defendant was negligent or guilty of criminal act. This submission of Mr. Chatterji cannot be accepted as Section 9 of the Carriers Act very clearly states that "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." Thus, it is clear that the onus is entirely on the defendant. The defendant is called upon to prove that he took reasonable care. The defendant is to lay down the available evidence before the court or at least so much of it as is needed to satisfy the court that it has a reliable history of the material facts. If this evidence establishes as the true cause a fact or event for which the defendants are not responsible, their burden is discharged. If it does not establish such a case then the defendants have to go further and prove that they exercised due care and skill in such of the matters depending upon their acts, as can still reasonably be supposed to contain the true explanation. It is, however, the well known principle that question of burden of proof is not of much practical importance when mass of evidence is before the Court. The question whether the defendant was negligent or not will not arise and the defendant will always be held liable for loss or damage as a common carrier's liability is that of an insurer. But such liability can be limited by a special contract. It is the case of the defendant that one of the trucks which was carrying the tea chests was involved in an accident and that the driver of the truck took reasonable care and caution in driving the truck when the same was involved in the accident and there was no negligence on the part of the driver. D.W. 1 - one of the partners of the carriers - deposes that one of the trucks was involved in the accident. He met the lorry driver at Siliguri. Later, his employee accompanied the lorry driver to lodge diary at Chopra Police Station. Police duly enquired into the case, later the goods involved in the accident were sent to Calcutta by another lorry. The witness asserts that they had no negligence in the matter of the above accident. They have no liability due to accident. The driver of the lorry was examined as D.W. 2. He states that he was the driver of the lorry involved in the accident. The number of his lorry was WBK 2178. He has no hand in the matter of accident. He was injured by the accident. He reported to Siliguri, Babus duly lodged information with the police. The accident took place at night during rains. Nothing was elucidated in cross examination from which it can be said that he was driving the truck rashly or negligently. D.W. 3 the owner of the lorry also proves the accident D.W. 4 is A.S.I. of police who proves the F.I.R. lodged in connection with the accident. It is his evidence that Ramesh Ch. Sukladas S.I. investigated the case. D.W. 5 is the S.I. It is his evidence that he investigated the goods of the lorry No. WBK 2178 involved in the accident. The F.I.R. was lodged on 20-8-68 in M.A. Case No 6. It was lodged by one Lachman Singh. The witness states that he submitted his final report on 8-9-68. He proves the final report. The certified copy of the F.I.R. is Ext. N and the copy of the final report is Ext. O. The concluding portion of the final report reads as follows :- "From the circumstances it appeared that the driver turned his vehicle to avoid a collision and due to the soft earth the truck was fallen down. None was injured except the driver. The driver had no fault in this case. So I pray that this may kindly be filed as a true case of accident." This is all the evidence - oral and documentary - produced by the defendant and we are satisfied from the evidence that there was no negligence or criminal act on the part of the defendant. But, even then the defendant will be liable for the loss or damage unless the defendant can show that there

was a special contract. Section 6 of the Carriers Act reads as follows :-

> "The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863.....may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same." Thus, this Section provides that a common carrier to whom this Act applies may limit his liability. He may limit his liability by special contract signed by the owner of such properties so delivered or by some person duly authorised on behalf of such owner. It follows that if the carrier neglects, or does not choose to adopt the means pointed out by the Legislature by which he may limit his liability then by necessary implication the liability which the common law imposes shall continue unlimited.
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> We have already found that there was no negligence or criminal act on the part of the defendant. Now, we are required to see whether the defendant limited its liability by any special contract. Mr. Chatterji very much relies on Ext. 3 - the consignment note. On the reverse of the said note the terms of the contract have been embodied Condition No. 4 reads as follows :-
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> "The company will not be responsible for any loss or damage to goods arising from the act of God, unexpected and unavoidable emergencies, State enemies, commotion, robbers, thieves, decoits, heat, fire, rain leakage and any kind of accident whatsoever."

Mr. Chatterji contends that the above condition shows that the defendant limited its liability to a great extent and if the defendant succeeds in proving that there was no negligence or criminal act on the part of the defendant in the matter of loss or damage sustained by the plaintiff, then it must be said that the defendant has no liability to compensate the loss or damage. In support of his contention Mr. Chatterji relies on a decision reported in *(India General Steam Navigation Co. v. Joy, kristo Shaha[1]).* In this case, it was held on facts that the loss was not occasioned by the negligence of the defendants; that the forwarding note "was a special contract" within the meaning of the Carriers Act; that the clause purporting to protect the defendants from negligence was bad as being in contravention of the Carriers Act; but that, nevertheless, the contract was not thereby rendered wholly bad, but was divisible, being good so far as it provided that the defendants were not to be liable for loss by accident, but bad so far as it provided that they should not be liable for negligence." In conclusion, their Lordships found that the contract was a special contract within the meaning of the Indian Carriers Act and the contract so far as it provided that the defendants were not to be liable for loss by accident was a good contract and as such their Lordships dismissed the suit.

[1](1890) ILR 17 Cal 39

5. Mr. Siti Kantha Lahiri, learned Advocate appearing on behalf of the respondents, relies on a decision reported in *(River Steam Navigation Co. Ltd. v. Syam Sunder Tea Co. Ltd[2].).* In this case, it has been held that it is no doubt open to a common carrier under Section 6 to limit his liability by special contract signed by the owner of the property so delivered, or by same duly

authorized person in that behalf, but the contract being in derogation of the common law, has to be strictly construed. "It was held" in the circumstances of the case that the carriers did not escape liability by virtue of the term in the forwarding note. Each case will have to be decided on its own facts and forwarding note in each case will have to be scrutinized carefully. "On going through the condition as mentioned in the forwarding note their Lordships found that liability was not limited. But, in the present case, we find that condition No. 4 is very clear to the effect that the defendant limited its liability which was accepted by the plaintiff. Mr. Lahiri next relies on a full Bench decision reported in *(Moothora Kant Shaw v. The India General Steam Navigation Co*[3]*.).* On the facts, it was found that "the defendants took as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, and that the loss was not occasioned by the act of God or the Queen's enemies. There was no special contract of the nature provided for by Section 6, Act III of 1865." It was held that Sections 151 and 152 of the Contract Act did not apply to the defendant who was liable for the loss of the goods. As has been stated earlier, the legal position is that even if the common carriers are not negligent or guilty of criminal act, even then also they would be liable for loss or damage because the common carriers are in the position of insurers. But a Common Carrier may limit its liability by a special contract as provided in Section 6. In the Full Bench case, their Lordships found on facts that there was no special contract. In the present case, we have already found that the defendant limited its liability by a special contract. Thus, on a consideration of the provisions of Sections 6, 8 and 9 of the Indian Carriers Act and the decisions referred to above, we are of the opinion that in the present case the defendant has been able to satisfy that there was no negligence or criminal act on their part and they have further proved that they, limited their liability according to the, provisions of Section 6 of the Act. It was agreed between the parties that in case of accident, the defendant will not be liable. This being the position, we are of opinion that the defendant cannot be held liable for the loss or damage sustained by the plaintiff.

6. In the result, the appeal is allowed on contest. The judgment and decree passed by the learned Judge are set aside. The suit is dismissed. The parties to bear their respective costs both in the court below and in this court.

Sudhindra Mohan Guha, J.

7. I agree.

Appeal allowed.

[2] AIR 1955 Ass 65

[3](1884) ILR 10 Cal 166