

inter State Transports Vs. Pfizer Ltd.

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Court : Karnataka

Decided On : Jul-07-1987

Reported in : II(1987)ACC366; ILR1987KAR2870

Judge : P.P. Bopanna and ;K.A. Swami, JJ.

Acts : [Carriers Act, 1865](#) - Sections 3, 6 and 8; [Insurance Act, 1938](#)

Appeal No. : R.F.A. No. 8 of 1977

Appellant : inter State Transports

Respondent : Pfizer Ltd.

Advocate for Def. : Shantharam Savanth, Adv.for W.K. Sundaramurthy, Adv.

Advocate for Pet/Ap. : K. Radesh Prabu, Adv. for Tukaram S. Pai, Adv.

Disposition : Appeal dismissed

Judgement :

P.P. Bopanna, J.

1. This appeal is directed against the judgment and decree of the trial Court in Original Suit No. 314/1974. The appellant who was the defendant before the trial Court was directed to pay a sum of Rs. 62, 141-97 with proportionate costs and current interest at 6 per cent per annum on the principal amount of Rs.56,727-97

from the date of suit till the date of payment, to the 1st plaintiff and a further sum of Rs. 55,100/-with proportionate costs and current interest at 6 per cent per annum on Rs. 50,320/-being the principal amount, from the date of suit till the date of payment to the 2nd plaintiff and also, costs incurred by plaintiffs 1 and 2 amounting to Rs- 6279-40 and Rs. 5788-75 respectively.

2. The parties hereinafter be referred to by the position assigned to them in the trial Court.

3. Plaintiff No. 1 is Pfizer Limited Company and is the consignor of the goods in question to its branch office in Cochin. Plaintiff No. 2 is the Insurance Company and the goods in question had been insured by plaintiff No. 1 against transit risk with this Insurance Company. Originally, the insurance cover was taken on the Hanover Insurance Co. Ltd., but at the time of filing of the suit, the 2nd plaintiff had taken over the Indian business of Hanover Insurance Co. Ltd., and there is no dispute about the assignment of the rights of the first plaintiff under the policy of insurance to the 2nd plaintiff.

4. Admittedly, defendant is a public carrier, carrying on business as carriers at its registered office in Bangalore. The goods in question were consigned by the 1st plaintiff under a G.C. Note issued by the defendant to its branch office at Cochin sometime in the month of July, 1971. The goods consigned were harmless medicines, manufactured by the first plaintiff and the defendant as a common carrier had undertaken to deliver these goods safely from Bombay to the depot of the 1st plaintiff in Cochin, on payment of the requisite amount as freight.

5. The case of the 1st plaintiff shortly stated is, that the defendant, as a common carrier, owed a duty to it to carry its goods safely and in good condition to its depot in Cochin, but, these goods were delivered on or about 22nd July 1971 in a damaged, deteriorated and soiled condition. Further, some of the contents of these goods were missing and thereby there was actual shortage in the quantities in the goods delivered to its depot. According to the 1st plaintiff, the defendant, its servants and agents failed to take the requisite care of the said goods as persons of ordinary prudence would have done in similar circumstances and by such carelessness, negligence, rashness and misconduct, the goods were delivered in

a damaged, deteriorated and soiled condition. As a result, plaintiff-1 got the goods surveyed by their Official Surveyor, viz., the Standard Surveyors Corporation of Cochin on 25 and 26th of July, 1971 and obtained from them the necessary certificates in respect of each of the consignment, wherein, the nature and cause of the loss and damage to the goods had been indicated. The surveyors in their certificates had certified that the loss, damage, shortage and soiling of the goods was due to pilferage, carelessness and exposure to rain or foreign substances.

6. Based on the Surveyor's report, the 1st plaintiff made a claim for damages assessed at Rs. 62,141-97 against the 2nd plaintiff and the 2nd plaintiff being the insurer of the goods in question settled the claim of the 1st plaintiff in terms Of the policy of Insurance in a sum of Rs. 50,320/-. But, it is the case of the 1st plaintiff that the amount of damages claimed from the Insurance Company i.e. the 2nd plaintiff was without prejudice to its rights to claim the balance amount of damages from the defendant. In paragraph 14 of the plaint it is averred that the 2nd plaintiff settled the claim of the 1st plaintiff partially to the extent of Rs. 50,320/- as the value of the general insurance policy taken by the 1st plaintiff was on an annual basis which was found to be less than the actual loss suffered by it. However, the 1st plaintiff did not waive its right to recover the damages from the defendant as the said amount of Rs. 50,320/- was not accepted from the 2nd plaintiff in full satisfaction of the claim against the defendant. The particulars of the claim made against the defendant are given in paragraph 16 of the plaint. The 1st plaintiff having assigned its right under the policy to the 2nd plaintiff under the instrument of subrogation in its favour, the 2nd plaintiff has joined in this suit and to the extent of reimbursement made by it, to the 1st plaintiff, it has sought the relief against the defendant. In all the plaintiffs 1 and 2 claim a sum of Rs. 1,17,242-37 inclusive of interest upto the date of suit.

7. The defendants, by their written statement, denied the allegations of the plaintiff and set up a plea of accident. According to them, the vehicle in question met with an accident due to causes which were beyond their control and there was no negligence on the part of their driver or any other employees ; that when the matter was referred to the police, they had not taken action against the driver, as it was purely an accident. On these facts, the defendant pleaded that it was not

liable for the suit claim. Its further contention was that the 1st plaintiff having failed to comply with the provisions of Sections 3 and 4 of the Carrier's Act, it was not entitled to the suit claim. It also pleaded that by the terms of the G.C. Note, it is protected from any liability for any act of alleged negligence or misconduct on the part of its agents or servants. Additionally it disputed the quantum of liability in a sum of Rs. 62,141-97 and a further sum of Rs. 50,320/- as claimed by the 1st plaintiff and 2nd plaintiff respectively.

8. On these pleadings, the Trial Court framed as many as 8 issues. All these issues were answered against the defendant and it made a decree as prayed for by the plaintiff. Hence, this appeal by the defendant

9. Learned Counsel appearing for the defendant Sri Radhesh Prabhu strongly maintained that, regard being had to the provisions of the Carrier's Act, which was applicable to the facts of this case, the Trial Court was in error in coming to the conclusion that the defendant had not proved that the accident in question was due to reasons beyond its control. According to him, the plaintiffs having alleged negligence on the part of the defendant, the burden was cast on the plaintiffs to prove negligence of the defendant and it is sufficient for the defendant to plead and prove that the loss sustained by the consignment in question was due to an accident which was beyond its control.

10. On the facts and pleadings of this case, the following points arise for our consideration :

(1) Whether the plaintiffs have established their right to claim the amounts in question from the defendant ?

(2) Whether they have proved the suit claims against the defendant ?

(3) Whether the defendant has proved that the damage to the goods in question was due to the accident sustained by the vehicle which was beyond its (defendant's) control ?

11. The third issue will have to be considered first since, in the light of the provisions of the Carriers Act, on which the defendant relies, it is for the defendant

to establish that it had taken sufficient care while discharging its duties as carrier. Though, the Carriers Act was not in force on the date of the accident, in the light of the decision of this Court in *Hercules Insurance Co. & Anr. v. Sri Ganesh Transport Co. & Anr.*, 1969 (1) Mys. L. J. 316 the principles of that Act are applicable as principles of justice, equity and good conscience. The effect of Sections 6 and 8 of the Act is, that a common carrier is liable for loss and damage caused due to its negligence or misconduct of its agents or servants, and that liability cannot be limited by contract. Therefore, on the principles laid down by the Division Bench of this Court, it is futile for Mr. Prabhu to contend that the liability for any damages due to negligence or misconduct on the part of the defendant, its employees, servants and agents is excluded by a clause more particularly, specified in the G.C. Note. In that case also, a similar clause found in the G.C. Note was considered by the Division Bench and it took the view that condition that 'the goods to be sent at owner's risk and that no responsibility would be taken in case of fire or accident' do not and cannot protect a common carrier if the damages flowed from its negligence or misconduct. So, it was incumbent on the defendant to prove that there was no negligence or misconduct on its part. But the contention of the Learned Counsel for the defendant is, that the plaintiffs having pleaded negligence in the plaint, the initial burden was cast on the plaintiffs and only when such burden had been properly discharged by the plaintiffs, it was defendants' turn to rebut that evidence. He relied on certain observations made by the Division Bench in the very same decision to sustain his plea. The Division Bench observed in paragraph 21 of its Judgment as follow :--

'Where the plaintiffs allege a specific case of negligence, the burden is on them to make out a prima facie case of specific act of negligence. The law on the subject has been succinctly stated in the *American Jurisprudence*, 2d., Volume 14, Second Edition, at page 132, paragraph 618 thus :

'In an action against a common carrier based upon a contract of carriage to recover damages for loss of or injury to goods during the course of transportation, the plaintiff need neither plead nor prove negligence on the part of the carrier, since the carrier, as an insurer of the safety of the goods, is liable for loss or damage thereto regardless of negligence. The plaintiff is aided in his case by the

presumption of negligence which arises when he establishes that the goods were delivered to the carrier in good condition, and that they were delivered at destination in damaged condition, or were not delivered. If, however, the plaintiff alleges specific acts of negligence, he then has the burden of proving such negligence.'

It was not incumbent on the plaintiffs to plead that the damage was caused on account of negligence but having alleged that the damage was caused on account of specific acts of negligence, it was not necessary for the defendant to plead that the damage was on account of the inevitable accident ; it was sufficient for him if he denied that there was any negligence.'

In our view, this observation of the Division Bench does not support the contention of the defendant. In that case the defendant called for particulars of negligence alleged to have been committed by it and in response to the application calling for particulars, the plaintiff therein had attributed a specific act of over-loading and rash and negligent driving which resulted in the :--

'Breaking of the main spring leaf of the front spring near the front end and the result was that the front axle went back on its rear shackle making the lorry turning to the right of the road and the driver could not have been able to control the vehicle because the lorry dragged to the right end one wheel went over the Irish Bridge and the truck had toppled and the transformer was thrown off the full weight.'

On these facts, this Court took the view that the plea of negligence alleged against the defendant was not proved. But, in the instant case, the plaintiffs had not alleged any specific acts of negligence. They had only pleaded that the defendant was a common carrier and it had not acted in a prudent manner and the damage and loss of goods in question was caused by rash and negligent acts of the defendant, its servants and agents. Therefore, a duty was cast on the defendant to prove that its servants and agents had acted prudently and not negligently. The defendant having admitted that the vehicle met with an accident, it was incumbent on the defendant to prove further that, that accident was due to reasons beyond its control. No evidence was forthcoming on behalf of the defendant on this point. The

driver was the best witness, who could have explained the circumstances leading to the skidding of the vehicle about which there is no dispute but he was not examined. The representative of the defendant who was examined as D.W.I had no personal knowledge about the accident and he had spoken only on the basis of the records. According to him, he went to the spot with the driver and saw the vehicle resting on the left side on its wheels. The lorry had skidded on the road and the road was under repair. It is elicited from this witness that -

'The driver told him (Manager Joseph) that due to heavy rain the tyre skidded on the road, under repair, I do not know whether he said truth or falsehood, Manager did not ascertain anything more.'

This is all the evidence on behalf of the defendant as regards part of negligence and care. From this evidence it is clear that the lorry had turned turtle after skidding. Whether it was not due to the negligence of the driver or whether he had taken sufficient care or whether he as a skilled driver could have prevented the skidding is not forthcoming from the records, because, the driver was not examined. But, it is common knowledge that the best way of avoiding a skid on a wet road is to switch off the ignition. But that evidence is not available on record since the driver was not examined, In the circumstances, the plaintiffs were not bound to prove any further facts in order to establish their claim against the defendant as a common carrier. D.W. 1 has also said that he does not know whether the driver has spoken the truth or falsehood ! Therefore, on this type of evidence, it is not possible to accept the plea of Mr. Prabhu that the plaintiffs had not established negligence on the part of the defendants, its servants or agents.

12. The defence theory of accident--beyond its control should have been proved to the satisfaction of the trial Court. Defendant having failed to do so, the plaintiffs were under no obligation to prove any further facts for making out a case of negligence on the part of the defendant. In our view, the trial Court, on this point was right in distinguishing the facts of this case from that of Hercules Insurance Company's case*.

13. However, a case was sought to be made out by the learned Counsel for the defendant, based on the provisions of Sections 3 and 6 of the Common Carriers

Act. He submitted that the goods in question come under Item No. 14 of the Schedule to the Act viz., 'Glass' and therefore, a declaration was necessary for such goods. In the absence of such declaration, the defendants were absolved of the liability to compensate in terms of the provisions of the aforesaid Sections. To attract the provisions of Sections 3 and 6, certain facts should have been specifically pleaded by the defendant. No facts are stated in the written statement as to how the liability of the defendant could be excluded, based on the provisions of Sections 3 and 6. Whether a declaration was necessary or not, whether the goods were Schedule goods or not, are mixed questions of fact and law and not pure questions of law. Therefore, having not pleaded that the goods in question come under Item No. 14 of the Schedule and that the consignment in question came within the mischief of Sections 3 and 6 of the Act, defendant cannot be permitted to contend that the contract of carriage in question was contrary to the provisions of Sections 3 and 6 of the Act.

14. Though an issue had been framed by the Trial Court on the basis of a contention in the written statement, that issue could not have been decided by the Trial Court in the absence of any definite pleading as to the facts and also evidence which brought the case within the scope of these two Sections; therefore the elaborate arguments advanced by the Learned Counsel for the defendant based on the provisions of Sections 3 and 6 of the Act do not merit consideration. The bald plea of the defendant in the written statement that in any event, these defendants are not liable because of the failure of the plaintiff to comply with Sections 3 and 6 of the Carriers Act would not advance their case any further. In the circumstances, point No 3 is answered against the defendant. Consequently point No. 1 is also answered against the defendant and in favour of the plaintiffs.

15. The next point for consideration is, whether the plaintiffs have proved the suit amounts claimed by them against the defendant. Mr. Prabhu made a grievance of the terms in the Insurance Policy and on the report of the Surveyor, According to him, the Insurance policy did not specifically cover these goods in question, therefore plaintiff No. 2 had no right of subrogation and the first plaintiff could not have assigned its right under the policy to the 2nd plaintiff. The policy in question is marked as Ex. P 1. This policy covers the goods mentioned therein subject to a

limit of Rs. 1,900,000/- only as described in the sheet 'A' attached thereto. This policy covers the risk of finished products in bottles and or tins or jars etc., and the same is valid for one year from December 1970 to November 1971. The accident occurred on 19-7-1971. The policy was in force then as between plaintiff No. 1 and plaintiff No. 2. The only grievance that the defendant, could have made on the terms of this policy is that they are not relatable to the specific goods consigned by plaintiff No. 1, in their carrier. But the terms of this policy are well understood in Insurance Law. This is a block Insurance taken by the 1st plaintiff to cover the risk of all the goods consigned by it on land during a particular period. So, it was not necessary for the 1st plaintiff to cover each consignment sent by it to different destinations. There was a valid policy of insurance which covered the risk in respect of the goods in question and under that policy the 1st plaintiff was entitled to be reimbursed to the extent of the loss caused to it by the defendant, and plaintiff No. 2 was entitled to obtain the rights of subrogation from plaintiff-1 to seek its remedy against the defendant after compensating plaintiff No. 1

16. That takes us to the next point regarding the quantum of damages claimed by plaintiffs 1 and 2 respectively.

17. Mr. Prabhu contended that the Surveyor was a Marine Surveyor, which only means that he was mostly engaged by shipping companies to assess the damage to the goods consigned in ships. That does not mean that he was not competent to assess the damages caused to the goods consigned by road. What is essential to a Surveyor's job is to make a proper assessment of the damage suffered by the goods in question.

18. It has not been brought out in his cross-examination that he was in any way not conversant with his job of assessing the damages to the goods in question. The Surveyor's Reports are found in Exs. P6 to P9 and on the basis of these survey reports the total extent/of damages in respect of the four consignments was assessed at Rs. 1,07,046-97. This claim was partly settled by plaintiff No. 2 in terms of the policy of insurance as is evident from Ex. P18. Accordingly plaintiff No. 2 paid a sum of Rs. 50,321-53 to plaintiff No. 1. This amount was received by plaintiff No. 1 as noticed earlier, reserving its rights to recover the balance amount

from the defendant.

19. One more contention that requires consideration by us is whether the Surveyor had not issued any notice to the defendant or his agents before the survey was made. The Surveyor was examined as P.W. 3. He has stated that he had issued notice to the defendant's representative and he was present at the time of survey. He has also stated that one of the representatives of the defendant was present at the time of survey. Though, D.W. 1 had stated in his evidence that he did not get any notice of survey nor he was present at the time of survey, cross examination of P.W. 3 was not directed against the presence or absence of D.W. 3. Only a general question was put to him and he had answered that the representative of the defendant was present at the time of survey. We see no reason to disbelieve the evidence of P.W. 3 who is a professional Surveyor. In the circumstances, the Trial Court was right in placing reliance on the evidence of the Surveyor for the assessment of the damages sustained by plaintiff-1. The fact that plaintiff No. 1 was reimbursed by plaintiff No. 2 in a sum of Rs. 50,000/- and odd is not disputed and is borne out by the letters of subrogation Exs. P 14 to 17 and also the receipts Exs. P10 to 14. On this material, there could be no doubt that plaintiff No. 2 was entitled to recover the amount paid by it to plaintiff No. 1 and plaintiff No. 1 was entitled to recover the balance amount due from the defendant after adjusting the amount received by it from plaintiff No. 2.

20. For the reasons stated above, we are in full agreement with the Trial Court that the amounts due from the defendant were proved by the plaintiffs.

21. For these reasons this appeal fails and is dismissed.