

Konsumex Vs. Anand and Co. and ors.

Konsumex Vs. Anand and Co. and ors.

SooperKanoon Citation : sooperkanoon.com/860154

Court : Kolkata

Decided On : Apr-10-1981

Reported in : AIR1981Cal298

Judge : Dipak Kumar Sen, J.

Acts : [Carriage of Goods by Sea Act, 1925](#) - Schedule - Article 3 - Rule 6; ;
[Evidence Act, 1872](#) - Section 115

Appeal No. : Suit No. 121 of 1978

Appellant : Konsumex

Respondent : Anand and Co. and ors.

Advocate for Def. : Sankar Mitra, Adv. for Defendant No. 3

Advocate for Pet/Ap. : B.K. Bachawat, Adv.

Disposition : Application allowed

Judgement :

ORDER

Dipak Kumar Sen, J.

1. The dispute in this case arises out of shipment of several consignments of men's under-garments by Anand & Co., the defendant No, 1, to Konsu-mex, the

plaintiff, a company.

2. The plaintiff's case inter alia is that 87,000 pieces of such garments were shipped between August and September 1975 by S. S. State of Meghalaya and S. S. Vishva Mangal from Calcutta to the port of Rijeka under two Bills of Lading issued by the Shipping Corporation of India Limited, the defendant No. 3.

3. The plaintiff's case is that it opened an irrevocable Letter of Credit in favour of the defendant No. 1 for the value of the said shipments and between July and October 1975 the defendant No. 1 negotiated the said Letter of Credit and obtained sum of Rs. 17,05,500.

4. The plaintiff alleges that on arrival at destination the said garments were found to be contaminated and infected with fungus and insects, and that the same were not fit for the purpose for which the same were purchased, not of merchantable quality and not in accordance with the samples. The plaintiff claims to have rejected the said garments and to mitigate its loss and damages to have sold a part thereof for Rupees 10,33,843/80.

5. The plaintiff claims the said sum of Rs. 17,05,500 with interest at the rate of 12% per annum and a further sum of Rs. 1,70,550 for its loss and damages from the defendant No. 1.

6. The plaintiff has alleged that in the alternative that the defendant No. 1 and the General Superintendence Co. of India (P.) Ltd., the defendant No. 2, who was required under the tenor of the contract of supply to inspect the said garments and issue inspection certificates vouching for the quality of the shipments and that the same to be in accordance with the samples, acted fraudulently and made false representations to the plaintiff to the effect that the said goods were of stipulated specifications and conformed to the samples. By reason of the aforesaid fraud and misrepresentation the plaintiff has suffered damages and the plaintiff claims such damages against the defendants Nos. 1 and 2 at Rs. 11,17,386/62.

7. In the further alternative the plaintiff has alleged that the defendant No. 2 acted negligently in issuing reports and certificates as to the condition of the said

garments and failed to exercise reasonable care and skill in inspecting and certifying the said goods as a result of which the plaintiff suffered loss and damages assessed at Rs. 11,17,386.

8. In the further alternative the plaintiff has alleged that the defendant No. 3 failed to carry the said shipments duly or properly, failed to take steps to prevent the same from being contaminated and damaged and failed to keep its vessels carrying the same free from such contamination. It is further alleged that in the breach of the Indian [Carriage of Goods by Sea Act, 1925](#) (hereinafter referred to as the said Act) and the rules thereunder the defendant No. 3 failed to keep the said vessels sea-worthy. As a result of the aforesaid wrongful acts and omissions on the part of the defendant No. 3 the plaintiff claims to have suffered loss and damages assessed at Rs. 11,56,554/50, decree for which amount has been claimed from the defendant No. 3.

9. It is not in dispute that the garments, shipped in the said vessels of the defendant No. 3 arrived at the Port of Rijeka between 21st December 1975 and 1st January 1976. The present suit was filed on the 28th February 1978 beyond one year from the date of the delivery of the said garments.

10. It is pleaded in paragraph of the plaint as follows :--

'The defendant No. 3, its servants and agents waived the stipulation that the suit for enforcement of claim under the said Bills of Lading would be instituted within one year from the date of delivery of the said goods and/or the date when the said goods should have been delivered. The defendant No. 3 also made representations that it would not rely upon or enforce the aforesaid stipulation and the plaintiff relied upon such representation and acted to its detriment. The defendant No. 3 should not be permitted and is estopped from contending to the contrary.'

11. The present application is by the defendant No. 3 praying that the plaint filed in the suit as against the defendant No. 3 be rejected Or that the suit be dismissed against it. It is alleged that the defendant No. 3 entered appearance in this suit and on the 17th May 1978 through its advocate on record asked for particulars of the

alleged waiver by the defendant No. 3 of the stipulation that a suit for enforcement of the claim under the Bills of Lading would be instituted within one year from the date of delivery of the goods. Particulars of the representations alleged to have been made on behalf of the defendant No. 3 that it would not rely upon or enforce the said stipulation and inspection of writing, if any, containing such waiver and/or representation were also asked for. The plaintiff having failed to furnish particulars or allow inspection as asked for on an application of the defendant No. 3 in this suit an order was passed on the 18th January 1979 directing the plaintiff to furnish particulars and allow inspection as asked for within the month from date. In spite of several extensions granted, the last being up to the 5th July 1979, the plaintiff is alleged has failed to furnish such particulars and allow such inspection.

12. The defendant No. 3 contends that this suit against the defendant No. 3 should be dismissed inasmuch as the plaintiff has violated the order of this Court. It is further contended that the suit against the defendant No. 3 should also be rejected inasmuch as the alleged liability of the defendant No. 3 as a carrier became extinct under Article III of Rule 6 of the Indian Carriage of Goods by Sea Act 1925, and that an allegation of waiver of the stipulation by the defendant No. 3 or the alleged representations of the defendant No. 3, in any event, cannot override the mandatory provisions of the statute.

13. No affidavit was filed on behalf of the plaintiff in opposition to the petition.

14. At the hearing learned Advocate for the defendant No. 3 relied on Clause (6) of Article III of the Schedule of Indian Carriage of Goods by Sea Act. 1925 which provides inter alia as follows:--

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered.

15. Mr. Sankar Mitra learned Advocate for the defendant No. 3 submitted that the above clause did not provide a period of limitation within which a suit may be instituted against a carrier for loss and damage to goods carried but laid down that unless the suit was brought within a period of one year the carrier would stand

absolved from all liability for such loss or damages. That is the shipper's cause of action in respect of loss or damage against the carrier would stand extinguished. He submitted further that there could be no waiver of such a statutory provision and no estoppel could arise against the same. He also submitted that in any event the plaintiff having failed to furnish particulars of waiver and representations alleged by it as directed by an order of this Court, cannot be allowed to rely on such pleas.

16. In support of his contentions Mr. Mitra cited a decision of the Supreme Court in *East and West Steamship Co., Georgetown, Madras v. S. K. Ramalinga Chettiar*, reported in : [1960]3SCR820 . In this case the Supreme Court construed the said Clause (6) of Article III of the Indian Carriage of Goods by Sea Act 1925 and held as follows (at p. 1065) :--

'The question we have to decide is whether in saying that the ship or the carrier will be discharged from liability, only the remedy of the shipper or the consignee was being barred or the right was also being terminated. It is useful to remember in this connection the international character of these rules, as has been already emphasised above. Rules of limitation are likely to vary from country to country. Provisions for extension of periods prescribed for limitation would similarly vary. We should be slow there-fore to put on the words, 'discharged from liability' an interpretation which would produce results varying in different countries and thus keeping the position uncertain for both the shipper and the shipowner. Quite apart from this consideration, however, we think that the ordinary grammatical sense of 'discharged from liability' does not connote 'free from the remedy as regards liability' but are more apt to mean a total extinction of the liability following upon an extinction of the right. We find it difficult to draw any reasonable distinction between the words 'absolved from liability' and 'discharged from liability' and think that these words 'discharged from liability' were intended to mean and do mean that the liability has totally disappeared and not only that the remedy as regards the liability has disappeared.' 'The distinction between the extinction of a right and the extinction of a remedy for the enforcement of that right, though fine, is of great importance. The legislature could not but have been conscious of this distinction when using the words 'discharged from all liability' in an Article

purporting to prescribe rights and immunities of the shipowners. The words are apt to express an intention of total extinction of the liability and should, specifically in view of the international character of the legislation, be construed in that sense. It is hardly necessary to add that once the liability is extinguished under this clause, there is no scope of any acknowledgment of liability thereunder.'

17. Mr. Mitra lastly cited *Hiralal Pannalal v. Dalhousie Jute Co. Ltd.*, reported in : AIR1978 Cal119 a decision of a single Bench of this Court for the proposition that there could be no estoppel against a statute.

18. Mr. B. K. Bachawat learned counsel for the plaintiff contended on the other hand that the Clause (6) of Article III of the Indian Carriage of Goods by Sea Act 1925 conferred an advantage to the benefit and protection of the carriers. This was a private benefit or advantage and the parties could contract out of it.

19. He contended that in the instant case the plaintiff has pleaded a waiver and/or renunciation of a legal advantage by the defendant No. 3 and the same will be agitated in the suit.

20. In support of his contentions Mr. Bachawat cited Carver's 'Carriage BySea', 12th Edition, paragraph 127 at page 196 which reads as follows :--

'Waiver. The party against whom a claim is made may elect to waive such a clause, or the parties may by consent enlarge the stipulated time. But such waiver will not be readily inferred.'

21. He also cited a passage from Maxwell on Interpretation of Statutes, Eleventh Edition, at page 375 which reads as follows :--

'Another maxim which sanctions the non-observance of a statutory provision is that *quilibet licet renunciare juri pro se introducto*. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an

Act which is intended, as a matter of public policy, to have a more extensive operation.

Thus, a person may agree to waive the benefit of statute of limitations.

22. He also cited Statutory Construction by Crawford, 1940 Edition, at pages 540 and 543 for the following passages :--

'The statute limiting the time within which actions shall be brought is for the benefit and repose of individuals and not to secure general objects of policy or morals. Its protection, therefore, may be waived in legal form by those who are entitled to it, and such waiver, when acted upon, becomes an estoppel to plead the statute.'

'As in the case of waiver, there is confusion in the law with reference to the part played by estoppel in determining whether a person can by his conduct be estopped from relying upon or asserting a given statute. There is authority, so far as the statute of limitations is concerned, that an estoppel can come in existence.'

23. He also cited Craies 'Statute Law', 7th Edition, page 269 on the following passage :--

'If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable. This rule is expressed by the maxim of law *Quilibet potest renunciare juri pro se introducto*. As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable and either party may waive them without affecting the jurisdiction of the court. Where a statute deprives a person of a legal remedy, but does not deny him a cause of action (e.g. the Statute of Frauds and its replacements or a Statute of Limitation), courts of justice, whether under the specific rules of procedure or under their general course of practice, treat the rights of the defendant to bar the remedy as

waived if he does not plead the statute which bars it. 'It is evident' said Alderson B., 'that a party who has a benefit given him by statute may waive it if he thinks fit.'

24. Lastly, he cited Broom's Legal Maxims, 10th Edition at pages 477-478 for the following observations :--

'A man may also not merely relinquish a particular line of defence, but he may also renounce a claim which might have been substantiated, or release a debt which might have been recovered by ordinary legal process; or he may, by his express contract or stipulation, exclude some more extensive right, which the law would otherwise have conferred upon him. In all these cases, the rule holds, omnes licentiam habent his quae pro se indulta sunt renunciare--every man may renounce a benefit or waive a privilege which the law has conferred upon him.'

25. In East and West Steamships Co. : [1960]3SCR820 (supra) the Supreme Court has clearly laid down that operation of Clause (6) of Article III of the Indian Carriage of Goods by Sea Act 1925 does not result merely in the extinction of the remedy against the carrier by a claimant but absolves the carrier from any liability. The Supreme Court also held that once such liability is totally extinguished there is no scope for any subsequent acknowledgment thereof. The authorities cited by Mr. Bachawat on the waiver therefore cannot be strictly applied in the facts of this case. The English authorities lay down that a person can waive any advantage of law or rule made for his benefit and this principle has been applied generally in cases where the advantage or benefit of limitation has been waived.

26. The passage cited from Carver's Carriage by Sea has been stated in respect of clauses in a Bill of Lading which limit the time within which a claim or a notice of claim thereunder should be given and the proposition is enunciated that party against whom such a claim is made may elect to waive such a clause.

27. The English Carriage of Goods by Sea Act, 1924 contains the identical Clause (6) in Article III and the English Courts have construed the same in cases where a party referred his claim to arbitration instead of filing a suit within the proscribed period of one year. A question arose whether the carrier in taking part in such arbitration had waived the clause. Ultimately the Court of Appeal held in 'The

Merak' reported in 1965 p. 223 that a suit includes arbitration.

28. The Supreme Court considered the principles of waiver in Waman Shrinivas Kini v. Ratilal Bhagwandas & Co., reported in : AIR 1959 SC689 . It was observed in the said decision as follows (at p, 694) :--

'Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied. But an agreement to waive an illegality is void on grounds of public policy and would be unenforceable.'

29. The Supreme Court further considered the principles relating to waiver in Jagat Bandhu Chatterjee v, Nilima Rani, reported in : [1970]2SCR925 and laid down as follows :--

'In India the general principle with regard to waiver of contractual obligation is to be found in Section 63 of the Indian Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver.'

30. Keeping the said principles in view it appears that in the instant case there has not nor could have been any release by the defendant No. 3 of any existing obligation on the part of the plaintiff. When the goods were delivered in a defective condition plaintiff was neither bound to nor obliged to file any suit at all. It can however be contended that after the prescribed period the defendant No. 3 obtained an advantage as against the plaintiff by reason of the said clause and assuming that the defendant No. 3 waived such an advantage it was tenable for the plaintiff to proceed under a suit against the defendant No. 3 successfully thereafter.

31. Construing the language of the said clause it appears to me that while it could have been possible for the defendant No. 3 to seek to waive such advantage but

in doing so it does not appear that the defendant No. 3 could create or bring into existence a new right in favour of the plaintiff and a new liability as against itself in place of the original liability which stood extinguished. This could only have been done under a proper agreement with consideration and not by way of waiver or release which could stand without any consideration.

32. I also take note of the conduct of the plaintiff, who in spite of an order of this Court, has failed and neglected to furnish the particulars as called for. Even in this application where categorical allegations have been made that the case of the plaintiff of waiver and estoppel is false no affidavit has been filed on behalf of the plaintiff even denying such allegations. The plaintiff has neither averred nor indicated whether it is in a position to substantiate its allegation of waiver and/ or representation by the defendant No. 3.

33. For the reasons above this application is allowed. The plaint filed in this suit is directed to stand rejected as against the defendant No. 3. The plaintiff will pay the costs of the allegation to the defendant No. 3.