M. G. BROTHERS LORRY SERVICE

v.

PRASAD TEXTILES

April 28, 1983

[D. P. MADON AND SABYASACHI MUKHARJI, JJ.]

Carriers Act, 1865—Ss. 6 and 10—Indian Contract Act, 1872—S. 23—Liability of common carrier for loss of or injury to goods—Liability can be limited by contract made expressly and in writing under s. 6 of Carriers Act—A condition designed to defeat provisions of s. 10 of Carriers Act is void in terms of s. 23 of Contract Act.

The respondent entrusted a consignment of goods to the appellant on May 1, 1969 under a Way Bill for being transported from Guntur to Vijayawada. As the appellant failed to deliver the goods at Vijayawada, the respondent gave a notice of claim on June 20, 1969 and thereafter instituted suits for recovery of damages from the appellant. The trial court held that the suit were barred by Condition-15 of the Way Bill which stipulatee that no suit shall lie against the firm in respect of any consignment without a claim made in writing in that behalf and preferred within 30 days from the date of booking or from the date of arrival at the destination by the party concerned. The lower appellate court confirmed the dismissal of the suits but the second appeal preferred by the respondent was allowed by the High Court which held that if Condition-14 of the Way Bill was given effect to, it would defeat the provisions of s. 10 of the Carriers Act.

Dismissing the appeals,

HELD : (a) Section 10 of the Carriers Act, 1865 provides that unless notice in writing of the loss or injury has been given to him before the institution of the suit and within 6 months of time when the loss or injury first came to the knowledge of plaintiff, no suit shall be instituted against a common carrier. In the instant case, in order to sustain the suit, Condition-15 of the Way Bill makes it imperative on the party concerned to give notice either within 30 days from the date of the booking or from the date of the arrival of the goods at the destination. The date of arrival of the goods at the destination may not be known to the party concerned for a long time. No claim can be made without the loss of the goods and therefore 30 days from the date of booking would become irrelevant unless loss or damage occurs. Even in a case where the plaintiff was unaware of the arrival of the goods at the destination or was unaware of the loss or damage, the plaintiff would not have ang right to institute a suit if no claim was made and could not have been made within 30 days. Condition-15 of the Way Bill, therefore, was designed to avoid the liability contemplated under s. 10 of the Carriers Act and that too in a situation where the parties had not by express contract limited their

liability as contemplated under s. 6 thereof. Condition-15 must therefore, be held to be void in view of s. 23 of the Indian Contract Act because its object was to defeat the provisions of s. 10 of the Carriers Act. [1032 H, 1033 A-H]

Home Insurance Company of New York v. *Victoria-Montreal Fire Insurance Co.*, [1907] Law Reports A.C. 59, referred to.

(b) The liability of a common carrier can be limited by agreement as provided under s. 6 of the Carriers Act but that must be limitation of the liability. The nature of the contract entered into must either have the limitation of the liability under the Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier. In the instant case it is clear from Condition-15 of the Way Bill that there was no limitation of liability expressed or intended but what was provided was that no suit shall lie against the firm unless a particular claim was made in a particular manner within a particular time. Their was neither any extinguishment of liability, nor contracting out of liability but what was provided was only, a special period of limitation, other than the one in s. 10 of the Carriers Act, for issue of notice. [1032 D-G]

The India General Navigation and Railway Co. Ltd. v. *The Dekhari Tea Company Ltd. and Ors.*, AIR 1924 P. C., 40 referred to.

(c) The Contention that the Carriers Act was essentially enacted for the benefit of the common carriers and therefore s.10 should not be construed as precluding notice of a period shorter than 6 months from the date of loss cannot be accepted. From the preamble to the Act it is clear that the Act was passed not only to limit the liability of the carriers but also to declare their liability. Therefore, any contract or bargain which seeks to defeat the liability of the carriers as enacted by law would defeat the provisions of the Act. [1034 A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 954-959 of 1978.

Appeals by Special leave from the Judgment and Order dated the 22nd November, 1976 of the Andhra Pradesh High Court in Second Appeal Nos. 76, 83, 84, 91, 100 and 152 of 1975.

A. Subba Rao for the Appellant.

A. K. Ganguli, L. K. Gupta and *Somnath Mukherjee* for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. M/s M. G. Brothers Lorry Service, the appellant is a firm, which carried on at the relevant time transport business and on the 1st of May, 1969 under a Way Bill, the plaintiff firm, M/s Prasad Textiles, the respondent herein had consigned one bale of yarn worth about Rs. 5,000 from their head office at Guntur to Vijayawada, at which place there was a branch office consigned "to self". The Way Bill and the invoice were in the usual course delivered to the State Bank of India with the instructions to deliver the same to the plaintiff-respondent M/s Prasad Textiles at Vijayawada. It appears that the defendant-appellant M/s. M. G. Brothers Lorry Service failed to deliver the said goods to the respondent-plaintiff at Vijayawada. The appellant's case was that the said goods had actually arrived at Vijayawada on the very next day, but the same were, however, not taken delivery of at Vijayawada for some time and that between 16th and 20th of May, 1969 there was a cyclone at Vijayawada as a result of which the said goods were damaged in their godown and when the said goods were opened on 20th May, 1969 in the presence of the representative of the appellant at Vijayawada, that the damage was discovered.

On 20th June, 1969, the plaintiff firm gave a notice of claim to the defendant firm and thereafter instituted six suits for recovery of various sums of money as claims on the ground that the plaintiff had entrusted the said consignment to the lorry service of the defendant firm to be delivered at Vijayawada and they had failed to do so and hence the plaintiff was obliged to file those suits. All these suits were tried together by the learned trial Judge on the ground that common issues arose in each of those suits and the question to be considered was the same. The lower court gave a common finding. We are not concerned, in view of the points arising in these appeals before us, to consider all the points For our purposes it is sufficient to note that the trial Court held that the defendant being the appellant before us had failed to prove that the non-delivery of the six consignments was not due to the negligence of the defendant or his men and the defendant was liable for the damages of Rs. 2,200 in each of the suits towards the value of the consignment which was not delivered by the defendant and it was also held that the plaintiff would be entitled to claim interest on the amount so decreed. The trial Court, however, ultimately held that the suits were barred by

virtue of Condition 15 of the Way Bill. The goods were consigned under terms and conditions mentioned in the Way Bill. Thereafter all the suits were dismissed.

Being aggrieved by the said decision, the defendant went up in appeal before the court of Sub-ordinate Judge, Vijayawada. The only point which is material for us to note is that the contention was that the consignment was accepted for transport by the appellant herein which was defendant in the original suit, at Guntur subject to special conditions printed on the reverse of the Way Bill.

Condition 15 which is material for our purpose is as follows :

> "No suit shall lie against the firm in respect of any consignment without a claim made in writing in that behalf and preferred within thirty days from the date of booking or from the date of arrival at the destination by the party concerned."

The trial Court's dismissal of the plaintiff's suit on the ground that these were barred because of Condition 15 was confirmed by the Lower Appellate Court. There was second appeal to the High Court before learned Single Judge of the High Court of Andhra Pradesh, Hyderabad. The High Court held that if Condition 15 of the Way Bill was given effect to it would clearly defeat the provisions of section 10 of the Carriers Act and as such would be void. It, therefore, allowed the appeal.

Thereafter the question arose as to whether further appeal would lie from the decision of a single Judge of the High Court in second appeal to the Division Bench of the Andhra Pradesh High Court. In that view of the matter, special leave application was filed before this Court. This Court was of the view, that whether under Section 100A of Civil Procedure Code, any appeal would lie to the Division Bench of the High Court, should be decided by the High Court itself. The special leave application was adjourned for a period of four months pending disposal of this question by the Division Bench of the High Court. The Division Bench of the High Court held subsequently that Letters Patent Appeal was no longer maintainable after coming into operation of Section 100A of the Code of Civil Procedure. In those circumstances

special leave to appeal was granted by this Court on 20th April, 1978. Thus this appeal comes up before us. A

In view of the contentions raised before the trial Court and the High Court, the only question that falls for our considesation in this appeal, is, whether clause or condition 15 of the Way Bill as set out hereinbefore under which the goods were carried by the carrier in this case, was contrary to section 10 of the Carriers Act, 1865 and as such the said condition 15 was void in view of section 23 of the Contract Act. B

Section 10 of the Carriers Act, 1865 provides as follows : C

> "No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff." D

The section was added by Act 10 of 1899. The original section was repealed by Act 9 of 1890. E

In order to consider the contentions urged in this case, it is therefore necessary to bear in mind the provisions of the Carriers Act, 1865 and the purpose of the same and to determine whether in fact by Condition 15 of the Way Bill, the liability of the carrier was limited, and if so to what effect. F

The Carriers Act, 1865, as the preamble states, was enacted because it was thought expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents. Therefore it is important to keep in the background that the Act was passed for both the purposes; to limit the liability of the carriers, as well as to declare the liability of the carriers. Section 6 of the Act stipulates that 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 the Act, (and in this connection it may G H

be stated that the goods in question with which we are concerned in this appeal are not type of goods described in the schedule) shall not be deemed to be limited or affected by any public notice. It further provides that such carrier may, by special contract, signed by the owner of such property so delivered or by some person duly authorised in that behalf by such owner, limit his liability in respect of the same.

Section 8 of the Carriers Act provides inter alia, that common carrier shall be liable for loss and damage to any property when such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants.

As we have noted before the liability of a common carrier can be limited by agreement under the provisions noted hereinbefore but that must be limitation of the liability. This position was highlighted by the Privy Council in the case of *The India General Navigation and Railway Co. Ltd.* v. *The Dekhari Tea Co. Ltd., and Ors.*(1) the Privy Council reiterated on the construction of Section 6 of the Carriers Act that what was required in the case of a person who answered the definition under the Indian Carriers Act, viz., was that the nature of the contract entered into must either have the limitation of the liability under the Indian Carriers Act made expressly and in writing or the facts must be such that for the contract in question the contractor was departing from his usual business and engaging in a different type of business from that of common carrier.

In this connection, it appears to us that on the construction of condition 15 of the Way Bill that there was no limitation of liability expressed or intended but what was provided was that no suit shall lie against the firm unless a particular claim was made in a particular manner within a particular time. In this case there was neither any extinguishment of liability or contracting out of liability but only a special period of limitation of notice was provided other than section 10 of the Carriers Act, 1865.

Section 10 of the Carriers Act, as we have noted before, provides that unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff no suit shall be instituted. Condition 15 of the Way Bill in the

(1) A.I.R. 1924 P.C. p. 40.

instant case makes it imperative to give notice either within 30 days from the date of the booking or from the date of the arrival of the goods at the destination by the party concerned, to sustain a suit. The date of arrival of the goods at the destination by the party may not be known to the party concerned for long time. No claim can be made without the loss of the goods and therefore 30 days from the date of booking would become irrelevant unless loss or damage, occurs. Therefore, it appears to us that condition 15 of the Way Bill was designed to avoid the liability contemplated under section 10 of the Carriers Act, 1865 and that too in a situation where the parties had not by express contract limited their liability as contemplated under section 6 of the Carriers Act. It appears to us, therfore, that the learned Judge of the Andhra Pradesh High Court was right in the view he took. The trial court and the first appellate court had held that condition 15 of the Way Bill was not violative of section 28 of the Indian Contract Act, That view of the lower courts has not been challenged before the High Court in the second appeal. Before us also that view was not seriously challenged. It also appears to us that neither there is restriction absolutely from enforcing rights by the usual legal proceedings nor limitation of time within which such rights might be enforced in the instant case but condition 15 was only intended to defeat or by-pass the provisions of section 10 of the Carriers Act. Section 23 of the Indian Contract Act provides that the consideration or object of agreement was lawful, unless, inter-alia, it was of such a nature, that, if permitted, would defeat the provisions of any law. In the instant case, it appears to us that if condition 15 be permitted then it will defeat the provisions of section 10 of the Carriers Act, even in a case where notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff. Even in a case where the plaintiff was unaware of the arrival of the goods at the destination or was unaware of a loss or damage, the plaintiff would not have any right to institute a suit if no claim was made and could not have been made within 30 days as stipulated in condition 15 of the Way Bill. In that view of the matters, we are of the opinion that condition 15 must be held to be void in view of section 23 of the Indian Contract Act because its object was to defeat the provisions of section 10 of the Carriers Act. This conclusion, in our opinion, follows from the construction of the section and condition 15 of the Way Bill.

A B C D E F G H

It was contended before the courts below and it was reiterated before us that Carriers Act was essentially enacted for the benefit of

the common carriers and section 10 of the Act should be so construed. It was, therefore, urged that it could not be construed as precluding notice for a shorter period than a period of six months from the date of loss specified therein. But the preamble as we have noted before indicates that the Act was passed, not only to limit the liability of the carriers, but also to declare the liability of the carriers. Therefore, any contract or bargain which seeks to defeat the liability of the carriers as enacted by law, would, in our opinion, defeat the provisions of the Act. Furthermore, as we have noted hereinbefore in essence condition 15 is to impose additional obligation upon the owner or consignee because it stipulates giving of the notice either from the date of the arrival of the goods at the destination which more often than not, is not known to the owner of the goods, or from the date of booking, which again is useless because unless loss or damage occurs no liability arises.

In the decision of the Privy Council in the case of *Home Insurance Company of New York* v. *Victoria-Montreal Fire Insurance Company*,[1] to which our attention was drawn, there was a contract of re-insurance which was engrafted on an ordinary printed from of fire insurance policy, and incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire. It was held by the Judicial Committee that having regard to the true construction of the contract, which had carelessly purported to include many conditions inapplicable to reinsurance, the above clause must also be regarded as inapplicable. Such a clause is reasonable in the original policy where the assured can sue immediately on incurring loss, it cannot apply where the insured was unable to sue until the direct loss was ascertained between the parties over whom he had no control.

Though the facts of the instant case and the condition with which we are concerned are different, the observations of Lord Macnaghten at page 64 are of some relevance that the clause prescribing legal proceedings after a limited period was a reasonable provision in a policy of insurance against direct loss to specific property, in such a case the insured was master of the situation, and he could bring his action immediately, but in a case of re-insurance against liability the insured was helpless, would throw light on the

(1) [1907] Law Reports—Appeal Cases p. 59.

present condition 15 in the instant case as we have noted hereinbefore. In the instant case as we have noted hereinbefore, the arrival at the destination of the goods may not be known to the owner or the consignee for a considerable period of time. A

Learned advocate for the appellant also drew our attention to the decision of the Court of Appeal in England in the case of *Bank of Australasia and Others* v. *Clan Line Steamers Limited.*(1) In the facts of this case, in our opinion, the said decision is not relevant for the controversy before us. B

Our attention was also drawn to a decision in the case of *India General Steam Navigation Company (Defendants)* v. *Joykristo Shaha and Others (Plaintiffs)*(2) where the point on which the Court rested its decision was that the contract in question was a divisible one. No such problem arises here. So it is not necessary to discuss the decision. C

In the case of *Haji Shakoor Gany* v. *H.E. Hinde & Co., Ltd.*,(3) the plaintiffs under a bill of lading incorporating the provisions of the English Carriage of Goods by Sea Act, had shipped sugar on defendant 1's ship. One of the provisions of the Act on the bill of lading was as follows : "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit was brought within one year after delivery of the goods or the date when the goods should have been delivered." The ship arrived in Bombay on 4th May, 1929 and was completely discharged on 8th May, 1929. The plaintiffs had sued on 27th June, 1930 to recover the value of the sugar short-delivered to them from defendants 1 and 2 who were the Bombay agents of defendant 1 and who gave a declaration to the customs authorities that they were answerable for the discharge of all claims for damage or short-delivery which might be established by the owner of any goods comprised in the import cargo in respect of such goods. It was held that the effect of the incoporation of the provisions in the bill of lading was that the rights of the plaintiffs were extinguished in respect of the claim made after one year, As we have mentioned hereinbefore, if under a particular bargain the rights of the parties were extinguished that would be D E F G H

(1) [1916] 1 Law Reports K.B. p. 39.
(2) I.L.R. 1890 Vol. 17 Calcutta 39.
(3) A.I.R. 1932 Bombay p. 330.

permissible, that will not hit the provisions of section 28 of Contract Act and as such would not be violative of section 23 of the said Act. But if rights are not extinguished but only the remedies are barred different consideration would apply.

As in the cases of *The Ruby General Insurance Co. Ltd.* v. *The Bharat Bank, Ltd. and others,*(1) *Dawood Tar Mahomed Bros. and others* v. *Queensland Insurance Co. Ltd.,*(2) *Pearl Insurance Co.* v. *Atma Ram,*(3) *Baroda Spinning and Weaving Co. Ltd.* v. *Satyanarayan Marine and Fire Insurance Co. Ltd.,*(4) *Assam Roadways* v. *National Insurance Co. and others,*(5) *M/s Indian Drugs and Pharmaceuticals Ltd. Hyderabad* v. *M/s Savani Transport P. Ltd , Hyderebad,*(6) *Rivers Steam Navigation Co. Ltd., and another* v. *Bisweswar Kundu*(7) *and Vulcan Insurance Co Ltd.* v. *Maharaj Singh and another,*(8) the points decided and views expressed were different from the present controversy, it is not necessary to refer to those decisions or express any opinion on those.

For the reasons we have mentioned hereinbefore, we are of the opinion that the decision of the learned single Judge of the Andhra Pradesh High Court on appeal must, therefore, be upheld. These appeals accordingly fail and are dismissed with costs.

H.L.C. *Appeals dismissed.*

(1) A.I.R. 1950 East Punjab p. 352.
(2) A.I.R. 1949 Vol. 36 Calcutta p. 390.
(3) A.I.R. 1960 Vol. 47 Punjab p. 236.
(4) A I.R. 1914 Bombay p. 225.
(5) A.I.R. 1979 Vol. 66 Calcutta p. 178.
(6) A.I.R. 1979 Vol. 66 Andhra Pradesh p. 41.
(7) A.I.R. 1928 Calcutta p. 371.
(8) [1976] 2 S.C.R. p. 62.