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HIGH COURT OF GUJARAT

EAST INDIA TRANSPORT AGENCY
Versus
TATA METALS & STRIPS LTD & 1 OTHER(S)

Date of Decision: 06 December 2019

Citation: 2019 LawSuit(Guj) 729

Hon'ble Judges: A P Thaker

Case Type: First Appeal

Case No: 1 of 1994

Subject: Civil, Contract

Editor's Note:
Indian Contract Act, 1872, Sections 230, 62 and 182-Carriers Act, 1865, Section 10-Mutual agreement-Novation or alteration-Held-Novation, rescission and alteration of contract under Section 62 can only be done with agreement of both the parties of a contract-Both the parties have to agree to substitute the original contract with a new contract or rescind or alter-It cannot be done unilaterally-Where there is no mutual agreement among all the parties to substitute a new contract for the old contract there cannot be a novation-Appeal dismissed. [Paras 17, 18, 19, 20, 21, 22, 23]

Law Point- Novation, rescission and alteration of contract under Section 62 can only be done with agreement of both the parties of a contract.

Acts Referred:
Contract Act, 1872 Sec 230, Sec 62, Sec 182
Carriers Act, 1865 Sec 10

Final Decision: Appeal dismissed

Advocates: Y H Motiramani, Divyesh G Nimavat, Nanavati Associates

Cases Referred in (+): 3

A. P. Thaker, J.

[1] Being aggrieved and dissatisfied with the judgment and decree dated 30.10.1991 passed by Civil Judge, Senior Division, Navsari in Special Civil Suit No.53 of 1985 whereby the Suit of the respondent no.1 herein against the appellant, who is defendant no.2 and against the respondent no.2 herein i.e. defendant no.1, have been passed directing them to pay a sum of Rs.6,44,496/- with interest at the rate of 18.5.% from the date of the suit till realisation and costs of the suit.

[2] Initially the appeal was filed by the appellant herein who is original defendant no.2 against the respondent no.1- original plaintiff and respondent no.2- original defendant no.1, however, during the pendency of the appeal, respondent no.2- original defendant no.1 has been deleted as party and, therefore, now the parties in the appeal is original defendant no.2 as appellant and respondent no.1 is the original plaintiff. For brevity and convenience the parties are referred to as the defendant no.2 and plaintiff respectively.

[3] The brief facts of the case is that the plaintiff filed suit against both the defendants for recovery of amount of Rs.6,44,496/- together with interest at the rate of 18.5% p.a. from the date of the suit till realisation and costs of the suit for the cold steel strips, which was sent through the defendant no.2 to defendant no.1 with instruction to the defendant no.2 to deliver the goods after retirement of the documents on payment of bill. The bill was forwarded by the plaintiff through their bankers. The amount was to be paid by defendant no.1. That in violation of these express instructions, the defendant no.2 has delivered 8 consignments to the defendant no.1 without collecting the relative Goods Consignment Notes (Lorry Receipt), duly retired by the defendant no.1 who has taken the delivery of the same but failed to pay the price thereof to the plaintiff. The suit has been resisted by both the defendants initially but during the trial the defendant no.1 did not appeared and produced any evidence whereas the plaintiff and defendant no.2 has produced oral and documentary evidence. On the basis of the evidence produced before the trial Court and after hearing both the sides and considering the evidence on record, trial Court has passed the judgment and decree in favour of the plaintiff and against both the defendants.

[4] The learned trial Court has framed the following issues:

1. "Whether the plaintiff proves that as per the order of the Deft. No.1 No. R.M.L. 26/77 dated :9/6/77 the goods worth Rs.4,49,821/- as described in para(1) of the plaint were supplied to the Deft. No.1?

2. Whether the plff. Proves that the said goods were supplied to the Deft. No.1 through its approved transport agent- Deft. No.2?

3. Whether the Plff. Proves that the Deft. No.1 has to present the transport receipts for taking delivery of the materials from the Deft. No.2?

4. Whether the plff. Proves that Deft. Acted contrary to and inconsistent with the terms and the conditions of the contract as alleged in para(3) of the plaint?

5. Whether the plff. Proves that Rs.4,49,821/- are found due as principal amount?

6. Whether the plff. Is entitled to any interest/ If yes at what rate?

7. Whether the plff. Is entitled to notice charges?

8. Whether the plff. Is entitled to recover in all the sum of Rs.6,44,497/-? If yes, then from both or any of the Defts.?

9. Whether the suit is bad on account of misjoinder of parties?

10. Whether this Court has jurisdiction to hear and decide this suit?

11. Whether the suit is filed within the prescribed period of limitation? 12. Whetehr the Deft. No.1 proves that there was no previty of contract between himself and plff.?

13. Whether the Deft. No.1 proves that the goods sent to him were defective and were not in accordance with the contract?

14. Whether the Deft. No. 1 proves that present dispute was settled with the plff. On date 11/6/85 and in full settlement of sum of Rs.50,000/- were paid to the plff. On date 19/6/85?

14A.Whether the Deft. No.1 proves that suit is bad for misjoinder of causes of action?

14B.Whether the Deft. No.2 proves that settlement of dispute between the plff. and Deft. No.1 dated 11/6/1985 amounts to novation? If yes,what is its effect on novation at law of the Deft. No.2, if any?

15. Whether the Deft. No.2 proves that suit is barred against it for want of notice under Section 10 of the Carrier's Act?

The above issues have been answered in a way that Issue Nos. 1 to 8, 10 and 11 were answered in favour of the plaintiff and remaining issues were decided in negative and ultimately passed the impugned order.

[5] Being aggrieved by the said judgment and decree it is contended by defendant no.2 herein that 8 consignments were booked with the East India Transport Agency India Private Limited, a Public Company incorporated of which defendant No.2 is a unit with no legal entity and could not sue or be sued and this fact has not been considered by the trial Court. It is also contended that the suit is not maintainable against it in view of the decision of the Apex Court in case of Modi Vanaspati Mfg. Co. v. Kothiar Jute Mills (Private) Ltd., 1969 AIR(Cal) 496.

[6] The defendant no.2 has categorically raised objection as to non-maintainability of the suit in present form as well as for misjoinder of party and on the ground that there is no cause of action arised against it. It has also been contended that the trial Court has committed error in appreciating the evidence in proper perspective and when the defendant no.1 has admitted its liability vide Exh-62 to pay the outstanding amount of the bills to the plaintiff by installments of Rs.50,000/- p.m. and which has been accepted by the plaintiff, and therefore, defendant no.2 cannot be liable for any payment. It is also contended that there was no contract between the plaintiff and defendant no.2. It is also contended that though the goods were handed over, there was no specific instruction that it should be delivered after retirement of the documents by the defendant no.1. According to it, under Section 62 of the Contract Act, there is a novatio between the plaintiff and defendant no.1 and therefore he is absolved from its liability.

[7] It is also contended that in view of the Carrier's Act,1865 no notice has been issued for non-delivery or compensation for loss of goods. It is stated that a Notice at Exh-60 and 61 are served beyond the 6 months period which is mandatory under the provisions of Carrier's Act. It is also contended that the contract of carriage as incorporated in relation to 8 Goods Consignment Notes of the Defendant No.2 mentioned that the consignments were to be delivered to the defendant No.1 or its order, producing the original Goods Consignment Notes duly retired from the defendant No.1. While referring the judgment of this Court in case of Shah Jugaldas Amritlal vs. Shah Harilal Talakchand, 1986 AIR(Guj) 88, it is contended that responsibility and liability of the Carrier doe not originate in the contract but is cast upon him by reason of his exercising public employment for reward and sections 8 and 9 of the Carriers Act, 1865 will be applicable. According to defendant no.2, the trial Court erred in holding that the defendant no.2 has committed breach of contract under provision of Contract Act and that Section 10 of the Carrier's Act, 1865 does not apply.

[8] It is also contended that the trial Judge has erred in deciding the Issue No.9 by holding that the present appellant (defendant No.2) was the agent of the original defendant no.1. It is also contended that when the goods were booked by the plaintiff with defendant no.2 with consignee as "Self", the ownership in property remained with

the plaintiff as consignor. Accordingly, there is no breach of contract regarding the said consignment. It is also contended that if the defendant no.2 was a agent of the defendant no.1, as held under Issue No.9, then in the face of it, the Suit would not lie against the defendant no.2 as an agent cannot be sued when the principal is disclosed.

[9] It is also further contended that defendant no.2 was only agent of defendant no.1 in terms of Section 182 of the Indian Contract Act and, therefore, its principal i.e. the defendant no.1 alone is liable for the dues of the plaintiff under Section 230 of the said Act and both the master and the servant cannot be sued for the same dues. It is also contended that the original deed of agreement is not produced by the plaintiff in the Court. It is also contended that the defendant No.2 has no obligation to retire the documents before delivery of the suit goods to the defendant No.1. It is also contended that if at all the defendant no.2 had any liability of the price of the goods, it was absolved from that liability as soon as the novatio was entered into under Section 62 of the Indian Contract Act between plaintiff and defendant no.1. In the alternative it is contended that if at all the defendant no.2 was held liable then it is only a carrier simplicitor under the Carrier's Act, the latter was entitled to receive a statutory notice of 6 months before institution of the suit and therefore the suit against it is time barred and on this ground it is prayed to set-aside the impugned judgment and decree against him.

[10] Initially notice was sent to both the respondents and was served to respondent no.1 but no one remained present for respondent no.1- original plaintiff herein, whereas respondent no.2, during pendency of this Appeal, the appellant has made submission that decree has been passed against the appellant and respondent being a joint decree out of which the appellant has challenged whereas respondent no.2 has not challenged the same. In that view of the matter the respondent no.2 being made proforma respondent no.2 however no prayer is sought for against respondent no.2 and therefore respondent no.2 was deleted from the cause title.

[11] In view of the aforesaid facts, the argument of learned advocate Mr. Y.H.Motiramani for the appellant-defendant no.2 has been heard.

[12] On perusal of the R&P of the Special Civil Suit No.53 of 1985, it is found that the trial Court has destructed the evidence on record and pursuant to which learned advocate for the parties were called upon to submit the Certified Copy of thereof if they have in their custody. The learned advocates for the parties have submitted that neither of them has the Certified copy of evidence on record, but they have produced the Paper-book thereof in this matter. They have also requested this Court to pass necessary order in the matter on the basis of paper books which they have supplied to this Appeal.

12.1 Considering the facts and circumstances of the case the request is accepted and now the matter is being disposed of on the basis of paper-book submitted by the learned advocates for the parties.

[13] Mr. Motiramani, learned advocate for the appellant-defendant no.2 has vehemently submitted the same facts which are narrated in the Memo of Appeal and has relied upon the following judgments:

"1. in case of Modi Vanaspati Manufacturing Company and another v. Katihar Jute Mills (Private) Limited, 1969 AIR(Cal) 496 for his preposition that a Suit against a limited Company in his business name is not maintainable and signing and verification of the written statement by a constituted Attorney of the Company is not indicative of the appearance of the company in the Suit. It is also contended that to allow limited company to be sued in its business name will be an inroad upon the Civil Procedure Code, to the fact that suit will not be competent against the defendant which has no legal character or basis.

2. He has also relied on the decision in case of Sharma Goods Transport, Wardha v. Vidarbha Weavers Central Cooperative Society, 1988 AIR(Bom) 269 for his preposition that under Section 10 of the Carrier's Act it is absolutely obligatory on the part of plaintiff in a suit for compensation for loss of goods to give a prior notice as required under the said Act even in the event of non-delivery of goods.

3. He has also relied on the decision in case of Shah Jugaldas Amritlal v. Shah Harilal Talakchand and others, 1986 AIR(Guj) 88, wherein while dealing with the provisions of the Carrier's Act, 1865 it was observed that in India liability of the common carrier is analogous to the liability of the common carrier under common law, and the principle of common law regarding the liability has been kept in fact and recognised by the Act. Such responsibility of the owner of the carrier does not originate in the contract, but is cast upon him by reason of his exercising public employment for reward. No doubt, under the provisions of S.6 of the Act, the said liability can be reduced by the carrier. But even in such cases the provisions of Ss.8. And 10 of the Act would be applicable and the common carrier would always remain liable for the negligence and misconduct of his servants, and it will 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. Where there was no special contract within the meaning S.6 of the Carriers Act nor was loss or damage due to act of God the carrier would be liable for the damage.

[14] The following points arises for determination of the present Appeal:

1."Whether the learned trial Court has committed error of facts and law in passing the impugned judgment and decree for the plaintiff?

2.Whether the impugned judgment and decree of the leaned trial Court in Special Civil Suit No. 53 of 1985 is liable to be set-aside?

3.What order?"

[15] For the reasons given below, my findings on the above points are as under:-

1.Negative.

2.Negative

3.As per final order.

[16] The main thrust of the argument of the Appellant-defendant no.2 is regarding applicability of Carrier's Act and non-service of Notice under the Carrier's Act. At this juncture it is worthwhile to consider the provisions of the Carrier's Act.

16.1 Carrier's Act, 1865 would be applicable in case of entrustment of the goods to a common carrier and there is some loss, damage or nondelivery of the goods by the common carrier in event of filing of a suit, the service of notice under Section 10 is must. Section 10 of the said Act reads as under:

"Section 10: Notice of loss or injury to be given within six months. 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".

[17] The learned advocate for the appellant has also referred to Section 62 and Section 230 of the Contract Act to demonstrate that the defendant no.2 is no way liable to pay any amount to the plaintiff.

17.1 Section 62 makes the provision in respect of contract which need not be performed. The said Section 62 reads thus:

"62. Effect of novation, rescission, and alteration of contract- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

17.2 Novation, rescission and alteration of contract under Section 62 can only be done with agreement of both the parties of a contract. Both the parties have to

agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. Where there is no mutual agreement among all the parties to substitute a new contract for the old contract there cannot be a novation.

17.3 Admittedly in this case the defendant no.1 has agreed to pay outstanding amount to the plaintiff by monthly installment of Rs.50,000/-. Merely because defendant no.1 has agreed to pay amount in installment, it does not change any agreement made between the plaintiff and the defendant no.2 regarding delivery of goods on the retirement of documents by the consignee. Therefore, in the present case the amount claimed against the defendant no.2 is concerned, it is breach of this condition. Therefore, in this case there will be no application of Section 62 of the Contract Act.

[18] Now admittedly in this case,as averred by the defendant no.2 itself, he was agent of defendant no.1. As such entrustment of the goods by the plaintiff to the defendant no.2 as agent of the defendant no.1,the liability of the carrier will not be governed under the Carrier's Act as the goods have already been handed over to defendant no.1 that too without any retirement of document by defendant no.1.

[19] Section 230 of the Contract Act provides that agent cannot personally enforce nor be bound by contracts on behalf of principal. The provisions of the said Section 230 reads thus:

"230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal- In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

19.1 As per this provision, an agent is not entitled to personally enforce nor is he bound by a contract entered into by him on behalf of a disclosed principal in the absence of a contract to that effect.

19.2 Now in this case, there is no contract entered into between the plaintiff with defendant no.1 through defendant no.2. It is only the case of the plaintiff that goods were entrusted to defendant no.2 for delivering it to defendant no.1. On the basis of earlier agreement, the defendant no.2 had to hand over the delivery of the goods after retirment of the documents by the consignee. Thus, the factual aspect of present case does not fall under provisions of Section 230 of the Contract Act.

[20] It is pertinent to note that from the impugned judgment on record it clearly transpires that defendant no.2 has specifically agreed with the plaintiff that he will not give delivery to the consignee in absence of retirement of document by the consignee.

Thus there was agreement between the plaintiff and the defendant No.2 to the effect that in absence of retirement of document from the purchaser or consignee the common carrier would not entrust the goods to the consignee. In this case, as discussed by learned Trial Court, without getting retirement document from the defendant no.1, defendant no.2 has delivered the goods in question in breach of its letter at Exh-67. As such observation of learned Trial Court that in this case the provision of Contract Act will be applicable and not that of Carrier's Act, is proper.

[21] From the facts and as discussed by learned trial Court it has come to know that the defendant no.1 has accepted delivery of the goods from defendant no.2. It also appears that the defendant no.1 has admitted in his written statement having received goods supplied by the plaintiff to defendant no.2 as agent of the defendant no.1. At the same time, defendant no.2 has also admitted that they have worked as an agent of defendant no.1 and have received the goods on behalf of defendant no.1 from the plaintiff, which they have delivered to the defendant no.1.At this juncture,it is worthwhile to refer to the observation by the trial Court regarding the agreement between plaintiff and defendant no.2 in Para-20 relating to the Issue Nos. 3 and 4. In the said paragraph, the learned Judge has relied on the communication between plaintiff and defendant no.2 dated 7.9.1981 at Exh-67 which clearly shows that the defendant no.2 has agreed with the proposal of the plaintiff not to delivered the consignment to the defendant no.1 without proper L.R. The copies of this letter as shown therein have been forwarded to Bombay, Calcutta, Assansol Office. The learned trial Judge has extensively reproduced the said letter:

> "To
>
> Ahmedabad Advance Limited, Navsari.
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> As per personal discussion with you, we have agreed with your proposal not to deliver the consignment to the consignee at the destination without proper L.R.
>
> We are assured for best cooperation.
>
> Early replies highly appreciated."

[22] This letter clearly shows that the defendant no.2 had to deliver the consignment only after retirement of the documents from the defendant no.1. This letter, therefore,

clearly reveals that there was agreement between the plaintiff and defendant no.2 and specific undertaking was given by the defendant no.2. As such, it is clearly found that in breach of the agreement, the defendant no.2 has delivered the goods to defendant no.1. Therefore, the action of delivery of goods to defendant no.1 without obtaining retirement of documents, is clearly breach of contract on the part of defendant no.2. Of course, he is a carrier of the goods but when there is specific agreement for delivery of goods then the agreement has to be executed in its letter and spirit. Now, admittedly the defendant no.2 has without obtaining retirement of documents by defendant no.1, delivered the consignment to defendant no.1 and thereby committed breach of contract. Therefore, the provision of the Contract Act would be applicable and not of Carrier's Act, 1865.

[23] One of the point raised by the defendant no.2 is regarding novatio between plaintiff and defendant no.1 as to settlement of their claim. However, it appears from the impugned judgment that the correspondence entered into between the plaintiff and defendant no.1 was regarding mode of payment of the price of goods. As per settlement, defendant no.1 has agreed to pay the amount in installment of Rs.50,000/- and thereafter, after making 1st installment he did not pay. Due to that the plaintiff had issued Notice to both the defendants and thereafter he has filed the Suit wherein the defendant no.1 has not chosen to examine any witness but has only cross-examined the plaintiff, who, as discussed by the trial Court, the evidence rendered by the plaintiff has remained uncontroverted on the cross-examination.

[24] From perusal of the impugned judgment it clearly transpires that while dealing with the evidence on record, the learned trial Judge has minutely examined the entire facts and evidence on record. He has not committed any error of facts and law in answering the issues as set-out hereinabove.

[25] In view of the above discussion, the impugned judgment and decree of the learned Trial Court cannot be said to be perverse and it cannot be set-aside.

[26] For the above reasons, the present appeal fails and is dismissed. The judgment and decree dated 30.10.1991 passed by Civil Judge, Senior Division, Navsari in Special Civil Suit No.53 of 1985 are hereby confirmed.

Decree to be drawn accordingly in this Appeal. No order as to costs.