9 SCOB [2017] AD 66

APPELLATE DIVISION

PRESENT:
Mr. Justice Surendra Kumar Sinha
Chief Justice
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NO. 137 OF 2010

(From the judgment and decree dated 26.11.2008 passed by the High Court Division in First Appeal No.28 of 2004.)

Biman Bangladesh Airlines And others	:	Appellants
Versus		
Al Rojoni Enterprise	:	Respondent
For the Appellants	:	Mr. Kamal-ul-Alam, Senior Advocate, instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.
For the Respondent	:	Syed Mahbubar Rahman, Advocate-on-Record.

Date of hearing and judgment: 23.11.2016

Carriage by Air (International Convention) Act, 1966
Rule 29 of the first schedule
Read with section 29 of the Limitation Act:

The High Court Division committed an error of law in holding that the date on which carriage stopped was the date on which the carrier defendants admitted its failure to deliver its goods finally and offered payment of compensation in lieu of the goods. The time for limitation began to run from the expiry of 7 days after the date on which the goods ought to have arrived, that is, on 22.01.1999. Since the suit was filed on 24.05.2001 apparently the same was barred by limitation in view of special limitation provided in Rule 29 of the first schedule of the Carriage by Air (International Convention) Act, 1966 read with section 29 of the Limitation Act. ...(Para 7)

JUDGMENT

Hasan Foez Siddique, J:

1. This appeal is directed against the judgment and decree dated 26.11.2008 passed by the High Court Division in First Appeal No.28 of 2004 reversing those dated 23.10.2003 passed by the learned Joint District Judge, 3rd Court, Dhaka in Money Suit No.21 of 2001.

2. The short facts, for the disposal of this appeal, are that the plaintiff respondent is a Proprietorship Firm carrying business of importing and selling of watch. In due course, it purchased spare parts of watch from Hong Kong worth of USD 18,911.00 equivalent to Bangladeshi Tk.12,10,000/-, which weighed around 322 Kgs. and were packeted in 9 cartoons. Those goods were booked in Hong Kong to be delivered in Dhaka through Bangladesh Biman, vide air-way bill No.997-8632-1653 dated 21.01.1999, scheduled to carry those goods through BG Flight No.079 on 22.01.1999. But those goods did not reach in Dhaka through the scheduled flight and, consequently, the Biman authority could not deliver those goods. The plaintiff-respondent repeatedly demanded to get delivery of goods. The defendants enquired into the matter but whereabouts of goods could not be detected. The defendants offered to pay compensation in terms and conditions laid down in the contract provided in Air-way bill assessing at USD 6400.00 on calculation of the loss goods weighing around 322 Kgs, the declared weight of the undelivered goods, at the rate of USD 20.00 per Kg. The compensation amount offered was equivalent to Bangladeshi Tk.3,15,560.00 as per the prevailing conversion rate, vide defendant's letters dated 19.08.1999 and 08.09.1999, against the claim of compensation made by the plaintiff for Tk.16,98,000.00. The offer was not acceptable to the plaintiff-respondent. Hence, was the suit.

3. The defendant-appellants contested the suit by filing written statement contending, that the suit was barred by limitation and that there was no cause of action for filing the suit. The plaintiff was entitled to get compensation @ USD 20.00 per Kg. on the declared weight of the goods. It was not entitled to get its claimed amount, which was calculated on the basis the alleged price of the goods since the plaintiff did not declare the price of the goods at the time of booking. The plaintiff was abide by the terms and conditions of the contract laid down in Air-way bill and also as per the provisions of the Carriage by Air (International Convention) Act, 1966.

4. The trial Court, on consideration of the evidence on record, dismissed the suit. The plaintiff preferred First Appeal in the High Court Division. The High Court Division, by the impugned judgment and decree, allowed the appeal upon setting aside the judgment and decree of the trial Court and decreed the suit for a sum of Tk.21,19,917.60/- together with interest @ 8% per annum. Thus, the defendant-appellant has preferred this appeal getting leave.

5. Mr. Kamal-Ul-Alam, learned Senior Counsel appearing for the appellants, submits that the instant suit was barred by limitation in view of Rule 29 of the First Schedule of the Carriage by Air (International Convention) Act, 1966, the High Court Division erred in law in decreeing the suit. He submits that the High Court Division erred in law in drawing conclusion that the rate of USD 20/- per kg. as stipulated in the Airway bill would vary with market price of gold prevailing at the relevant time inasmuch as in view of the contract of carriage contained in the Airway bill if the goods were lost, the carrier's liability would not exceed USD 20/- per kg. and that the said rate of USD 20/- per Kg. was based on USD 42.22 per ounce of gold and no market rate of gold otherwise than the rate stipulated in the Airway bill could be applied in calculating the compensation payable to the respondent.

6. It appears from the pleading and evidence on record that plaintiff-respondent booked 9 cartons of spare parts of watch weighed 322 Kg. through BG Flight No.079, Biman Bangladesh Airlines vide Air-way Bill No.997-8632-1653 dated 22.01.1999 from Hongkong. After arrival of the Biman on 22.01.1999, the plaintiff sent its representative on 24.01.1999 to

collect the said goods from cargo office of the Airport but related office informed the representative of the plaintiff that the goods booked had not yet been reached in Airport. On 15.02.1999, the plaintiff wrote a letter to the Manager of Biman to get delivery of imported goods and the Assistant Manager of Airport Terminal intimated the plaintiff by a letter dated 18.02.1999 that the booked goods had not been reached. On 24.02.1999, Airport authority intimated the plaintiff that the imported goods were loaded in B.G. 079 dated 22.01.1999 vide flight pallet No.PAJ 9588 but those had not been reached in the Airport. In the plaint, the plaintiff admitted that on 18.02.1999 the Biman authority, in writing, intimated the plaintiff that the goods had not been reached in Dhaka. The plaintiff further stated, *"Bnvi DË‡i wegvb KZ¢¶ ev`x dvg‡K Zv‡`i 24-2-1999Bs Zwi‡Li c‡Îi gva¨‡g Rvbvb †h D‡jwLZ †gwb‡dó Abyhvqx †`Lv hvq †h weR-079/22-1-99Bs Zwi‡Li dvB‡U c¨v‡jU bs wcG‡R 9588 weR G‡Z gvj¸wj †jvW Kiv nBqv‡Q Ges H c¨v‡jUUv XvKvq †cŠ‡Q‡Q Z‡e gvjvgvj¸wj XvKvq †cŠ‡Q bvB|* " The period of limitation for claiming damages has been provided in Rule 29 of the First Schedule of the Carriage by Air (International Convention) Act, 1966 (the Act), which runs as follows:

> 29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

7. As per terms of the Contract, that is, the Air-way bill as well as Rule 29 quoted above, it appears to us that the limitation for right to get damages would be extinguished if no action is taken within 2 years from the date of arrival at the destination or from the date on which the air craft ought to have arrived, or from the date on which the carriage stopped. The High Court Division held that the date on which the carriage stopped was in the instant case the date on which the defendant admitted its failure to deliver the goods finally and offered payment of compensation in lieu of the goods. Rule 13(3) of schedule B of the First schedule of the Act provides that if the carrier admits the loss of the goods or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage. In view of specific provision of Rule 13(3) it was immaterial that the defendant purportedly admitted the loss of the goods on 19.08.1999 and offered the plaintiff compensation in lieu thereof since the time for limitation began to run from the expiry of 7 days after the date on which the goods ought to have arrived, i.e. on 22.01.1999. From the materials on record of this case, it appears that the goods "ought to have arrived" on 22.01.1999 and the carrier through which the goods was supposed to be carried to the destination arrived as per schedule on 22.01.1999. The instant suit has been filed on 24.05.2001. The High Court Division held that the date on which the carriage stopped provided in Rule 29 of First Schedule of the Act corresponding to clause 12.3 of the Airway Bill mean "refusal by the carrier or its agent to deliver the goods" inasmuch as the term 'the date on which the carriage stopped' is to be interpreted as the date when in normal course of event the goods arrived. The contract of carriage seized to exist and the goods are actually delivered to the consignee whereby the carrier is no longer 'in charge' of the actual custody and control of the goods within the meaning of Rule 18 of the First Schedule of the Act. In the instant case since good never 'arrived at the destination' there being no actual delivery thereon to the respondent, it be said that there was a date when the carriage stopped. The High Court Division committed an error of law in holding that the date on which carriage stopped was the date on which the carrier defendants admitted its failure to deliver its goods finally and offered payment of compensation in lieu of the goods. The time for limitation began to run from the expiry of 7 days after the date on which the goods ought to have arrived, that is, on 22.01.1999. Since the suit was filed on 24.05.2001 apparently the same was barred by limitation in view of special limitation provided in Rule 29 of the first schedule

of the Carriage by Air (International Convention) Act, 1966 read with section 29 of the Limitation Act.

8. Since the suit was barred by limitation, though the defendants admitted the damage caused and offered compensation in view of terms of contract, that is, terms of Airway-bill, we are of the view that it is unnecessary to discuss the second point raised the Mr. Alam.

9. Accordingly, the appeal is allowed. The judgment and decree of the High Court Division is hereby set aside.