

(1959) 03 CAL CK 0007
In the Calcutta High Court
Case No : A.F.A.D. No. 1167 of 1953

Agarwalla Air Transport

APPELLANT

Vs

Md. Nasratulla and Another

RESPONDENT

Date of Decision : 11-03-1959

Acts Referred:

Carriage by Air Act, 1972 — Section 4
Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 161

Citation : AIR 1959 Cal 755

Hon'ble Judges : S.K. Sen, J

Bench : Single Bench

Advocate : Bankim Chandra Dutta and Bhabani Sankar Bagchi, for the Appellant; Monomohan Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Sen, J.—This second appeal is by the defendant viz. Messrs. Agarwalla Air Transport. The plaintiff Md. Nasratulla who carries on business at Bharat Shoe Stores at Chawk Bazar, Darjeeling, instituted the suit for recovery of Rs. 1,850-8-0 as compensation on account of non-delivery of a parcel of leather goods consigned for carrying by Air to the defendant Company. This claim included Rs. 404/- claimed as interest and damages, while the value of the leather goods and freight paid came to Rs. 1,448-8-0, according to the case of the plaintiff.

2. Defendant No. 1 company filed written statement and contested the suit, denying that the value of goods consigned to the defendant company for Air carriage from Calcutta to Darjeeling was Rs. 1,446-8-0 including the freight. According to the defendant company, the value could not exceed Rs. 200/-, and the consignment which weighed only 66 Ibs. could not possibly include leather goods worth Rs. 1,446-8-0 and the claim of the plaintiff was grossly inflated. The defendant company also stated that though the goods were made over to the

defendant company for Air carriage, the goods could not be delivered to the consignee due to unavoidable circumstance.

3. The learned Subordinate Judge who tried the suit held on the evidence that the value of the goods in the consignment was Rs. 1,416-8-0 and that freight and other incidental charges came to Rs. 30/- and therefore the plaintiff was entitled to recover Rs. 1,446-8-0. According to the case of the plaintiff the leather goods were purchased from a Chinese merchant Mr. Chung of Chunking Shoe Stores of Calcutta, and out of price of the goods, Rs. 1,314-8-0 was paid in cash to Mr. Chung at Calcutta and a receipt obtained for the payment, and for the balance of Rs. 132/- the Air consignment note was sent to the Darjeeling Branch of the Comilla Banking Corporation, and the Air consignment note was cleared from the Bank by the plaintiff by paying the sum of Rs. 132/- and thereupon the consignment note was endorsed in favour of the plaintiff. The payment of the cash money at Calcutta was challenged strenuously by the defendant company. But on the evidence the learned Subordinate Judge accepted the plaintiffs case on the point as sufficiently proved and therefore the learned Subordinate Judge decreed the suit for Rs. 1,446-8-0, disallowing the claim of Rs. 404/- on account of interest and damages. The suit was decreed with proportionate costs.

4. The defendant company filed an appeal which was heard by the learned District Judge, Darjeeling. The learned District Judge agreed with the findings of the learned Subordinate Judge and therefore dismissed the appeal. There was a cross-objection by the plaintiff in respect of the damages disallowed, but the cross-objection was also dismissed by the learned District Judge.

5. The defendant company has filed this second appeal. Mr. Bankim Chandra Dutta appearing for the appellant has urged that the Courts below failed to take into account the express terms of the contract of carriage as contained in the Inland Consignment Note (Ext. 1) and that if the terms of contract of the carriage are taken into consideration it must be held that the defendant Company has no liability at all. Mr. Dutta has next urged that under Rule 22 (2) of the first schedule of the Indian Carriage by Air Act, 1934, the liability of the carrier of goods by air must be limited to the equivalent of 250 francs per Kilogram, in the absence of a declaration of value at the time of booking by the consignor, and as there was no such declaration, the compensation allowed must be limited in accordance with the terms of the Rule. Finally Mr. Dutta has urged that plaintiff did not acquire title by endorsement by the Comilla Banking Corporation in favour of the plaintiff on the Air consignment Note and that the plaintiff was not entitled to maintain the suit.

6. The last point can be disposed of easily. On the evidence accepted by both the Courts below, the plaintiff was the consignee of the parcel of leather goods, and he paid in full for the consignment, partly in cash at Calcutta through his agent and partly in clearing the Air consignment Note from the Bank in Darjeeling. Thus the plaintiff based his claim not merely on the endorsement on the Air

consignment Note but on the fact that he was in fact the party entitled to the consignment of leather goods. Accordingly there is no substance in this point urged.

7. As regards the first point urged by Mr. Dutta, Clause 1 of the conditions of carriage printed at the foot of the consignment note is as follows :

"All freights are accepted subject to our conditions of carriage which are exhibited in full and available at any of our offices."

8. The second Clause is the most important Clause and runs as follows :

"The carriage of freight is arranged on the condition that the carrier shall be exempt from any liability whatsoever under the law whether to the sender or to the consignee or legal representative thereof, in case of damage or loss, pilferage or detention, from any cause whatsoever (including accidents, negligence or default of pilots, agents, flying, ground or other staff, or employees of the carriers and breach of statutory or other regulation) whether in course of journey or prior or subsequent thereto, or whether while the freight be on board the aircraft or elsewhere, and all sorts of causes due to the act of nature."

9. Mr. Dutta has strenuously urged that in view of this condition which was accepted by the consignor, the consignor or the consignee cannot claim any compensation for the non-delivery of the parcel of leather goods. Mr. Dutta has urged that this clause gives complete exemption from any liability whatever to the carrier; and in this connection Mr. Dutta has urged that by a special contract of carriage in the absence of statutory provisions to the contrary, a carrier may protect himself completely against liability for loss or damage during transit. In this connection Mr. Dutta has referred to "The Law of the Air" by Sir Arnold Duncan McNair, second edition, at pp. 168-169 "if however, the language (of the contract of carriage) is clear and unambiguous, the carrier may escape completely"; and again "that a carrier can only effectively protect himself against liability from the consequences of the negligence or other mis-conduct of himself or his servants by unambiguous language, has become better defined as the result of a number of "cases." The question is whether in the present case, Clause 2 of the conditions of carriage on which Mr. Dutta relies, gives complete exemption in unambiguous language for non-delivery of goods consigned to the Air Company for carriage. The clause in terms gives exemption from liability in case of damage or loss, pilferage or detention. In this case we are not concerned with damage, pilferage or detention. The word "loss" as used in the clause cannot be interpreted as loss to the consignor or consignee i.e. as equivalent to non-delivery, but must mean loss to the carrier company itself. In other words, this clause comes into operation when the goods are lost by the Air Company, from any cause whatsoever, whether as a result of some fault of the Pilot or some fault of the ground staff or by an act of nature. That loss means loss to the Carrier Company has been held in a long series of decisions concerning the liability of Railway Companies. Among other cases, I may refer to E.I. Ry. Co. Vs.

Janakidas Marwari and Another, and East Indian Railway Co. Vs. Jogpat Singh, . I may refer also to the cases Gopiram Bihariram v. Agents, E. I. Rly. Co. and O and R. Rly. Co., 30 Cal WN 209: (AIR 1926 Cal 61) and G.I.P. Ry. Co. Ltd. Vs. Jesraj Patwari and Others, in both of which it was repeated that the term "loss" as used in Risk notes and Section 72 of the Indian Railways Act meant loss of the goods to the Company and not to the consignor; and it was held that in a suit for compensation for non-delivery of goods, the Railway Company must first prove the loss of the goods by the Company, and on such proof the onus will shift back to the plaintiff to prove negligence of the Railway Company or its servants. Interpreting the word "loss" as loss to the Carrier Company, it must be held that in such a case as the present one, for compensation for non-delivery of a parcel of goods entrusted to the Carrier Company, the Carrier Company must first prove loss of the parcel by itself, and unless that is done it cannot claim exemption. Once loss by the Carrier Company is proved, then in view of the terms of Clause 2 quoted above, even if the plaintiff were to show that the loss was due to negligence of the pilot or ground staff or agent, the Carrier Company would be exempt from liability. There would however, be no exemption if there was a proof of misconduct. In the present case however, the Carrier Company did not prove that the consignment was lost to it in the course of carriage. In the written statement the defendant Company stated that the goods could not be delivered due to certain unavoidable circumstances. In the evidence no attempt was made to show whether the parcel had really been lost to the Company. Only one witness was examined for the defendant and he merely stated that the value of the leather goods contained in the parcel weighing only 66 lbs. could never exceed Rs. 200/-. He did not explain at all why the parcel could not be delivered. In the circumstance I must hold that in the present case the claim for compensation for non-delivery cannot be met by pleading exemption under Clause 2 quoted above. In Fact the defendant Company never took the defence of complete exemption from liability. It only took the defence that the loss to the plaintiff could not exceed Rs. 200/-. Moreover, it appears that the defendant Company, without modifying Clause 2, subsequently added other conditions by Clauses 5 and 6 which appear not in the consignment note in suit, Ext. 1, but in a sample consignment note which was produced in Court by the defendant Company and is on the record. Clause 6 provides that unless otherwise declared the value of the goods shall be RS. 1-4-0 per lb.; in other words in the absence of a declaration to the contrary the maximum compensation that a consignor or consignee can get for non-delivery of the parcel is Rs. 1-4-0 per lb. of the total weight of the parcel. The defendant Company cannot in the present suit get the benefit of this clause, because this clause does not appear in the consignment note Ext. 1; but the fact that such a clause has been subsequently added as one of the conditions of carriage would indicate that defendant Company does not claim absolute exemption from liability by Clause 2 on which Mr. Dutta has relied.

10. Further, the carrier as bailee has statutory liability under the general law, viz. Indian Contract Act, for non-delivery of goods entrusted to it for carriage. Since

in my view Clause 2 of the conditions of carriage does not confer complete exemption and in the case of non-delivery, it was for the defendant Company to show that the consignment was really lost to it on account of some reason or other and there is no such evidence in the present case, I must hold that the appellant cannot claim exemption in the present case.

11. Finally, there is the question whether under Rule 22 (2) of the First Schedule of the Indian Carriage by Air Act, 1934, the amount for compensation may be limited to the equivalent of 250 francs per Kilogram of the total weight of the parcel. The Indian Carriage by Air Act, 1934 was enacted by the Indian Legislature in 1934 to give effect to a Convention for adopting certain uniform rules relating to compensation for death or injury of passengers and loss or damage to goods in the course of international carriage by Air. The first rule of the First Schedule is that the rules apply to all international carriage of persons, luggage or goods. The Act does not apply of its own force to internal or non-international carriage of persons luggage or goods, but by Section 4 of the Act, the Central Government is given authority to issue notification applying the rules in the first Schedule to internal carriage by Air. Mr. Dutta has been unable to show that any such notification u/s 4 of the Act applying the rules of the First Schedule of the Act to internal carriage by air has been issued by Central Government of India. In fact, the copy of the Indian Aircraft Manual, corrected up to 1-6-1952, which he has produced does not contain references to any such notification. In the circumstances I must hold that the appellant cannot have the benefit of R. 22 (2) of the First Schedule of the Indian Carriage by Air Act. 1934.

12. As regards the quantum of loss suffered by the plaintiff, in other words as regards the value of the parcel of leather goods, it is no doubt somewhat peculiar that out of the total value of the goods, as much as Rs. 1314-8-0 should have been paid in advance in Calcutta and the air consignment note should have been sent to the Bank for clearance only for the balance of Rs. 132/-. But on this point the Chinese seller of Chunking Shoe Stores supported the case of the plaintiff, and this case was accepted by both the Courts below and therefore this finding being a finding of fact cannot be challenged in second appeal. In the circumstances this appeal is dismissed, but there will be no order for costs in this Court.