

(1964) 03 CAL CK 0030
In the Calcutta High Court
Case No : Second Appeal No. 562 of 1956

Air Carrying Corporation

APPELLANT

Vs

Shibendra Nath Bhattacharya

RESPONDENT

Date of Decision : 25-03-1964

Acts Referred:

Constitution of India, 1950 — Article 372(1)
Contract Act, 1872 — Section 151, 152

Citation : AIR 1964 Cal 396

Hon'ble Judges : D. Basu, J;B.N. Banerjee, J

Bench : Division Bench

Advocate : Bankim Ch. Banerjee and Ganganarayan Chandra, for the Appellant;
Sudhansu Bhusan Sen and Hemesh Ch. Sen, for the Respondent

Final Decision : Allowed

Judgement

D. Basu, J.—This second appeal is directed against a decree of the learned Distant Judge of Darjeeling by which he affirmed the decree of the learned Subordinate Judge awarding Rs. 1170/- as damages on account of the loss of a consignment of a tea booked by the plaintiff-respondent for carriage by the defendant-appellant, the Air Carrying Corporation, from Darjeeling to Calcutta.

2. The plaintiff's case was that the defendant Corporation failed to deliver the goods at their destination, on account of its negligence. The defence was that the loss was due to an act of God, or the accidental destruction of the air-craft by which the goods were being transported. It is the concurrent finding of both the Courts below that the loss of the plaintiff's goods has been occasioned by the negligence of the defendant Corporation and not an act of God, and the learned Advocate for the defendant-appellant has confined his argument to a question of law, namely, that even assuming that the loss of the goods was due to the negligence of the Corporation, it was not liable in view of the special contract, to wit, the terms of note 2 to the consignment from subscribed by the plaintiff, which exempted the defendant Corporation from any liability for the loss of the

goods, whether due to accident, negligence or any other cause. This question of law was agitated before the court of appeal below but was rejected on the ground that Sections 151 and 152 of the Contract Act governed the liabilities of the defendant-Corporation and that even if the consignment form purported to contract out of the statutory liability laid down by the aforesaid provisions of the Contract Act, such contract, was invalid and inoperative.

3. On this question of law, however, there is a Division Bench ruling by my learned brother sitting with Niyogi, J., to the effect that the liability of a common carrier by air, other than an international carrier, is governed, in India, not by any of the statutes in force, such as the Carriers' Act, 1865, the Indian Carriage by Air Act, 1934, or the Indian Contract Act, 1872, but by the Common Law of England which acknowledged that a common carrier might exempt himself from liability by a special contract and that by such special contract even liability due to negligence could be excepted : Indian Airlines Corporation Vs. Keshavlal F. Gandhi and Another, .

4. Learned Advocate for the respondent has not been able to lay his hands on any authority contrary to this Division Bench decision, save that of a Single Judge of this Court, P. C. Mallick, J., in Sm. Mukul Dutta Gupta and Others Vs. Indian Airlines Corporation, . Before we go into the question in any further details, it may be said at once that the Singh Judge's decision is not binding on this Bench and since we are convinced that the Division Bench has correctly stated the law as it exists today, we might have disposed of the appeal before us, without more.

5. But since it is evident from the authorities referred to in the Division Bench case that the present State of the law in India is a result of legislative accidents and that the resultant position is anomalous, calling for suitable legislation, we consider it necessary to analyse the existing state of the law relating to the subject. At this hour of the day, little authority is required for the proposition that at the beginning of the British Administration in India, it was the English Common Law which governed, in the main, the rights of parties before the Courts.

(a) So far as the settlements of the East India Company, which later developed into the Presidency-towns, were concerned, the position was simple, because the British people claim it as their proud privilege a right to carry their law along with their Flag wherever they go and settle on the face of the earth. The Indian Chief, (1801) 3 Ch, Rob. 12 and, in India, this law came to be extended even to the local inhabitants of these territories because to the English Judges of the Mayors' Courts (established in the Presidency towns by the Letters Patent of 1729), who were directed to give judgment "according to justice and right", "justice and right" meant the rules of English law. In 1863, therefore, the Judicial Committee had no hesitation in holding, Advocate-Central v. Ranee Surnomoyee Dossee, 9 Moo Ind App 387 (426-7)(PC), that "the English law, both civil and criminal, has been usually considered to have been made applicable to the Natives, within the

limits of Calcutta in the year 1726, by the Charter, 13th Geo. I."

(b) But the position in the territories outside the Presidency towns was not so simple. These were not establishments set up by British traders, but the realm of the Moghul Emperor. In 1785 the administration of these territories came over to the East India Company, by the grant of the Dewani, along with an indigenous system of Courts administering Indian law. And yet the English law entered through the back-door into these territories as well. Shortly after Warren Hastings substituted these indigenous Courts by the Courts of the Company, two principles came to be established, through various regulations and statutes, which may be expressed best in the language of a much later enactment, namely, section 37 of the Bengal Agra and Assam Civil Courts Act of 1857, which still governs the jurisdiction of the civil Courts of this State outside the Presidency town of Calcutta. These principles are -

(a) that in matters personal, such as succession, inheritance, marriage and the like, the law applicable is the personal law of that party;

(b) that in other matters, the Court shall act according to "justice, equity and good conscience." Explaining this latter expression in 1837, the Judicial Committee observed, *Waghela v. Masluddin*, 14 Ind App 89(96) (PC), that it meant the rules of English law if found applicable to Indian society and circumstances.

6. In matters outside the sphere of personal law, thus the basic law applicable throughout British India was the English common law, the areas outside the Presidency towns being distinguished by the slender thread that the Courts had the liberty of discarding a rule of common law if it was repugnant to the local circumstances.

7. The subsequent development of the law in India has been one of gradual codification of the principles of English Common Law relating to various branches and, today, but for a few solitary instances, the entire realm of general law in India (i. e. relating to matters outside personal law), may be said to be codified. The matter before us, viz., the law of Carriage by internal air carriers is a curious example of the residue that has not yet been touched by legislation. Even after the adoption of the Codes, it has been acknowledged in India that in matters where a Code was silent or in places where a Code was not applicable, Courts in India would act according to the principles of English Common Law with this rider that the Courts had the freedom to differ from those principles where they were not consonant with the immutable principles of justice, equity and good conscience : *Watson v. Ramchand Dutt* ILR 18 Cal 10 ; *Namdeo Lokman Lodhi Vs. Narmadabai and Others*, .

8. In the process of codification, the law as to common carriers early received the attention of the Indian legislature, and in 1885 it was codified by enacting the Carriers" Act, 1865. It defined a "common carrier" as "a person, other than the Government, engaged in the business of transporting for hire property from

place to place, by land or inland navigation, for all persons indiscriminately", and laid down the principles and the extent of liability of such common carriers. It is evident that the defendant corporation, which carries on the business of transporting goods on hire for members of the public, would have come within the scope of this definition but for the fact that the definition is confined to transportation by land and inland navigation only and does not extend to air navigation. It is obvious that carriage by air was unknown at that time and, that is why, the Legislature provided for carriage by land and inland navigation only. It is a matter of accident that during the long lapse of one century the Act has not been extended to carriage by air, nor any suitable legislation has been undertaken to codify the principles of common law relating to inland common carriers by air.

9. In 1872, the Indian legislature codified the general law of contract in the Indian Contract Act. Chapter IX of this Act dealt with bailment and provided the principles of liability of a bailee. In section 148 of the Contract Act, a bailment is defined as "the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee." There is no doubt that the foregoing definition of bailment is wide enough to include a bailment for carriage, and a carrier by air on hire would be a bailee. One might expect, therefore, that carriage by air, not being included in the special statute, viz., the Carriers' Act, 1865, would be governed by the provisions of Chapter IX of the Contract Act. But in 1891, when the question of liability of a carrier by sea came up before the Privy Council, it was held by their Lordships in *Irrawady Flotilla Co. v. Bhugwandas*, 11 L R 18 Cal 820 that the entire law as to common carriers was excluded from the scope of the Contract Act of 1872. The reasoning of the Judicial Committee was that "the subject of common carriers, having been dealt with by a special statute, was not intended to be affected by the general law of contracts, embodied in the Contract Act, 1872, which was not exhaustive of the entire law relating to contracts and did not profess to repeal the Carriers Act of 1865. The result of this decision is clear, viz., that if a common carrier carries its business on land or inland waters, it is governed by the special enactment, viz., the Carriers' Act, 1865, but if it carries on business by air or by sea, it would not be governed by the provisions of the Contract Act, but by the rules of English Common Law until any special legislation to govern the rights and liabilities of such carriers is undertaken by the Legislature. The law relating to carriage of goods by sea from one port in India to any other port, whether in or outside India, has, in fact, been subsequently codified in the Indian Carriage of Goods by Sea Act, 1925. Even carriage by air has been dealt with by the Indian Carriage by Air Act, 1934; but this Act is confined to international carriage by air and does not profess to deal with internal carriers of air-craft flying within the territories of India.

10. The logical result of this history of legislation is that common carriers by air,

who carry on their business within the territory of India, are not governed by the provisions of the Indian Contract Act of 1872, or of the Carriers' Act, 1885, or the Indian Carriage by Air Act, 1934, but are left in the same position as all common carriers were prior to 1885, viz., that they are to be governed by the rules of English Common Law. In applying Sections 151-152 of the Contract Act, therefore, the Courts below were clearly wrong and acted in disregard of the Privy Council decision in the Irrawady Flotilla case. ILR 18 Cal 620) (ibid).

11. The specific question before us is whether the defendant corporation could contract out of their liability for damage caused by negligence. Were the question to be governed by the provisions of any of the Acts just mentioned, the answer would clearly have been in the negative.

12. But, under the rules of English Common Law, the answer must be in the affirmative. As explained by the House of Lords in *Peek v. North Staffordshire*, (1863) 10 H L C 473 and by the Privy Council in *Alfred William Luddit v. Cinger Coote Airways* AIR 1947 P C 151 at common law, a common carrier was an insurer of the goods which he had undertaken to carry for hire, but he could limit his stringent obligations by special contract. This absolute freedom to contract out of liability has, however, been disliked by the Legislature and has been controlled by statutes such as the Railway and Canal Traffic Act, 1854, the Carriage by Air Act, 1932.

13. Since the common law relating to inland carriage by air has not been modified by any statute in India, it follows that the absolute freedom of the carrier to contract out of his liability even in cases of negligence remains and this is the view taken by the Division Bench presided over by my learned brother in the case reported in the *Indian Airlines Corporation Vs. Keshavlal F. Gandhi and Another*, and in a series of previous decisions of this Court.

14. In a territory outside the Presidency-towns, however, there is an additional question to be answered, namely, whether the above rule of English common law is consonant with the principles of "justice, equity and good conscience". The case before Mallick J., in *Sm. Mukul Dutta Gupta and Others Vs. Indian Airlines Corporation*, , as well as the case before us relate to such territory. Apparently, there is force in the view taken by Mallick J. that such absolute freedom of a common carrier should not be imported into India in view of the fact that, in the United Kingdom itself, in exercise of the power conferred by the Carriage of Air Act, 1934, an Order in Council has been made, namely, the Carriage by Air (non international carriage) U. K. Order, 1952, under which the carrier has been debarred from contracting out of his liability in cases of negligence. That such a freedom was unreasonable and unsuitable to the conditions of this country was also the view of Sankaran Nair, J., in his minority judgment in *Sheik Mahamed v. British India Steam Navigation Co, Ltd.* ILR 32 Mad 95 but the view of Sankaran Nair, J., was not acceptable not only to the other two Judges in that case but also to the Division Bench which next considered this question, in *Kariadan Kumber v. British Indian Steam Navigation Co. Ltd.* ILR 38 Mad 941 : (AIR 1915 Mad 833).

Eventually, the view of Sankaran Nair J. has been expressly dissented from by a Division Bench of the Madras High Court in *British India Steam Navigation Co. Ltd. Vs. T.P. Sokkalal Ram Sait* by agent K.A. Hariganga Ram, , observing that "the consensus of authority" of this High Court as well as other High Court was to the contrary.

15. Having regard to this overwhelming consensus of authority referred to in the Madras case, just cited, and the Privy Council decision in the *Irrawaddy Flotilla* case ILR 18 Cal 620 (PC), we do not think it would be of any use to refer this question to a Full Bench in view of the lone observation of Mallick, J., though forceful. This is a case for legislative intervention and not for a judicial reversal of precedents which, as my learned brother has said, "has acquired the sanctity of *stare decisis*" *Ganges River Transport Vs. Reliance Jute and Industries Ltd. and Others*, . There is, besides, a practical aspect of the matter which also we cannot overlook. A reversal of this particular rule of the common law, that is, as to the freedom of the common carrier to contract out of his liability will not solve the problem because, if we enforce the rest of the common law, imposing upon the inland common carriers by air the absolute liability of an insurer, without introducing the limitations to this liability as have been laid down by statutes in the case of other common carriers, we would be causing injustice to the carriers of this class in order to relieve the other party to the contract. On the other hand, if the common law is wiped off, in its entirety, by a judicial verdict there would be no other law applicable to determine the liability of the internal carrier by air in India, so long as the Privy Council decision in the *Irrawaddy Flotilla* case I LR 18 Cal 620 (PC) (*ibid.*) stands ; for since the special statutes relating to carriers are clearly inapplicable to such carriers, the only law that could possibly be applied to them is the general law in the Contract Act, but that Act is inapplicable to common carriers, according to the Privy Council. This decision is binding on all Courts in India as the existing law, under Article 372(1) of the Constitution, except the Supreme Court, which alone is not bound by precedents and is competent to override it.

16. Even as to unreasonableness or the rules of English common law relating to common carriers of the residuary class, with Whom we have to deal in this case, Courts cannot fail to take cognisance of the fact that the Legislature has not intervened for a century and the Courts throughout India have been applying those rules. Even the Central Government, which had been given power, by Section 4 of the Indian Carriage by Air Act, 1934, to extend the provisions of that Act to non-international carriage by air, has not utilised that power, as in England. Nor would it be logical for the Courts to hold, today, that what is good law within the limits of the Presidency towns would be inequitable outside those areas, even though the historical conditions which demarcated the two parts of the country have long disappeared. The real solution is to replace the common law rules by an entire set of new rules, whatever that might be, and that is the task of the legislators, not the Judges.

17. A parallel instance may be of interest in this context. Even, as late as 1962, the Supreme Court painfully observed, *The State of Rajasthan Vs. Mst. Vidhyawati and Another*, that it was a pity that the maxim "King can do no wrong" was still applicable in the Republic of India as a heritage of English Common Law, even though Monarchical England had done away with it as regards tortious liability, by enacting the Crown Proceedings Act, 1947. But, at the same time, their Lordships had to add that it was for the Legislature in India to take up appropriate legislation, as contemplated by Article 300 of the Constitution, and that so long as that was not done, it was the duty of the Courts to apply that maxim as a part of the law which was applicable in the days of the East India Company.

18. The question before us is also one which requires legislative intervention) for reasons given earlier. In what lines such legislation shall be undertaken, e. g., whether the provisions of the Carriers' Act, 1865, should be extended to inland carriers by air or the general principles underlying the Contract Act should be extended to them by appropriate amendments, is one for the Legislature to determine. The executive may, as well, issue a notification u/s 4 of the Indian Carriage by Air Act, 1934, to extend the provisions of that Act to inland carriers by air, as has been done in the U. K.

19. But it is not for us to indicate the lines of legislation. It may be mentioned in this context that the Law Commission of India, while revising the Indian Contract Act, 1872, recommended that "laws relating to carriers should be codified and consolidated into one separate statute": Thirteenth Report of the Law Commission, para. 4. But no such codification has yet been made. I have discussed the matter at length only to point out the desirability if appropriate legislation relating to the rights and liabilities of common carriers running the business of non-international carriage by air, and I would direct a copy of this judgment to be forwarded to the Legislative department is the Ministry of Law, Government of India.

20. Subject to these observations, this appeal must be and is accordingly, allowed, and the plain-tiff-respondent's suit dismissed, but without any order as to costs.

Banerjee, J.

21. I have already expressed my views on the point of law involved in this matter in *Ganges River Transport Vs. Reliance Jute and Industries Ltd. and Others*, . Since my Lord has substantially agreed with that exposition of law with additional reasons of his own, I respectfully agree with the order made by my Lord.