

(1949) 03 PAT CK 0013
In the Patna High Court

Aish narayan Singhanian

APPELLANT

Vs

Governor-General of India in Council

RESPONDENT

Date of Decision : 01-03-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1890 — Section 77

Citation : AIR 1949 Patna 493

Judgement

1. This is an appeal by the plaintiff who is aggrieved by the decision of the learned Subordinate Judge of Purnea, dated 14th September 1943, by which he dismissed the suit instituted by the appellant for recovery of Rs. 45,000 as loss sustained owing to the neglect of the railway company in not delivering the goods entrusted to them for carriage in the following circumstances.

2. On 21st March 1942, under railway receipt covered by risk notes A and B, the plaintiff delivered certain machineries packed in 59 packages to the G.I.P. Railway Administration at Poona for carriage and delivery at Jogbani, a railway station on the Bengal Assam Railway, in the District of Purnea. The machineries in highly damaged condition and mostly reduced to scrap iron were offered for delivery by the railway at Jogbani to the plaintiff, but he refused to take the delivery. The plaintiff made a claim for compensation to the railway, and the usual correspondence ensued ending in the railway refusing to acknowledge the correctness of the claim. The plaintiff thereupon served the requisite notice u/s 80, Civil P.C., on 18th December 1942, and instituted the suit giving rise to this appeal on 20th May 1943.

3. The defence of the railway was that the packages could not be loaded in a covered wagon, and an open wagon had to be used, that the packages were put in N.W.R. open wagon No. 41051 and despatched from Poona on 21st March 1942, that on 26th March 1942, at about 23.40 hours when the goods train to which the wagon was attached was running between Jukehi and Amdara Railway Stations, situated on the Jubbulpore-Allahabad section of the G.I.P. Railway, fire was noticed in that wagon which was fourth from the engine. Thereupon the

driver and the guard immediately stopped the train and tried their utmost to put off the fire, but the fire could not be controlled. Finding that there was an oil wagon behind this wagon, the first four wagons were detached from the main train and taken by the engine to Amdara, the nearest railway station, and on its arrival there the wagon was detached on the main line and the engine water was used to put out the fire, but the fire could not be controlled as the flames were running high, notwithstanding the efforts of the railway staff who took out water in buckets also from the railway well and threw ashes and earth on the burning wagon, but the fire went on burning with the result that the goods had become damaged; the wagon was detached and kept on a siding, and after it was examined by the carriage examiner the contents were transhipped into another wagon, and thereafter it was sent on to Allahabad where these were transhipped into metre gauge wagons, and these reached Jogbani railway station on 26th April 1942. The goods when received were unloaded and kept in that condition in the goods shed, and the delivery was offered to the plaintiff, but the consignee refused to take the delivery. These facts were pleaded to show that the railway company did their utmost to put out the fire which was beyond their control, and being covered by risk notes A and B, the railway company is free from liability. It was also pleaded that the plaintiff has exaggerated the value of the Dobson and Barlow ring frames contained in the packages and that the amount of damages is exorbitant.

4. The railway company also took the objection that the notice: u/s 80, Civil P.C., was not valid and the suit was not instituted before the expiry of two months from the date of its service and further that the notice u/s 77, Railways Act was not served.

5. The learned Subordinate Judge held that (1) the notice u/s 80, Civil P.C. was duly given and the suit was instituted after the expiry of the period of two months; (2) the letter from the Chief Commercial Manager of the B.A. Railway (EX. 11) in reply to a letter of claims sent on behalf of the plaintiff fulfils the requirements of law, and therefore, it must be inferred that the notice u/s 77, Railways Act was served in the manner required by Section 140; (3) the price of the goods in suit including the monetary value of the damage sustained by the plaintiff in consequence of the non-delivery is Rs. 22,000; (4) the means available to the station staff and taken recourse to by them for extinguishing or controlling the fire were limited and inadequate, but the railway servants are not guilty of any misconduct or wilful neglect, and there is no proof of any misconduct of the railway administration. In the result, the suit was dismissed. Hence, the appeal by the plaintiff.

6. When the learned advocate for the appellant opened this appeal, he submitted that the only question in this case was as to whether the railway was protected by risk notes A and B, and whether in the circumstances, the railway company was liable to pay damages to the plaintiff, and that he would establish on the evidence that the railway administration and the railway staff were guilty of

neglect and misconduct. In case, he succeeded to establish these facts, the appeal must be decreed as he was content to accept the finding of the Subordinate Judge as to the extent of the damages. On that date the learned advocate for the Railway agreed that this was the only question which was in controversy in this appeal; but later on after the appeal was adjourned for reason stated in the order-sheet the learned advocate for the Railway insisted that he was entitled to show that the amount of damages claimed was excessive. As the amount involved was substantial, we thought it fit to hear the arguments on the question of quantum of damages also, and did not think it proper to force the advocate to be bound by his admission made on the first date.

7. No other question was argued before us either on behalf of the appellant or on behalf of the respondent; that is to say, the findings of the Subordinate Judge on the validity of service of notice u/s 80, Civil P.C., and under Sections 77 and 140, Railways Act were not challenged before us.

8. It is well to dispose of the first argument on behalf of the Railway that the amount of damages fixed by the learned Subordinate Judge is excessive this was the first finding of the Subordinate Judge under issues Nos. 5 and 6.

9. No objection was taken before us that the learned Judge correctly came to the conclusion at page 61 that the plaintiff's case as to the contents of the 59 packages of machineries, as stated in Schedule A of the plaint, is correct and should be accepted. This finding is supported by good evidence referred to by the learned Subordinate Judge and must be affirmed.

10. The evidence relating to the value of the machineries was not printed because the appellant was content with the finding of the Subordinate Judge. As the learned advocate for the Railway objected to this finding, the appeal was also adjourned to supply us with typed copy of the paper book containing the relevant evidence. Having perused that evidence we are satisfied that the learned Subordinate Judge has come to a correct conclusion. (Their Lordships, after discussing the evidence as to the value of the machineries, affirmed the finding of the Subordinate Judge that if the plaintiff succeeds he would be entitled to a decree of Rs. 22,000 and proceeded):

11. The question which then remains to consider is an important question as to whether the Railway is at all liable by reason of their having, failed to take adequate steps to put out the fire. Having considered the evidence, we are of the opinion that the railway staff made some perfunctory efforts to put out the fire, but they are not seriously to blame because they were handicapped in not having sufficient means at that control at Amdara railway station to effectively-put out the fire. (Their Lordships after discussing the evidence, proceeded:)

12. The result of the examination of the evidence forces us to reach the conclusion that the-railway staff at Amdara did not make any serious attempt to put out the fire because the flames had reached so high that the means at their disposal were wholly inadequate for them to control the fire.

13. The question, however, is whether in these circumstances the railway is protected by risk notes A and B, and when they have not taken the trouble to get risk note C executed by the plaintiff.

14. It was conceded before us, and indeed it is obvious from the evidence, that the destruction of the goods by fire would not have happened if the consignment was not carried in an open wagon. In the present case the Railway carried the goods in an open wagon because some of the packages were so heavy that a crane had to be used for loading them; but the packages were packed in wooden crates and were liable to damage when so carried. It is said that this was done at the request of the sender; but in order to protect themselves from liability for the loss or destruction of goods arising from being conveyed in an open wagon, Section 72(2)(b), Railways Act provides for an agreement in the form of risk note c which is to be used as stated in the form itself:

When at sender's request open wagons, carts or boats are used for the conveyance of goods liable to damage when so carried, and which, under other circumstances, would be carried, in covered wagons, carts or boats.

It is not questioned that the goods packed in wooden crates will not ordinarily be carried in open wagon, and the Railway is not expected to carry them in open wagons merely because a crane has to be used to lift them into the wagons unless it is done at the request of the consignor. It was the look-out of the Railway, in these circumstances, to have taken an agreement in the term of risk note 0. The result is that in respect of the destruction of the goods owing to the risk incidental to their being carried in open wagons, the responsibility of the Company at once arises as a bailee u/s 151, Contract Act, being not limited by any agreement. In these circumstances, the railway took upon themselves the responsibility for safe carriage of the goods and the onus is on them that they were not liable for the loss of goods by fire.

15. It is true that they could escape the responsibility by proving that they took as much care of the goods consigned to them and carried in an open wagon as a man of ordinary prudence would have done under similar circumstances with regard to his own goods. (The railway is undoubtedly protected by risk notes A and B to the extent that the goods have been destroyed from causes other than from being conveyed in an open wagon.) In our opinion, the railway have failed to discharge this onus because the only evidence which they have produced has been discussed by me above which shows that they made some sort of efforts to put out the fire when the wagon reached Amdara railway station. It was strenuously argued by Mr. N.C. Ghosh that when the railway did not have sufficient appliances at Amdara they cannot be blamed if they made only perfunctory efforts to put out the fire because they could not have used any greater efforts. This would have been a good answer if the situation was covered by risk notes A and B. But in the present case it is no answer to the destruction of the goods by fire that the company did not have sufficient appliances at their disposal at Amdara railway station. Their failure to have the risk note 0 executed

throws upon them the responsibility as the bailee.

16. In the case of *Ralliarum Dingra v. Governor-General of India in Council* AIR 1946 Cal. 249, the railway escaped the liability for the destruction of the consignment which was carried in an open wagon because they had taken the precaution to have risk note C executed. In that case, as is the present case, the cause of the fire was assumed to be the sparks from the engine. In these, circumstances, it was argued there that risk note C did not exempt the railway from liability for negligence or misconduct as no reference is made to such exemption in risk note C. It was held that risk note 0 exempted the railway from losses occasioned by the negligence or misconduct of their servants but only to a limited extent, namely to the loss which might arise by reason of the consignment being carried in an open wagon. That decision clearly shows that if the risk note G had not been taken, the railway would have been liable for the loss of the merry-goround which was destroyed as a result of the fire because it was being carried in an open wagon. The view of the learned Subordinate Judge that the absence of the risk note c in the present case did not distinguish it from *Ralliarum's* case AIR 1946 Cal. 249, is not correct. In our opinion, if the risk note c is not taken and the goods are carried in open wagons and then destroyed by] fire from the engine in course of the transit, all that the plaintiff need prove for making the railway company liable in spite of the consignment being covered by risk notes A and B is (1) that the goods in question were liable to damage when carried in an open wagon; (2) that they would have been normally carried in a covered, wagon; and (3) that the damage or destruction of the goods was due to the consignment being carried in an open wagon. In such cases it is no defence for the railway to urge and to prove that the goods were carried at the request of the sender.

17. Upon the facts found in the present case, it must be held that the goods were carried; at the risk and responsibility of the railway and not at the risk of the plaintiff, and the plaintiff never agreed to hold the railway harmless and free from all responsibility for the losses arising. from fire due to the goods being carried in an. open wagon. It was suggested by Mr. Sarjoo Prasad for the plaintiff that in these circumstances the railway should have taken the pre. caution to cover the goods by tarpaulin, as is the practice when the goods are carried in open truck, or that the railway should have provided the goods train with fire extinguisher, or taken other means to see that such goods are not destroyed by fire in course of the transit. But it is not necessary for us to suggest what precaution the railway should have taken. It is enough to hold that the railway is responsible for the destruction of the goods by fire in the circumstances found above. In this view of the matter, the cases cited at length at the bar to show what constitutes misconduct need not be considered because they are all cases which are covered by risk notes A and B and have not dealt with the position which arises in the present case due to the absence of the execution of risk note C by the consignor.

18. To conclude, we are satisfied that in the present case the plaintiff has discharged the onus which was upon him, and the railway administration has not discharged the onus which was upon them, because (1) the machineries were packed in wooden crates and carried in an open wagon, (2) they were liable to damage when so carried; (3) these packages, even though they were heavy, could have been loaded in a closed wagon; (4) if they could not be loaded in a closed wagon, then the consignor should have been asked to execute risk note C; (5) they were destroyed by fire because they had been conveyed in an open wagon; (6) the railway servants at Amdara railway station did not have sufficient means at their disposal to put out the fire or they made only some perfunctory efforts to put out the fire. It is not the case of the railway that there was not sufficient water in the well which could have put out the fire.

19. The result is that the appeal must be allowed, the decision of the learned Subordinate Judge set aside and the plaintiff is entitled to a decree for Rs. 22,000. The plaintiff is also entitled to costs in proportion to his success of the trial Court and of this Court.