

(1924) 07 CAL CK 0045
In the Calcutta High Court

Arjun Das Nariram Agarwalla Firm

APPELLANT

Vs

The Secretary of State

RESPONDENT

Date of Decision : 15-07-1924

Acts Referred:

Contract Act, 1872 — Section 151, 161
Railways Act, 1890 — Section 72, 76

Citation : AIR 1925 Cal 737

Judgement

1. This was a suit by the plaintiff against the Secretary of State for India as owner of the Eastern Bengal Railway for damages for late delivery of a bale of cloth. The case for the plaintiff is that he booked 9 bales of cloth on 21st September, 1918, at the Armenian Ghat Station of the Eastern Bengal Railway in Calcutta for despatch to Kushtia. He also booked 6 bales on the 24th September, 1918, at the same station for Kushtia. The consignment of 9 bales reached Kushtia on the 24th September and plaintiff took delivery of them on giving a clear receipt, but he subsequently discovered that one of the bales he had taken delivery of was a bale booked by one Ramdeo Mahadeo on the same date at the Armenian Ghat Station for one Bhagaban Das at Kushtia the plaintiff made over that bale wrongly delivered to him to Bhagwan Das and complained to the goods clerk at Kushtia that he had not received one of the 9 bales consigned by him on the 21st September. On the 28th October, 1918, the plaintiff sent a notice of claim to the Traffic Manager and on the 20th November, he got delivery of the missing bale. He further alleged that on account of the negligence of the Railway authorities and the consequent delay in the delivery of the bale he sustained damages to the extent of Rs. 930-, the market for these goods having in the meantime considerably fallen. He then brought the present suit after serving the necessary notice on the Agent of the Eastern Bengal Railway.

2. The defendant contended that the notice was not legally valid, that the delay was not due to the negligence on the part of the Railway Administration but to the neglect of the plaintiff to help them in tracing the bale when asked to. do so, and that the lost bale was not of the consignment of the 9 bales but it was of the

consignment of the 6 bales and that plaintiff's men were negligent in not seeing that the bale was properly labelled by the Booking Clerk at the Armenia a Ghat Station at the time of delivery. The defendant stated that in the circumstances the plaintiff was not entitled to any damages and that in any event the claim for damages was excessive.

3. With regard to the legality of the notice, it was held by the Munsif that it was legal and valid and this objection was not further pursued. On the merits, the learned Munsif found that at the time when the bales were booked, there was a huge traffic in goods at the Armenian Ghat Station owing to the approach of the Durga Puja and hence the mistake in omitting to put the Railway mark on the missing bale must be due to pure accident. He further presumed that since the plaintiff's man took delivery at Kushtia of Bhagwan Dasbale mistaking it for his own, the omission must have been due to the plaintiff's man not being able to identify the correct bale at the Armenian Ghat Station. He sums up his conclusions thus :-" I must hold that the exchange was purely accidental and plaintiff's man is liable for it." He further held that the lost bale was of the consignment of 9 bales and not of 6 bales as alleged by the defendant. The last finding of the Munsif was not challenged in appeal and the case in the lower Appellate Court and in this Court also proceeded on the assumption that the lost bale was one of the consignment of 9 bales. In the above view, the learned Munsif dismissed the plaintiff's suit.

4. On appeal by the plaintiff the learned District Judge affirmed the decree of the Munsif on the finding that " there was no neglect on the part of the Railway authorities in delivering the missing bale to the plaintiff and the delay was due more to the negligence of the plaintiff in not supplying all information for tracing out the missing bale than to any negligence on the part of the Railway Staff of the defendant." The plaintiff has appealed to this Court and it is urged on his behalf that the learned Judge has erred in law in casting on the plaintiff the onus of proving negligence of the Railway Authorities. We think there is much force in this contention. As there was no special contract between the Railway and the plaintiff, u/s 72 of the Railways Act the Railway occupied the position and suffered from the liabilities of the bailee imposed by Sections 151 and 161, Indian Contract Act. The consequence of this liability is that the loss or non-delivery in proper time of goods entrusted to a bailee is prima facie evidence of negligence and the burden of disproving negligence, therefore, lies on the bailee; Surendra Lal v. Secretary of State for India (1917) 25 C.L.J. 37, Nanku Ram v. Indian Midland Railway (1900) 22 All. 361, Hirji Khetsey v. B.B. & C.I. Railway (1915) 39 Bom. 191, Section 76 of the Railways Act points in the same direction. The learned Judge has expressed himself on this question in these words: "The onus lay heavily upon the plaintiff to prove the negligence on the part of the Railway Authorities and it was the bounden duty of the plaintiff to show this negligence very satisfactorily." After making some observations on the evidence the learned Judge remarks, " I think plaintiff has not discharged his onus satisfactorily." We are of opinion that this view is incorrect in law and that the

burden of proving want of negligence is on the defendant.

5. The onus of disproving negligence being on the defendant, the next question for consideration is, whether he has been able to discharge it. The Courts below assume that the delay in the delivery of the bale was due to plaintiff's negligence, firstly in not seeing that the bale was properly labelled before despatch by the goods clerk and, secondly in not responding to the call of the Railway to come and identify an odd bale found lying unclaimed at Armenian Ghat. This neglect on the part of the plaintiff may affect the measure of damages and the principle on which they should be assessed but cannot exonerate the defendant from the legal liability of disproving his negligence. The lower Courts have further assumed that the mistake must have been due to the rush of work at Puja time and to the probability of the plaintiff's man either refusing to identify or making a mistake in identifying the bale at the time of delivery to the Railway Authorities at Armenian Ghat. There is no evidence in support of these surmises and the case ought not to be decided upon suspicions or suppositions in the absence of proof. When a carrier receives goods under a contract of carriage he cannot shake off his statutory liability u/s 151 of the Contract Act by pleading pressure of work or avoidable accident. As to the plaintiff's man making any mistake when he was handing over the bales to the Railway for transmission there is absolutely no evidence on this point. In the above view, we hold that the defendant has failed to discharge the onus that lies on him of proving want of negligence on his part, as the defendant has offered no other explanation for the delay in delivery. On the evidence there is no reason to disbelieve the fact that the plaintiff's man did as a matter of fact deliver 9 bales to the clerk who gave a Railway receipt for the same. The question then arises whether any damages for loss of market were due and if so on what principle are they to be assessed. The plaintiff has claimed damages on the difference between the price he paid for the bale in the market and the price of such cloth on the day when it was delivered to the plaintiff, namely the 20th November. We think that he is not entitled to calculate damages on this basis. The law as to measure of damages in a case like the present is thus summarised in Addison on Contracts, 11th Edition, page 1072. "Generally speaking when a carrier fails to deliver articles of merchandise in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold if they had been carried, according to the contract, and their marketable value at the earliest period at which they could have been brought to the market after the delivery to the consignee, will be the measure of damages recoverable." u/s 73, Explanation of the Contract Act, in estimating the loss or damage arising from a breach of contract, the means which exist-ed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. The facts found by the Courts below are that the Railway Authorities were using their best endeavours to trace out the missing bale, that the Goods Supervisor at the Armenian Ghat station wrote on the 9th October, 1918, to the plaintiff to help the defendant to trace out the missing bale to which the plaintiff

did not respond, that the plaintiff did not up to the last moment supply the Railway authorities with his identifying marks and description to enable the defendant to find out whether the odd bale found at Armenian Ghat at the end of September was the missing bale and that after due enquiry on 14th November, 1918, the Railway authorities learned that that particular bale belonged to the plaintiff and despatched it at once to the plaintiff. On these findings we think that the delay in delivery is partly due to the unjustifiable conduct of the plaintiff, of which he cannot in justice and fairness take advantage. In our judgment the justice of the case requires that the last day of which the market value should be taken into calculation ought to be the day on which the plaintiff would in ordinary course have received the goods if he had complied with the request contained in the letter of the 9th October, 1918. The learned District Judge believes that the letter reached the plaintiff which must be on the 10th October. Had he attended to it immediately the bale could have been despatched on 11th and delivered to the plaintiff on 14th October. The plaintiff is, therefore, entitled to damages calculated at the difference, if any, in the market price of the goods on the 24th September, 1918, when the other bales of the same consignment were delivered and that on the 14th October, 1918.

6. The result of the foregoing considerations is that the appeal succeeds in part, the decree of the Court below dismissing the plaintiff's suit is reversed and the plaintiff's suit is decreed to the extent and in the form above indicated. The case will be remitted to the first Court for ascertaining the amount, if any to which the plaintiff may be entitled according to this judgment. Parties will be at liberty to adduce further evidence to prove market rates on the 24th September, 1918, and the 14th October, 1918, but for no other purpose. Costs will abide the result.