

**(1990) 09 KL CK 0014**  
**In the High Court Of Kerala**  
**Case No : S.A. No. 9 of 1986**

A.V. Bhatt

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision :** 18-09-1990

**Acts Referred:**

Railways Act, 1989 — Section 73, 74

**Citation :** (1991) 1 ACC 295 : (1991) ACJ 536

**Hon'ble Judges :** S. Padmanabhan, J

**Bench :** Single Bench

**Advocate :** R.D. Sheno, for the Appellant; M.C. Cherian, Saramma Cherian and T.A. Rajan, for the Respondent

**Final Decision :** Dismissed

## Judgement

S. Padmanabhan, J.—Liability of the railway administration for the alleged damage in transit is the short question for consideration in this second appeal filed by the plaintiff. Both the courts dismissed the suit holding that burden of proving negligence is on the plaintiff and he did not discharge the burden. Contention is that the burden was wrongly cast.

2. Appellant is the consignee. The consignment of 440 bags of M.S. wire nails was despatched under Exh. B-1, railway receipt, from Tatanagar to Ernakulam station on 31.8.1977. It reached destination in time on 25.9.1977. 127 bags were found drenched in water and portion of the contents rusted. Delivery was taken after assessment of damages. Rs. 7,992.87 is the claim. Actual damage assessed by court after mitigation of resale value is Rs. 5,246.38.

3. Consignment was despatched on payment of railway risk rate u/s 74. Wagon was allotted on the application of the consignor who loaded it in his siding without any supervision from the railway staff. It was the sealed consignment which was entrusted for carriage. Quality and quantity were entered in Exh. B-1 only on the information conveyed by the consignor. There is no short delivery or

delay causing damage. The only item of negligence alleged is leakage of the wagon which resulted in entry of rain water which caused rusting. The witnesses examined are only PW 1 and DW 1. PW 1 (plaintiff) could only say that 127 bags were found wet and rusted at the time of delivery. He does not know the condition of goods at the time of despatch. DW 1 said that at the time of despatch there was no occasion to ascertain whether the consignment was wet or rusted. Consignor or his employees were not examined. An attempt made in that respect was not pursued. It is not known whether the wagon was leaky at the time of loading.

4. Dismissal of the suit was on the basis of the decision in Union of India (UOI) Vs. Chotelal Shewnath Rai, rendered u/s 73 of the Indian Railways Act holding that when it is not shown by the consignor that a defective or leaky wagon was supplied at the despatching station and it was merely asserted by him that when goods reached destination the wagon was leaking badly, it would be presumed that the wagon supplied was in good condition. Merely because it was found leaking at destination no inference as to negligence of Railways or misconduct of its employees could be drawn to arrive at the liability of the Railways. Though the counsel said that the above decision was dissented from by the same court in The Bihar State Co-operative Marketing Union Vs. Union of India(UOI) and Others, it was only distinguished on facts saying that the principle is not applicable when the consignor handed over the goods to the Railways and it has been loaded by the Railways. Responsibility in such a case was on the Railways for the goods. As in Union of India (UOI) Vs. Chotelal Shewnath Rai, in the present case also the consignor himself loaded and sealed the goods in the wagon allotted to him at his request. Section 58(6) of the Indian Railways Act shows that verification by the Railways to ascertain the description of the goods will be at its risk.

5. It is true that except in the nine classes of exempted cases provided in Section 73, the Railways shall be responsible for the loss etc. in transit arising from any cause and even in the exempted cases the Railways shall not be relieved unless it further proves that it has used reasonable foresight and care in carriage. Act of omission or negligence of the consignor or his agents or servants is one of the exempted cases and that alone is alleged in this case. Prior to the amendment of 1961, the responsibility of the railway administration with respect to loss etc. of goods entrusted for carriage was that of a bailee only. The amendment made the liability as of a common carrier or an insurer. Responsibility of the Railways as carrier is absolute. That means even in a case where loss or damage is proved to have arisen from any omission or negligence of the consignor, the railway administration will not be relieved unless it further proves use of reasonable foresight and care. That is the effect of the decisions in Shiv Saran Dass Vs. Union of India, ; K.R. Rajamanickam v. Union of India AIR 1974 Mad 375; Punjab National Bank v. Beni-prasad Maheshwari 1981 ACJ 431 (MP) and Firm of Chabildas Manikdas and Brothers, Hyderabad Vs. The Union of India, , cited before me. The responsibility of the Railways as carrier was considered in the

decision in *Babu Oil & Flour Mills v. Union of India* 1980 KLT 116, also.

6. But when the animals or goods were tendered to be carried and carried at owner's risk rate, then in spite of Section 73, the railway administration shall not be responsible except upon proof that loss etc. was due to negligence or misconduct on the part of the railway administration or of any of its servants. [See *Union of India v. Universal Traders Corporation* 1983 ACJ 319 (Kerala)]. But the case in hand will not come under that provision because the railway risk rate was selected to be paid in writing and paid. But in this case, there is no allegation of any negligence on the part of the Railways as the cause of the damage except the leaky condition of the wagon. The wagon was selected by the consignor who had the option to reject it if it was leaky. There is no evidence that it was leaky then. If so, the mere assertion of the appellant who knew the condition only at the time of delivery at destination is not sufficient and it has to be presumed that the wagon was in good condition when it was supplied. Delivery was in time and seals were intact. There was no short delivery also. If so, even if it is taken for granted that leakage occurred during transit due to rain by natural causes, that cannot be said to be due to lack of foresight and care on the part of the Railways. Merely because it was found leaky at destination, no inference as to negligence of Railways or its employees could be drawn to arrive at the liability of the Railways.

7. When goods are booked by the consignor and the information given by the consignor is accepted as correct for the purpose of charging freight, there is no admission on the part of the Railways regarding the quality or quantity of the goods. Therefore, there is no admission that the description of the goods as furnished by the consignor is correct. In the absence of independent evidence regarding quality of the goods as shown in Exh. B-I, railway receipt, it cannot be said that quality deteriorated in transit. It is for the consignor or consignee to adduce such evidence as these are facts within their special knowledge. [See *Hari Sao v. State of Bihar* AIR 1970 SC 843; *Union of India (UOI) Vs. The Cuttack Cycle Supply and Co., and Union of India v. Aluminium Industries Ltd.* 1988 ACJ 809 (Orissa)]. There is no such evidence in this case. For these reasons, it cannot be said that the appellant succeeded in establishing that there was deterioration in the quality of goods in transit. If that be the case, for that reason alone, there is no burden on the Railways to prove that proper care was taken. No interference is required in second appeal.

Second appeal is dismissed. No costs.