

(1965) 04 PAT CK 0017

In the Patna High Court

Case No : Letters Patent Appeal No. 63 of 1960

Bala Prasad Agiwai

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 27-04-1965

Acts Referred:

Railways Act, 1890 — Section 72

Citation : AIR 1965 Patna 408

Hon'ble Judges : R.L. Narasimham, C.J;Tarkeshwar Nath, J

Bench : Division Bench

Advocate : Harilal Agarwal, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—This is an appeal by the plaintiff against that portion of the judgment of U.N. Sinha, J. disallowing his claim in respect of the freight charges from the respondent railway. The material facts are as follows. On the 23rd, September, 1953, a consignment of 300 bags of sugar was despatched from Marhowrah Railway station on the Northeastern Railway to Tatnagar Railway station on the Kastcrn (now South Eastern) Railway, the consignment being booked under railway risk. The plaintiff took open delivery on the 4th October, 1953, at Talanagar Railway station as there was shortage of sugar in some of the bags and also damage to several bags of sugar due to rain water entering inside the wagons. The plaintiff claimed damages from the railway at the rate of Rs. 32/8/- per maund, saying that that was the prevailing market rate at Jamshedpur. The learned trial Court, viz. Subordinate Judge, decreed his claim at the rate of Rs. 29/3/6 per maund, basing it on the actual cost price which was Rs. 27/6/6 and adding to that the railway freight at the rate of Rs. 1/5/3 per maund which was admittedly paid by the plaintiff, dunnage at the rate of Re. 0/4/3 per maund and cartage at the rate of Re. 0/3/6 per maund.

There was mi appeal by the railway before The single Judge, and there was also A cross-objection filed on behalf of the plaintiff. The learned single Judge

affirmed the finding of the Trial Court that short delivery in respect of some bags of sugar and damage in respect of some other bags were due to negligence on the part of the railway, and that they were liable to pay damages. He, however, rejected the contention of the plaintiff that the market rate of sugar of Talanagar was Rs. 32/8/- per maund. as stated by him. He thought that the evidence adduced by the plaintiff in proof, of that market rate was not satisfactory, and was not acceptable. Though Mr. Agarwal for the appellant-plaintiff wanted to challenge this finding of the learned single Judge, we are not inclined to reverse his finding which is based on appreciation of the evidence on record. Admittedly the evidence adduced by the plaintiff was very meagre, and it was open to the two Courts of fact to decline to accept the same as sufficient proof of the market rate at the place of destination.

2. But the learned single Judge observed that the plaintiff-appellant was not entitled to add the freight actually paid to the amount due to him from the railway by way of damages. He held that, once the plaintiffs' evidence about the market rate at the place of destination was not accepted, the only other way for estimating the market rate was to ascertain the actual price paid by the plaintiff and add to that the dunnage which he fixed at a lump sum of Rs. 30/-. He held that railway freight and cartage should not be allowed because expenditure in respect of those items was incurred by the plaintiff in the performance of his part of the contract with the railway. The legality of this view has been strenuously challenged by Mr. Agarwal for the appellant, who contended that, in estimating the market price of the goods at the place of destination, the Court ought to have added the transport charges to the price at the place of consignment. In support of this contention, he relied on some observations in a recent decision of a Division Bench of this Court, consisting of Misra and G.N. Prasad, JJ. in *Sagarmal Choudhury Vs. Union of India(UOI)*, where the learned Judge observed :

"We would accordingly make the position clear that where the railway freight has been established to have been already paid by the consignor to the railway administration, this amount could not be excluded from the prevailing market rate at the place of destination."

Mr. Bose, on behalf of the respondent, challenged the correctness of this view, and invited our attention to several previous decisions of this Court, to which the learned Judges themselves were parties, where railway freight was not allowed to a party while awarding damages against the railway either for nondelivery or short delivery of goods. He referred to the judgment of Misra and S.P. Singh, JJ. in *Union of India v. Loknath Prasad Shariff*, First Appeal No. 335 of 1955, disposed of on 11-7-1961 (Pat.) where the learned Judges themselves observed:

"It is well settled that as a general rule where goods entrusted to a carrier are not delivered according to the contract, the measure of damages is the value of the goods at the place of destination in the condition in which the carrier undertook to deliver them at the time when this should have been delivered, less

the proper charges of transportation and delivery, if the same have not been paid by the consignor."

He also referred to the judgment of Misra, J. in *Lohal Sugar Works of Darbhanga Co. v. Union of India* First Appeal No. 192 of 1954, disposed of on 23-12-1958 (Pat). Misra and G.N. Prasad, .TJ. in *Hardutlrai Agarwalla v. Union of India*, First Appeal No. 103 of 1955, disposed of on 15-3-1961 (Pat.). Ramratan Singh, J. in *Ganesh Lall Gupta v. Union of India*, First Appeal No. 160 of 1961 disposed of on 17-1-1964 (Pat.) and Hai and U. N. Sinha JJ. in *Union of India v. Mahaclen Lal*, First Appeal No. 368 of 1953, disposed of on 11-2-1959 (Pat), in all of which the freight paid was never deducted from the total damages payable by the railway to the consignee.

It is true that in these decisions, the law on the subject has not been fully discussed, whereas in the Division Bench decision in *Letters Patent Appeal No. 119 of 1959*, there is some discussion of the law on the subject. In the aforesaid Division Bench decision, however, the question of the liability of the railway to pay the railway freight did not directly arise because the learned Judges held that there was no evidence on the record to show that the consignee had actually paid the freight. On this finding of fact, they disallowed his claim. Hence, there was no necessity to further examine whether the railway would have been bound to pay the freight to the plaintiff, if, in fact, he had paid the same while taking delivery of the damaged goods. Any discussion of this question of law was not necessary in that case, and hence the observation quoted above must be held to be obiter. This relieves us from the necessity of referring this matter to a large Bench to examine the correctness of the view taken by the learned Judges.

3. A contract between a consignor or consignee on the one hand and the railway on the other is mutual. The consignor agrees to bring the goods to the railway station and to pay the freight charges either by himself or through the consignee, and the railway agrees to transport the goods as bailee subject, of course, to the special terms of the contract involved in booking goods at railway risk. Hence, where a claim for damages for breach of contract is made against the railway, it is obvious that the plaintiff must show that he performed his part of the contract, viz., that he brought the goods at his own expense to the station and also paid the railway freight. He cannot add this item of expenditure also to the total damages claimed from the railway because, if this is permitted it would, in substance, mean that the railway must carry the goods freely. This point was rightly emphasised in a Nagpur decision in AIR 1931 29 (Nagpur) .

4. There are two leading English decisions bearing on this question which have been followed in a number of subsequent decisions in England, India and America, in *Rodocanachi Sons and Co. v. Milburn Brothers*, (1887) 18 QBD 67, where the carrier was a shipping company, it was laid down that, where the carrier is liable for breach of contract, the measure of damages is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost.

"If the goods are delivered he obtains them, but in order to obtain them he must pay the freight in respect of which there is a lien on them. If there were no lien, he would be entitled to the goods without paying anything".

He is entitled to the market value of the goods at the place of destination, but if there is no market value of such goods at that place, the value has to be estimated by taking into account the cost of the goods at the place of consignment and adding to that the estimated profit he would make at the place of destination. Lord Esher, M. R. further observed:

"But the plaintiff would not get the market value clear, and therefore to arrive at the loss a plaintiff in such a case as this has sustained, it is also necessary to consider what he would have to pay in order to get the goods, viz., the freight for which there was a lien. He would get the goods, but in order to do so he must pay the accruing freight. Therefore the damages are the market value of the goods, when they ought to have arrived, minus the accruing freight. With regard to the third point as to the prepaid freight that is paid and cannot be recovered : it is immaterial with regard to it whether the goods arrive, or not so that in respect of that the plaintiffs' position is just the same, whether the goods are delivered or not. In estimating the difference of his position in the two events, therefore, the prepaid freight is not to be taken into account."

The other two Judges, viz., Lindley, L. J. and Lopes L. J. fully endorsed this view so far as the law for freight charges is concerned.

Mr. Agarwala, however, relied on *O' Haitian v. Great Western Ry. Co* (1865) 122 ER 1274. where it was held that, if there is no market at the place of destination, the damages must be ascertained by taking into consideration, in addition to the cost price and the expense of transit, the reasonable profit of the importer. This decision has also been cited in Halsbury's Laws of England, Third Edition-Volume 4 at p. 151. There is really no conflict between the two views, as pointed out in *Mayne on Damages*, Twelfth Edition, at pages 562 to 564. The normal measure of damages is the market value of the goods at the place and time at which they should have been delivered less the amount which would have cost to get them to the place of delivery. A person claiming damages will, therefore, have to lead evidence to prove the market value of the goods at the place of delivery. If the freight has not been paid, that must be deducted; but if the freight has already been paid, nothing falls to be deducted from the market value. But difficulty is experienced in proving the market value of the goods at the place of destination, especially when there is no market there. Under such circumstances, one of the modes of estimating the market value is, as pointed out in (1865) 122 ER 1274 first of all; by finding out the cost price at the place where the goods were delivered to the carrier, and adding to it the cost of the carriage and also an additional amount to cover the reasonable profit in the ordinary course of business of a person transporting goods to the particular place of due delivery. It is true that, in assessing the market value in this manner, the cost of transport is taken into consideration; but, as pointed out in note 22 at page 564 of that book,

"although this cost would be included to give the market value, it would generally fall to be deducted again to give the normal measure of market value of goods less market rate of freight."

The principle is quite clear. Freight charges must always be deducted from the market value at the place of destination. The point can be illustrated by the following simple mathematical formula :

(a) Normal measure of damages ---

Market value of the goods at the place of delivery minus freight charges due to the carrier.

(b) Where no reliable evidence of the market value of the goods at the place of delivery can be given either because there is no market there or for any other, reason, the market value is calculated as follows-

Cost of the goods at the place of consignment plus freight charges plus reasonable profits.

Substituting this in (a), the next result is--

Normal measure of damages ---

Cost price of the goods at the place of consignment plus freight charges plus reasonable profits minus freight charges.

Plus and minus cancel each other, and hence freight charges will have to be completely excluded in calculating the net measure of damages.

5. Here, it was open to the plaintiff to show, apart from the actual cost price as proved from his bijak, what was the reasonable profit he would have made at the place of destination viz., Tatanagar, by the sale of the goods. He, however, led no evidence on this point but relied on his own meagre evidence about the selling rate of sugar at Tatanagar, which has been disbelieved by the Courts of fact. Hence, he is entitled only to the cost price as shown in the bijak plus dunnage as allowed by the learned single Judge. It was urged that, by adopting this principle, the plaintiff is put to a loss, inasmuch as he gets only the price of the goods at the place of despatch, though that price would generally be far below the price at the place of destination; but this result is brought about by his own failure to prove the market value of the goods at the place of destination in any of the methods indicated above, and this cannot be a ground for adding the freight charges also to the cost price which would result in the railway carrying the goods free of charge for the plaintiff's sake.

6. For these reasons, I must hold that the learned single Judge was right in refusing to allow the actual freight charges and the cartage paid for the transport of the goods to be added in computing the damage payable by the railway to the plaintiff. The appeal is dismissed; but, in the circumstances, both parties will bear their own costs of this appeal.

Tarkeshwar Nath, J.

7. I agree.