
(1942) 07 PAT CK 0001
In the Patna High Court

Bengal and North-Western Rly. Co.

APPELLANT

Vs

Mohammad Munshi

RESPONDENT

Date of Decision : 23-07-1942

Acts Referred:

Contract Act, 1872 — Section 151, 161

Citation : AIR 1943 Patna 111

Hon'ble Judges : Fazl Ali, J;Chatterji, J

Bench : Full Bench

Judgement

Fazl Ali, J.—This appeal arises out of a suit instituted by the respondent against the Bengal and North Western Railway Co., to recover Rs. 1182-4-3 as damages. The Munsif granted a decree for Rs. 711-3-3, but the District Judge partially varied the decree and I reduced the amount of the decree to Rupees 643-7-3. The defendant railway company have now preferred this second appeal. The circumstances under which the suit was instituted were these: On 2nd August 1938 the plaintiff delivered to the defendant company 224 baskets of mangoes for despatch from Pusa Road to Belanganj, a station on the B.B.C.I. Railway. The consignment was booked under risk notes drawn in forms A and B and the consignee named in the railway receipt was one Mohammad Afzal who is said to be the plaintiff's own brother. The plaintiff's case was that it being expected that the consignment should in the ordinary course reach its destination by 5th August at the latest, his brother used to go to the railway station at Belanganj every day from 5th August till 14th August, but the consignment did not arrive during this period. Thereupon the plaintiff had to serve a notice upon the agent of the railway requiring him to pay damages and later on had to institute the present suit when the liability to pay the damage was denied.

2. The defendant railway company resisted the suit on many grounds, but their main defense was that the delay in delivering the consignment was due to an unforeseen event and that they had taken every possible step to despatch the goods by the quickest route available. It was stated that owing to heavy floods

there was a breach in the railway line beyond Maijapur railway and so the consignment could not be sent by the ordinary route which was via Cawnpore, Kashganj Achhnera and Agra. If the ordinary route had been followed, the consignment would have had to be transferred to B.B.C.I. Railway at Cawnpore, but owing to the breach this route had to be deviated from and the railway company sent the consignment back from Maijapur to Shahganj where it was transferred to a bigger wagon on the E.I.Ry. and thence taken to its destination via Lucknow, Cawnpore, etc. It has been found by both the Courts below that there was a breach in the line on account of floods and it is also not disputed that the consignment was sent by the quickest route available in the circumstances. The consignment however reached the destination on 15th August and the fruits were then in such a bad condition that the railway company could not realise more than Rs. 25 by their sale. The question to be considered is whether in these circumstances the railway company can be held to be protected by the terms of the risk notes which, as I have already said, were drawn up in forms A and B or whether they are liable for damages. Upon the terms of the risk notes the railway company were to be liable only upon proof of misconduct on their part.

3. Now, it has been proved that the consignment reached Maijapur on 5th August. There is no clear evidence as to the extent of the breach or as to whether the consignment could be taken by some other means of transport such as by coolies or trollies beyond Maijapur. There is however evidence that on 5th August several passenger trains went beyond Maijapur towards Cawnpore between 2-25 P.M. and 5-15 P.M. The Courts below have not dealt with the evidence relating to these matters, but the point which impressed them was that an important condition of the contract between the parties had been varied in this case without the variation being brought to the knowledge of the plaintiff, that is, without his being consulted as to whether the consignment should be diverted and sent by a different route from the one which was the subject of the agreement. The Courts below in deciding the case have referred to, and greatly relied on the decisions of the Allahabad High Court in *Secy. of State Vs. Kesho Prasad Sheo Prasad Belanganj and Kishan Lal Matrumal Vs. B.B. and C.I. Railway Company and Others*, .

4. In the first case the facts were these. On 30th September 1929, certain bags of sugar weighing about 420 maunds were despatched under risk notes in Forms A and B from Kantapokar to Agra City. The usual time taken for the goods to arrive from Kantapokar to Agra City, if transmitted across the ordinary route, is five or six days. The wagon containing the goods was taken on the ordinary route up to Tundla, but owing to a mistake instead of being sent from there to Agra City it was sent to Aligarh. The wagon remained at Aligarh for some time and then the goods were unloaded and were ultimately despatched to Agra on 31st October 1929 where delivery was taken by the plaintiff under protest. The plaintiff after taking delivery found that the consignment was short in weight by about 30 maunds and he accordingly claimed damages with respect to the same. It was held by a learned Judge of the Allahabad High Court that the exemption

from liability afforded to the railway administration by the risk notes A and B is operative and available to the railway administration only during the transit on the ordinary route and once the goods are diverted from the route, the protection afforded by these risk notes ends. It was further held that in the absence of a clear and unambiguous stipulation to the contrary the presumption is that the consignor at the time of consigning his goods contemplated that the goods would be transmitted across the ordinary route within a reasonable time and the railway administration must in such cases always be deemed to have accepted the goods for despatch by the ordinary route; that the contract evidenced by risk notes in Forms A and B does not contemplate the carrying of the goods otherwise than by the ordinary route and if there is a diversion from the ordinary route, it does not matter for what distance, the railway administration cannot invoke to its aid the benefits of the said forms.

5. In the second case the facts were as follows: Two consignments of oil were booked with B.B.C.I. Railway at Hathras for despatch to stations in East Bengal. Each consignment was loaded into and occupied one whole wagon of that railway. The consignments were accepted under risk notes drawn up in Forms A and B. The ordinary route by which the consignment would have travelled was over that railway as well as the R.K. Railway and B.N.W. Railway and all the railways being of the same gauge the original wagons could run through and there was no necessity for transshipment of the goods. Owing however to breaches on the B.N.W. Railway caused by flood the consignments were diverted to a different route via the E.I.R. at Benares and the latter railway being of a wider gauge the contents of the original wagons had to be transferred to two wagons of that railway. As these wagons were bigger, the tins did not fill them compactly as before and the railway took no steps to pack the tins round in such a manner as to prevent them knocking against each other. It was found that there was a leakage of 11 maunds of oil and that no notice had been given by the railway to the consignor of the deviation of the route or of the transference of the tins to a bigger wagon. On these facts when the consignor sued for the recovery of the value of the shortage it was held that the deviation without notice to the consignor from the ordinary route, though it might be due to a part of that route being flooded, caused a forfeiture of the special protection given to the railway by risk-notes Forms A and B; that the obligation of the railway to deliver the goods at destination in proper time did not justify such deviation without notice, and that the failure of the railway to take proper measures for the safe and compact packing of the tins on their transshipment to the bigger wagons or to give notice to the consignor to enable him to do so constituted negligence and the railway was liable for the loss. It was further held that though the law places an obligation upon the bailee to deliver the goods at their destination in proper time he cannot be held to have committed a default within the meaning of Section 161, Contract Act, if he is prevented from fulfilling that obligation not by any mistake or negligence on his part but by some circumstance beyond human control, for example, a breach caused in the railway line by floods.

6. At the same time, however, if the bailee is unable to fulfil the obligation by some such circumstances, and in order to do so he adopts some other course necessarily attended with risk, which is not contemplated in the contract between him and the bailor, without the latter's knowledge and consent, he does so at his own risk. The learned Munsif has specially relied on the last case and has quoted the following passage from the judgment of Mulla J.:

If they (the railway company) had informed the plaintiff he would have taken the necessary measures, but they did not convey any information to him. I cannot therefore hold that they acted like an ordinary prudent man dealing with his own goods and I find that they were guilty of negligence and are consequently liable for the loss caused to the plaintiff.

7. The learned Subordinate Judge also has relied upon these two cases and he has held that the railway company were liable to pay damages because they did not give notice to the plaintiff about the breach in their line and resorted to the change of the route without his consent. Mr. S.N. Bose who has argued the case at great length contended that the facts of the two cases to which reference has been made are quite distinguishable from those of the present case. The first case, Secy. of State Vs. Kesho Prasad Sheo Prasad Belanganj , is easily distinguishable because in that case it was conceded that the wagon containing the consignment had, owing to mistake on the part of the railway company instead of being sent from Tundla to Agra City, been sent to Aligarh. As to the second case, the distinguishing feature is said to be that in that case the loss to the consignor had been caused by the failure on part of the railway company to pack the tins in the bigger wagon of the E.I.Ry. in such a manner as to prevent their knocking against each other. Mr. Bose therefore contends that the decision upon which the Courts below have relied cannot govern the present case which must be decided upon its own facts.

8. In my opinion this case does not present any great difficulty because of the findings of fact by which we are bound in this second appeal. As I read the judgment of the Munsif I think that what he meant to find was that the railway company were guilty of negligence in the present case and they had not acted like an ordinary prudent man dealing with his own goods. This conclusion inevitably follows from the fact that the learned Munsif in coming to the conclusion that the defendant railway company were liable to pay damages has quoted and relied upon the particular passage in the judgment of Mullah J. to which reference has been made. Again the finding of the Munsif as to negligence must be taken to have been affirmed by the District Judge who says that he agrees with the Munsif's conclusion. The only question is whether this finding can be disturbed in second appeal and whether upon this finding the railway company are or are not liable in law for damages. There can be no doubt that there was deviation from the ordinary route by which plaintiff's consignment was intended to be despatched under the contract. That being so, on the view expressed by the learned Judge in Secy. of State Vs. Kesho Prasad Sheo Prasad

Belanganj the railway administration cannot invoke to its aid the benefits of the risk notes in Forms A and B. Also upon that view the responsibility of the railway company will be that of an ordinary bailee and as provided by Section 151, Contract Act, the bailee is bound to take as much care as a man of prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. Assuming, however, that the risk notes in Forms A and B still bound the parties, even then in my opinion the railway company cannot escape liability if they are found to have caused damage to the plaintiff by wilful negligence. The crucial point therefore to be decided in this case is whether the railway company were negligent.

9. It is to be remembered that the plaintiff's consignment was a consignment of fresh fruits which fact must be assumed to have been known to the railway company because the contents of the consignment are stated in the railway receipt. The plaintiff's case is that as his consignment was one of fresh fruits it was expected that it would reach its destination by 5th August at the latest. The Courts below, however, have found that in the ordinary course the consignment should have reached Belanganj latest by 7th or 8th August. Now, it is not disputed that the consignment was not despatched by the defendant railway company from Maijapur before the morning of 6th August. It must have been therefore quite evident to everyone concerned that this consignment could not possibly reach Belanganj on 7th or 8th August. The railway company have all along laid stress on the fact that they had despatched the consignment by the quickest route available and it is also common ground that it did not reach Belanganj until 15th August. Therefore it could not have escaped the notice of the railway company that the fresh fruits contained in this consignment which were admittedly treated as perishable articles could not be fit for consumption at the time when they would arrive at Belanganj. What should the railway company have done in those circumstances? It was clear that the original contract, namely, that of sending the consignment by a particular route had become incapable of performance and the railway company must be expected to have known that the fruits could not reach Belanganj in proper condition. The Courts below have concurrently held that in such circumstances they should have informed the plaintiff and sought his advice, and it has been argued before us that if the plaintiff had been informed he would have come to Maijapur himself and dealt with his consignment as he liked or he might have given suitable instructions to the railway company as to what was to be done in those circumstances. The railway company, however, merely followed the mechanical course of forwarding the consignment to its destination without troubling to consider what would be the fate of the consignment by the time it reached its destination. Now, ordinarily the railway company should not be held to be liable to pay damages if they are prevented from fulfilling their obligation by some circumstances beyond human control but they cannot escape liability if there is negligence amounting to misconduct on their part.

10. In the present case, as I read the judgments of the Courts below, I take it to

have been concurrently held by them that there was negligence on the part of the railway company and as a Court of second appeal we are unable to hold that there was no such negligence.

11. In these circumstances I must uphold the judgment and decree of the Court below and dismiss this appeal with costs.

Chatterji, J.

I agree.