

(1959) 09 PAT CK 0020
In the Patna High Court
Case No : Civil Revision No. 604 of 1957

Bihar Agents Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-09-1959

Acts Referred:

Evidence Act, 1872 — Section 114

Railways Act, 1890 — Section 72, 74A, 74C, 74D

Citation : AIR 1960 Patna 111

Hon'ble Judges : Untwalia, J

Bench : Single Bench

Advocate : Hari Lal Agrawal, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Allowed

Judgement

Untwalia, J.—This is an application in revision by the plaintiff u/s 25 of the Provincial Small Cause Courts Act against the decision of the learned Small Cause Court Judge dismissing its suit.

2. The short facts are that one bale of cloth was despatched from Ahmedabad to Bhagalpur on the 1st of April. 1954, the bale arrived at the station or destination in a pilfered condition, open delivery was given to the plaintiff on 10-5-1954 and 39 pieces of sarees were Found short, that is to say, the package was delivered to the plaintiff, but 39 pieces of sarees were not delivered out of it. The plaintiff, therefore, filed the suit claiming compensation of Rs. 331/- for the short delivery, and also claimed interest pendente lite and future. The defence, in short, is that the goods were defectively packed, and, therefore, the case was covered by Section 74A of the Railways Act, and the plaintiff was not entitled to claim anything, unless it proved negligence or misconduct on the part of the railway administration or its servants. Other pleas were also raised in the written statement, but it is not necessary for me to state them. I would, however, state that the onus to prove the amount of compensation was thrown on the plaintiff.

3. The learned Small Cause Court Judge has held that the short delivery was due to the negligence or misconduct on the part of the railway administration or its servants, but he has dismissed the suit on the ground that the plaintiff has failed to establish the price of the 39 pieces of sarees which were delivered short, as it failed to produce its account books.

4. In my opinion, the judgment of the learned Small Cause Court Judge on the second question is not in accordance with law. The evidence on behalf of the plaintiff was there, and it was ex parte evidence. No adverse inference ought to have been drawn against it for its failure to produce the relevant account books to show the prevailing market rate of the sarees in question at Bhagalpur, as they were not called for from the plaintiff by the defendants. It is an established principle of law that it is for the suitor to decide which would be the best evidence to prove his case, and, for failure to produce one piece of evidence, an adverse inference should not be drawn against the party who has chosen not to file it, unless the other side had called for that evidence (Vide 19 CWN 1207 (Privy Council)). This case has been followed by a Division Bench of this Court in Chandra Narayan Deo v. Ramchandra Serawgi AIR 1940 Pat 66.

5. Mr. Rose, however, tried to support this judgment by attacking the finding of the learned Small Cause Court Judge on the question of negligence or misconduct. His submissions on this question are three.

6. Firstly, his submission is that this case is covered by Section 74A of the Railways Act, and, therefore, there was no obligation to disclose, as provided in Section 74D. The latter part of the submission is, no doubt, sound, but its former part is not correct, in view of the fact that the railway has not succeeded in establishing in this case that in the forwarding note the sender or its agent had recorded the condition of the bale as being defective or improperly packed. I have examined the evidence of D. W. 1 on this question and I find that his evidence is not sufficient to establish this fact. In my opinion, u/s 74A of the Railways Act, the onus was on the railway to establish this. The position of a consignment booked at owner's risk rate, as provided in Section 74C, is now a different one.

But, in regard to a case sought to be brought u/s 74A, the onus is still on the railway to prove by legal and reliable evidence the recording of the condition of the package on the forwarding note either by the sender or its agent. This case, therefore, will be governed by a Division Bench decision of this Court in Ram Das Ram and Others Vs. Dominion of India, , which was a case under the old risk note, where the onus was on the railway to establish and prove the due execution of the risk note either by the consignor or his agent. In my opinion, therefore, the instant case is governed by Section 74C of the Railways Act, and the bale must be deemed to have been despatched at simply owner's risk rate, and cannot be held to have been despatched in a defective or improper packing. If it is a case of Section 74C only, as in my opinion it is, the provisions of Section 74D are clearly attracted, and this was fairly conceded by Mr. Bose also. Then the

obligation to disclose is there on the railway.

7. The second contention of Mr. Bose is that the learned Small Cause Court Judge has erred in law in saying that the shortage in the bale by itself is sufficient to presume negligence on the part of the railway. To that extent, the contention of Mr. Rose is correct, and the learned Small Cause Court Judge has failed to distinguish between a consignment booked at owner's risk and one under railway risk. The learned Judge has enunciated the law which would be applicable to the latter case but that by itself is not sufficient to displace the judgment of the learned Judge, in substance and it takes me to the consideration of the third submission of Mr. Rose.

8. He contended that, even on the evidence of disclosure given by the railway, the negligence ought not to have been inferred and found in this case. I am not inclined to accept this contention. The learned Judge has discussed the evidence adduced On behalf of the railway, has come to the conclusion that the bale was safe and full up to Moghalsarai and was received in a defective condition, containing some short sarees, at Bhagalpur. And then he goes on to say that the railway has failed to discing how this consignment was dealt with between Moghalsarai and Bhagalpur, therefore, adverse inference must be drawn against it. This view is supported by the Privy Council decision in AIR 1937 152 (Privy Council) .

9. I would therefore, allow this civil revision application, set aside the judgment of the learned Small Cause Court Judge, and would decree the plaintiff's suit to the following extent. The plaintiff would get a sum of Rs. 282-12-0 as the price of the 39 pieces of sarees at the rate of Rs. 7-4-0 per piece that is the Bijak and cost price of the sarees. The plaintiff would not get any profit or the cost of sending notices, as, in my opinion, under the law, it is not entitled to those two amounts. Of course, the plaintiff would have been entitled to the price of the sarees at the prevailing market rate at Bhagalpur, provided there be evidence on the record in support of that. I have examined the evidence of P. W. 1 on this question, and I find that he has succeeded in proving the cost price of the sarees according to the bijak, and no other rate he has spoken of in his evidence as the prevailing market rate at Bhagalpur, He is not entitled to claim profit by saying that that would be deemed to be the prevailing market rate at Bhagalpur at the time when the goods ought to have been delivered. The plaintiff, of course, is entitled to interest pendente lite and future in view of the Privy Council decision in AIR 1938 67 (Privy Council) . The suit is, therefore, decreed for a sum of Rupees 282-12-0 with interest pendente lite and future, that is to say, from the date of the institution of the suit till realisation at the rate of 6 per cent per annum with proportionate costs of both the Courts. Hearing fee Rs. 16/- of each Court.