

(1964) 08 PAT CK 0011
In the Patna High Court
Case No : A.F.O.D. No. 302 of 1959

Dehri Rohtas Light Railway Co. Ltd.

APPELLANT

Vs

Central Godhar Colliery Co. and Another

RESPONDENT

Date of Decision : 28-08-1964

Acts Referred:

General Rules, 1954 — Rule 10, 3
Railways Act, 1890 — Section 47(1), 55

Citation : AIR 1965 Patna 49

Hon'ble Judges : H. Mahapatra, J; A.B.N. Sinha, J

Bench : Division Bench

Advocate : Mahabir Prasad, General, Purnendu Narayan and Gorakh Nath Singh, for the Appellant; J.C. Sinha, A.C. Roy and P.K. Bose, for the Respondent

Final Decision : Dismissed

Judgement

Mahapatra, J.—The plaintiff Dehri Rohtas Light Railway Company, having its head office at Dalmianagar, who is the appellant, filed the suit against two defendants-- (1) Central Godhar Colliery Company and (2) S.G. Bose, Proprietor, Kuchwar Lime and Stone Company, for realisation of Rs. 97,993/15/-, in respect of which an account was given as Schedule A to the plaint. Their case is that defendant No. 1, (Central Godhar Colliery Company) booked a consignment of coal from Kusunda, Railway Station on the Eastern Railway to defendant No. 2, (S.G. Bose, Proprietor, Kuchwar Lime and Stone Company,) to be carried to Banjari Railway Station. As defendant No. 2 refused to take delivery of the consignment on the 28th September, 1955, when the wagon arrived at Banjari railway station or thereafter in spite of repeated requests, wharfage charges accrued to the railway company against the defendants. They were entitled to enforce their lien on their subsequent consignments mentioned in Schedule A. After the first consignment arrived at Banjari railway station on the 28th September, 1955, six others arrived at the same station addressed to the same consignee (defendant No. 2), four of them on the 12th October, another on the 7th of December and the last on the 9th of December, 1955. In Paragraph 8 of the plaint it was stated that a deadlock

was created as defendant No. 2 took a wrong stand expressing his unwillingness to pay wharfage and demurrage in respect of a consignment.

Finally after taking permission from the Government for sale of coal the plaintiff sold them at a public auction after proclamation and publication in newspapers, on the 19th of June, 1956, and recovered Rs. 6,000/- as sale proceeds. Their total charge against the defendants came to Rs. 1,03,993-15-0, and giving a deduction of Rs. 6,000/- received from sale proceeds, the balance was claimed in the suit. Defendant No. 1 filed a written-statement denying their liability for any charges due to the plaintiff company and stated that no such charge could be due on account of any of the consignments of coal despatched by them. According to them, defendant No. 2 would be responsible for that, if at all. The written statement filed on behalf of defendant No. 2 denied the plaintiff's claim. In paragraph 7 he stated that

"the first wagon arrived at Banjari on the 28th September, 1955, and with the permission of the station master, Banjari, the representative of this defendant immediately unloaded the wagon. The representative of this defendant under instruction from this defendant approached the station master, Banjari with the freight in cash but the station-master, Banjari refused to deliver the consignment. Repeated attempts were made by this defendant to take delivery of the consignment on payment of the freight but the station master, Banjari and also the plaintiff's Manager did not take any care to deliver the consignment in spite of offering the freight by the defendant on many occasions.

This defendant also denied that the plaintiff was entitled to enforce any lien on the subsequent consignments, and therefore, there was no question of accrual of demurrage or wharfage on the subsequent consignments. In paragraph 9, he categorically alleged that the station master never accepted the freights offered by him and he (the station master) refused to release the consignment. Several correspondence that passed between the parties were also referred to in the written statement.

2. The admitted fact is that the first consignment of coal addressed to defendant No. 2 arrived at Banjari Railway Station on the 28th of September, 1955. According to the plaintiff, as the wharfage due on account of this consignment was not paid by defendant No. 2 before taking delivery, the railway company exercised their right of Lien on the six consignments of coal that came to that railway station subsequently as they were all addressed to defendant No. 2. All the consignments of coal were sold in auction and Rs. 6,000/- was received therefrom by the plaintiff. The dispute between the parties was in regard to what happened on the 30th September. I should point out here that though the plaintiff and the written statement give the impression that the unloading of the first consignment had taken place on the 28th September, 1955, the uncontradicted evidence of witness No. 1 for defendant No. 2 is that one day or a little less was occupied in unloading and he approached the Station Master, Banjari, for taking delivery of those goods on payment of the freight but he refused to do so. The

plaintiff examined only one witness, who was an audit clerk, and had got nothing to do with the railway station in regard to the arrival of the wagon, its placing at the siding, unloading from that wagon or, selling of the coal when it was not taken away by the consignee. His evidence, however, does not disclose what charges were demanded from defendant No. 2 on account of the first consignment or if at all any such demand was made, or, if made, when.

No documents were filed by the plaintiff company although such papers were admitted to be in their office. In cross-examination P. W I stated that Schedule A (account of claim) was prepared on the basis of letters and transshipment register. He said that he had filed the transshipment register but we do not see that either it was filed or it was proved. He further admitted that all papers supporting Schedule A were in the file of the station office, the dates mentioned in Schedule A were taken from the railway siding Delivery Book and the witness admitted that that Book was also with the plaintiff. It is very strange that none of these original papers or registers or Books were produced or proved in this case. The Station Master, Banjari, or any one else working during the relevant period at that station was not examined. On the other hand, what P. W. 1 stated in further cross-examination is very much fatal to the plaintiff's case. HE stated:

"I cannot say orally the date when demand of freight, wharfage or demurrage was made from defendant No. 2. Mr. Bulati, the General Manager of the plaintiff Company demanded these charges from defendant No. 2 by letter. Demand was made when goods were in the wagon. First demand was made when one wagon had been unloaded. I cannot say the amount of freight, demurrage and wharfage due on that date."

In Schedule A of the plaint no claim was made on account of demurrage for the first consignment Only Rs. 22,115.10.0 was claimed as wharfage from the 30th September, 1955 to the 18th of June 1956 (the date of sale). Neither in the plaint it was alleged that defendant No. 2 failed to pay on demand the freight or any other charge for the first consignment nor it was stated in evidence that such a thing had happened. Witness No. 1 examined for defendant No. 2 stated in evidence that he had offered the freight on the 30th September, 1955. The Station Master did not accept that and said that he would give delivery later on and would accept the freight at that time. One day or little less was taken in unloading the first consignment on the railway siding. The Station Master did not tell him that he would not accept the freight unless the demurrage and wharfage were paid. He did not know if demurrage and wharfage were demanded by the railway. In view of this evidence it is difficult to say that the plaintiff made out a case that any definite sum of money was due from defendant No. 2 on account of wharfage by the 30th September, 1955, or when his (defendant No. 2's) representative approached the Station Master for taking delivery of the goods after unloading on payment of the freight, any demand for payment of that was made from defendant No. 2 or his man and it was refused to be paid.

Under Section 55(1) of the Indian Railways Act, "if a person fails to pay on

demand made by or on behalf of a railway administration any rate or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods, or if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession." In the absence of a proved case of demand by the railway administration and failure by the consignee to pay it, the right of lien either over the same goods for which the demand was made or on subsequent goods that may come later will not arise in favour of the railway.

3. The learned Advocate General appearing for the appellant contended that in view of the admitted case that the unloading had taken place either on the 28th or 29th September and defendant No. 2's man came to take delivery of those goods from the railway premises on payment of only railway freight on the 30th September, certain amount of wharfage, at least for one day had already become payable by the consignee and there is no case by the defendants that that charge was offered to be paid. The Station Master was, there-fore, right to refuse to give delivery when approached for that purpose by defendant No. 2's man on the 30th September. Whether actually wharfage had become due or not would depend upon the time when the unloading took place and also on the time when the railway wagon was placed at the siding where unloading could be possible. There is no evidence on the plaintiff's side to indicate that time.

The learned Advocate General admitted that a free time of six hours is available to the consignee for unloading and clearance of goods after the wagon is placed at the railway siding or at any place where the unloading can be possible. Until the free time expires. . there will be no charge leviable for demurrage or wharfage against the consignee. It appears from Rule 3 framed u/s 47(1)(f) of the Railways Act that.

"a wharfage charge may be levied in respect of all goods, not removed From railway premises before closing time of the day following that on which they are made available for delivery."

That being the position, the important evidence in the present case to fix liability of any wharfage charge on defendant No. 2 would have been the time at which the railway wagon was placed on the siding on the 28th or 29th or when actually the unloading took place.

4. The other argument was that Rule 10 as contained in the General Rules No. 29, which were enforced from the 1st June, 1954, gives the right to the railway company to exercise a lien not only on the first consignment but also on the subsequent consignments. The rule reads as follows:

"Except in the case of dangerous and other goods specially provided for in this Tariff or in Exception Lists for which prepayment of freight is compulsory, all charges must be paid either when goods are presented for dispatch or at the time of delivery, and all goods are subject to lien not only for the freight,

wharfage, demurrage and handling charges on the particular goods, but also for any general balance which may be due to the Railway by the owner or consignor or consignee of such goods. If the money in respect of which goods are detained, be not paid, they may be sold by auction, in the case of perishable goods at once and in the case of other goods, on the expiration of 15 days" notice of the intended auction and the proceeds applied in liquidation or reduction of the amount due and expenses."

The argument was that because charges on the first consignment were not paid the railway had the right of lien not only on those goods but also for the other goods of the consignee that arrived subsequently. There are more than one difficulty to accept this contention. First of all. Rule 10 is not one which was made u/s 47(l)(f) of the Railways Act, which authorises the Central Government or in the case of a railway company, the railway administration to make general rules consistent with the Act for the purpose of regulating the terms and conditions on which the railway administration will ware-house or retain goods at any station on behalf of the consignor or the owner. The learned Advocate General urged that this rule was adopted by the Indian Railway Conference Association of which the plaintiff is a member. For carrying out the daily administration, a railway company is competent to make such rules. In other words, apart from the rules that could be made u/s 47 of the Act, a railway company can also make rules for general purposes of day to day administration

In support of this, reliance was placed on the case of *Pallonji N. Metha Vs. State and Another*, . In that case, a passenger who held a season ticket was found to be subject to a penalty as the season ticket was not in proper form. Rule 39(1) was the basis of that. The question arose whether that rule had been made u/s 47 of the Railways Act. The learned Judge observed that a railway could frame a rule apart from rules u/s 47 if that is not in conflict with the Act, or the rules framed u/s 47 and the rule is reasonable. But such a rule cannot contain any provision in regard to any punishment or penalty. Section 113 of the Railways Act deals with travelling without pass or ticket or with insufficient pass or ticket or beyond authorised distance and penalties have been provided thereunder. I cannot see how that decision can be of any help to the plaintiff here.

Rule 10 of the General Rules is not one of the nature of which Rule 39(1) discussed in the Bombay case was. Secondly, exercise of lien is a penal provision and that has been contained in Rule 10. Thirdly, there is no reasonableness in this rule authorising the railway to exercise lien not only on the goods for which some charges are due from the consignee but also on goods that may come subsequently for him, specially in view of the provisions made by the legislature u/s 55 in regard to exercise of lien by the railway for failure of payment of charges by the consignee or the consignor. If this rule is clearly in conflict with Section 55, applying the standard given in the Bombay case, this rule, on that ground alone, cannot be upheld. The learned Advocate General contended that Section 55, only provides for lien to some extent whereas General Rule No. 10

has extended it; it is not in conflict with that statutory provision. This can hardly be accepted.

Section 55 makes the lien subject to two things --accrual of liability in respect of charges payable to the railway and demand for such payment by the railway from the consignor or the consignee. Unless these two things are there, particularly, the demand, there will be no room for exercise of lien. Besides, the extent of lien has been provided there. Rule 10 has omitted the condition of demand and has extended the lien beyond the limit prescribed by Section 55; it is clearly in violation of the statutory provision. In that view, Rule 10 can never be supported. There is a further difficulty in the application of Rule 10 to the facts of the present case. As I have already shown, there is no material to conclude that any wharfage had been demanded from defendant No. 2 on the 30th of September for the first consignment when his representative approached the Station Master for taking delivery of the goods. There was no question of wharfage or demurrage for the subsequent consignments because defendant No. 2 was not allowed to take delivery of those goods at all as the railway, in exercise of their supposed right of lien on those consignments, retained them.

5. The learned Advocate General also referred to the case of Kanyaka Parmeswari Vs. Union of India (UOI) and Others, . That was in connection with the validity of Rule 31, Clause (2) of the General Rules. The learned Judge there accepted that that was a rule which had been made u/s 47 of the Railways Act and had been published under the Government of India Notification No. 231 dated the 3rd July, 1902. I must confess that on a reference to that Notification we were not able to find that rule. But whatever that may be, on the assumption that that was a rule which had been made u/s 47 and had undergone the formalities prescribed thereunder in regard to publication, the learned Judge accepted the validity of that rule. That, therefore, can have no application to the present case.

6. For the reasons given above, there is no way what-so-ever to interfere with the Judgment and decree of the trial Court by which the plaintiff's suit was dismissed. Accordingly, this appeal is dismissed with costs payable to defendant Nos. 1 and 2 half and half.

7. Before I part with this case, I would like to observe that the case on behalf of the plaintiff company has not at all been properly conducted in the trial Court. Who-so-ever may be responsible for the failure to produce and prove in Court the necessary original papers that were admittedly in possession of the plaintiff, the least that can be said is that it is regrettable. Large amount of court-fee was paid in the trial Court and also here. But no attempt was made to prove the plaintiff's case either by oral or documentary evidence.

A.B.N. Sinha, J.

8. I agree.