

(1956) 10 AHC CK 0031

In the Allahabad High Court

Case No : First Civil Appeal No's. 89, 90, 91 and 92 of 1948

Dominion of India

APPELLANT

Vs

Gaya Pershad

RESPONDENT

Date of Decision : 08-10-1956

Acts Referred:

Contract Act, 1872 — Section 55
Railways Act, 1890 — Section 72

Citation : AIR 1957 All 193

Hon'ble Judges : V. Bhargava, J; Agarwala, J

Bench : Division Bench

Advocate : B.N. Mulla, for the Appellant; B.K. Dhaon and G.N. Mukerji, for the Respondent

Final Decision : Dismissed

Judgement

V. Bhargava, J.—These four appeals arise out of four different suits which were numbered as Suits Nos. 64/5 of 1947, 72/10 of 1947, 73/11 of 1947 and 74/12 of 1947 in the trial Court. In all the four suits the plaintiffs and the defendants were the same. The suits all related to a claim made by the plaintiff-respondent against the defendants-appellants who are the two railway administrations at present known as the Central Railway and the Northern Railway and which, at the time of the suits were known as the G. I. P. Railway and the E. I. Railway; The claim was in respect of damages to baskets of oranges which were sent from the railway station Katol on the Central Railway to Lucknow on the Northern Railway. The consignors of the four consignments were different but the consignee in each case was the plaintiff-respondent. The first consignment in question was booked from Katol on the 21st of March, 1946 and the other three consignments were booked on the 22nd of April, 1946. In each case it was mentioned in the railway receipt that the wagon was to be carried by C. O. G. Special. We understand from learned counsel for the appellant that the correct term used is C. O. G. which letters connote trains known as Coaching Specials. These trains are parcel trains which run faster than goods trains like parcel

express. The goods consigned on the 21st of March 1946 were delivered at Lucknow to the plaintiff-respondent on the 30th of March, 1946 when it was found that the oranges had considerably deteriorated. The amount of deterioration was estimated by the Station Superintendent, Lucknow at 75% which was noted down in the delivery book. The other three consignments were offered for delivery at Lucknow to the plaintiff-respondent on 3rd May, 1946 when the plaintiff refused to take delivery on the ground that the goods had deteriorated completely and become unfit for consumption.

A note was made by the plaintiff-respondent In the delivery book that the contents of these wagons were extremely rotten and unfit for human consumption so that he was refusing to take delivery. Thereafter the plaintiff-respondent gave notice to the two railway administrations concerned and then instituted these four suits for recovery of damages incurred by the plaintiff by reason of the late delivery of the goods.

Various defences were raised to the suits. All the four suits were tried together and decided by one single judgment. The Court rejected the pleas in defence and decreed the suit for damages.

2. Four different appeals have been filed in this Court but since all the suits were decided by one judgment and common questions are involved, we are also deciding these four appeals by one single judgment.

3. When these appeals came up for hearing before us, learned counsel for the appellants urged three points before us. The first point urged was that the plaintiff-respondent, who was only the consignee and not the owner of the goods of these four consignments, had no right to bring suits for damages to or loss of the goods. The second point urged was that it was incumbent upon the plaintiff-respondent to establish that the damage to the goods was the result of misconduct on the part of the railway administrations or their servants in view of the risk notes which had been executed by the consignors at the time when the goods were booked and since the plaintiff-respondent failed to establish any such misconduct, he was not entitled to a decree in any of these suits. The third point, which learned counsel took up, was that the amount of damages awarded by the lower Court had not been properly assessed. No other points besides these three were canvassed before us on behalf of the appellants.

4. The first point raised an important question of law. In that question it had to be determined whether the consignee had a right to bring a suit for damage to the goods in respect of which he was entitled to take delivery from the railway administration even though he was not the owner of these goods. It was found by us that in considering this question it was necessary to reconsider a Division Bench decision of this Court. Consequently we framed a question and referred it for opinion to a Full Bench. The decision of the Full Bench on that point was given on the 23rd of March, 1955 (Reported as Dominion of India as owner of G.I.P. Rly. and Another Vs. Gaya Pershad Gopal Narain, . That decision of the Full

Bench is against the appellants and in favour of the plaintiff-respondent. The decision was that the consignee in these cases had a right to bring the suits for damage to the goods even though he was not the owner of these goods. That point is thus disposed of by the decision of the Full Bench.

5. On receipt of this answer to the question referred to the Full Bench, the appeal came up for hearing before us again and on this occasion the remaining two questions mentioned above were argued before us by learned counsel for the appellants.

6. The main contention on the second point on behalf of the appellants was that though the position of the railway as carrier of the goods was that of a bailee by virtue of the provisions of the Indian Railways Act, in this particular case the appellants were specially protected by the risk notes in Form B which had been executed by the consignors when these four consignments were booked. Under these risk notes the consignors had, in consideration of lower charge, agreed and undertook to hold the railway administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to the said consignments from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the railway administration or its servants. There were also some provisos to this clause but they, need not be quoted as they are not applicable and relevant to the case before us. On behalf of the appellants stand was taken on this condition in the risk notes and it was urged that, unless the plaintiff-respondent had proved that the damage to the goods was the result of misconduct on the part of the railway administration or their servants, the plaintiff-respondent could not claim damages from the appellants. In the lower Court, this point was sought to be met on behalf of the respondent on the ground that the risk notes had been obtained from the consignors by misrepresentation of facts by the servants of the railway administration concerned. This plea of the plaintiff-respondent was not accepted by the lower Court, nor has it been pressed again before us. The position, that has been taken up on behalf of the plaintiff-respondent before us, is that in this case the facts admitted and proved showed that the goods were not carried by the railway administrations in accordance, with the contracts entered into as evidenced by the parcel way bills and since the goods were not carried in accordance with the contract and there was a breach of the contract on the part of the railway administrations, the railway administrations were not entitled to claim the protection of the risk notes. It appears from a joint statement given by learned counsel for the parties in the lower court that the wagons in respect of all the four consignments were despatched from Katol railway station, where the goods were consigned, by C. O. G. Specials. In all cases the goods were carried up to Jhansi by C. O. G. Specials. The first consignment, which was in Wagon No. 8126, was sent from Jhansi by being attached to a goods train which left Jhansi on the 26th of March, 1946 at 4.00 a.m. It arrived at Juhi near Kanpur Central Station on the 26th of March, 1946 at 4.40 p.m. and from there it was despatched by another goods train on the 27th

of March at 12.00 a.m. The wagon arrived at Lucknow on the 28th of March, 1946, at 11.50 a.m. when it was placed in the goods yard. Thereafter it was placed at the parcel delivery siding on the 29th of March, 1946 at 5.00 p.m. So far as the other three consignments are concerned, they were carried by C. O. G. Special from Jhansi up to Juhi where they arrived on the 27th of April, 1946 at 7.15 a.m. From Juhi, however, the wagons were attached to a goods train which left Juhi on the 1st of May, 1946 at 11-20 p.m. The wagons then arrived at Lucknow on the 2nd of May, 1946 at 6.30 a.m. and were placed for delivery at the parcel delivery siding on the 3rd of May, 1946, on which date delivery was refused by the plaintiff-respondent. This movement of the wagons containing the goods shows that part of the way the goods were carried by the type of train which was agreed upon between the consignors and the railway administration, but for part of the way the wagons were carried by goods train which was contrary to that contract. The reason in the case of Wagon No. 8126 given on behalf of the railway administration is that though that wagon could be attached to a passenger (No. 603 Down) which was to leave Jhansi at 3.00 a.m. on the 26th of March, 1946, this could not be done as that train was already carrying an overload. According to the evidence of defence witness S. D. Awasthi, that train usually had a load of 10 bogies whereas on that day it was actually carrying 11 bogies. Further questioned, the witness went on to say that the train was actually carrying 10 passenger bogies, one military motor van and one military stores wagon. The train ordinarily carried 8 passenger bogies but there were 10 passenger bogies in the train that day. He has also stated that this excess in the number of bogies in the train came about since two extra passenger bogies had come in the train from Bombay. This does show that the train was carrying an overload that day so that this Wagon No. 8126 could not be attached to that train. The witness has also stated that in order to avoid heavy detention, this Wagon No. 8126 was then attached to the goods train No. D-5. It has been urged by the learned counsel for the appellants that this step which was taken at Jhansi was a prudent act of a bailee inasmuch as the wagon was attached to the goods train to avoid further detention as far as possible in view of the fact that the wagon contained perishable goods. Having heard learned counsel on this point, we are not satisfied that this step, which was taken on behalf of the railway administration, was really a prudent act. The facts disclosed by the railway administration themselves show that the result of the attachment of that wagon to the goods train at Jhansi was that the wagon went to Juhi where there had to be a detention of about 17 hours. Even when it was sent from Juhi by another goods train to Lucknow, there was a further delay in delivery of the goods, the wagon having come by a goods train, which according to rules, had to be sent to the goods yard. It actually reached the goods yard at 11.50 a.m. on the 28th of March, 1946 and thereafter there was a delay of about 30 hours before it could be placed at the delivery siding. There were thus two long delays at Juhi and Lucknow which were clearly very material delays in view of the nature of the goods that were being carried. The delays occurred because the goods were sent from Jhansi onwards by a goods train and not by the type of

train which had been agreed upon between the consignor and the railway administration. If the wagon had not been sent by goods train from Jhansi on the 26th of March, 1946, but had been sent by the passenger train No. 603 Down on the 27th or 28th of March, 1946 even then it could have been available for delivery at Lucknow earlier than the time when it became available on being attached to the goods train. Further, it appears that when that wagon was attached to the goods train at Jhansi, no steps were taken to ensure that the railway servants, who had to deal with the wagon at later stages, came to know that there had been a contract to carry that wagon by C. O. G. Special. If any such step had been taken, the delays, which occur in the case of wagons ordinarily sent by goods train, could have been avoided. No such prudent step was taken either. Another aspect that has to be kept in view is that the failure to attach the wagon to No. 603 Down passenger train was also the result of the actions of the railway administration itself. The two extra coaches, that had been attached from Bombay, were attached by the same railway administration which accepted the hooking of these goods at Katol. It is true, as urged by learned counsel, that during those days there was pressure of traffic on the railways and there was at the same time shortage of rolling stock and engines but if the railway administrations anticipated that the goods booked by C.O.G. Special from Katol could not be carried by passenger train and had to be carried by goods train, they should not have contracted to carry the goods by C.O.G. Special. Having, contracted with the consignors to carry the goods by C. O. G. Special, the equivalent of which is a passenger train, it was the duty of the railway administration to take steps that the goods were carried in the expeditious manner contracted between the parties and not by a slower train. For all these reasons, we are unable to hold that the alteration of the type of train from the C. O. G. Special to goods train was a prudent act on behalf of the railway administration. The result of this alteration by the railway administration was that the goods were no longer being carried in accordance with the terms of the contract between the parties. Once the carriage of the goods was no longer in accordance with the terms of the contract, and a breach of the contract in that respect had been committed by the railway administration, the railway administration could no longer seek the protection of the risk note in Form B as that risk note was executed by the consignor on the clear understanding that the goods would be carried by C. O. G. Special and not by goods train. In the case of perishable goods like oranges, the term of contract that the goods are to be carried by a special type of train which is faster than the ordinary goods train, is clearly of the essence of the contract. The arrival of the goods was delayed in consequence of the change of type in train and not because it was not possible for the railway administration to carry the goods throughout by C. O. G. Special.

The railway administration need not have contracted to do so, but when they did contract to do so, the risk note, which was executed by the consignor, could protect the railway administration only so long as they carried out the transit of the goods in accordance with the terms of the contract. This view of ours is fully

supported by a decision in *Gunyon v. South Eastern & Chatham Rly. Co.*'s Managing Committee, 1915-2 KB 370 (A). In that case also an owner's risk note had been executed by the consignor under which the consignor had elected to book the goods at a reduced rate agreeing to relieve the Managing Committee and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the Managing Committee's servants. It was held that the owner's risk clause could only be effective in cases in which the railway afforded the consignor an alternative rate below the general rate. The rate was alternative to a general rate "for the carriage of fruit by passenger train or by other similar service" which of course the Midland goods train (by which the goods were actually carried for part of the way) was not. To make the owner's risk operative the contract had to be one for carriage by passenger or equivalent train. It was held that it was during any portion of such transit only that the sender agreed to relieve the company from liability. It was only during the performance by the railway company of such transit that the sender could be called upon to show that his loss had arisen from the wilful misconduct of the company's servants. But when in London the cherries were shipped on a goods train, that contract was no longer being performed and the goods were no longer being carried at owner's risk. The Midland Railway Company shipped the goods upon a train to which neither the contract nor the rate of payment applied and consequently the ordinary incidents of carriage by carrier at once became applicable. The mere fact that they were being carried over the line of rails of the Midland Railway Company did not constitute the performance or an attempted performance of that special contract. The company never carried and never intended to carry at owner's risk; for they must have known that the only valid owner's risk rate for fruit in force was one for carriage by passenger train. It will be noticed that the above case was similar in facts to the cases before us. In both cases owner's risk forms had been executed under which the railway administrations were exempted from liability for damage, etc., except upon proof of misconduct on the part of the railway administrations or their servants. In the case of *Gunyon v. South Eastern and Chatham Railway Companies*" Managing Committee (A) the goods were to be carried by passenger train and were instead carried by goods train for part of the way. It was held that the damage resulting from delay on that part of the transit could be claimed without proof of misconduct. In our case also, the delay occurred materially in the transit between Jhansi and Lucknow when the goods were not being carried in accordance with the terms of the contract under which they had to be carried by C. O. G. Special. They were being carried by goods train which was slower than C. O. G. Special and to which the rates applicable must be lower. This principle was applied in India by the Bombay High Court in *B. B. & C. I. Railway v. Mahamadbhai Rahimbhai and Anr.*, AIR 1929 Bom 355 (B). In that case also the goods were being carried under a risk note which was in Form H under which the

railway administration was protected unless there was wilful neglect on. their part. It was held that the carriage of goods, which were of a perishable nature, by passenger or parcel train was the essence of the contract and when that contract was broken by carrying the goods by goods train the protection of the risk note was no longer available to the railway administration. In these circumstances, since we are unable to hold that the railway administration was justified in sending the Wagon No. 8126 from Jhansi by goods train and in committing breach of contract, the railway administration is not entitled to the protection of the risk note in Form B. The facts with regard to the other three consignments are very similar. In these cases also the goods were sent from Juhi by goods train. There was considerable delay at Juhi where the wagons were dealt with like wagons being sent at ordinary rate by goods train. Again at Lucknow, there was delay in placing the wagons for delivery, because, having been treated as wagons coming by goods train, they first went to the goods yard and were later placed at the delivery siding, in these circumstances, no question arises of the plaintiff-respondent being required to prove that the damage to the goods booked was due to any misconduct on the part of the railway administrations or their servants and consequently we need not go into the question whether there was any such misconduct in this case or not. Learned counsel for the appellants also urged before us that there was no evidence that the deterioration in the goods was the result of delay in delivery occasioned by the carrying of the goods by goods train instead of C. O. G. Specials. The nature of the goods itself indicates that detention of the goods before delivery was likely to affect the quality of the goods. The longer they were delayed, the more deterioration was bound to occur. In the case of goods sent on the 21st of March, 1946, there was an assessment by the Station Superintendent, Lucknow, himself that the deterioration was to the extent of 75%. So far as the goods of the other three consignments are concerned, there is evidence on behalf of the respondent that there was complete deterioration and the goods had become unfit for consumption. There is no evidence to the contrary on behalf of the appellants to show that the goods were still in good condition and fit for consumption. The deterioration was due to delay in delivery as no alternative cause for deterioration has been alleged or proved on behalf of the appellants. The second point urged on behalf of the appellants must also, therefore, be decided against them.

7. So far as the question of the amount of damages is concerned, learned counsel has only pressed it before us with regard to the amount of damages in one suit, No. 64/5 of 1947 out of which First Appeal No. 89 of 1948 has arisen. It was in that case that the amount of loss was estimated at 75%. Learned counsel's argument was that the value of the damage to the goods accepted by the lower Court as Rs. 3,447-5-0 has not been properly proved by the plaintiff-respondent whose evidence on this point was unsatisfactory. We, however, find that the value of the damage was assessed by an officer of the railway administration at Lucknow who has also been produced in this case as a witness

on behalf of the appellants. No attempt was made to show in his evidence that his assessment was wrong or had been arrived at on some misrepresentation made by the plaintiff-respondent. There is, therefore, no reason for rejecting the figure of assessment of damage made by him. In the other three cases, the rate per basket for the goods damaged was fixed by the lower Court on the basis of the statement of Mr. G. Dan, who was the Assistant Fruit Marketing and Utilisation Officer and who had been in Government service. We see no reason to differ from the views taken by the learned Judge of the lower Court that his evidence is reliable.

8. Consequently we find that there is no force in these appeals and they are dismissed with costs.