
(1949) 03 CAL CK 0004
In the Calcutta High Court
Case No : Civil Revn. No. 1379 of 1948

Dominion of India

APPELLANT

Vs

Guruprosad Ram Gupta and others

RESPONDENT

Date of Decision : 04-03-1949

Acts Referred:

Citation : (1949) 03 CAL CK 0004

Judgement

Das Gupta, J.—This application raises a question of the operation of proviso (b) in "Risk Note B" under which certain consignments were sent by rail. It appears that on 1st July 1946 a consignment of 250 bags of mustard seed was booked at Birsinghapur, a station on the Bengal Nagpur Railway Administration, for carriage to and delivery at Ranigunj, a station on the East Indian Railway Administration. On unloading at Ranigunj on 11th July 1946 it was found that 7 bags out of the 250 bags had been cut and the total shortage in these bags amounted to 12 maunds and 36 seers. The plaintiff is the party who took delivery on the railway receipt duly endorsed by the consignee, the consignment having been made to self. In the railway receipt it is said that Risk Notes A and B were held. The plaintiff's claim was for damages with respect to the shortage in delivery.

2. The main defence of the Railway Company was that in view of the terms of Risk Note B the plaintiffs were not entitled to any damages except on proof that the damage arose from misconduct on the part of the Railway Administration or its servants. The learned Small Cause Court Judge has made certain adverse comments as regards the evidence of execution of Risk Notes A and B that was sought to be proved by the Railway Company. I do not find however that he actually came to any definite finding on this question whether these Risk Notes were actually executed by the consignor. In my opinion the learned Judge has erred in not taking into consideration the circumstance that, in spite of the fact that the railway receipt, no doubt granted by the defendant company, definitely states about execution of the Risk Notes A and B by the consignor, no evidence was sought or attempted to be adduced by the plaintiff company to deny execution of these Risk Notes. In my opinion, the arguments that found favour

with the learned Judge that if the man did not know Hindi he was almost like a blind man as regards proving the execution of the documents, is of much value. The reasonable conclusion from the circumstances taken with the evidence clearly is that both Risk Notes A and B were executed by the consignor.

3. It is not claimed that any misconduct on the part of the Railway Administration or its servants has been directly proved. The argument that found favour with the learned Judge was that as this was a case of pilferage which is dealt with in proviso (b) of the Risk Note B the Railway Administration was in law bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control. If that duty did arise, it would be the duty of the Court to call upon the Railway Administration to give evidence as to how the consignment was dealt with before the consignor is called upon to prove misconduct. If there was such a duty of the Railway Administration and if the Court found that that had not been properly discharged, circumstances may very often arise from which the Court finds it reasonable to presume that there was misconduct. The important question which the Court had therefore to decide was whether there was such duty cast on the Railway Administration, (b) of the proviso which casts the duty is in these terms:

Pilferage from a package or packages forming part of the said consignment properly packed as in (a), when such pilferage is pointed out to the servants of the Railway Administration on or before delivery.

In such cases of pilferage clearly the Railway Administration shall be bound to make to the consignor the disclosure as mentioned above. In my opinion three conditions are necessary before a case can be said to fall under (b): (1) There must be pilferage from one or more packages forming part of the consignment, (2) a package or packages from which there has been pilferage must be properly packed, (3) the pilferage must be pointed out to the railway administration before suit. It is not disputed that the requirements (1) & (3) were satisfied. The question is whether the requirement (2) viz., that there was proper package, has been satisfied.

4. The learned advocate for the opposite party contended that it is not necessary for the application of proviso (b) that these packages should be properly packed. To accept his argument would be to treat as redundant and useless the words "properly packed" occurring in the proviso. It was argued by the learned advocate that when it is a case of pilferage the question whether it was properly packed or not can hardly be of any consequence. I am unable to agree with him. In my opinion, the question whether the package was properly packed or not is of great importance for a case of pilferage. Obviously it may be very much easier to remove certain things from a package which is defectively packed than from one which is properly packed. Be that as it may, I do not think that it is possible for Courts to make new contracts for parties. When the parties entering into a contract had themselves in no uncertain terms included the requirement of proper package, in proviso (b), it is not open to the Court to disregard it. I hold

therefore that before the case, can be considered to be within the proviso (b), the package from which pilferage has taken place must be shown to be properly packed.

5. The question is whether it has been proved in this case that the package was properly packed. I find that the learned Small Cause Court Judge did not record any finding on this point at all. He said that the bags did not give way due to inherent defect or weakness in them. That clearly does not amount to a finding that the packages were properly packed. The plaintiff, in para. 5 of the plaint, did make the definite case that the goods under consignment were carefully packed and firmly secured and sewn in strong gunny bags and were perfectly in good condition. The truth of this was wholly denied in the written statement. It was upto the plaintiff then to give definite proof as regards this statement in para 5 of his plaint, but this has not been done. The persons who could have given evidence are either the officers of the consignor or the consignor himself; none however of the said persons has given evidence on the point. I find that the plaintiff has given no evidence at all as regards proper packing of any of the packages from which pilferage had taken place.

6. The learned advocate for the petitioner has argued that in view of the fact that the consignor had executed the Risk Note A also, it was not open to the plaintiff to try to prove that there was proper package. The Risk Note A is executed only in case where articles are tendered for carriage which are either already in bad condition or were defectively packed as to be liable to damage or leakage. It is nobody's case here that the mustard seed was in bad condition. The only reason therefore for which the Risk Note A could have been demanded, and executed by the consignor was that the articles were so defectively packed as would make them liable to damage or leakage. The learned advocate for the opposite parties argues that as the question of liability of the Railway Company is to be decided in this case according to Risk Note B it is not proper for the Court at all to take Risk Note A into consideration. I am not impressed by the argument. The question certainly is whether in view of the contract between the parties as indicated by Risk Note B, the Railway Company is liable; but I do not think that it is open to the Court to refuse to take notice of a circumstance which has come before it by reason of the fact of execution of the Risk Note A. That circumstance is that by the execution of the Risk Note A, the consignor was admitting defective packing. That was an important fact in deciding the question of liability under Risk Note B and therefore it was not only open to the Court but it was its bounden duty to take into consideration Risk Note A.

7. On taking this admission by Risk Note A into consideration I find it proved affirmatively that the articles were defectively packed and were not properly packed within the meaning of proviso (b).

8. My conclusion therefore is that though this was a case of pilferage this did not come within the proviso (b) and that consequently the Railway Company was under no duty to disclose. The result therefore is that there is no scope for

making the presumption against the Railway Company, because of non-disclosure by them, that there was misconduct on the part of the Railway Administration or its servants.

9. I am clearly of opinion that on the facts of this case as established by the evidence on record the plaintiff is not entitled to any damages from the Railway Company. I am also clearly of opinion that by omitting to consider at all the question whether there was proper package of the goods or not the learned Small Causes Court Judge has erred in law. Consequently this is a fit case where this Court should interfere with the decision of the lower Court.

10. I accordingly allow this application, set aside the judgment and decree passed by the learned Small Cause Court Judge and order that the suit be dismissed with costs. The rule is made absolute with costs; hearing fee one gold mohur.