

(1954) 07 MP CK 0002

In the Madhya Pradesh High Court

Case No : Second Appeal No. 253 of 1949

Erachshaw Desabhai Kerawalla

APPELLANT

Vs

Dominion of India

RESPONDENT

Date of Decision : 17-07-1954

Acts Referred:

Contract Act, 1872 — Section 151

Citation : AIR 1955 MP 70

Hon'ble Judges : Samvatsar, J;Newaskar, J

Bench : Division Bench

Advocate : K.A. Chitale, D.C. Bharucha and J.D. Patel, for the Appellant; V.R. Dhodapkar, for the Respondent

Final Decision : Allowed

Judgement

Newaskar, J.—This second appeal arises out of a suit brought by plaintiff Erachshaw Kerawalla of South Tukoganj Indore for the recovery of Rs. 4491-13-0 against Governor General in Council, representing the B. B. & C. I. Railway Co. in the Court of Additional District Judge Railway Lands in Central India.

2. The suit was initially decreed by the trial court on 28-9-1946. An appeal preferred against this decision was heard by Mehta J. of this Court after the formation of Madhya Bharat State. He allowed the appeal preferred by the defendant and dismissed the plaintiff's suit with costs throughout.

3. Plaintiff has now preferred this second appeal.

4. The allegations of the plaintiff are that on 26-6-1943 M/s. Eastern Chemical Company Ltd., Bombay booked ten carboys of Hydrochloric acid and five carboys of Nitric acid under R/R No. 10967 and ten carboys of Nitric Acid under R/R No. 10968 from Dadar (Bombay) by the B. B. & C. I. Railway to be carried to Indore Railway Station. These carboys of acid were, according to plaintiff, purchased by him and the same were consigned in his name as the consignee by the Eastern Chemical Co. Ltd., who, having obtained the railway receipt aforesaid from

Railway Company, forwarded the same to the plaintiff, that when the consignment reached Indore it was found that the carboys were broken and empty and the plaintiff therefore could not take the delivery of the goods; that this resulted in a loss to the plaintiff amounting to Rs. 4491-13-0 as detailed in Para. No. 3 of the plaint; that this loss to the plaintiff occurred due to the misconduct of the servants of B. B. & C. I. Railway administration while the consignments were in the course of transit. The plaintiff held Governor General in Council liable as the said Railway Company was owned by the Government of India.

5. The defendant in written statement contended that the plaintiff alone could not sue as there are other partners of the firm of M/s. Kerawalla and Co. and further that the suit was not maintainable as the aforesaid firm is not registered under the Indian Partnership Act.

6. The defendant admitted the fact of booking of the carboys from Dadar but did not admit that the plaintiff was the purchaser thereof. It was alleged by the defendant that M/s Kerawalla and Co. who were mentioned as the consignees, were selling agents of Eastern Chemical Co. Ltd. It was therefore contended that neither the plaintiff nor his firm could sue. It was admitted by the defendant that the carboys reached Indore Railway Station in a smashed condition but he averred that the consignees were bound to take delivery of the same. It was denied by the defendant that the plaintiff suffered a loss as detailed in Para. No. 3 of the plaint but admitted the amount of railway freight.

7. It was further asserted that the consignments were booked at owner's risk under Risk Note G which exonerates Railway administration from liability. It was further stated that the consignments in question were loaded by the railway authorities in Wagon No. 28404 on 26-6-1943; that the wagon arrived at Surat on 29-6-1943 and while it was standing in the yard awaiting outward dispatch a fire broke out inside the wagon; that the railway servants at Surat took immediate steps to extinguish the fire but the same could not be brought under control except with great difficulty; that thereafter when the packages were checked the carboys in question were found broken and empty. Notices given by the plaintiff under Ss. 77 and 140 of Railways Act and S. 80, Civil P. C. were stated to be invalid in law.

8. As a further clarification the plaintiff in his rejoinder denies the fact that M/s. Kerawalla and Co., is a firm but it was stated that this was the name of plaintiff's shop of which he alone was the proprietor. He denied that he or M/s Kerawalla and Co., were the selling agents of Eastern Chemical Co., Ltd. Besides controverting other allegations made by the defendant it was stated that the wagon carrying carboys contained spirit as well. It was also asserted that it is for the defendant to show how the consignments were dealt with during their transit and disclosed the reasons for the fire.

9. When the interrogatories were served the fact was admitted that the wagon

carrying the aforesaid acid consignment contained spirit as well.

10. Principal points debated in the courts below and which still survive are:

First: Whether the plaintiff is the purchaser of the acid carboys in question or was merely a distributing agent of the purchaser and therefore could not sue.

Second: Whether there was misconduct on the part of Railway Company within the meaning of the term as used in Risk Note G.

11. The trial court over-ruled the defence on both these points and further found that the plaintiff had suffered loss to the extent alleged. The suit was thereupon decreed by it in full with costs.

12. The appellate court reversed the findings in both the aforesaid points. It held that the plaintiff was a distributing agent and could only get commission from the purchaser "Imperial Chemical Industries". It further held that the plaintiff had failed to prove misconduct on the part of railway administration within the meaning of Risk Note G and that there was no sufficient material to draw an inference of misconduct so as to hold the defendant responsible.

13. On these findings the suit was dismissed.

14. Plaintiff has now preferred this second appeal.

15. Mr. Chitale for the appellant contended that the decision of Mehta J. on both these points require further scrutiny.

16. He contended, as regards first point, that apart from any other consideration plaintiff being a consignee of the goods in question he had a perfect right to file this suit and relied in this connection upon the decisions reported in -- "Jalan and Sons Ltd. v. Governor-General in Council", AIR 1949 EP 190 (A) and -- Ram Narain Vs. The Dominion of India, New Delhi and Another, . He further contended that, on the materials as they stood, there is overwhelming evidence to prove that the plaintiff was the purchaser and not merely an agent of Imperial Chemical Industries as found by Mehta J. He particularly laid stress upon the statement of Mr. Pitt, the Sales Manager of the Imperial Chemical Industries and urged that when this witness on oath states that the plaintiff is the purchaser of these goods and not a mere agent of Imperial Chemical Industries there was no good reason to disbelieve him.

The inference sought to be drawn by the learned Judge from the document Ex, "B" was, according to him, not justified particularly as Mr. Pitt, from whose statement that inference was sought to be drawn, was not any way concerned with the document. The opinion of the learned Judge that Exs. A and B were "worthless pieces of papers" was criticised as being inconsistent with the earlier statement in the Judgment to the effect that Ex. B clearly established that the plaintiff was merely the distributing agent. Failure to produce the original orders was immaterial under the circumstances he said.

17. As regards the second point it was contended that although the learned Judge has correctly set forth what amounts to misconduct within the meaning of the term as used in Risk Note G the inference drawn regarding the existence of such a misconduct from the fact and circumstances proved on record was inapt. He urged that the view taken in appeal that Red Tariff Loading Regulation given at page 101 (B) controlled those given with reference to Hydrochloric and Nitric acids in the last column of the table at page 106 of Red Tariff No. 16 was erroneous. According to him the special supplementary regulations regarding the loading of glass carboys containing the aforesaid acids really controlled more general regulation given at p. 101 the distinguishing factor being the loading and carriage of acids in glass carboys. He criticised the oral testimony of railway servants both at Surat and Dadar and contended that the story that the drums of spirit and the carboys of acids were kept considerably apart cannot be believed.

18. On the whole according to him there was misconduct on the part of railway servants in loading the drum of spirit contrary to regulation with glass carboys containing acid and the real cause was that owing to rough shunting leakage in both the spirit and acid was inevitable. He further relied upon the opinion of Dr. Kaushal, D. Sc., of Holkar Collage Indore that the acids of concentration, such as those in this case, when brought in contact with spirit combine with explosive violence causing fire.

19. He further contended that the plaintiff, in this case, having succeeded in establishing misconduct on the part of railway authorities and his right to file suit both as consignee and purchaser, is entitled to a full decree and that the decision of the trial court in this respect was correct.

20. Mr. Dhodapkar who appeared for the respondent on the other hand generally put forward in his argument the line of reasoning adopted by Mehta J. As regards the first point he relied upon the view by Bhagwati J. in --"Shamji Bhanji & Co. v. North Western Rly. Co.", AIR 1847 Bom 169 at pp. 178, 79 (C) and contended that the contract of carriage prima facie is with the person to whom the goods belonged. According to him, the fact that the goods was purchased by the plaintiff from Eastern Chemical Company and he was the owner of it when the same was destroyed by fire had not been established.

21. As regards the second point he drew distinction between misconduct and negligence (however gross or wilful it be) and urged that mere error of judgment as regards the regulation to be applied, if at all there is one, cannot amount to misconduct. He further urged that the regulation at p. 101 was correctly applied and usual course of practice prevailing then was followed. The damage, according to him, might have been as a result of failure on the part of consignor in keeping glass carboys of strong acid in grass package which was contrary to regulations. He therefore urged that the decision appealed against was correct and does not deserve to be interfered with.

22. In my view, the appellant in this case deserves to succeed on both the points

in controversy and the decision of the trial court deserves to be restored.

23. As regards plaintiff's right to file this suit the defendant do not appear to have taken the stand, they did with a view to protect themselves from being embarrassed by the multiplicity of actions first by wrong party and next by proper parties but merely with a view to fight on all fronts. Care does not appear to have been taken while asserting that M/s Kerawalla and Co. is a firm of partners and that plaintiff alone could not sue and that too without registration of the firm under Indian Partnership Act. Even on the second part of their case on this point instead of bringing on record decisive material to disprove the plaintiff's case that he was the purchaser suggestions based on indecisive, vague or uncertain materials were put forward.

24 to 31 On a careful scrutiny of the materials relied upon by Mehta J. I am inclined to take the view that the fact that the plaintiff was merely an agent having no interest whatsoever in the property destroyed is difficult of acceptance. On the other hand, materials do indicate that he is the purchaser and at any rate had sufficient interest to entitle him to file this suit. (After discussion of the evidence His Lordship proceeded).

32. On the whole the finding arrived at on this point Mr. Mehta deserves to be set aside. This is no doubt, to a certain extent, a finding of fact but it is needless to say that limitations of s. 100 Civil P. C. do not apply to this appeal.

33. Besides this plaintiff was a consignee of these goods and as such had a sufficient interest in the goods so as to enable him to file this suit. The decision of Tejasingh and Mahajan JJ., in AIR 1949 EP 190 (A), clearly supports this proposition. In this case reliance is placed upon a Division Bench case of Bombay High Court reported in -- "Dolatram Dwarkadas v. B. B. & C. I. Rly. Co.", AIR 1914 Bom 178 (D), wherein the learned Judges took the view that, an endorsee of a railway receipt though he be an agent of the consignor had sufficient interest in the goods to file a suit. This view appears to have been based on the consideration that the railway receipt is a document of title and clothes the endorsee with an authority to give discharge to the Railway Company.

The aforesaid Bombay case has been followed by the Allahabad High Court in -- Firm Peare Lal-Gopi Nath Vs. The East Indian Railway Company, (El. The learned Judges of the East Punjab High Court have disapproved certain remarks of Bhagwati J. in AIR 1947 169 (Bom.) , which run counter to the aforesaid Division Bench case of Bombay High Court and with the same I entirely agree. It cannot be denied that railway receipt is a document of title" as will appear from the definition of the term in Sale of Goods Act, S. 2 (4) and enables the person mentioned as consignee to give a valid discharge in respect of the goods to which, it relates. How can it then be said that he is not entitled to file the suit?

34. But, even assuming that where the consignee is a mere agent or Sub-agent of the consignor right of suit survives to the consignor and consignee cannot sue, it is clear in this case, on the findings arrived at by me, that the plaintiff was the

purchaser and the property in the goods had passed to him. He, therefore, is entitled to maintain this action.

35. As regards the second part viz, whether there was misconduct on the part of railway administration within the meaning of the term as used in Risk Note G the question may be divided in two parts:

(I) What exactly is the meaning and the scope of the term "misconduct" as used in the Risk Note G?

(II) Whether circumstances have been established in this case to justify an inference of misconduct on the part of railway administration.

36. As regards (I) two divergent views have been expressed by Judges about the meaning of this term. One view proceeds upon a comparison of the expression "wilful misconduct" used in the English risk-note. According to this view misconduct means any unbusiness like conduct, any act, of commission or omission, intentional or unintentional. Thus viewed, misconduct cannot be far from negligence. The second view proceeds upon the consideration that ordinary bailee's liability is sought to be reduced by the execution of the risk-note which holds the Company liable for misconduct. According to this view misconduct is opposed to accident or negligence. It is the wilful or intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the consequences may be.

37. Besides these there is a third view which is in between these two views.

38. According to S. 72 Clause (1) of the Indian Railways Act the responsibility of a railway administration for the loss, destruction or deterioration of goods delivered to it to be carried by railway is, subject to the other provisions of the Act, that of bailee.

39. Clause (2) however indicates that the administration can get the liability further reduced if it secures an agreement in writing from the person sending or delivering the goods to it in a form approved by the Central Government.

40. It is clear that a bailee is liable for the loss arising out of his neglect under the Indian Contract Act (Vide Section 151). Therefore when the railway administration secures an agreement under Risk Note G, this cannot but be intended to lessen its liability to which it would otherwise be exposed. This is further clear from the fact that the sender executing risk-note in this form is required to pay lesser amount of freight.

41. From this it appears that the words misconduct which is used to govern this liability cannot be read as synonymous with negligence but involves a greater degree of culpability than negligence.

41a. According to Guha J.:

Misconduct is something opposed to accident, or negligence; it is the intentional

doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be. (M. and S.M. Ry. Co. Ltd. Vs. Sunderjee Kalidas,)

42. This was followed by the Division Bench of the same High Court in -- Firm, Banwarilal Jagannath. Vs. B. B. and C. I. Ry. Co. Ltd., .

43. However in -- "Ralliararam Dingra v. Governor-General of India in Council", AIR 1946 Cal 249 (H), Gentle J., following the observations of Hilton J., in -- AIR 1930 120 (Lahore) , held as follows:

The opinion in M. & S. M. Rly. case (F), was given after reference was made to several decisions of the English Courts upon risk, or consignment, notes by which the railway was liable only upon proof of wilful misconduct or wilful default. Since the word "wilful" was absent from the risk note under consideration in the M. & S. M. Rly. Co. case (F), and is absent in the risk-note in the present case it may be, and probably is, that the view expressed goes too far with regard to the meaning of the word "misconduct". In Bengal Nagpur Railway Company, Ltd. Vs. Haji Latif Abdulla, , Jack J. observed at p. 412 that negligence in his view would not always be tantamount to misconduct; which is the view held in -- "Lewis v. G. W. Rly. Co. Ltd.", (1877) 3 Q. B. D 105 (K) in which it " was said that misconduct is something opposed to accident on negligence.

In my opinion for an act to amount to mis-conduct there must be a greater degree of wrong than is required for negligence. Misconduct is something in the nature of improper behaviour and is not merely either wrongful commission or wrongful omission. An act of misconduct can well be and in most cases probably is, negligence; but a negligent act is not by itself misconduct. It seems to me that misconduct is the genus and negligence species of the genus. The observation of Hilton J. in AIR 1930 120 (Lahore) , appears in point. At p. 121 the learned Judge observed:

The phrase "misconduct of the railway administration's servants" can only have the second meaning, which involves the passing of a moral judgment on the part of person concerned, however slight may be the lapse from rectitude which provokes it.

44. In -- Firm Sheikh Wajid Ali Mohammad Rafiq Vs. Bengal and North Western Railway Co. and Another, , Collister J. after indicating the two opposing views one in M. and S.M. Ry. Co. Ltd. Vs. Sunderjee Kalidas, , expressed by Guha J, and another in -- Jamunadas Ramjas Vs. East Indian Railway Co. Ltd. and Another, , by Jwala Prasad J. held as follows:

It seems to me that it will serve no very useful purpose to attempt a general definition of "misconduct" in risk note form H. But if I did venture upon one, I should say that the simplest and most non-committal definition of the word would be "improper conduct". What the court has to do in case of this sort is to consider all the facts and circumstances and then arrive at a conclusion as to

whether the conduct of the railway employees was such as to render the railway administration liable to damages upon a reasonable view of the matter.

45. The case which takes the view that misconduct practically amounts to negligence besides *Jamunadas Ramjas Vs. East Indian Railway Co. Ltd.* and Another, is *The Madras and Southern Mahratta Railway Co. Ltd. Vs. S.M.C.P. Nallathambi Chetti, A. Rathnavelu Chetty and Co.,* .

46. On consideration of these views and the provisions contained in S. 72 of the Indian Railways Act it appears to me that the view that misconduct amounts to or is not far from, negligence cannot be accepted. It is clear that a greater degree of culpability is needed than mere negligence to make the Railway Company liable for loss due to misconduct. With that as limitation each case will have to be judged on its own merits and it will have to be found out from facts and circumstances proved whether the act or omission on the part of railway servants amounts to misconduct. I further think that whether on given set of facts and circumstances the act or conduct of railway servants amounts to misconduct is a question of law.

47. The next question to be considered then is what are the facts and circumstances established in this case and whether they amount to misconduct.

48. It is undeniable that the 25 glass carboys of acid were entrusted to B. B. & C. I. Railway for carriage to Indore. It is admitted that the carboys were broken and entire amount of acids was lost. It is further admitted by the Railway Company that the wagon in which these glass carboys were loaded contained Methylated Spirit etc.

49. This brings us to the business practice contained in loading regulations contained in. Red Tariff No. 16 pages 101 and 106.

50. There are standing regulations prescribed by railway authorities for the guidance of its servants and officers in cases involving danger or loss of goods contracted to be carried.

51. They are intended to serve as a timely warning that the servants ought to follow the instructions given in these regulations in order to avoid possible risk. The railway servants are expected to know them and follow them meticulously. If the servants of the railway company act not caring what these regulations are or in total disregard or violation of them and the loss occurs it is difficult to call it mere negligence. Conduct such as this should in my opinion amount to misconduct. There is a higher degree of culpability involved in such conduct than mere negligence.

52. On behalf of the Railway Company it is contended that the regulation which applied was regulation No. 100(B) which runs thus :

B. It is undesirable that this traffic (i.e. those which are to be labelled B as provided in the Table at page 106) should be loaded in the same wagon or van

with inflammable liquids.. or other goods likely to be damaged in the event of leakage. If no other wagon or van is available, however it may be loaded with such articles provided it be stowed far apart from them.

53. At page 106 a table of dangerous, corrosive and poisonous goods is given mentioning special letters to be used for labelling that kind of traffic. Besides the special regulations contained at page 101 the table in its last column gives supplementary packing, loading and unloading regulations.

54. As against hydrochloric and nitric acids these supplementary regulations mention thus :

When packed in glass carboys no other merchandise be transported in the same truck (wagon) except acids.

55. It is thus clear that when the acids are being transported in glass carboys the supplementary regulations which, to my mind, control special regulations should be followed. For if this is not done the supplementary regulations will be rendered nugatory. Glass carboys is a special circumstance which attract the supplementary regulations.

56. In the present case it is admitted by the defendants in answer to the interrogatories served upon them that "besides the suit acids wagon No. 28404 contained acids, methyated spirit, caouthoucine and pyridine".

57. The railway servants have therefore violated the appropriate regulation in this case and there was fire and consequently loss of goods. It is therefore difficult to say that this was mere negligence and not misconduct.

58. It was suggested by Mr. Dhodapkar in his argument that the consignor had packed these glass carboys in iron boxes filled with glass contrary to special instructions.

59. In the first place this was not the case put forward in the pleadings by the defendants. They rest contented by stating that the cause for the loss was fire and they were therefore not liable.

60. Only answer elicited from the plaintiff in this connection is that railway (Company) in the case of carboys generally requires them packed in straw.

61. Only in the statement of witness of Apabhai Assistant Station Master Surat suggestion is made that there was packing of straw between the carboys and iron crates. But in the first place this is not what other railway servants examined say. Moreover besides the suit acid there was some more acid. It is not clear to which acid the statement relates and how other acid was packed. The carboys were accepted for consignment by the railway and it will be presumed that the same were according to regulations. The plaintiff was the consignee and was unaware of the nature of packing.

62. According to Dr. Kaushal D. Sc. who served as a professor of chemistry in

Holkar College, methylated spirit and Nitric acid of the specific gravity such as was in this case when brought in contact with each other combine with explosive violence causing fire. Mr. Apabhai wanted to suggest that there was only one drum of spirit and it was intact when the wagon was opened. According to him the drum opened when it was being taken out. He further stated that the acid carboys and the spirit drums were kept on two opposite sides.

63. However Apabhai's statement that there was one drum of acid is in conflict with the statement of Khandubhai Goods Clerk, Surat and Raghunath Madhoo, Seal Clerk who admitted that there were several drums. Apabhai admits that "when the door of the wagon opened the inside of it was burning all around". It is admitted by Khandubhai that the wagon when it caught fire was brought on low level yard after shunting. It also appears from evidence that acid cases were placed in the middle of the wagon and drums of spirit next to them.

64. Under these circumstances it cannot be said that the fire was the result of an unknown or inexplicable cause and that the loading and transport was according to regulations. The conduct of the railway servants in this case cannot fall short of misconduct and therefore the defendant cannot escape from liability.

65. As regards the quantum of loss no argument was advanced at the bar that the acids and the carboys were of lesser value than alleged. The trial court had found in plaintiff's favour and the appellate court did not touch that finding.

66. The result is that this appeal is allowed and plaintiff's suit is decreed in full with costs throughout. The plaintiff will get interest at 6 per cent, per year from the date of the suit till realisation.

Samvatsar J.

67. I agree.