

(1949) 09 CAL CK 0038
In the Calcutta High Court
Case No : Civil Rule No. 599 of 1949

Gangadhar Ram Chandra, a firm

APPELLANT

Vs

Dominion of India

RESPONDENT

Date of Decision : 09-09-1949

Acts Referred:

Limitation Act, 1908 — Article 30, 31
Railways Act, 1890 — Section 72

Citation : AIR 1950 Cal 394 : (1951) 1 ILR (Cal) 119

Hon'ble Judges : Das Gupta, J

Bench : Single Bench

Advocate : Purushottam Chatterji, for the Appellant; Bhabesh Narayan Bose, for the Respondent

Final Decision : Allowed

Judgement

Das Gupta, J.—240 bags of rape seed were booked from Delhi to Burdwan on 17th March 1947, the present petitioner being the consignee. He took delivery on 18th April 1947. All the 240 bags were delivered, but of these 7 had been cut and there was a resultant shortage in the contents, of 3 maunds 35 seers, as certified by the goods clerk who gave delivery. The petitioner having sued the Railway Company for compensation for this loss, the defendants pleaded that due to the special protection afforded by a certain clause in Risk Note A under which the consignment had been sent, the plaintiff could not succeed unless misconduct on the part of the Railway administration's servants was proved and that there was no such misconduct. It was further contended that the plaintiff's claim was barred by limitation.

2. The learned Judge of the Small Cause Court who tried the suit came to the conclusion that the defendants were entitled to protection of the clause in Risk note A, that no misconduct had been proved and also that the suit was barred by limitation.

3. For the purpose of the present Rule, we must proceed on the assumption that

the learned Judge's finding of fact that no misconduct had been proved is correct. The other two questions namely whether the defendant was entitled to any special protection in view of the clause in Risk Note A or the question whether the suit was barred by limitation are questions of law on which it is necessary to consider whether the learned trial Court's conclusion is right.

4. Risk Note A forms the basis of the contract in cases where articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The special clause runs thus:

"I/We, the undersigned do hereby agree and undertake to hold the Railway Administration harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants."

5. In a recent case of the Patna High Court, viz. Governor-General of India in Council Vs. Firm Bishundayal Ram Gourishankar, , Meredith J. held that the word "loss" as used in Risk Note A cannot refer to any loss of the goods, but refers to loss arising from the condition in which the goods are delivered; that in other words the Risk Note A has no application at all to cases of failure to deliver, or pilferage, because a thing never delivered cannot be said to have been delivered in any condition, and therefore, no question arises of any loss arising from the condition in which the goods were found on delivery. It was accordingly held that the Railway Administration can never plead the execution of Risk Note A in bar to a claim based on non-delivery, on account of pilferage.

6. In Bansi Ram and Others Vs. B.N.W. Ry. Co., and Another, , Sulaiman J. took a different view as regards the meaning of the words "loss arising from the same". He held that while this would mean loss arising from condition in which the goods are delivered, a shortage in weight is a condition in which the goods are delivered, and is covered by the saving clause in Risk Note A.

7. To hold that when, say X goods are consigned and (X-N) goods are delivered, really X goods are being delivered in a condition of shortage, involves some straining of the word "delivery". The fact, however, that the clause is clearly intended to cover cases of wastage and leakage of the contents justifies this straining, and I agree that for the purpose of Risk Note A, shortage in weight of goods is a condition in which the goods are delivered. It does not follow, however, that once Risk Note A has been executed every case of short delivery will be covered by the saving clause.

8. It is necessary to look to the entire document to decide how far the protection of this clause in Risk Note A extends. The form opens with the words:

"To be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or

wastage in transit."

This clause was known to and must be taken to have been consciously in the mind of the parties at the time, the risk note was signed. When therefore in the operative portion of the document the signatory agrees to hold the Railway authorities "free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from the misconduct on the part of the Railway Administration's servant," the parties must be taken to have also agreed that this would apply only where the condition in which the goods are delivered may either be due to the fact that they were already in bad condition or to the fact that they were so defectively packed as to be liable to damage, leakage or wastage.

9. It is no doubt true that the very fact that in this case Risk Note A was executed is evidence to show that either the goods were in bad condition when tendered or they were so defectively packed as to be liable to damage, leakage or wastage in transit. The evidence indicates that this was a case of defective packing inasmuch as the bags used were old.

10. Something more, however, is necessary before the saving clause can have operation. It must appear prima facie that the loss which actually occurred was in some way connected with the defective condition of the packing. That, in my opinion, the defendant has failed to show. When bags are old they may burst and wastage may occur because of that. The defendant's own papers, the U. T. M. Book however clearly indicates that this was not a case of wastage because of the bad condition of the bags; for, it runs thus: "240 bags of R/seed of which found 7 bags out and slack through flap door gaps." I find it impossible to put any interpretation on this except that the person who wrote this concluded from what he saw of the condition of the 7 bags that they had been cut through the flap door gaps.

11. My conclusion, therefore, is that the special protection afforded by the clause in Risk Note A is not available to the defendant in the circumstances of this case.

12. It was, however, argued by Mr. Bose on behalf of the opposite party that in any case the liability of the defendant cannot be more than that of a bailee and so the defendant would not be liable to compensate the plaintiff unless it appeared that the shortage was due to circumstances which were within the control of the Railway Administration. The learned Advocate has drawn my attention to a passage in the judgment where the learned Judge observes:

"In the absence of such positive evidence given by the plaintiffs regarding misconduct on the part of the servants of the defendant who has given all material and necessary evidence to show that the shortage was due to the circumstances beyond the control of the Railway Administration"

The learned Advocate asks me to consider this as a finding of fact that in fact the

Railway defendant has proved that the shortage was beyond the control of the Railway Administration. I am unable to read that passage in that manner. It does not appear that the learned-Judge's attention was drawn to the question whether the liability of the defendant would be merely just that of a bailee; in any case, he does not record it as his conclusion that the defendant had proved that the shortage was due to circumstances beyond the control of the Railway Administration. His statement, to my mind amounts only to this that the defendant has given evidence which if believed would tend to show that the shortage was due to circumstances beyond the control of the Railway Administration. I must admit, however, that on going through the evidence of the two witnesses examined on behalf of the defendant, I am unable to understand what evidence the learned Judge was thinking of when he said that the defendant had given evidence to show that the Railway Administration had given all material and necessary evidence to show that the shortage -was due to circumstances beyond the control of the Railway Administration. In the present case the shortage was due to presence of some gaps in the flap door. If evidence had been given that the extent of the gaps in the flap door of this wagon was such as cannot be prevented by ordinary care, I could have taken that as evidence to show the shortage was due to circumstances beyond the control of the Railway Administration. Nothing has, however, been said by the witnesses either about the extent of the gaps in this particular wagon or about the question whether such gaps can be prevented or not. The learned Advocate wanted me to assume that some gaps there must remain and argued that the mere existence of such gaps should not be considered to show any omission to take due care on the part of the Railway Administration. I do not see, however, any justification for making such an assumption in the absence of proper evidence on the record.

13. My conclusion after a reading of the evidence is that it has not been shown that the shortage was due to circumstances beyond the control of the Railway Administration and consequently the defendant would be liable for compensation, unless the plaintiff's claim appears to be barred by limitation.

14. On the question of limitation, the first point for decision is whether this case is to be governed by Article 30 or Article 31, Limitation Act. Article 30 provides one year's limitation from the date "when the loss or injury occurs" for suits "against a carrier for compensation for losing or injuring goods." Article 31 provides the same period of one year from the date "when the goods ought to be delivered" against a carrier for compensation for non-delivery of, or delay in delivering goods. Obviously, any case of loss of goods would, at the same time, be a case of non-delivery. But there may be cases of non-delivery even without any loss. Article 31 should, therefore, be held to apply to all cases of nondelivery other than those due to loss of the goods. In view of this, it would, I think, be pro-per to treat this case as covered by Article. 30, Limitation Act.

15. The question would then arise as to when the loss occurred. Obviously, this would be a matter which the carrier is in a much better position to prove than

the plaintiff. We may indeed think of many cases where neither the carrier defendant nor the plaintiff is in a position to know when the loss has occurred. In the present case, there is no evidence on the record to indicate when the loss did actually occur. The learned trial Court has stated in its judgment that some bags were cut during transit between Dalhi and Burdwan. The learned Advocate for the opposite party has placed reliance on this statement and has argued that this showed that the loss certainly occurred some day before 28th March when the wagon reached its destination -- Burdwan. I am unable to see, however, any basis in the evidence on record for the learned Judge's finding that the bags were out during transit. This appears to be a finding without any evidence and so I cannot attach any weight to this.

16. In the absence of any evidence on the point, it seems to me that the date of the loss should be taken to be date on which the loss was first discovered, namely, 18th April 1947. This is undoubtedly somewhat arbitrary, but there seems to be no other way in which to deal with a situation of this nature. If the time runs under Article 30 from 18th April 1947, the suit must be held to be within time after giving the plaintiff two month's time for service of notice u/s 80, Civil P. C.

17. I, therefore, hold that the suit was not barred by limitation.

18. Even if Article 31 is held to apply to this case, it seems to me that the suit is within time. Under Article 31, limitation runs from the time "when the goods ought to be delivered." In the present case, as in most cases, no special date was fixed as the time on which delivery would be made by the carrier. In deciding what point of time should be held to be the time when the goods ought to be delivered it seems to me to be reasonable to take into account the date when the goods are dispatched, the date when the goods reach the destination, the nature of the goods and the manner in which the goods are sent. Thus, if a wagon load of goods is sent, more time should be given after the despatch and the proper time for delivery than in a case where just a few bags are sent. Again, if the goods are of a perishable nature, very little time should be given for delivery after the goods have reached their destination. It seems to be usual for the Railway Administration to send notices after the arrival of goods at the destination with a warning that if the goods are not taken delivery of within a certain period demurrage will be charged. If and when such notice is issued, the point of time after which demurrage will be chargeable may very well be taken to be the time when the goods ought to be delivered. No evidence has been given in the present case whether any such notice was issued. Mr. Bose on behalf of the defendant has suggested that it may very well be that the defendant without obtaining any notice went by chance to the station on that day to see whether the goods had arrived and found that the goods had arrived. I do not think it necessary, however for the purpose of this case to arrive at any decision as to whether any such notice was served. Even in the absence of such notice, it seems to me clear that when one wagon full of rape seed booked on 18th March

at Delhi arrived at Bardwan on 28th March, the 18th of April on which delivery was taken cannot reasonably be considered to be beyond the date when "the goods ought to be delivered." I am, therefore, of opinion that even if Art. 31, Limitation Act, applies, the suit is within time.

19. The plaintiff's suit should, therefore, succeed except that he is not entitled to the interest claimed for the period prior to the institution of the suit.

20. Accordingly, I would set aside the order of the learned Munsif and order that the suit be decreed for the amount of RS. 138-9.0. The plaintiff should get his costs in both the Courts.