

(1964) 10 AHC CK 0008
In the Allahabad High Court
Case No : Second Appeal No. 1149 of 1953

Gobind Sharma

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-10-1964

Acts Referred:

Goods Tariff Rules — Rule 29(2)
Railways Act, 1890 — Section 47, 72

Citation : AIR 1965 All 480

Hon'ble Judges : Gangeshwar Prasad, J

Bench : Single Bench

Advocate : Kamta Nath Seth, for the Appellant; Krishna Sahai, for the Respondent

Final Decision : Allowed

Judgement

Gangeshwar Prasad, J.—This is a plaintiff's appeal and arises out of a suit for recovery of Rs. 1880-5-0 as damages for loss of goods on the railway. The case of the plaintiff was that on 30th December 1948 he hooked three packages containing "Chappals" from Rawatpur, a station on B. B. & C. I. Railway; for carriage to Barhanpur, a station on G. I. P. Railway, and to be delivered there to M/s Raj Brothers. The consignment reached Barhanpur but M/s Raja Brothers did not take delivery whereupon the plaintiff got it rebooked on 20th April 1949 for being carried to Kanpur and delivered there to the plaintiff. On 24th May 1949 the plaintiff presented the railway receipt for taking delivery but when he saw the packages he found them in a broken condition. He therefore, took open delivery on 26th May 1949 and it was then discovered that the packages contained grass and bricks instead of Chappals. The plaintiff claimed to have suffered a loss of Rs. 1880-5-0 and he brought this suit on 20th December 1949 for recovering it from the Dominion of India. The main defence was that the plaintiff had in reality booked only grass and bricks and the packages never contained Chappals, that Raja Brothers was only a fictitious concern and that the plaintiff had indulged in a fraudulent contrivance to cheat the railway. The suit was dismissed by the trial

court and its decision was confirmed by the lower appellate court.

2. It has been found by both the courts below that the packages booked by the plaintiff did really contain chappals and that the same goods arrived at Kanpur on 3rd May 1949. The reasons why the suit of the plaintiff has been dismissed is that as the plaintiff did not take delivery of the goods until the expiry of 21 days after the arrival of the goods at Kanpur the railway was protected under rule 29 of the Goods Tariff Rules and the plaintiff was not entitled to claim any damages. It may be mentioned that the bar of Rule 29 to the claim of the plaintiff was not pleaded in the written statement and it was only at the stage of arguments before the trial court that the rule was pressed into service on behalf of the defendant. The plea was, however, allowed to be raised and was accepted. Before the lower appellate court it was urged for the plaintiff that in the absence of a specific defence based on Rule 29 and an issue in regard to it the defendant could not claim the protection of the rule. The court below, however, thought that as the facts on which determination of the applicability of the rule depended were covered by the issue framed in the case and what was stated by the plaintiff himself attracted the operation of Rule 29 the defendant could claim exemption from liability under the said rule even without a plea to that effect. The only point involved in the appeal is whether Rule 29 of the Goods Tariff Rules saves the defendant from the claim in suit.

3. The contention of Mr. Seth learned counsel for the plaintiff) is that the rule is ultra vires and that even if the rule is regarded as valid the protection of the rule is not available to the defendant inasmuch as it has failed to prove the conditions requisite for its application.

4. The relevant portions of Rule 29 of the Goods Tariff Rules are as follows :

"(1) That they are not accountable for any articles unless the same are booked and a receipt for them given by their clerk or agent, and that when the articles are so accepted for conveyance, the responsibility of the Railway for the loss, destruction or deterioration of the articles is subject to the provisions of Section 72 of the Indian Railways Act IX of 1890.

2. That in respect of goods not removed from Railway premises at station of destination within the time allowed free of demurrage and wharfage the Railway is not liable in any respect of any loss, destruction, deterioration of or damage to such goods arising from whatever cause notwithstanding that the Railway may have warehoused or otherwise kept the goods and notwithstanding that the Railway shall be entitled to be paid the authorized "charges for goods so left on their premises."

5. It is not disputed that the goods were not removed from the premises of Kanpur Railway Station within the time allowed free of demurrage and wharfage and the stand taken by the defendant, therefore, is that under Clause (2) of the Rule the railway ceased to be liable.

6. The argument on behalf of the plaintiff, on the other hand, is that in so far as the rule purported to grant an exemption from liability to the railway it was inconsistent with the obligation imposed upon the railway by Section 72 of the Railways Act (as it then stood) and was outside the purview of the rule-making power conferred by the Act. Reliance for this argument is placed on the Full Bench decision of this Court in *Firm Sohanpal Munnalal Vs. The East Indian Railway*, and on a single Judge decision of the Lahore High Court in *Governor General in Council v. L. Jagan Nath* AIR 1943 Lah244. Rule 29 (2) of the Goods Tariff Rules was not involved in *Firm Sohanpal Munnalal Vs. The East Indian Railway*, but some observations made there with regard to the validity of a rule exonerating the railway from its liability as a bailee were quoted in the Lahore case AIR 1943 Lah 244 in which Rule 28 (2) corresponding to Rule 29 (2) in question here was directly involved and it was held that the rule could not put an end to the statutory liability of the railway as a bailee and that it exceeded the rule-making power of the railway.

7. In reply it has been urged by Mr. Krishna Sahai, learned counsel for the defendant, that Rule 29 (2) fell within the sphere of the rule making power conferred by Section 47 of the Railways Act and that since the liability created by Section 72 of the Railways Act was made subject to the other provisions of the Act, Rule 29 (2) could validly effect its curtailment. In support of his contention Mr. Sahai has referred to the cases of *Vidya Sagar v. Governor General in Council* AIR 1949 Lah 166 and *Kanyaka Parmeswari Vs. Union of India (UOI) and Others*, .

8. In view of the fact that the alternative contention put forward by Mr. Seth on behalf of the plaintiff appears to me to be well founded and sufficient to dispose of the present case, it is unnecessary to enter into the question whether Rule 29 (2) is ultra vires and to discuss the authorities cited by the learned counsel and the other authorities dealing with the question. I have only indicated in brief the lines on which the arguments of the learned counsel for the parties have proceeded on the question relating to the validity of Rule 29 (2).

9. On the shorter and simpler question whether on the facts proved in the case, Rule 29 (2), assuming that it is valid, gave an immunity to the railway against the plaintiff's claim the answer, in my opinion, must be in the negative. Exemption from liability for loss, destruction, deterioration or damage to goods can be claimed under Rule 29 (2) only when these things occur after the lapse of what is called the "free time" and the rule cannot be construed as exempting the railway from liability irrespective of when the loss etc. occurs if the goods are not removed within the "free time". It seems to me clear that for availing of the protection of Rule 29 (2) it has to be established by the railway that the goods remained intact till the expiry of the "free time" and if this fact is not established a case for exemption from liability under the rule cannot be regarded as having been made out. The rule purports to discharge the railway in absolute terms from its statutory obligation as a bailee and the burden, therefore, of proving

that the requisite conditions for the application of Rule 29 (2) are satisfied obviously falls on the railway. That burden had not been discharged in the present case. Indeed, there is nothing on record to indicate that the loss did not occur during the "free time". All that the defendant has attempted to prove is that the packages reached Kanpur on 3rd May 1949 but how they were dealt with later till the expiry of the "free time" is not known. The statement of Satya Prakash Assistant Goods Clerk (D. W. 6), the only witness examined on this point by the defendant, is that one of the three packages was found damaged when the goods arrived at Kanpur on 3rd May 1949 and the outer condition of the other two packages was good. He has further stated that on 3rd May 1949 he kept the damaged packet in the strong room and the other two in the goods shed but how the packages were dealt with later during the "free time" is not known. In this state of the evidence it is not possible to hold that the loss occurred only after the expiry of the "free time" and not during it. At any rate the possibility of the loss having occurred during the "free time" itself has not been excluded and if that possibility has not been excluded, the liability of the railway for the loss of the goods has also not been excluded under Rule 29 (2) of the Goods Tariff Rules.

10. The result, therefore, is that the decision of the case does not rest on Rule 29 (2), But on the ordinary law governing the relationship created between the plaintiff and the railway by the delivery of the goods to the latter. The point for consideration is whether the railway continued to be a bailee of the goods even after their arrival at Kanpur Railway Station and if so till when.

11. It does not, in my opinion, admit of any doubt that the railway does not cease to be a bailee of a consignment as soon as the consignment reaches the station of destination and that the liability of the railway as a bailee continues even after the termination of the transit. It is true that the purpose of the bailment is carriage of the consignment but the duties of the railway as a bailee do not come to an end merely on the accomplishment of the purpose of the bailment and they continue until the consignment has been disposed of according to the directions of the person who delivered it to the railway.

12. Dealing with the question as to the continuance after transit of the liability of a railway in regard to goods handed over to it for carriage in the case of B.N.W. Railway Co. and Another Vs. Mul Chand, Walsh, J. observed:

"The principles governing this question are contained in a clear statement by Chief Justice Cockburn, in the course of the judgment in Chapman v. Great Western Rly. Co. (1880) 5 Q B D 278. The contract of the carrier being not only to :carry but also to deliver, it follows that the custody of the goods as carrier must extend beyond the period of their transit. A reasonable time must be allowed for the exigencies of traffic and for the convenience of the consignee to whom delivery has to be made. And when the carrier is ready to deliver, the recipient is allowed a reasonable time and no more to take delivery."

13. In *The East Indian Railway Company, Limited, Vs. Janki Prasad and Others*, Sulaiman, J. (as he then was) referred to the above decision and said :

"The contract of the Railway Companies as pointed out in that case at p. 660 was not only to carry the goods but also to deliver them. It follows that the custody of the goods with the carriers must extend beyond the period of their transit."

14. The liability of the railway as a bailee does., therefore, extend beyond the transit and the question only is as to its duration. On that question there is a divergence of views. One view is that even if delivery of a consignment is not taken within a reasonable time the railway does not cease to be a bailee because the rules framed u/s 47 (1) (f) of the Railways Act for charging demurrage and wharfage should be deemed as constituting an agreement on behalf of the railway to warehouse the goods after the transit and until delivery. According to this view, after the cessation of the liability of the railway as a carrier there arises a further contract of bailment for warehousing the goods on account of the rules made for charging demurrage and wharfage and on account of the retention of goods by the railway subject to the conditions of the rules. This view has been expressed in *Chhatumull Chowthmull Vs. Union of India (UOI)*, . The other view is that a charge of demurrage and wharfage does not by implication give rise to the acceptance of the responsibility of warehousing and that the burden of warehousing cannot be placed upon the railway for an indefinite length of time. This view was taken by Walsh, J. in *B.N.W. Railway Co. and Another Vs. Mul Chand*, referred to above.

15. There can however, be no doubt that the person entitled to take delivery must be allowed reasonable time for doing so and it is not until the expiry of reasonable time that the liability of the railway can cease. What would be reasonable time cannot obviously be laid down with rigidity nor can it be fixed by the railway itself, and it is bound to vary with circumstances. In order to escape liability the railway has therefore to prove that for a reasonable period of time after the arrival of the goods at the station of destination the railway took such care as it was bound under the law to take and the loss to the goods did not occur during that period. In the absence of such proof the liability of the railway under the bailment is not discharged and it cannot be urged that if delivery of the goods is not taken within reasonable time the railway is relieved of the obligation to prove that the loss did not occur during that period of time.

16. In the present case, as I have already said, there is no proof of the manner in which the packages were dealt with or of the condition in which they remained after they had been kept at the places indicated in the statement of D. W. 6 on 3rd May 1949. It is, therefore, not necessary to consider whether the plaintiff can be said to have attempted to take delivery within reasonable time or not. The loss to the goods might have taken place even on 3rd May 1949 or at any time thereafter. No material has been placed before the Court to enable it to find that the railway discharged its legal duties as long as it retained the character of a bailee and that it was after the cessation of its character as a bailee that the

loss occurred.

17. On the finding of fact recorded by the Courts below, which has not been challenged before us, the plaintiff is, in my opinion, entitled to a decree for the loss of his goods. It was agreed by the parties before the trial Court the price of goods for the purposes of assessing damages may be taken as Rs. 1650/-. The plaintiff's claim has, therefore, to be decreed to that extent.

18. The appeal is allowed, the decrees of the Courts below are set aside, and the suit of the plaintiff is decreed for Rs. 1650/- with proportionate costs in all the Courts.