
(1977) 12 DEL CK 0007

In the Delhi High Court

Case No : Regular First Appeal No. 157D of 1966

Gopi Shyam

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-12-1977

Acts Referred:

Citation : (1978) 14 DLT 169 : (1978) 1 ILR Delhi 620 : (1978) 1 ILR Delhi 17 : (1978) RLR 335

Hon'ble Judges : S. Ranganathan, J;Prakash Narain, J

Bench : Division Bench

Advocate : Keshav Dayal, R.N.Dixit and Y.K.Sabharwal, for the Appellant;

Judgement

S. Ranganathan, J.

(1) This is an appeal from the judgment and decree of the Sub Judge, 1st Class, Delhi dismissing with costs the suit filed by the plaintiff Gopi Shyam against the defendant. Union of India, for the recovery of Rs. 13,217.67 towards the loss sustained by him on account of the non-delivery of two silver bars consigned to him by the Northern Railway.

(2) Gopi Shyam, the plaintiff, was employed in the Lucknow branch of a firm known as Inder Narain Har Narain which was carrying on business in gold and silver with head office at Delhi and a branch at Lucknow. He left the employment of the above firm sometime in 1959 and was thereafter carrying on business as bullion broker at Phoolwali Gali, Lucknow. On 9-5-1961, he placed an order on telephone with M/s. Inder Narain Har Narain at Delhi for the purchase of two bars of silver. He asked them to send the silver bars by passenger train and send the relative parcel way-bill and bijak to their Lucknow branch for delivery to him against payment. The firm, on the same day, delivered two silver bars weighing 66.532 kilograms to the Northern Railway at Delhi for carriage to Lucknow. The silver bars were booked under parcel waybill No. 450059 dated 9-5-1961, which showed Gopi Shyam as the consignor and the consignee. The value of the bars

was declared in the forwarding note as Rs. 13,000 and the railway freight" was pre-paid. The plaintiff's case is that M/s. Inder Narain Har Narain sent the parcel way-bill and bijak by post to their Lucknow branch on the same day but this letter and the parcel way-bill did not reach the branch at Lucknow. On 12-5-1961 Gopi Shyam went to the Lucknow parcel office of the Northern Railway and demanded delivery of the said silver bars but he was told that the delivery of the bars had already been effected on 11-5-1961. On 12-5-1961, the plaintiff lodged a report with the Railway Police at Lucknow. There was a railway police investigation but the goods could not be traced. It was in these circumstances that the plaintiff instituted a suit against the Railway Administration, after serving notices u/s 77/104 of the Railways Act and section 80 of the Code of Civil Procedure, for the recovery of the sum of Rs. 13,217 being the value of the silver bars and the expenses incurred by him by way of sales-tax, railway freight etc.

(3) In the plaint the following allegations, inter alia, were made :-

(I) The delivery appeared to have been effected by the railway to a person who produced parcel way-bill No. 450059 without obtaining any signatures thereon and without the person to whom delivery was made being identified by anybody.

(II) In the delivery book maintained by the Northern Railway, the entry pertaining to the delivery of the silver bars in question purported to be signed by one Gur Sahai in Nagri Script with the words Gopi Shyam appearing in English there under.

(III) The gate-pass under which the delivery was effected purported to be signed by Gur Shyam Ram Gopal, Saraf, Chowk, Lucknow.

(IV) The relative entry in the strong room register of the Northern Railway did not bear any signatures.

It was alleged by the plaintiff that the non delivery of the said two bars to him, who was the consignee, was due to the gross negligence and misconduct on the part of the Railway Administration and/or its servants. It was also alleged that the bars had been removed by the Railway Staff or by some one in league with them surreptitiously.

(4) The Union of India, representing the Northern Railway Administration, which was the defendant in the suit, did not deny that on 9-5-1961 two silver bars were booked at owner's risk rates from Delhi to Lucknow under parcel way-bill No. 450059, Shri Gopi Shyam being the consignor and the consignee. It was also admitted that the value of the bars had been declared at Rs. 13,000. The defense of the Railways was, however that they were not liable to the plaintiff in any manner for two reasons :-

1. The consignor, though required so to do by the Railway Administration, did not pay or engage to pay in writing a percentage on the declared value by way of compensation for increased risk within the meaning of section 75 of the Indian Railways Act. On the other hand the endorsement on the parcel way-bill showed

that the goods were "N.I." (non insured).

2. In any event, the consignment in suit had been delivered on 11-5-1961 on the production of the original parcel waybill to the consignee named therein in the normal and ordinary course of business. There was nothing to arouse the suspicion of the delivery staff. The delivery of the consignment was perfectly in order and the responsibility of the Railway Administration ended in law when the consignment was delivered as stated above.

In addition to the above pleas the defendant also raised doubts regarding the bona fides of the plaintiff and also denied the allegation that either the railway staff or someone else in league with them had surreptitiously removed the silver bars.

(5) The learned Trial Judge framed the following issues :-

1. Whether section 75 of the Indian Railways Act is applicable to the present case ?

2. If the issue No. 1 is proved, whether the plaintiff was required by the railway administration to pay or engage to pay percentage on the value declared in writing; if so, to what effect ?

3. Whether the railway delivered the consignment on the original Pwb to the named consignee in the normal and usual course of business as alleged in para 6 of the written statement ?

4. Whether there were circumstances to arouse suspicion of ordinary prudent man against the genuineness of the person who demanded delivery on the basis of Pwb as per reason given in the plaint ?

5. Whether the railway staff either themselves or some one with their connivance removed the said bars from the strong room and mis-appropriated the same as alleged in para 11 of the plaint ?

6. Whether non-delivery to the plaintiff is due to negligence and misconduct on the part of the railway administration concerned ?

7. Whether the notice served upon the defendant is invalid ?

8. To what amount of damages, if any, is the plaintiff entitled ?

9. Relief.

(6) The first two issues were answered by the learned Sub Judge in the affirmative. He found that the provisions of section 75 of the Indian Railways Act were applicable to the present case and that the Railway Administration had required the person who brought the two bars of silver for booking to pay the amount of compensation for increased risk but that the person above mentioned had refused to do so. In view of his finding on issue No. 1 and 2 that section 75 of the Indian Railways Act protected the Railway Administration from liability, the

learned Trial Judge did not find it necessary to give findings on issues No. 3 to 6. It was pointed out by him that even if issues numbers 3 and 4 were decided in favor of the plaintiff and even assuming that there was mis-appropriation of the goods or negligence and misconduct on the part of the Railway Administration still the provisions of section 75 of the Indian Railways Act would protect the interests of the Railway in view of the decision of the Punjab High Court in the case of Romesh Chander V. Governor-General in Council A.I.R 1949 EP 285. (1) Issue N.o. 7, 8 and 9 were decided against the plaintiff and the suit was accordingly dismissed with costs. Hence the present appeal.

(7) On behalf of the appellant two contentions have been urged before us. The first it that the present case is not covered by the provisions of section 75 of the Indian Railways Act. The second contention is that, once section 75 is out of the way, the liability of the railway is that of an ordinary bailee of goods and that, since in the present case, the evidence clearly showed that there had been negligence and want of due care and caution on the part of the Railway resulting in the delivery of the goods to a person other than the consignee, the Railway Administration was liable to make good the loss of the goods in question to the plaintiff

(8) Section 75(1) of the Railways Act (before the expensive amendments of the said Act by the Act 39 of 1961) was in the following terms:-

"WHENAny article mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway and the value of such articles in the parcel or package exceeds three hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared in writing or declared them in writing at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay in writing a percentage on the value so declared by way of compensation for increased risk".

(9) On behalf of the appellant it is urged that this sub-section cannot help the Railway Administration in the present case for three reasons:-

(A)This is a case where the silver bars were consigned in an open state without being wrapped up or otherwise covered or packed so as to constitute a parcel or package within the meaning of section 75, sub-section 1;

(B)This is not a case of loss, destruction or deterioration of the article but only a case of wrong delivery of the goods and the railway administration is not entitled to take advantage of this section.

(C)The defense raised on the basis of this sub-section will be available only where the railway administration had demanded extra payment for increased risk and the consignor had refused to pay the extra compensation inspire of such a

demand, which was not the case here.

(10) After hearing both the parties we are of the opinion that it is not necessary to consider the second and third pleas put forward on behalf of the appellant as we are satisfied that the first of the three conditions mentioned above for the applicability of section 75(1) is not fulfilled in the present case. There is really no controversy in the present case that two open bars of silver were consigned as such under parcel way-bill No. 450059. The plaint says that two bars of silver weighing 66.532 Kg. were delivered to the Northern Railway at Delhi. Jiwan Dass, the parcel clerk at Delhi, was examined as DW7 and he stated that the silver bars in dispute were booked by him. However, he did not get the weighment effected and this was done by Sardari Lal, another parcel clerk who has been examined as DW-5. Sardari Lal states that he weighed the silver bars and his evidence also makes it clear that what was consigned was two open silver bars. Similarly, the evidence of J. N. Pandey (DW-3) who was the batch-in-charge at the parcel office at Lucknow shows that what was unloaded by him and delivered to the person who brought the railway receipt were two silver bars. In fact D-1/X which is the copy of the parcel way-bill in the railway register shows that the two bars of silver were "unpacked".

(11) The short and interesting question that arises is as to whether the protection of Section 75 is available to the Railway in such a case as the present. The opening words of sub-section 1 of Section 75 refer to an article mentioned in the second schedule and contained in a parcel or package. It is common ground that one of the articles mentioned in the Second Schedule to the Act is :-

"GOLD and silver, coined or uncoined, manufactured and unmanufactured, The silver bars consigned in the present case, Therefore, constitute the article mentioned in the second schedule. But can it be said that these articles were "contained in any parcel or package delivered to the Railway administration" for carriage by Railway?

(12) On behalf of the respondent it is suggested that it was not likely that silver bars were delivered to the railway without any packing or wrapping but there is no basis for this suggestion and there is no evidence led by the Union of India to show that the silver bars were contained in any wrapping or packing. On the other hand, the evidence referred to above leaves no doubt that the silver bars were delivered in open and raw state and accepted as such for the purposes of carriage. We may also point out that the decided cases cited at the Bar also show that the consignment of open silver bars appears to be quite a usual and common practice. This contention of the respondent cannot Therefore be accepted.

(13) It is then argued on behalf of the respondent that even if this position be conceded that the plaintiff had delivered two silver bars to the Railway, open and unpacked, still the railway would be entitled to the protection of section 75 of the Act and in support of this contention reliance was placed on the decision of the

Lahore High Court in Kundan Lal Baru Mal v. Secy. of State A. I. R. 1929 Lah 698. In that case, a bar of silver consigned by the plaintiff was lost in transit between Delhi and Ambala. Though the trial court decreed the claim of the plaintiff, the District Judge allowed the appeal holding that the risk was covered by the terms of the consignment note in the case and the railway company was thereby protected. On second appeal to the High Court, this finding of the District Judge was confirmed. This disposed of the case but the learned Judges made certain observations, by way of obiter, to the effect that the contention that the consignment in the case did not form a parcel because the silver bar was not packed in a box or surrounded by any form of packing could not be accepted. In this connection a reference was made to the decision in *Whaite v. Lancashire & Yorkshire Railway Co.* (1874) 43(3) L.J. Ex. 47, as settling the above point against the claimant. In the English case, a wagon in which some pictures had been laid one upon another without any covering or tie, the wagon having no top, was held to be a parcel or package within the meaning of the Carriers Act and it was thought that this principle concluded the issue in the case before the learned Judges as well.

13A. The learned trial judge in the present case considered himself bound to follow the decision of the Lahore High Court. We are unable to agree. As we have pointed out earlier. Section 75 of the Act contemplates an article being contained in a package or a parcel and these words are inappropriate to cover a silver bar which is dispatched in an open and unpacked condition. The observations of the learned judges were purely in the nature of obiter because the point at issue in the case was decided on the first contention urged and accepted by their Lordships that the risk note in the case protected the railway completely. We also find that the view of the above High Court has not been accepted by the Allahabad High Court and Bombay High Court. In the Allahabad Case, reported as *Firm Mahesh Glass Works Vs. Governor General in Council*, the question arose in respect of a consignment of bangles which were tied together with pieces of string in the form of garlands. It was held that the consignment in question constituted a parcel or package. *Whaite Case*, (supra) was distinguished and, after referring to the decision in *Studebaker Distributors Limited v. Chariton Steam Shipping Company Ltd.* (1938) I K. B. 459, Desai J. observed:-

"I consider that a bare article like a car or a silver bar or a bangle cannot possibly be described as a parcel or a package; in order that an article can be said to be "contained" in a parcel or package, it is necessary that some other article is used with it in order to protect it, or cover it, or keep it in position, or keep it together with another article or articles. There was absolutely nothing used with the silver bar in Kundan Lal's case AIR 1929, Lah 698 and with great respect to the learned judge who decided it I am unable to agree that it came within the meaning of "Parcel or Package"."

To the same effect is the decision of the Bombay High Court in *Firm Kaluram Sitaram Vs. The Dominion of India*, . This was a case where four silver bars were

consigned by the plaintiff to self from Bombay to Ballia on the Oudh Tirhut Railway. One of the defenses taken by the railway was that it was protected by section 75 of the Act and in respect of this contention the conflicting view of the Lahore and Allahabad High Courts were canvassed before the Bombay High Court. Chagla C. J. pointed out that on a reading of the section it was clear that it contemplated two objects : first, an article mentioned in the Second Schedule and second, the object which constitutes the container for that article. It was further pointed out that the question of declaring the contents of a parcel or package will arise only where there is a parcel or package and something is contained in the parcel or package. In regard to the decision of the Lahore High Court it was pointed out that the observations were obiter and further that the Whaite Case (supra) did not decide the point under consideration. The view taken by the Allahabad High Court, relying upon the decision in the Studebaker Case (1938) 1 K.B. 459, was endorsed.

(14) We are in entire agreement with the view taken by Allahabad and Bombay High Courts. We are of the opinion that the observations of the Lahore High Court were obiter and were not necessary for the purposes of the decision in that case. In our opinion this is not a case to which the provisions of section 75 of the Act will be applicable and this defense taken by the railway has to be rejected.

(15) The next question that arises for consideration is as to whether the defendant railway is responsible to make good the loss incurred in the present case. It is well established that in the absence of any special contract between the parties limiting the liabilities of carriers, the railways are bailees for the goods delivered to them by a consignor and will be responsible for the loss of such goods if it is due to their negligence or misconduct. Such loss could also arise when the railway authorities deliver the goods to some person not entitled to receive "" them and are unable to trace them out when required to do so for delivery to the real owner. The railways will not be liable if they have acted with due care and caution as required u/s 152 of the "Contract Act. We have now to consider whether on the facts and circumstances of the present case, the railway administration could be said to have discharged its responsibility as bailee and exercised due care and caution in the delivery of the goods to the person who brought the railway receipt to them. On behalf of the railway, the plea that has been taken up is that the railway receipt constitutes a document or title to the goods and that since the goods in the present case have been delivered to the person who brought the receipt they must be held to have discharged the responsibility resting on them as bailee of the goods. We cannot accept this broad proposition put forward on behalf of the railways. It is no doubt true that the railway receipt is a document of title but at the same time, in our opinion, it is not sufficient for the railway to merely take umbrage under the fact that some person came forward with a railway receipt and that they delivered the goods to such person. They should further show that, in so doing, they acted, not negligently, but with due care and caution.

(16) In the present case the plaintiff has alleged want of due care and caution on the part of the railways and in support of this allegation he has relied on a number of circumstances which have been referred to earlier, and we shall proceed to consider whether this plea has been established by the evidence in the case.

(17) The most important piece of evidence in such cases is the railway receipt itself. In the present case, the goods were consigned by Gopi Shyam to self. It is not known whether the endorsement on the railway receipt contains the signature of Gopi Shyam or not. The best evidence in this respect would be the railway receipt itself but the court diary shows that, despite several opportunities given to the defendant, the original railway receipt has not been produced. It was "stated at one stage that the railway receipt was in the custody of the police officer who conducted the enquiry. Shri R. R. Singh, the Station Officer of the Railway Police at Kanpur, who was examined as Dwi, stated that he had passed on all the documents which had been recovered by him in connection with the case to his successor, Shri Ram Murti Prasad. But Shri Ram Murti Prasad, .examined as DW-2, stated that R. R. Singh had handed over charge to one Yadav Nath and that he had not" taken charge of the parcel way-bill in question or the other relevant documents and books. Matters rested at this stage. Considering that all the other documents and books that had been seized by the police authorities were available and were led in evidence by the defendant, it is significant that the original railway receipt has not been produced to enable the court to verify the contention that it was delivered to Gopi Shyam or a person purporting or claiming to be Gopi Shyam, the consignee. Normally one may presume, as a matter of fact, that the bearer of a railway receipt is also the person who was entitled to the same and the delivery of goods to him may be presumed to have been effected bona fide. But, in the present case, the allegation of the plaintiff that the delivery of the goods had been effected without exercising due care and caution is also reinforced by the other evidence presented in the case. We have examined this evidence which consists of the delivery-book maintained by the railway as well as the gate-pass under which the delivery was effected and we have come to the conclusion that the plaintiff has made out a case of gross negligence on the part of the railway in effecting the delivery of the goods to the bearer of the railway-receipt.

(18) EX. D-5 is the relevant entry in the Register of parcels received and delivered at the Lucknow Railway Station. There are two columns in this register being columns No. 24 and 25 where the signatures of the receiver and the delivery clerk are to be obtained. Obviously, what happens is that after the entries are made, the register is put across the counter to the person who comes to receive the article for many of the signatures of the recipients are found to be upside down. In this case, there is no signature in column No. 24 but against the last column of "remarks" there is a scribbled signature in Hindi which is upside down. The first word of this signature obviously is "Gur". The second word is illegible but it appears to be "sahai". It has been suggested for the respondents

that it is "Shyam" but one thing that is perfectly dear is that the first word of this signature is not "Gopi". Another significant feature is that in column No. 25 there is a scribbled initial, apparently of the delivery clerk and above this have been written in English the words "Gopi Shyam". These words in English have obviously been written by the delivery clerk himself, and they could have been written either at the time of delivery or much later. This delivery book shows that the person who came to take the delivery did not sign in the above register as "Gopi Shyam" which was the name of the consignee on the railway receipt. The other piece of evidence is the gate-pass issued by the goods clerk to enable a person to take delivery of the goods. This consists of two sides. On the first side is written the number of the railway receipt, the description of the goods and the date of delivery. On the back side there are a number of columns but this side is used to obtain the signature of the person to whom the delivery is made. On this back side we find again in Hindi the words "Ramji Lal Ram Sahai, Chowk Bazar, Lucknow", and this is followed by the signature again in Hindi, of the representative of the above firm. This signature again starts with the letter "Gu" which is followed by a letter which could be "Ra" or "P". This is followed by certain letters which appear to read "Sahai". An attempt was made here again to read it as "Shyam" but we cannot agree for it consists of the letter "Sa" (as in "song") and not "sh" as in "Shiva". Again, here also the first two letters read "Gur" and cannot be read as "Gopi". Moreover, this indicates that delivery was taken on behalf of a firm by someone and the firm is nowhere in the picture. The allegation in the plaint that there is no such firm in existence in Lucknow has remained uncontroverted. A perusal of these documents clearly shows that the person who took delivery of the goods was not Gopi Shyam who was the consignee as per the parcel way-bill. There is thus clear evidence to show that the goods were delivered by the railway to some person who apparently came with the receipt without even a cursory attempt at verifying that he was the person who was the consignee of the goods as per the parcel way-bill.

(19) As pointed out by the Patna High Court in the case of Mohammad Ekram and Others Vs. Union of India(UOI), :-

"WHEN the railway receipt is produced for taking the delivery of the goods it is the duty of the parcel clerk to compare the entries on the railway receipt with those in the delivery books. Where the parcel clerk without comparing these carefully gives delivery of the goods to the person producing the railway-receipt on behalf of the consignee and entries in the receipt do not tally with those in the book: and these discrepancies could have been noted by the parcel clerk had he been careful in tallying the entries, the clerk cannot be said to have acted as an ordinary prudent man in doing so and this is sufficient to prove want of required care under the law. He ought not to have delivered the goods to the bearer of the railway receipt on the strength of such a railway receipt".

IN the case before the Patna High Court the goods had been consigned by .Mohd. Idris Brothers in favor of themselves. What happened was that one B. K. Roy

produced certain forged railway-receipts containing an endorsement purporting to be signed by Mohd. Idris on each receipt to the effect that the goods should be delivered to the bearer B. K. Roy and it is on the strength of this railway-receipt and the instructions of Roy that the goods were dealt with. In other words, the railway authorities had before them a receipt, at least purporting to be signed and endorsed by the ostensible consignees; but, in the present case, the position is much worse. The signatures in the delivery register as well as the gate-pass do not tally at all with the name of the consignee as mentioned in the railway receipt. The allegations made in the plaint that the entries in the delivery book and gate-pass were totally at variance with the name of the consignee is clearly established by the above two documents. We are, Therefore, satisfied that in the present case the railway authorities have not exercised due care and caution in delivering the goods to the person who produced the railway receipt.

(20) On behalf of the appellant a point was also made that the negligence of the railway was clear from the fact that no entries were made in the register of the strong-room maintained by the railway in which the goods had been deposited on receipt at Lucknow. But so far as this point is concerned the evidence shows that the register pertained only to a strong-room to which such of those goods as had been received on any particular day but not delivered were transferred at the end of the day for safe-custody. The evidence indicates that where the goods were delivered on the same day as their arrival they were not put in the strong-room in respect of which the register was maintained. There is nothing to contradict or disbelieve this evidence and so we do not attach any importance to the fact that there are no entries in the strong-room register maintained by the Railway. But, as already pointed out, even apart from this there is other evidence to prove lack of due care and caution on the part of the Railway in delivering the goods.

(21) We, have Therefore, come to the conclusion that" the plaintiff's suit should have been decreed and the defendant directed to pay to the plaintiff the loss as claimed in the plaint There is no controversy regarding the value of the consignment or the miscellaneous items of expenditure. We, Therefore, reverse the judgment and decree of the Sub Judge and direct that there should be a decree in favor of the plaintiff for the sum of Rs. 13,217.67 with interest from the date of the decree.-

(22) The appeal is allowed. The appellant will be entitled to the costs in this court as well as the lower court.