
(1947) 04 PAT CK 0008
In the Patna High Court

Governor-General in Council

APPELLANT

Vs

Thakursi Dass

RESPONDENT

Date of Decision : 21-04-1947

Acts Referred:

Evidence Act, 1872 — Section 114(g)
Provincial Small Cause Courts Act, 1887 — Section 25

Citation : AIR 1948 Patna 45

Hon'ble Judges : Meredith, J

Bench : Division Bench

Judgement

Meredith, J.—This is a defendant's application u/s 25, Provincial Small Cause Courts Act.

2. The plaintiff opposite party consigned certain hales of cloth from Ahmedabad station on the B.B. & C.I. Railway to Darbhanga station on the C. & T. Railway, executing risk notes, A and Z. The consignment arrived in a suspicious condition, and, therefore, open delivery was taken, on which it was found that there was a shortage of cloth Worth Rs. 66. The plaintiff then after the necessary notices brought a Small Cause Court suit to recover that sum. The learned Small Cause Court Judge has decreed the claim, holding that the loss was due to the misconduct, of the railway servants, and this finding seems to be based merely on an inference which is drawn from another finding that the defendant's case that the packing was defective was not correct. That finding in turn he based on a statement of defendant's witness 2 that the bales in question were ill-pressed packed with iron bands.

3. It is necessary to consider the nature of the two risk notes and the legal position in cases of this kind. Risk note Z, which is for Our purposes the same as risk note B, is a special form to be used when the sender elects to dispatch at a special reduced or "owner's risk" rate, and, in view of the reduced rates, charged it exempts the Railway Administration from responsibility for loss and damage except under certain conditions. The consignor in consideration of such lower

charge agrees to hold the Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the consignment from any cause whatever upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants.

4. There is, however, a proviso. If the consignment is packed in accordance with the instructions laid down in the Tariff or, where there are no such instructions, is protected otherwise than by paper or other packing readily removable by hand, and fully addressed, then where non-delivery or partial non-delivery ensues, which is not due to accidents to trains or to fire, and, secondly, where there is pilferage from a package or packages forming part of the consignment properly packed, and when such pilferage is pointed out to the servants of the Railway Administration on or before delivery, then the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, and if necessary, to give evidence thereof, before the consignor is called upon to prove misconduct. But if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor.

5. In the present case, as the learned Munsif has pointed out, no evidence was given of any special packing instructions and the package was certainly protected otherwise than by paper or other packing readily removable by hand, and the pilferage was pointed out to the servants of the Railway Administration on or before delivery, because open delivery was taken. Therefore, the proviso is applicable, and before the plaintiff could be called upon to prove misconduct it was for the Railway Administration to make the disclosures referred to in the proviso.

6. What exactly this involves and the proper procedure on such cases has been clearly explained by the Privy Council in AIR 1937 152 (Privy Council) . What it comes to is this. The Railway Administration must first make the necessary disclosure, and if the consignor is not satisfied with or is doubtful as to the accuracy or truth of the information disclosed and wants evidence, then the Railway Administration must be the first to submit their evidence at the trial. If the consignor is satisfied that full disclosure has been made, then he must discharge the onus upon him, and he can do it either by showing that misconduct may be inferred from the evidence led by the Railway Administration, or the disclosures made by them, or he may in his turn affirmatively lead evidence which establishes misconduct. That is one possible course. If, on the other hand, he is not satisfied with the disclosure made, then it is his duty to call upon the Railway Administration for further and better disclosure, or evidence. If he does so, then it will be for the Court to decide whether his demand has or has not gone beyond the obligation which lies upon the Railway Administration under the proviso. If the Court holds that his demand for further proof is not justifiable,

then of course the Railway Administration need not disclose anything more, and there can be no inference against them from that fact. The plaintiff still has to discharge his burden.

7. But, if the Court holds that the demand is reasonable and in spite of the Court's direction the Railway Administration does not disclose the further particulars called for, then the presumption u/s 114(g), Evidence Act, which says that a presumption may be drawn that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it, will come into operation, and the plaintiff may call upon the Court to draw an inference of misconduct upon the basis of that presumption alone. But, if the Railway Administration has made the further disclosure and no inference can be drawn from the evidence disclosed, then the burden still lies upon the plaintiff, and he has to discharge it before he can succeed. That is the position with regard to risk notes B and Z, and that is the procedure which should be followed by Courts trying such cases. It was not followed in the present case. In similar circumstances in *Governor-General in Council v. Visheshwar Lal* AIR 1947 Pat. 84 Ray J. ordered a remand, presumably because the learned Judge thought that the Court should have explained the legal position of the parties, with respect, I do not think that there was any onus on the Court to see that the parties followed the proper procedure. It was the business of the plaintiff to ascertain the law, and, if he failed to conduct his case properly, I do not see why he should be given a further opportunity to do so. In the present case, the Munsif has held that the Railway Administration did not sufficiently disclose how the consignment had been dealt with. But there is nothing to suggest that the plaintiff was not satisfied with the disclosure. If he was not satisfied, he ought to have called for further particulars as I have explained, and, in my view, the Munsif was not entitled to draw a presumption against the Railway Administration unless the Administration had been called on to adduce further evidence and had not done so. As I have explained, the facts that the plaintiff did not call for further disclosure, and must be presumed to know the law, would lead to an inference that he was satisfied with the disclosure made, and would try to show misconduct either by an inference from what was disclosed or otherwise by his own evidence. But, in the present case, no inference has been directly drawn from anything in the defendant's evidence, nor was there anything in evidence from which an inference could have been drawn. Nor was there any direct evidence of misconduct led by the plaintiff. I do not find any sufficient grounds to order a remand, and I may notice that in another of these cases *Sinha J. in Badridas v. Governor-General for India in Council* AIR 1947 Pat. 118 ordered no remand, but upheld the order dismissing the suit, pointing out that where a plaintiff does not call upon the Railway Administration in the lower Court to furnish material facts relating to the details of the carriage of the goods to enable him to make out his case of misconduct, he cannot make it a grievance in the High Court that all the material information had not been given by the Railway Administration.

9. So much for Risk Note Z. But in the present case the consignor also executed Risk Note A, and thereby even further exempted the Railway Administration from liability. Obviously where two risk notes have been executed limiting the Railway's liability, it is open to the Railway Administration to take advantage of either, and if under either it can be shown that the Railway Administration has escaped liability, then the suit must be dismissed, even if some other form of risk note might also have been executed under which it might be held that liability had not been fully taken away. Risk Note A is a special form of risk note 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. The plaintiff chose to execute this Risk Note A, and having done so it was not open to him at the trial to claim that the packing was perfect, and the learned Munsif was not entitled to hold upon the basis of a statement made by one of the defendant's witnesses that the packing was fully in order (see *Mafat Lal Gogal Bhai Vs. B.B. and C.I. Ry. Co. Ltd. and Another*,) with which I agree. In short, if the consignment was properly packed, then why did the consignor execute this risk note? If he did so, he must be prepared for limitation of the Railway Administration's liability to the extent which that risk note involves.

10. Now let us consider what that risk note does involve, and how it differs from Risk Note B, a point which has not been considered in some of the cases to which I have been referred. Like Risk Note B, the Railway Administration is held harmless and free from all responsibility for the condition in which the goods may be delivered to the consignor 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. It may be arguable that "condition in which the goods may be delivered" does not relate to pilferage, but leaving that aside the difference between this risk note and Risk Note B is that there is no proviso under which in certain circumstances the Railway Administration has first to make disclosure before the plaintiff can be called upon to prove misconduct. Therefore, there, is an unconditional burden upon the plaintiff in such cases to prove the misconduct or wilful negligence before he can hope to succeed. It may be very difficult for the plaintiff in such circumstances to prove misconduct, see *Jankidas Marwari v. Governor-General of India in Council* AIR 1946 Pat. 336 (which case is, of course, only an authority upon its peculiar facts), but I must observe that a difficulty in proving anything can afford no ground for dispensing with proof, and if the consignor does not wish to incur the undoubtedly heavy onus involved, then it is surely open to him not to sign Risk Note A, but instead to inquire in what respect his packing is defective and see that it is put right before dispatch. It seems to me, therefore, that a consignor who elects instead to sign Risk Note A has no real grievance. I also think that when Risk Note A has been executed, there is no duty, cast upon the Railway Administration to disclose anything, and where there is no duty to disclose there can be no penalty for non-disclosure, and consequently Section 114(g) never comes into operation, and there is no scope for any adverse inference. It is only where there is some onus

on a party to disclose his evidence that an adverse inference can follow from failure to disclose it. In the present case there was no real attempt on, the part of .the plaintiff to establish misconduct affirmatively, and the result is that this suit should have failed upon the ground that having regard to the conditions of Risk Note z no liability had been made out on the part of the Railway Administration.

11. In the result, therefore, I allow this application, set aside the decision of the Court below, and dismiss the suit with costs throughout, hearing fee two gold mohurs.