
(2011) 04 AHC CK 0234

In the Allahabad High Court

Case No : First Appeal From Order No. 439 of 1999

J.K.Cement Works

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 21-04-2011

Acts Referred:

Railways Act, 1989 — Section 93, 99

Citation : (2011) 04 AHC CK 0234

Hon'ble Judges : F.I.Rebello, CJ and Devendra Kumar Arora, J

Final Decision : Dismissed

Judgement

Devendra Kumar Arora, J.—The instant First Appeal From Order arises out of judgment & order dated 29.7.1999, passed by Railway Claims Tribunal, Lucknow Bench, Lucknow in Claim Application No. O.C. 9200325 M/s J. K. Cement Works vs. Union of India thereby dismissing the claim of the appellant.

2. The facts, in brief, are that M/s J. K. Cement Works, the appellant having its Head Office at Kamla Tower, Kanpur booked a consignment of 17927 bags cement in 32 wagons under Railway Receipt No. 741929 to 741933 dated 13/15.5.1989 from Nimbahera siding to Kanpur Anwarganj goods shed which reached at destination on 21.5.1989. Out of 32 wagons, only 19 wagons were placed in covered shed meant for inward traffic and 13 wagons were placed at outward shed which was partly having roof of G.I. Sheets open from all sides and the rest of the platform was quite open. Though all these wagons should have been placed in covered shed, but Railway Administration placed 13 wagons consisting of almost 7280 bags of cement at a shed not meant for the purposes, where the necessary arrangements for protection of goods from rain did not exist. The appellant's agent requested the Railway Staff to place the said wagons in the covered shed for unloading but the request was turned down. After waiting for two days the appellant had to unload the wagons and the cement bags were stacked under the roof to the extent the accommodation permitted and the remaining bags on open platform. Before the consignment could be removed

from the platform after taking delivery, rain took place on 24.5.1989 at 16.45 hours and continued upto 17.20 hours. The working hours of the Goods Shed were 6 to 18 hours meaning thereby that the entire staff on duty was present at the time the rains started but no means were applied to protect the consignment from damage by rain. As a result, out of 7280 cement bags lying on platform of Shed No. 5, 4231 bags were affected with rain to the extent that 1994 bags were partly set and 1617 bags were fully set. As per joint survey report issued by Railway Administration a loss was caused to the tune of Rs. 2,11,555/. The appellant served a notice under section 78B of Indian Railways Act on 18.7.1989. When no response was received from the respondent, the appellant preferred an Application No. O.C.9200325 before the Railway Claims Tribunal for claiming recovery of Rs. 2,11,555/ alongwith cost and pendente lite and future interest due to damage of the consignment by rain while in the custody of the respondent who failed to exercise due and reasonable care for the protection of the consignment.

3. The claim of the appellant before the Tribunal was contested by the Railways. In the Written Statement filed, title of the appellant and its right to prefer the claim petition was challenged on the ground that the appellant was not the owner of claim consignment, the application had not been signed and verified by the competent person. It was also denied that there was any negligence or carelessness on the part of railway administration in dealing with the consignment. The consignment was booked under owner's risk rate. After the consignment reached the destination, the consignee/his representative signed the wagon transfer register in acceptance of placement of racks. Consignee was issued gate pass for effecting removal of the consignment. Sufficient covered sheds were provided to the consignee. The consignee, for the reasons best known to him, did not start unloading till expiry of the transit time and was in hurry and chose to unload the consignment on open platform instead of covered shed. The consignee after seeking permission could have removed the entire consignment during the night but he did not do so. The contract of carriage between Railway and the consignor terminated as soon as the consignee took delivery of the consignment by putting signatures on the delivery book and only thereafter the consignee was permitted for effecting removal. Delivery is always given for the whole consignment and not in part. Signature of the consignee on the delivery book is a sufficient proof for effecting physical delivery. As such, Railway Administration is protected under section 93 (a)(f) & (I) and 94 of the Indian Railways Act., 1989.

4. The following issues were framed by the Tribunal:

1. Is it true that the applicant has right to sue?
2. Is it proved by the respondent that they are immune from the liability under section 93(a)(f)(i), section 84 and section 102 (3)(i) of the Railways Act, 1989?
3. To what relief?

5. Learned Tribunal after appreciating the evidence and submissions of learned counsel for parties, decided the issue no. 1 in favour of the applicant/appellant. The issue no. 2 was decided against the appellant on the ground that the Railways had fulfilled all the liability by delivering the consignment and issuing gate passes. The goods were in the custody of the appellant/applicant who failed to remove the goods in time. As such, the learned Tribunal held that it was on account of the consignee's negligence and omission that the damage occurred and the respondent gets protection under section 93 (f) and 102 (C) (i) of the Railways Act, 1989. The issue no. 3 was rejected on the basis of the finding of issue no. 2 and finally the learned Tribunal dismissed the application.

6. Being aggrieved with the Judgment & Order of the Tribunal, the appellant has come up before this Court through this appeal.

7. Submission of learned counsel for the appellant is that liability of the railway administration has been defined under section 99 of the the Indian Railways Act, 1989 (hereinafter referred to as "Act, 1989") which provides that railways administration shall be responsible as a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872), for the loss, destruction, damage, deterioration or nondelivery of any consignment up to a period of seven days after the termination of transit. The damage to the goods in question and consequential loss to the appellant occurred due to gross negligence and misconduct of the Railways Administration and its servants. Firstly, the appellant was forced to unload the goods at the destination in a shed unfit for the purpose and, secondly, the assessment of damage was delayed. As a result, the consignment remained lying in a wet condition for a period of nine days and the condition deteriorated further.

8. It is also submitted that the respondent in evidence has not submitted even a single proof which could prove that they took any care as bailee to protect the goods from rain. The learned Tribunal although decided the issue no. 1 (title) in favour of the appellant but the remaining issues no. 2 & 3 were decided against the appellant and dismissed the claim application. It is also submitted that the findings on issue no. 2 are beyond the facts & pleadings. The learned Tribunal failed to apply the relevant provisions of law and rules which resulted in miscarriage of justice. The protection claimed by the respondent under section 93 of the Act, 1989 is applicable only during the period when the consignment is in transit. In the present case, the period of transit had expired and the respondents were holding the liability of a bailee under section 99 of the Act. The consignment was lying in the railway premises beyond free time for which the respondent levied additional charge of ground rent called wharfage charges and held responsibility of a bailee upto a period of seven days after termination of transit but they failed to discharge the same. Learned Tribunal in a most mechanical manner has not given protection to the appellant of section 99 of the Act. Learned Tribunal has also failed to take into account the time gap between signing the delivery book and the final removal of the consignment and erred in

holding that the physical delivery had been taken and consignment was in the custody of the appellant.

9. Learned counsel for respondent, while opposing the appeal, submitted that the consignment was booked under owner's risk rate. Sufficient covered sheds were provided to the consignee. The consignee for the best reasons known to him, did not start unloading till expiry of the transit time and thereafter was in hurry to unload the consignment. The consignee after seeking permission could have removed the entire consignment during the night but he did not do so. The consignee signed the Wagon Transfer Register in acceptance of placement of rakes and was issued gate passes for effecting removal of the consignment. The contract of carriage between Railways and Consignor terminated as soon as the consignee took delivery of the consignment by putting signatures on the delivery book and thereafter the consignee was free to remove the consignment.

10. Further submission of learned counsel for respondent is that on the one hand the consignee did not start unloading till expiry of transit time and thereafter consignee was in hurry and chose to unload the consignment on open platform instead of in covered shed. Hence, on their own risk they unloaded the consignment in question on open platform.

11. It is also vehemently submitted by learned counsel for the respondent that not only book delivery but physical delivery had also been given to the appellant and, thus, the consignment was in the custody of the appellant. The appellant signed the delivery book in token of having received delivery of consignment and gate passes had also been issued. It is also submitted that at the time of delivery, the goods were in perfect shape and there was no remark regarding the damage in the delivery book.

12. Further submission of learned counsel for respondent is that the railways as carrier was not responsible for any loss if the goods were not removed in reasonable time by negligence of the consignee. Mere charging of demurrage did not create liability as warehouseman and the claim of the appellant seeking protection of section 99 of the Act, 1989 is not available to him as the Railways had fulfilled its liability by delivering the consignment and issuing gate passes. The goods were in the custody of the appellant and for his failure to remove the goods in time the Railways cannot be held responsible.

13. The basic claim of learned counsel for the appellant is that liability of the Railway Administration under section 99 of the Act, 1989 is clearly defined as that of a bailee under section 151, 152 and 161 of Contract Act, 1872 (hereinafter referred to as "Act, 1972") and while consignment was in the premises of Railways, the railways authorities were responsible to take care of the consignment upto a period of seven days after the termination of the transit.

14. Learned counsel for the appellant, in support of his contention, placed reliance upon a decision reported in AIR 1966 SC 395, *The Union of India vs. Ishwarnand Saraswat* in which it has been observed that till the goods are

unloaded by the Railways, the goods must be held to be in the custody of the railways and no delivery could be said to have taken place merely by signing the delivery book or surrendering the railway receipts. On this background, it is submitted that though there was a token delivery but there was no real delivery by the railways to the consignee.

15. In our considered view, the judgment relied upon by the appellant is not applicable in facts and circumstances of the case as admittedly in the present case the consignment reached at the destination on 25th May, 1999 and the rakes were placed at shed no. 5. It is also admitted position that the consignee signed the delivery transfer register in acceptance of the placement of rakes and was issued gate passes for effective removal of consignment but the consignee for the reasons best known to him did not choose to unload the consignment till expiry of the transit time and thereafter hurriedly unloaded the consignment and kept the same in open platform instead in covered shed.

16. It has come on record that due to acute shortage of labour, the consignee could not remove the consignment from the railway premises and the same was in his custody, therefore, the protection of Section 99 of the Act, 1989 cannot be claimed by the appellant. It would have been a different position if either the consignment had not been unloaded or no possession would have been taken by the consignee. In the present case, admittedly the appellant unloaded the consignment themselves. They were issued necessary gate passes but due to shortage of labour they could not remove the consignment from the railway's premises. Although the consignment was in the railway's premises, yet it was in possession of the consignee and once the consignment came into custody of the consignee, the responsibility of Railway Authorities as a bailee comes to an end.

17. Section 151 of the Act, 1872 provides that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed.

18. Section 161 of the Act describes bailee's responsibility when goods are not duly returned. It provides that if by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

19. Further Section 93 of the Act, 1989 describes the responsibilities of Railway Administration as Carriers. It reads as under:

"93. General responsibility of a railway administration as carrier of goods Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or nondelivery of any consignment, arising from any cause except the following namely;

(a) act of God;

(b) act of war;

- (C) act of public enemies;
- (d) arrest, restraint or seizure under legal process;
- (e) orders or restrictions imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central government or a State Government authorised by it in this behalf;
- (f) act or omission or negligence of the consignor or the consignee or the endorsee or the agent or servant of the consignor or the consignee or the endorsee;
- (g) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;
- (h) latent defects;
- (i) fire, explosion or any unforeseen risk;

Provided that even where such loss, destruction, damage, deterioration or nondelivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or nondelivery unless the railway administration further proves that it has used reasonable foresight and care in the carriage of the goods."

"in transit" has been defined in sub section (21) of Section 2 which reads as under:

"in transit", in relation to the carriage of goods by railway, means the period between the commencement and the termination of transit of such goods, and unless otherwise previously determined."

20. Learned counsel for the respondent, in support of his submission has placed reliance upon a judgment of this Court, decided on 7th February, 2006 in FAFO No. 115 of 1997 and other connected appeals, reported in 2008 (26) LCD 230, M/s Raymond Cement Works vs. Union of India in which it has been held that the liability of the respondent as bailee ceases soon after actual delivery of the goods is taken. It was duty of the owner to have taken all the possible steps to avoid damage of the goods.

21. Learned counsel for the respondent rightly argued that after delivery of the goods in good and sound condition the liability of railways as bailee came to an end under section 160 of the Contract Act.

22. We have heard learned counsel for the parties and gone through the record.

23. From the above discussion, it is evident that the railway administration is responsible for the loss only if delivery is not taken during "in transit" period but once the delivery has been taken by owner, it is the responsibility of the consignee/endorsee to take proper steps to remove the goods at the earliest or

take care for its protection. However, owner can leave the goods on siding without any levy of charge by the railway administration during "in transit" period but if goods are not removed by the owner within "intransit" period as required under Rule 2 (41) of the Act, 1989, charge is to be levied on the goods for not removing them from the railway premises after the expiry of free time. The word "Free Time" has been used in the definition of "in transit" and according to same the transit terminates on the expiry of the free time allowed for unloading of consignment from any rolling stock and where such unloading has been completed within such free time, transit terminates on the expiry of the free time allowed, for the removal of the goods from the railway premises. Therefore, in cases where the delivery of the goods has been taken and the same has been unloaded from rolling stock, if goods are not removed within the free time the owner is liable to pay charge for occupying the said place beyond free time. Therefore, in cases, where delivery of the goods has been taken and the same has been unloaded from the rolling stock, the owner can use the railway premises without paying any charge till expiry of free time at his own risk.

24. Learned counsel for the respondent rightly pointed out that the liability of the railway administration as bailee comes to an end, the moment delivery of the goods is taken and, therefore, liability of the railway administration also came to an end under section 99 of the Act, 1989. Further, even after the termination of the responsibility of the railway as bailee, the railway administration will have right to charge demurrage/wharfage for not unloading from railway wagons or removing the goods from railway premises "intransit" period.

25. In view of the above discussion, we come to the conclusion that the railway administration was not responsible for the damage occurred to the goods (cement bags) of the appellant after delivery of the consignment and unloading of the same after expiry of the free time. The railways ceases to become responsible as bailee in view of the provisions of section 160 of the Act, 1872 and the learned Tribunal rightly held that the respondent gets protection under section 93 (f) and 102 (c)(i) of the Railways Act, 1989. We find no illegality or infirmity in the judgment & order passed by the learned Tribunal.

26. The appeal, therefore, fails and is hereby dismissed. No order as to costs.