

(1889) 06 CAL CK 0003
In the Calcutta High Court

Joykristo Shaha and Others

APPELLANT

Vs

India General Steam Navigation Company

RESPONDENT

Date of Decision : 14-06-1889

Acts Referred:

Carriers Act, 1865 — Section 6, 8

Citation : (1890) ILR (Cal) 40

Hon'ble Judges : W. Comer Petheram, C.J.;Gordon, J

Bench : Division Bench

Judgement

W. Comer Petheram, C.J.—This was a suit which was brought by the plaintiffs against the India General Steam Navigation Company to recover the value of goods which were entrusted by the plaintiffs to them for carriage. The defendants are carriers of goods between Calcutta and various parts of the country by means of flats towed by steamers, which proceed up the rivers in the country. The plaintiffs are merchants carrying on business at Calcutta and at Dacca, and the business to a great extent consists in the purchase of goods in the Calcutta market and sending them up from Calcutta to Dacca by means of these flats for sale in their shop there.

2. The owner of the plaintiff's" business is a person of the name of Joy Kristo Shaha, and he has two sons who assist him in his business, one of them being at Dacca and the other at Calcutta, and it is the business of the man at Calcutta to purchase goods and forward them to his brother at Dacca, whose business is to sell them there.

3. The defendants are common earners within the meaning of the Indian Carriers Act (Act III of 1865), and the defence which they set up to the action is, that these goods were lost by the loss of the flats without any negligence on their part, and that they are protected from liability by the special contract which they make with their customers, and which they made with the plaintiffs in this case.

4. The first question that was tried in this case was whether the goods were, in

fact, lost by the negligence of the defendants, and the learned Subordinate Judge who tried the case has found that the defendants were negligent in the performance of their duty as carriers and that the goods were lost by such negligence. In that finding we are unable to concur, and the learned Pleader who argued the case for the plaintiffs did not attempt to support it, because upon the evidence which was adduced in this case there is nothing whatever to show any negligence on the part of the defendants, or to show that in this case every care was not taken by them.

5. The flat, in which the goods in question were being carried, was lost by coming in contact with a snag in the bed of the river, the existence of which could not be ascertained by any precautions on the part of the defendant; and that being the case, the case comes within the class of cases in which accidents have been caused by hidden defects in machinery and in which consequently the loss has been held to be due to accident and not to negligence in any sense. We find therefore, as a fact, that the loss here was not caused by any negligence on the part of the defendants.

6. That being the case, the question then arises, whether the defendants were, according to the law, entitled to protect themselves by special contract against accidental loss or injury.

7. The Carriers Act, Section 6.*, provides that, under certain circumstances, carriers may limit their liability by special contracts. The way in which the defendants carry on their business is this: when goods are received by them they obtain from their customer a forwarding note which is signed by the customer, and by the terms of the note the customer delivers over to them the goods subject to the condition that they are not to be held liable for accidents, and next, that they are not to be held liable for negligence; and the first question is whether this is a special contract within the meaning of the Indian Carriers Act.

8. It has been contended here with great force, that the special contract under that Act must mean a contract for some different consideration than the mere agreement by the carriers to carry the goods, it must mean that the customer has the option of different rates, or some new arrangement making a different contract.

9. The case of *Peek v. North Staffordshire Railway Company* 10 H.L.C. 473 shows that it has been established for many years in England that a special contract under such circumstances means a special arrangement by the carrier with his customer for the carriage of his goods; and that such arrangement will be binding on the customer notwithstanding the fact that he does not get any advantage beyond getting his goods carried, provided the terms of the special arrangement or contract are reasonable; and the reason for that seems to be this, that although the carriers are common carriers and as such bound to take and carry the goods with the liability of common carriers, they do not carry them as common carriers, when they are delivered to them without tender of their

reasonable charges for their carriage, but under a new arrangement or contract which they make with their customers.

10. Under these circumstances, we think that this was a special contract within the meaning of the Act, and that therefore the defendants were not liable for loss not caused by the negligence of their servants, and the only question which is left is, whether this contract is so divisible that it is a good contract to protect the defendants from liability from accident notwithstanding that one of the terms of it is that they, the carriers, will not be liable for negligence, it being provided by Section 8 of the Indian Carriers Act that such a contract as that shall not be binding upon the customer.

11. Various cases have been cited and especially the case of Ashendon London and Brighton South Coast Railway Company (L.R. 5 Exch. D. 190), in which the Court of Exchequer held that where carriers made a contract with their customers that they would not be liable for any loss, however occasioned, such a contract was unwise and was unreasonable and bad, and could not be enforced as to any part of it; and that no doubt would be so, because the contract by a carrier not to be liable for the negligence of his servants has been held to be bad in England, and such a contract would clearly be bad in this country, because it is prohibited by the terms of the Statute.

12. But in this particular case the terms are distinct, because the customer says, in effect, to the carrier, I hand you my goods to be carried on the terms that I will not hold you liable for accidents, and then in another clause he goes on to say, and further I will not hold you liable for negligence. The two things are totally distinct, and, drawn in that way, we do not think it can be taken to be so indivisible as to render the whole of it bad by reason of one of its terms being so.

13. Under these circumstances, we think that the contract in this case was a special contract within the meaning of the Indian Carriers Act; that it was a divisible contract, so that one portion of it might be good and another portion bad; and that, so far as it provided that the defendants were not to be liable for loss by accidents, it was a good contract: and we think that the Subordinate Judge was wrong in decreeing the plaintiff's suit, and this appeal must be decreed and the suit dismissed with costs in all the Courts.

* In respect of what property liability of carrier not limited or affected by public notice.

Carriers, with certain exceptions, may limit liability by special contract.

[Section 6;-The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or Companies, and

for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.]