
(1972) 04 MAD CK 0061

In the Madras High Court

Case No : Appeal No's. 558 of 1964 and 199 of 1965

Jugalkishore Devideen

APPELLANT

Vs

Sri Murugan Ghee Supply Co. and Others

RESPONDENT

Date of Decision : 01-04-1972

Acts Referred:

Contract Act, 1872 — Section 106, 151, 152, 160, 161
Railways Act, 1989 — Section 72(1), 73

Citation : AIR 1973 Mad 331

Hon'ble Judges : K. Veeraswami, C.J; Raghavan, J

Bench : Division Bench

Judgement

Raghavan, J.—These two appeals arise out of O. S. No. 114 of 1958 on the file of the Subordinate Judge of Erode. The third defendant is the appellant in A. S. 558 of 1964 and the plaintiff is the appellant in A. S. 199 of 1965. The suit is for recovery of Rs. 16715-31 from defendants 1 to 3. The plaintiff is a firm registered under the Indian Partnership Act, 1932, carrying on business in ghee, oil and oil seeds at Dharapuram. Defendants 1 and 2 are the Union of India, represented by the General Managers, Central Railway and the Southern Railway. The third defendant is a firm carrying on similar business at Itarsi in Madhya Pradesh. The plaintiff firm and the third defendant firm were having dealings for some time past. The fourth defendant and his son fifth defendant are brokers and commission agents. In the first week of February, 1958, the third defendant sold through these brokers a wagon load of tilly seeds at Rs. 59 per bag of two imperial maunds each. The third defendant agreed to deliver the goods by rail at Erode railway station and receive the value of the consignment less the advance of Rs. 1000 paid, through the bank. In pursuance of the contract, the third defendant sent the R. R. for one wagon load of 251 bags of tilly seeds to the State Bank of India at Erode. The plaintiff cleared the railway receipt by payment of the balance of Rs. 13430-66 into the State Bank of India at Erode and obtained the railway receipt duly endorsed.

2. The case of the plaintiff is that he entered into the transaction of sale believing

bona fide that the third defendant is the owner of the 251 bags of tilly seeds, which were sent by the railway wagon and which were covered by the railway receipt, a document of title in favor of the third defendant, that under such bona fide impression he cleared the railway receipt, that the wagon arrived at Erode on 16-3-1958, and when he presented the railway receipt, the railway authorities informed him that the wagon contained only 54 bags and added that as per the instructions from their superiors, they would not deliver even those 54 bags. The further case of the plaintiff is that the railway receipt shows that the goods were booked under railway risk, that defendants 1 and 2 were responsible for the safe delivery of all the 251 bags to the person who lawfully produced the railway receipt, that defendants 1 and 2 failed to give delivery to the plaintiff and consequently defendants 1 and 2 are liable to pay compensation for the loss of the goods and that if the goods had been delivered, the plaintiff would have realized Rupees 17570 at the market rate prevailing on 16-3-1958, namely, Rs. 70 per bag, after deducting Rs. 1141-30 towards freight due to the railways at the destination, the plaintiff would have got a sum of Rs. 16428-81. After issue of the suit notice on 31-3-1958 to the Central Railways, the present suit is filed for recovery of the said amount.

3. The further contentions put forward in the plaint are that the railway receipt for 251 bags showed that the goods were taken charge of by the railway authorities, that the Officers were guilty of collusion with the consignor that they acted fraudulently and negligently in the discharge of their duties and consequently, the railway officials are liable to compensate the plaintiff, and that the third defendant is also liable for the suit claim. In the result, a decree against defendants 1 to 3 was prayed for.

4. The second defendant filed a written statement contending that one Lakshminarayanan alias Kalooram loaded on behalf of the Consignor (Motilal) 54 bags of tilly goods, that the said goods were consigned under invoice No.1, dated 21-2-1958 at Khirkhiya station on the Central railways to be delivered "to self" at Erode, that the consignment was booked subject to the condition that the goods should be loaded and unloaded by the owner, that the wagon was checked at Ajni transshipment shed on the Central railways and was found to contain only 54 bags, that the plaintiff, as endorsee of the railway receipt, cannot have better rights than the owner himself and that when the consignor had fraudulently obtained railway receipt by making willful misrepresentation, it is not open to the plaintiff, the endorsee, to claim higher rights, that the plaintiff, can claim only 54 bags actually loaded, that the negligence or misconduct attributed to the railway officials was denied, and that the railway administration was not vicariously liable for the malfeasance, if any, on the part of its officials, when the consignor himself was guilty of fraud and willful misrepresentation, that the negligence and misconduct, if any, on the part of the railway employees was not the proximate cause of the alleged loss sustained by the plaintiff, that the requisite notice was not issued, and that the plaintiff has no cause of action. The first defendant adopted the written statement filed by the second defendant. 5. The third

defendant contended in his written statement that he never sold tilly seeds, as such, to the plaintiff, that one Lakshminarayana of Khirkiya handed over a railway receipt for a wagon load of goods of tilly seeds for sale to a merchant in Erode, that this defendant acted as a commission agent and sold the railway receipt to the plaintiff, through the 4th defendant, who acted as broker for the plaintiff, that the 4th defendant paid an advance of Rs. 1000 and for the balance a hundi was drawn on the plaintiff through the State Bank of India, that this defendant was not aware of the actual loading in the wagon, that as a bona fide purchaser of the railway receipt through Lakshminarayana for Rs. 14810 that he sold the same to the plaintiff in good faith that he is not liable for any latent defect, that he neither saw the wagon, nor the contents thereof and he is not aware of the shortage, that this defendant is an unnecessary party to the suit and he prayed that this suit may be dismissed so far as he is concerned.

6. Defendants 4 and 5 filed a written statement contending that they acted only as commission agents, that they never acted on behalf of the third defendant and that they are unnecessary parties to the suit.

7. The trial Court held that defendants 1 & 2 were absolved from liability by reason of the fraud practiced by the owner, that defendants 1 & 2 are not liable for the suit claim, that they are not liable for any loss, since no loss had been made out as the owner of the goods himself had practiced fraud upon the defendants 1 and 2 notwithstanding the fact that there is negligence and misconduct on the part of the railway servants in accepting the fraudulent representation of the owner. The learned Judge, however, found that the railway receipt is not a genuine document of title, that the third defendant cannot be termed as a bona fide purchaser for value, without notice of the defect in the title covered by the railway receipt. In the result, the trial Court passed a decree against the third defendant holding that he alone is liable for the loss sustained by the plaintiff, and observed that the third defendant, if so advised, in his turn, would proceed against the consignor Lakshminarayanan. In the result, the plaintiff was given a decree against the third defendant for Rs. 16715-31 P. together with interest and the suit was dismissed so far as defendants 1,2,4 and 5 were concerned. Against the said judgment, the plaintiff and the third defendant have filed the above appeals.

8. We shall deal with both the appeals together. The contention urged on behalf of the third defendant, appellant in A. S. 558 of 1964 is that he is only a commission agent, who sold the railway receipt to the plaintiff through the fourth defendant, who acted as a broker for the plaintiff, that the fourth defendant had paid Rs. 1000 as advance and for the balance a hundi was drawn, that he had received the railway receipt from Lakshminarayanan through the State Bank of Itarsi against payment and that he was not aware of the actual bags loaded in the wagons, that he is a bona fide purchaser of the railway receipt from Lakshminarayanan, which he sold to the plaintiff in good faith and that he is not liable for the suit claim.

9. The contention of the plaintiff-appellant in A. S. 199 of 1965 is that the railway authorities having issued the receipt, Ex. A-3 dated 31-1-1958 in token of their taking charge of the consignment consisting of 251 bags of tilly seeds, it is not open to the defendants 1 and 2 to contend that they have not taken charge of the goods and that a smaller quantity, viz, 54 bags of tilly seeds alone were loaded in the railway wagon, that defendants 1 and 2 were negligent in not satisfying themselves that the entire consignments of 251 bags were loaded in the wagon before issuing the receipt Ex. A-3, that defendants 1 and 2 alone are liable for the short delivery, that the short delivery was as a result of fraud and negligence on the part of the railway administration and that defendants 1 and 2 are bound to meet the suit claim.

10. In dealing with the above contentions it is necessary to briefly analyze the facts. One Lakshminarayanan alias Kalooram is a merchant dealing with tilly seeds at Khirkhiya, a wayside railway station on the Itarsi Bhusawal section of the Central Railways. On 31-1-1958 Lakshminarayanan consigned 251 bags of tilly seeds to Erode as per Ex. B.11 the forwarding note No. 107 attached to the invoice No. 6433/14 of the Central Railway. The forwarding note was handed over to the railway authorities at Khirkhiya and the railway authorities at Khirkhiya are expected to verify the particulars given by the consignors and fill up the entries on the back portion of the forwarding note and Ex. A.3 is the railway receipt signed by the station master of Khirkhiya showing that 251 bags described as "tilly seeds" with marks showing the actual weight had been handed over by the consignor at the Khirkhiya station. The said railway receipt contained the endorsement "by Murugan Ghee Supply Co." (plaintiff). The other endorsement in favor of defendants 3 and 5 also appear on the railway receipt Ex. A-3. The railway receipt appears to have been sent by the third defendant to the State Bank of India, Erode, to enable the plaintiff to make the payment and obtain delivery of the goods. Pursuant thereto the plaintiff paid Rs. 13,430-66 on 10-3-1958 and took delivery of the railway receipt. The goods were loaded in the wagon on 31-1-1958 and the wagon commenced its journey. The wagon appears to have been tampered with and the seal broken. On 1-3-1958, the tampering was detected by the railway officials at Ajni and the railway officials put the seal afresh and consigned the wagon to Erode. At Ajni an investigation into the tampering was made. If the railway receipt Ex. A.3 is alone taken into account, the inference will be that the entire consignment of 251 bags were taken charge of by the railway officials at Khirkhiya and loaded and the tampering of the wagons took place prior to its reaching Ajni. But the case of the railway is that only 54 bags were loaded at Khirkhiya notwithstanding the railway receipt for 251 bags, said to be loaded. A criminal case was launched. The consignor and two other railway employees, the Assistant Station Master of Khirkhiya and the commercial clerk (loading foreman of Khirkhiya) and others were prosecuted. It is unnecessary to go into the details of the prosecution.

11. The wagon arrived at Erode railway junction on 16-3-1958 and when the plaintiff presented the railway receipt at Erode junction and demanded delivery,

he and the railway officials found the wagon with 54 bags of tilly seeds, while it should have contained 251 bags as per the railway receipt. The railway officials refused to deliver even the 54 bags on the ground that there was an investigation into the tampering of the railway wagon and that they could deliver the said 54 bags only after the termination of the investigation and the proceedings connected therewith. The case of the railway is not consistent. While stating that only 54 bags were loaded into the wagon at Khirkhiya we find that they have charged for the full consignment of 251 bags and deducted the entire charges out of the sale proceeds of 54 bags, the sale itself having been held under orders of this Court pending this appeal. We may observe that the case of the railway is inconsistent and the conduct of the officers of the department is reprehensible. The plaintiff, who paid the entire consideration for the consignment, after issuing notices to the concerned authorities, filed the above suit for damages for short delivery alleging fraud and negligence on the part of the railway administration and also of the third defendant. The amount claimed represents the value of 251 bags of tilly seeds as against the third defendant on the basis of failure of consideration and as against defendants 1 and 2 on the basis of a contract as embodied under the forwarding note and the railway receipt on the ground of willful neglect or gross negligence on the part of the railway servants in not delivering the quantity taken charge of by them.

12. When there is a discrepancy with regard to the quantity as entered in the railway receipt and the actual quantity found on opening the wagon, there is a prima facie duty cast upon the railway administration to explain the causes for the discrepancy. The railway administration was, however, content in discharging the heavy burden cast on them by examining two railway coolies, D. Ws. 1 and 3. It is no doubt true that the consignor, Lakshminarayan, was not examined. But the railway receipt evidencing the receipt of 251 bags with marks containing the weight signed by the station master evidencing the receipt of the consignment on weighment is prima facie evidence of the goods having been taken charge of by the railway administration. We fail to see how the entry in the receipt as to the weight of the consignment was entered into, if 251 bags were not factually produced and weighed. Having issued the railway receipt in token of their accepting the consignment, it is not open to them to plead that they did not receive the consignment or that they received the consignment only in part. The learned Judge, while rightly stating that the administration was bound to explain the deficiency erroneously came to the conclusion that the non-examination of Lakshminarayanan, the consignor, would absolve the railway administration from discharging their burden and that the railway administration is not liable in damages in any way. In the present case, the goods were booked at railway risk and the charges have been paid at a higher rate. Even when the goods are booked at the owner's risk, the railway administration is bound to call all the material witnesses to prove the facts which are within their special knowledge. Section 72(1) of the Railways Act prior to amendment laid down that the responsibility of a railway administration for the loss, destruction or deterioration

of animals or goods delivered to the administration to be carried by the railway shall, subject to the other provisions of that Act, be that of a bailee under Sections 151, 152 and 161 of the Contract Act, 1872. The mere omission of Sec. 160 of the Contract Act in the above list of sections in the Indian Contract Act, 1872 does not mean that there is no responsibility in the railway administration for the non-delivery of the goods taken charge of by them. The obligation to return or deliver the goods taken charge of by them is implied in the contract of carriage for reward and it is implicit in the old Section 72(1) of the Act read with Section 161 of the Contract Act. The new Section 73 replaces the old Section 72 of the Act. But the basic responsibility of the railways which was that of a bailee under the old Sec. 72 has now been changed under the new Section 73 to that of a common carrier i.e., the railways are now undertaking greater responsibilities and are liable for loss or injury to consignments in all cases arising when they are in the course of transit unless such loss or injury is caused by an act of God or other unexpected perils specified in the section. Thus, the position of the railway being that of a bailee, the railway administration must return the goods which they took charge of and in respect of which they issued the receipt in token of their acceptance of liability. Proof of non-delivery of the goods establishes prima facie the case against the bailee and puts him on his defense.

13. Section 106 of the Evidence Act will apply and the railway administration is bound to establish the facts within their knowledge and produce all the evidence which it has in its possession in discharge of its burden. The discrepancy in regard to quantity stated in the railway receipt and that actually found on opening the wagon having been established, the burden is cast upon the administration to explain the deficiency. We have perused the evidence of D. Ws. 1 and 3 and we cannot place any reliance upon their evidence as they speak to facts four years ago of their moving 54 bags only and not the entire consignment of 251 bags. It is impossible for the coolies to remember how many bags they moved on a particular day four years ago. Further they appeared before the Commissioner and gave evidence without summons. This is the only evidence placed on behalf of the administration. The best man to speak about the facts is the station master, who signed the railway receipt. He has not been examined. The concerned clerk has also not been examined. On the other hand, the case of the railway administration is that the plaintiff has not examined Lakshminarayanan, the consignor. There is no justification for this criticism as what has to be established is what happened at the time when the goods were handed over to the administration for loading into the wagon. The documentary evidence, viz., the railway receipt establishes the fact of receipt of 251 bags by the railway authorities which is described by weight also. That shows that the goods were weighed after receipt before being put into the wagons and the railway administration took charge of the consignment. The plea of the railway administration is that the consignor played a fraud in actually loading 54 bags instead of the figure stated in the receipt. The liability of the administration arises on the issue of the receipt in token of the acceptance of the goods by

them. Therefore, what happened subsequent thereto is irrelevant in this context.

14. The view of the learned Judge that the third defendant is liable to make good the suit claim cannot be sustained. The third defendant is a purchaser for value of the railway receipt showing that 251 bags were consigned. The criticism of the learned Judge that the third defendant did not peruse the railway receipt is unjustified as the railway receipt even if perused will show only that 251 bags with weight and marks have been consigned. The learned Judge is not right in holding that the third defendant is a party to the fraud perpetrated by Lakshminarayanan, the consignor and the railway officers. We have perused the evidence of D.W. 5, who is a clerk in the service of the third defendant. The evidence discloses that the third defendant entered into negotiations with the plaintiff-firm through the fourth defendant for purchasing the railway receipt for 251 bags of tilly seeds and the rate of supply per bag and the commission charged. The third defendant drew a hundi for Rs. 13,425/- after giving credit for Rs. 1000/- advanced by the fourth defendant. The daily cash book of the third defendant has been produced and the relevant entries are marked in evidence. The ledger book has also been filed into Court and the corresponding entries have been marked in evidence. All the above materials clearly establish the fact that the third defendant paid cash for the transaction. The view of the learned Judge that the third defendant is not a bona fide purchaser for value cannot, in the circumstances, be accepted. We hold that the third defendant is a bona fide purchaser for value of the consignment of 251 bags as per the railway receipt. The decree passed against him cannot, therefore, be sustained and the suit has to be dismissed against him.

15. In view of the fact that defendants 1 and 2 have not discharged their burden, the plaintiff will be entitled to a decree for the amount claimed in the suit against defendants 1 and 2.

16. In the result, we modify the decree of the Court below. The third defendant's appeal, A. S. 558 of 1964, is allowed and the third defendant will be entitled to his costs payable by defendants 1 and 2 in this Court and in the trial Court. The plaintiff appellant in A. S. 199 of 1965 is entitled to a decree for the amount claimed by him with costs recoverable from defendants 1 and 2 in this Court and in the Court below. In other respects, the decree of the lower Court will stand.

17. Decree modified.