
(1990) 12 KL CK 0033
In the High Court Of Kerala
Case No : A.S. No. 1350 of 1986

Khadigramodyod Bhavan

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-12-1990

Acts Referred:

Railways Act, 1890 — Section 76F

Citation : AIR 1991 Ker 413 : (1991) 2 ILR (Ker) 801

Hon'ble Judges : P.K. Shamsuddin, J

Bench : Single Bench

Advocate : P.K. Behanan and George Thomas, for the Appellant; Mathews P. Mathew, for the Respondent

Final Decision : Allowed

Judgement

P.K. Shamsuddin, J.—Plaintiff in O.S. No. 27 of 1981 on the file of the Sub Court, Ernakulam, is the appellant. The suit is for recovery of damage.

2. Plaintiff despatched during the years 1977 and 1978 piece goods under three consignments Exts. B1, B2 and B4. Out of the consignments, the subject-matter of the appeal is only the consignment under Ext. B4 that was despatched on 23-1-1978. This consignment reached Ernakulam on 10-2-1978. Pilferage and shortage were suspected and on demand made by the plaintiff, open delivery was allowed and accordingly on 6-3-1978 open delivery was given and the Railway Inspector issued Ext. B5 certificate showing that 20 pieces were found short. The value of the goods found short was admitted to be Rs. 3815.07. In spite of repeated demands made by the plaintiff, to settle their claim, the Railway Administration refused to pay the amount. Hence the suit.

3. 1st defendant in the written statement contended that there was no valid notice u/s 78(B) of the Indian Railways Act. It was also averred in the written statement that the consignment reached at Ernakulam of 2-2-1978 and was ready for delivery. According to the 1st defendant, the plaintiff applied for open

delivery on 13-2-1978 i.e. after 7 days of the termination of transit and accordingly, the plaintiff is not entitled to any relief. 2nd defendant adopted the contention of the 1st defendant.

4. On a consideration of the evidence in the case, the court below found that the plaintiff failed to adduce any evidence to show that it was due to the negligence of the Railway Administration that the consignment was lost and therefore in view of Section 74(3) of the Indian Railways Act the Railway is not liable to pay compensation for the loss.

5. In this appeal, learned counsel for the appellant has challenged the finding of the court below. Learned counsel invited my attention to Section 76-F of the Act and contended that the Railway Administration is bound to disclose to the consigner how the consignment or the package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from disclosure the burden of proving such negligence or misconduct shall lie on the consignor.

6. On the other hand, counsel for respondent submitted that this is a case which falls u/s 74(3) of the Act as the goods were carried at the owner's risk and therefore the Railway Administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit of goods, from whatever cause arising except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the Railway Administration or of any of its servants. In order to appreciate the respective contentions of the learned counsel on both sides, it is profitable to refer to Sections 74(3) and 76-F of the Act:

Sub-section (3) of Section 74 reads as follows :

"When any animals or goods are deemed to have been tendered to be carried, or are carried at the owner's risk rate, then notwithstanding anything contained in Section 73, the Railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit of such animals or goods, from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the Railway Administration or of any of its servants."

Section 76-F reads as follows :

Burden of proving misconduct in case of non-delivery or pilferage in transit of goods carried at owner's risk rate -- Notwithstanding anything contained in Section 74.--

(a) Where the whole of a consignment of goods, or the whole of any package forming part of a consignment, carried at owner's risk rate is not delivered to the consignee and such non-delivery is not proved by the Railway Administration to have been due to fire or to any accident to the train, or

(b) where, in respect of any consignment of goods or of any package which had been so covered or protected that the covering or protection was not readily removable by hand, it is pointed out to the Railway Administration on or before delivery that any part of such consignment or package had been pilfered in transit, the Railway Administration shall be bound to disclose to the consignor how the consignment or the package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the Railway Administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor."

Section 73 of the Act lays down that the Railway Administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit of animals or goods delivered to the administration to be carried by Railway, except in cases enumerated in (a), (b), (c), (d), (e), (f), (g), (h) and (i) of that section. But if the goods are carried at owner's risk, the burden u/s 74(3) is on the owner to show that loss, destruction, damage, deterioration or non-delivery in transit occurred due to negligence or misconduct on the part of Railway Administration. Notwithstanding anything contained in Section 73, the Railway Administration is not liable to compensate for the loss of goods if such proof was absent in such case. However, Section 76-F is a special provision which deals with the burden of proof of misconduct in case of non-delivery or pilferage in transit of goods carried at the owner's risk rate. We are concerned with Clause (b) of Section 76-F of the Act. It was pointed out to the Railway Administration that there was shortage. In such cases, notwithstanding anything contained in Section 74, the Railway Administration shall be bound to disclose to the consignor how the consignment or the package was dealt with throughout the time it was in its possession or control in view of Section 76-F. It is clear from Section 76-F(b) that if the negligence or misconduct on the part of the Railway Administration or any of its servants, cannot be fairly inferred from disclosure, the burden of proving such negligence or misconduct shall lie on the consignor. In the light of the above provisions, it is clear that where it was pointed out to the Railway Administration that before delivery of the consignment, or part of the consignment had been pilfered in transit the Railway Administration is bound to disclose to the consignee how the consignment or package was dealt with throughout the time it was in its possession or control and on failure to do so there is presumption that the loss occurred as a result of the negligence or misconduct of the Railway. In the instant case, the Railway Administration failed to disclose how they dealt with the goods. In the circumstances, it is only legitimate to infer in view of the provisions contained in Section 76-F(b) that pilferage occurred as a result of the negligence or misconduct on the part of the Railway. I am supported in this view by a decision of the Delhi High Court in *Union of India v. Gopal Dass Ramesh Chand* ILR 1976 Del 508 which held that a presumption of negligence could be drawn against the Railway for its failure to disclose as to how the Railway had dealt with the parcel in transit. In AIR 1937

152 (Privy Council)), the Privy Council also held that on failure of the Railway to adduce evidence how the goods were in transit were dealt with, adverse inference can be drawn against the Railway u/s 114(g) of the Evidence Act. Learned counsel placed great reliance on a Division Bench Ruling of this Court in Union of India (UOI) Vs. Universal Traders Corporation, Cochin, . It was a case where damage was caused due to delay in transit. There also the carriage was at the owner's risk. This Court held that in view of the non obstante clause contained in Section 74, the burden is on the plaintiff to show that the loss, destruction or damage was due to the negligence or misconduct on the part of the Railway Administration and the plaintiff having failed to discharge that burden the plaintiff's claim is liable to be dismissed. But in the instant case, the pilferage is alleged in transit of goods. It is true that the carriage was at the owner's risk. The provisions contained in Section 76-F did not come up for consideration before the Division Bench and therefore the Division Bench had no occasion to consider the legal effect of Section 76-F(b). It may also be noticed under Section 76-F(b) contains a non obstante clause which says that notwithstanding anything contained in Section 74 whereas there is no such non obstante clause contained in Section 76. In the circumstances the said decision has no application to the facts of this case. Though a general contention was taken in the written statement that the suit is barred by limitation, it has not been shown by the learned counsel how the suit is barred by limitation as far as the consignment in question is concerned. Learned counsel has not argued that in view of Section 77 of the Act, the claim is unsustainable, Obviously Section 77 has no application to the facts of this case.

7. The foregoing discussion would show that the Court below was not justified in not drawing an adverse inference against the Railway Administration from the fact that the Railway Administration did not fulfill its statutory obligation to disclose how the Railway Administration has dealt with the goods throughout the time it was in its possession and control. It follows that the plaintiff is entitled to a decree in respect of the shortage of the goods which occurred during the course of transit. I therefore, set aside the judgment and decree of the Court below and grant a decree in favour of the plaintiff for recovery of a sum of Rs. 3815,07, together with interest at 12% per annum from the date of suit till realisation.

8. The appeal is allowed as above. There will be no order as to costs.