(1981) 09 BOM CK 0065

In the Bombay High Court

Case No : First Appeal No. 71 of 1974

Kisan Bilas Badrinarayan APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 09-09-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1890 — Section 54, 77B, 78B

Citation : (1982) 2 BomCR 257

Hon'ble Judges : V.A. Mohta, J

Bench : Single Bench

Advocate : B.A. Udhoji, for the Appellant; K.A. Ghatpande, for the Respondent

Final Decision : Dismissed

Judgement

V.A. Mohta, J.—An interesting point as to the construction of section 77-B of the Indian Railways Act ("The Act" for short) is involved in this appeal by the original plaintiff-a bullion merchant from Warora in Chanda district.

2. The facts so far as relevant to the controversy may be put in nutshell thus. On 13th January, 1971, the plaintiff entrusted a sealed and packed parcel containing old silver ornaments purporting to be of the value of Rs. 15,000/- at Warora Station to the employee incharge of the Central Railway for being carried and transported to Bombay. The consignee was another bullion merchant at Bombay who was to pay the freight at the time of delivery. Forwarding note declared the contents of the parcels and the value thereof as being Rs 10,000/-. Normal period of delivery was 3 to 4 days. It never reached the destination and after a period of merely one week, the plaintiff was informed that the parcel was missing from the Cloak room of the Wardha Railway Station on its way to Bombay. The plaintiff gave notice of claim as contemplated u/s 78-B of the Act followed by a notice as required u/s 80 of the Civil Procedure Code. There was no compliance and hence, the present action was filed claiming Rs. 15,000/- as the price of silver ornaments, Rs. 2850/- by way of difference in the market price and some

miscellaneous charges, total claim being of Rs. 18,140/-. According to the plaintiff, this loss was caused due to negligence and misconduct of the Railway Administration which was, therefore, liable to compensate the plaintiff.

3. The defendant-Railway Administration-accepted the fact of delivery of one sealed tin box covered with gunny and cloth which was said to contain old silver ornaments at Warora Station for carriage to Byculla Railway Station in Bombay. As per further defence the weight of the package was 311/2 Kgs. and the price of the package was declared by the plaintiff only at Rs. 10,000/-. As per the consigner''s instructions given in writing, on the original forwarding note, the parcel was offered for booking under the remark "not insured". Railway Administration did not know the contents. However, the parcel was accepted by the railway staff as per consigner''s instructions. Parcel weigh bill containing the necessary remarks in the forwarding note was given to the plaintiff''s station dalal. "Silver" falls within the category of articles of special value mentioned in Second Schedule of the Act for which special provision in the shape of section 77-B has been made. There are certain mandatory requirements for making the administration liable in respect of liability for loss etc. of such articles. They were not complied with and consequently Railway Administration was absolved from all the liabilities in respect of the said parcel. The parcel was not lost on account of any negligence or misconduct on the part of the railway staff.

4. The trial Court accepted the defence of the Railway Administration as regards absolvent of liability for failure on the part of the plaintiff to pay percentage charges contemplated u/s 77-B. The story of the plaintiff that the parcel contained silver ornaments worth Rs. 15,000/- and to also its loss on account of negligence and misconduct of railway staff was negatived. It was, however, held that the parcel was stolen from the strong room at Wardha Railway Station. Findings are recorded on certain other issues also but they are not relevant for the purposes of the present appeal.

5. The principal defence of the Railway Administration is that the suit was not maintainable for non-compliance with mandatory requirements contemplated u/s 77-B. This section reads as under :

"77-B. Further provision with respect to the responsibility of a Railway Administration as a carrier of articles of special value.

(1) Notwithstanding anything contained in the provisions of this Chapter, when such articles mentioned in the Second Schedule are contained in any parcel or package delivered to a Railway Administration to be carried by railway and the value of such articles in the parcel or package exceeds five hundred rupees, the Railway Administration shall not be responsible for the loss, destruction, damage or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared in writing or declared them in writing at the time of the delivery of the parcel or the package for carriage by railway and if so required by the

administration, paid or engaged to pay in writing a percentage on the value so declared by way of compensation for the increased risk.

2) When any parcel or package of which the value has been declared under sub-section (1) has been lost destroyed or damaged or has deteriorated, the compensation recoverable in respect of such loss, destruction, damage or deterioration shall not exceed the value so declared.

3) A Railway Administration may make it a condition of carrying a parcel or package declared to contain any article mentioned in the Second Schedule that a railway servant authorised in this behalf has been satisfied by examination or otherwise that the parcel or package actually contains the article declared to be therein.

4) The Central Government may, by notification in Official Gazette, direct that any article mentioned in the Second Schedule may, without being contained in any parcel or package, be delivered to a Railway Administration to be carried by railway and upon the issue of such notification, the provisions of this section shall apply in relation to such article as they apply in relation to any article mention in the Second Schedule and contained in any parcel or package."

Now, it is plaintiff''s own case that the parcel contained articles mentioned in Second Schedule and that its value exceeded Rs. 500/-. The defendant has not disputed that the contents of the parcel and value were declared in writing and that the parcel was stolen at Wardha Station from the custody of the Railway Administration. The principal question is whether the plaintiff has "paid or engaged to pay in writing a percentage on the value so declared by way of compensation by the increased risk" as required by the administration. The plaintiff''s case is that the Railway Administration never required the plaintiff to pay or to be engaged to pay in writing a percentage on the value for the increased risk. In this connection, opening section 72 of Chapter VII of the Act dealing with the responsibility of Railway Administration as carriers may be noticed. It is mandatory that a person delivering the goods for carriage execute a forwarding note in such form as may be prescribed by the Central Government. Section 54 deals with power of Railway Administrations to impose conditions for working traffic. Subject to control of the Central Government, Railway Administration can impose conditions not inconsistent with the Act and issue general rule with respect to receiving, forwarding or delivering of the articles. Such conditions are to be kept at the railway station and are open to inspection free of charge by any person at all reasonable time. It is under this section that general Rules known as "Coaching Tariff" are issued from time to time. Under these provisions the Railway Administration prescribes various types of forwarding notes and issues instructions. Goods Tariff No. 33, Part I prescribes different types of forwarding notes. The form of forwarding note in respect of excepted articles as these contains a column at Item No. 2 reading as under :

"I declare that each package contains/piece is of a value of Rs and engage/do not engage to pay the percentage charge on the value for the increased risk, as required by the Administration. (Description and contents in each package and value of excepted articles should be specifically mentioned)".

A person filling in this forwarding note has to strike out the portion inapplicable. Added to this, is explanatory note No. 2 reading as under :---

"(2) Railways are not responsible for any loss, destruction or deterioration of or damage to a parcel or package containing any Article (s) specified in the Second Schedule to the Indian Railways Act IX of 1890, whose value exceed Rs. 500/- per package or piece unless the contents and value are declared and an engagement entered into to pay the authorised percentage on value charged, if required. The declaration of contents and value must be made in Clause (2) overleaf and the word "engage" or the words "do not engage" struck out according to whether the consignment is to be booked by the railway with bailee''s responsibility or otherwise. The administration hereby give notice that payment of percentage on value is required."

6. The combined reading of these Rules makes it clear that a person has to make a positive declaration about engagement to pay percentage charge and if he chooses to engage to pay, actual payment is necessary at the time of booking. It is a common ground that neither such declaration of engagement nor payment of percentage charge has, in fact, been made in the present case. Ex. 38 is the forwarding note. The form used is in respect of "General Merchandise" and not the one for "excepted articles". Naturally, therefore, it does not bear the above quoted relevant clause. It bears the endorsement "not insured" in the handwriting of plaintiff''s station broker Ramchandra Pisal (P.W. 2). The plaintiff''s case is that this endorsement was written at the instance of the Parcel Clerk Shri Keshao Shiraskar (D.W. 1). That P.W. 2 Ramchandra was the agent of the plaintiff working at the railway station and that he was accustomed to send parcels is an admitted position. A suggestion was thrown at D.W. 1 Keshao in his cross-examination that P.W. 2 Ramchandra had, in fact, demanded the form of ''excepted articles''. This witness however, admitted that the said form was not then available. From the evidence of P.W. 2 as well as the plaintiff himself who is examined as P.W. 1, it does not appear that their case was of absence of knowledge about requirement of filling of a particular from. It is in evidence that this percentage charge is sometime known as "insurance charge". In this background, the presence of the endorsement "not insured" in Ex. 38 is significant. The explanation of P.W. 2 on this is that Booking Clerk D.W. 1 Keshao enquired whether the parcel was insured with the insurance company and to that P.W. 2 answered in the negative. This witness had to admit that he was the Station Dalal for the last 15 to 16 years and was aware of all the procedure relating to parcels. In this background, the suggestion that the endorsement related to a private insurance through Insurance Company, to say the least, is untrue. Indeed, this witness admitted further that three was no company insuring railway parcel at Wardha. It was also admitted by this witness that he

generally makes endorsement in the forwarding note. Lastly, the witness was compelled to admit that he never asked the parcel clerk as to which insurance he was referring. In this background, the plaintiff''s case that percentage charge was not in fact demanded cannot be accepted as a truthful version of the reason behind the endorsement "not insured" on Ex. 38.

7. It was contended that it was for the Railway Administration to positively prove such demand or requirement and inasmuch as there was no positive evidence about actual requirement, the case could not be governed by section 77-B. In the first place, on facts there is no scope for advancing such an argument. That apart, it seems to me that actual demand is not at all necessary under law. The Railway Administration has all India net work and it functions on the basis of the Rules framed and general instructions issued as required by law from time to time. Section 77-B does not contemplate individual demand. If that was the requirement of the section, the position would have been different. This demand has been incorporated in the explanatory note in the forwarding notes and it amounts to a general notice that pre-payment of percentage charge in respect of ''excepted articles'' is a must. Articles 141 and 143 of Goods Tariff are specified the excepted articles and percentage charges. Silver is one of them. All this leaves no scope to doubt that in exercise of the powers u/s 54 of the Act, Railway Administration has not only given a notice of its non-liability for loss in respect of excepted articles unless percentage charge is not only agreed to be paid but it also, in fact, pre-paid at the rates specified. All this dispenses with the individual demand. Therefore, in this background, it is difficult to accept the contention of the appellant that the administration could not take benefit of the provision of section 77-B. Thus, the plaintiff must fail on this ground alone. It is, therefore, unnecessary to go to other points.

8. In conclusion, the appeal is dismissed but without any order as to costs, the reason being that the plaintiff must have really lost valuable articles but he has failed only because of the failure to pay percentage charges which are meagre.