

(1938) 08 AHC CK 0015
In the Allahabad High Court

Kishan Lal Matrumal

APPELLANT

Vs

B.B. and C.I. Railway Company and Others

RESPONDENT

Date of Decision : 08-08-1938

Acts Referred:

Contract Act, 1872 — Section 161

Citation : AIR 1938 All 561

Hon'ble Judges : Mulla, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Mulla, J.—This is a plaintiff's application in revision from a decree of the Court of Small Causes in a suit brought by him for damages for shortage in the goods consigned by him to a Railway Company. The plaintiff is the proprietor of a firm called Kishan Lal Matru Mai which owns an oil mill at Hathras. He loads tins of mustard oil in railway wagons at a siding in his own mill for being despatched to various places. In this case we are concerned with two consignments of 420 tins of oil each which he delivered to the B.B. & C.I. Railway Company at Hathras on two different dates, one on 15th August 1934 for being despatched to Narainganj and the other on 28th August 1934 for being despatched to Dacca. Each consignment occupied a four wheeler wagon of the B.B. & C.I. Railway Company. These consignments were accepted by the Railway under risk-note forms A and B. The acceptance of goods under these forms implied that owing to the bad condition and defective packing of the goods the Railway Company was not prepared to take any responsibility for the condition in which they might be delivered to the consignee and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the railway administration's servants. It implied further that the Railway Company would not be responsible for any loss, destruction or deterioration of or damage to the consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants.

2. The ordinary route by which the two consignments in question had to be taken to their destination was via Qasganj, Sitapur, Gorakhpur and Katihar. The goods had consequently to pass in transit not only on the B.B. & C.I. line, but also on the B.N.W. and R.K. lines. It is to be noted that all these lines are metre-gauge lines so that the two wagons containing the tins of oil despatched by the plaintiff could reach their destination without the necessity of the goods being transferred from one wagon to another at any place on the way. It must be presumed that when the plaintiff despatched the two consignments from Hathras and the Railway Company accepted the consignments, it was clearly understood between the parties that the ordinary route will be followed. In this case, however, there were breaches caused on the B.N.W. line by floods and hence the two consignments were diverted either from Sitapur or from Gorakhpur to a different route and were sent to Benares. It is admitted that no information of this diversion of route was conveyed to the plaintiff. At Benares both the consignments were transferred from the four, wheeler wagons of the B.B. & C.I. to bigger wagons of the E.I. Railway. It is again admitted that the plaintiff was not given any information of this transfer of the consignments from one class of wagon to another. As the E. I. Railway wagons were bigger in size, the tins of oil were necessarily packed rather loosely so that there was likelihood of the tins striking against each other and against the sides of the wagon. The consignments reached their destination and were unloaded in the presence of the railway authorities. A note was made at the time that there was a shortage of 11 maunds, 7 seers and 4 chataks in weight. It was in order to recover damages for this shortage that the plaintiff brought the suit out of which this application in revision arises. The suit was brought in the Court of the Munsif at Hathras on the Small Cause Court Side.

3. It may be mentioned here that the plaintiff had despatched nine other consignments on different dates to a place called Bhairavbazar. These consignments had also to be taken by the same route and they were also diverted to Benares with the exception of one which was detained at Sitapur. When these consignments reached their destination and the plaintiff's agents took delivery, it was found that there was a shortage and the tins bore marks of having been cut or bored-with some pointed instrument. The consignment which had been detained at Sitapur reached its destination later on by the ordinary route, and it was found at the time of delivery that there was no shortage in it. The plaintiff brought a regular suit for damages in respect of the eight consignments in which there was a shortage. The learned Munsif disposed of both the suits by the same judgment. He gave the plaintiff a decree in, respect of the eight consignments in the regular suit on the ground that the shortage was due to misconduct on the part of the railway servants. In the other suit out of which this application arises he held that owing to the diversion of route without the plaintiff's knowledge the defendants could not claim any protection from liability under risk, note forms A and B and their liability had to be determined under the Contract Act, but he found that in transferring the goods from a Small

wagon to a bigger one they had not done anything which a prudent man would not have done in the circumstances and hence they were not responsible for the loss. Upon this finding the suit has been dismissed and the plaintiff has come up in revision.

4. Now the first question for consideration is whether the diversion of route in this case was or was not a circumstance which deprived the defendants of the exemption from liability afforded to them by the risk-note forms A and B. The lower Court has answered that question in the affirmative, but it has been contended on behalf of the defendants that in diverting the consignments to Benares, the defendants only tried to fulfil their obligation to deliver the goods at their destination in proper time. It was suggested that if they had failed to do so and there had consequently been a delay in the delivery of the goods at their destination causing loss to the plaintiff, the defendants would have been held liable for that loss and hence they acted in good faith in diverting the consignments to Benares in order to save themselves from that liability. I do not find much force in that contention. It is true that the law places an obligation upon the bailee to deliver the goods consigned to him at their destination in proper time, but I do not think that he can be held to have committed a default within the meaning of Section 161, Contract Act, if he is prevented from fulfilling that obligation not by any mistake or negligence on his part but by some circumstance entirely beyond human control, as for instance, a breach caused in the railway line by floods which happened in the present case. On the other hand, I think that if the bailee is unable to fulfil that obligation by some circumstance entirely beyond human control and in order to do so he adopts some other course necessarily attended with risk, which is not contemplated in the contract between him and the bailor without the latter's knowledge and consent, he does so at his own risk.

5. In the present case it was necessarily implied in the contract between the plain, tiff and the defendants that the consignments would be taken to their destination by the ordinary route. He had loaded and packed the consignments upon that clear understanding and he had taken the risk of loss or deterioration upon himself by executing risk-note forms A and B. If the defendants had followed the ordinary route they would have been free from all responsibility for any loss, destruction or damage except upon proof of misconduct on the part of their servants. When they found that they could not take the consignments to their destination by the ordinary route, I think it was their duty to inform the plaintiff before diverting the consignments to another route, and specially so, because the diversion necessarily involved a transfer of the goods from a small wagon to a bigger one which introduced a new factor for causing loss or damage. If the plaintiff had been advised of the intended diversion of route involving a transfer of the goods from a small wagon to a bigger one, he could have exercised his option either to direct the defendants to detain the goods at the point beyond which they could not be taken by the ordinary route or to take the necessary measures himself to prevent loss or damage which was likely to be

caused by the transfer of the goods from a small wagon to a bigger one.

6. In the course which the defendants adopted in the present case an important condition of the contract between the parties was varied without the plaintiff's knowledge and he was given no opportunity of safeguarding himself against any loss or damage likely to result from the change. I am therefore of the opinion that the diversion of route and the transfer of goods from a small wagon to a bigger one constituted a breach of a necessarily implied term in the contract between the parties and the defendants cannot therefore claim any protection under the risk-note forms A and B. This view is, I thin, fully supported by a single Judge decision of this Court in Secy. of State Vs. Kesho Prasad Sheo Prasad Belanganj . The learned Judge of this Court who decided that case made the following observations relevant to the present case:

It appears to me that the exemption from liability afforded to the railway administration by the risk-note forms A and B is operative and available to the railway administration only during the transit on the ordinary rout and once the goods are diverted from that rout the protection afforded by these risk-notes ends. In the absence of a clear an unambiguous stipulation to the contrary the presumption is that the consignor at the time of consigning his goods contemplates that the goods would be transmitted across the ordinary route within a reasonable time and the railway administration must in such cases always be deemed to have accepted the goods for despatch by the ordinary route. The contract evidenced by the ordinary rout. The contract evidenced by risk-note forms A and B does not contemplate the carrying the goods otherwise than by the ordinary rout, and if there is a diversion form the ordinary rout, it does not matter for what distance, the railway administration cannot invoke to its aid the benefits of the said forms.

7. With these observations, which to my mind lay down a general proposition relating to the liability of railway companies I entirely agree. The learned Counsel for the defendants however argued that these observations must be deemed to be confined to a case where the diversion of route takes place owing to a mistake or negligence on the part of the railway company but they cannot be applied to the present case where the diversion was deliberately made in good faith. I am unable to agree with that contention, for to my mind the ratio decidendi of the case to which I have referred was the breach of contract involved in the diversion of route and not the mere fact that the diversion was due to some mistake or negligence on the part of the railway company. I am therefore of the opinion that the defendants in this case cannot invoke the protection initially given to them by the risk-note forms A and B under which they accepted the two consignments in question. The next question for consideration is whether the diversion of route and the transfer of the goods from a small wagon to a bigger one did actually cause the loss or shortage in the present case.

8. The lower Court has answered that question in the affirmative relying

principally upon the indisputable fact that no shortage occurred in the solitary consignment which was detained at Sitapur instead of being diverted to Benares like the other consignments. That finding cannot but be accepted as correct, and all that remains for consideration is whether the defendants can be absolved of negligence and the consequent responsibility for the shortage. The lower Court has found that they did nothing which a prudent man would, not have done in the circumstances, but I cannot agree with that finding. In my opinion, when the goods were transferred from a small wagon to a bigger one, it was the duty of the defendants to see that they were so packed as to prevent the possibility of the tins striking against each other and the sides of the wagon. It is admitted that they took no steps to prevent that possibility. If they had informed the plaintiff he would have taken the necessary measures, but they did not convey any information to him. I cannot therefore hold that they acted like an ordinary prudent man dealing with his own goods and I find that they were guilty of negligence and are consequently liable for the loss caused to the plaintiff.

9. The reason given by the lower Court for arriving at a finding in favour of the defendants is that it was proved, upon the evidence that the plaintiff himself had not put any grass or bhusa round the tins so as to prevent them from striking against each other and against the sides of the wagon. The plaintiff had made an allegation to that effect, but the lower Court found that it had not been proved. That does not however afford a ground for holding that the defendants were not guilty of negligence. It appears to me that the lower Court entirely ignored the fact that when the plaintiff loaded the consignments at Hathras, he did so in small four wheeler wagons of the B.B. & C.I. Railway and it may not have been necessary to put any grass or bhusa round the tins having regard to the small space inside the wagon. That did not however afford any justification to the defendants for omitting to take that precaution when the goods were transferred from the small wagons to bigger ones. It appears from the judgment of the lower Court in the regular suit that one of the defendants, namely the R.K.R., could not be held responsible for any loss or shortage because it had obtained a clear receipt and that the suit was accordingly dismissed against the R.K.R. That consideration applies to the present case also. In the result I allow this application in revision and setting aside the decree passed by the lower Court decree the plaintiff's suit with costs and future and pendente lite interest at 31 per cent, per annum against all the defendants excepting R.K.R., defendant 3. As against defendant 3 the suit is dismissed with costs.