
(1956) 01 AHC CK 0025
In the Allahabad High Court
Case No : Second Appeal No. 1124 of 1948

L. Pyare Lal

APPELLANT

Vs

Governor-General of India in Council

RESPONDENT

Date of Decision : 18-01-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Evidence Act, 1872 — Section 101
Railways Act, 1890 — Section 72

Citation : AIR 1957 All 21 : (1956) 26 AWR 842

Hon'ble Judges : Mootham, C.J;Agarwala, J

Bench : Division Bench

Advocate : J.N. Takru and Ambika Pd, for the Appellant; D. Sanyal and A. Sanyal, for the Respondent

Final Decision : Dismissed

Judgement

Mootham, C.J.—This is a second appeal by a plaintiff from a Judgment and decree of the learned Civil Judge of Etawah dated 2-6-1947, which has been referred to a Bench by a learned Single Judge.

2. The appeal arises out of a suit filed by the appellant against the Governor General of India-in-Council for the recovery of Rs. 2,691 as damage for loss of part of a consignment of ghee. On 5-5-1944, the appellant sent 319 tins of ghee from Etawah to Bardwan by the East India Railway. The goods were sent under two risk notes, in Forms A and Z respectively.

When the train reached Bardwan on 17th May it was found that 7 tins were missing altogether, that 16 tins were empty and that 19 were of short weight. The trial Court gave the appellant a decree for Rs. 2,659-2-0, but on appeal the lower appellate Court modified the decree as it was of opinion that the appellant was only entitled to recover from the respondent the value of the 7 tins which had been wholly lost. It accordingly substituted for the decree of the trial Court a decree for Rs. 514-2-0.

3. There has been some discussion before us as to whether the liability of the railway administration was to be determined on the basis of the risk note in Form A or of the risk note in Form Z, and it is the appellant's case that the latter is the risk note which embodied the contract between the parties. I do not propose to say anything about the risk note" in Form A as in my opinion the appeal must fail even if the risk note in Form Z is, as the appellant contends, the risk note which is material.

4. Risk note Z, so far as it is relevant, reads as follows:

"I, the undersigned, in consideration of such consignment being charged for at the special reduced or owner's risk rates, do hereby agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the Railway Administration or its servants; provided that in the following cases-

(a) Non-delivery of the whole of a consignment or of the whole of one or more packages forming part of a consignment packed in accordance with the instructions laid down in the tariff or, where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to trains or to fire;

(b) Pilferage from a package or packages forming part of a consignment properly packed as in (a) when such pilferages is pointed out to the servants of the Railway Administration on or before delivery; the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor."

5. Now this matter comes before us in second appeal, and we are therefore bound to accept the findings of fact arrived at by the lower appellate Court unless it is shown to our satisfaction that those findings are not based on any evidence. The facts as found are that the consignment left Etawah on 5-5-1944, and that at the time when the goods were tendered to the railway administration and the risk notes were signed a note in the following terms was made by the goods clerk. "Tins new, without outer covering, soldering defective."

The train carrying the consignment reached intermediate station, Barakar, on the 14th May, and it was then discovered that the seal on one side of the wagon was broken. The contents of the wagon were not checked but the broken seal was replaced by a new seal. On arrival at Burdwan the one seal which had been placed on the wagon at Etawah and the second seal which had been placed on

the wagon at Barakar were found to be intact, and it is therefore clear that the seven tins which were missing must have been removed from the wagon before it left Barakar. On arrival at Burdwan the following note was made by the railway goods clerk :

"Unloaded 312 tins ghee instead of 319 tins as per seal from wagon 35076 N.W.R. both sides R/R intact and one side Etawah seal intact and one side Barakar seal intact on 17-5-44. Out of 312 tins ghee found 19 tins in leaky condition R/F 3 maunds 8 seers and 16 tins burst dented and entirely empty, caution labels were found pasted on the sides of the wagon".

A further note was also made by the same goods clerk which reads

"Freight paid and delivery effected by Pt. Radha Kishan on 17-5-44 under following qualified remarks. "Not received seven tins entirely, received 16 tins empty and 19 tins dented burst weighing 2 maunds 2 seers.""

6. The Railway Administration did not disclose to the appellant how the consignment was dealt with during the time it was in its possession or control and at the trial it gave no evidence on this point. In these circumstances the lower appellate Court inferred, as in my opinion it was fully justified in inferring, that the loss of the 7 tins which were found to be missing from the wagon on its arrival at Burdwan was due to the misconduct of the railway administration.

The learned Civil Judge was, however, further of opinion that the loss of ghee from 16 tins and the shortage of ghee in 19 tins was not due to the misconduct of the administration, and it is that part of his finding which has been strongly challenged in this Court. Learned counsel for the appellant has argued that in the same manner as the Court inferred from the failure of the administration to account for the manner in which the consignment was dealt with that the 7 tins had been stolen, so also ought it to have inferred that the ghee missing from the 35 other tins had also been stolen" and that the theft was due to the misconduct of the railway administration.

7. It is in my opinion of some importance to see what was the case of the appellant which was put forward in the trial Court, and it appears that in that Court the appellant led evidence for the purpose of showing that the 35 tins from which it is alleged the ghee had been abstracted had been deliberately cut open. It was not the appellant's case that the tins had opened, or had been broken open, in any other manner.

The learned Judge wholly rejected the evidence that the tins had been cut, and his finding was that the loss of ghee was due to the bursting of the tins caused by the movement of the train. That finding has been challenged before us on the ground that there was no evidence to support it, but I am unable to accept that submission. The tins were not found to have been cut open, but they were found to be dented & in a battered condition & it is not in "dispute that the railway clerk's note that the soldering was defective was correct.

In these circumstances, I can see no sufficient reason why, in the absence of any other explanation, the judge was not entitled to find that the bursting and denting of the tins was the consequence of transit by the train itself.

It must be borne in mind that although the loss of 7 tins must have occurred before the train left Barakar there is no evidence that the loss of the ghee from the remaining 35 tins must also have taken place within the same period, and that loss may have occurred anywhere between Etawah and Burdwan, nor in my opinion, can the finding of the learned Judge be said to be unreasonable, for it seems to me a little hard to accept as likely the view that when 7 tins could be removed from the wagon the thieves considered it more convenient to empty the contents of 16 of the remaining into other receptacles while they were in the wagon instead of taking the tins away.

Be that as it may, the learned Judge has found that the loss of the ghee, other than the ghee which was in the 7 tins which were removed from the wagon, was due to the bursting and denting of the tins in course of transit. I am unable to hold that this was not a finding which can be supported in law and upon that finding it follows that there was no pilferage and the proviso to the risk note has no application.

8. I am accordingly of opinion that this appeal fails, and I would dismiss it with costs.

Agarwala, J.

9. I agree. The main contention of the learned counsel for the appellant was that since the railway administration did not lead evidence to show how the consignment was dealt with during the time it was in its possession or control risk-note Z did not exempt the railway administration from liability and the loss must be presumed to be due to the misconduct of the servants of railway administration. It was further contended that risk-note A did not apply to the case as it applied only to the deterioration of the goods during transit and not to loss accruing due to bad packing. I think both the contentions are without substance.

10. In the present case the consignment was booked under risk-notes A and Z. Risk-note Z conforms to what is now called risk-note Form B. These two risk-notes apply to different circumstances. Risk-note A applies to loss occurring on account of the condition in which goods are delivered to the railway, i.e., when they are in a bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit. The relevant provisions in the risk-note are as follows:

"Whereas the consignment of tendered by me as per Forwarding Order No of (date) for dispatch by the Railway Administration to station under Railway Receipt No. of (date) is in bad condition and/onliable to damage, leakage or wastage in transit as follows-

"I the undersigned do hereby agree and undertake to hold the said Railway Administration over whose Railway the said goods may be carried in transit from station to station harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination 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."

11. The head note of this risk-note shows that it is "to be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit." Bad condition mentioned at the top of the risk-note may refer to the condition of the contents of the consignment or may refer to the condition of the packing thereof.

The word "condition" is wide enough to cover both senses. The risk-note being designed to meet a case in which loss may accrue due to the bad condition or defective packing of the articles and the word "condition" being coupled with the phrase "liable to damage, leakage or wastage", it must be held that the word "condition" was used to include bad condition of the packing as well.

The phrase "the condition in which the aforesaid goods may be delivered to the consignee at destination" must also therefore refer to the condition of the package even though it may also refer to the condition of the contents of the package. The phrase "for any loss arising from the same" consequently must refer to the condition in which the goods are delivered, i.e., if the goods are delivered in a bad packing loss arising on account of that condition is also included in the agreement. This interpretation of risk-note A has been followed practically in all the cases that have been cited before us with the exception of one.

12. In *Governor-General of India in Council Vs. Firm Bishundayal Ram Gourishankar*, it was clearly stated that by signing the risk-note A the consignor admits that the packing was defective and that it is not open to him to assert that the packing was not defective.

13. In *Bansi Ram and Others Vs. B.N.W. Ry. Co., and Another, Sulaiman J., (as he then was)* had to construe risk-note A, and his Lordship was of opinion that-

"It is used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit..... it is not now open to the plaintiffs to urge that the consignment was neither in bad condition nor defectively packed.... In my opinion the expression "loss arising from the same", means "loss arising from the condition in which the goods are delivered.".... It seems to me that a shortage in weight is a condition in which the goods are delivered and is covered by the saving clause. When a bundle is insecurely packed any goods comprised in it may slip out and be lost on the way. There can be no necessary inference that it has been stolen, much less that it has been stolen by a servant of the railway company concerned."

14. In Secy. of State and Another Vs. Rup Ram-Audh Behari Lal and Another . It was held by a single Judge of this Court :

"The bale after something was missing would be the condition of that bale at the time of delivery and the Railway company, under the protection granted to it under risk-note A, would not be responsible for that condition except upon proof that the loss was due to misconduct on the part of the railway administration or servants."

That was a case in which the railway company had delivered the cask or bags in good, bad or indifferent condition but the contents were short in weight, and it was held that risk-note A covered the case.

15. In Bengal North Western Railway Co. v. Firm Dassundhi Mal Bishambhar Das AIR 1928 Lah 166 (D) it was held :--

"The risk-notes are prima facie evidence of defective packing.... In the absence of any other explanation, it must, I think, be held that a part of the goods was damaged during transit owing to defective packing and such loss is covered by the risk-notes."

16. In Qadir Salamat Ullah Vs. Governor-General in Council and Another, three bales of cotton piece goods were consigned to the Railway. When the consignment reached the destination & the plaintiff went to take delivery of the same he found two of the bales having been tampered with and some cloth pieces removed therefrom. The learned Judge observed that the risk-note A did not protect the railway. The learned Judge went on to observe:

"What has to be noticed in this document is that the complaint of the plaintiff claiming damages must have reference to the "condition" in which the goods have arrived, that the loss thereby suffered by the plaintiff must have originated directly from that condition and that it is in respect of such loss that the burden is on the plaintiff to prove the same being due to the misconduct of the Railway servants.

Where, therefore, there is a shortage in the quantity of the goods arrived or there is a loss of a complete package or complete packages, it would not be a case covered by this risk-note, Form A at all, for the simple reason that it cannot be said that the "goods" have arrived or the "goods" have been delivered at the destination point. The Risk Note would obviously apply to cases & only to such cases where the plaintiff has suffered some monetary loss due to some deterioration in the condition of the goods and not to a cutting away of a portion of the goods owing to theft or pilferage. In the latter case, there would be no question of any loss due to a deteriorated condition."

The learned Judge differed from the earlier case of this Court in Secy. of State and Another Vs. Rup Ram-Audh Behari Lal and Another I have no hesitation in accepting the learned Judge's view that risk-note A would apply to cases where the plaintiff has suffered some monetary loss due to some deterioration in the

condition of the goods and not to a cutting away of a portion of the goods owing to theft or pilferage, but I find it difficult to agree that risk-note A is confined only to loss arising due to a deterioration in the condition of the goods.

As was held in the earlier decisions of this Court the risk-note covers cases of loss arising due to bad condition of packing. This was therefore a case which was completely covered by risk-note. Form A and the railway administration could not have been held liable for the loss unless the plaintiff proved that the loss was due to misconduct on the part of the railway administration's servants. The burden of proving that the loss arose from misconduct on the part of the railway administration's servants under risk-note A was on the plaintiff and not upon the railway administration. This the plaintiff failed to discharge. He was therefore rightly held not entitled to claim damages from the railway.

17. The same conclusion is arrived at when we refer to risk-note Form B. Under this note the consignor holds the railways company free from all responsibility for any loss, destruction, or deterioration of or damage to the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the railway administration or its servants. There is a proviso to this clause of the agreement which lays down as follows :

"provided that in the following cases-

(a) Non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment packed in accordance with the instructions laid down in the Tarrif or where there are no such instructions, protected otherwise than by paper of other packing readily removable by hand and fully addressed where such non-delivery is not due to accidents to trains or to fire.

(b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a) when such pilferage is pointed out to the servants of the Railway Administration on or before delivery;

the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and if necessary, to give evidence thereof before the consignor is called upon to prove misconduct but, If misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor".

18. As held by the Privy Council in AIR 1937 152 (Privy Council) the railway administration is bound to lead evidence in the first instance when any of the two conditions mentioned in the proviso is present. There must be either non-delivery of the whole consignment or of the whole of one or more of the packages or there must be pilferage from a package or packages forming part of the said consignment which must be properly packed in either case.

For the non-delivery of some of the tins the plaintiff has already obtained a decree and there is no appeal before us against it. We are in the present case only left with Clause (b) "Pilferage from a package or packages forming part of the said consignment." This clause applies only when two conditions are fulfilled namely (1) it must appear that there was pilferage, and (2) it must appear that the consignment was properly packed. If one of these conditions is not fulfilled this clause does not apply and if this clause does not apply there is no burden on the railway administration to lead evidence to show how the consignment was dealt with during transit.

In the present case when the risk-note A was signed it was admitted by the consignor that the goods were not properly packed. He cannot go behind that admission because that was a term of the contract between the parties. Indeed the finding of fact recorded by the Court below is that at the time of consignment the tins were not properly soldered. This would be sufficient to hold that Clause (b) of the proviso to risk-note B did not apply in the present case.

19. Again, there was no evidence from which it could be inferred that there was pilferage. As found by the Court below this was not a case of pilferage at all but was a case of damage or leakage because of bad packing.

Consequently Clause (b) of the proviso to risk-note B would not apply and therefore the omission on the part of the railway administration not to lead evidence in the first instance to show how the consignment was dealt with during transit would not be material and the Court would not be entitled to draw any inference against the railway administration from that omission. The judgment of the Court below on the point under consideration was therefore perfectly correct.

THE COURT

20. We dismiss the appeal with costs.