

(1956) 03 PAT CK 0010
In the Patna High Court
Case No : A.F.A.D. No. 1579 of 1951

Manilal Raghavji Kothari

APPELLANT

Vs

Union of India(UOI)

RESPONDENT

Date of Decision : 22-03-1956

Acts Referred:

Contract Act, 1872 — Section 151, 152, 161
Evidence Act, 1872 — Section 101, 102, 103, 104, 65
Railways Act, 1890 — Section 72(1), 72(2), 80

Citation : AIR 1956 Patna 434

Hon'ble Judges : Jamuar, J

Bench : Single Bench

Advocate : R.P. Katriar, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Dismissed

Judgement

Jamuar, J.—This second appeal is by the plaintiff whose suit has been dismissed by both the Courts below.

2. The suit was brought by a firm carrying on business at Bermo, a station on the East Indian Railway, against the Union of India as the defendant. The plaintiff's case was that, on 21-5-1948, his agent had delivered to the employees of the Oudh Tirhut Railway at Darbhanga railway station 630 tins of ghee, weighing 203 maunds 20 Seers, for being delivered to the employees and agent of the plaintiff at Bermo station,

The plaintiff's agent was given a railway receipt and an invoice which was endorsed in favour of the plaintiff. The goods were delivered to the plaintiff at Bermo in two instalments, the first instalment having been delivered on 11-6-1948, and the second on 31-7-1948. It was discovered that some of the tins of ghee were in a damaged condition while some other tins had been cut open.

On weightment, there was found a shortage of 10 maunds 25 seers 8 chhataks of

ghee. The plaintiff alleged that he had served notices upon the railways concerned for payment of compensation for the loss sustained by him; but, since the railway did not compensate him for, the loss, he instituted the suit out of which the present appeal has arisen.

3. A number of defences were taken in the trial Court; but it is necessary only to state that part of the defence to which arguments in the present appeal have been confined. It was stated by the defendant that the consignor of the tins of ghee had executed Risk Notes in forms A and B under which the defendant was not liable and had been absolved from any liability arising out of loss or damage or deterioration in respect of the consignment; and, in the same connection, it was alleged that the shortage, in the consignment had been due to bad and defective packing by the consignor himself, and that there had been no misconduct or negligence on the part of the railway administration or its servants.

The other defence, with which we are concerned in the present appeal, was that the suit was Bad for non-joinder of parties, as the plaintiff had not made the Oudh Tirhut Railway a party to the suit.

4. Mr. Katriar, who has appeared for the plaintiff-appellant, contended, in the first place, that the onus lay upon the defendant to prove that the consignor of the tins of ghee had executed Risk Notes in forms A and B, but that, since the defendant had failed to prove that fact, he, could not take up a defence of the kind which he has taken on the ground of the execution of those Risk Notes.

It may be stated at the outset that the Risk Notes in forms A and B were not produced at any stage of the case. The courts below, however, placed reliance upon the railway receipt (exhibit B) under which the consignment had been booked. Almost at the top of this receipt, there are printed these words "Risk Note Form", and then there are the words in carbon "A B".

From this note made on the railway receipt, an inference has been drawn in the Courts below that the receipt, on the face of it, shows that the consignment was booked subject to Risk Notes in forms A and B. Mr. Katriar has strongly contended that no such inference could be drawn merely upon the note made on the railway receipt, as it was the bounden duty of the defendant to prove the due execution of the Risk Notes in forms A and B.

5. Risk Note in form A 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; and the Risk Note in form B is used when the sender elects to despatch at a "special reduced" or "owner's risk" rate, articles or animals for which an alternative ordinary" or "risk acceptance" rate is quoted in the tariff.

In this latter Risk Note, the consignor, in consideration of payment of a lower charge, undertakes to hold the railway administration harmless and free from responsibility 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", with some provisos which need not be quoted.

6. In support of his contention, Mr. Katriar relied upon the case of -- Ram Das Ram and Others Vs. Dominion of India, in which their Lordships made a distinction between the existence of Risk Notes in forms A and B and the execution of such Risk Notes. In that case also, reliance had been placed upon some railway receipts which referred to Risk Notes in form B.

It was pointed out in that case that that would merely prove that there were such documents which did not, however, relieve the railway administration from proving the due execution of the Risk Notes, with particular reference to the conditions which have to be fulfilled under Sub-section (2) of Section 72, Railways Act.

It was further pointed out in that case that, the original Risk Notes having been lost, it was open to the railway administration to give secondary evidence of due execution; but this they failed to do. The case relied upon by Mr. Katriar supports his contention. The further question, however, which arises in this case is whether the absence of proof of due execution of Risk Notes in forms A and B is now a matter upon which the suit should succeed.

7. Mr. P. K. Bose, appearing for the respondent, has argued that, upon the findings arrived at in the Courts below, the absence of proof that the two aforesaid Risk Notes had been executed will be of no assistance to the plaintiff. I have pointed out above that the execution of a Risk Note in form B relieves the railway administration from responsibility for loss, destruction or deterioration of or damage to, the consignment from any cause whatsoever except upon proof that such loss destruction, deterioration or damage arose from the "misconduct of the railway administration's servants. The plaintiff had to prove that loss, "destruction, deterioration or damage was due to the misconduct of the railway administration's servants.

8. Section 72 (1), Railways Act provides that the responsibility of a railway administration for loss of goods shall, subject to the other provisions of the Act, be that of a bailee under Sections 151, 152 and 161, Contract Act, 1872.

Under Section 151, Contract Act, a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods and u/s 152 the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the goods bailed, if he has taken the amount of care of it as described in Section 151.

And u/s 161 if, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. In this connection, the

Court of Appeal below has given the following finding :

".....the alleged shortage in the consignment at the time of the delivery was due to the fact that some of the tins got damaged during their journey from Darbhanga to Bermo. They also show that this damage was due to the defective packing since the tins were not wrapped in gunny bags and the result was that during the course of then journey from Darbhanga to Bermo they struck against each other with the result that they got dented, some of them burst open, others were cut and some of them began to leak. There was apparently no misconduct on the part of the Railway employees to whom the aforesaid loss can be attributed. The plaintiff too has not adduced any evidence worth the name indicating any such misconduct or carelessness on the part of the employees of the E. I. Railway."

9. These are findings of fact which are binding upon me in second appeal. Clearly, the loss cannot be attributed to any misconduct on the part of the servants of the railway administration. This being so, I think that the plaintiff can take no advantage of the omission on the part of the defendant to prove the due execution of the Risk Notes in forms A and B.

10. Mr. P. K. Bose then raised the point that there is another difficulty in the way of the plaintiff. The tins of ghee had been consigned to the employees of the Oudh Tirhut Railway at Darbhaaga. Their delivery was made at Bermo, a station on the East Indian Railway. The plaintiff has not made the Oudh Tirhut Railway, a party.

In order to entitle the plaintiff to a refund to compensation for the loss of the goods delivered it was necessary, under the provisions of Section 77, Railways Act, to serve a notice upon the Oudh Tirhut Railway preferring a claim to compensation within six months from the date of the delivery of the goods. Such a notice was not served upon the Oudh Tirhut Railway. This railway, therefore, could not be made liable to pay compensation. A notice u/s 77, Railways Act, however, was served upon the East Indian Railway.

11. Now, under the provisions of Section 80, Railways Act, this latter railway, namely, the East Indian Railway, could be made liable if the loss had occurred on this railway. Section 80, Railways Act gives the plaintiff the choice of claiming his remedy either against the railway administration on which the goods are consigned or against the railway administration on which the loss occurs. The remedy is alternative, and not cumulative.

Where the goods are consigned to a railway for delivery at a railway station at another railway and the suit for damages for short delivery is brought against the defendant representing the latter railway, on which railway the loss has not taken place, the latter railway cannot be made liable for the loss either on the theory of agency or partnership (See the case of -- Governor-General of India in Council Vs. Sukhdeo Ram Marwari and Another, and, so far as the East Indian Railway is concerned, this was not the railway administration to which the goods had been

Consigned. Therefore, this railway can only be made liable if it be found that the loss occurred on it;

Now, the goods were carried from Darbhanga up to Mokamah Ghat by the Oudh Tirhut Railway. The goods were then transhipped to the East Indian Railway to be taken to Bermo station. The finding of the final Court of fact is that the loss was discovered at Mokamah Ghat, that is to say, that the loss had taken place when the goods were with the Oudh Tirhut Railway. Such being the finding, the East Indian Railway cannot be made liable to compensate the plaintiff for the loss.

12. For these reasons, I am of the opinion that the plaintiff's suit has been rightly dismissed. There is no ground for interference with the judgment and decree passed by the Court of appeal below. This appeal is, accordingly, dismissed with costs.