

(1979) 01 DEL CK 0001

In the Delhi High Court

Case No : Civil Revision Appeal No. 643 of 1975

Mehar Singh Kishan Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-01-1979

Acts Referred:

Citation : (1979) 15 DLT 217

Hon'ble Judges : M.L. Jain, J

Bench : Single Bench

Advocate : M.L. Bhargav and H.S. Mac, for the Appellant;

Judgement

M.L. Jain, J.

(1) This revision is against the order of Additional Judge, Small causes, Court, Delhi of January 29, 1975. The petitioner had filed a suit against Union of India, defendant No. 1, on the allegations that 17 consignments of Mosammies were dispatched to him by M/s. Angoor Mohd. Yunus and Sons defendant No. 2 from Madras by Railways. The consignments upon delivery were found short and damaged too. He filed a claim for Rs. 671.00 but the Railway conceded liability over to the extent of 128.00. He refused to accept such a smaller amount and in the suit, prayed for a decree of the aforesaid amount of Rs. 671.00. Issues were framed and evidence recorded. The learned Judge dismissed the suit while deciding issue No. 2 that the plaintiff being the consignee had no locus standi to sue. He relied upon a judgment of Supreme Court reported in Union of India (UOI) Vs. West Punjab Factories Ltd., .

(2) Kishan Singh Public Witness 2 had deposed that his business was to advance the price to the consignor, receive and sell the goods and after deducting the commission and the advance payment made by him, to send the balance to the consignor. This showed clearly that the plaintiff was a commission agent. The learned judge rejected this evidence on the ground that this was not a case pleaded in the plaint and further that the plaintiff had failed to lead evidence that

he in fact advanced money to the consignor. He, Therefore was unable to hold the the plaintiff acquired any interest in the goods. Though the owner consignor of the goods had also been imp leaded and had not repudiated the claim of the plaintiff, the learned judge felt that no decree could be passed unless defendant No. 2 was transferred as plaintiff No. 2 and no transposition was possible without a notice u/s 80 Civil Procedure Code. The notice already served by the plaintiff could not fulfill the requirement of the law, because there would then be lack of total indemnity of the parties.

(3) Having considered the matter I am of the view that the learned judge fell into an error both in respect to law and fact. In *Union of India Vs. B. Prahlad and Co.,* , Avadh Behari Rohatgi, J. had, after careful consideration of the aforesaid decision and several other cases, laid down that a consignee can, if he is a commission agent, institute a suit for compensation against the railways if he is able to show that the goods represented by railway receipt had been transferred to him or sufficient interest therein had been created in his favor. That is, if I may so, because, to borrow viscount Simon L.C.in *Suxer (Bastborne) Ltd, v Cooper*, (1941) A.C. 108, contracts, with commission agent do not follow a single pattern, and the primary necessity in each instance is to ascertain with precision what are the express terms of a particular contract under discussion. There is, however, a contrary decision of this court delivered by Anand, J. on April 8, 1976 and reported in *Union of India v. Jashan Mal & Co.*, Air 1976 Del 385. The learned Judge appears to have taken a view that a commission agent had no right or property in the goods, which may justify an action for damages against the Railways, because what he has is bare right to receive the goods and sell them on behalf of the principal, Misra, J. in *Union v. Gopal Das*, 2nd (1976) 2 Del 508, noticed both the decisions and observed that there is no real conflict between the two decisions and the questions in each case was answered on the facts and circumstances disclosed. He held that a Commission agent is not by nature an employee or agent and it is consistent with its position to deal with the goods as principal and acquire the property in goods as well as realise the commission.

(4) After reflections I find it easy to state that in case of loss or damage to the goods, the person who suffers the loss, will have a cause of action to sue. Therefore the general rule is that the owner of the goods is the proper person to sue for damages vide Halsbury's Laws of England Halsham's edition 4th, Vol. 5 para 452. This position is supported by section 74 of the India Railway Act, 1890, relating to the owners' risk rate, section 76 and 76-E thereof placing the burden on the owner to prove the damage in case of delay or detention or in case of carriage over foreign railways and section 77(4) speaking of owners' liability to demurrage and wharfage, and one might as well remember that the liability of the railway under contract of Carriage has been for over a century and quarter governed by statutes beginning with Act 18 of 1854 and a host of rules and forms prevalent at the relevant time. Broadly such liability began as that of an insurer, then it was equated with a bailee, and under the law as it now stands, it is akin to a common carrier with an exception that it is that of a bailee for 7 days

after the termination of transit, it is a matter of evidence as to who is the owner of the goods when they are in transit. In *Union of India v. W. P. Factories* (supra), it was contended before the Supreme Court that the consignee and not consignor had the right to sue. The court held that ordinarily it is the consignor who can sue because the contract of carriage is between the consignor and the carrier. I, Therefore, think that where the person suing is neither the consignor nor the owner of goods and is consignee he will in order to establish his claim to compensation have in goods in virtue of purchase or pledge or otherwise or some special agreement or that the consignor had dispatched the goods as his agent. This right to receive the goods must be as his agent. This right to receive the goods must be coupled with an interest so as to entitle the consignee to claim compensation. In the case of sale, it would be determined on the principles laid down in the sale of Goods Act, whether the property in goods had passed to the consignee during their transit. As stated in *Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another*, , the consignee is presumed to be the owner of the goods, though such a presumption is rebuttable ,because he holds the railway receipt, which is a document of title under sale of Goods Act; It Therefore, appears that beyond saying that the person who is during transit the owner of the goods is entitled to sue for loss or damage to the goods in transit, it is not possible to lay down as a rule that the consignor or the consignee can or cannot sue, because the right of the plaintiff to sue for compensation will ultimately depend upon the pleadings and evidence of the parties. The concern of the Railways arises because they have to find the person to whom they should pay compensation in the event of goods being lost or damaged so as to completely discharge the liability and not to be liable twice over. In this case, the consignor owner has not challenge the title of the plaintiff and if the railways make payments to the plaintiff they will have completely satisfied the claim without being liable to the owner consignor. There is no need for any transposition of the parties. As a matter of fact, until they filed the written statement, railways did not dispute the consignor's light to damages. In his replication, the plaintiff had stated that he was a consignee for consideration and being a commission agent had interest in the goods. He explained this in his statement. There is no variance between pleading and proof. He had a right to sue.

(5) I, Therefore, accept this revision petition, set aside the impugned judgment, decide issue No. 2 in favor of the plaintiff petitioner and direct the learned trial judge to proceed to decide the remaining issues in the suit. The cost of this revision shall be costs in the suit. Petition Allowed,