

(1979) 11 KL CK 0020
In the High Court Of Kerala
Case No : S.A. No. 511 of 1975

M.M. Nagalinga Nadar and Sons

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 16-11-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22(1)
Contract Act, 1872 — Section 151, 152, 161, 73
Interest Act, 1978 — Section 3(1)
Railways Act, 1890 — Section 73, 76F, 77, 77C, 77C(4)

Citation : (1979) 11 KL CK 0020

Hon'ble Judges : Bhaskaran, J

Bench : Single Bench

Advocate : V. Bhaskaran Nambiar, R. Bhaskaran, M.K. Anandakrishnan and C.R. Natarajan, for the Appellant; K.P. Pathrose and M.C. Cheriyan, for the Respondent

Judgement

Bhaskaran, J.—The Plaintiff in a suit for recovery of damages is the Appellant in this second appeal. A wagon load consignment of 330 tins of coconut oil weighing 66.20 quintals was despatched by him from Quilon to Gulbarga by goods train. On taking open delivery of the consignment at Gulbarga 51 tins were found completely empty and 68 tins leaking. In Ext. A-1 certificate of damage and shortage dated 15th April 1969 the shortage was noted to be 10.86 quintals of the value of Rs. 4,704. The Plaintiff issued notice claiming damages, and ultimately instituted the suit for the recovery of a sum of Rs. 5,106.19 with further interest at 6 per cent per annum. The courts below have concurrently dismissed the suit holding that u/s 77C of the Indian Railways Act, 1890, shortly stated the Act, the railway administration was exempted from liability.

2. The main point that arises for consideration is whether, without proving negligence and misconduct on the part of the railways, the Plaintiff-Appellant would be entitled to obtain a decree for damages when admittedly the goods tendered to the railway administration to be carried by the railway were defectively packed or were packed in a manner not in compliance with the

general or special order issued by the Central Government u/s 77C(4) of the Act. The counsel for the Appellant submitted that the responsibility of the railway administration u/s 73 of the Act is not confined to that of a common carrier, but extends to that of a bailee, under Sections 151, 152 and 161 of the Indian Contract Act, as held by the Supreme Court in Union of India (UOI) Vs. West Punjab Factories Ltd., in paragraph 17 at page 401, and in that view the Respondent is liable in damages for the loss and deterioration of the portion of the goods consigned by the Appellant in the absence of proof that the administration had used reasonable foresight and care in the carriage of goods. Section 73 of the Act reads as follows:

73. General responsibility of a railway administration as a carrier of animals and goods.--Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery in transit, of animals or goods delivered to the administration to be carried by Railway, arising from any cause except the following, namely:

(a) not of God;

* * * * * (i) fire, explosion or any unforeseen risk:

Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods.

3. The argument of the counsel for the railways, however, is that the provisions contained in Section 73 are general in nature, and as provided in the very same section, will have application only in the absence of special provisions pertaining to any particular thing; and the responsibility of the railway administration for damage arising out of defective or improper packing, as in the present case, is restricted by the provisions of Section 77C. Sub-sections (i) and (4) thereof, directly relevant for the purpose of this case, are extracted below:

77C. Responsibility of a railway administration for damage, deterioration, etc., of goods in defective condition or defectively packed.--(1) When any goods tendered to a railway administration to be carried by railway--

(a) are in a defective condition as a consequence of which they are liable to damage, deterioration, leakage or wastage, or

(b) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under Sub-section (4), and as a result of such defective or improper packing are liable to damage, deterioration, leakage or wastage,

and the fact of such condition or defective or improper packing has been

recorded by the sender or his agent in the forwarding note, then notwithstanding anything contained in the foregoing provisions of this Chapter, the (sic) administration shall not be responsible for an damage, deterioration, leakage or wastage, or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants.

* * * * * (4) The Central Government may, by general or special order prescribe the manner in which goods delivered to a railway administration to be carried by railway shall be packed.

Condition P-3 prescribed by the Central Government in exercise of the powers under Sub-section (4) of Section 77C of the Act requires that outer packing with wooden cases is necessary in the case of consignment of oil (with very few exceptions like the case of wagon-load consignment of certain things not involving transshipment.) There is no clear finding as to whether the Plaintiff's consignment was a full wagon-load or not, though a wagon is stated to have been allotted to him. There is, however, no dispute that this was a case where transshipment for change over from meter-gauge wagon to broad-gauge wagon was necessary.

4. The Plaintiff has no case that the goods were packed in wooden cases; they were consigned and sent in metal containers in a wagon. In the plaint it is averred that the oil was filled in new tin-plated containers which were water-tight, free from rust, corrosion or leakage, the capacity of each container being four gallons, and tied with ropes on four sides to avoid damage during transit. It is also averred that special care to avoid the tins touching the walls of the wagon was taken by filling the gaps with enough straw. 330 tins were loaded very compactly and the whole layer was tied with ropes so as to avoid any damage during transit. The finding of the trial court is that these averments had not been denied expressly in the written statement, and that it should be deemed that this part of the Plaintiff's case has been admitted by the Defendant by non-traverse. All the (sic), as already noticed, the courts below refused to grant a decree in favour of the Plaintiff on the ground that the railway administration was protected under the provisions of Section 77C(i)(b) of the Act, pointing out that the manuscript portion of the forwarding note read:

P/3 not complied with. Not packed in cases.

5. On an analysis of Section 77C(i)(b) of the Act it is clear that to absolve the liability of the railway administration for damages by virtue of the provisions contained in that sub-section, it is necessary that three conditions are to be satisfied: (i) the packing must have been defective or done in a manner not in accordance with the general or special order issued under Sub-section (4) of the section; (2) as a result of the defective or improper packing goods are liable to damage, deterioration, leakage or wastage; and (3) the fact of such defective or improper packing has been recorded by the sender or his agent in the forwarding

note. In this case the Plaintiff admits that the packing was not proper in the sense that it was not done in conformity with the conditions prescribed by the Central Government under Sub-section (4) of Section 77C. In the forwarding note it was also specifically mentioned that "P/3 not complied with. Not packed in cases". The endorsement, however, did not mention that as a result of the defective or improper packing the goods were liable to damage, deterioration, leakage or wastage. The railway administration did not adduce any oral or documentary evidence to prove the effect of the defective or improper packing in the particular case, though on the side of the Plaintiff P.W. 1 has spoken--

The damage was caused to the goods due to negligence and misconduct of the railway. There was no possibility of the goods being damaged except by the misconduct of the railway authorities.

He has also stated that the packing used to be done following the same method.

6. The courts below are seen to have taken the view that once the consignor admits that the packing was defective or improper, he cannot succeed in a suit for damages unless and until he proves that the damage sustained was the direct result of negligence or misconduct on the part of the railway administration or of any of its employees. In this Court the counsel for the Respondent sought to support the view taken by the courts below placing reliance on the decisions of Madhya Pradesh, Allahabad and Delhi High Courts respectively in *Firm Kesrimal Ratanlal Sarada and Co. Vs. Union of India (UOI)*, ; *Prabhu Lal v. Union of India* 1970 (68) All L.J. 28 (D.B.) and *Prabhu Dayal Laxmi Narain Vs. Union of India*, .

7. The view expressed by the Madhya Pradesh High Court in the decision cited above cannot be of any help for our case, as unlike in the present case it was a case in which the admitted fact was that the oil was contained in old loose tins with dents and the tins were defectively packed. Moreover, the contention put forward on behalf of the Plaintiffs in that case was that the loss of the consignment was due to the misconduct or negligence on the part of the railway administration. No doubt, it has also to be noticed that in that case the High Court appears to have taken too liberal a view of Section 77C of the Act in favour of the railway administration.

8. The view expressed by the Allahabad High Court in paragraph 5 of the decision cited, at page 31, is that to attract the application of Section 77C of the amended Act the following three conditions are to be satisfied: (i) that the goods, which were tendered to a railway administration for booking, were either in a defective condition or were defectively packed or packed in a manner not in accordance with the general or special order prescribing the manner of packing; (ii) that the fact of such defective condition or defective or improper packing had been recorded by the consignor or his agent in the forwarding note; and (iii) that, as a consequence of the defective condition or defective or improper packing, the goods were liable to deterioration, leakage, wastage or damage. After having formulated the conditions mentioned above, what has been stated

towards the end of the decision, in paragraph 7, reads as follows:

In the present case, it is not denied that the first two conditions are satisfied. In view of the defective packing, it is clear that the goods were liable to leakage or wastage. The applicant has failed to produce any evidence to show that the wastage or leakage was due to negligence or misconduct of the railway administration or of its servants. Nor has it been shown that the leakage or wastage was due to some cause other than defective packing. Even if it were necessary for the railway administration to show that the leakage or wastage was due to the defective packing, it would be reasonable, in the circumstances of the present cases, to infer that the leakage or wastage was due to defective packing.

Once it is accepted that the three conditions are to be satisfied to attract the application of Section 77C of the Act, when admittedly two conditions alone are satisfied, without nothing more, the court would not be justified in jumping to the conclusion that the fulfilment of the third condition could be taken for granted. If the position is that the fulfilment of the third condition would follow automatically when the other two conditions are satisfied, the legislature would have made only two conditions for attracting the application of the section. In other words, in a case of defective or improper packing, as the case on hand, the section would have read as follows: "When any goods tendered to a railway administration to be carried by the railway.... (b) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under Sub-section (4), and the fact of such condition of defective or improper packing has been recorded by the sender or his agent in the forwarding note, then, notwithstanding anything contained in the foregoing provisions of this Chapter, the railway administration shall not be responsible for any damage, deterioration, leakage or wastage, or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants".

9. The Delhi High Court in decision cited has taken the view that the legislature would not have intended to bring about a dead-lock between the consignor and the railway administration by the former being required to write the words "and as a result of such defective or improper packing (goods) are liable to damage, deterioration, leakage or wastage". With due respect, I find it difficult to accept this line of reasoning. The legislature must be presumed to have intended to convey the meaning which the expression used carries with it. On a plain reading of the section it could be seen that the shifting of burden towards the consignor to prove misconduct or negligence on the part of the railway administration or of its servants could arise only when the three conditions mentioned by the Allahabad High Court in paragraph 5 of its decision cited are satisfied. In fact, if I may say so, the very approach of attributing cause of damage to defective packing, once damage is discovered at the destination end, without reference to the question as to whether at the time of tendering the goods for being carried by the railway they were so defectively or improperly packed as to cause

damage, is something not warranted by the provisions of Section 77C of the Act. The railway administration will stand exonerated only if all the three conditions mentioned above are found to have been satisfied at the very time when the goods were tendered for being carried by the railway; and when those conditions are satisfied, the consignor can succeed only if he proves misconduct or negligence on the part of the railway administration or of its employees. In the absence of any presumption in that behalf it would be illogical to hold that in every case of defective or improper packing damage would invariably follow. There may be cases where the packing might not have been in accordance with the conditions laid down in the order issued under Sub-section (4) of Section 77C. For example there may be a case where, instead of wooden cases for outer packing, steel cases might have been used. The packing, in the technical sense, might have been improper; but, could it be said or inferred that the defective or improper packing was the cause of damage? Unless the forwarding note mentions that the packing was so defective or improper as the goods are liable to damage as a result thereof, it will be for the railway administration to prove that in the particular case the defective or improper packing was such that it was the direct cause of the damage. The word "such" preceding the words "condition or defective or improper packing" employed in the section is pregnant with meaning. Otherwise, the legislature could have rest content with making it obligatory on the part of the consignor to record in the forwarding note the fact that the packing was defective or improper. In essence Section 77 operates as an exception to the general liability contained in Section 73 of the Act, and that being so, it has to be construed strictly. Even otherwise, the section read as a whole does not give any room to doubt that unless the fact of such defective packing as is liable to result in damage to the goods is recorded in the forwarding note, or is admitted by the consignor, or is established by other item of evidence, there could be no warrant for giving exoneration to the railway administration from the general liability contained u/s 73 of the Act.

10. The counsel for the Appellant has referred to me the decision of the Calcutta High Court in *Union of India (UOI) Vs. Laduram Fakirchand*, in support of the proposition that not only the fact of defective packing should be recorded in the forwarding note, but it has also to be further recorded therein that as a consequence of such defective or improper packing the goods are liable to damage, deterioration, leakage or wastage. He has also drawn my attention to the decisions of the High Courts of Assam and Nagaland, Andhra Pradesh and Patna respectively in *Union of India v. Kuthari Trading Co.* AIR 1969 Gau 84 , *The Union of India and Another Vs. Batchu Subba Rao and Co.*, , and *The Bihar State Co-operative Marketing Union Vs. Union of India(UOI) and Others*, . These decisions, though, no doubt, are in favour of the consignor and against the railway administration, do not appear to be directly on the point, inasmuch as in the Assam case the point involved was how to determine the quantum of compensation when the goods were lost in transit and not delivered to the consignee by the railways; the Andhra Pradesh decision is rendered while

construing the scope of Section 76F, while the Patna case was concerned with short delivery in which the forwarding note also was not produced.

11. In this case, while the witness on behalf of the consignor spoke about the manner in which packing was done, there was no evidence on the part of the railways. In the absence of proof that the damage was the direct result of defective or improper packing which was not in conformity with what was prescribed by the Central Government by virtue of the orders issued under Sub-section (4) of Section 77C of the Act, the courts below were not justified in declining to grant a decree for damages rightly due to the Plaintiff.

12. The counsel for the Respondent submitted that the Plaintiff's claim for interest on damages till the date of institution of the suit is not sustainable in law. He pointed out that the damages assessed as shown in Ext. A-1 certificate is Rs. 4,704, whereas the plaintiff claim is for Rs. 5,106.19 the difference between the two being the interest for the period from the date of Ext. A-1 certificate to the date of institution of the suit. He contended that neither the provisions of Section 73 of the Indian Contract Act nor the relevant provisions of the Interest Act would warrant a claim for interest on damages for a period prior to the date of institution of the suit. The counsel for the Appellant placed reliance on the decision of the Supreme Court in *Union of India (UOI) Vs. The Steel Stock Holders Syndicate Poona*, . That was a case in which the Plaintiff claimed damages calculating the quantum at the rate of 12 per cent (which has been reduced to 6 per cent) per annum on the amount which remained locked up in the bank as a result of delay in delivering the goods consigned. It was not really a case of the Plaintiff claiming or receiving interest on damages; there is real distinction between the above case decided by the Supreme Court in which the Plaintiff claimed interest as a yardstick or measure for arriving at the damages by way of compensation for the loss he sustained on account of the amount deposited in the bank remaining idle on the one hand and the present case in which, after having ascertained the damages, as noted in Ext. A-1 certificate, the Plaintiff adds up interest thereon as part of the suit claim. It was not a case of the Plaintiff claiming interest on a quantified amount or profit due to loss of the market that was considered by the Supreme Court. In such cases, where the Plaintiff merely calculates interest as a yardstick or measure to assess the damages which he would be entitled to, it cannot be said that it was a case in which interest was claimed on any quantified amount of damages. The decision of the Supreme Court relied on by the counsel for the Appellant is of no assistance to him. In this case, what the Plaintiff has done is to add interest on the damages assessed from the date of Ext. A-1 certificate to the date of institution of the suit. The position has been well-settled by the decision of the Privy Council in AIR 1938 67 (Privy Council) . Noticed and approved by the Supreme Court in *Union of India (UOI) Vs. Watkins Mayor and Co.*, wherein it has been observed as follows:

Under the Interest Act, 1839, the Court may allow interest to the Plaintiff if the

amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case is not a sum certain but compensation for unliquidated amount. On behalf of the Respondent it was submitted by Mr. Aggarwala that interest may be awarded under the Interest Act which contains a provision that "interest shall be payable in all cases in which it is now payable by law." But this provision only applies to cases in which the Court of Equity exercises jurisdiction to allow interest.

The counsel for the Appellant then submitted that under the provisions of the Interest Act at least from the date of issue of notice the Plaintiff is entitled to claim interest on the amount of damages. Exts. A-1 to A-3 are the claim letters sent by the Plaintiff to the Chief Commercial Superintendent of Railway, Secunderabad. In none of them it was stated that the railway administration would be liable to pay interest on the amount of damages claimed. On the other hand, the request in all those letters was for the issue of a payment order for the sum claimed in the letters. There is conspicuous absence of a claim for interest on the damages claimed. By virtue of the provisions contained in Section 3(1)(b) of the Interest Act (Act 14 of 1978) the court could, if it thinks fit, allow interest to the person entitled to damages from the date mentioned in that regard in a written notice issued by him. This condition not having been satisfied, there is no justification for allowing interest on the damages claimed by the Plaintiff.

13. The counsel for the Appellant then submitted that the trial court in its judgment in paragraph 9 under issue No. 5 has entered a finding that in case the Plaintiff succeeds he will get the damages claimed in the plaint, and that for the reason that the Respondent did not challenge this finding by way of cross-appeal, it cannot now canvass the correctness of the decree based on such a finding impliedly confirmed by the 1st Appellate Court. Under Order XLI, Rule 22(1) of the CPC it is stated--

Any Respondent, though he may not have appealed from any part of the decree, may not only support (sic) also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

In this case the Respondent had succeeded in both the courts below, and had no need for filing an appeal. In the second appeal filed by the Appellant the Respondent is entitled to state that the decree for damages, if any, passed cannot take in the interest portion of the claim made in the plaint. In law the Appellant is not entitled to interest on damages and the Respondent is entitled to point out that the finding entered by the court below is erroneous so far as it relates to interest on damages is concerned. I, therefore, uphold the contention of the Respondent on that point.

In the result, the appeal is allowed in part setting aside the judgments and decrees of the courts below; there will be a decree for damages in the sum of Rs. 4,704 with interest at b per cent per annum from the date of institution of the suit. In the circumstances of the case I direct the parties to bear their respective costs throughout.