

(1999) 02 MAD CK 0009
In the Madras High Court
Case No : S.A. No. 1387 of 1987

M/s. Orient Litho Press

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Contract Act, 1872 — Section 151
Evidence Act, 1872 — Section 106
Partnership Act, 1932 — Section 69(2)
Railways Act, 1989 — Section 73, 93

Citation : (1999) 02 MAD CK 0009

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : S. Subbiah, for the Appellant; No appearance, for the Respondent

Final Decision : Allowed

Judgement

K.P. Sivasubramaniam, J.—This Second Appeal arises out of a judgment of the learned TV Additional Judge, City Civil Court, Madras, in

C.M.A. No. 447 of 1985 confirming the judgment of the learned 16th Assistant Judge, City Civil Court, Madras, in O.S. No. 493 of 1981. The

plaintiff in the suit is the appellant in the above Second Appeal. The suit was filed for a decree for a sum of Rs. 16,856.90 with further interest on

Rs. 16,366.00 at the rate of 9 per cent per annum from the date of plaint till the date of decree and thereafter at 6 per cent per annum till

realisation. According to the plaintiff claiming to be a registered partnership firm, also claims to be one of the leading printers in the entire South

India, having been established in the year 1948. The plaintiff supplied lottery tickets to the Government of Rajasthan and 36 cases of the said

lottery tickets were booked through parcel service of the Southern Railway (defendant) at Central Station on 18.4.1980 under the Way Bill No.

379689 to be consigned from the Central Madras Station to Jaipur. However, at the destination place only 26 cases were delivered as against the

total of 36 and the Parcel Officer at Jaipur Junction had issued partial delivery certificate dated 25.4.1980 evidencing the short delivery of the

consignment. According to the plaintiff, the cost of non-delivered 10 parcels was valued at Rs. 16,366/-. The non-delivery of the said materials

was only due to the carelessness, misconduct and negligence on the part of the Railway servants, staff and administration. The defendant did not

also inform the plaintiff as to how the goods were dealt with during the transit. Though the second defendant namely, Western Railway at a later

stage came forward with a contention that there was a fire, the entire events were not disclosed in detail. Therefore the plaintiff was not bound to

accept the unilateral stand of the defendant. The plaintiff took delivery of the parcels without prejudice and under protest, reserving the rights to

claim for the cost of the non-delivered 10 cases of the printed materials. It is further stated by the plaintiff that they had preferred a claim u/s 78B

of the Indian Railways Act to the Chief Commercial Superintendent, Western Railway, Bombay on 3.5.1980 and inspite of several subsequent

reminders, there was no response from the addressee. However, the Chief Parcel Supervisor, Nagpur, had sent a letter dated 3.8.1980 informing

that his office had received 26 cases from Wardha. Therefore, a statutory notice was issued to the defendant on 30.8.1980 demanding the

defendant to compensate the loss incurred by the plaintiff. There was no response from both of the defendants. Subsequently, the second

defendant came up through his letter dated 29.11.1980 contending that the subject parcel was involved in accidental fire at Wardha on 19.4.1980.

It was further stated that the findings of the Joint Fire Enquiry which was held had revealed that the fire was "natural fire" which was beyond the

control of the Railway Administration and that no railway servant was held responsible. The plaintiff further states that they are not aware of the

enquiry said to have been conducted by the Railway administration. According to the plaintiff there was no natural cause for the accident. The

nature of the accident would clearly show that the defendants had no valid or substantial reason to reject the claim of the plaintiff. As the

defendants were not in a mood to settle the claim of the plaintiff, the plaintiff had no other option except to take up the legal proceedings.

2. In the written statement filed by the first defendant while denying the plaintiff claims, it was stated that the plaintiff was not competent to issue on

behalf of the firm u/s 69(2) of the Indian Partnership Act and that the plaintiff had no title to the consignment so as to maintain the suit for

compensation. Apart from craving leave of the trial Court to file an additional written statement as soon as the enquires were complete, in the

written statement there is absolutely no pleading as regards the various facts pleaded in the plaint. It was further stated that there was no valid

service of notice as required u/s 78B of the Indian Railways Act and there was no proper notice u/s 80, C.P.C..

2-A. Even though notice has been served on the respondents/Railways, there is no representation on behalf of the respondents.

3. During the trial, the plaintiff examined himself as a witness on his side and had marked several documents to substantiate the dispatch of the

consignment through the defendants/Railways. On the other hand, the defendant had filed Ex. B.1 being the enquiry report of the enquiry

conducted by the Railways with reference to the fire accident and a staff of the Railways was examined as D.W.1. On a consideration of the said

pleadings and the evidence both oral and documentary, both the Courts concurrently held that the plaintiff had not established that the

defendants/Railways were in any manner responsible for the fire accident and the consequent destruction of the goods. It was also held that it was

not established that any official or staff had been negligent in the performance of their respective duties and that therefore, the burden of proving

negligence as cast upon the plaintiff u/s 73 of the Indian Railways Act, 1890, had not been discharged. On the basis of the said findings, both the

Courts below dismissed the suit and the appeal respectively. The appellate Court also found that there was no proof of actual damages suffered by

the plaintiff. Hence the present Second Appeal by the plaintiff.

4. Mr. S. Subbiah, Learned Counsel for the appellant contends that on the admitted facts in evidence as per the enquiry report of the Railway

having stated that the cause of the fire was ""not definitely determinable"", it was not open to the Railways to plead that there was no negligence on

their part. According to him, though Section 73 of the Indian Railways Act, 1890 (hereinafter called "the Act") corresponding to Section 93 of the

Indian Railways Act, 1989, had enumerated certain categories of reasons for the accident as exceptions to the liability of the Railway

administration for the damage or loss to any of the consignment, the proviso to the said Section had made it clear that apart from the responsibility

to prove that the damage was only due to any one of the reasons enlisted thereunder, the Railway administration should further prove that it had

used reasonable foresight and care in the carriage of the goods. Section 73 of the Act reads as follows:-

73. 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) act of God;

(b) act of war;

(c) act of public enemies;

(d) arrest, restraint or seizure under legal process;

(e) orders or restrictions imposed by the Central Government or a State Government or by any officer or authority subordinate to the Central

Government or a State Government authorised in this behalf;

(f) act or omission or negligence of the consignor or the consignee or the agent or servant of the consignor or the consignee;

(g) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;

(h) latent defects;

(i) fire, explosion or any unforeseen risk;

Provided that even where such loss, destruction, damage, deterioration or nondelivery 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 of goods.

Having regard to the terms of the provisions mentioned above, the burden of proof is fixed by the statute itself on the Railway. In the present case,

the question arises as to whether the Railways had satisfactorily discharged the burden of proof on them as to whether the fire was due to natural

cause or causes due to any negligence on their part and whether the Railway had exercised the required care and action in preventing and

extinguishing the fire immediately after the fire was detected.

5. Learned Counsel for the appellant has referred to the following decisions cited below and in my opinion rightly he contends that the Courts

below have cast the burden wrongly on the plaintiff.

6. In the judgment reported in 85 L.W. 413 (Rafeeq Ahmed and Co. v. Union Of India) Ismail, J. has observed that Section 73 of the Railways

Act has actually changed the-character of the liability of the Railways from that of a bailee into that of an insurer. Even if the loss, destruction,

damage deterioration or non-delivery had resulted from any one of the causes enumerated therein, still the railway administration will be liable to

the owner of the goods, unless it proves that it has used reasonable foresight and care in the carriage of the animals or goods.

7. In the judgment reported in 87 L.W. 245 (K.R. Rajamanickam Chettiar v. The Union of India) a Division Bench of this Court held that on a

reading of Section 73 of the Act it is clear that when once the goods are carried by the railways, the administration cannot escape liability for loss,

etc., unless it is established that the railway administration had used reasonable foresight and care in the carriage of the animals or goods. Even if

the loss was due to one of the causes mentioned therein, still railways administration will be liable to the owner of the goods, unless the Railways

prove that it had used reasonable foresight and care in the carriage of the animals or goods. The Division Bench further held that so long as there

was a failure to use reasonable care and foresight on the part of the Railways, the railways cannot escape their liability by merely pointing out that

such loss had occurred on account of the causes enumerated in the Section. The Division Bench further held that the Court has to find out first

whether the loss was due to any one of the causes enumerated u/s 73 of the Act and that even if it comes to the conclusion that the loss was due to

any one of the those causes, then it has to find out and record a finding that the

railways had used reasonable foresight and care.

7-A. In another judgment of this Court reported in 1977 (II) M.L.J., 335= 90 L.W.438 {Associated Cotton Traders Ltd v. Union of India), it

was held that the obligation of the railway includes not only the duty of taking all reasonable precautions to eliminate all possible risks, but also had

the duty of taking of proper measures for the protection of the goods when such risk had occurred, for example by making reasonable provision

for the protection of the goods by extinguishing any fire that may break out. When the goods entrusted to a bailee are lost then the burden of proof

shifts over to the bailee to show that he had taken as much care of the goods as a man of ordinary prudence would, under similar circumstances

have taken over his own goods. The Division-Bench also pointed out that having regard to Section 106 of the Indian Evidence Act, when any fact

is especially within the knowledge of the Railways, the burden of proving the fact was on the Railways. It will not be possible for the plaintiff to

prove what had occurred or could have occurred during the period of custody of the goods with the defendant.

8. Another Division Bench of this Court in the judgment reported in 1994 (I) M.L.J., 590 (Southern Railway v. United Tractors) held that the

responsibility of the railways in such circumstances was that of a bailee and it has to discharge its duties as enumerated u/s 151 of the Contract Act

and it had to discharge its duties as a bailee u/s 151 of the Contract Act. If there is a failure to"" do so, the railways had to be made liable for the

loss or damage to the goods.

9. As far as the present case is concerned, on the question of proving the cause of fire, the very report of the defendant goes against them. Merely

stating that the cause of the fire was not definitely determinable, cannot absolve their responsibility to prove that they have taken reasonable care.

The general principle as would arise u/s 106 of the Evidence Act namely, that the burden is on the party when any fact is especially within the

knowledge of that party, has not been discharged in the present case. Merely, stating that the cause of the fire was not known cannot amount to

satisfactory discharge of the said burden. If the Railways or for that matter any carrier is to be let off their liability as a bailee merely on the basis of

a self-serving report to the effect that the cause was unknown then it would be

unfair and impossible to expect the plaintiff to disprove anything to

the contrary. It is precisely for the reason the initial burden is rightly placed on the railways under the proviso to Section 73 of the Railways Act.

9-A. It is in this context a judgment rendered by a Division Bench of this Court in A.S. No. 309 of 1974 dated 9.9.1977 assumes significance.

That was also a case in which the Railway took a stand that the cause of the fire was unknown. The Division Bench held as follows:-

Even if we are not to draw an inference of any negligence on the part of the Railway, merely because the cause of the fire is unknown, the

inference of negligence could be drawn from the fact that the railway has not taken any step to ensure the safety of the goods under consideration

against some external cause for fire. It is here that we apply the maxim *res ipsa loquitor*. We may reiterate that the goods under consideration are

not combustible goods by self-ignition. They had necessarily to catch fire from outside source. Even though the railway engines may not have

contributed to the fire still there seems to have been some external cause, against which protection had not been afforded to this particular wagon.

The events prove this. It is possible to draw the inference of negligence from this circumstance alone.

10. The analysis of the evidence by the Courts below disclose a total non-application of mind in the context of the burden of proof. Instead of

trying to find out as to whether there was any evidence on the side of the Railways, as regards the cause of accident and as to whether they had

exercised their due diligence and care, the entire discussion centers around only the oral evidence let in by the plaintiff, thus expecting the plaintiff to

establish the negligence on the part of the defendant. The said approach is not consistent with the statutory requirement under proviso to Section

73 of the Act. The only evidence relied upon by the Railways is Ex. A.1 being the enquiry report of the Railways. The evidence recorded in the

enquiry instituted by the Railways and the report submitted thereon could not be treated by itself alone as substantive evidence in the present suit in

the absence of at least some of those witnesses tendering evidence and subjecting themselves to cross-examination. Without any such supporting

evidence, Ex. A-1 cannot be accepted as substantive evidence. The report is a self-serving document and cannot be relied upon to sufficiently

discharge the statutory burden of proof. It may also be pointed out that even the report does not help the Railways since the report is only to the effect that the cause was not known. The finding that the cause was unknown is not a fact which can be accepted in evidence much less could be a proof of the fact that the fire had occurred inspite of proper care and diligence. There has to be a positive assertion by and proof on the side of the Railways to the effect that the fire was only due to natural causes or causes beyond their control and that the same had their due occurred in spite of their due care and diligence. Therefore, I am inclined to hold that the defendant had not properly discharged their burden of proof as envisaged u/s 73 of the Act. Even the normal burden placed as against a bailee in terms of Section 151 of the Contract Act also had not been satisfactorily discharged.

11. The oral evidence of D.W.1, the only witness examined on the side of the defendant, is also not of much help to the defendant. Apart from merely referring to some of the portions of the enquiry report, he has not adduced any positive evidence to substantiate the factum of due care and diligence on the part of the defendant as contemplated under proviso to Section 73 of the Act. Therefore, there is no proper proof to substantiate the claim of the plaintiff that the fire itself had occurred only due to natural cause and not due to any reason within the control of the Railways.

12. Also on the question as to whether the defendant had taken proper steps to extinguish the fire soon after its detection, the evidence of D. W. 1 is of lesser use to the defendant. In fact, in paragraph 12 of the judgment of the trial Court it is stated that even though in the chief-examination he has stated that he saw the fire at 17.50 hours and that the fire was extinguished at 20.30 hours by using water from water-tank, in the cross-examination he has admitted that he was not aware of the efforts taken in extinguishing the fire since he had left the place of the fire. He does not also speak as to whether any fire extinguisher was available or not in the train itself to extinguish the fire in the event of outbreak of fire.

13. Therefore, it is clearly seen that the Courts below had wrongly cast the burden on the plaintiff completely ignoring the requirements u/s 73 of the Act. The Courts below had also given undue weight to the enquiry report, even according to which, the cause of the accident was not

determinable. Therefore, I am unable to sustain the judgments of the Courts below and they are liable to be set aside. In the result, the Second

Appeal is allowed, the judgments and decrees of the Court below are set aside and the suit is decreed as prayed for with costs throughout.