
(1949) 07 CAL CK 0020
In the Calcutta High Court
Case No : Suit No. 1427 of 1945

Nanda Kumar Bardhan

APPELLANT

Vs

Governor-General in Council

RESPONDENT

Date of Decision : 05-07-1949

Acts Referred:

Citation : (1949) 07 CAL CK 0020

Judgement

Chatterjee, J.—This is an action by the Plaintiffs for the-recovery of Rs. 5,865, instituted against the Defendant, for damage caused to a consignment. In 1944; the Worth-Western Railway had its head office at Lahore in the Punjab and the East Indian Railway had its head office at Calcutta. On. July 12, 1944, a consignment of 402 bags of onions was made over to the North-Western Railway at a station called Moga Tahsil. This station is on the Ludhiana-Ferozepur line. It is at a distance of about 43 miles from Ludhiana Junction and is about 34 miles from the Ferozepur Cantonment Junction. The railway administration accepted the onions for carriage to-Howrah. The invoice number is 65 and the railway receipt,, which was granted on July 12, 1944, bore number 725689.

2. The consignment in question was hooked under Risk Notes "A" and "B". They have been tendered and marked Ex. 3. The railway receipt was duly endorsed in favour of the Plaintiffs and there is no dispute as to the Plaintiffs" right to maintain the suit.

3. Plaintiffs" case is that the railway administration failed to deliver the goods to the Plaintiffs within reasonable time and as a result thereof, the goods had deteriorated or been damaged.

4. On August 14, 1944, Plaintiffs obtained delivery of the onions from the East Indian Railway administration.

5. From the documents, which are admitted, it appears that there was an inspection and survey of the goods. Upon such survey, the consignment was found to have been damaged. The damage was assessed on or about August 10,

1944, at 70 per cent., in case of 31 bags and 60 per cent, in respect of the balance 371 bags. Under the Risk Notes, the Plaintiffs have got to satisfy the Court that the damage or deterioration was caused by the misconduct of the railway. Paragraphs 10 and 11 of the plaint contain the relevant allegations:

10. The Plaintiffs state that the said non-delivery within reasonable and/or usual time of the said consignment and/or the said delay in the delivery thereof rose from the misconduct of the servants of the said railway administrations or either of them in wrongfully detaining and/or misdirecting the said consignment.

11. The Plaintiffs crave leave to furnish further particulars of the said acts of misconduct upon obtaining discovery from the said Defendant.

6. The written statement admits the consignment but denies any misconduct and repudiates liability altogether. Paragraph 7 of the written statement contains the material allegations to show that there was really no default on the part of the railways and the same is set out here:

7. The said consignment was loaded at Moga Tahsil in wagon No. 13194 which was duly sealed and rivetted and was despatched on July 12, 1944. The said wagon arrived on July 13, 1944, at Chawapail, a station on the North-Western Railway, where it was detached for hot axle. The consignment was consequently detained at Chawapail for the period 13th to 21st July, 1944, during which period the wagon No. 13194 being found on examination to be unfit for further journey transshipment of the said consignment to a wagon bearing No. 13086 had to be made and the said wagon No. 13086 was despatched for Howrah on July 21, 1944. On August 4, 1944, the said wagon arrived at Asansol where it was found to have needed repairs and after repairs it became fit and available for further movement and it left Asansol in the early hours of August 6, 1944 and arrived at Howrah on August 7, 1944 and the goods were available for delivery on the same date.

7. Interrogatories were administered and were answered under an order of this Court made by S.R. Das J. These answers gave further particulars of the dealing with the consignment at different stages. In short, the railway's case is that the detentions and consequent delay were due to causes and circumstances beyond the control of the railway administration. Consequently, the Defendant is not liable for the same.

8. On behalf of the Defendant, Mr. Pranabananda Chatterji was called. He is the Commercial Transportation Inspector, Howrah. In August, 1944, he was the Claims Inspector. He inspected the consignment jointly with a representative of the Plaintiffs and made a report to the Chief Commercial Manager. He purported to say that he had some knowledge about onions and according to him, if they are really properly ripe, they can withstand all weather conditions for eight months or so. I do not place much reliance on the testimony of this gentleman, because he candidly admitted in cross-examination that he was not an expert and his evidence is of very little assistance.

9. The next witness called by the Defendant is Mr. Satyanarayan Chatterji, Assistant Goods Clerk, at the Howrah Goods Shed. He proved the Missing and Damaged Goods Return. Nothing else was proved by the railway. An attempt was made to prove a letter which came from the Station Master at Chawapail to the Chief Commercial Manager, Howrah, but Mr. Pranabananda Chatterji failed to prove the same.

10. On behalf of the Plaintiffs, two witnesses were called. One was Jogeshwar Sarkar, an employee of the Plaintiff. He proved that he had gone to Moga Tahsil and actually purchased large quantities of onions and despatched the same from that place. He supervised the packing and loading and his evidence is that when they were packed they were in very good condition. I accept this gentleman's evidence and I have no doubt that he was the representative who was making purchases and looking after the despatch of the goods from the Punjab to the Plaintiffs in Calcutta. According to this witness, the onions that he purchased and consigned would remain in good condition for twenty or twenty-five days, if they were properly packed and he admits that they were properly packed.

11. Dharendra Nath Guha, another employee of the Plaintiffs, gave evidence. He had nothing to do with the purchase or the consignment of the onions, but he proved the relevant entries in the books which I hold are genuine. He was subjected to a protracted cross-examination, but he stood his ground.

12. From a chart prepared by the Plaintiff, it is clear that usually it takes about twelve or thirteen days for a consignment from Moga Tahsil to reach Howrah. In this case, there were obviously detentions and transshipment and that led to delay and the consignment came after the lapse of about twenty-five or twenty-six days. The following issues were raised:

1. Are the statements of fact pleaded in para. 7 of the written statement true?
2. Was the delay or detention due to causes and circumstances beyond the control of the railway administration?
3. If not, was the same due to the misconduct on the part of the railway and frustration, as alleged in para. 10 of the plaint?
4. What relief, if any, the Plaintiffs are entitled to?

13. With regard to issues Nos. 1 and 2, the onus is clearly on the railway and no evidence has been adduced by the Defendant to establish the facts which are pleaded in para. 7 of the written statement. I decide both the issues in the negative.

Issue No. 3: This is the most important issue in this case.

14. In the absence of special contract, the railway is bound to deliver the goods within a reasonable time. If there is no Risk Note, the railway would be liable as a bailee for loss or deterioration caused by unreasonable delay in the transit or delivery of the goods. But the railway can contract out of such liability by suitable

Risk Notes and their terms determine the rights and liabilities of the parties.

15. I had to deal with a number of authorities on the question of the liability of the railways in India in a recent judgment, which I delivered in *G.A. Jolli v. Dominion of India* ILR (1950) 1 (Cal.) 142. The law seems to be now fairly well settled, at least in this High Court. Counsel for the railway accepted the law laid down in *Jolli's* case as correct, but contended that the same has no application in a case where a consignment is covered by both Risk Notes "A" and "B" and when the proviso to Risk Note "B" cannot be invoked.

16. By virtue of Section 12(1) of the Railways Act, the railways in India are not common carriers. That section makes the railway administration liable as a bailee under the Indian Contract Act "subject to the other provisions of this Act". By virtue of Section 72(2), the liability of a bailee for negligence or misconduct can be limited by, agreements contained in Risk Notes which have been approved by the requisite authority.

17. In the case of a Risk Note in form "A", the liability of the railway arises only on the misconduct of the railway administration. Risk Note "A" is intended to be used when articles are tendered for carriage which are either already in bad condition, or, are so defectively packed as to be liable to damage, leakage or wastage in transit. In this case, the words "damage" and "leakage" were struck out in the Risk Note.

18. Under Risk Note "A", the burden of proving misconduct is wholly on the Plaintiff. There is no provision in Risk Note "A," as there is in the proviso to Risk Note "B", that the railway administration in the first instance must disclose as to how the consignment was dealt with throughout the journey before the Plaintiff is called upon to prove misconduct. *Governor-General of India in Council v. Firm Bishundayal Ram Gourishankar* (1948) AIR (Pat.) 48.

19. Risk Note "B" is used when the consignor elects to despatch goods at special reduced rates instead of the ordinary tariff rates.

20. Under Risk Note "B", the railway is free from responsibility for any loss, destruction or deterioration of or damage to the goods from any cause whatever except that arising from misconduct of the railway administration or its servants. Admittedly this is a case of deterioration or damage and the railway pleads immunity unless the Plaintiff can establish misconduct. In such a case the position of the consignor is the same under both, the Risk Notes "A" and "B", when the Plaintiff cannot compel the railway to adduce evidence as to its dealing with the consignment.

21. In the two cases mentioned in the proviso to the Risk Note "B", namely, (a) non-delivery of the whole of the consignment or one or more packages forming part of the consignment and (b) pilferage from a package or packages forming part of the consignment, there is an obligation on the railway administration to disclose to the consignor how the consignment was dealt with and to give

evidence thereof, if necessary, at the trial, before the consignor is called upon to prove misconduct, although the burden of proof of such misconduct is on the consignor.

22. The failure on the part of the railway administration to adduce the requisite evidence constitutes a breach of its contractual obligation under Risk Note "B", when the proviso is attracted. Hence the court is entitled to presume in terms of Section 114, illustration (g) of the Indian Evidence Act, that the material evidence, if produced, would have been unfavourable to the railway and in consequence misconduct on the part of some servants of the railway may be inferred.

23. Unfortunately for the Plaintiffs in this case, the proviso to Risk Note "B" does not come into operation, because the entire consignment reached Howrah and there is no question of pilferage. Therefore, the railway administration is not bound in this case to give evidence as to its dealing with the consignment during the time it was in its possession. There is, consequently, no scope for invoking the rule that in case of failure to produce such evidence the railway administration is liable for loss or destruction or deterioration even in the absence of proof of misconduct by its servants. Such presumption of misconduct can be drawn in a proper case: *Raigarh Jute Mills Ltd. v. Commissioners for the Port of Calcutta* (1947) AIR (Cal.) 98; *Governor-General in Council v. Visheshwar Lal* (1947) AIR (Pat.) 84 and *Governor-General in Council v. Dedraj Bajuria* (1948) AIR (Cal.) 168. Thus a consignor under Risk Note "B" cannot recover damages for deterioration of goods unless he proves misconduct on the part of the railway: *Bengal and North Western Railway Co. v. Sobrati Miya* ILR (1943) 1 Cal. 397.

24. Learned Counsel for the Plaintiffs, Mr. Niren De, has urged that, apart from the contractual obligation specified in the proviso to the Risk Note "B", Section 114 of the Evidence Act can be invoked independently of any contract or special obligation. He argues that the facts are within the special knowledge of the railway administration and u/s 106 of the Evidence Act the burden of proving these facts is upon the railway and inasmuch as the evidence which could be produced has not been produced, the Court should presume that the relevant evidence, if produced, would be unfavourable to the railway administration which is withholding the same and the Court should infer misconduct. He relied on the following observations of Lord Thankerton in *Surat Cotton Spinning and Weaving Mills Ltd. v. Secretary of State for India in Council* ILR (1937) Bom. 375 (378-9) : L.R. 64 I.A. 176 (181-2):

The first portion of the proviso (to Risk Note "B") provides that 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. In their Lordships' opinion, this obligation arises at once upon the occurrence of either of cases (a) or (6) and is not confined to the stage of

litigation. Clearly one object of the provision is to obviate, if possible, the necessity for litigation. On the other hand, the closing words of the obligation clearly apply to the litigious stage. As to the extent of the disclosure, it is confined to the period during which the consignment was within the possession or control of the railway administration; it does not relate, for instance, to the period after the goods have been the fatuously removed from the premises. On the other hand, it does envisage a precise statement of how the consignment was dealt with by the administration or its servants. The character of what is requisite may vary according to the circumstances of different cases, but, if the consignor is not satisfied that the disclosure has been adequate, the dispute must be judicially decided. As to the accuracy or truth of the information given, if the consignor is doubtful or unsatisfied and considers that these should be established by evidence, their Lordships are of opinion that evidence before a court of law is contemplated and that, as was properly done in the present suit, the railway administration should submit their evidence first at the trial.

At the close of the evidence for the administration two questions may be said to arise, which is important to keep distinct. The first question is not a mere question of procedure, but is whether they have discharged their obligation of disclosure, and in regard to this, their Lordships are of opinion that the terms of the Risk Note require a step in procedure, which may be said to be unfamiliar in the practice of the court; if the consignor is not satisfied with the disclosure made, their Lordships are clearly of opinion that it is for him to say so and to call on the administration to fulfil their obligation under the contract and that the administration should then have the opportunity to meet the demands of the consignor before their case is closed; any question as to whether the consignor's demands go beyond the obligation should be then determined by the court. If the administration fails to take the opportunity to satisfy the demands of the consignor so far as endorsed by the court, they will be in breach of their contractual obligation of disclosure.

The other question which may be said to arise at this stage is whether misconduct may be fairly inferred from the evidence of the administration; if so the consignor is absolved from his original burden of proof, But, in this case the decision of the court may be given when the evidence of both sides has been completed. It is clearly for the administration to decide for themselves whether they have adduced all the evidence which they consider desirable in avoidance of such fair inference of misconduct. They will doubtless keep in mind the provision of Section 114 of the Indian Evidence Act.

25. I cannot accept the contention of the Plaintiffs that Section 114(g) of the Evidence Act can be invoked aliunde the Risk Notes on the issue of misconduct. Obviously the reference to Section 114 of the Indian Evidence Act in the judgment of the Judicial Committee was made with reference to a case where the railway administration failed to satisfy the demands of the consignor with regard to the production of relevant evidence in breach of its contractual

obligation of disclosure under Risk Note "B" and still claimed immunity. In my view, it is not right to expose the railway to the presumption u/s 114(g) or to presume misconduct against the railway, when there is no condition or special agreement imposing the duty of disclosure or production of evidence and when the ordinary obligations of a bailee have been qualified by the terms of the Risk Notes. Under the proviso to Risk Note "B", the submission or production of the requisite evidence is a condition to be fulfilled by the administration in order to avail itself of the immunity given by the Risk Note. Where that condition is not complied with, the consignor is not really called upon to prove misconduct on the part of the railway or its servants and is entitled to damage for loss even in the absence of any proof of misconduct. To hold that the same result would follow when the proviso to Risk Note "B" has no application would be really to place a burden on the railway not warranted by the language of the Risk Notes and to make out a new contract between the railway and the consignor. The contention of the Plaintiffs is not justified by the language " used by Lord Thankerton when delivering the judgment of the Board in the Surat case (*supra*). If an inference of misconduct can be fairly drawn from the wilful withholding of evidence by the railway in breach of its contract, then the Plaintiffs are not called upon to adduce any evidence to show misconduct and they are absolved from the onus on this point. This view is reinforced by another passage from that judgment of Lord Thankerton which I venture to quote here:

While their Lordships would be inclined to hold that the Respondent, by his failure to submit the evidence of Rohead, was in breach of his contractual obligation to give the evidence necessary for disclosure of how the consignment was dealt with, they are clearly of opinion that the failure to submit the evidence of Rohead (who was the guard of the train in question), in the circumstances of this case, entitles the Court to presume, in terms of Section 114(g) of the Evidence Act, that Rohead's evidence, if produced, would be unfavourable to the Respondent and that, in consequence, misconduct by complicity in the theft of some servant or servants of the Respondent may be fairly inferred from the Respondent's evidence.

26. A Division Bench of this High Court has held in a recent case that for an act amounting to misconduct there must be a greater degree of wrong than is required for negligence. A (negligent act by itself is not misconduct. *Rallia Ram Dingra v. Governor-General of India in Council* ILR (1944) 2 Cal. 487. The contrary view that negligence is synonymous with misconduct as expressed in *Bengal Nagpur Railway Co. v. Moolji Sicka and Co.* (1930) ILR 58 Cal. 585, can no longer be accepted as sound. See also *Governor-General in Council v. Jamunadas* (1948) ILR 27 Pat. 301.

27. The view I have taken is in accord with that adopted by a single Judge of the Patna High Court in *Governor-General in Council v. Thakursi Dass* (1948) AIR (Pat.) 45, 47. Meredith J. held that so far as Risk Note "A" is concerned, there is an unconditional burden on the Plaintiff to prove misconduct or wilful negligence-

before the Plaintiff can succeed. The learned Judge proceeded to observe as follows:

It may be very difficult for the Plaintiff in such circumstances to prove misconduct, see *Jankidas Marwari v. Governor-General of India in Council* (1946) AIR (Pat.) 336, which case is, of course, only an authority upon its peculiar facts, but I must observe that a difficulty in proving anything can afford no ground for dispensing with proof * * * I also think that when Risk Note "A" has been executed, there is no duty cast upon the railway administration to disclose anything and where there is no duty to disclose there can be no penalty for non-disclosure and consequently Section 114(g) never comes into operation and there is no scope for any adverse inference. It is only where there is some onus on a party to disclose his evidence that an adverse inference can follow from failure to disclose it.

28. With respect I agree with this observation of the learned Judge. I should, however, add that there are other observations in the judgment with which I do not express my concurrence.

29. On the first and second issues, the onus is on the railway and no evidence has been given and I have decided the same against the railway.

30. I hold that on the third issue as to misconduct, the onus is wholly on the Plaintiffs to establish the same and no evidence has been adduced by the Plaintiffs to prove the same. The result is that misconduct has not been proved and the suit must fail and is dismissed with costs. Certified for two counsel.