

(1918) 09 BOM CK 0006
In the Bombay High Court
Case No : First Appeal No. 114 of 1916

Narsinggirji Manufacturing Co.

APPELLANT

Vs

The Great Indian Peninsula Ry.

RESPONDENT

Date of Decision : 10-09-1918

Acts Referred:

Railways Act, 1890 — Section 72

Citation : AIR 1918 Bom 26 : (1919) 21 BOMLR 406

Hon'ble Judges : Shah, J; Basil Scott, J

Bench : Division Bench

Judgement

Basil Scott, C.J.—This appeal arises in Civil Suit No. 709 of 1914 in the Court of the First Class Subordinate Judge at Sholapur. It is one of a number of suits resulting from the destruction of goods in the goods forwarding shed at Sholapur by a fire which took place on the 14th May 1913 at about 3 o'clock in the afternoon.

2. The defendants are a company governed by the provisions of the Indian Railways Act of 1890.

3. Section 72 of that Act provides that their liability in respect of goods delivered to be carried shall be that of a bailee u/s 151 of the Indian Contract Act, and their liability as bailee in respect of such goods can only be limited by agreement with the consignor provided that such agreement has been approved by the Governor General in Council. The expression "goods delivered to be carried" is taken from the English Carriers Act, and Section 72 is intended to indicate that the railway companies in this country shall not be liable to the extent of common carriers in England, but only as bailees under the Contract Act. The words "delivered to be carried" must, it seems to me, be read literally and according to their natural meaning in the same way as they have always been read in connection with cases arising under the English Carriers Act.

4. The first question which arises is whether upon the facts proved the goods of

the plaintiffs had been "delivered to be carried" at the time of the fire by which they were destroyed ? For if this question is answered in the negative the plaintiffs' suit must fail.

5. There is no dispute as to the procedure resulting in the goods being lodged in the goods forwarding shed. It is described in the judgment of the trial Court as follows:--

The Hundekari (agent) in charge of goods appears at the station gate, prepares the upper part of the consignment note and presents it to the gate clerk who on seeing that the consignment is complete gives the aerial number of the day to the consignment note and takes the Hundekari's or consignors signature in the 10th column of the Register Exh. 40. The goods are taken on the premises of the forwarding goods-shed and are dumped down in the proper section in the goods-shed. The Hundekari is generally aware of the position and there are boards stuck to show the section. If he is not aware the clerks there give him the information. The register clerk fills the first and second columns of the lower half of the consignment note in English before it is given back to the Hundekari. The consignment note is next taken by the Hundekari to the clerk called receipt clerk who marks the entries of the first two columns of the office copy of railway receipt called record receipt along with other copies by use of carbon paper, makes entries as to sender and consignee, place of destination of the goods from the consignment note, and then gives the intended mark number of the goods in the third column and puts in the Book number and by number, i. e., the entire receipt number on the consignment note at its right hand upper corner. The serial number of the consignment note is at times found on the record receipt, The consignment note so marked is next presented to one of the foremen to which thy consignment relates according as it has to go to up or down direction or to the grain scale and the foreman next calls upon the Hundekari to get the goods at his expense to the scale where a wagon for the goods is available. He next weighs the goods, orders the marker under him to put mark number on the packages and tills the column in the lower part of the consignment note relating to actual weight, the wagon number and of the condition of the goods, if any, and then orders the Company's Hamals to load the goods. The weighing, marking and loading are done at once and at the same time and the consignment note is next sent by him singly, if desired, or in a lump number to the goods clerk who enters the columns of weight charges, the rates of the several railways, if any. the total charges, to pay or be paid, and makes a note of the risk note to be taken if any in the lower part of the consignment note It is next sent by him to the receipt clerk who prepares the record receipt from the particulars in the aforesaid consignment note and is ready to give it to the Hundekari. The Hundekari takes the mark number from the receipt clerk on presenting the consignment note to him as noted above, and then going to the marker clerk unloads the goods at the place shown by him, gets him, tha marker clerk, to note the marks on the packages and then he goes and gives over the consignment note to the foreman and does nothing more. The force man gets

and weighs the goods on the scale and loads them on behalf of the Company and the Hundekari gets the railway receipt the next day or any later date from the receipt clerk.

6. The learned Judge appears to have doubted whether the evidence that after the Hundekari gave over the consignment note to the foreman he did nothing more in relation to the goods was correct. Whether correct or not it appears to me that the railway company cannot escape from the conclusion that the goods were "delivered to be carried" as soon as they were taken into the goods forwarding shed. The delivery is the delivery of the consignor and the intention of the consignor has to be considered. For what other purpose can it be supposed that the consignor delivery good a to a railway company to be lodged in the forwarding shed, if not to be carried by railway? The mere fact that the particular branch of the railway administration which is concerned with the loading of goods upon trucks has not yet banded the goods cannot affect the question whether the goods have been delivered by the consignor to be carried, compare *Burrell v. North* (1847) 2 C. & K. 680, a case under the English Carriage Act. In *Chapman v. Great Western Railway Co.* (1880) 5 Q.B.d. 278, it was said: "The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond, as well as precede, the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure--sometimes one of considerable duration". The Company's rules and notifications suggest the same conclusion. For example, Ex. 80, page 235, a Supplement to the Traffic Instruction Book, revised Order No. 101, entitled "Procedure to be adopted in regard to the dispatch of goods", states: "A sender desiring to dispatch goods by Railway will bring his goods into the Railway Yard and stack them on the platforms in a manner prescribed and in a position to be pointed out by the Railway Company. II. Should the quantity of the goods tendered be in excess of the accommodation available, the Railway Company will close its gates to the receipt of goods for dispatch., The Railway Company will be the sole judge of when it is necessary to close its gates to the receipt of goods traffic, but it will endeavour to give notice at 18 hours the previous evening of its intention to do so. When the Railway Company opens its gates for the reception of a limited quantity of goods only on any day, the quantity to be received will be stated in the notice referred to."

7. Exhibit 92 is an example of the notices which the Company was in the habit of issuing advising consignors that the goods shed was open for the receipt of goods for dispatch. "The receipt of goods for dispatch," which is the expression used in Clause II of Order 101, describe from the railway company's point of view the operation which the consignor would regard as "delivery of goods to be carried," The railway company in order that they may not be responsible for the goods in the goods shed have endeavoured to limit their liability by taking the signature of the consignor upon one of their register forms so as to indicate that he acquiesces in the terms stated above the signature. It is, however, admitted,

and correctly admitted, by the learned counsel for the railway company that if the goods have been "delivered to be carried", such an agreement as a indicated by the consignor's signature upon the register form would not, inasmuch as it has not been approved by the Government of India, be of any avail. We are, therefore, unable to agree with the decision of the learned Judge that the Company are not liable inasmuch as the goods had not been delivered to be carried.

8. The first question being answered in the affirmative and against the railway company, the question remains whether the defendants have discharged the onus which is upon them of showing that they took proper care of the goods committed to their charge as bailees.

9. It is important to notice that on the 30th April 1912 a fire took place at the goods shed of the same Station in which a number of bales of cotton were destroyed, and the conclusion came to by the investigating Panch was that the fire was duo to engine sparks. That also appears to have been the opinion of the Station Master.--See Exhibit 151.

10. The fire in the present case, as has been stated, took place on the 14th May 1913, and a report was called for by the District Magistrate from the railway company in that month for submission to Government. After various reminders the District Magistrate obtained information from the railway company that the fire in the goods shed had originated from a spark from the shunting engine working in the goods yard and that a number of bundles of gunny bags which were stacked in the west end of the forwarding goods shed were noticed to be on fire at about 3 noon on the 14th of May. Every attempt was made to extinguish the fire, but this could not be done owing to a heavy wind and the rapidity with which the flames burnt down the whole of the shed with the goods in it. See Exh, 160.

11. On the 12th June 1913, the Deputy Traffic Manager had addressed an answer (which did not reach its destination) to the District Magistrate in reply to his inquiry of* the 29th of May stating that a number of bundles of gunny which were stacked in the west end of the forwarding goods shod were noticed to be on fire. It had not been ascertained how the fire originated. Every attempt was made to extinguish the fire, but this could not be done owing to a heavy wind prevailing at the time and the flames spread rapidly burning down the whole of the shed with the goods in it and close to it.

12. As regards the cause of the fire there appears to be no other conclusion open to the Court upon the evidence but to hold that it was due to the sparks of a shunting engine which was working alongside the goods shed in the afternoon of the 14th of May. The emission of sparks however is not in all cases evidence of negligence and it has been proved that the railway company had adopted the best known mechanical devices available to them for the prevention of spark emission, and the danger of spark emission was therefore reduced to minimum.

If, therefore, the Company are to be held liable for negligence, it must be on some other ground than the emission of a spark from the shunting engine.

13. The evidence now recorded makes it clear that the fire commenced at the northern end of the goods shed with the ignition of bundles of gunny bags stacked against the iron sheeting with which the northern end of the shed was partly inclosed, that the flames rapidly ignited the roof of the shed, and that in consequence the shed and the goods in it were destroyed. It is contended that the storing of the gunny bags at the northern end of the shed was evidence of negligence inasmuch as they constituted inflammable material, and the experience of the previous year should have shown the danger arising from sparks of shunting engines. Although the gunny bags were separated from the contents of the goods shed by metal sheeting, we are of opinion that their storage in that position was evidence of negligence since the ignition of the gunny bags would at once endanger the inflammable roof of the shed.

14. The most vulnerable points in the defendants' case are the inflammable nature of the roof of the shed and the absence of proper resources for the rapid extinguishment of the fire.

15. With regard to the materials of the shed the Station Master (Exh. 73) says : "The roof of the goods shed was a tiled roof with ordinary common tiles. There was matting below the tiles. It was Bamboo matting. The matting was on battens. As far as I know it was an old roof probably as old as the station."

16. Kirby, the Loco Foreman, Exh. 103, says : "The fire traveled very rapidly owing to the inflammable nature of the goods inside the shed, the dryness of the substance of which the roof was made and a very stiff breeze blowing from the direction where the fire originated."

17. Govind Appaji, Exh. 123, in the service of the railway company as head goods clerk, states: "My attention was drawn to the fire by noise. I came out and went towards the forwarding goods shed. I went to the scene of the fire. Half of the heap of the old bagging was already on fire when I went there. It was rotten and was at the outside of the Bombay end of the forwarding goods shed. When I saw the fire first I found that the flames were reaching up to the top of the roof near the eaves on one side. The roof was tiled roof with ribs under Bamboo tatties."

18. On behalf of the railway company it is said that the railway company's buildings are subject to inspection by Government Inspectors who have to remark if anything is wrong, and that if the roof had been dangerous it would have been noticed. This is an argument of a very negative type. The Acting District Traffic Superintendent, Exh. 101, states that "a Government Inspector passes over this section of the line two times a year in company with the Head Officials of various departments of the Railway. They go about together and examine the buildings, the lines, bridges and everything else connected with the Railway. They do inspect the goods sheds at certain stations. I cannot say if they

inspected this goods shed. This examination comes within their purview. As a result of this inspection the Government Inspector makes the report on any points which he considers important for the attention at the hands of the railway company. During the course of one of the inspections every building comes within the notice of the Inspector. No adverse comments were ever made by him regarding the Sholapur goods shed to my knowledge."

19. Perhaps goods sheds of this description are not likely to escape adverse comment at the hands of the Inspectors since the occurrence with which we are now concerned. The position appears to be this; that had the goods shed roof been non-inflammable, the fact that the flames were driven high by a strong wind from the pile of gunny bags would not have caused ignition of the roof and thence of the shed and everything therein contained, and we cannot hold that persons storing goods of their customers in an inflammable shed, the immediate surroundings of which are liable to accidental fire, are taking reasonable and proper care of the goods. The obligation of the bailee is to take reasonable care that any building in which the bailor's goods are deposited is in a proper state so that the things therein deposited may be reasonably safe in it : see *Searle v. Laverick* (1874) L.R. 9 Q.B. 122,.

20. But that is not all that can be said against the railway company. It is contended that there were no sufficient resources available to enable the railway employees to cope with the fire. In the first place, there were no buckets with water in the goods shed ready to be thrown on the flames. We are not prepared to say that the absence of buckets in the circumstances made any material difference in the result of the fire.

21. It is also said that the supply of water available was insufficient, and that the hydrant from which water would ordinarily be obtained was not in proper order, and was very difficult to open, and that this led to serious delay. The day after the fire the Station Master sent this report to the Deputy Traffic Manager:--"The fire was first discovered at 15 hours Bombay end of forwarding goods shed among bundles of bagging; owing to strong high winds roofing of forwarding goods shed caught fire and within 10 minutes the whole roofing was ablaze. There was insufficient water in our hydrant and water column, hence I applied to the Vishnu Mills and obtained their assistance to extinguish the fire, from 15-20 of 14th May 1913 to 5 hours on the 15th two pumps were working of the Mills. The Municipality also sent us two pumps one in charge of the City Police, the other in charge of Water Works Engineer. The City Police pump was stopped at 19 hours, while pump in charge of Water Works Engineer was utilized off and on till 5 A.M." The rapidity of the fire is indicated by the telegram by the Station Master on the 14, Exhibit 76, "Very serious fire forwarding shed and goods stock in it completely burnt at 15 hours to-day serious loss cause unknown report follows." That was handed in for dispatch at 16-40, that is to say, an hour and 40 minutes after the fire had first been observed, and at that time the whole of the shed and the goods stacked in it was reported to be completely burnt.

22. It is important, therefore, to consider whether there was any delay in getting water working on the flames owing to negligence on the part of the railway company, for we know from the report of the 15th that the Vishnu Mill pumps were not brought into requisition before 15-20 on the 14th.

23. [His Lordship, after discussing the evidence of various witnesses, proceeded.]--

It appears to us that the conclusion to be drawn from the evidence to which attention has been called is that the railway hydrant was not in working order at the time the fire broke out, that it was some considerable time before it could be opened, that when it was opened no water came through it that could be used for the extinguishment of the fire, and that the first water which was brought to play upon the burning shed was water from the Vishnu Mills through the Vishnu Mills' pumps. We can only conclude that the railway company did not do their duty in taking all measures for the protection of goods in the goods shed when the risk of fire was imminent or had actually occurred: see *Brabant & Co. v. King* (1895) A.C. 632 and *River Steam Navigation Company v. Choutmall* (1899) L.R. 26 IndAp 1 The condition of the hydrant and the absence of the water must be attributed to want of care on their part.

24. We refer the trial of issues Nos. 1, 10, 11 and 12 raised in the Sholapur Court to that Court for trial and direct the Court to take the additional evidence, if any, required and to return such evidence to this Court together with the findings and the reasons for the same.

25. Findings should be returned within three months.

Shah, J.

26. I desire to add a few words as supplementing the judgment of my Lord the Chief Justice, with which I entirely agree.

27. First, as to the question of the delivery of goods to be carried by railway, the rule framed u/s 47, Sub-section (1), Clause (f) that there can be no delivery until a receipt is given for the goods delivered to be carried has been held to be invalid as being inconsistent with the provisions of Section 72 of the Indian Railways Act in *Ramchandra Natha v. G. I. P. Railway Company* (3). For the reasons stated in my judgment in that case I am still of the opinion that the rule is invalid as being inconsistent with Section 72 so far as it postpones the liability of the company beyond the time of actual delivery, until the receipt is given by the railway company.

28. On the evidence in the present case it is clear that the goods were delivered to be carried by railway. They were brought in the goods shed to be carried by railway, and were not re-moveable there from without the permission of the railway authorities. The consignment notes in respect of the goods were given by the Hundekari and received by the goods clerk. The evidence shows that the consignment notes are registered after the goods are brought there and that the

consignment notes were registered in respect of the goods in question. Thus the delivery in fact for carriage by railway was, in my opinion, complete for the purposes of Section 72.

29. The consignment note contains conditions, which are approved by the Governor-General-in-Council u/s 54 of the Indian Railways Act. The first condition is in effect the same as the rule just referred to. It postpones the responsibility of the company u/s 72 until the goods are booked and a receipt given for the same by their clerk. Section 54 requires that the conditions should be consistent with the provisions of the Act; and I think that this condition is inconsistent with the provisions of Section 72 to the same event as the said rule made u/s 47, and for the same reasons.

30. The railway company in addition to the said rule and the Condition printed on the consignment note take an undertaking from every consignor, indemnifying the railway from ad interim liability till the railway receipt is granted for goods tendered, in column X of the register of the consignment notes (see Exh. 49). This form is admittedly not approved by the Governor-General-in-Council u/s 72(2)(b); and it could not well be, if, according to the rule and the condition just referred to, there could be no delivery and therefore no liability u/s 72, Sub-section (1) before a receipt is given I doubt whether the company has any power to insist upon such an agreement from every consignor, if the rule and the condition printed on the consignment note be invalid. The rule and the condition, if valid, are sufficient to protect the company in this case apart from the agreement. If the rule and the condition cannot validly postpone according to law the liability arising u/s 72 in virtue of the actual delivery of the goods to be carried by railway until a receipt is given, such an undertaking cannot help them. We are not concerned in this case with the consideration of the possible use, which the company may be able to make of such an agreement in their favour, if an attempt were made to make them liable in virtue of their power to charge wharf age under Rule 1 made u/s 47, Sub section 1, Clause (f) apart from Section 72 of the Act.

31. Secondly, on the point of negligence, I agree with the learned Chief Justice both as to the facts which the evidence establishes, and as to the inference to be drawn from those facts.

32. The question of the burden of proof is not important under the circumstances of this case. The lower Court has considered the evidence on the footing that the onus lies on the defendant company, and has found in favour of the company except that it did not provide an adequate roof for the building of the goods shed in question. Mr. Binning for the defendant company has not suggested before us that the lower Court's view as to the onus being on the company is wrong. This view is supported by certain decisions of the Indian High Courts. But it must be considered in the light of the observations of their Lordships of the Privy Council in the recent case of Dwarkanath Rai Mohan Chaudhuri Vs. The Rivers Steam Navigation Company Ltd., . In the present case both the defendant company and

the plaintiff have adduced evidence on the question of negligence, and on that evidence it has to be determined whether the defendant company is shown to have taken as much care of the goods bailed to them as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The defendant company would not be liable) if they took the requisite amount of care. If the evidence establishes that they failed to take the requisite amount of care as required by Section 151 of the Indian Contract Act, the plaintiff must succeed, as in that case the burden of proving the negligence of the defendant company would be discharged. For this reason it is unnecessary to discuss the question of the burden of proof any further. Assuming that the burden of proving the want of due diligence or the negligence of the railway company lies upon the plaintiff, in my opinion the burden is amply discharged; and the evidence taken as a whole establishes that the defendant company failed to take the requisite amount of care.

33. As to the cause of the fire, it seems to me that in all probability the fire was due to a spark from a shunting engine. But the defendant company have strongly contested this view before us, and maintained that the cause of the fire is not known. On that footing the position of the railway company is not any better, as it would leave open the reasonable possibility that the fire may have been due to the negligence of any servant of the company. Even if the cause of the fire is traced to a spark from an engine, I do not think that the mere fact that the company cannot reasonably be expected to control the emission of a spark, when proper precautions have been taken " to reduce the possibility of such emission to its minimum, can absolve the company under the circumstances of this case. As a matter of ordinary prudence the risk of fire in consequence of a spark from an engine should have been taken into account in relation to the locality and its surroundings, and the railway company should have taken such care in shunting, in watching the goods directly exposed to such a risk, in storing inflammable goods like gunny bags near the goods shed and in providing a suitably protective shed for the goods delivered to them for carriage by railway as a man of ordinary prudence would, under similar circumstances, take in dealing with his own goods. In my opinion they did not take such care, and are responsible for the quick spread of the fire, even though no doubt it was considerably aided by the strong breeze blowing at that time.

34. I have considered the argument urged by Mr. Dinning that the fire was so sudden and quick that nothing could have saved the goods, and that therefore even if the company may have been negligent in maintaining a proper water supply and the fire appliances, it would not matter. I am unable to accept this argument. The fire was sudden and quick, but its operation might have been and probably would have been arrested or appreciably prolonged if some watch were kept to guard against the reasonable possibility of fire resulting from a spark from the engine while the shunting was going on, if the inflammable materials had not been stored in such large quantity and in such close proximity to the goods shed and if the goods shed had not a roof of inflammable materials. These

factors contributed materially, in my opinion, to the easy and extensive spread of the fire. Even apart from that I am by no means satisfied that ordinary and effective arrangements for water supply would not have saved a substantial part of the goods burnt in the shed.

35. Further I am slow to allow the benefit of such an argument to a bailee, who has been negligent in keeping such appliances and water supply available at the proper time as he would be expected to keep as a bailee, unless of course it is absolutely clear that nothing could have prevented the spread of fire. I am not satisfied that the normal water supply and appliances could not have prevented the spread of the fire and saved the goods in question.

36. As to the deficient water supply, I think that Mr. Burning's criticism against the evidence of Sanyal, the Municipal Engineer, loses much of its force when we remember the fact that the Company never taxed the Municipality soon after the fire or at any time that the insufficient supply of water was due to any defect in the municipal main or to any defective supply by the Municipality. At least there is nothing to show that the railway company ever wrote to the Municipality to that effect or suggested it in any other way; on the contrary, the assistance rendered by the Municipality is acknowledged in the report made by the station Master on the next day after the fire.