
(1973) 08 CAL CK 0019

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 569 of 1963

Piramal Banwarilal

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 24-08-1973

Acts Referred:

Railways Act, 1890 — Section 74C(3)

Citation : AIR 1974 Cal 107 : (1974) 1 CALLT 392

Hon'ble Judges : Debiprosad Pal, J

Bench : Single Bench

Advocate : N.C. Chakraborty and Kanika Banerji, for the Appellant; A.K. Basu, for the Respondent

Final Decision : Allowed

Judgement

Debiprosad Pal, J.—The plaintiff is the appellant in this appeal which arises out of a suit instituted against the Northern Railway, New Delhi and Eastern Railway, Calcutta, for a sum of Rs. 4,692/- and interest thereupon claimed by way of damages on account of negligence and misconduct on the part of the defendants' employees. The admitted facts are that 395 bags of dry chillies of which the plaintiff is the owner were booked from Patiala to Bankura. At the time of taking delivery at Bankura 275 bags were found badly damaged by water and the damages were assessed by the Assistant Commercial Superintendent at 50 per cent., which amounts to 72 mds. 7 srs. and 3ch. On the said basis a sum of Rs. 4,692/3/-, being the price therefore was claimed by way of compensation, together with a sum of Rs. 211/8/- as interest. The plaintiff's allegation is that the consignment was put in a leaky wagon and hence the damage caused was due to the negligence and misconduct on the part of the defendants and/or their employees. The suit was originally decreed on contest against the defendant No. 2, the Eastern Railway and ex parte against the defendant No. 1. On appeal the learned District Judge sent the matter back with a direction that the defendants should be given an opportunity to examine the loading clerk and the train

examiner as prayed for and the case thereafter should be disposed of according to law. When the matter came back before the learned Subordinate Judge, Bankura, the train examiner was not examined. One Sri Ram being D.W. 4 has been examined in defence, he being the goods clerk at Patiala in January, 1954. It is in evidence that the rain water had percolated through cracks and holes in the wagon and had damaged the dry Chillies. The learned Subordinate Judge found that no competent train examiner had examined the wagon at Patiala. D.W. 4 was not a competent wagon examiner. The said witness admitted that train examination involves some degree of technical skill and special training and that people who are appointed as wagon and train examiners are given special training. The learned Subordinate Judge also found that Sri Ram was a goods clerk at Patiala and that he loaded the consignment through the coolies of the sender. His evidence is that he adopted a visual test by getting inside the wagon and by closing all the doors verified if light came in from anywhere. The day when the wagon was loaded was a cloudy one and this mode of examination by visual test was found by the learned Subordinate Judge to be defective. He further held that the wagon was not adequately tested at the starting point and the fact that cracks were noticed at the destination would indicate that possibly the leaks were there all through and could not be detected at the booking station because of the unsatisfactory mode of examination by an incompetent person. The finding of the learned Subordinate Judge was that there was enough proof to show that goods were negligently sent in a leaky wagon and the defendants were held liable for negligence. The suit was therefore decreed for a sum of Rs. 4,692/3/- against the defendant No. 2 and ex parte against the defendant No. 1.

2. The defendant No. 2 preferred an appeal before the learned District Judge, Bankura, who allowed the appeal and set aside the judgment and decree of the learned Subordinate Judge and dismissed the suit. The lower appellate Court held that there was no evidence from the side of the plaintiff to show that when the goods were booked at Patiala, the wagon was leaky. Relying upon the evidence of D.W. 4, Sri Ram the appellate Court held that there was nothing to show that there is any rule under which any different sort of, examination of the wagon other than the visual test adopted by D.W. 4 had to be made. The wagon, according to the appellate Court, although was not examined by any train examiner at Patiala, there was no rule that it had to be so examined. Proceeding on that view the appellate Court allowed the appeal.

3. On a second appeal the learned Counsel for the plaintiff appellant contended that the defendants specifically prayed for the remand before the lower appellate Court to have an opportunity of examining the loading clerk and the train examiner. When the case was remanded at the prayer of the defendants the train examiner was not examined. The loading clerk also was not examined but D.W. 4, Sri Ram who happened to be the goods clerk at Patiala was examined. The submission of the learned Counsel for the appellant is that when it has been found that the rain water has percolated through the leaky wagon thereby causing damage to the dry chillies, the lower appellate Court should have held

that the damage caused is due to the negligence on the part of the railway administration.

4. The goods in the present case were admittedly booked at the owner's risk. u/s 74-C(3) of the Indian Railways Act, 1890 (hereinafter referred to as the Act), where the goods are carried at owner's risk rate the railway administration shall not be responsible for any loss, destruction or deterioration or damage to such goods from any cause whatsoever except upon proof that such loss, destruction, deterioration or damage was due to negligence or misconduct on the part of the railway administration or any of its servants. Therefore if a person has to claim damages in respect of goods consigned at the owner's risk rate, the onus is upon such a person to prove that the negligence or misconduct on the part of the railway administration or any of its servant was the cause for such loss or damage or destruction as the case may be. Such onus may however be discharged by either positive proof or by circumstantial evidence which establishes negligence on the part of the railway administration. Section 74-C and Section 74-D were inserted by Section 10 of the Indian Railway (Amendment) Act, 1949 and came into force on 1st August, 1950. The important change which was introduced by the amendment is to hold the railway administration liable in respect of goods carried at owner's risk rate not only upon proof of misconduct but also upon proof of negligence of the administration or its servants. Negligence is something less than misconduct. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. In other words, the test to be applied is the care taken by an ordinary prudent man who need not be necessarily a perfect man. Whether the care that has been taken is or is not reasonable is a question the answer to which varies with circumstances. The categories of negligence are never closed and there will always remain room for diversity of views in determining the standard of care expected of the hypothetical reasonable man. It is ultimately left to the Judge to decide what, in the circumstances of a particular case, the reasonable man would have done. The factors which guide the Judge in this creative process depend upon the adjustment of the relative values of the conflicting interests involved. How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the Court's assessment of the demands of society for protection from the carelessness of others (*Hedley Byrini and Co Ltd. v. Heller and Partners Ltd.* (1964) AC 465 .

5. What therefore amounts to negligence or misconduct so as to make the administration liable u/s 74-C of the Act depends on the facts of each particular case. In the case of *Moolzee Sickka v. Dominion of India* (1955) 59 CWN 976, the use of a wagon to carry tobacco leaves during the monsoon without taking necessary precaution was held to be negligence of a grave character and the fact that water was entering into the wagon in large quantities due to a defective wagon was considered to be a case amounting to misconduct on the part of the

railway authorities.

6. In the present case the finding of the Subordinate Judge, Bankura is that train examination involves some degree of technical skill and special training and that people who are appointed as wagon and train examiners are given special training. The evidence of D.W. 4 is that there was no train examiner at Patiala at all, but such train examiner was available and he comes to Patiala when he is wired. The further evidence is that on 7th January, 1954, i. e., the day when the goods were booked from Patiala, there was a cloudy weather. The finding therefore is that the visual test adopted by D.W. 4, Sri Ram who was neither a train examiner nor even a loading clerk was defective one. When the seals of Patiala railway station were found in act and when the goods were unloaded on 21-1-1954, there could be no damage to the consignment except by means of rain water getting into it. D.W. 1 sent a message Ext. A stating that the roof sheet had cracks at two places over a flap door and that the rain water was still then flowing into the wagon. This finding has not been reversed by the Appellate Court. The Appellate Court proceeded on the footing that there was no rule under which any different sort of examination of the wagon has to be made. According to the Appellate Court although the wagon was not examined by any train examiner at Patiala there was no such rule that it is to be so examined. In my view the appellate court laid an undue emphasis upon the existence of any statutory rules under which the examination of the wagon has to be made. As already stated the test of negligence on the part of the railway administration is to be determined by the yardstick of the conduct of a prudent and reasonable man placed in similar circumstances. When train examiners are appointed with special training for that purpose and when they are so available when called for, the failure to have the wagon examined by a competent train examiner does amount to negligence on the part of the administration. The use of the wagon to carry dry chillies without taking necessary and reasonable precaution as to its water tight condition particularly when the weather was a cloudy one amounts to serious negligence. There may not be any statutory rule for the examination of the wagon. The absence of such statutory rule does not absolve the railway administration or its employees from taking reasonable care and diligence in the examination of the wagon at the time when the goods are loaded. Even when the goods reached the destination the rain water was still flowing into the wagon. The weather report and chart indicate that there was rain over the regions through which the wagon passed at the relevant time. In my view on the facts and circumstances of the present case the railway administration and/or its officers were liable for acts of negligence u/s 74-C (3) of the Act and the appellant is entitled to claim for the loss or deterioration of the goods in question.

7. For the reasons stated above this appeal succeeds, and is allowed. The judgment and decree of the learned District Judge Bankura is reversed and those of the learned Subordinate Judge is restored. The appellant will be entitled to a decree for Rs. 4692/3/-against the defendant-respondents. There will be no order as to costs.