

(1977) 12 DEL CK 0015

In the Delhi High Court

Case No : Civil Revn. No. 538 of 1973

Prabhu Dayal Laxmi Narain

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-12-1977

Acts Referred:

Railways Act, 1890 — Section 72, 77

Citation : (1978) ACJ 467 : AIR 1978 Delhi 227 : (1978) 14 DLT 103 : (1978) RLR 230

Hon'ble Judges : V.S. Deshpande, J;H.L. Anand, J

Bench : Division Bench

Advocate : M.L. Bhargava, for the Appellant; H.S. Mac, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Deshpande, J.—This reference to a larger Bench is made because two divergent constructions of S. 77-C (1) of the Indian Railways Act, 1890 (hereinafter referred to as the Act) seem to be possible. One construction results in making the Railway Administration liable for any damage, deterioration, leakage or wastage of goods carried by it, while the other construction exempts the Railway from such liability. We are to consider which of the two constructions is to be preferred and why.

2. Sub-secs, (1) and (4) of S. 77-C of the Act, which alone are relevant, are reproduced below:-

" (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-sec. (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 a 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.

.....

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

3. The revision petitioner sent 110 bags of white gram at Railway risk from Sambalpur Railway Station to Delhi. At the time of delivery 383, Kgs. were found short. The trial court assessed the damage to the petitioner at Rs. 200 per quintal, but held that it was the duty of the consignor to have provided dunnage as required by the conditions under which the consignment was accepted by the Railway for carriage. The damage to the five bags found near the flap door was due to the non provision of the dunnage, Since the petitioner did not prove fault or negligence on the part of the Railway, the petitioner's claim in respect of the five bags near the flap door was rejected.

4. The contention of the petitioner in the revision is that in the forwarding note the consignor only admitted that the goods were packed in used and single bags and that dunnage had not been provided. Within the meaning of S. 77-C (1) (b) this only meant that the goods were either defectively packed or packed in a manner not in accordance with the general or special order, if any issued under sub-section (4). For, the said orders required dunnage to be provided. But, according to the petitioner this was not sufficient to exempt the Railway Administration from liability. It was further necessary to state in the forwarding note that such defective packing was likely to result in deterioration, leakage or wastage. Without mention of both these things the exemption from liability did not accrue to the Railway Administration.

5. On the other hand, it was contended for the respondent Railway that it was sufficient to secure exemption from liability of the Railway Administration that the fact of the goods being defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under sub-section (4) is mentioned in the forwarding note, It was not necessary to state further therein that as a result of such defective or improper packing the goods were liable to damage, deterioration, leakage or wastage. These are the two rival constructions submitted to us for consideration.

6. In favor of the submission made by the petitioner reliance is placed on the decision in Union of India (UOI) Vs. Laduram Fakirchand, , followed by a learned single Judge of this court in M/s. Sant Lal Hukum. Chand v. General Manager,

Northern Railway, C.R. No. 112 of 1970 decided on 17th Feb, 1975. The reasoning on which these decisions are based is as follows: The words "and the fact of such condition or defective or improper packing has been recorded by a sender or his agent in the forwarding note" have been taken to mean that the whole of the language describing the condition in clause (a) or of the defective packing in clause (b) of sub section (1) has to be reproduced in the forwarding note before the Railway Administration can be held to be exempt from liability. Thus, the description in the forwarding note is to include not only the mention that the goods were defectively packed or packed in a manner not in accordance with the order issued under sub-section (4), but also that as a result of such defective packing the goods were liable to damage, deterioration, leakage or wastage. This argument is based on the word "such" which qualifies the words "condition or defective or improper packing". The meaning of the word "such" would appear to mean

"the condition or defective or improper packing" as is described above or as is referred to above. The question for consideration, Therefore, is whether the description in the Forwarding Note must include the words "and as a result of such defective or improper packing are liable to damage, deterioration, leakage or wastage."

7. A plain reading of clause (b) of sub section (1) of S. 77 C would show that the reference to defective packing is made only in the following words "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)". The subsequent words are not in the nature of an adjectival clause after these words. Nor do they qualify these words by indicating any degree or quality of the defective packing. An adjective or a qualification would have said "such defective packing as was likely to lead to damage, etc." On the contrary, they are separated from the reference to the defective packing by the disjunctive word "and". Further, using the word "clause" in the grammatical and not in the legislative jargon, the opening clause of sub-sec, (1) of S. 77-C ends with the words "under sub-section (4) and a comma". Then follows another clause beginning with the words "and as a result of such defective or improper packing". It is only the first grammatical clause of sub-section (1) which describes the defective condition or the defective packing. The second grammatical clause is not a part of such description, but states only the likely result of such defective or un proper packing. The statement as to the result is a statement of a possibility which does not exist as a fact at the time the description on a forwarding note has to be written. The event is to come into existence. Subsequently after the consignment is made over to the Railway Administration. At the time of the consignment, it can only be an inference from the defective packing that the goods were liable to damage due to such defective packing. It is to be noted that S. 77-C (1) (b) requires only "the fact" of defective packing to be mentioned, but not the likely consequence of it.

8. Section 77-C replaces "the old Section 74-A and the two are in pari materia in

respect of cls. (a) and (b) of sub sec.(1). Two conditions are to exist and are to be mentioned in the forwarding note to exempt the Railway Administration from liability. These are a) defective condition and (b) defective packing. They are mentioned in cls.(a) and (b) of sub-section (1). Each of them is followed by words indicating the likely consequences of the defective condition and the defective packing. It is to be noted that the consequences of defective condition and defective packing mentioned in cls. (a) and (b) are such as could be said to have been caused by the defective condition or the defective packing. The exemption of the Railway Administration from liability is secured only in respect of these consequences. Deterioration, leakage, wastage or damage has to be such as could be a result of defective condition, while leakage, wastage or damage has to be such as to a result of defective packing or packing which is not in accordance with the orders issued under sub-section (4). The railway is not protected against any other kind of loss. This was the law under the old S. 74-A and note A and continues to be the law u/s 77-C(1).

9. The significance of the description of the consequence, which defective condition or defective packing can lead to is to, be gathered from the reason why the consequences are mentioned in cls. (a) and (b). Unless and until damage takes place, its nature cannot be ascertained and it cannot be said whether it is the kind of damage concern plated in cls. (a) and (b). At the time the sender entrusts the consignment to the Railway Administration, he can at beat be made to admit the defective condition or the defective packing because these are objective facts. Defective packing is also defined as being contrary to orders issued under sub-section (4). These orders, for instant require that dunnage should be provided to protect the bags. The non provisions of the dunnage makes the packing contrary to these orders. The consignor cannot, Therefore, deny this fact at the time of the booking of the consignment. Neither the consignor nor the Railway Administration can, however, anticipate at the time of the booking what kind of damage, deterioration, leakage or wastage is likely to be caused to the goods by the defective condition or the defective packing. The sender cannot, Therefore, be expected to write on the forwarding note vaguely that the goods are liable to damage, deterioration, leakage or wastage without having any idea as to what damage deterioration, leakage or wastage was likely to occur.

10. On the other hand, once the damage deterioration, wastage or leakage has occurred, it would be discovered at the time of the delivery of the consignment. It is then for the consignor and the Railway Administration to make their own assessments as to whether the kind of damage, etc. which has occurred, is the one contemplated by cls. (a) and (b) of S. 77-C (1). They may reach agreement as to the cause and nature of the damage. If they do not, the question will have to be decided by the court if it comes before it. It is only after it is known as to what the damage is that an assessment or a judgment can be made as to the nature and the cause of the damage. It is only then that it can be decided whether the damage is covered by the language of cls. (a) and (b) of sub-sec(1)

of S. 77-C.

11. In cls. (a) and (b) the defective condition of the goods and the defective nature of packing are facts. They are to be contrasted with the consequences to which then facts may lead. The consequences may be of various kinds. Some of these consequences may be those which are contemplated by cls. (a) and (b), while others may be beyond such contemplation. The requirement of Section 77-C (1) is that "the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note". The fact to be recorded is the defective condition or the defective packing. The adjective "such" qualifying, condition or defective or improper packing must also be given a meaning. The obligation of the sender is confined to recording only such fact as consists of a particular kind of defective condition or defective packing. It is that kind of defective condition or defective packing which makes the goods liable to damage, deterioration leakage, or wastage, which is to be recorded. That is to say, it is at the time of recording the fact that it has to be considered by the sender and the Rail way Administration whether the facts require to be recorded as may lead to the kind of damage, which is contemplated there in. Nevertheless the obligation is confined to the recording of the fact which can only consist of the defective condition or the defective packing. The consequences which are likely to occur due to the defective condition or defective packing cannot be properly called facts. They are not, Therefore, required to be recorded in the forwarding note. They are future events which may or may not occur. Further, they are of various kinds. It would be impossible to know before hand which one of them will take place.

12. Since the conflict between the two alternative interpretations of the words "the fact of such condition or defective or improper packing has been recorded by the sender or his agent" centres round the question whether in addition to the defective condition or defective packing the sender must also mention that as a consequence thereof the goods are liable to damage, leakage, deterioration or wastage, aid may be taken of the other related provisions of the Act, which will throw light on the meaning of these words in S. 77-C (1). Firstly, the nature of defective condition or improper packing is itself defined in S, 77-C (1) (b) as being "not in accordance with the general or special order, If any, issued under sub-section (4)". The relevant order is reproduced in Goods Tariff No. 33, Part I, containing the General Rules of Acceptance, Carriage and Delivery of Goods, in force from 1 st Feb. 1971. Chapter 9 deals with packing conditions and special conditions. Section Iii thereof deals with special conditions applicable to certain commodities. The relevant part of special condition, S. 27 is as follows:-

"Consignment when in wagon load should be protected at the doors with damage materials by sender remarks will be entered by the sender on the forwarding note to the effect that the special condition has been complied with and these remarks will be reproduced at the time of, preparation of Railway Receipt."

The non provision of dunnage by the sender in this case brings the consignment

within the language of S. 77-C (1) (b), because the packing was not in accordance with the special condition issued under sub-section (4). The special condition does not require the sender to state anything except whether the packing was in compliance with the special condition or not.

13. Since S 77-C (1) requires the sender to make the endorsement on the forwarding note, we may usefully refer to S. 72 which states when a forwarding note is to be executed and what should be the form of the forwarding note and particulars to be entered in it. It has to be executed under S. 72 (b) (iv) *inter alia*, when goods are in a defective condition or defectively packed. This covers the case before us. The forwarding note has to be in such form as may be prescribed by the Railway Administration and approved by the Central Government. The forwarding note executed in the present case is a printed document in which the necessary entries have been made it states that it has been approved by the Central Government for use by the Railways under S. 72 of the Act Section 72 further says that in this forwarding note the sender or his agent shall give such particulars in respect of animals or goods so delivered "as may be required". What in the meaning of the words "as may be required"? Clearly every provision of the Act which requires a sender to give the particulars of his consignment would be covered by these words. Firstly, the execution of a forwarding note by the sender is made compulsory by S, 72. Unless this is done, the consignment will not be accepted for carriage by the Railways. It is S. 72, Therefore, which may be first read as to what is required to be stated in the forwarding. note by the sender. When S. 72 says that the sender has to execute a forwarding note in the prescribed form it necessarily means that the particulars of the consignment which are required by this prescribed form to be given by the sender are a part of the forwarding note which is to be executed by the sender. These particulars are, Therefore, within the meaning of the words "as may be required". Clause (1) on the front side of the forwarding note is "internal packing condition I.P./.....application has been/has not been complied with." The words which are not applicable have to be struck out. Against this clause, the sender has written "bags used and single, dunnage not provided". Clause (1) on the back of the forwarding note is as follows:-

"Wherever an internal packing condition has been shown in the tariff against a commodity the fact whether the internal packing prescribed has been provided or not should be recorded in clause (1), overleaf."

This shows that the only requirement of the forwarding note is whether the internal packing condition has been complied with or not. This negatives the argument that the sender has to record on the forwarding note the likely consequences contemplated in cls. (a) and (b) of S. 77-C (1).

14. Sub-section (4) of S. 77-C is expressly intended to enable the Central Government to issue general or special orders prescribing if manner in which the goods delivered to the Railway Administration to be carried by the Railway shall be packed. These orders have been issued and the relevant condition prescribed

there by S-27 is referred to above. The words, "the fact of such condition or defective or improper packing has been recorded by the sender or his agent" have to be read with sub-s, (4) and special condition S-27. When read together, this recording required by Section 77-C (1) (b) could only be the recording of the fact whether the defective packing has been recorded or not. Special condition S-27 does not state that if the dunnage is not provided the goods should be liable to be damaged. It does not give any reason why the dunnage must be provided. It simply states that dunnage must be provided. The non compliance with it, Therefore, consists in non provision of the dunnage. Nothing else is required to be stated. The consequences of the non provision of the dunnage are also required to be stated.

15. In the light of S. 72 and sub section (4) of S. 77-C, can it be successfully argued that the consequences of the defective packing must also be recorded by the sender in the forwarding note? Firstly, S. 72 and sub-section (4) of S. 77-C negative the necessity of recording the likely consequences of the defective packing. Secondly, S. 77-C (1) also does not expressly state that the consequences have also to be recorded along with the fact of the defective condition or the defective packing. Thirdly, what is to be recorded is only the fact of such condition or defective packing. It is true that the word "such" means that only such defective condition or defective packing as would lead to damage, etc. are to be recorded. This is only to determine which defective condition or defective packing is to be recorded. The word "such" is used to obviate the necessity of describing the consequences. The contemplated consequences are only to be borne in mind, so that the sender may know if the defective condition or defective packing has to be recorded by him. That is the force of the word "such". If the sender were to be required not only to record the defective condition or the defective packing, but also the consequences contemplated in cls. (a) and (b), then it was needless for the legislature to use the word "such" to qualify the condition or packing. For, the word "such" is intended to render unnecessary description of the consequences.

16. The submission of the petition of that all the words contained in clause (b) of S. 77-C (1) have to be written on the forwarding note is also opposed to reality. In practice the Railway would be receiving numerous consignments. The consign would be reluctant to admit that the consignment is defectively packed, while the representative of the Railway would have to see that the defective nature of the consignment is noted in the forwarding note. There is thus a conflict of interests between the two. The consignor would admit only what exists at the time of the consignment, namely, that the packing is either defective or is not in accordance with the orders issued under sub-section (4). He cannot be expected to admit further that the result of defective packing would do damage to the goods. Nor can the representative of the Railway Administration at that time be called upon to make such a judgment at that very time and to insist that he would not accept the consignment unless it is written in the forwarding note that the defective packing would make the goods liable to damage.

17. In trying to find out what was to be written on the forwarding note, attention must be paid to the fact that the description of the condition of the goods or the defective nature of the packing is required to be recorded "by the sender or his agent". It would be against human nature to accept the sender or his agent to go beyond the existing nature of the consignment and to venture the probabilities of a future event, viz., that the goods were liable to be damaged. The sender would dispute that the section required him to make such admission of a future event and there would be unnecessary and avoidable disputes between the sender and the Railway Administration at the time of the snaking over the consignment if such a practice were to be adopted by the Railway Administration. In the interests of facilitating easy and quick transport. the Railway was not expected to insist on the consignor writing such a thing. The legislature could not have intended to bring about a deadlock between the consignor and the Railway Administration by the former being required to write such a thing in the forwarding note.

18. When the trial court arrived at a finding of fact that the damage caused to the consignment was due to non compliance of the condition regarding the provisions of dunnage by the sender, the burden shifted to the sender to prove that the damage was due to the negligence or misconduct on the part of the Railway Administration or its servants. Since this burden was not discharged by the sender, the trial court rightly dismissed the suit.

19. With respect, Therefore, we are unable to agree with the decision of the Calcutta High Court and that of the learned single Judge of our High Court referred to above, The interpretation of S. 77-C (1) (b) made by us above after invoking the aid of S. 72 and S. 77-C (4) is different.

20. For the reasons given by us above, we dismiss the revision petition without any order as to costs.

21. Revision petition dismissed