
(1979) 07 MP CK 0014
In the Madhya Pradesh High Court
Case No : First Appeal No. 150 of 1972

Radheshyam Agarwal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-07-1979

Acts Referred:

Contract Act, 1872 — Section 148, 149, 238
Railways Act, 1890 — Section 72, 73

Citation : AIR 1980 MP 95 : (1979) 24 MPLJ 793

Hon'ble Judges : M.L. Malik, J;J.S. Verma, J

Bench : Division Bench

Advocate : Y.S. Dharmadhikari, Kanti Rao and R.K. Nema, for the Appellant;
N.S. Kale, for the Respondent

Final Decision : Dismissed

Judgement

J.S. Verma, J.

This is an appeal by the plaintiff. The plaintiff's suit has been decreed to the extent of Rupees 33,955.50 Paise, with interest, only against the defendants Nos. 3 to 6 and it has been dismissed in its entirety against defendants 1, 2, 7 and 8. The plaintiff in this appeal prays for passing the decree against defendants 1 and 2 (respondents 1 and 2) also but no such prayer has been made against defendants 7 and 8 who have not even been impleaded as parties. Thus the only question in this appeal is whether the suit can be decreed also against defendants Nos. 1 and 2.

The plaintiff Radheshyam Agarwal is a businessman carrying on business in oil and other commodities at Jabalpur, Defendants 1 and 2 are the Central Railway and Southern Railway administrations. The defendant No. 3 is a partnership firm carrying on business in coconut oil at Alwaye in the State of Kerala, Defendants 4 to 6 are the partners of this firm and they are brothers. Defendants 7 and 8 are two banks.

In March 1963, the plaintiff placed an order with the defendant No. 3 Firm for supply of 650 tins of coconut oil at the rate of Rs. 47 per tin, each tin containing 17 Kgs. of oil. The defendant No. 3 firm alleging to have despatched two consignments, each containing 330 tins of coconut oil ex-Chalakudi railway station on the Southern Railway to Jabalpur on the Central Railway against two railway receipts (Exs. P-3 and P-4) dated 3-4-1963, handed over these railway receipts together with two Hundis, each for Rupees 15,510, drawn on the plaintiff, to the defendant No. 7 Bank at Alwaye, The documents were then sent to the defendant No. 8 Bank from which the plaintiff collected the two railway receipts on payment of Rs. 31,308. The plaintiff, as the last endorsee of these railway receipts, claimed delivery of the goods at the destination station, but being unable to get the goods shown in the railway receipts to have been booked, he gave notice u/s 78B of the Railways Act and Section 80 of the CPC to defendants 1 and 2. The railway administration asked the plaintiff for invoices of these consignments and then by a letter dated 28-12-1963 intimated the plaintiff that enquiries made had revealed that no such goods had been tendered to the railway administration for carriage at the forwarding station by the consignor on account of which the railway administration was unable to return the same.

The suit was filed on 30-1-1964 to recover in all Rs. 37,804 as the costs of the goods, banking charges, loss of profit, interest and notice charges.

The defence of the two railway administrations (defendants 1 and 2) has been that the goods were not delivered by the consignor to the railway administration at Chalakudi on account of which the contract of carriage was never made. Issue of the railway receipts was admitted but it was alleged that they had been obtained fraudulently by the consignor in collusion with the railway servants, without tendering the goods mentioned therein to the railway administration. It was also stated that in addition to these two instances, there were 31 other similar instances where defendant No. 3 had obtained railway receipts from the railway servants without delivering the goods shown to have been consigned under them. It was claimed that there was no liability on the railway administrations since the goods shown to have been booked under these two railway receipts had, in fact, never been delivered to the railway administration at the forwarding station and the railway receipts had been obtained fraudulently by the consignor. This, in substance, was the defence of the two railway administrations.

Defendants 3 to 6 remained ex parte and did not even file their written statement. However, defendant No. 4, a partner of defendant No. 3 Firm, appeared as a witness (P. W. 2) for the plaintiff and asserted that the firm had delivered the goods at the forwarding station to the railway administration and obtained the railway receipts after delivery of the goods. The defence taken by the Banks (defendants 7 and 8) is no longer relevant since no decree has been passed against them and this appeal has also not been preferred against them.

The trial Court found that the consignments shown in the aforesaid two railway

receipts were not delivered for carriage at the forwarding station to the railway administration; that the railway receipts were obtained fraudulently by defendants 3 to 6 from the railway servants at the forwarding station; and that a sum of Rs. 31,308 was paid on 18-5-1963 by the plaintiff through the Bank to defendants 3 to 6 against the two railway receipts. Accordingly, it held that the two railway administrations are not liable to the plaintiff and that the plaintiff is entitled to recover in all Rupees 33,955.50 Paise with interest from defendants 3 to 6 only. Plaintiff's claim against other defendants was found untenable and dismissed.

The contention of Shri Y.S. Dharmadhikari, learned counsel for the plaintiff-appellant, is that the plaintiff as the transferee of the railway receipts which are documents of title to the goods is entitled to get the goods or its value from the railway administrations under the contract of carriage. He argues that a presumption of delivery of goods for carriage at the forwarding station arises from these railway receipts which has not been rebutted by the railway administrations. Finally he contends that even assuming there was no delivery of goods for carriage to the railway administration by the consignor, the plaintiff is not concerned with it and he is entitled to recover value of the goods from the railways as transferee of the documents of title. In reply to our query, Shri Dharmadhikari specifically stated that the plaintiff's case was based only on the contractual liability of the railways evidenced by the railway receipts and not vicariously in tort for the acts of its servants in issuing the railway receipts fraudulently to defendant 3 Firm. Shri N.S. Kale, on behalf of the railways, replied that without the actual delivery of goods for carriage, to the railway administration, no such contract was created to fasten any liability on the railway administrations. He asserted that the railway receipts were spurious having been issued without delivery of goods by the consignor and they created no contractual liability on the railway administrations.

The first question, therefore, is whether there was in fact delivery of the goods by the consignor at the forwarding station to the railway administration for carriage to Jabalpur, The railway receipts do raise a presumption of delivery of goods by the consignor to the railway administration at the forwarding station. The question then is whether the railway administration has rebutted that presumption. In our opinion, from the material on record, that presumption has been rebutted and it has been shown that the two railway receipts were issued by the railway servants at the forwarding station to the consignor without delivery of the goods shown therein.

Defendant No. 4 appearing as the plaintiff's witness (P. W. 2) has asserted that the goods shown in the railway receipts were actually delivered for being carried to Jabalpur at the forwarding station. The forwarding notes for these two consignments were filled by the consignor and given to the railway servants on 26-3-1963 but the corresponding railway receipts were issued much later on 3-4-1963. This witness admits that even though the goods were booked in

"smalls" and not being a wagon load consignment the identification mark thereon had to be put by the consignor himself, yet he does not remember having seen any such mark on the consigned goods. He says that he had gone to the railway station on 25-3-1963 but the Assistant Station Master, Rajappa Menon (D. W. 2) did not accept the goods and that the same were accepted by him the next day on 26-3-1963. However, he admits that he had not himself gone to the railway station on that day. There is no explanation why the railway receipts were issued much later on 3-4-1963, if the goods had actually been delivered and forwarding notes filled by the consignor on 26-3-1963. The fact that defendant No. 3 Firm was a leading coconut oil merchant at Alwaye and the railway servants had without authority extended the irregular facility to it of getting railway receipts in anticipation of delivery of goods, is proved beyond doubt. This witness himself admits that he also had the facility of getting payments against demand drafts without railway receipts from the Bank, which was unusual for others. In this very case, even though the railway receipts were issued on 3-4-1963 and delivery of goods to railway is alleged on 26-3-1963, yet the defendant firm had been able to get money from the Bank against those consignments much earlier on 26-3-1963. The witness has further admitted that even though he was in possession of documents to prove purchase by the defendant firm of these goods earlier and then its delivery for carriage to the railway administration at the forwarding station, yet he did not consider it necessary to produce the same and, therefore, they have not been produced in the Court.

The aforesaid two railway receipts, on which the suit is based, were issued by Rajappa Menon (D. W. 2), the Assistant Station Master, Chalakundi. He has admitted the fact of issuing these two railway receipts (Exs. P-3 and P-4). However, he refused to give any further statement and neither accepted nor denied the fact of having received the goods shown to have been consigned by these railway receipts, on the ground that there was a criminal case pending against him in relation to these railway receipts. It may be mentioned here that the consignor and the concerned railway servants were also prosecuted for forging these and other railway receipts in all of which consignor was the defendant No. 3 Firm. However, Chakko (D. W. 6), who was the Travelling Inspector of Accounts in that area on the Southern Railway, has proved the fact that Rajappa Menon (D. W. 2) had admitted to him, soon after the irregularity was detected, that he had made a wrong entry in the loading register of the forwarding station, showing booking of the consignment against the railway receipts Exts. P-3 and P-4 and he expressed regret for his act. This witness accordingly had made a remark at that very time against the entry in the loading register saying that it was a bogus entry. It is, therefore, clear that the concerned Assistant Station Master, Rajappa Menon (D. W. 2), who had issued the railway receipts Exs. P-3 and P-4, had soon thereafter admitted the fact that no goods had actually been booked against these railway receipts, even though the receipts had been issued.

Shri Dharmadhikari tried to contend that the railway documents show that 660 tins of coconut oil had been carried in wagon No. CR 58286, as shown in the loading register against these railway receipts Exs. P-3 and P-4, but they had been miscarried to Cuttack and delivered there against some other railway receipt. We are satisfied that in view of the evidence produced in this case, including the testimony of Chakoo (D. W. 6) who proves also the earlier admission of the concerned Assistant Station Master Rajappa Menon (D. W. 2), it is clear that the goods carried in the wagon to Cuttack and delivered there were not the ones booked against these railway receipt Exs. P-3 and P-4 but against some other railway receipts and a wrong entry was made in the loading register at the forwarding station by Rajappa Menon (D. W. 2) to cover up his lapse.

From the positive facts proved in this case and the circumstances emerging from the evidence, we are satisfied that the railway administrations have discharged the burden, which was on them and they have shown that there was actually no delivery of goods by the consignor to the railway administration at Chalakudi as claimed by the plaintiff against these railway receipts Exs. P-3 and P-4 and that these railway receipts were fictitious. It is obvious that the goods not having been delivered to the railway administration for carriage, even though railway receipts were issued, there was no occasion to return the same after carrying it to the destination station under the alleged contract of carriage.

The question now is whether the railway administrations can be held liable only on the basis of these fictitious railway receipts when the consignor never delivered the goods to it for carriage under the alleged contract of carriage. For this purpose, we have to consider the provisions and principles which apply to determine the railway's liability as carrier of goods, with which alone we are concerned.

The railway's liability as carrier of goods is laid down in the Indian Railways Act, 1890. The Act has been considerably amended with effect from 1-1-1962 by the Indian Railways (Amendment) Act (39 of 1961). Prior to 1-1-1962, the responsibility of railway as carrier of goods was substantially that of a bailee under provisions of the Contract Act, by virtue of the old Section 72 of the Railways Act. After 1-1-1962, by the new Section 73, the character of basic responsibility of railway has been changed from that of a bailee to substantially that of a common carrier. Certain exceptions have been given in Section 73 itself and together with other provisions, in the Act, they show that to some extent railway's basic liability as a common carrier has been diluted in particular circumstance. However, in this case we are concerned only with the basic nature of railway's liability as a common carrier in order to decide whether it can be held liable even without delivery of goods to it for carriage.

Actual delivery of goods to the railway administration for carriage is an essential requirement to attract railway's liability as a common carrier of goods under the new Section 73 after 1-1-1962, as it was earlier under the old Section 72 to attract its liability as a bailee. In this respect there has been no change by

amendment of the Railway Act. The expression "goods delivered to the administration to be carried by railway" occurring in the old Section 72 has been retained in the new Section 73 to indicate that commencement of the railway administration's liability in either case is from the same point of time i.e. when actual delivery of the goods is made by the consignor to the railway administration for its carriage by rail. The plain meaning of new Section 73 with which we are primarily concerned, shows that unless there is actual delivery of goods for carriage by rail to railway administration, the basic liability of the administration as a common carrier does not commence. The section does not even make a mention of the railway receipt and shows that railway administration's liability is not dependent on the issue or non-issue of railway receipt, that being only one of the relevant facts for deciding the question of actual delivery of goods to the railway administration for commencement of its liability as carrier. This conclusion finds support from the authorities mentioned hereafter.

For the reasons given earlier, the authorities in which the expression "goods delivered to the administration to be carried by railway" occurring in the old Section 72 was construed to determine the starting point of railway administration's liability continue to apply even now for this purpose, In *Ramchandra Natha v. G.I.P, Railway Co.* ILR (1915) Bom 485 it was held, relying on some earlier decisions, that the real question to be determined on the facts of each case was whether actual physical delivery of the goods had been made by the consignor to the railway administration to commence the responsibility of the railway administration and that the issuance or non-issuance of a railway receipt was not decisive of the question, it being merely of evidentiary value. The learned Judges constituting the Division Bench delivered concurring, though separate judgments. The relevant extracts from the judgments are as follows :--
Heaton, J.:--

"A "delivery to be carried by railway" means something more than a mere depositing of goods on the railway premises; it means some sort of acceptance by the railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case but it certainly may be completed before a railway receipt is granted." Shah, j. :--

"The delivery contemplated by Section 72 is an actual delivery and marks the beginning of the Company's responsibility. That delivery would no doubt involve not merely the bringing of the goods on the railway premises but acceptance thereof by the Company for the purpose of. carrying the same by railway. Such acceptance may be express or implied in a variety of ways by the usual course of business, but may be quite independent of any receipt being granted by the Company. Of course it will depend upon the circumstances of each case and the usual course of business of the railway ad ministration as to whether the goods can be said to be delivered to be carried by railway u/s 72 of the Act." x x x "It follows, therefore, that the commencement of the liability of the Company for

goods delivered to be carried u/s 72 is in no way dependent upon the fact of a receipt having been granted, and must be determined on the evidence.....".

Substantially the same view has been taken by other High Courts also. The case was followed by the Bombay High Court in subsequent decisions, of which Governor-General of India in Council Vs. The Jubilee Mills Ltd., is one.

This view, which has been followed substantially by the other High Courts as well, clearly indicates that the fact of actual delivery of goods by the consignor to the railway administration for carriage by rail marks the starting point of the railway's liability as common carrier under the existing Section 73 of the Railways Act and the issue or non-issue of the railway receipt for the same, is at best merely of an evidentiary value and not decisive of the question whether actual delivery of the goods had been made by the consignor and accepted by the railway administration. Whenever there is any dispute about the fact of actual delivery of goods by the consignor to the railway administration, the same has to be determined on the basis of evidence adduced in the case since it is this fact of actual delivery and not the circumstance of issue or non-issue of a railway receipt which provides the starting point for commencement of the responsibility of the railway administration as carrier of the goods. (See AIR 1933 261 (Nagpur) ; Jalim Singh v. Secretary of State ILR (1904) Cal 951; Hardayal Ram Dass Ray Vs. B. and N. W. Ry. Co., ; Firm Sohanpal Munnalal Vs. The East Indian Railway, ; Secy. of State Vs. (Firm) Sheo Bhagwan, ; Laxmi Narain Brahma Narain v. Governor-General in Council AIR 1950 P & H 87; Ardeshir v. Agent, G.I.P. Ry. Co. AIR 1928 PC 24 and Mariappa v. G. G. in Council AIR 1950 Mad 700.

In The Morvi Mercantile Bank Ltd. and Another Vs. Union of India (UOI), , it was held, relying on earlier privy Council decisions, that a railway receipt is a document of title to the goods covered by it and transfer of the said document for consideration effects a constructive delivery of the goods with the result that the endorsee of the railway receipt will have the same remedies as owner of the goods would have for deprivation of the said goods or injury to them. It follows from this decision that the endorsee of the railway receipt, therefore, steps into the shoes of the consignor of the goods having the same rights and nothing more. The rights of the consignor of the goods under the railway receipt are only that which flow from the contract of carriage evidenced by the railway receipt. If it is shown that no real contract of carriage resulted notwithstanding the issue of the railway receipt, on account of want of delivery of goods by the consignor to the railway administration for carriage by rail, then the right to claim return of the goods does not arise since there has been in effect no such contract of carriage created. It was also observed in the minority judgment of this case, with which the majority did not disagree, that a railway receipt is not like a negotiable instrument unless there be a trade or usage to that effect. No such trade or usage having been pleaded or proved in the present case, it must be held that

the character of the railway receipt was merely of a document of title as held by their Lordships and not like that of a negotiable instrument. The position, therefore, is the same as indicated earlier that the railway administration cannot be held liable as carrier of the goods unless actual delivery of the goods to it by the consignor for carriage by rail has been proved.

The above position which emerges from the statutory provisions contained in the Indian Railways Act is the same as that under the general law relating to a common carrier or a bailee, as shown hereafter.

In Halsbury's Laws of England, Fourth Edition, Volume 5, in paragraph 339 at page 160, under the heading "Commencement of common carrier's liability" the starting point of liability has been stated as under :--

"The duties and liability of a carrier do not begin until he has accepted the goods for carriage."

Acceptance of the goods for carriage presupposes actual delivery of the goods by the consignor to the carrier without which admittedly the occasion for its acceptance by the carrier does not arise. It is, therefore, clear that a common carrier's liability under the general law does not arise until there has been actual delivery of the goods to it by the consignor for carriage and the same has been duly accepted for that purpose.

Section 238 of the Contract Act relates to the effect on agreement of misrepresentation or fraud by an agent. Illustration (b) to that section is as under:

"(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor."

The illustration is based on an earlier English decision in *Grant v. Norway* (1851) 10 CB 665. That decision was given in an action brought by the endorsees of a bill of lading against the owners of a vessel to recover the amount of advances made by the former upon the bills of lading, the goods never in fact having been shipped. It was held that the master of a ship signing the bill of lading for goods which had never been shipped is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of the bills of lading so signed. The action was therefore, dismissed against owners of the ship. It is evident from illustration (b) to Section 238 that the principle laid down in this decision has been embodied in the Indian Contract Act. There can thus be no doubt that the railway administration cannot be held liable for the act of its servants in issuing a railway receipt without delivery of the goods for carriage by the consignor to the railway administration, even on this basis. Sections 148 and 149 of the Contract Act also show that to constitute bailment it is necessary to prove delivery of the goods to the bailee and till such delivery has been proved, no question arises for holding the bailee

liable for return of the goods.

From the above discussion, it is obvious that the basic liability of the railway administration in such a case both under the provisions of the Indian Railways Act and under the general law as a common carrier is the same and to commence its liability, actual delivery of the goods to it by the consignor for carriage by rail must be proved. Unless that is shown, no contract of carriage is made out and, therefore, there is no occasion to fasten any liability on the railway administration to return the goods. In this case the very first essential requirement to commence the railway administrations' liability, not having been proved as stated earlier, the plaintiff's suit was rightly dismissed against the railway administrations. This appeal must, therefore fail.

Consequently, this appeal is dismissed but in the circumstances of the case, the parties shall bear their own costs of this Court.