

(1960) 07 OHC CK 0019
In the Orissa High Court
Case No : First Appeal No. 15 of 1954

Rasabati Bewa and Another APPELLANT
Vs
Union of India (UOI) and Another RESPONDENT

Date of Decision : 07-07-1960

Acts Referred:

Railways Act, 1890 — Section 72, 74A, 74B, 74C, 74C

Citation : AIR 1961 Ori 113

Hon'ble Judges : R.L. Narasimham, C.J;G.C. Das, J

Bench : Division Bench

Advocate : H. Sen, for the Appellant; B.K. Pal and H.C. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

G.C. Das, J.—This appeal by the plaintiff is directed against the judgment of the Subordinate Judge of Cuttack dated March 12, 1954, dismissing his suit, (M. S. No. 132 of 1952).

2. The plaintiff commenced the aforesaid suit for recovery of Rs. 5986-13-9 pies as damages from the Bengal Nagpur Railway and East Indian Railway Administration on the ground that certain damages to his goods consigned at Kanpur was caused by delay due to negligence and misconduct on the part of the Said railway administrations. Shortly stated, the facts are these : One Sankar Das Kailash Chan-dra consigned 187 bags of potatoes in a closed wagon from Kanpur Central- Railway station under R/R No. 284444, invoice No. 5 dated April 26, 1951, for delivery to the plaintiff at Cuttack Railway Station.

According to the plaintiff this consignment was due to arrive at the destination within seven days but actually it arrived after a period of 11 days OB account of the gross negligence and misconduct on the part of the defendants. As a result of this un-usual delay the contents had deteriorated, damaged and rendered unfit for human consumption. The consignment arrived at the Cuttack Railway Station

on May 5, 1951 and was delivered to the plaintiff on May 6. The contents having been damaged the Station-master, Cuttack, gave a certificate to that effect (Ext. 1) on May 7, assessing the damages at 75 per cent. This assessment of course was without prejudice.

The plaintiff accordingly preferred a claim u/s 77 of the Indian Railways Act (Act IX of 1890) on June 16, 1951, and also served a notice u/s 80 of the Code of Civil Procedure, on November 10. The claim not having been settled, the plaintiff was constrained to file the present suit (M. S. No. 132/52) claiming only 75 per cent of the total damages in accordance with the damage certificate (Ext, 1).

3. Defendant 2, the East Indian Railway Administration, remained *ex parte*. Defendant 1, the Bengal Nagpur Railway Administration however, contested the suit. The defence of the 1st defendant was that the consignment was not due at the destination station within seven days of the booking. There was in fact no delay and the alleged loss was not due to any such delay; but the loss, if any was due to inherent vice common in the goods consigned, and the assessment of damage as per Ext. 1 was without prejudice and accordingly was not binding on the defendants. It was further contended that the claim has been grossly exaggerated and the plaintiff did not in fact suffer damage to the extent claimed by him. There having been no special contract to carry the goods within any specific time the plaintiff is not entitled to claim any damages. The consignment was booked at owner's risk rate under loading and unloading condition by the consignor and the potatoes were a new crop with moisture likely to be rotten within seven days.

The consignment in wagon No. GIP 255455 was made over by the East Indian Railway at Gomo on 30-4-1951, passed Adra on 2-5-1951 and arrived at Kharagpur on the same day and was despatched on 4-5-1951 reaching Cuttack on 5-5-1951. Thus, the consignment had travelled a distance of 777 miles and there was no delay as a whole in spite of the fact that there was an accident at Kharagpur to train No. 193 to which this wagon was attached resulting in the derailment of all wheels of the brake van and the consignment was despatched on 4-5-1951 at the earliest possible convenience. Thus, there was no misconduct or negligence on the part of the defendants. One other defence taken was that the suit was barred by limitation, but it was not pressed before this Court.

4. The learned Subordinate Judge after a careful analysis of the evidence on record, both oral and documentary, came to the conclusion that the delay was for two days which was not unreasonable and the defendants are not guilty of any negligence or misconduct. Accordingly he dismissed the plaintiff's suit. It is against this judgment that the present appeal was filed.

5. From the documents Exts, A, B and 7/a and the evidence of D. Ws. 1, 2, 3 and 4, it is abundantly clear that 187 bajjs of potatoes were booked under R/R 284444, invoice No. 5 dated 26-4-1951. from Kanpur Central Railway Station to Cuttack via Gomo by Sankardas Kailashchandra and the consignment was

despatched by Wagon No, GIF. 255455 and correctly made over to the Bengal Nagpur Rail" way administration at Gomo from where it was despatched by train No. GH0 1 on 30-4-1951 at 10.5 hours to Cuttack.

The wagon arrived at Bhujuri Railway Station at 12.5 hours on 30-4-1951 and left the station by train No. 327 on 1-5-1951 at 10/45 hours, and. it arrived at Adra on the same date at 12.55 hours and left by Train No. 193 to Kharagpur Railway Station on 2-5-1951 at 8.00 hours and arrived at Kharagpur Railway Station on the same day at 19.30 hours. It left Kharagpur on 4-5-1951 at 23.40 hours by train No. 202 and arrived at Cuttack On 5-5-1951 and the plaintiff unloaded the wagon on 6-5-1951 at 14.00 hours and took open delivery.

The fact that there was a derailment of the brake-van of train No. 193 at 19,45 hours on 2-5-1951 is clearly proved by D.W. 2 and the entry in the diary of the Assistant Yard. Master of the Kharagpur Railway Station, Ext. 9. It may be remembered here that the distance between Kanpur and Gomo is 445 miles and it has not been alleged by the plaintiff that there was any delay while the goods were on the rails of the East Indian Railways, The distance from Gomo to Cuttack via Kharagpur is 332 miles and the actual time taken for this consignment to reach Gomo from Kanpur was from 26-4-1951 to 30-4-1951 and from Gomo to Cuttack was from 1-5-1951 to 5-5-1951. Thus, the only delay appears to be at Kharagpur which was apparently due to the derailment of a train.

6. On these facts two contentions were raised by Mr. Sen -- (1) The damage to the goods was due to the delay which amounts to negligence and misconduct on the part of the railway administration; and (2) the defendants contravened the Stand-ing Order (Rule 163 (a)) in not attaching the "perish-able" label. His argument was that if this label was attached, then the consignment would have moved faster and the damage to his goods would have been avoided.

7. Before dealing with the. contentions as raised by Mr. Sen, I would like to clarify the exact position of law in a little more detail. As I had pointed out in the case of Damodar Debata v. The Union of India 22 Cut LT 512 : (AIR 1956 Ori 222), certain amendments were made to the Indian Railways Act (Act IX of 1890) (hereinafter referred to as "the Act") by the amending Act No. 56 of 1949. By this amendment Sub-section (2) of Section 72 of the Act was omitted and Sections 74-A, 74-B, 74-C, 74-D and 74-E were inserted.

Thus, under Sub-section (1) of Section 72, the responsibility of a railway administration for the loss, destruction or deterioration of the goods delivered to the administration to be carried by railway shall, subject to the other provisions of the Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872, Before the amendment under the old Sub-section (2) , the responsibility or the railway administration was subject to the execu-tion of risk notes which were in the form of a sepa-rate contract.

But by the introduction of the new sections in place of Sub-section (2) as above mentioned this contra-tual obligation under the risk notes has now been replaced

on the statutory basis. Thus, whenever goods are delivered to the Railway Administration or Administrations to be carried by the Railway at the owner's risk rate, provision has been made u/s 74-C of the Act which lays down the liability of the Railway Administration for carriage of goods at the owner's risk rate.

Sub-section (1) of Section 74-C lays down that when any goods are tendered to a railway administration for carriage by railway and the railway administration provides for the carriage of such animals or goods either at the ordinary tariff rate (in the Act referred to as the Railway risk rate) or in the alternative at a special reduced rate (in the Act referred to as the owner's risk rate) the goods shall be deemed to have been tendered to be carried at owner's risk rate, unless the sender or his agent elects in writing to pay the railway risk rate.

Sub-section (2) lays down that where the sender or his agent elects in writing to pay the railway risk rate under Sub-section (1) the Railway Administration shall issue a certificate to the consignor to that effect. Sub-section (3) states that when any goods are carried or are deemed to be carried at owner's risk rate, a railway administration shall not be responsible for any loss, destruction or deterioration of 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.

The plaintiff does not produce any certificate that the goods were sent at the railway risk rate. It is on the other hand admitted that the consignment was made under the owner's risk rate. Thus, there is no doubt that Sub-section (3) of Section 74-C applies to the present case. It may be made clear that Section 74-D does not apply to the present case for that section refers to non-delivery of whole of a consignment or whole of any package forming part of any consignment. It is only in those events that the "railway administration is bound to disclose to the consignor how the consignment or package was dealt with throughout the time it was in its possession or under its control.

8. Turning now to the first contention of Mr. Sen, there is no doubt that there was some negligence on the part of the Railway Administration as a result of which the train was derailed at Kharag-pur and thereby two days' delay was occasioned. It is clear that the wagon reached the Cuttack Railway Station on the 10th day of its loading and was unloaded on the 11th day by the plaintiff. P. W. 1 deposed that the consignment should have reached Cuttack within seven or eight days.

He, however, admits that there was no special contract between the defendants and the plaintiffs or his consignor that this consignment should be delivered to the consignee within seven days from the date of booking. He was unable to file any document to show if previously any consignment of any particular goods between Kanpur and Cuttack reached Cuttack within seven days of its booking.

D. W. 1, however, stated that this coassignment was booked at owner's risk rate under Goods Tarrif General Rules No. 28. As a result of this the rate charged was Rs. 1-6-11 per maund.

If the consignment had been at the railway risk rate, the rate would have been Rs. 2-7-4 per maund. The consignment was booked under loading and unloading conditions, i.e., the loading and unloading is to be done by the consignor or the consignee. Rule 8 of the Tariff Rules No. 28 states that the railways do not guarantee the despatch of goods by any particular train nor will they be responsible for the arrival of goods at any station within any definite time.

Clause (3) of Rule 30 also lays down that the railways however are not liable for the loss of, or damage to the goods when it occurs by reason of accidental or unavoidable delays to transit or otherwise. The consignment as I have stated earlier had to travel a distance of 777 miles. What is the reasonable time to be taken in transit has been laid down in Sub-rule (14) of Rule 48 of the said Rules, according to which reasonable time may be assumed to be an allowance of 100 miles per day in the case of goods trains and 250 miles per day in the case of passenger trains, plus two days for necessary formalities of booking and destination stations. Admittedly in this case there has been two days delay. Even then it is for the plaintiff to prove that the damage was due to this delay. No evidence whatsoever has been led by the plaintiff.

9. Mr. Sen tried to rely upon certain cases to show that he is entitled to judgment since it is due to the negligence of the railway administration that the delay had occurred. For this purpose, he relied upon two cases, one of Nagpur High Court reported in *Sk. Mohammad v. Governor General in Council* AIR 1954 Nag 337 and the other of the Calcutta High Court reported in *Union of India (UOI) Vs. Ganesh Chandra Das*, .

These two cases deal with cases of non-delivery. Accordingly, they were governed by Section 74-D of the Act, under which the railway administration was bound to disclose to the consigner as to how the consignment or package was dealt with throughout the time it was in its possession or under its control. According, their Lordships of the Nagpur High Court held that the plaintiff was entitled to success firstly because the defendants did not make full disclosures as to how the consignment was dealt with and secondly because the servants of the defendant committed a breach of a specific duty imposed upon them by the rules of the railway administration to label the wagons of potatoes as "perishable".

Consequently, the failure to label the wagons as "perishable", transshipping a through wagon at Katni and delaying it at that junction and at Bilas-pur without any reasonable explanation for the delay amounted to an improper behaviour on the part of the railway administration or its servants and misconduct within the meaning of the Risk Note B. Similarly the Calcutta High Court in the case referred to above took the view that since there was an unusual and unreasonable delay, the consignment having been detained at Jharra for one

week the railway administration was guilty of misconduct and the delay was the cause of deterioration of the goods.

Thus, these cases clearly come u/s 74-D of the Act and do not help the contention of Mr. Sen. Reliance was also placed on a case reported in *Erachshaw Dasabhai v. Dominion of India*, (S) AIR 1955 MP 70. In that case the plaintiff booked ten carboys of Hydrochloric Acid and five carboys of Nitric Acid under R/R No. 10967 and ten carboys of Nitric Acid under R/R No. 10968 from Dadar by the B. B. and C. I. Railway to be carried to Indore Railway Station. These carboys of acid were, according to the plaintiff, purchased by him and the same were consigned in his name as the consignee.

When the consignment reached Indore it was found that the carboys were broken and empty. The question was whether the loss to the plaintiff occurred due to the misconduct on the part of the railway administration. The carboys of acid stand on quite a different footing from the potatoes. In that case the learned Judges construed the Sub-section (1) and the old Sub-section (2) of Section 72 of the Act and held that the railway administration was guilty of misconduct.

In view of the clear provision in Section 74-C of the Act this case cannot be of any avail to the applicant. Reliance was also sought to be placed upon a decision of this Court reported in 22 Cut LT 512 : (AIR 1956 Ori 222) referred to above. That was a case in which certain baskets of mangoes were consigned from Kantakapalli to Cuttack. In ordinary course the consignment would have reached the destination the next day, but on account of gross negligence and delay on the part of the Railway Administration, the parcel reached its destination three days after with the result that the contents were found to be rotten and unfit for human consumption.

Mangoes, as soft fruits, stand on a different footing from the potatoes. Both being perishable goods it would depend upon the degree of perishability in each case. The only other case that was referred to was a case of Rajasthan High Court reported in *Sattanmal Vishandas Vs. The Union of India (UOI)*, . A single Judge of that Court was of the opinion that the presumption under Sub-section (1) of Section 74-C that the goods are at owner's risk rate arises in cases where the railway administration provides for the carriage at two rates, one ordinary tariff rate known as railway risk rate and the other a special reduced rate known as owner's risk rate.

But where no document has been produced to show that in the case of particular goods in dispute there were two rates as referred to in Section 74-C (1), the presumption does not apply and the circumstances mentioned in Sub-section (3) that is, negligence or misconduct on the part of railway administration, are not required to be proved by the consignor. In the instant case there is evidence that in case of potatoes there were two rates but the goods were consigned at the reduced rate. Hence it was admitted that the goods were sent at the owner's risk rate. Thus, this case far from helping Mr. Sen militates against his contention.

10. With regard to the second contention, strong reliance was placed on Rule 163 of the Standing Orders of the Operating Department of the old East Indian Railway (now Northern Railways) regarding perishable goods. According to this rule "perishable goods" shall be despatched by the first available means. In case of large consignments, a special wagon shall be used to destination direct; both sides of the wagon labelled with "perishable" and "quick transit" labels.

Ventilator and doors must be kept open to admit fresh air into the wagons. Wagons containing potatoes shall be despatched by fast goods or mixed trains. The despatching station shall wke to all junctions and engine-changing stations en route to push the wagon on by connecting trains. The delay, if any, in this case had happened while the goods were on the lines of the Bengal Nagpur Railway. There is nothing to show that this Standing Order applies to the Bengal Nagpur Railway also.

Whether Rule 163 applies or not, the degree of damage or deterioration more often than not depends upon the nature of goods. For instance, in the case of mangoes, bananas or for the matter of that, any soft fruit or fish or meat would deteriorate much sooner than other kinds of perishable goods such as potatoes, onion and cabbages. Evidence is that a wagon with an iron floor with two ventilators and flap doors was selected by the consigner and the goods were loaded, locked and sealed by him. From Ext. 9 it appears that there was rain on 2-5-51 from 18.00 to 20.00 hours and when the flap doors were opened on 6-5-51 there was water inside the wagon.

11. There is no rule in the Goods Tariff General Rules No. 28 regarding attaching of "perishable labels" to such wagons. Thus, the consignor of such perishable articles must prove in order to recover the damage, that the deterioration in the goods was due not only to the delay in transshipment of the articles but was also to want of care on the part of the Railway servants or administration. In this connection I would refer to a decision of Wort J. in the case of Tilak Mahto Vs. Akhil Kishore and Others, .

In that case a consignment of potatoes reached the destination after 11 days from the date of consignment, and the potatoes were sold by auction as they were in a perishing condition. The consignor instituted a suit against the Company for non-delivery. The trial court found that there was no misconduct on the part of the company and dismissed the suit. Against that order a Civil Revision was preferred.

Wort, J. held that there was no misconduct on the part of the Company under Sub-clause (b) of Risk Note B inasmuch as the goods, though in one sense perishable were not perishable in the sense that they could under no circumstances stand the railway journey and would not have perished if they were in good condition when they were first consigned. Mr. Pal's whole argument was that mere delay would not entitle the plaintiff to damages. He must prove that this delay itself was the cause of damages or deterioration.

For this purpose Mr. Pal relied upon a case of the Patna High Court reported in Dominion of India as owner of E.I. Rly. and E.P. Rly. Vs. Ado Shaw Aklu Shaw and Another, . The facts in that case were that 201 bags of potatoes were booked on 14-9-1946, from Kendaghat to Jharia which reached Jharia station on 1-10-1946, at about 8 a.m. The consignments were unloaded at about 10 a.m. and the plaintiff took delivery of the same at about 2 P.M. after assessment of the percentage of loss.

In the circumstances the learned Judges were of opinion that whether the railway administration is guilty of misconduct or not really depends on the facts and circumstances of each case and it is not possible to lay down any hard and fast rule by which every case is to be judged. Misconduct is something more than mere negligence. It is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be.

It could not be said that the detachment at a certain station of wagons containing consignment of potatoes for about two days amounted to misconduct on the part of the railway administration, nor could it be held that the trains by which the wagons were despatched from that station were ordinarily slow-going trains. Accordingly, they set aside the judgment and decree passed by the Subordinate Judge and allowed the appeals.

In the case of Bengal and North Western Railway Co. Ltd. Vs. Sobrati Mia and Others, five Consignments of fish were received at Asansole by the plaintiff eight hours late. The question was whether the railway administration was guilty of misconduct due to delay. It was held that in order to claim damages for deterioration of the perishable goods consigned, it is not enough for the consignor to prove that the deterioration was due to delay because of misconduct in transit for want of good care on the part of the railway servant.

It is further necessary for him to prove that the damage to the consignment was due to such misconduct. The principle has been well laid down in the case of Taylor v. Great Northern Rly. Co. (1866) 1 C. P. 385. The facts were that the defendants, a railway Company, were prevented by an unavoidable obstruction on their line from carrying the plaintiff's goods within the usual (a reasonable) time. The obstruction was caused by an accident resulting solely from the negligence of another Company who had under an agreement with the defendants sanctioned by Act of Parliament running powers over their line.

In these circumstances Erlo, C. J. held that a common carrier of goods is not, in the absence of a special contract bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case; he is not responsible for the consequences of delay arising from causes beyond his control, and the defendants were not liable to the plaintiff for damage to his goods caused by the delay.

12. Thus, we have to examine if there was any unreasonable delay which itself would lead to the presumption that the goods were damaged due to this delay.

From Rule 14 of the Goods Tariff General Rules No. 28, referred to above, it is apparent that to cover a distance of 777 miles with two days necessary for formalities of booking and destination station, the reasonable time would be nine days. The goods actually arrived at the Cut-tack Railway Station on the 10th day and delivery was taken on the following day.

In the case of Tilak Mahto Vs. Akhil Kishore and Others, a delay of eleven days was held not unreasonable. Similarly in the case of Dominion of India as owner of E.I. Rly. and E.P. Rly. Vs. Ado Shaw Aklu Shaw and Another, a delay of two days was not held to be unreasonable. The same view was also taken by the Calcutta High Court in the case of Madras and Southern Mahratta Ry. Co. Ltd. Vs. Ravi Shing Deepsing and Co., wherein it was held that the delay on the part of the Railway Company to carry the consignment which is not unreasonable is no indication of misconduct.

Thus there does not appear to be tiny merit in the contentions raised on behalf of the appellant. In the result, I would dismiss this appeal with costs.

Narasimham, C.J.

13. I agree.