
(1977) 08 AHC CK 0029
In the Allahabad High Court
Case No : Second Appeal No. 3207 of 1972

Safdar Husain

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 20-08-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 1978 All 53

Hon'ble Judges : M.N. Shukla, J

Bench : Single Bench

Advocate : Dhruva Narayana, for the Appellant; Gur Pratap Singh, for the Respondent

Final Decision : Dismissed

Judgement

M.N. Shukla, J.—These appeals arise from the dismissal of a suit for declaration of the plaintiff's removal from railway service as void and/or other connected reliefs, namely, a permanent injunction restraining the defendant from realising the sum of Rs. 10,510.21 Paise from the plaintiff by deducting the same from the Provident Fund dues payable to him, a declaration that the plaintiff is entitled to 15 months' pay by way of gratuity permissible under the rules on reaching the age of superannuation on 12-5-1971 and any other appropriate relief. The trial court dismissed the suit with costs. The plaintiff preferred an appeal which was partly allowed by the Addl. District Judge, Bareilly and the order dated 6-8-1970 passed by the defendant directing recovery of Rupees 10,510.21 Paise from the plaintiff was set aside. The rest of the decree was maintained. In these circumstances both parties have filed the present appeals in this court.

2. The basic facts of the case are not in dispute. The plaintiff-appellant Safdar Husain was posted at Bareilly railway station of the Northern Railway as Head Stock Clerk entrusted with the duty of keeping the stocks of railway tickets. In 1967, however, he was further entrusted with the functions of the Chief Booking Clerk on retirement of the original incumbent to that post. In his capacity as the

Chief Booking Clerk he was expected to maintain accounts of cash entrusted to him by various Booking Clerks on sale of tickets or otherwise. He had an iron safe in his office for keeping cash. There was also originally an iron almirah in the office room of the Assistant Station Master in which he was expected to keep cash at night. This almirah, however, went into the use of the Assistant Station Master because his own almirah had gone out of order sometime in 1967. Consequently the plaintiff appellant had at his disposal only the iron safe in his own office room. This office room had one door on the backside which used to be closed by a chain latch. The main door of the office room opened on the side of the platform which used to be locked after the office hours. The office also had an almirah in which the stacks of tickets used to be kept.

3. On 26-2-1968 the appellant Safdar Husain had a sum of Rs. 10510.21 Paise as cash in hand which as usual he kept in the iron safe. Thereafter he placed the key of the iron safe inside the wooden almirah and locked the almirah with his own lock. The back door was bolted from inside by a porter named Moti who was at the disposal of Safdar Husain for attending to his various requirements in discharge of his official duties. Safdar Husain locked the outer door of his office and went home. On 27-2-1968 he returned on duty, opened the main door, went inside the office and found that the latch and the lock of wooden almirah had been broken open. The key of the safe was, however, in the almirah. The chain latch of the back door was also found open. When Safdar Husain opened the safe he found the entire cash missing.

4. A preliminary enquiry was held by the Enquiry Committee which submitted its report dated 18-4-1968. On the basis of this report disciplinary proceedings were started against Safdar Husain by means of a charge-sheet dated 7-6-1968. The following charges were framed against the appellant :

"(1) Not observing the existent rules and orders for keeping the keys of the cash safe in his personal custody and leaving keys in the wooden almirah, even not in the Godrej almirah which was available which amount to gross negligence and carelessness as this resulted in the loss of Government earnings.

(2) Not physically ensuring that the back doors of his office were properly bolted and chained from inside, which would have been done in the ordinary course by any man of common prudence and thus not ensuring safety of cash.

(3) Not bringing to the notice of the S.M.C.M.I. or T.A. in writing that the cash safe in the A.S.M.'s office meant for C.P.C.'s cash had been taken over from him and he had been deprived of the mandatory facility of keeping the cash in A.S.M.'s office during night and, thus not ensuring proper safety to the railway earnings.""

5. On these charges an enquiry was held by Sri K. N. Wali, Deputy Commercial Superintendent who submitted his report and held that the above three charges had been proved against the appellant. He, however, further found that the appellant has not misappropriated the amount. The report and the documents

etc. were forwarded to the Divisional Superintendent, Northern Railway, Moradabad who was the disciplinary/appointing authority. The latter issued a second show cause notice dated 2-5-1970 with a tentative punishment of removal from service of the appellant and recovery of Rs. 10510.21 Paise from his dues. The appellant submitted his reply to the show cause notice. The Divisional Superintendent passed final orders on 7-8-1970 confirming the second show cause notice and consequently ordering removal of the appellant from service and recovery of Rs. 14510.2,1 P. from his settlement dues. It was this final order which was challenged by the plaintiff in the suit which has given rise to these appeals.

6. The lower appellate court affirmed the finding of the trial court that there were no such rules or orders for keeping the keys of the cash-safe in personal custody. It, however, came to the conclusion that the plaintiff could not be said to have acted with due care and caution in leaving the key of the iron safe in the wooden almirah of his own office room. It went on to add that the defendant could not impose a fine of Rs. 10510.21 Paise on the plaintiff because under explanation (2) of Rule 6 penalty of fine could not be imposed on a railway servant who was exclusively employed for clerical work. In other words, it was of the opinion that the punishment of fine could not be awarded. Alternatively it held that the recovery of the above amount was in the nature of recovery of loss caused to the railway administration, therefore, it fell within the purview of Rule 6 (1) (iii) of the Rules of 1968 in which the field of recovery was limited to the pay of the railway servant. The ultimate finding, therefore, recorded by the court below was that the defendant had no jurisdiction to order recovery of Rs. 10510.21 P. from the plaintiff by the impugned order and the punishment for recovery of that amount from the appellant was illegal. 7. The sole point, therefore, which has arisen for decision in the second appeal is whether the act of keeping the key of the iron safe in the wooden almirah in his own office room by the appellant rather than in his personal custody or in the iron almirah kept in the office room of the Assistant Station Master constituted gross negligence on the part of the plaintiff resulting in the loss of earnings to the railway administration. It was expressly averred in paragraph 7 of the plaint that the railway administration had not provided any place for keeping the key of the safe by the employees when they left their duty and that neither the safe nor the iron almirah in the Assistant Station Master's office was guarded by any force of Railway Protection Force. In para. 13 of the plaint it was pleaded that the plaintiff used to keep the various keys of the office in a hidden place in the wooden almirah as usual and according to the consistent practice of the previous Chief Booking Clerks. The crux of the case therefore, is as to whether in these circumstances the leaving of the key in the wooden almirah amounted to gross negligence on the part of the plaintiff which resulted in loss of earnings to the railway administration. I am afraid that despite the vehement contention of the Learned counsel for the railway administration I am unable to accede to the proposition that the action of the plaintiff-appellant amounted to negligence. Sri Gur Pratap Singh. learned counsel

for the railway suggested the various alternative courses which according to him should have been adopted by the plaintiff as a prudent man and he ruled out from the gamut of such prudent actions the course actually followed by the appellant, leaving the key of the iron safe in the wooden almirah kept in his own office. It was emphatically urged before me that any person possessed with a modicum of wisdom and sense of responsibility in these circumstances would have preferred to carry the key of the iron safe in which the cash was kept with him to his residence and not leaving it in the office. Before I proceed to express my opinion on this crucial aspect of the case there is a preliminary objection which has been raised on behalf of the defendant-respondent and which must therefore be disposed of.

8. It was contended on behalf of the defendant-respondent that the concurrent findings of the courts below to the effect that the plaintiff was guilty of negligence and carelessness were beyond the purview of jurisdiction of this court u/s 100, C.P.C. and could not be disturbed. I cannot accept this submission and in my opinion this preliminary objection must be overruled. To my mind the finding with regard to the alleged negligence of the plaintiff-appellant was not a finding of fact or at any rate it was not a pure finding of fact. It must be regarded as a mixed question of fact and law which was therefore not excluded from the jurisdiction of this court in second appeal. I am inclined to echo the dictum succinctly laid down by Iqbal Ahmad, J. in *Bachan Singh Vs. Bhika Singh*

""While I am anxious not to, in any way, abridge the effect of Section 100 of the Civil P. C., and not to depart from the well-established rule that findings of fact recorded by a court of first appeal are binding in second appeal, I cannot, in view of the equally well-established rule, that inference from proved facts is always a question of law, affirm the finding or the decision of the lower appellate Court in this case."

After scrutinising the evidence in the case his Lordship was of the view that the finding whether the house in dispute was protected from attachment and sale by Section 60(c) of the Civil P. C. and whether it was an agriculturist's house could be challenged in second appeal. The leading case of the Privy Council which has since been followed in a number of decisions, is AIR 1927 102 (Privy Council) . It was held by the Judicial Committee that the proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is one of a legal inference from facts and not itself a question of fact. The Privy Council reiterated in AIR 1930 91 (Privy Council) the dictum that the proper legal effect of a proved fact is essentially a question of law. These two decisions of the Privy Council were followed by this Court in *Mt. Raghbiri Vs. Lakhpat Singh*, where it was ruled that what were the proper inferences which could be drawn from certain proved facts in respect of the disruption of the joint status of the family was a question of law and could be considered in second appeal.

The decision of the Privy Council in *Dhanna Mal's case* (supra) was approved by the Supreme Court in *Bejoy Gopal Mukherji Vs. Pratul Chandra Ghose*, and it was

held that in spite of the concurrent findings in that case of the courts below that the tenancy was permanent, the Supreme Court could consider the question since it was one of proper inference in law to be deduced from the facts. In fact the basic principle had been enunciated in two still earlier decisions of the Privy Council. In *Ram Gopal v. Shanshkhaton*, Law Rep (1692) 19 I A 228 (PC) it was observed :

"Although a third Court cannot entertain an appeal u/s 584 of the Civil P. C. upon any question as to the soundness of findings of fact by a second court, it can, nevertheless, adjudicate as matter of law upon the soundness of the conclusions which have been derived from those findings."

The pronouncement of the Judicial Committee in *Chandra Pal v. Shukur Sheikh* AIR 1918 PC 92 was still more explicit when it remarked (at p. 93) :

"Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law."

Their Lordships proceeded to observe that the jurisdiction of the High Court in second appeal not to interfere with a finding recorded by the court below must be confined to what was an unmixed finding of fact, or, in other words, to borrow the picturesque language of their Lordships of the Privy Council to those cases in which they were "unable to find that the decision of the District Judge stood in any shadowy border land between fact and law."

9. Coming specifically to cases of negligence there is a catena of authorities laying down the proposition that the question whether on certain facts what would amount in law to negligence is open to review in second appeal. Sri Gur Pratap Singh, learned counsel for the defendant-respondent strongly relied on *Madamanchi Ramappa and Another Vs. Muthalur Bojjappa*, wherein their Lordships had observed that the sufficiency or adequacy of evidence to support a finding of fact was a matter for decision of the court of facts and could not be agitated in second appeal. In the instant case, however, the point for consideration is whether on the admitted facts and the circumstances what has been done amounts to negligence in law on the part of the plaintiff. As already observed, the proper legal effect of proved facts is essentially a question of law and the High Court is entitled to interfere in second appeal. What is the legal principle to be drawn from the facts and whether the negligence or want of care on the part of the plaintiff has been made out is in my opinion a question of law. The point arose directly in *Rikhai Lal Bindeshri Prasad Vs. Banarsi Singh and Others*, . A Division Bench of this court ruled that a finding of negligence or a finding that there was or was not default was not necessarily in all cases a finding of fact if that finding had not been approached from the proper legal standpoint. Similar view was expressed in two cases of Madras High Court. In *(Komandur) Srinivasacharlu and Others Vs. (Koduru) Munirathna Naidu*, it was held that whether particular facts found constituted gross negligence was a question of law. Likewise in *Subbaratnam v. Gunavanthlal* AIR 1937 Mad 472 it

was held that the question, whether on certain facts, what would amount in law to negligence had been made out or not was one which* it was open to the court to consider in second appeal. I respectfully adopt the distinction brought out in this connection in the case of D. K. Lakshmiah v. Union of India AIR 1969 A P 386 at p. 387, by Satyanarayanarao, J. in the following passage :

"The question to be considered is whether the finding of the courts below that there was no negligence on the part of the defendants is correct. Normally, the question of negligence is based on facts established by evidence in the case. As pointed out in several decisions, the facts on which the negligence is based is one thing and the correctness of the inference from the facts is another thing. The finding of facts which are the basis for establishing negligence which have been found by the courts below cannot be disturbed. But the inference from the facts established being question of law, it is open to the second appellate Court to reconsider the question."

The decision of the Mysore High Court in Bore Gowda v. B. Nagaraju, AIR 1969 Mys 8 is in the same line of decisions for it was to the effect that the question whether on the admitted facts gross negligence on the part of the guardian in conducting the suit on behalf of the minor was made out, was a question of law and the High Court could interfere with the finding of the lower appellate court u/s 100, C. P. C.

10. Thus, I have no doubt in my mind that the finding of the lower appellate court on the question of negligence of the plaintiff is one of law and it can be scrutinised by this court in second appeal.

11. Coming to the merits of the case I have to decide the question posed by me in the earlier part of my judgment. namely, whether the act of keeping the key in the wooden almirah of his own office room rather than in his personal custody or in the iron safe in the office room of the Assistant Station Master constituted gross negligence and carelessness of the plaintiff resulting in loss of railway earnings. I agree with the conclusion reached by the lower appellate court that the Assistant Station Master himself got the iron safe kept in his office room sealed and consequently for no fault of his own the plaintiff could not keep the cash in that iron safe and was in fact deprived of the use of the same. Hence, the question of keeping the cash in the Assistant Station Master's Office room did not arise and I have to judge whether the conduct of the plaintiff in leaving the key in a hidden place in the wooden almirah in his own office room could be said to amount to gross negligence on his part. It is my considered opinion that such conduct could not be equated with negligence or want of adequate care on the part of the plaintiff. To me it appears that it would have been far more hazardous for the plaintiff to keep the key in his own custody and carry it along with him when he left the place for home. One is painfully aware of the untoward incidents which frequently occur even in urban areas where shopkeepers and other businessmen, who carry with them the keys of their shops where the earnings and collections are left, have been waylaid and relieved of the keys. The plaintiff

exercised all the care which is expected of a prudent and reasonable man in the circumstances. He kept the key in a hidden place in the wooden almirah which he locked and thereafter locked the office also before leaving. Normally that was sufficient for him to ensure the safety of the key and he could not be blamed for any innovation in this regard. Precisely the same practice had been followed by the Chief Booking Clerks who had preceded him. The law has been from times immemorial that the standard of care for determining negligence in a particular case is founded on a consideration of the care which would be observed by a prudent and reasonable man. It was emphasised in one of the earliest decisions on the point in *Blyth v. Birmingham Water Works* (1856) 156 ER 1047 by Alderson, B. :

"The case turns upon the question, whether the facts proved show that the defendants were guilty of negligence. 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. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done".

I would also like to refer in this connection to the classic speech of Lord Dunedin in *Morton v. William Dixon Ltd.* 1909 SC 807.

"Whether the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

Lord Normand on the above observations of Lord Dunedin and after quoting the same in *Paris v. Stepney Borough Council* (1951) 1 All ER 42 (49) proceeded to add :

"The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances, but it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it"

It has been stated in *Halsbury's Laws of England*, Second Edition, Volume 22, pages 183-184, para. 307 :

"It is the duty of the servant to obey the master's lawful orders and to serve him faithfully. It is also the servant's duty to take proper care of such property of the master as is entrusted to his charge and to exercise reasonable care and skill in the discharge of his duties : and for negligence in these respects the servant may be made liable to the master in damages.

There is however, no such breach of duty if the loss is occasioned by mere accident or circumstances beyond the servant's control "

The rule is further explained in Halsbury's Laws of England, Volume 23, Second Edition, page 572, para. 825 in these words :

" nor can any one be said to be negligent merely because he fails to make provision against an accident which he could not be reasonably expected to foresee."

Bearing these principles in mind I have not the least doubt that the legal basis or the finding of negligence recorded against the plaintiff is very slender. It has also to be remembered that what is habitually done in similar circumstances is a valid defence in a charge of negligence. I would also adopt with respect the principle laid down in *Morris v. West Hartlepool Steam Navigation Co. Ltd.* (1956) 1 All ER 385 by Lord Cohen who after reviewing what had been stated in *Paris v. Stepney Borough Council* (1951) 1 All ER 42 at p. 49 and construing the language used by Parker J. in the case *Tinder* consideration said :

"I think that the effect of their Lordships' observations is that, when the court finds a clearly established practice "in like circumstances", the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one."

12. Thus, the evidence of previous practice in similar circumstances is of very great value if not conclusive, in deciding the question of negligence. In the instant case it has been found by the courts below that there were no rules or orders for keeping the key of the cash-safe in personal custody but the plaintiff adduced specific evidence which was believed by the lower appellate court which proved that the erstwhile Chief Booking Clerks had also been placing the key in the same wooden almirah after locking it and the office room as was done by the plaintiff. This was in my opinion a very strong circumstance which must be construed to the plaintiff's advantage and for justifying his conduct and absolving him from the charge of negligence. On these facts I find it impossible to draw the inference that the plaintiff failed to observe the standard of care of a reasonable and prudent man. The general practice weighs heavily in the scale even though it is not conclusive.

13. Yet another point in favour of the plaintiff is that he was discharging these duties gratuitously. The duties of the Chief Booking Clerk were only additional duties entrusted to him over and above his substantive post as the Head Stock Clerk. Such action cannot be judged by any stricter test than the care of a

reasonable and prudent man. The law is stated in Halsbury's Laws of England, Third Edition, Volume 28, page 8, para 5 :

"Where a person, not professing to be skilled in the particular matter undertakes to do an act for another, without reward, he is only bound to exercise honestly that care which he, as an ordinarily prudent man, would exercise in acting for himself. He is not to be held liable for mistake, or for an error of judgment, which a reasonably prudent man might commit, or for mere non-success."

Applying this criterion also I am of the opinion that the plaintiff cannot be said to have acted without due care and caution in leaving the key of the iron safe in the wooden almirah of his own office. The circumstances are not sufficient to constitute negligence and hence the contrary finding of the courts below that the plaintiff was negligent cannot be affirmed. It will be necessary, to note in this connection that there was not the slightest allegation by the defendant-respondent that the theft of the railway cash was either collusive or that the plaintiff was dishonest and had any complicity in the same. It is thus manifest that the plaintiff was not guilty of negligence and the order of punishment awarded to him by removal from service or recovery of the amount in question from his dues was wholly illegal and must be set aside. The plaintiff's appeal, therefore, succeeds and must be allowed whereas the appeal preferred by the defendant has no substance and must fail.

14. In the result Second Appeal No. 3207 of 1972 preferred by the plaintiff is allowed and the decree passed by the court below is modified. The impugned order removing the plaintiff from service is set aside. The suit is decreed for Rs. 1782.40 Paise as being arrears of pay, dearness allowance etc. claimed in the plaint by the plaintiff. The plaintiff's claim for gratuity permissible under the rules on reaching the age of superannuation is also allowed. The order of the court below setting aside recovery of Rs. 10510.21 Paise from the plaintiff by the defendant is affirmed. Second Appeal No. 2262 of 1973 preferred by the defendant is dismissed. In the circumstances of the case the parties are directed to bear their own costs.