
(1930) 12 CAL CK 0001
In the Calcutta High Court

Secretary of State

APPELLANT

Vs

Gopalmal Purusotham Das

RESPONDENT

Date of Decision : 09-12-1930

Acts Referred:

Contract Act, 1872 — Section 151
Evidence Act, 1872 — Section 106
Railways Act, 1890 — Section 72, 75

Citation : AIR 1932 Cal 3

Hon'ble Judges : Suhrawardy, J; Jack, J

Bench : Full Bench

Judgement

Suhrawardy, J.—This is an appeal by the Secretary of State representing the E.I. Ry. Co., arising out of a suit for the price of goods lost in transit by the railway company. The plaintiff's case is that he sent two consignments of "Benares cloths" from Moghal sarai to Howrah under two prepaid railway receipts, one consignment consisting of one parcel and the other containing two parcels, for street delivery in the city of Calcutta. The first consignment consisting of one parcel was entirely lost and one of the parcels of the second consignment was also lost. Only one parcel of the second consignment was delivered to the consignee. On these facts the plaintiff claimed damages as the value of the goods lost while in the custody of the railway company. The defendant raised various objection's on which two main issues arose and were tried by the Court below: (1) whether the missing packages did not contain silk of the value of more than Rs. 100 in each of the consignments.; and (2) whether the defendant did not fail to do his duties u/s 151, Contract Act. The learned Subordinate Judge in the trial Court found on issue 2 that the loss was due to the negligence and carelessness on the part of the railway company. On issue 1 "he held that the evidence and circumstances of the case did not satisfy him that the lost parcels did not contain silk.

2. In this view he dismissed the suit. On appeal the learned Additional District Judge of Howrah agreed with the trial Court on the finding relating to the

negligence of the railway company. On issue 1 he was however of opinion that the onus lay entirely on the defendant to prove that the lost parcels contained silk cloths and as he failed to discharge it, the plaintiff's suit must be decreed. The defendant has appealed, and we will have to see whether the view of the law taken by the lower appellate Court is correct. It is not disputed that the parcels were sent at the ordinary railway parcels* rate.

3. The learned Judge in the Court of appeal below did not consider the plaintiff's evidence on issue 1 and the criticism of it by the learned Subordinate Judge. In his opinion the defendant can escape only by proving that the lost package contained silk cloth of the value of more than Rs. 100 and as the defendant has failed to prove it, he is liable for the amount claimed, the onus lying entirely upon him. After giving my anxious thought to the question raised, I have come to the conclusion that the position is by no means so clear as the learned Judge seems to think.

4. It is manifest that Section 75, Railways Act, is intended to afford protection to the Railway Administration in certain circumstances. But to insist on the Railway Administration to prove those circumstances is to deny that protection. A package covered and sewn or sealed is handed to it for carriage. It has no means of knowing its contents which are only known to the sender. To demand proof from it that the package contained an article mentioned in Schedule 2 to the Act is to ask a blind man to tell the colour of a flower. Section 106, Evidence Act, is intended to cover cases like this. That section enacts an exception or a proviso to or a rider on the general principle enunciated in Section 102. What a lost parcel contained is within the special knowledge of the sender and he must prove it. Section 72, Railways Act, makes the liability of a Railway Administration as that of a bailee under the Contract Act, "subject to the other provisions of this Act." It will thus be seen that the liability as bailee of a railway company is not absolute and unqualified. One of the provisions to which Section 72 is subject is contained in Section 75 of the Act. That section is so worded as to absolve the railway company, if the articles mentioned in Schedule 2 be of the value of more than Rs. 100 declared or insured and a higher percentage of rate paid. I will read Sections 72 and 75 thus:

5. The Railway Administration as bailee is liable for the loss of a parcel entrusted to it for carriage, provided it does not contain any article mentioned in Schedule 2 exceeding Rs 100 in value. The person therefore who seeks to recover damages from the Railway Administration for goods lost must prove these facts, namely, that he entrusted a parcel to the Railway Administration and that it did not contain any of the excepted articles mentioned in Schedule 2. To hold otherwise would facilitate practising fraud on the Railway Administration. Scheduled articles may be sent at ordinary rate without the knowledge of the Railway Administration and when any such consignment is lost in transit, the defendant is called upon to prove that it contained such articles. The position seems to me absurd, unreasonable and iniquitous. The plaintiff in this case admits, as

remarked by the learned Subordinate Judge, that he always sends silk cloths by railway parcels without insuring them. If any such parcel were lost, the defendant would have found himself at the mercy of the plaintiff to prove its contents. Reliance has been placed by the lower appellate Court on *Sudarsan Maharaj Nandram v. E.I. By. Co.* [1920] 42 All. 76 where no doubt the learned Judge sitting singly said:

in order to avoid liability under the provisions of Section 75 Act 9 of 1890, a railway company has to establish two conditions. The first is that the articles composing the consignment are articles mentioned in Schedule 2. The second is that the total value of the consignment exceeds Rs. 100.

6. The question of the burden of proof was not raised in that case and was not discussed. The question which the learned Judge was called upon to decide was whether the word "lace" used in Schedule 2 was intended for both machine made and hand made laces. That case accordingly should not be treated as authority in support of the view taken by the learned Judge.

7. The question may be viewed from another standpoint. The plaintiff claims the price of goods lost. He must prove what the goods were and their value. He cannot put a fancy claim without proving that the goods were worth the amount claimed. There are circumstances in this case which must be taken into account in weighing the evidence relating to the contents of the lost packages. The parcels are said to have contained "Benares cloths" which ordinarily suggest silk cloths generally embroidered. The plaintiff's witness, the consignee and purchaser, says that the cloth he purchased was not made of cotton, but it was of the stuff called *belati. chamak*. We do not know what that stuff is, but, according to the plaintiff's own evidence it was not cotton. Defendant's witness, the Claims Inspector, says that the plaintiff told him that Benares cloths were prepared from waste silk. The plaintiff did not produce the cloths of which open delivery was given. He also did not produce his *khatas* to show the stuff of which the cloths were made. He is a trader in cloths and supplies yarns to the workmen to make cloths for him. It is reasonable to expect that the *khatas* would show the nature of the yarns used for making these cloths. Then one other important circumstance upon which the learned Subordinate Judge laid much stress is that two of the saris in the lost parcels were worth Rs. 113 and three others called *pote janglas* were worth Rs. 360 or Rs. 120 each. This is too high a price for an ordinary cotton sari, and the learned Subordinate Judge is far from being wrong in dismissing the explanation of all these circumstances coming from the plaintiff. On the other hand the fact which goes against the defendant is that he did not cause to be produced some cloths of the lost packages which, it is said, were picked up by a railway police officer. The learned District Judge has not considered the evidence adduced by the parties on this issue. He asked the defendant to prove that the lost parcels contained silk and as the defendant was not able to discharge the burden, he was held liable for the price of goods lost. This mode of dealing with the case does not commend itself to us. In a case like

this it was the duty of the learned Judge at any rate to consider the entire evidence, to lay the onus in the proper quarter and decide the case on the evidence on the record. The issue as framed put the onus on the plaintiff.

8. As to issue 2 both the Courts below have concurrently found that the goods were lost owing to the negligence of the railway administration. That point must now be taken as settled. If the Court below finds that goods did not contain silk, the defendant is clearly liable for damages; if on the other hand it finds that they did, the defendant must be held exempt from liability u/s 75 of the Act.

9. The result therefore is that the appeal is allowed, the decree of the lower appellate Court set aside and the case remitted to that Court for a rehearing of the appeal on the evidence on the record and in the light of the above observations. Costs of this appeal will abide the final result.

Jack, J.

10. I agree.