

(1933) 04 AHC CK 0002
In the Allahabad High Court

Secretary of State

APPELLANT

Vs

Raghubar Dayal-Babu Ram

RESPONDENT

Date of Decision : 10-04-1933

Acts Referred:

Contract Act, 1872 — Section 73

Citation : AIR 1933 All 595

Hon'ble Judges : Bennet, J

Bench : Division Bench

Judgement

Bennet, J.—This is a second appeal by the Secretary of State for India in Council through the Agent of the East Indian Railway, Calcutta, against a decree of the learned Subordinate Judge of Cawnpore. The plaintiffs are merchants in Cawnpore, and there was a consignment of 200 bundles of steel rods despatched from Kidderpore Dock station on 22nd August 1929, for the plaintiffs as consignees to Lucknow. The consignment reached Lucknow on 30th August 1929, and at the instance of the plaintiffs the consignment was re-booked for Cawnpore on 11th September 1929, and reached Cawnpore on 15th September 1929. When the consignment arrived at Cawnpore the plaintiffs refused to take delivery of the consignment because they alleged that 9 bundles out of the 200 bundles of steel rods had been changed and did not bear the marks which were on the invoices of the shippers from Europe. There was also difference in the weight of some 12 maunds, 13 seers and 8 chhataks short. Now the plaintiffs in consigning the goods in Kidderpore had not put in their invoice for the railway the marks which were on the goods in the shippers' invoices. Accordingly the Railway Company were apparently unable in the first instance to check the accuracy of the claim of the plaintiffs. The Railway Company therefore on 5th October through the goods Inspector asked the plaintiffs to take delivery on a clear receipt: as the number of bundles was correct, and they suggested that a refund of freight should be granted only on the shortage of 12 maunds odd in the weight. The plaintiffs on 7th October 1929, objected to this procedure, and alleged that "there was an exchange of the packages which are not in the

invoice." Further correspondence followed between the parties and on 24th February 1930 the Commercial Manager wrote as follows:

As 191 bundles of the- above consignment agree with the specifications in your Beejak there is no justification for your declining to effect delivery of them. Will you please arrange to remove these 191 bundles at an early date and then submit your claim for the rejected 9 bundles which will be considered,

2. In reply to this the plaintiffs wrote on 7th March 1930:

We note that you admit that an exchange has taken place. It is too late to ask us to remove the bundles which we cannot sell as there will be a very heavy loss. But if you will promise to make good our loss we shall sell them for the sake of you.

3. As the plaintiffs refused the offer it was withdrawn. Eventually the plaintiffs brought the present suit. The Court of first instance granted the plaintiffs a decree for return of the 191 bundles and damages for the 9 bundles, less freight and wharfage at Lucknow, the decree in favour of the plaintiffs being for Rs. 52-1-7 with interest at 6 per cent, per annum on this amount from 16th September 1929, till date of payment. The plaintiffs appealed to the lower appellate Court, and that Court has granted a decree for the recovery of Rs. 1,320-13-6 and interest at 6 per cent, per annum from 16th September 1929, the date of the arrival of the consignment in Cawnpore. This decree is for the total value of the 200 bundles of steel rods. In second appeal before us it is admitted that the Railway Company has a liability for the 9 bundles of steel rods as if it was not contested that those bundles did not correspond to the bundles shown in the shippers' invoices produced by the plaintiffs, but it is contended that this is the only sum for which, the Railway Company is liable. It is contended that in the first place the consignment was sent under Risk Note Form A on account of the steel rods being defectively packed, and under this Risk Note the Railway Company was only liable for loss arising from misconduct on the part of the railway administration's servants. It is further urged that under Rule 45 of the Goods Tariff Part 1-A rules, the following rule applies:

A consignee must take delivery of goods forming part of a, consignment whenever they are available for delivery notwithstanding that the remaining goods are short or damaged or have not arrived at their destination or are otherwise not available for delivery ; and, if the consignee does not take delivery of such goods forming part of a consignment as are available for delivery, they will be subject to wharfage charges if not removed within the time allowed for removal.

4. Under this the plaintiffs were bound to take partial delivery of the consignment, that is, the plaintiffs were bound to take delivery of the 191 bundles in spite of the fact that 9 bundles were not tendered to the plaintiffs. We have no doubt that this rule applies, when on 24th February 1930, the Commercial Manager offered delivery of the 191 bundles to the plaintiffs. learned

Counsel for the respondents argued that the plaintiffs were entitled to get a certificate of short delivery. But the very terms of the letter in question show that a short delivery was being offered, and no further certificate was necessary. The plaintiffs indeed did not claim any certificate of short delivery in their reply of 7th March 1930, but they refused the offer on the ground that there would be a heavy loss between the date of arrival and the date of the offer. No evidence has been given by the plaintiffs to show that there was any fall in price between these two dates, and in any case we do not consider that the period of time which had elapsed, about five months, was an unreasonable period. "As we have pointed out, the delay was occasioned by the fact, in the first place, that the plaintiffs had never asked for delivery of the 191 bundles alone, and secondly that the plaintiffs had not put in their forwarding notes the marks which were in the shippers' invoices, and therefore it was not possible for the Railway Company to ascertain whether the objection made by the plaintiffs was well-founded or not. We consider that this failure of the plaintiffs to accept the offer of 24th February 1930, governs the rights of the parties in this case, and that having once refused that offer, the plaintiffs are not entitled to claim any damages in regard to the 191 bundles. The legal rights of the plaintiffs are limited to the return of these 191 bundles, and that was granted in the decree of the Court of first instance.

5. It has been argued in second appeal that the plaintiffs were entitled to damages in regard to the 191 bundles u/s 73, Contract Act, that is, to the difference in price of these 191 bundles at the date when they should have been delivered and at some later date. In the first place the plaintiffs did not make their claim on these lines, and in the second place plaintiffs did not tender any evidence to the Court of first instance that there was any fall in price or any deterioration of the materials. It was only after the evidence had closed before the Court of first instance that the plaintiffs made an application to produce evidence that there had been a fall in price, and the Court of first instance rejected that application as made too late. This matter again formed part of the grounds of appeal to the lower appellate Court, but the allegation merely was that there had been deterioration of the goods and a fall in price during the period of 17 months. We consider that the period of 17 months cannot apply, and the only period to be considered would be five months, and as already stated, no evidence was produced in regard to any such fall or deterioration in that period. The lower appellate Court did not act on this principle u/s 73, Contract Act, but the lower appellate Court went beyond that section and granted a decree for the total value of the 200 bundles. We consider that this decree of the lower appellate Court was contrary to law.

6. Under the circumstances of this case we consider that the correct decree is the decree passed by the Court of first instance, and accordingly we restore that decree except as regards costs. That Court decreed costs in proportion to success and failure and assessed those costs as 2/3rd in favour of the plaintiffs and one-third in favour of the defendant. Those figures are apparently based on

a consideration of the value of the 191 bundles, but the Railway Company did not at any period make an objection to delivery of those bundles to the plaintiffs. Accordingly we do not consider that the value of those 191 bundles is a factor to take into account in the (apportionment of costs. The plaintiffs brought the suit for Rs. 1590-8-9, and the decree which we grant is for Rs. 52-1-7. Accordingly we direct that the parties shall pay and receive costs throughout in all Courts in proportion to their success and failure.