

(1969) 05 PAT CK 0011
In the Patna High Court
Case No : A.F.A.D. No. 225 of 1966

Sobharam Jokhiram

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 16-05-1969

Acts Referred:

Evidence Act, 1872 — Section 106

Railways Act, 1890 — Section 74A, 74A(1), 74A(2), 74C, 74C(3)

Citation : AIR 1970 Patna 182 : (1969) 17 BLJR 871 : (1969) 2 PLJR 399

Hon'ble Judges : Tarkeshwarnath, J;K.K. Dutta, J

Bench : Division Bench

Advocate : B.P. Rajgarhia and Biswanath Agarwal, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Dismissed

Judgement

Dutta, J.—This appeal arises put of a suit for recovery of compensation on account of shortage in delivery out of a consignment of 696 tins of cocoanut oil, which were booked from Trichur station of the Southern Railway to Sahebganj station of the Eastern Railway on 30-3-6C under Railway Receipt No. 470341 Invoice No. 13. The consignment reached Sahebganj Railway station on 22-4-60 and thereafter, open delivery was taken by the plaintiffs in whose favour the railway Receipt had been transferred. 289 tins of cocoanut oil were found to have become dented and leaky and out of these. 71 tins were found to be completely empty and the remaining 218 tins were partly empty and this had resulted in a shortage of 42 maunds 2 seers of cocoanut oil and aforesaid 289 tins were further alleged to have become completely unserviceable. The shortage, according to the plaintiff was caused by the negligence and misconduct on the part of the Southern Railway, South Eastern Railway and Eastern Railway and their servants. The plaintiff claimed to have duly issued notices u/s 77 of the Indian Railways Act and Section 80 of the CPC to the General Managers of the aforesaid Railways, but they failed to satisfy the plaintiffs' claim. On these allegations, the plaintiff brought the suit out of which this appeal arises, claiming

a sum of Rs. 3805/8/, on account of the value of 42 maunds 2 seers of cocoa-nut oil and a further sum of Rs. 433/8/- on account of the price of 289 tins besides some other amounts, the total claim being for Rs. 4700.

2. A written statement was filed in the suit by the Union of India as owner of the Eastern Railway and, subsequently, the same written statement was adopted by the Union of India as owner of the Southern Railway and South Eastern Railway also. The defendant challenged the plaintiff's allegation about the aforesaid loss being due to negligence or misconduct on the part of the Railway Administration concerned or their servants. The damage caused to the tins and the resulting shortage due to leakage therefrom were ascribed as being solely due to the failure of the consignors in packing the tins properly in cases or crates in accordance with the Tariff Rules and also due to their failure to provide sufficient dunnage in between the tins in consequence of which these could not stand the strain due to normal oscillation of the train in course of the long journey of over 1000 miles. The defendant further alleged that the consignments had been booked at the risk of the consignor and after booking the tins were loaded in Wagon No. 49588 of Northern Railway in presence of the senders' agent at Trichur and after loading the wagon was properly sealed and rivetted in his presence and subsequently the wagon reached Sahebganj with both sides original seals and rivets intact. The fact that on opening the wagon at Sahebganj in presence of the plaintiffs' agent, 71 tins were found to be entirely empty and 218 tins partly empty resulting in the total shortage of 42 maunds 2 seers of cocoanut oil was admitted. The defendant further denied the legality and validity of the service of notices u/s 77 of the Railways Act and Section 80 of the CPC and the claim as made by the plaintiff was further alleged to be highly inflated and exaggerated. Pleas of limitation as well as non-maintainability of the suit as framed was also taken.

3. The issues regarding limitation and invalidity of the service of notices u/s 77 of the Railways Act and Section 80 of the CPC and non-maintainability of the suit were decided against the defendant and the correctness of these findings was not challenged in the present appeal. The trial court further held that there was failure on the part of the Railway servants to affix the label not to be loose shunted on the wagon in which the consignment was carried and the damage to the tins of cocoanut oil, which had resulted in leakage therefrom, was caused on account of severe, jolting which took place in consequence of the loose shunting of the wagon in course of the journey. That court accordingly came to the finding that the damage was due to the negligence of the servants of the Railway Administration and the plaintiff was, therefore, held to be entitled to recover damage for the loss sustained by it. The entire amount of Rs. 3805/8/- as claimed by the plaintiff on account of the value of the cocoanut oil was allowed by that court, but the amount claimed on account of the price of the tins was reduced by allowing the same at the rate of ten annas per tin. Some further amounts were allowed on account of incidental charges and profits at the rate of 5 per cent on the value of the oil and on account of costs on notices etc. and. in

all, a decree for a total amount of Rupees 4192/2/- was passed by that court.

4. There was an appeal by the defendant and the lower appellate court disagreed with the finding of the trial court that the damage was caused on account of loose shunting and held that the possibility about damage to the tins having been caused as a result of toppling down and then tossing on the floor in course of the normal movement of the train could not be ruled out in the circumstances of the case. It was further held that there was no evidence to prove any negligence or misconduct on the part of the Railway Administrations and their servants in dealing with the consignment while in transit and the plaintiff was accordingly held to be not entitled to recover any amount as damage. The appeal was, accordingly, allowed and the decree as passed by the trial court was set aside. The present appeal has thereon been preferred by the plaintiff.

5. Before proceeding to discuss the points that were urged before us in the present appeal, it will be convenient to refer to certain facts which are not disputed. As already mentioned, the defence case was that the consignment was loaded at Trichur in a wagon which was duly rivetted and sealed and the same arrived at the destination, that is, Sahebganj with the seals and rivets intact. This version has not been challenged and it was admitted that the consignment had arrived at Sahebganj in the same wagon in which it had been loaded at Trichur and that the seals and rivets of that wagon were found to be intact. It is further admitted that the shortage was not due to any pilferage but was actually due to leakage from the tins in consequence of the tins having become dented and leaky as a result of toppling down and jolting in course of the journey from Trichur to Sahebganj. Hence the only point that has to be determined is whether the damage to the tins was caused on account of any negligence or misconduct on the part of the Railway Administrations or their servants.

6. The lower appellate court has come to the finding that the provisions of Section 74A (as the same stood prior to the amendment of the year 1961) were applicable to the case and, as such, the Railway Administrations could not be held liable for the loss and damage except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants. This section, as it stood prior to the amendment of 1961, was as follows:

"(1) When any goods tendered to a railway administration for carriage by railway--

(a) are in a defective condition as a consequence of which they are liable to deterioration, leakage, wastage or damage in transit, or

(b) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under Sub-section (2) and, as a result of such defective or improper packing, are liable to leakage, wastage or damage in transit,

and the fact of such condition or defective or improper packing has been

recorded by the sender or his agent in the forwarding note, the railway administration shall not be responsible for any deterioration, leakage, wastage or damage, or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants.

(2) The Central Government may, by general or special order, prescribe the manner in which goods tendered to a railway administration for carriage by railway shall be packed."

It is thus manifest that for the applicability of the provisions of this section, which exonerates the railway administration for any deterioration or leakage, wastage or damage to the consignment except upon proof of negligence or misconduct, two conditions have to be satisfied, namely, (i) that the goods tendered to the railway administration for carriage were in defective condition in consequence of which they were liable to deterioration, leakage, wastage or damage or that they were either defectively packed or packed in a manner not in accordance with the general and special order, if any, issued under Sub-section (2) and as a result of such defective and improper packing were liable to wastage or damage and (ii) that the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note. In the present case, it has been found by both the courts below that the tins of the cocoanut oil were not packed in cases or crates in accordance with the prescribed rules, but had been merely tied with some coir ropes and, as such, these were defectively packed and were liable to leakage, wastage or damage in course of the transit thereon. These findings are fully supported by the entries in the Railway Receipt as well as by the admissions of "the plaintiff's witnesses. It appears, however, that the forwarding note has not been proved in this case with the result that the second condition for the applicability of these provisions regarding onus as incorporated in Section 74A, namely recording of the defective and improper packing by the sender or his agent has not been satisfied. It was contended on behalf of the respondent that the non-production of the forwarding note is not of any importance as the fact that the goods were defectively packed is admitted in the present case and, as such, the provisions of Section 74A regarding onus should be held to be applicable. This contention, however, cannot be accepted. According to the terms of this section, there should be not only a defective packing of the goods or packing in a manner not in accordance with any general and special order issued under Sub-section (2), but the fact of such defective or improper packing must also be recorded by the sender or his agent in the forwarding note. The admissions as made by the plaintiff's witnesses merely prove that one of the conditions for the applicability of the section, namely, the defective packing of the goods, has been established, but that cannot dispense with the other condition laid down in the section, namely, recording of such defective packing in the forwarding note itself by the sender or his agent. Hence, the aforesaid contentions as made on behalf of the Respondent cannot be upheld and the view taken by the courts below that the provisions of

Section 74A are applicable to this case cannot be accepted as correct. It follows, therefore, that this section, that is Section 74A can have no bearing in determination of the point whether the damage in question was due to any negligence or misconduct on the part of the railway administration or its servants.

7. It was next contended on behalf of the appellant that the provisions of Section 74A being inapplicable to this case for reasons mentioned above, it was not open to the Courts below to arrive at any finding that the consignment was defectively packed. This contention, however, appears to be quite untenable, as there is nothing in Section 74A which provides that the defective condition of the packing can be proved only in cases to which the provisions of this section will apply. Reliance was placed on behalf of the appellant in this connection on a decision in Bihar Agents Ltd. Vs. Union of India (UOI) and Others, . This was a decision of a Single Judge of this Court and in this case there was pilferage from a consignment of a bale of cloths. The goods in this case had been booked at the owner's risk and after rejecting the contention of the Respondent about the applicability -f Section 74A, the following observations were made:

"In my opinion, therefore, the instant case is governed by Section 74C of the Railways Act, and the bales must be deemed to have been despatched at simply owner's risk rate, and cannot be held to have been despatched in a defective or Improper packing. If it is a case of Section 74C only, as in my opinion it is, the provisions of Section 74D are clearly attracted and this was fairly conceded by Mr. Bose also. Then the obligation to disclose is there on the railway."

The question as to whether the defendant is debarred from proving that the goods were defectively packed in cases where the provisions of Section 74A are found to be inapplicable on account of the failure to bring on record and prove the forwarding note to show that there is no such defective packing therein does not appear to have been specifically raised or decided in the above case and, as such, it cannot be held to be an authority for this contention. As already mentioned, there is nothing in the section itself to support this contention and the only effect of failure of the defendant to prove the forwarding note would be that the consequences as laid down in the last portion of Sub-section (1) could not follow. Hence, the contention that it was not open to the courts below to come to a finding about the goods having been, packed in defective condition is quite untenable.

8. Now although the provisions of Section 74A are not applicable in view of the Facts of the present case, there cannot be any doubt regarding the applicability of Section 74C, as it is admitted that the consignment was booked at the owner's risk rate and this position was fairly conceded by learned Counsel on behalf of the appellant also. This section provides as follows:

"(1) When any animals or 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 this Act referred to as

the railway risk rate) or in the alternative at a special reduced rate (in this Act referred to as the owner's risk rate), the animals or 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.

(2) 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.

(3) When any animals or 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 of any of its servants."

It is also necessary to refer to Section 74D in this connection which runs as follows:

"Notwithstanding anything contained in Section 74C--(a) where the whole of a consignment of goods or the whole of any package forming part of a consignment carried at owner's risk rate is not delivered to the consignee and such non-delivery is not proved by the railway administration to have been due to any accident to the train or to fire, or

(b) where, in respect of any consignment of goods or of any package which had been so covered or protected that the covering or protection was not readily removable by hand, it is pointed out to the railway administration on or before delivery that any part of such consignment or package had been pilfered in transit.

The railway administration shall be bound to disclose to the consignor how the consignment or package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor."

9. In view of the provisions of Sub-section (3) of Section 74C, as the consignment in this case was booked at the owner's risk rate, there cannot be any doubt that the railway administration cannot be held to be responsible for any loss, deterioration, destruction or damage to the goods from any cause whatsoever except upon proof that the same was due to the negligence or misconduct on the part of the railway administration or any of its servants. u/s 74D, no doubt, the railway administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, but this liability for disclosure arises only in the circumstances mentioned in Clauses (a) and (b) of this section that is, either when the whole of

the consignment or whole of any package forming part of the consignment is not delivered and such delivery is not due to any accident to the train or to fire when there has been pilferage in transit in the circumstances mentioned in Clause (b). In the instant case there is no question of applicability of Clause (b) for, as already mentioned, it is admitted that the loss in this case was not due to any pilferage. Clause (a) also appears to be inapplicable in the present case, as there was neither any non-delivery of the whole consignment nor any non-delivery of the whole of any package forming part of the consignment, as although some of the tins were found to be completely empty, the tins themselves also constitute parts of the packages concerned. If the railway had failed to deliver any of the tins containing coconut oil, the case would have been covered by Clause (a), but as this was not the position, it cannot be said that there was any non-delivery of the whole of any of the packages forming part of the consignment. As neither Clause (a) nor Clause (b) of Section 74D applies to the facts of the present case, there was no liability on the railway to make any disclosure to the consignor in accordance with the provisions of this section.

10. It was, however, contended on behalf of the appellants that even if there was no liability on the part of the railway to make any disclosure u/s 74D, the railway was bound to give evidence making disclosure as to how the consignment had been dealt with throughout the time it was in its possession in view of the provisions of Section 106 of the Evidence Act, as these facts were within the special knowledge of the defendants. The decisions reported in *Union of India v. Delhi Cloth and General Mills Co. Ltd.* AIR 1964 P&H 147, *Textiles and Yarn (P) Ltd. Vs. Indian National Steamship Co. Ltd.*, , *Ramkrina Ramnath Shop Vs. Union of India and Others*, were relied upon in support of this contention and the decision in *Governor-General in Council Vs. Ramglal Nandlal*, was also relied upon in this connection. The principle laid down in these cases is that if a material fact is within the special knowledge of a party, an adverse inference can be drawn against him if he fails to adduce evidence on that point and, similarly, an adverse inference can be drawn if a party fails to adduce some material evidence. In the present case, the plaintiffs did not call upon the defendant at any stage of the case to produce any particular evidence or to make any disclosure on any particular point. The only prayer for disclosure is contained in paragraph 7 of the plaint, which runs as follows:

"The plaintiff is unable to give particulars of negligence and/or misconduct on the part of the Railways and/or their servants until the defendant Union of India gives full disclosure as to how the suit goods were dealt throughout the time the same were in the possession and control of the Railways. The plaintiff hereby calls upon the defendant Union of India to give such disclosure."

The disclosure that was sought for in this paragraph is evidently a disclosure as contemplated by Section 74D of the Railways Act and, as already mentioned, this section has no application to the facts of the present case. It further transpires that in reply to paragraph 7 of the plaint, the defendant had disclosed in

paragraph 11 of the written statement about the consignment having been booked at the risk of the consignor, and had further stated that after booking, the tins were loaded in wagon No. 49588 NR in the presence of the senders' agent at Trichur and after loading, the wagon was properly sealed and riveted in presence of the senders' agent and after this the wagon left Trichur for its destination and reached Sahebganj on 22-4-60 with both sides original seals and rivets intact. After these statements by the defendants, the plaintiff did not pray for any disclosure by the defendant on any further point and did not call upon the defendant to adduce any evidence on any particular point. As such, the contention that an adverse inference should be drawn against the defendant in accordance with Section 106 of the Evidence Act for the failure of the defendant to adduce evidence as to how the consignment was dealt with at the booking station or at any other place is quite untenable.

11. It would thus appear that in view of the provisions of Section 74C, already referred to above, the railway administration cannot be held liable for the loss in the present case unless it is proved that this loss was due to negligence or misconduct on the part of the railway administration or its employees. In the plaint itself, there is no allegation of any particular act of negligence or misconduct and, as already mentioned, in paragraph 7 of the plaint, the plaintiff expressed its inability to give any such particulars. The only negligence that was alleged during the hearing of the case was that there was failure on the part of the railway administration to affix to the wagon the label "not to be loose shunted" and it was in consequence of this failure that there had been loose shunting of the wagon in course of the journey and the damage took place due to that. The trial court accepted the plaintiff's case about no such label having been affixed to the wagon, but the lower appellate Court has not come to any definite finding on this point, as it was of the view that this was quite immaterial as no rule had been produced before that court to show that affixing of such label was necessary. Some of the rules, however, were placed before us and it appears that Rule 152 of the General Rules framed u/s 47 of the Indian Railways Act provides as follows:

"Vehicles containing passengers, explosives dangerous goods, or livestock shall not be loose shunted and no loose-shunting shall be made against such vehicles."

Another rule which is relevant in this connection is Rule 132 (B) which appears to be one of the rules issued under Standing Orders of the Operating Department and it runs as follows:

"Loose shunting of the following descriptions of wagons (among others) is strictly prohibited by G. R. and S. R. 152 (b);

* * * *

(12) Wagons loaded with ghee, vegetable oils (i.e. mustard, castor, mowha, til and linseed) methylated and denatured spirits and lubricating, groundnut and cocoanut oils.

* * * *

Wagons containing the abovementioned consignments must be labelled prominently on both sides with a special label "Not to be loose shunted" printed in red, specifically provided for the purpose.

Station-Masters and Yard-Masters particularly at Stations with Hump-yards must see that wagons bearing the above label are not loose or fly-shunted under any circumstances."

It would thus appear that according to the aforesaid Rule 132 of the Standing Orders, wagons containing cocoanut oil are also required to be affixed with a label "not to be loose shunted", so that such wagons may not be loose shunted in any of the stations in course of the journey from the starting station to the destination. It was contended on behalf of the Respondent that although General Rule 152, referred to above, has statutory force, Standing Order Rule 132 has no such force and, as such, any failure to comply with the directions regarding affixing of label as given in Rule 132 of the Standing Order cannot be construed as amounting to any negligence on the part of the railway servants. It was also contended by him that so far as Rule 152 of the General Rules is concerned, there is nothing to show that cocoanut oil is a dangerous goods and, as such, it cannot be held to come within the purview of this rule. As no materials have been placed before us to show that cocoanut oil has been classified or described as a dangerous goods, there appears to be some force in this contention that Rule 152 of the General Rules, which is a statutory rule, does not cover cocoanut oil. Rule 132 of the Standing Order, however, specifically prohibits shunting of a wagon containing cocoanut oil and also directs the affixing of the label, as mentioned above, to such wagon although this rule cannot be said to have statutory force, the contention that a breach of this rule by the railway servants cannot be construed as amounting to negligence by them, does not appear to be at all tenable. As these rules have been framed for the guidance of the railway servants, it is their duty to obey these directions and if they fail to comply with such directions, such non-compliance must be construed as amounting to negligence by them. In this connection, reliance was placed on behalf of the respondent on the decision in the case of Union of India, Railway Administration, Madras and Others Vs. Eastern Match Co., Tirumangalam, in which some observations have been made to the effect that no negligence can be inferred from the mere fact of non-observance of certain rules in the Red Tariff, which were held to be mere executive instructions. I am unable to agree with this view so far as Rule 132, referred to above, is concerned, as although this rule was a departmental rule, the railway servants were bound to carry out the directions as contained therein and their failure to carry out the same would clearly amount to negligence on their part.

12. It would thus appear that if it is found that the plaintiff has been able to establish that no label of the description mentioned above was affixed to the wagon in question, it will have to be held that there had been some negligence

on the part of the railway servants. In this case, evidence has been adduced by the plaintiff's witnesses to show that no such label was found affixed on the wagon after its arrival at the destination, that is, Sahebganj. On the other hand, one of the defence witnesses has deposed to the effect that such label was found affixed, but as observed by the trial court, he admitted that he did not remember about the fact but had made his statements to this effect merely because there was no mention about it in the D. D. which he sent to the higher railway authorities after arrival of the wagon. As against this, the version of the plaintiff's witnesses is supported by the entry fExt. 6) as made in the Goods Delivery Book at the time of delivery of the consignment in which there is specific mention of the fact that the wagon did not bear any such label. It would thus appear that the trial court has come to a correct finding that there was no such label on the wagon when it arrived at the destination. The question, however, arises as to whether from this fact alone, an inference can be drawn that no such label had been affixed on the wagon even at the starting station, as required by the rules. The journey of the wagon covered a period of 23 days and a distance of over 1000 miles as mentioned in the written statement and the possibility about the label having become detached from the wagon during this long period cannot be excluded. No evidence has been adduced on behalf of the plaintiff by examining the consignors or their agent to show that no such label was affixed at the starting station. It is true that the defendant also has not adduced any evidence to show that any such label was actually affixed on the wagon but the onus in the present case being on the plaintiff, it was incumbent upon the plaintiff to adduce evidence on the aforesaid point and in view of their failure to examine the consignors or their agent, it cannot be held to have discharged that onus. Besides, as I have already mentioned, no specific plea was taken in the plaint itself about any particular act of negligence and there was no allegation therein that there was no affixing of the label at the starting station or that the wagon did not bear any such label. In these circumstances, it would appear that the evidence is quite insufficient for coming to a finding that no such label was affixed on the wagon in question at the starting station and that there was negligence on the part of the Railway servants by non-observance of the rule relating to the affixing of such labels.

13. It was further incumbent upon the plaintiff to prove that the damage in question was caused as a result of loose shunting. There is no evidence to show that there was any such loose shunting, but an inference about such loose shunting is sought to be drawn from the condition in which the damaged tins from which the oil had partly or wholly leaked out, were found at the destination. It is not disputed that these tins had become dented and some of the joints thereof had burst and the tins had become open at places as a result of jolting. The question, however, arises as to whether the jolting was due to loose shunting or due to natural oscillation of the wagon in course of the journey coupled with the fact that the tins had not been packed in any cases or crates as prescribed by the rules and they could not stand the strain of such jolting. The trial court

appears to have come to the finding that there was loose shunting merely on the basis of the aforesaid condition of the tins while the lower appellate court has observed that such inference cannot be drawn and this condition might have resulted from natural oscillation of the wagon in course of the lone journey when the tins were not protected by being packed in the prescribed manner. In absence of any evidence to show that there was actually any loose shunting, the mere fact that the tins which were not packed in cases or crates were found in the aforesaid condition cannot necessarily lead to an inference that this was the result of severe jolting due to loose shunting and not due to natural oscillation of the wagon during the journey, It is a matter of common experience that the natural oscillation of the carriages during their movement along the railway line is particularly severe at the junction of different lines. In these circumstances, it would follow that the evidence as adduced in this case is quite sufficient for establishing that the damage in question was caused due to any negligence on the part of the railway administration or its employees and, as such, the plaintiff's claim appears to have been rightly disallowed by the lower appellate court.

14. In the result the appeal is dismissed and the judgment and decree of the lower appellate court are hereby affirmed. The parties shall bear their own costs of this appeal.

Tarkeshwar Nath, J.

15. I agree.