

(1957) 02 CAL CK 0020

In the Calcutta High Court

Case No : Appeal from Original Decree No. 126 of 1954

Sukul Bros

APPELLANT

Vs

H.K. Kavarana

RESPONDENT

Date of Decision : 18-02-1957

Acts Referred:

Carriers Act, 1865 — Section 10, 8
Contract Act, 1872 — Section 180

Citation : AIR 1958 Cal 730 : (1958) 1 ILR (Cal) 376

Hon'ble Judges : S.R. Das Gupta, J; Bachawat, J

Bench : Division Bench

Advocate : N.N. Bose, for the Appellant; P.P. Jinwala and Dipak Sen, for the Respondent

Final Decision : Allowed

Judgement

Bachawat, J.—This appeal arises out of a suit in which the Plaintiff seeks to recover from the Defendant firm the sum of Rs. 12,220 as damages for breach of its duty as common carrier to deliver 45 bales of jute entrusted to it for carriage, alternatively as damages for conversion of the goods. By his declaration in the plaint the Plaintiff states that on the 29th of January 1952 he delivered to the Defendant 45 bales of jute for transport from the Calcutta Hydraulic Press Ghat at Cossipore to Howrah Jute Mills Ltd. and safe delivery thereof to Howrah Jute Mills Ltd. for reward and that the said 45 bales of jute were accepted by the Defendant for carriage and safe delivery as aforesaid and were duly loaded on the Defendant's vehicle No. MBL 4327. By its defence the Defendant denied that it was a common carrier. It also denied delivery and entrustment of the goods to it by the Plaintiff. The Defendant firm alleged that it only let out to the Plaintiff on hire the vehicle No. WBL 4327 and provided the Plaintiff with a driver, that the said vehicle and the driver thereof were under the full control, custody and supervision of the Plaintiff and that the 45 bales of jute were lost while the same were under the custody and control of the Plaintiff. It also pleaded absence of statutory notice required by Section 10 of the Carrier's Act. Upon these

pleadings, issue was joined and the action was tried by his lordship Bose J. Evidence, both oral and documentary, was adduced on behalf of both parties. The learned trial Judge accepted the testimony of the Plaintiff's witnesses. He discarded the testimony of Kalap Nath Sukul, the partner of the Defendant firm, as unreliable.

2. The evidence adduced at the trial establishes the following facts. The Plaintiff is a carrier of goods and possesses 2 lorries. Messrs. Sinclair Murray and Company Ltd. who have a godown at the Calcutta Hydraulic Press have to send goods to their customers. Such goods are carried in their own lorries and also in other persons' lorries. Whenever they require other lorries they approach the Plaintiff who carries the goods in his own lorries and whenever necessary employs other lorries. The Plaintiff says that he is the sole transport agent of Sinclair Murray and Company Ltd. for the purposes of such carriage and that he is responsible to Sinclair Murray and Company Ltd. for the safe carriage of all goods carried by the Plaintiff or other carriers engaged by him. (Plaintiff-Questions 166, 174, 179-80, 369-70, Daroga Singh-Question 31-33.) The goods used to be taken out of the godown, of Sinclair Murray and Company Ltd. and loaded on the lorries by the coolies of Sinclair Murray and Company Ltd. and then stacked by the driver and the coolies attached to the lorries. A chalan addressed by Sinclair Murray and Company Ltd. to the consignee used to be given by their clerk to the driver of the lorry concerned. The driver on unloading the goods at the destination used to obtain a receipt for the goods on the chalan. The chalan thereafter used to be collected from the Defendant firm by the Plaintiff's employee (Daroga Singh-Questions 61-64; Dharendra Prosad Dutta Gupta-Questions 14-15; Plaintiff- Question 504). On the 29th of January, 1952 the Plaintiff personally engaged the Defendant to carry jute from the Calcutta Hydraulic Press to the Howrah Jute Mills and instructed the Defendant to send the lorries to his principal's place at the Calcutta Hydraulic Press. The employment was oral and was on a promise to pay remuneration fixed on the basis of the bales to be carried (Plaintiff Questions 341-46). It appears that the Defendant used to obtain payment of the hire against bills made out in the name of and submitted to the Plaintiff. On the same day, the Defendant sent its lorries Nos. WBQ 927 and WBL 4327 to the Calcutta Hydraulic Press with drivers and coolies. The lorries were loaded with the goods as usual. One Ujagar Singh, an employee of the Defendant, supervised the loading. Dharendra Prosad Dutta Gupta, a clerk of Sinclair Murray and Company Ltd., gave the usual chalans to the drivers and gave them instructions as to the destination (Daroga Singh-Questions 90, 102-03, 107-10; Dharendra Prosad Dutt Gupta-Questions 22-24). The lorry No. 927 duly reached its destination and the driver duly delivered the goods. Matru Goala, the driver of lorry No. 4327, absconded with the lorry and with the 45 bales of jute loaded on it. The lorry was later recovered. The goods were not recovered and are now lost. By a letter, dated the 1st of February, 1950 Sinclair Murray and Company demanded from the Plaintiff payment of the sum of Rs. 12,220 being the value of the goods. The Plaintiff instituted the suit on the

4th of February 1952. Later, on the 21st of February 1952 the Plaintiff paid the sum of Rs. 12,220 to Sinclair Murray and Company

3. The learned trial Judge has found that goods were lost while they were in the custody and control of the Defendant and that the case of the Defendant that it left the lorry and the driver in charge of and under the control of the Plaintiff or his agent is untrue. He also found that the Defendant accepted the goods on the usual undertaking to carry the goods as common carrier. He also found that the Defendant is a common carrier. I agree with this finding.

4. It is a common case that the Plaintiff is not the owner of the goods and that the goods are the properties of Messrs. Sinclair Murray and Company, Ltd. The learned trial Judge also held that as the goods had been lost the Defendant firm as a bailee of the goods cannot be sued for conversion. This finding has not been challenged. I agree with this finding.

5. The Plaintiff has sued also for non-delivery of the goods. The Defendant has committed breach of its duty as common carrier to deliver the goods safely. The Plaintiff claims that he is entitled to recover damages for non-delivery by virtue of his rights (a) under the common law, (b) under the Carrier's Act, (c) under his contract with the Defendant and (d) as a bailee of the goods. The learned trial Judge held that the Plaintiff is not entitled to maintain the suit under the Carriers Act. He, however, held that the Plaintiff is entitled to maintain the suit (a) by reason of a contract of bailment entered into between him and the Defendant and (b) also because the Plaintiff was a bailee of the goods. He accordingly decreed the suit. These findings have been challenged before us.

6. The important question in this appeal is whether the Plaintiff is entitled to maintain his suit.

7. Since the great case of *Irrawaddy Flotilla Company, Ltd. v. Bugwandass* (1891) ILR 18 IndAp 121 it is well settled that the duties and obligations of a common carrier are governed by the English Common Law as modified by the provisions of the Indian, Carriers Act. By the common law a common carrier is bound to deliver the goods within a reasonable time and to insure their safety during their carriage and until delivery; act of God and the King's enemies only excepted. The obligation is not founded upon contract, but on the exercise of public employment for reward. The duty arises irrespective of contract. The owner of the goods may sue the common carrier for breach of the common law duty in an action of tort.

8. In 28 CWN 302 (Privy Council) Lord Shaw observed that the carrier "is answerable to the "owner for safe and sound delivery".

9. In *London and North Western Railway Company v. Richard Hudson and Sons, Limited* (1920) A.C. 324, 333 at page 333, Lord Dunedin observed:

Now Lord Mansfield in *Forward v. Pittard* (1785) 1 T.R. 27, 33 speaks of this obligation on the carrier's part as an obligation independent of the contract. By

that I understand that it is not an adjected term to the contract as made but is an obligation which attaches from the fact of the goods being carried by a common carrier, in favour of the owner of the goods, whoever he may be.

10. These observations were followed and applied by this Court in the case of K.C. Dhar v. Ahmad Bux. (1933) ILR 60 Cal. 879.

11. Where there is a contract between the owner and the carrier the owner may sue the carrier either on contract or in tort at his option.

12. The Indian Carriers Act, while restricting the power of a common carrier of exempting himself from his common law liability, by Section 8 affirms or creates a liability and gives the benefit of that liability to the owner. Only the owner can take advantage of the benefit of that section. The Plaintiff not being the owner is not entitled to maintain this suit u/s 8 of the Indian Carriers Act.

13. The Plaintiff next contends that there is a contract between him and the carrier and he may sue for breach of that contract. Whether the Plaintiff has employed the carrier on his own account is a question of fact. The ordinary inference is that the contract of carriage is between the carrier and the owner in whose favour the common law duty exists. In a proper case such is the inference even when the owner is not the consignor. (The Proprietors of the Cork Distilleries Company v. The Directors, etc., of the Great Southern and Western Railway Company (Ireland) 1 L.R. 7 H.L.R. 69, 277. The person whose property the goods are is prima facie the party with whom the contract is made Mullinson v. Carver (1843) 1 L.T.U.S. 59. "In the Dekhari Tea Company Ltd. v. The Assam-Bengal Railway Company, Ltd. (1906-7). 23 C.W.N. 998 Rankin J. observed:

As to goods the law will presume when it can that the carrier's contract is with the owner Dutton v. Solomonson (1803) 3 Band P. 583.

14. The presumption is a presumption of fact and is rebuttable Murphy v. Midland Great Western Railway of Ireland (1903) 2 Irish Reports 5 (30) A person other than the owner may employ the carrier on his own account and then may sue the carrier on such contract. The special contract supersedes the necessity of showing the ownership of the goods (William Dunlop and Ors. v. George Anthony Lambert and Ors. 6 CI and Fin. 600 : 7 E.R. 824(834) The onus is upon him who alleges "that there is such special contract.

15. Now, what contract has the Plaintiff pleaded and proved? He does not plead any express contract. He has pleaded delivery of the goods by him and acceptance of the goods by the Defendant for carriage. He does not expressly plead a contract implied from such delivery and acceptance, but we must decide the case on the footing that he has pleaded an implied contract. He has however totally failed to establish that he had delivered the goods to the Defendant. The goods never came to his possession. They were delivered by Messrs. Sinclair Murray and Company, Ltd., to the Defendant directly from their godown. Their coolies loaded the lorry and the goods were then stacked on the lorry by the

driver and the coolies attached to the lorry. The loading was supervised by the Defendant's employee Ujagar Singh. Plaintiff's employee Daroga Singh watched the operation, the clerk of Messrs. Sinclair Murray and Company, Ltd., issued a chalan in their name so that delivery may be made and receipt of the goods may be obtained on their account and gave the chalan to the driver with instructions to take the lorry to the destination. The Plaintiff has totally failed to establish any contract that could be implied for entrustment of the goods by him to the Defendant. This is sufficient to dispose of the claim of the Plaintiff to maintain the suit by virtue of the contract pleaded. The Plaintiff, however, now claims that apart from the entrustment of the goods he has entered into an express contract with the Defendant for the employment of the Defendant on his own account. The express oral contract of employment is not pleaded. I think we ought not to allow the Plaintiff to set up such an express contract. Assuming that the Plaintiff is allowed to do so, I am not satisfied that the Plaintiff employed the Defendant on his own account. Prima facie, the contract of employment is with Messrs. Sinclair Murray and Company Ltd., who are the owner of the goods and the Plaintiff in engaging the carrier acted as their agent. The inference is strengthened by the fact that the goods were entrusted to the Defendant for carriage by Messrs. Sinclair Murray and Company, Ltd., directly with the chalan in their own name with instructions to deliver the goods on their account. The Plaintiff's testimony that he is the transporting agent of Messrs. Sinclair Murray and Company and that he expressly instructed the Defendant to send a lorry to his principal place reinforces this inference. The circumstance that the Plaintiff promised to pay the freight to the Defendant does not displace the inference (see *William Dunlop and Ors. v. George Anthony Lambert and Ors.* (Supra), *Murphy v. Midland Great Western Railway of Ireland* (Supra). The fact that the Plaintiff was responsible to Messrs. Sinclair Murray and Company, Ltd., for the safe carriage of the goods is consistent with agency. An agent who is answerable to the principal for the due performance of the contract made by him on behalf of his principal, merely because he is so answerable cannot personally enforce a contract which he is not otherwise entitled to enforce. *Bramwell v. Spiller* (1869-70) 21 Law Times. 672 In my opinion, the Plaintiff employed the Defendant on behalf of Sinclair Murray and Company, Ltd. and not on his own account and is not entitled to enforce the contract in his own name. The Plaintiff has, therefore, failed to establish any contract by virtue of which he is entitled to maintain the suit.

16. The Plaintiff also contends that he is the bailee of the goods and as such having regard to Section 180 of the Indian Contract Act has sufficient title to maintain the suit. In my opinion, the Plaintiff has totally failed to establish that he was at any time a bailee of the goods. Messrs. Sinclair Murray and Company, Ltd. never delivered the goods to the Plaintiff. It is not the case of the Plaintiff that the Defendant was his agent or servant or that the delivery to the Defendant was delivery to him. The Plaintiff's alleged title as the bailee of the goods is not pleaded in the plaint. It is, therefore, not necessary to decide whether a bailee of the goods can enforce the duty imposed by law on the common carrier and sue

him in tort for breach of the common law duty or whether the owner alone can do so and whether Section 180 of the Indian Contract Act has effected a modification of law in this respect.

17. Where a bailee who is in possession of the goods and who is bound to deliver them at his own risk to the owner entrusts the goods to a carrier, it may be inferred that the bailee has employed the carrier on his own account and the bailee may then sue the carrier on the contract of employment, *Freeman v. Birch* (1833) 3 Q.B. 493 : 114 E.R. 596 A bailee may also sue for conversion of the goods. In this case the Plaintiff is not a bailee of the goods and the contract of employment of the Defendant is not a contract with the Plaintiff personally. It is also clear that the Defendant is not guilty of conversion of the goods.

18. The Plaintiff has, therefore, failed to establish that he is entitled to maintain the suit.

19. It is, therefore, not necessary to decide a further question, viz. if the suit is maintainable in the absence of the notice required u/s 10 of the Indian Carriers Act. We should, however, record our findings of the fact on this matter. The learned trial Judge held that the notice, u/s 10 of the Indian Carriers Act was duly sent to the Defendant under a certificate of posting. dated the 2nd of February, 1952, and was received by the Defendant before the institution of the suit. I am unable to agree with this finding. There is no evidence on the record to show that the notice, dated the 2nd of February, 1952. was duly posted under the certificate of posting. In fact this was conceded before us by Mr. Sen. We, therefore, hold that the notice contemplated by Section 10 of the Indian Carriers Act was not given by the Plaintiff before the institution of the suit.

20. With regard to costs we must bear in mind that the Defendant made a totally false case that it left the lorry and the driver in the charge of the Plaintiff and that the goods were lost while the goods were under the control of the Plaintiff. The cost of litigation has been considerably increased by this false case set up by the Defendant.

21. We, therefore, allow the appeal, set aside the decree passed by the learned trial Judge and dismiss the suit. The Appellant will get the costs of this appeal including reserved costs of the application. Certified for two counsel.

22. We direct that each party will pay and bear its own costs in the trial court.

S.R. Das Gupta, J.

23. I agree.