

(1957) 11 KAR CK 0010

In the Karnataka High Court

Case No : Civil Revision Petition No. 121 of 1954

The Bellary Central Co-operative Stores Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 22-11-1957

Acts Referred:

Contract Act, 1872 — Section 161
Railways Act, 1890 — Section 72, 74 C, 74 D

Citation : AIR 1959 Kar 90 : (1958) 36 MysLJ 216

Hon'ble Judges : A.R. Somnath Iyer, J

Bench : Single Bench

Advocate : B. Ramachandra Rao, for the Appellant; K. Nanjundayya and C.K. Narayana Rao, for the Respondent

Judgement

A.R. Somnath Iyer, J.—On 12-1-1952 defendant 2 consigned from a railway station at a place called Pithapuram, 225 bags of sugar to be delivered to the plaintiff at Bellary. When this consignment of goods was delivered to the plaintiff at Bellary on 29-1-1952 there was a shortage to the extent of 9 maunds and 28 seers of sugar. The plaintiff there- fore brought this suit against defendant 1 the Railway administration for the recovery of its value and the interest thereon.

2. The Railway administration repudiated this claim principally on the ground that the loss was not attributable to any misconduct or negligence on its part or on the part of its servants. It also pleaded that the plaintiffs suit had to fail on account of the absence of notices properly issued under Sections 77 and 140 of the Railways Act. The Court below dismissed the plaintiff's suit and this revision petition is directed against that decision.

3. The Court below did not decide whether the notices required by Section 77 and 140 of the Railways Act were or were not issued by the plaintiff. Mr. Nanjundiah, learned Advocate for defendant 1 has, in this revision petition, attempted to support the decision of the Court below, on the ground that such notices were not issued; but the view that I take on the main question involved

in this revision petition makes it unnecessary for me to consider this contention raised by Mr. Nanjundiah. It does not appear from the record that that contention was either pressed or argued in the Court below.

4. It is not disputed by the plaintiff that the consignment of sugar was tendered for carriage by defendant 2, at a special reduced rate referred to in the Railways Act as the owner's risk rate. P. W. 1 a Clerk of the plaintiff admits it. In other words, it is the case for both sides that the sender of the goods did not elect to pay the ordinary tariff rate referred to in Sub-section (1) of Section 74-C of the Act, as the railway risk rate.

5. Now it is clear, that ordinarily, the responsibility of a Railway administration for the loss destruction or deterioration of goods delivered to it for carriage, is, as provided by Section 72 of the Act, that of a bailee under Sections. 151, 152 and 161 of the Indian Contract Act. Those sections of the Indian Contract Act run thus:

Section 151. "In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed."

Section 152. "The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151."

Section 161. "If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time".

So, the Railway administration occupying the position of a bailee of the goods carried by it is normally under a duty to take reasonable and proper care for the due security and proper delivery of that bailment. It should, in order to take such care of the bailment, do what a reasonable and prudent man would do and omit to do what a reasonable and prudent man would not do.

6. Then again, as provided by Section 76 of the Act, in a suit for compensation for any loss or damage, it is not necessary for the plaintiff to prove how the loss or damage was caused.

7. While this is so, it is also clear that these provisions of Sections 72 and 76 of the Act are made subject to the other provisions of the Act among which Section 74-C and 74-D are those relevant to the discussion of the question involved in this case. Sections 74-C and 74-D of the Railways Act read as follows:

74-C. (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.

74-D. Notwithstanding anything contained in Section 74-C-

(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.

8. The position therefore is, that ordinarily, when it is proved that goods delivered to the Railway administration for carriage are lost, the Railway administration is not exonerated from liability in respect of such loss except upon proof of those facts which would render the Indian Contract Act exempt a bailee from liability.

It would be for the Railway administration to prove that it took as much care of the goods as a man of ordinary prudence would, in similar circumstance. But it is plain that this rule which emerges from Section 72 and 76 of the Act which are subject to the provisions of Section 74-C and 74-D, does not apply to a consignment carried at the special reduced rate referred to in the Act as the owner's risk rate.

To a consignment so carried, the provisions that apply in so far as they are relevant to this discussion, are those contained in Ss. 74-C and 74-D of the Act and Railway administration would not be liable for its loss or damage except as

provided by Section 74-C, upon proof that such loss or damage was due to negligence or misconduct on the part of Railway administration or its servants.

Such negligence or misconduct has in such a case, to be proved by the plaintiff unless the fair inference, from the disclosure such as may be made by the Railway administration u/s 74-D of the Act as to how it dealt with the consignment, when it was in its possession or control, is, that the loss is attributable to negligence or misconduct on its part or on the part of its servants.

9. Now in this case, the consignment having been tendered to defendant 1 for carriage at the reduced owner's risk rate and not at the ordinary railway risk rate, defendant 1 is not liable for its loss except upon proof that such loss was due to negligence or misconduct on the part of the railway administration or any of its servants. It is also clear that in respect of tin's consignment, which, as the evidence discloses had been so covered that the covering or protection was not readily removed by hand -- the sugar having been packed in gunny bags which had been stitched more than once -- the Railway administration was, if it was pointed out that any part of the consignment had been pilfered in transit, bound to disclose to the consignor as required by Section 74 of the Act, how the consignment or package was dealt with, throughout the time it was in its possession or control, and that if from such disclosure negligence or misconduct on the part of the railway administration or any of its servants could be fairly inferred, the plaintiff would be entitled to recover.

10. Although it is not clear from the evidence that it was pointed out by the plaintiff or defendant 2 to the Railway administration that any portion of the consignment had been pilfered in transit, the Railway administration did in this case make a disclosure of how the consignment was dealt with throughout the time it was in its possession or control.

11. The evidence adduced by the Railway administration is that the sugar bags consigned from the railway station at Pithapuram on 12-1-1952 were loaded into a wagon which was duly sealed. That wagon arrived at the railway station at Tadepalli on 24-1-1952 at 7 a.m. It was a broad-gauge wagon from which the sugar bags had to be removed for transporting them to Bellary on the meter guage section during the rest of their journey.

12. D. W. 3 Subramanya Sastri who was the Assistant Transshipment Clerk at Tadepalli on that date has given evidence that when that wagon arrived at Tadepalli on 24-1-1952 it was being guarded by the Watch and Ward Department of the Hail-way administration and that the seals on it were in tact. When he opened that wagon on the afternoon of that day, he discovered that some sugar bags near the door of the wagon were in a damaged condition. The bags which had not been damaged were first transshipped into two meter guage wagons and the sugar from the damaged bags lying scattered in the broad-gauge wagon was collected and put into the torn sugar bags which were again stitched and loaded into the meter guage wagons.

D. W. 3, immediately sent a message which he describes as a deficiency message to D. W. 1 the Railway Station Master at Pithapuram railway station and a copy of it to the Chief Commercial Superintendent at Madras. Exhibit B-4 is the original of the deficiency message. In that communication the discovery of the damaged condition of the sugar bags was intimated to D. W. 1 and the Chief Commercial Superintendent.

13. It cannot be disputed that it was on account of the damage caused to the sugar bags before the broad-gauge wagon was opened at Tadepalli railway station that the 9 maunds and 28 seers of sugar, the value of which has been claimed by the plaintiff in this suit, must have been lost during the transit of the consignment from Pithapuram to Tadepalli. The question for decision is whether the Railway administration is liable for this loss.

14. It cannot be suggested that the Railway administration did not, as required by Section 74-D of the Act. fully disclose how the consignment was dealt with by it when it was in its possession or control; nor can it be said that any negligence or misconduct could fairly be inferred from the disclosure actually made.

15. I say so because, it is, I think, impossible for the plaintiff to contend that the facts disclosed by the Railway administration as to how it dealt with the sugar bags during their journey between Pithapuram and Bellary, properly give rise to any inference of misconduct or negligence on the part of the defendant 1 or its servants.

On the contrary, while the evidence of D. W. 2 who was when the goods were tendered for carriage, the Station Master at Pithapuram, is, that those goods which were packed in a manner not conforming to that prescribed by what he called a rule, were loaded into the wagon by the servants of the consignor, the evidence of D. W. 3 who was the Assistant Transhipment Clerk "at Tadepalli makes it very clear that he took as much care of the goods as any ordinary prudent man would take in respect of goods belonging to himself.

When he opened the broad gauge wagon as he had to, for transshipping the sugar bags to the meter gauge wagons for the continuance of the journey of those sugar bags to their destination, the seals of the wagon were quite intact. Until he so opened the wagon, those bags were being guarded by the Watch and Ward Department of defendant 1.

When he found after opening the wagon that a few of those bags near the doors of the wagon had been damaged during transit, he took the pre-caution of collecting the sugar that had been scattered "on the floor of the wagon and of loading it into those bags. He also took the further precaution of stitching those bags again before they were loaded into the meter gauge wagons.

Then, it is admitted by the plaintiffs Clerk P. W. 1 that when the wagon arrived at Bellary, the seals thereon were all right. It would therefore, be futile for the plaintiff to contend that from the disclosure made by the Railway administration,

it could be fairly inferred that there was any negligence or misconduct on the part of the Railway administration or its servant at any stage when the consignment was in their control or possession.

16. That being so, in this case in which the consignment was tendered for carriage at the special reduced owner's risk rate, and not at the ordinary railway risk rate, the burden of establishing negligence or misconduct on the part of the Railway Administration or its servants on proof of which alone the Railway administration would, as provided by Section 74-C of the Act be responsible for the loss of any portion of the consignment, was clearly on the plaintiff.

17. Mr. Ramachandra Rao has strongly urged and has cited a number of decisions in support of his argument that u/s 72 of the Act the liability of the Railway administration being that of a bailee under Sections 151, 152 and 16f of the Contract Act, the Railway administration would, the moment the loss of the consignment or any part of it was proved, be liable to compensate the plaintiff in respect of such loss, the burden of establishing the absence of negligence or misconduct being on the Railway administration. But it is clear that in this case in which the liability of the Railway administration is governed by the provisions of Sections 74-C and 74-D of the Act, to which the provisions of Section 72 are subject, this contention raised by Mr. Ramachandra Rao cannot be accepted as sound.

On the contrary, the question arising for determination is whether in respect of the lost portion of the consignment tendered by defendant 2 for carriage at the reduced owner's risk rates, any negligence or misconduct on the part of the Railway administration or its servants can be inferred from the disclosure made by the Railway administration as to how the consignment was dealt with by it when it was in its control or possession. If as I have held, no such inference could be drawn the question that next arises is whether the plaintiff has proved satisfactorily that the loss was attributable to the negligence or misconduct on the part of the Railway administration or its servants.

18. There is, in this case, no evidence at all that there was any negligence or misconduct of any description on the part of the Railway administration or its servants to which the loss of the small portion of the consignment which is the subject-matter of this suit is attributable. Neither P. W. 1 nor P. W. 2 who are the only two witnesses examined by the plaintiff gave any evidence that there was any such misconduct or negligence.

19. Although what I have said so far would be enough to dispose of this revision petition, I deem it necessary to refer to a contention raised by Mr. Nanjundiah, learned Counsel for the Railway administration that it is established that the loss of a portion of the consignment in this case was attributable to the negligence of defendant 2. Mr. Nanjundiah has, in support of that argument, relied on a condition prescribed by the Railway administration which, is described in its written statement as Special Condition 29 of the Goods Tariff which provides:

"Section 29 Consignments when in wagon loads should invariably be protected at the doors with dunnage materials by senders. The dunnage materials will consist of 6 bags, three on each side of the flap doors and loaded six inches away. The bags should be stuffed with suitable materials such as cinder ash, paddy husk, straw or dry clay. These bags will be carried free of charge by the railway to the destination station. Remarks will be entered by the sender on the Forwarding Note to the effect that the special condition has been complied with and these remarks should be reproduced at the time of preparation of the Railway Receipts." Mr. Nanjundiah contends that defendant 2 neglected to comply with the requirements of this special condition which according to him was prescribed by the Central Government under the provisions of Sub-section (2) of Section 74-A of the Act. The Court below has based its conclusion that the plaintiff's suit must fail, on the omission on the part of defendant 2 to protect the sugar-bags in this case with the dunnage materials referred to in the above condition. P, W. 2 Venkataramiah, another clerk working under the plaintiff, has admitted that no dunnage material had been used for so protecting the sugar bags, He also admitted that the seals of the wagon in which the sugar bags arrived were in tact.

20. Mr. Ramchandra Rao, learned Advocate for the plaintiff has contended that defendant 2 was not bound to comply with the requirements of the above special condition or to provide any dunnage material and that non-compliance with the requirements of that condition did not absolve the Railway administration of its liability for the loss. In support of his contention, he relied on the decision in Union of India (UOI) Vs. Shantilal Nanchand Jain, , in which Bhutt J., took the view that the Railway administration had no power either u/s 47 or u/s 54 of the Act to make rules for exemption from liability for any loss, deterioration or destruction of or damage to goods.

In that case, a consignment of Sarees had been tendered by the plaintiff to the Railway administration for carriage; upon its arrival at the destination it had been deposited on the open platform near the verandah of the railway station; those sarees were stolen a few days after their arrival at the destination station. In a suit for the recovery of the value of those goods, the contention of the Railway administration that Rule 29, of Part I-A of the Goods Tariff absolved it from liability in respect of such loss, was repelled for the reason mentioned above. That decision has hardly any application to the present case.

21. The condition on which the Railway administration relied in the above case was in no sense similar to the Special Condition on which Mr. Nanjundiah's argument rests. Nor does the condition referred to by Mr. Nanjundiah exempt the Railway administration from any liability imposed by the provisions of the Act. It only prescribed the manner in which goods tendered to the Railway administration for carriage, shall be packed.

22. But it is seen that the origin and source of this Special Condition relied on by the Railway administration is in a state of obscurity. There is no evidence in this case and no material has been produced from which it could be gathered that

this condition was prescribed by the Central Government under Sub-section (2) of Section 74-A of the Act by general or special order.

Be that as it may, it appears to me that although that condition may not enable the Railway administration to place reliance on the provisions of Section 74-A for repudiating its liability which it might have been able to do in certain circumstances, it would, it appears to me, be possible for the Railway administration to urge that non-compliance with that condition by the consignor, would at least amount to such negligence on his part as would preclude him from holding the Railway administration liable for any loss caused by it.

23. It appears to me that in this case such negligence on the part of the consignor is established. D. W. 1 who was the Station Master at Pithapuram when the consignment was tendered for carriage by defendant 2, has given evidence that a copy of the Special Condition to which I have referred, was exhibited on the notice board in the Railway Station and that the dunnage material which the consignor was required to provide for the protection of the consignment during its journey was intended to prevent moisture getting into the sugar bags from the door crevices and also to prevent damage to sugar bags by the rattle of the doors and to prevent possible pilferage. He has also given evidence that he asked the Clerk of defendant 2 (consignor) who tendered the goods for carriage, to provide such dunnage material as required by that condition, but that he pleaded the unavailability of such dunnage material with him.

24. Neither the consignor defendant 2 nor his clerk to whom D. W. 3 has referred has given evidence in this case. Thus the evidence of D. W. 3 stands unrebutted. If as deposed to by D. W. 3, a copy of special condition 29 offering to carry without charging any freight the dunnage material required for the protection of the consignment against any possible damage to it either by moisture or by the movement of the doors of the wagon or by pilferage had been published by its affixment to the notice board at the Railway Station at Pithapuram and the Clerk of the consignor neglected to provide such dunnage material, and some of the sugar bags so consigned without their being protected in that way were discovered in a damaged condition at the Railway Station at Tadepalli, it is clear that the proper inference to be drawn is that the loss of a portion of the consignment which is the subject-matter of the suit, was wholly attributable to the omission on the part of the consignor to take a precaution which it was in his interest to take, in order to give the necessary protection to the consignment against any loss or damage.

There was nothing that the Railway administration had to do in that regard, it being clear that the sugar bags were loaded by the servants of the consignor as stated by D. W. 1, into the broad-gauge wagon in the condition in which they were tendered for carriage and the wagons were properly sealed. The consignor must and ought to have known that if those sugar bags were carried in the manner in which they would ordinarily be carried by the Railway administration, there was every likelihood of their being damaged or lost -- whatever may be the

extent of the loss -- unless he provided the dunnage material which the Railway administration excess was willing to carry without charging any freight.

That being so, the consequence of the omission on the part of the consignor to take the precaution required by that special condition is that in the absence of" proof of negligence or misconduct on the part of the Railway administration or its servants, he cannot be allowed to contend that the Railway administration would be liable for any loss or damage to his goods during their journey in that way.

25. In this view of the matter, I would not be justified in differing from the finding of the Court below that no negligence or misconduct on the part of the Railway administration or its servants having been proved, the plaintiff was not entitled to recover. This revision petition therefore fails and is dismissed with costs.

26. Petition dismissed.