
(1948) 02 PAT CK 0009
In the Patna High Court

The Governor-General in Council

APPELLANT

Vs

Jamuna Das Agarwala

RESPONDENT

Date of Decision : 24-02-1948

Acts Referred:

Contract Act, 1872 — Section 152, 161
Railways Act, 1890 — Section 72

Citation : AIR 1949 Patna 119

Hon'ble Judges : Sinha, J; Mahabir Prasad, J

Bench : Full Bench

Judgement

Sinha, J.—This is a defendants' second appeal from the concurrent decisions of the Courts below decreeing the plaintiff's suit for damages for wilful neglect of the servants of the Railway Administration concerned in respect of a portion of a consignment of cocoanut oil, as a result of which the plaintiff is said to have suffered a loss of Rs. 8,796-11-6 as price of cocoanut oil lost besides RS. 701-80 claimed as price of 201 tins and as interest on the principal amount of damages the claim for the latter amount having been dismissed by the Courts below.

2. In this case the facts admitted or found are as follows. On 20th February 1944, 651 tins of cocoanut oil, weighing 809 maunds and 5 seers, were despatched from Cochin, Out Agency (on the South India Railway) to Jharia (a station on the East Indian Railway). The consignment was loaded in one wagon. The consignment traversed four railway systems, namely, S.I. Railway, N. & S.M. Railway B.N. Railway and R.I. Railway, covering a distance of about 1,200 miles. The goods were booked under Risk Notes A & B, that is to say, at the owner's risk, in consideration of the facts that a reduced rate of freight was charged by the Railway Administration. Up to Jalarpur station on the S.I. Railway, the seals and rivets were found to be intact. The consignment was then made over to the M. & S. Railway which carried the goods up to Waltair where also the seals and rivets were found intact, but it was noted that oil was leaking; when the wagon reached Kharagpur Railway Station it was checked and found that there were 650 tins only, and the seals were broken. Nothing is said about the contents of

the tins. The wagon was received at Asansol on 28rd March 1944 and it was despatched from there on 29th March 1944. It reached Jharia on 30th March 1944, and open delivery was taken on 1st April 1944. It was then discovered that 64 tins were entirely empty and 146 "almost empty" with the result that there was shortage of 80 maunds and odd seers, and damages have been claimed in respect thereof at Rs. 47 per maund. The claim was thus made for Rs. 3,796 11-6 price of 201 tins and interest on those sums of money. Four separate written statements were filed on behalf of the four Railway Administrations which were represented by Governor-General in Council, the contentions raised in all of them are to the same effect that the consignment consisted of second-hand tins which were not in a sound condition, not having been properly soldered and crate packed that the oil leaked out presumably, due to the weak canisters giving way to pressure, that there was no misconduct on the part of the Railway Administrations concerned or of their employees, finally that the consignment having been despatched under Risk notes A and B, no liability attached to the Railway Administrations concerned. Other pleas were also raised in bar of the suit, but it is no more necessary to notice them, as those contentions have been decided in favour of the plaintiff and have not been repeated in this Court.

3. The learned Subordinate Judge, who tried the suit in the first instance, came to the conclusion that the onus lay on the plaintiff to make out his case of misconduct, and that in the circumstance disclosed in the evidence, the inference was irresistible that the loss to the plaintiff was caused by wilful neglect on the part of the Railway Administration in so far as there was no "caution label" attached to the Railway wagon containing the goods with the result that there was "rough shunting" causing the tin canisters to be broken and damaged. The trial Court also held that the fact that the tins had not been loaded in a proper way inasmuch as there was no straw or grass underneath the tins when placed in the wagon, would lead to the inference that there was negligence on the part of the employees of the Railway Administration which accepted the goods for carrying. In that view of the matter, the Court granted the plaintiff a decree for the sum of RS. 3,796/11/6, price of the quantity of oil lost to the plaintiff but disallowed the claim for the price of the 301 tins or for the interest on the ground that the plaintiff had taken away those tins except for one which was missing and also because there was no contract for payment of interest.

4. From the decision of the learned Subordinate Judge, the Governor-General in Council representing the Railway Administrations concerned preferred an appeal, and the plaintiff filed his cross-objection in respect of that part of his claim which had been disallowed by the learned Subordinate Judge. The lower appellate Court dismissed the appeal as also the cross-objection, agreeing with the trial Court that the damage to the plaintiff's consignment was the result of rough shunting, as there was no caution label attached to the wagon. The lower appellate Court does not appear to have held that there was any negligence in the packing or loading of the goods in the wagon. Hence this second appeal by the defendant and the cross-objection by the plaintiff.

5. Learned Counsel for the appellant has urged in the first instance that it was not the specific case laid in the plaint that there was no caution label attached to the wagon in question, as a result of which there was rough shunting causing the damage in question. It is true that it is not stated in the plaint that there was no caution label attached to the wagon, but it is stated in para. 4 of the plaint that the "consignment had been most roughly handled." The lower appellate Court has held that that is a sufficient averment of the fact that there was rough shunting which would not have happened if there had been a caution label attached to the wagon. Counsel for the appellant contended that the fact that the goods-clerk at Jharia did not find the caution label at Jharia did not necessarily lead to the inference that it had not been attached at the station from where the wagon started. It was also argued that there was no evidence of "rough shunting." And, finally, it has been urged on behalf of the appellants that the findings arrived at by the Courts below do not necessarily lead to an inference of misconduct on behalf of the Railway Administration or its employees. In my opinion, this case must be decided on the footing that there was no caution label attached to the wagon, and that there was loose shunting which may have caused the damage to the tin canisters containing the cocoanut oil so consigned, especially in view of the fact as noted in the goods Forwarding Note (Ex. B) that the tins were "second hand this not enclosed in sal, liable to leakage." It has also been contended on behalf of the appellant that the learned District Judge, on appeal, has decided the case on the footing that mere proof of negligence on the "part of the Railway Administration will entitle the plaintiff to damages. This argument is based on the following observation of the learned Judge below "The question that has to be determined in this case is whether there was any negligence on the part of the Railway.

6. In my opinion there is a good deal of force in this contention because the learned Judge below has not made any distinction between "mere negligence" and "wilful neglect." As this part of the judgment of the learned District Judge has been rightly assailed by the learned Counsel for the appellants, it would have become necessary to remand this case for a fresh decision of the appeal; but both parties asked us to look into the evidence, which is not voluminous, in order to make up our minds as to whether the evidence on the record could sustain a finding of wilful neglect on the part of the Rail-way Administration or its employess.

7. I have looked into the evidence led on behalf of the parties, both oral and documentary. The only witness examined on behalf of the plaintiff is the plaintiff himself. His evidence that all the tins were new is not acceptable in view of the entry made in the goods forwarding note, already referred to. He was not present when the booking was done. He was only present at the time of the unloading at Jharia. His evidence that the tins were cut, apparently meaning thereby that somebody bad tried to pilfer the oil by cutting the tin canisters is not true, and has not been so found by the Courts below. He admits that the consignment had been taken by the Railway Administration concerned on Risk

Notes A and E. He says that there was no caution label, and that there was delay in giving delivery. On the question of delay in giving delivery, the lower appellate Court has rightly found that it has not been made out. His statement that the Railway Administration did not do proper shunting is apparently his opinion. So was his statement to the effect that the loss to him was due to the misconduct of the Railway servants. That is all the oral evidence adduced by the plaintiff in support of his case of misconduct by the Railway Administration or its servants.

8. The first witness for the defendant is the clerk at Jalarpur on the N. & S.M. Railway. He took over the wagon in question at Jalarpur from the S.I. Railway and found the wagon and the rivets intact. The second witness for the defendants is the Number-taker of Waltair railway station which is the joint station of B.N. Railway and N. & S. M. Railway. He found the seals and rivets intact, but the wagon was leaking on both sides. He states that there was no rough shunting of this wagon, though he admits in cross-examination that he was not present at the time of shunting. The third witness for the defendants is the relieving clerk at Kharagpur. He checked the wagon at Kharagpur, and found 650 tins of coconut oil, and the wagon floor was full of oil. Both seals were found broken by the Watch and Ward Department at Kharagpur. Hence seals and rivets were put on both sides at Kharagpur. He denied that there was any cutting of the tins. He stated in cross-examination that the tins had been tied with strings. He also admits that he did not find the tins in smashed condition. The fourth witness for the defendants belongs to the Watch and Ward Department of the B.N. Railway at Kharagpur. He was present when the wagon was checked by the third witness as aforesaid. The fifth witness is the Assistant number-taker of wagons at Asansol. He received the wagon in question at Asansol and found the seals and rivets intact. He was cross-examined as to shunting, and he denied that he had anything to do with shunting or guarding of the wagons. The sixth and last witness was the unloading clerk at Jharia, He unloaded the consignment in question in the presence of the consignee. He denies that any tins had been cut or that he or any other servants of the Railway had cut any of the tins. For the first time, in the cross-examination of this witness, the following statements were elicited:

There was no caution label on the wagon in question; caution labels are attached on the wagon in which oil tins are loaded and this is the rule of the Railway. There is rule to keep straw and grass also when loading tins. To Court: Grass and straw are not placed when husk is placed in the wagon". I found all tins in fallen and scattered condition when I unloaded them. There is a rule of the Railway to fasten the oil tins with string. These tins had not been tied with string when I unloaded them; when I unloaded I found that the tins had not been loaded in proper way. Caution labels are attached so that rough shunting may be avoided.

Hence the whole case of the plaintiff-respondent rests on the testimony of this witness as to whether his statements elicited for the first time in cross-examination make out a case of wilful neglect on the part of Railway

Administration or its employees.

9. Now, the question is whether the plaintiff has discharged the burden which admittedly lay upon him of proving that the loss in respect of which the damages have been claimed, was occasioned by the misconduct of the Railway Administration concerned or of its servants. u/s 72, Railways Act (ix of 1890), the responsibility of the Railway Administration for the loss in question, subject to other provisions of the Act, would have been that of a bailee as laid down in Sections 161, 152 and 161, Contract Act, but for the agreement limiting that responsibility as evidenced by the risk notes in forms A and B. But for the special agreement contained in those forms, the Railway Administration would have been bound to take as much care of the consignment as a man of ordinary prudence under similar circumstances would have taken of his own goods, Risk Note A in this case was taken apparently because the articles tendered for carriage were so defectively packed as to be liable to damage, leakage or wastage in transit. The effective portion of the risk note A is in these forms:

the undersigned do hereby agree and undertake to hold the said Railway Administration...harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants.

As already indicated, the tin canisters containing the cocoanut oil in this case were not in a sound condition, as noted by the goods clerk who received the consignment.

10. Risk Note B was also taken in this case because the goods were despatched at a "special reduced" or "owner's risk" rate. The relevant portion of the note is as follows:

Whereas the consignment...is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment, I, the undersigned, do in consideration of such lower charge, agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants.

11. The new risk notes A and B, portions of which have been quoted above, came into force in 1924. Two provisos have been incorporated in the new Risk Note Form B, which need not be noticed in detail, as the decision of this case does not turn upon the consideration of those provisos. Though the terms of the provisos aforesaid were not applicable to the facts of the present case, the Railway Administration produced in Court the persons who had dealt with the consignment in question at different stages of its journey from the station of its origin to its destination, so that the plaintiff was informed of the circumstances in which this consignment was found at different stages. It has already been

pointed out that the plaintiff's evidence does not make out even a prima facie case of "misconduct" on the part of the employees of the Railway Administration, but the whole case of the alleged "misconduct" has been founded on the evidence of the last witness examined on behalf of the Railway Administration. We have not been referred to any statutory or departmental rules of the Railway Administration which would make it obligatory on the part of the Railway Administration to fasten caution labels to the wagon containing the consignment. But, as already observed, I propose to decide this case on the assumption that there was an omission on the part of the Railway Administration in so far as the necessary caution labels had not been so attached. This, in my opinion, would amount to negligence. Is "negligence" the same thing as "misconduct" as used in the risk notes referred to above?

12. In the leading case of *Blyth v. Birmingham Water Works Co.* (1856) 11 Ex. 781, Alderson, B. said;

Negligence is the omission, to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do.

Lord Wright in the recent case of *Lochgelly Iron and Coal Co. v. M'Mullan* 1984 A.C. 1 said;

In strict legal analysis, negligence means more than headless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

Jwala Prasad J in the case of *Jamtadas Bamjas v. East Indian Railway Co. Ltd.* AIR 1983 Pat. 630 observed that "a mere omission to do what is expected of a person to do constitutes misconduct". It would thus appear that in his opinion "misconduct" is synonymous with "negligence". I had an occasion recently to consider that case sitting singly in the case of *Governor General in Council Vs. Motilal Kajriwall and Another*, . On that occasion, I referred to the different decisions of this Court and of the Madras High Court and the Calcutta High Court which had taken the view that Jwala Prasad J., had laid down the law rather too widely.

13. I need not repeat those observations on the present occasion. In my opinion, it is enough to point out that "misconduct" cannot be read as interchangeable with "negligence". I cannot do better than adopt the head-notes which correctly represent the decision of a Division Bench of the Calcutta High Court in *Ralliam Dingar v. The Governor General of India in Council* AIR 1946 Cal. 249.

misconduct on the part of the Railway Administration or its servants contemplated by risk note Form B under the Railways Act is not synonymous with negligence; for an act to amount to misconduct there must be a greater degree of wrong than is required for negligence. Misconduct is something in the

nature of improper behaviour and is not merely wrongful commission or wrongful omission. An act of misconduct can well be negligence, but a negligent act by itself is not misconduct. Misconduct involves the passing of a moral judgment on the part of the person concerned however slight may be the lapse from rectitude which provokes it.

14. In that case their Lordships have considered a number of decisions of that Court, and have expressed a disagreement from the observations made in certain previous decisions of the same Court taking the view that "misconduct" and "culpable negligence" were synonymous. If "misconduct" would be used as synonymous with "negligence", then certainly the plaintiff has made out his case against the defendants but in my opinion, "misconduct" denotes something more than mere "negligence". In the present case, the plaintiff has proved that the servants of the Railway Administration did not take the care of attaching caution labels to the wagon containing the consignment in question. The further question arises whether this omission was the direct cause of the loss which the plaintiff suffered. May it not be, as indeed it was suggested on behalf of the appellants, that the defective condition of the tin canisters and the defective packing were the direct cause of the leakage of the oil consigned. There is no evidence one way or the other. If the matter is left to conjecture, the loss may have been due to rough shunting or to the defective packing and the defective containers or it may have been due to its both contributing to the result. If such is the state of evidence on the record, can it be contended that the plaintiff has discharged the burden which admittedly lay on him of connecting the loss directly with the "misconduct" alleged by him on the part of the Railway Administration or its servants? In my opinion in such a state of the record, the plaintiff must be held to have failed in proving his case.

15. In this connection reference may be made to the decision of their Lordships of the Privy Council in *Tamboli v. G.I.P. Ry. Co.* AIR 1928 P.C. 24. In that case, affirming the decision of the Bombay High Court, their Lordships held that the omission by a Railway Administration to provide sufficient means for extinguishing fire is not evidence of "wilful neglect." It has been laid down by a Division Bench of this Court in the case of *Durga Dutta-Shri Ram Firm Vs. Secy. of State for India and Another*, that the word "misconduct" used in the new Risk Note B does not connote anything less than "wilful neglect."

16. It was further argued by Mr. Mukherjee on behalf of the respondent that it is a case of *res ipsa loquitur*. He contends that, though the burden lies on the plaintiff of proving "misconduct" on the part of the employees of the Railway Administration, he has discharged the burden by showing the condition of the tin containers at their destination. So many of those tin containers were broken, thus pointing to the conclusion that the wagon containing them was rough shunted. He contended further that the plaintiff could not be expected to prove as to how the consignment was dealt with during transit and, as the consignment had travelled more than 1200 miles necessitating several changes and

consequent shuntings, the tin canisters got smashed as a result of rough handling. The maxim *res ipsa loquitur* is prayed in aid of a plaintiff who has to prove "negligence" in order to succeed in his claim for damages. He appeals to the Court to infer "negligence" from the condition of things as disclosed. There must be reasonable evidence of negligence. It is said in *Scott v. London and St. Katherine's Docks Co.* (1865) 3 H. & C. 596.

but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

But this maxim does not lay down any rule of legal presumption of "negligence" which has to] be rebutted by the defendant, it only provides a mode of proof. But, even assuming that this" maxim applies to the present case it carries the plaintiff's case to no more than proving "negligence" But, as already indicated, proof of mere "negligence" is not enough; the plaintiff has to prove "wilful neglect" or "misconduct" as it occurs in the Risk Notes which govern the present case.

17. For the reasons given above, it must be held that the plaintiff has failed to prove "misconduct" on the part of the employees of the Railway Administration. The appeal must, therefore, be allowed, the judgment and decree passed by the Courts below set aside, and the suit dismissed but without costs in the special circumstances of the case. It follows that the cross-objection also stands dismissed.

Mahabir Prasad J.

18. I agree.