

(1948) 02 CAL CK 0014
In the Calcutta High Court

The Governor-General in Council

APPELLANT

Vs

Kishengopal Bhartia

RESPONDENT

Date of Decision : 20-02-1948

Acts Referred:

Citation : (1948) 02 CAL CK 0014

Hon'ble Judges : Lodge, J

Bench : Division Bench

Judgement

Lodge, J.—This rule has been obtained by the defendant Railway Company and it arises out of a suit for compensation for non-delivery of mustard seeds despatched from Alwar on the B.B. & C.I. Railway to Raniganj on the E.I. Railway.

2. The material facts are as follows: 398 bags of mustard seeds were booked from Alwar on the B.B. & C.I. Railway by one Rampatmal Jaharmal to Raniganj on the E.I. Railway. The railway receipt was subsequently transfer, red to Kishengopal Bhartia, the plaintiff who took delivery of such bags of mustard seeds as subsequently arrived at Raniganj. At the time of delivery it was found that there were cuts in two of the bags and that consequently there was a shortage of 3 mds. and 30 seers of mustard seeds. The plaintiff sued the Railway Company claiming Rs. 72/14 as the value of the mustard seeds plus interest alleging that the shortage was due to the negligence and misconduct of the servants of the Railway Administration. When the goods were booked at Alwar the consignor executed Bisk Notes "a" and "b". The suit was decreed in full by the learned Munsif against the E.I. Railway Company. The East India Railway Company obtained a rule from this Court. When the rule was heard the suit was remanded to the Court of first instance to allow the parties to adduce further evidence as to the manner in which the goods were booked and the manner in which they were dealt with by the Railway Company from the time of the booking to the time of delivery. On behalf of the plaintiff evidence was given to the effect that the goods were packed in new and doubly sewn bags of sound condition but this evidence was disbelieved by the learned Judge of the Court of Small Causes.

On the other hand, evidence was given by witnesses on behalf of the Railway Administration first as to the packing of the goods at Alwar, secondly as to the transshipment of the goods at Agra East Bank Station from the B.B. & C.I. Rly. wagons to the wagons of the E.I. Rly., and the witness who deposed to this transshipment, viz., Zainul Abedin (D. W. 2) deposed that the consignment was then in sound condition. The witness also deposed that the bags were placed in a wagon and the wagon was sealed. A third witness for the Railway Company, Kapil Deo Narayan Prosad (D. W. 3) deposed that when the goods were unloaded at Ranigunj the seals on the wagon were found intact but when the bags were taken out two of the bags were found to have cuts and there was a shortage of 3 3/4 mds. On this evidence the learned Judge in the Court of Small Causes held that Risk Note "a" was not applicable, that under Risk v Note "b" the Railway Company was bound to make full disclosure, and as full disclosure had not been made, the Railway Company could not get immunity under Risk Note "b". He held that the loss undoubtedly occurred while the goods were in the possession of the East Indian Railway Administration and he held that the circumstances indicated that the shortage was due to negligence and misconduct of the servants of the East Indian Railway Company. He accordingly decreed the suit in full with costs. The Railway Company have obtained this rule.

3. A number of questions has been raised. It has been argued on behalf of the petitioner that there is no material on record to show that the proviso to Risk Note "b" is applicable at all in the present case and, therefore, the Railway Company had no duty to make disclosure as to how the consignment was dealt with throughout. Secondly, it has been contended that even if there was such a duty on the Railway Company, the evidence that has been given is a complete disclosure of all the material facts within the knowledge of the Railway Company and that no other disclosure has been asked for or could possibly have been made. Thirdly, it has been argued that on the facts established there is no material to justify the inference that the loss was due to negligence or misconduct of the servants of the Railway Company. Fourthly, it has been argued that the learned Judge in the Court of Small Causes was not justified in making a decree for interest prior to the date of the institution of the suit.

4. It is convenient to take the first three arguments together and to consider the effect of Risk Notes "a" and "b" in a case like the present one. It was held at the time when the order of remand was passed that Risk Note "a" in itself was not applicable in this case but was only applicable to cases where the goods arrived at the destination in a damaged condition. The Risk Note "a" itself is not applicable to cases of non-delivery; but the fact remains that the contract governing the dealings of parties is Risk Note "a" plus Risk Note "b". Under Risk Note "b" the consignor undertakes to hold the Rail-way Administration harmless and free from any loss or damage to the consignment except upon proof that the loss or damage arose from the misconduct on the part of the Railway Administration or its servants provided that in certain cases the Railway Administration shall be bound to disclose to the consignor how the consignment

was dealt with throughout the time it was in its possession or control. Question 1, therefore, is whether it has been shown in the present case that this proviso is applicable. It is admitted that no proof has been given by the plaintiff to show that the loss or damage arose from the misconduct on the part of the Railway Administration or its servants and unless an inference can be made from the disclosure subsequently given by the Railway Company this suit is bound to fail. The proviso is divided in two parts; the first part (a) has no application in the present case. The second part (b) reads as follows:

(b) Pilferage from a package or packages forming part of the said consignment properly packed as in (a) when such pilferage is pointed out to the servants of the Railway Administration on or before delivery.

It is conceded in the present case that there might have been pilferage from the two bags. It is conceded that pilferage was pointed out to the servants of the Railway Administration on or before delivery. Therefore, if the said consignment was properly packed as in (a), it follows that there was a burden upon the Railway Company to make the necessary disclosure. We have, therefore, to consider in the present case whether the consignment was proved to have been properly packed as in (a). In (a) occurs the following provision:

consignment packed in accordance" with the instructions laid down in the Tariff or where there are no such instructions, protected otherwise than by, paper or other packing readily removable by hand.

In the present case there is no evidence whatever to the effect that the packing was in accordance with the instructions laid down in the Tariff and there is no evidence that no such instructions are laid down in the Tariff. On the other hand Risk Note "a" was admittedly executed and formed part of the contract and Risk Note "a" contains an admission that the package was defective. It must be taken as conclusive for the purposes of the present case that the package was not packed in accordance with the instructions laid down in the Tariff but the burden was on the claimant in the first instance to show either that there are no instructions in the Tariff or that the package was packed in accordance with the instructions laid down in the Tariff. Strictly speaking, if the claimant makes no attempt to show that the package was packed in accordance with the instructions laid down in the Tariff or that there were no such instructions, the claimant is not entitled to claim that the provisions of the proviso in Risk Note B are applicable; and further it seems to me that where the claimant has admitted by executing Risk Note A that the package is defective and has omitted to show that in spite of the admitted defects the consignment was packed in accordance with the instructions laid down in the Tariff or to show that no instructions have been laid down, the proviso cannot be applied. It seems to me obvious in the present case that the claimant was not entitled to take refuge under this proviso; and the burden of proof was on him to show that the loss or damage arose from misconduct on the part of the Railway Administration or its servants. No such evidence was given and therefore if no evidence had been given by the defence,

in my opinion, the suit ought to have been dismissed. In the present case, however, evidence was given by the defence and evidence of disclosure was made. The learned Judge in the Court below has held that there was no full disclosure, and from the omissions in the disclosure has held that the reasonable inference is that the loss or damage was due to misconduct or negligence of the Railway Administration or its servants. I am unable to accept this view. The evidence on record shows that the goods were transhipped apparently in their entirety at Agra East Bank Station and they were placed in a wagon which was sealed. That sealed wagon arrived with the seals intact at Ranigang. When it was opened at Ranigunj the full number of bags was found but two of the bags had been cut. It is clear therefore that the sealed wagon must have continued sealed throughout and there could be no question of an opportunity having arisen for the seals to be removed, goods abstracted and new seals affixed. For if that had occurred, it is incredible that merely two bags could have been cut open and a comparatively small portion of the goods abstracted. The evidence of D. W. 3 shows that on arrival the complete number of bags was found at Ranigunj. This evidence has not been disbelieved, and this evidence, if true, makes it perfectly clear that the loss did not occur after the wagon was unsealed at Ranigunj and the loss must have occurred between the sealing of the wagon at Agra East Bank and the unsealing of the wagon at Ranigunj. The learned Judge in the Court below accepted this view, and apparently held that the loss must have occurred through two of the bags being cut and the mustard seeds leaking out through the cuts and falling through the crevices of the wagon. If this is what happened it is perfectly clear that no evidence by the Railway Company as to the manner in which the consignment was dealt with between Agra East Bank and Ranigunj would explain this loss and the fact that it occurred in this manner does not indicate in any way that it was one or more of the Railway Company's servants who was negligent or who misconducted himself and thereby caused the loss. Unless it can be shown that it is the duty of the Railway Company to provide wagons without crevices, it is obvious the Railway Company cannot be held responsible for the acts of a thief who succeeds in inserting a knife between the crevices of a wagon and causing small things like mustard seeds to leak out and be lost to the consignor. In my opinion in the circumstances of the case if the evidence is true, there was a complete disclosure of all the necessary facts within the knowledge of the Railway Administration which could have any bearing on the case and the facts disclosed did not warrant an inference that the loss or damage was due to the misconduct or negligence of the Railway servants.

5. In this view I am satisfied that the suit ought to have been dismissed.

6. With regard to the question, whether interest prior to the institution of the suit can be charged, this matter was considered in the case in AIR 1938 67 (Privy Council) and it was there pointed out that interest prior to the institution of the suit can only be awarded in certain specified classes of cases. The learned Judge in the present case did not consider whether the present case was one of those indicated in the judgment of the Privy Council. In view of my opinion, however,

that the case should be dismissed in its entirety it is not necessary for me to consider whether if the case had been decreed interest prior to the institution of the suit should have been awarded or not.

7. In the result, therefore, the Rule is made absolute. The judgment and decree of the learned Judge of the Court of Small Causes is set aside and the suit is dismissed with costs?hearing fee one Gold mohur.