

(1968) 04 MP CK 0021
In the Madhya Pradesh High Court
Case No : F. A. No. 71 of 1964

Union of India and another

APPELLANT

Vs

Hukumchand and others

RESPONDENT

Date of Decision : 20-04-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1890 — Section 77

Citation : (1969) MPLJ 737

Hon'ble Judges : T. C. Shrivastava, J; A. P. Sen, J

Bench : Division Bench

Advocate : K. V. Tambay and P. R. Padhye, for the Appellant; H. S. Verma and J. L. Verma, for the Respondent

Final Decision : Allowed

Judgement

A. P. Sen, J.

This appeal, filed by the Union of India, as representing Northern and Central Railways, is directed against a decree of the Additional District Judge, Damoh, dated 27th April 1964.. decreeing the plaintiffs' claim for damages due to non-delivery of goods occasioned by their alleged negligence and/or misconduct.

The relevant facts are these. M/s. H. R. Sugar Factory Ltd., Bareilly consigned 182 bags of crystal sugar Ex-Bareilly, on the Northern Railway, on 13th June 1955, for their carriage to Damoh, on the Central Railway, under R/R No. 355490, at Railway risk. The goods were consigned to self, and the railway receipt endorsed to the plaintiffs, being their purchasers, for value. The consignment reached its destination on 28th June 1955, and was unloaded the same day, by the unloading Foreman in the presence of one of the plaintiffs. They found that some of bags were damaged by rain. Their immediate reactions were, different. The plaintiffs, through their representative Gajrajsingh, served a notice on Station Master, Damoh, making a demand for open delivery after assessment alleging that all the bags of sugar were damaged by wet, while the

Unloading Foreman in his Damage and Deficiency message stated that some of the bags were damaged. In consequence, the Assistant District Commercial Inspector, Sagar, as per Assessment Memo dated 10th July 1955, assessed the damages at Rs. 244.37 P. but the plaintiffs signified their non-acceptance of assessment and unwillingness to accept any delivery unless they were allowed to enter in the Delivery Register that all goods were drenched wet. The Assistant District Commercial Inspector, Sagar, then sent a letter dated 11th July 1955 asking the plaintiffs to take delivery within 3 days failing which the consignment was to be treated as lying at their risk subject to payment of wharfage. The plaintiffs did not favourably react to this. The District Commercial Superintendent reached Damoh a few days later, and after inspection of the goods, offered Rs. 450 as damages to the plaintiffs but they did not accept this offer and, instead, served notices u/s 77 of the Railways Act, read with section 80 of the Civil Procedure Code. The District Commercial Superintendent, made a re-assessment of damages at Rs. 655.50 P., as per Assessment Memo, dated 23rd September 1955. The plaintiffs, however, refused to accept the assessment, saying that all the bags were damaged by wet and that their loss was to the extent of Rs. 2,000 and made endorsements to that effect both in the original assessment memo and also on the copy delivered to them. The Divisional Commercial Superintendent sent them notice dated 26th September 1955 asking the plaintiffs to effect delivery within 15 days on reasonable assessment, and failure of which, they should treat it as a notice under sections 55 and 56 of the Railways Act. It also stated that the railways would not permit making of an entry in the Delivery Register by the plaintiffs indicating the extent of their loss. In response to this, the plaintiffs by their reply dated 20th October 1955, made a grievance that the Railway-station authorities, at Damoh, were not allowing the making of an endorsement in the Delivery Register and unless this was allowed, they would be unwilling to take delivery. As a result, the Claims Inspector of the Central Railways, Bombay, came down to Damoh, for the sole purpose of effecting a settlement. Samples of both good and damaged stuff were taken from the consignment lying in the goods shed, Damoh, and shown to local merchants. It was found that good stuff would sell Rs. 30 and damaged stuff RS. 20 per Bengali maund. He accordingly, made an offer of Rs. 1,500 as damages in full and final settlement of the claim but this offer was unreasonably turned down and his attempt to effect a settlement proved to be abortive. The plaintiffs, instead, remitted railway freight amounting to Rs. 777.78 P., to the General Manager, Central Railway, Bombay, by a bank draft, but the same was returned on the ground that it should have been made to the order of the Chief Cashier, Central Railway, Bombay, or paid to the Station Master, Damon. After further correspondence, the goods were ultimately despatched to the Unclaimed Goods Office, Wadi Bunder, for sale by auction, and they were eventually sold for Rs. 12,300 on 20th March 1956. The plaintiffs then served notices u/s 77 of the Railways Act, read with section 80 of the Civil Procedure Code, on 24th and 26th April 1956, but their claim went unsettled. The Superintendent of Claims, Central Railway, by a notice of demand dated 1st June 1956, asked them to pay Rs.

14,497 as freight and wharfage charges. On these facts, the plaintiffs claimed Rs. 19,000 as damages for nondelivery of the goods, which comprised of these items, namely price, loss of profits at 20%, interest and other charges. The Northern and Central Railways filed a joint written statement disputing the claim. The Railways alleged that the plaintiffs themselves were responsible for non-delivery of the goods as they were unreasonably insisting on their right to make an entry in the Delivery Register as regards their actual loss. They asserted that the plaintiffs should have withdrawn their claim to take open delivery, and instead, taken delivery without assessment after paying the freight due. The Railways claimed that the non-delivery was the result of plaintiffs' own wrongful conduct and they were, therefore, not entitled to claim any damages. As regards the proceeds of the sale of the unclaimed goods, it was asserted that Rs. 14,497 were due to the Railways on account of (i) freight, from Bareilly to Damoh, Rs. 777.87 P., (ii) wharfage charges, Rs. 12,627.50 P., and freight, from Damoh to Wadi Bunder, Rs. 1,091.62 P., and after adjustment of these items, nothing was due and payable to the plaintiffs.

This Court had remanded the suit for a retrial after framing certain additional issues, in First Appeal No. 88 of 1958, dated 22nd September 1961. The findings now reached by the trial Court are these: (i) damage to the consignment was due to leakage of rain-water into the wagon during its transit from Bareilly, (ii) although the wagon in which the goods were loaded by the Northern Railway was certified to be "W. T. W.", it was, in fact, a leaking and not water-tight wagon, and there were openings in its roof through which water had leaked, (iii) that in certifying a defective wagon as water-tight, that railway administration was guilty of negligence and /or misconduct, (iv) its negligence lay in testing the wagon by a visual test and not in a shower room, (v) the plaintiffs were not justified in insisting upon their right to an open delivery after assessment of proper damages and in making an entry in the Delivery Register as regards the actual condition of the goods, (vi) the Central Railway was also not right in imposing a condition that delivery should be taken on acceptance of assessment as made by its servants, and, therefore, the non-delivery was due to its misconduct, (vii) the sale of the goods as unclaimed goods by auction, at Wadi Bunder, was in violation of the requirements of sections 55 and 56 of the Railways Act and, therefore, invalid, (viii) no wharfage of Rs. 12,629.50 P. was payable due to want of a notice of demand nor was Rs. 1,091.62 P., payable as freight from Damoh to Wadi Bunder, (ix) plaintiffs were, however, liable to pay Rs. 777.87 P., on account of freight from Bareilly to Damoh. As a result of these findings, the trial Court has decreed the plaintiffs' claim for Rs. 16,029.50 P., inclusive of profits at 12% on the total outlay as reasonable damages.

At the very outset, the learned counsel appearing on behalf of the Union of India, rightly tried to confine the appeal to a consideration of the question, whether the non-delivery of the goods was the result of the plaintiffs' own wrongful conduct, or, was it due to the railways' arbitrarily imposing conditions on taking of delivery. That really is the only question that arises in the suit itself. It is a suit

for damages for non-delivery resulting from alleged refusal by the railways to give delivery except on terms imposed by them. The cause of action alleged in the notices u/s 80 of the Civil Procedure Code, is also of that nature. The rest of the facts stated are only statements of fact leading to the claim. Nevertheless, we think it necessary and desirable to deal with all aspects of the claim, as reflected in the issues framed, in view of the directions contained in this Court's judgment, in First Appeal No. 88 of 1958, dated 22nd September 1961, remanding the suit for retrial on certain additional issues.

The first question for consideration is, whether the damage to the consignment was due to the negligence of the Northern Railway administration in loading the goods in a defective wagon at the starting station, or, was it due to circumstances beyond their control. The responsibility of a Railway administration for the loss or destruction of goods delivered to the administration is, by virtue of section 72 of the Railways Act, that of a bailee under sections 151, 152 and 161 of the Contract Act. The Railway administration is not in the position of an insurer or a common carrier. Section 152 of the Contract Act, provides that a bailee, in the absence of any special contract, is not responsible for the loss etc., of the thing bailed, if he had taken the amount of care of it described in section 151, that is, as much care of the goods as a man of ordinary prudence would under similar circumstances, take of his own goods of the same quality as the goods bailed. The burden, therefore, lies upon the railway that it had taken that much care. When the goods are carried at "railway risk", the special facts and circumstances under which the consignment was handled are only known to the Railway administration, and, therefore, it is for them to place that material before the Court for forming its opinion on the question whether it had taken as much care of the goods as is required of them. [See, *Asharam v. Union of India* 1956 M P L J 119 : 1956 N L J 679 : AIR 1957 Nag. 59.]. It follows that the Railway administration has the duty of producing all the relevant material and their non-production may justify the raising of an adverse inference against them.

The learned Judge is not right in observing that the fact that rainwater did enter into the wagon and caused damage to the consignment was itself sufficient to infer that adequate precautions were not taken. There is, however, no justification for drawing any such inference in this case because the railways have placed sufficient material showing that proper and requisite precautions were taken by them to provide against any such contingencies. The damage to the goods was not attributable to any negligence on the part of the Railway administration or its servants, but it was caused due to natural causes by percolation of rain-water during a long journey from Bareilly to Damoh. In like circumstances, this Court in *Natwarlal v. Union of India* 1957 M PL J 153. held that no liability can be fastened on the Railway administration merely on account of damage due to water percolating during rains in a long journey stating:

They were, therefore, bound to take only the amount of care which has been enjoined on a bailee u/s 151 of the Indian Contract Act, 1872, As has been held

in *Dwarkanath v. R. S. N. Co., Ltd.* A I R 1917 P C 173., the burden of proving negligence on the part of the servants of the carrier is on the plaintiff. There is no proof of any such negligence on their part. In the absence of evidence of want of due diligence, the mere fact that great damage was done to the goods cannot raise on inference of negligence, when it could be caused in the long course of the journey an account of natural forces.

The Railway administration having discharged the burden of showing that it had taken as much care of the goods as was required of them, it became necessary for the plaintiffs to have established that not only that the wagon was found defective at the arrival station, but also that it was on account of negligence of the servants of the Northern Railway administration that it was or became defective. But this they have not proved. They have examined the consignor's representative, Har Govind (P. W. 15), but he does not say that the wagon was not in a good condition. On the other hand, the evidence on the side of the defendant, of R. D. Saxena, Goods Clerk, Bareilly (D. W. 5), is that the loading of the goods into the wagon was done by the consignor at its factory-siding, and there was no protest that a defective wagon had been supplied. He further states that one Jageshwari Prasad, the consignor's agent was present and the wagon after a thorough check-up in his presence, was certified to be "water-tight". The Forwarding note, Exh. D-5, executed by Jageshwari Prasad, on behalf of the consignor and the Goods Clerk, R. D. Saxena contains an entry to the following effect:

Wagon jointly examined and found water-tight by visual test.

This evidence does not seem to have been challenged or contradicted on behalf of the plaintiffs. It is, therefore, clear that there is evidence that the wagon was in a good condition when it left Bareilly, but it was found in a leaky state when it arrived at Damoh. The defect in the wagon that was discovered at Damoh might be due to causes other than negligence of the railway company. Unless the plaintiffs succeed in definitely establishing that the injury to their goods was due to want of care of the railway servants and that the cause of such injury was their negligence and nothing else, they are not entitled to succeed on mere surmise.

The trial Court has held the Northern Railway administration liable for its alleged negligence and/or misconduct, in certifying a defective wagon to be water-tight. It was of the view that negligence lay in employing a "visual test" when the wagon should really have been taken to a "shower-room", stating:

It is so very surprising that the learned counsel for the defendants vehemently argued that this was the only test possible and that no other test was available throughout the Railways in India. It is conceivable, if this statement of the learned counsel for the defendants is true, that the Railway Administration does not have "shower" rooms for testing the wagons. If it is so, it is high time that this glaring deficiency is removed.

We find no warrant for the view that the "visual test" was not a proper test and there appears no basis for holding that the Railway administration to be negligent in not testing wagon in a "shower-room". The term "water-tight" is used as descriptive of a type of wagon and it is not to be understood as a guarantee that it is actually water-tight, although it is supposed to be so [See, *Secretary of India v. Seth Laxmi Narain* A I R 1931 Nag. 1]. The learned Judge assumes that the goods were loaded in a leaky wagon. As we have pointed out, there is no evidence in support of this finding. If, there is any evidence upon this point it is just the other way. The goods were sent in the midst of rainy-season, and they took nearly 15 days to arrive at their destination. It is possible that the wagon got damaged on the way by the elements or by some other cause not referable to the negligence of the railway servants. When the wagon was a sealed wagon it was no part of their duty to cause inspection of the goods during transit [see, *Bengal Nagpur Railway Company, Ltd. Vs. Haji Latif Abdulla*, .]. Nor is the learned Judge right in suggesting that their liability arises by reason of their failure to paint the words, "W. F. W." outside the wagon because the painting of these letters would not have prevented the rainwater from percolating into the wagon through crevices. We, accordingly, hold that the alleged damage to the goods was not attributable to any negligence and /or misconduct on the part of the Northern Railway administration, or its servants but the damage was due to natural causes by percolation of rain-water during the long journey from Bareilly to Damoh.

The next question is, whether the non-delivery of the goods was the result of the plaintiffs' own wrongful conduct. The law is clear on the subject. This Court has repeatedly stated that a Railway administration is not bound to give open delivery on demand of the consignee, nor has the consignee any right to insist that the consignment should be inspected before he can be called upon to take delivery, nor has he a right to insist that there should be an endorsement made in the Delivery Register as regards the actual condition of the goods, nor can he refuse to take delivery, if the Railway authorities fail so to do. The remedy of the consignee, is to take the delivery of the goods in the condition in which they are found after giving notice to the officer giving delivery as to their condition and then sue the Railway administration for shortage or damage, if any. [See, AIR 1931 29 (Nagpur) .; AIR 1948 65 (Nagpur) .; *Managing Agents (Martin and Co.) Vs. Seth Deokinandan and Another*, . and *Union of India (UOI) Vs. Ibrahim Gulaba Tobacco Merchant and Others*, ,].

The next question for consideration is, whether the non-delivery of the goods was as a result of the plaintiffs' refusal to take delivery, or, was it due to the unwillingness of the defendants to give delivery without attaching any specific condition. We have already indicated that a consignee of the goods is not entitled, as of a right, to claim open delivery. The trial Court has held that while that plaintiffs were justified in informing the authorities about the damaged condition of the goods and asking for an assessment, they certainly were not justified in refusing to take delivery of the damaged goods on the pretext that

they were not allowed to make an entry in the Railway Register of their own assessment. Apart from the authorities cited, that conclusion is irresistible from the terms of rule 31 (2) and rule 47 of the General Rules for Acceptance, Carriage and Delivery of Goods. Under rule 31 (2), a consignee is bound to take delivery within the time indicated therein, under normal circumstances, i. e., within reasonable time. The reasonable time may vary in individual and special cases. Normally, as per the rule, the reasonable time within which delivery should be taken, would be the free time allowed for demurrage and wharfage on railways. Rule 47 provides that the consignee is bound to take delivery of the entire consignment even though part of it is found damaged.

The trial Court then proceeds to fix the responsibility for non delivery on the defendants, stating that they had forgotten to offer an "unencumbered" or rather "unconditional" delivery to the plaintiffs, in terms of Paras. 161-1 and 161-11 of the Rules relating to Reporting of Damages, Deficiencies, or loss of Goods. It was of the view that the "advent of the Claims Department in the picture"" created a new problem, and this problem was created more by carelessness than by malice or forethought, by their offering delivery on certain conditions. Since such conditions offered, namely, their agreeing in writing to the assessment was not acceptable, the plaintiffs could not take delivery. With regard to the correspondence that passed on the subject, it has observed:

the trend of the correspondence clearly reveals that it was only after the plaintiffs agreed to the assessment of the railway authorities, that the delivery would be effected, or, rather the arrangement would be made to effect the delivery. It is thus, clear that the defendants were never willing to give delivery, or offer delivery of the goods to the plaintiffs, without specific conditions.

It then proceeds to consider Exhs. P-23, 24 and 25 relied upon by the railway for showing that they were always ready to give delivery but the plaintiffs were adamant and had defaulted. After consideration of this material, the Court holds that these letters do not constitute an unconditional offer to give delivery but were meant to make the giving of delivery conditional upon the plaintiffs entering in the Delivery Register that the assessment had been accepted by them. Eventually, the Court reached the conclusion that the defendants were never willing to give delivery unless and until the plaintiffs agreed to accept their assessment of the damages. In that view, the plaintiffs were held to have been justified in refusing the delivery since they did not agree with the assessment made by the authorities. It also held that the defendants could not treat the goods as unclaimed property and take it to Wadi-Bunder for sale, and, therefore, could not claim any wharfage or freight from Damoh to Wadi Bunder from the plaintiffs.

The learned counsel for the appellant, challenges the finding on the ground that it proceeds on a misreading of these documents out of their context. It is urged that these letters were written in response to the plaintiffs' letters and unless they were read in that sequence, the real import of these 3 documents, Exhs.

P-23, P-25 and P-26, cannot be appreciated. We have already referred to the sequence of events, with advertence to the correspondence, at the beginning of this judgment and it is needless for us to set them out again in detail. Suffice it to say, that even though Exhs. P-23, P-25 and P-26 were in response to the plaintiffs' letters, these documents clearly betray the mind of the Railway authorities that they were not prepared to give delivery except on their terms. The construction placed by the learned Judge on the terms of these letters is clearly borne out by the language employed.

When the plaintiffs were compelling the Railway administration to grant them open delivery after a proper assessment of damages on their being permitted to make an entry in the Delivery Register as regards the actual condition of the goods, they were insisting on something to which they were not, in law, entitled. This action of the plaintiffs was not justified because there is no provision in law or rule which obliges the Railway administration to make, or allow to be made in its Delivery Register any entry of this kind alleging that the goods consigned are received in damaged condition. When the plaintiffs found that the Railway administration was not willing to accept their terms, their only alternative was to withdraw their claim to take open delivery, and instead, to have taken delivery without any assessment of damages after payment of freight under rule 58 of the General Rules.

Nevertheless, Central Railway administration was not, thereby, exonerated of its liability. It was equally unreasonable in detaining the goods and refusing to give delivery to the plaintiffs except on its terms, i. e., on unconditional acceptance of the assessment. That was not a forthright attitude to be adopted by the Railway administration. By its insistence on the terms imposed, the railway administration deliberately misled the plaintiffs into thinking that there was no other manner of taking delivery except on the terms suggested. It should have, when it found that the plaintiffs were being unreasonable in their attitude, asked them to take delivery without any assessment of damages on payment of freight. For these reasons, we uphold the finding reached by the trial Court that the non-delivery was due to the misconduct of the Central Railway administration in refusing to give delivery except on the terms arbitrarily imposed by them. In these circumstances, the finding that the defendants could not treat the goods as unclaimed property and take it to Wadi Bunder for sale, must also be affirmed. It necessarily follows that they cannot claim wharfage or freight from Damoh to Wadi Bunder from the plaintiffs.

Even otherwise, the question then is, whether the Central Railway administration can disclaim all liability by falling back on their powers under sections 55 and 56 of the Railways Act. It is well settled that the right to sell u/s 55 (1) on account of the failure to pay demurrage, wharfage or other charges, due to the railway, does not arise in the absence of a demand for payment of a fixed sum. [See, *Bengal and North-Western Railway Vs. Matru Ram and Others*,]. Now, the Assistant District Commercial Inspector's letter Exh. P-23, dated 11th July 1965,

the District Commercial Superintendent's letter, Exh. P-25, dated 26th September 1966, and the Superintendent of Claims' letter, Exh. P-26, dated 21st November 1955, merely stated that full wharfage would be chargeable if they did not hear within 3 days anything in the matter, or, that these letters should be treated notices under sections 55 and 56 of the Railways Act, and that if there was a failure to effect delivery within 15 days, the consignment was to be disposed of under the provisions of those sections. Nowhere had the Central Railway administration claims any specific ascertained sum by way of wharfage charges, and without serving any notice of demand for payment of a specific sum the Central Railways appear to have transferred the goods from Damoh to their Unclaimed Goods Office at Wadi Bunder, despite protests of the plaintiffs and without reference to them, and eventually sold them by public auction for Rs. 12,300 on 20th March 1956. The plaintiffs were first intimated of this fact after the sale, by the Superintendent of Claims' letter, Exh. P-27, dated 31st May 1956, in response to their notice u/s 80 of the CPC claiming Rs. 1,900 as damages for non-delivery of the consignment. The sale could not be for recovery for unpaid freight because the plaintiffs had already tendered Rs. 777.87 P., by their Bank draft dated 31st October 1955. At any rate, there was no failure on their part to pay the freight on demand made. As regards the wharfage charges, the right to sell would not arise merely because wharfage became payable, but there had to be an actual demand for payment of a definite amount by way of wharfage. The sale was, therefore, not in terms of section 55.

In AIR 1931 29 (Nagpur) . Staples A. J. C. after stating that a consignee has no right to make any remarks in the Railway Company's delivery books, held that if he refuses to take delivery, ""he cannot sue the railway company for wrongful conversion of the goods if the Company sells the goods after giving notice u/s 55 of the Railways Act". The portion extracted clearly implies that the giving of a notice of sale to the consignee is mandatory. In AIR 1938 12 (Privy Council) ., their Lordships of the Privy Council stated:

A notice under sections 55 and 56 of an intention to sell at a public auction cannot be sufficiently effective unless it specifies time of public auction and, the nature of goods intended to be sold and all other particulars necessary to enable the members of public to appreciate which is intended to be put for sale at the public auction.

Admittedly, the alleged auction sale at Wadi Bunder on 20th March 1956, had been held without notice as required by section 56 (1) , and, without publication in local news-papers as enjoined by section 55 (2).

We must, accordingly, hold that the alleged sale was not valid, and the Central Railways cannot rely on the protection given by the Act. In that view, the sale being contrary to the provisions of statute, was without legal authority and wrongful and the Central Railway administration is, therefore, guilty of conversion. [See, G. P. Venkataraman and Co. v. Union of India AIR 1958 Mad. 321.]. The measure of damages for conversion would be the value of the goods

as received at Damoh in a damaged condition.

Thus the plaintiffs are entitled to recover the bijak price Rs. 14,208.69 P. of bags of crystal sugar purchased by them from M/s. H. R. Sugar Factory, Bareilly, less Rs. 1,980.50 P., representing the extent of damage to the goods suffered during transit as found by the trial Court which must fall on them, according to the finding reached by us, and less freight Rs. 778.81 P., from Bareilly to Damoh which, in any event, is payable by them under the contract of carriage. Besides, they are also entitled to recover Rs. 26.81 P., and Rs. 28.44 P., paid towards bank commission and interest. Their claim for Rs. 3,059.44 P., as profits at 20% of the total outlay is, however, disallowed because they were equally responsible for this unfortunate trend of events and for this reason also they must be disallowed their costs throughout. They are further not entitled to reimbursement of any octroi duty or cartage or labour charges because none was incurred nor any notice and other charges. The resultant net claim works out like this:

"Bijakprice ..

.

. Rs. 14,208.69

Bank commission

.

. Rs. 26.81

Bank interest

.

. Rs. 28.44

= Rs. 14,263.94 P.

Less (i) Extent of damage

.

. Rs. 1,980.50

(ii) Freight

.

. Rs. 777.81

= Rs. 2,758.31 P.

Nett claim

Rs. 11,505.63 P."

The result is that the appeal partly succeeds and is allowed. The decree of the

trial Court is modified, by decreeing a nett claim of the plaintiffs to the extent of Rs. 11,505.63 P., as worked out in the foregoing paragraph, but their cross-objection is disallowed. The costs shall be borne by the parties themselves as incurred.