

(1968) 03 BOM CK 0015

In the Bombay High Court

Case No : Second Appeal No. 18 of 1962

Union of India and Another

APPELLANT

Vs

Radhakisan and Another

RESPONDENT

Date of Decision : 27-03-1968

Acts Referred:

Railways Act, 1890 — Section 72, 74

Citation : AIR 1968 Bom 7 : (1969) 71 BOMLR 123 : (1968) MhLj 678

Hon'ble Judges : Chandurkar, J

Bench : Single Bench

Advocate : R. Padhye, for the Appellant; H.W. Dhabe, for the Respondent

Judgement

1. This is a second appeal by the Union of India owning the South-Eastern Railway Administration and the Central Railway Administration against a decree for damages which was passed by the trial Court in favour of the plaintiff and was confirmed by the lower appellate Court.

2. The plaintiff in his capacity as sole proprietor of the shop "Ramkrishna Ramnath" and as owner of 305 bags of bidi tobacco sued the appellants-defendants for damages on account of negligence or misconduct of the Railway Administration alleging that 39 bags of the consignment which was booked on 6th June 1956 Enplane out agency to Tirora, was damaged by water. These bags were delivered on 18th June 1956 in a damaged condition and the Railway authority had assessed the damage at 13 per cent on each bag. The plaintiff, therefore, claimed Rs. 1543.1.0 as damages including notice charges.

3. The main contention of the defendants was that the goods were booked at the owner's risk rate and therefore they were not liable for any damage to the goods during transit which had occurred because of the defective package. The right of the plaintiff to file the suit was also denied and it was denied that the consignment was damaged by rains or that the damage was due to the negligence or misconduct of the defendant-Railway Administration. The usual

pleas of validity of notice under Ss. 77 and 80 were also raised. When in the written statement the frame of the suit was found fault with by the defendants the cause title of the plaint was amended and the plaint as amended was "Radhakisan son of Ramnath Proprietor of M/s. Ramkrishna Ramnath shop". The suit was filed on 9-8-1957 and the amendment was made on 5-11-1958. At no stage of the suit this amendment of the plaint was challenged.

4. On the evidence tendered on behalf of the plaintiff and the defendants, the trial Court found that the plaintiff was the sole proprietor of the shop Ramkrishna Ramnath and was entitled to file the suit. The trial Court found that the packing of the goods was not inherently defective and that the defendants were liable to pay damages in respect of 39 bags of bidi tobacco which was delivered in a badly damaged condition. It was also found that the damages were caused as a result of the misconduct of the Railway Administrations as alleged. The defendants' challenge to the validity of the notices was negated by the trial Court. Thus a decree for Rs. 1506-2-0 and corresponding costs was passed against the defendants. In appeal against this decree filed by the Railway Administration, the lower appellate Court confirmed the finding of the trial Court that the damage was due to the misconduct and negligence on the part of the Railway Administration and that 39 bags of bidi tobacco were received by the plaintiff in a badly damaged condition. The plaintiff, was therefore, held entitled to get damages as decreed by the trial Court. The appeal, was therefore, dismissed. The defendants have now come up in second appeal.

5. The first contention raised by the learned counsel for the appellants was that the plaintiff was not the owner of the suit consignment and therefore he was not entitled to file the present suit. Both the Courts have, however, found on facts that the plaintiff was the consignee and owner of the goods. On that finding which is binding in the second appeal, the argument of the learned counsel that the plaintiff has no right of suit as he is not the owner, cannot be entertained at this stage.

6. The second contention of the learned counsel for the appellants is that the finding recorded by the lower appellate Court that the Railway Administration is guilty of negligence is based on an erroneous assumption which has been made in paragraph 9 of the judgment that there are rules which provide that, for carriage of goods during monsoon, it is the duty of the railway servants to provide water-tight wagons for the goods which are liable to be damaged by water. According to the learned counsel, the learned Judge of the lower appellate Court has also not properly considered the effects of Sections 74-A and 74-C of the Indian Railways Act, and the finding of negligence is based upon an erroneous assumption that burden of proof to show that the Railway Administration was not negligent, was on the Railway Administration. The learned counsel also contends that the lower appellate Court was not justified in following the decision of this Court in *Ramkrishna Ramnath Firm v. Union of India* 1960 NLJ 177=AIR 1960 Bom. 344 as according to him even this decision is

based on an admission by counsel of both sides appearing in that case. The learned counsel says that the admission on which the judgment is based is that there are rules which require the Railway Administration to use a watertight wagon in monsoon for carriage of goods. The counsel was emphatically asserting that as a matter of fact there are no such rules, and relied on a subsequent decision by a Single Judge of this Court in second appeal No. 108 of 1961 (Bom.) in which according to the learned counsel the contention raised on behalf of the Railway Administration that water-tight wagon is not a category of wagons which is provided by relevant rules has been accepted on the basis of certain publications issued by the Railway Administration which were referred to at the hearing of that appeal. Fortunately, for the purpose of this case in view of the averments in the written statement it is not necessary to go into the question as to whether any obligation is cast, by statutory rules or otherwise on the Railway Administration to supply water-tight wagons for the carriage of goods during monsoon. It is also not necessary to consider the arguments of the learned counsel for the appellants that in the absence of any such enforceable obligation the Railway authority is absolved of any responsibility to show that it was not guilty of negligence where goods are damaged and the allegation of the plaintiff is that the goods were liable to be transported in a watertight wagon.

7. A bare reading of the written statement of the Railway Administration in this case will show that even according to them, the goods were transported in a water-tight wagon. In view of the fact that the extensive arguments were advanced by the learned counsel for the appellants on the extent of the obligation of the Railway Administration it will be proper to refer to the pleadings of the defendants. In paragraph 3 of the written statement it is stated:

"It is submitted that the goods was transhipped in a wagon which was watertight and thereon it was carried in the same wagon till destruction (probably destination) without exposing the bags to rain and these defendants are not liable for the loss if any."

In paragraph 4 of the written statement it is stated:

"The wagons arrived without tampering to Tirora, and the water must have entered the crevices of flap doors of the wagons, due to strong wind and speed of the rain, and intensity of rains which could not be checked in spite of due care and caution of a prudent man, carrying his goods in a water-tight wagon."

The defence, therefore, is not that the Railway Administration was not bound to carry the goods in a water-tight wagon. The absence of negligence on the part of" the Railway Administration was sought to be made out on the basis of the fact that the Railway Administration had carried the goods in a water-tight wagon and very likely the water must have entered the crevices of the flap door of the wagon due to strong wind and intensity of rains. On this statement, it is therefore, clear that the damage to the consignment of the plaintiff was caused by the rain water. But the liability for such damage is sought to be avoided by

saying that the force of the wind and intensity of the rains were such that in spite of the wagon being water-tight, water entered into it. It is true that the lower appellate Court has observed that Railway Rules provide that for carriage of goods during monsoon, it is the duty of the Railway servants to provide water-tight wagons for goods which are liable to be damaged by water. In so far as these observations of the learned Judge are concerned, the grievance of the appellant appears to be justified because none of the parties has been able to produce any such rules. But merely because those observations appear to be erroneous, the conclusion reached by the learned Judge is not vitiated. On evidence, the learned Judge has come to the conclusion that negligence of the Railway Administration has been proved. It is at this stage that the learned counsel wants to take recourse to the provisions of Sections 74-A and 74-C of the Railways Act. Section 74-A of the Railways Act is as follows:

"Section 74-A. (1) When any goods tendered to a railway administration for carriage by railway (a) are in a defective condition as a consequence of which they are liable to deterioration, leakage, wastage or damage in transit, or (b) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under sub-section (2) and, as a result of such defective or improper packing are liable to leakage, wastage or damage in transit, and the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, the railway administration shall not be responsible for any deterioration, leakage, wastage or damage or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants.

(2) The (Central Government) may, by general or special order, prescribe the manner in which goods tendered to a railway administration for carriage by railway shall be packed."

Before the railway authorities want to take advantage of this section, certain essential conditions are required to be satisfied as enumerated in that section. These conditions are:

(1) That the goods which are tendered to the railway administration must be in a defective condition or must be either defectively packed or packed in a manner not in accordance with the general or special order as provided by sub-section (2) thereof,

(2) The fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, and

(3) Deterioration, leakage, wastage or damage in transit must be a consequence of the defective condition or the defective packing must result in leakage, wastage or damage in transit.

It is only if these conditions are satisfied that it is open to the railway

administration to take recourse to this section and then say that the railway administration shall not be liable for any deterioration, leakage, wastage or damage or for the condition in which such goods are available for delivery at destination, except upon a proof of negligence or misconduct on the part of the railway administration or of any of its servants.

8. Section 74-C is more or less a similar provision but providing for a different set of circumstances viz., when animals or goods are carried at owner's risk rate which is admittedly a lesser rate advantageous to the consignor or consignee and the railway administration is not made responsible for any loss, destruction or deterioration 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. It is the contention of the learned counsel for the railway administration that in view of this special provision in both these sections, the railway administration is absolved of all responsibility or obligation at all stages of the proceedings in the suit to show that it was not negligent in carrying out the contract of carriage.

9. It is difficult to see how such a conclusion can follow on a construction of both these sections. No doubt the liability of the railway administration for deterioration, leakage, wastage or damage or the damaged condition of the goods, is made conditional upon a proof of negligence or misconduct on the part of the railway administration or any of its servants. But it cannot be forgotten that facts about the manner in which the consignment is dealt with and handled are facts which are exclusively within the special knowledge of the railway administration itself. If it is the obligation of the plaintiff to show that the railway administration was negligent, that can only be done when the relevant facts which are in the exclusive knowledge of the railway administration are brought on record and it is difficult to appreciate how the railway administration can disown any obligation to bring on record such facts by taking protection of sections 74-A and 74-C and asking the plaintiff, who obviously has no knowledge of the relevant facts, to show that the railway administration was negligent. The scope of provisions of Section 74-C came for consideration before the Division Bench of this Court in *Ramkrina Ramnath Shop Vs. Union of India and Others*, where a similar argument was advanced. Repealing such an argument, the Division Bench observed in paragraph 8 of the judgment as follows:

"In case to which S. 74-C of the Railways Act is applicable the burden of proving misconduct or negligence is of course on the plaintiff, but as observed by the Privy Council in *Dwarkanath v. Rivers Steam Navigation Co. Ltd.* 20 Bom LR 735=AIR 1917 PC 173, under S. 106 of the Indian Evidence Act the bailee should call all the material witnesses to prove the facts which were within the special knowledge of the bailee. As observed in *Union of India v. Parikh Shankarlal Jethalal* AIR 1956 Nag 255 the law does not cast any burden upon the administration to establish positively how the loss or damage occurred, and to prove an absence of negligence on their part, but a duty is cast on the

administration to lay all the materials concerning the occurrence before the Court; but even so it remains for the consignees to satisfy the Court that the true inference from the materials is that the carrier's servants have not shown due care, skill and nerve. As observed in *Asaram Gangaram v. Union of India*, New Delhi AIR 1957 Nag 59:

"It is no doubt true that it is always for the plaintiff to prove that the loss was caused by the neglect or negligence of the Railway Administration. But when the Court has the evidence that the goods had deteriorated while in the custody of the Railway Administration, there is a prima facie case of negligence for the Railway Administration to answer. Under S. 106 of the Evidence Act, 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. The Railway Administration should place material before the Court from which it could be inferred how the consignment was dealt with, in order to ascertain whether the Railway Administration took as much care as is required of them, being bailees of the goods under Ss. 151, 152 and 161 of the Contract Act".

The principle contained in Ss. 74-A and 74-C with regard to the burden of proof is the same except that two different sets of circumstances are contemplated by these two sections and the observations quoted above apply equally to a case governed by S. 74-A of the Railways Act.

Thus though Ss. 74-A and 74-C of the Railways Act cast a burden on the plaintiff to prove that the railway administration was negligent, the railway administration cannot claim to be absolved from the obligation to place the relevant facts before the Court to enable it to decide the question whether the Railway had taken as much care of the goods as was required of them. The learned counsel contended that the decision of the Division Bench cannot be considered as an authority for this proposition because according to him it is a decision which is based on admission. If the decision of the Division Bench is read carefully it becomes clear that the only finding which was given on the admission of the counsel was that there was an obligation on the railway administration to supply water-tight wagons. But so far as the construction of Section 74-C of the Railways Act was concerned, the construction propounded in that decision is not based on any admission or concession, but is based on the consideration of the provisions of the Act itself. I am, therefore, unable to accept the contention of the learned counsel that the decision of the Division Bench is not an authority in so far as the construction of Section 74-C was concerned. That question was considered independently of the question of obligation to supply a water-tight wagon.

10. The learned counsel then contended that the plaintiff had not discharged the burden of proof laid upon him by Sections 74-A and 74-C. According to him the forwarding note had an endorsement with regard to the nature of the packing and that endorsement showed that it was a gunny bag packing and that the

goods were to be transported at the risk of the consignor. There is no evidence in this case even to indicate that the damage in respect of which the plaintiff has sued the railway administration has resulted from a defective packing. As I have already stated before, if the railway administration wants to take protection under S. 74-A of the Act, it must be shown that the goods were liable to deterioration, leakage, wastage or damage in transit as a result of the defective packing. In other words, it is only when the damage complained of has resulted from a defective packing and in addition to this such defective packing is recorded by a sender in the forwarding note then only it is the duty of the plaintiff to show that the railway administration is guilty of negligence or misconduct. But if in a given case the damage is not in any way related to or is not a consequence of the defective packing, obviously the condition necessary for the operation of Section 74-A is not fulfilled. In the instant case, therefore, even assuming that the alleged endorsement in the forwarding note amounts to an admission of the consignor that the packing was a defective packing, it is not the defendant's case, or it is at least not proved, that but for such a defective packing the goods would not have been damaged. On the other hand the plea of the defendant-railway administration is that the water which damaged the consignment must have gone through the door flaps. In this case the damage is caused by an external agency. It is not the case of the defendants that any defective packing was the cause of the damage caused to the consignment. It is not established in this case that the damage to the consignment was a result of any defective packing and in my view the instant case is not at all governed by the provisions of Section 74-A of the Act.

11. Both the Courts below have found as a fact, on evidence that the negligence of the railway administration has been proved. As already stated, the plaintiff was entitled to rely on the evidence tendered on behalf of the defendants for the purpose of showing this. The Courts were also entitled to take into account the fact that material witnesses have not been examined by the defendants-railway administrations. The case of the defendants in the written statement was that water must have entered the wagon as a result of heavy rains and stormy wind. But when the plaintiff called upon the defendants to answer such interrogatories in this matter, the defendants denied knowledge as to whether when the consignment was being dealt with there were rains at any places. Even with regard to the type of wagon described in the written statement as water-tight the description was not adhered to in the interrogatories and with regard to the kind of wagon the interrogatories stated that the wagon "was not marked NWT" (non-water tight). Thus one gathers an impression that the railway administration was reluctant to place on record all material facts. As a matter of fact, since the plea was that water must have entered the wagon because of heavy rain one would have expected the railway administration at least to tender evidence to show that at particular station there was heavy rain and strong wind, in which case their defence that damage was caused by reasons beyond their control may have been justified. But in spite of doing that, relevant material is

suppressed by the defendants. The material witnesses have also not been examined. As observed by the lower appellate Court, the defendants have not cared to examine any clerk or Station Master or train examiner from Ghorpadi or Tirora who would have been material witnesses and whose evidence would have been material to bring on record important material. Under such circumstances if the Courts have come to the conclusion that plaintiff has succeeded in proving that the defendants-railway administrations were negligent it is difficult to understand how that finding is open to challenge in this second appeal. That finding, therefore, must be accepted for the purposes of the decision of this appeal. In view of that finding, the appellants' contention that the judgment of the lower appellate Court is based on an erroneous construction of S. 74-C cannot also be accepted, because on merits it has been found that the plaintiff has discharged his burden of showing that the railway administrations were negligent.

12. Another point which was raised by the learned counsel for the appellants was that the plaintiff had not disclosed as to how the consignment which was damaged consignment was dealt with and that he had suffered monetary loss as a result of the alleged damage, and unless that was shown he was not entitled to a decree for damages. It is not disputed that the consignment when it arrived at the destination was found in a damaged condition. The railway authorities have themselves assessed the damage in respect of 39 bags at 18 per cent. This fact is also not disputed. It is, therefore, clear that when the plaintiff has received the damaged consignment and the extent of the damage itself is ascertained,, merely because the plaintiff has led no evidence to show as to the exact monetary loss caused to him, it cannot be said that the plaintiff is not entitled to damages. The very fact that the railway authorities have found that the consignment had deteriorated in value and the extent of that deterioration was estimated at 13 per cent,. it is not now open to the railway administration to say that the plaintiff is not entitled to damages. The quantum of the damages has been fixed by both the Courts below on the basis of assessment made by the Railway Administration and the same is not liable to be interfered with. These were the only contentions raised by the learned counsel and since all of them have been negatived the result is that the appeal is liable to be dismissed. The appeal is dismissed with costs. The appellants' counsel requests for leave to file Letters Patent Appeal. Leave refused.

13. Appeal dismissed.