

**(1969) 09 MAD CK 0017**  
**In the Madras High Court**  
**Case No : Appeal No. 263 of 1963**

|                                                           |    |            |
|-----------------------------------------------------------|----|------------|
| Union of India and Another                                | Vs | APPELLANT  |
| Sri Rajendra Mills Ltd., S. Singaram Chettiar and Another |    | RESPONDENT |

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**Date of Decision :** 19-09-1969

**Acts Referred:**

Contract Act, 1872 — Section 151, 152  
Evidence Act, 1872 — Section 114

**Citation :** AIR 1971 Mad 53 : (1970) 83 LW 251 : (1971) 2 MLJ 41

**Hon'ble Judges :** Ramanujam, J; Ramakrishnan, J

**Bench :** Division Bench

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## Judgement

Ramanujam, J.—The defendant in O. S. No. 69 of 1960 on the file of the Sub Court, Salem, is the appellant before us. The suit was filed by

the plaintiffs. Sri Rajendra Mills Limited, Salem and the Eagle Star Insurance Company Limited, Bombay against the Union of India, representing

Southern Railway and Central Railway for damages in a sum of Rs. 10,128/- being the loss suffered by them as a result of the damage to the first

plaintiff's goods by fire. The facts which gave rise to the suit are not in dispute.

The first plaintiff was consignee of 100 bales of pressed cotton from Messrs. Naran Das Rajaram (Private) Limited, Bombay. The bales were

securely packed and delivered in good condition at Banosa in the Central Railway and were accepted for carriage at railway risk to be delivered

to the plaintiff at Salem in Southern Railway, under invoice No. R. R. No. 9120/34 dated 2-3-1959. Out of the said consignment of 100 bales, 90

bales were loaded in one wagon and 10 bales were loaded in one wagon and 10 bales were loaded in another. The wagon containing 90 bales

arrived at Salem and the contents were found to be damaged by fire. The

remaining 10 bales were however received later in a good condition and accepted by the first plaintiff on 9-5-1959. As the first plaintiff refused to take delivery of the 90 bales, the railway authorities surveyed the goods on 9-5-1959 and found 21 bales were in good condition and the other 69 bales were damaged and they assessed the damage for, 23 bales at 22%; 30 bales at 30%; 16 bales at 40%. The plaintiff took delivery of the 21 bales which were in good condition and refused to take delivery of the damaged bales. Ultimately the damaged 69 bales were sold with a view to minimise the damages, through the intervention of the second plaintiff who are the insurers for the consignment for Rs. 21, 000/-.

2. It was the plaintiffs case that the resulting loss caused to them by the fire was Rs. 14,105/- that the damage was caused due to the acts of negligence, malfeasance and non-feasance on the part of the Railway administration during the transit of the goods and that though they are entitled to claim the said damage of Rs. 14, 105/- they are restricting their claim in the suit to Rs. 10,128/- being the damages at the percentage estimated by the Assistant Traffic Superintendent at the survey held on 9-5-1959.

3. The defendant admitted that 100 bales of pressed cotton were accepted for carriage from Banosa to Salem on 2-3-1959 and they were sent in two wagons as stated by the plaintiffs. As regards the consignment of 90 bales which was loaded in one wagon C. R. 4028 at Banosa station. the defendant pleaded that they were transhipped into P. R. C. 88933 at Murtazpur owing to break of gauge on 5-3-1959, that it was received at Balharsha on 6-3-1959 and that soon thereafter the wagon was found on fire which was immediately extinguished with the help of water from the water hydrant nearby. According to them the fire was purely accidental and not due to any negligence or misconduct on the part of the railway administration or its servants. They stated that all care and caution required of the railway had been taken, that the cause of fire was not known, and that the cause of fire was not known, of the railway authorities. The defendant repudiated the claim on the ground that the fire was purely accidental and not due to any misconduct or negligence either on the part of the railway administration or its servants.

4. The learned Subordinate Judge of Salem, who tried the suit, found that the goods were carried by the defendant at the risk of the railway and as

such it was for the railway administration to show that the damage was caused not on account of any negligence or misconduct on the part of the

railway administration or its servants. This finding that the goods were carried at the risk of the railway is not challenged before us. The learned

Subordinate Judge, after considering the evidence, both oral and documentary held that the damage was on the part of the railway administration

and assessed the damaged in a sum of Rs. 8, 623/85 and granted a decree for the said sum.

5. The learned counsel for the railway administration did not dispute the quantum of damages fixed by the lower Court. The only three contentions

that were urged before us by the learned counsel for the Railways are:

1. That the trial court was in error in taking the view that the burden of proving want of negligence or misconduct is on the part of the railway

administration.

2. that the trial Court has not properly appreciated the evidence adduced by the railway administration which is sufficient to shift the onus to the

plaintiffs in whom the burden of proof of the issue as to negligence ultimately rests and

3. that the trial Court was also in error in invoking the presumption u/s 114(g) of the Indian Evidence Act and the principal of *res ipsa loquitur* to

the facts of this case.

5A. According to the learned counsel for the appellant, even in a case where the goods are carried at railway risk, once the railway satisfied the

Court that they have taken all due care and caution as a man of ordinary prudence would taken on such goods if they were his own, the burden of

proof shifts to the plaintiffs and they have to prove positively that the railway was negligent and that the loss had occurred as a result of such

negligence. The learned counsel took us through the evidence of the various witnesses on the defendant's side and urged that the evidence

adduced is quite sufficient to show that the defendant has taken all possible care and caution as a man of ordinary prudence would take if the

goods were his own. He particularly relied on the evidence of D. Ws. 1, 6 and 8.

6-8. (His Lordship went through the evidence of D.W. 1, Tally Clerk at Murtazapur, D.W. 6, Train Examiner at Balharsha, D.W. 8, Train Clerk

at Balhatsha and D.W.2, Assistant Station Master at Balharsha and proceeded.)

9. Relying on the deposition of the above witnesses examined on the side of the defendant, the learned counsel for the appellant submits that it has

been clearly established that the wagon was found to be ""watertight"", property secured, without cracks, crevices, that the wheels were tested for

hot axle and break power etc. that the duty of the railway does not extend any further and that the railway is not responsible for accidental fire. The

learned counsel relied on following decision:

1. Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI),

2. Fushraj Thanmull Vs. Union of India (UOI), .

and contended that where the defendant has shown that there has been no failure or negligence on its part, it is incumbent upon the plaintiff, in

order to establish liability on the defendant, that there was negligence on the part of railway authorities or their servants or agents. According to the

learned counsel, the plaintiff has not adduced any evidence in this case to prove want of care or that there was negligence on the part of the railway

authorities or their servants or agents. On the facts of the case in Fushraj Thanmull Vs. Union of India (UOI), it was held that the cause of fire was

beyond any control of the railway authorities and that on the materials disclosed by thee railway authorities it was clear that they took all possible

care and precaution to extinguish the fire and were not negligent in any manner. On the findings aforesaid the Court held that the defendants was

not liable for damages as the plaintiff did not show any ground to suggest that there was any negligence or misconduct or lack of care on the part of

the railway authorities or its servants or agents.

10. In Indian Trade and General Insurance Co. Ltd. Vs. Union of India (UOI), dealing with the responsibility of the railway administration in cases

of this kind, G. K. Mitter. J., expressed as follows:--

The responsibility of the railway administration, therefore, is that of a bailee under the provisions of S. 151 of the Contract Act. It has to take as

much care of the goods bailed to it as a man of ordinary prudence would, of his own goods of the same bulk, quality and value, and by virtue of

the provisions of S. 152, is not to be responsible for any loss, destruction or deterioration if it has taken the care which S. 151 enjoins upon it. The

result of the statutory provisions, therefore, any be summarised as follows :

1. The railway administration must take as much care of the goods while under control as a man of ordinary prudence would take of such goods if

they were his own.

2. The railway administration is liable for the loss, destruction etc., if it happens by its default or negligence.

3. When loss destruction, etc., occurs, it is not for the plaintiff to prove, in the first instance, as to how it happened.

Then as regards the burden of proof the learned Judge expressed as follows:--

The burden of proof of the issue as to negligence ultimately rests with the plaintiff. The plaintiff has to satisfy the Court that the defendant was

negligent but the duty of showing how the consignment was dealt with during transit lies on the railway administration, as a matter within its special

knowledge. As the law does not cast on the plaintiff the obligation of proving how the ;loss rose and as to imposes on the defendant the duty of

showing how the goods were dealt with while under its control, the latter must first adduce evidence disclosing its treatment on the goods, and the

plaintiff may rely on that evidence in addition to any tendered by him to show that the loss had occurred by reason of defendant's default or

negligence or that the loss could not have occurred by for such default or negligence. If the defendant does not adduce all the evidence at is

command the plaintiff may, in proper cases, ask the Court to make a presumption u/s 114(g), and to come to the conclusion that the evidence

which has been withheld would have gone against the defendant.

We find from the facts of that case that that was also a case where goods were carried at the railway risk. With respect we agree with the view

taken by the learned Judge in that case.

11. The learned counsel for the respondents on the other hand relied on the decision of the Privy Council in *River Steam Navigation Co. v.*

*Choutmull*, (1899) 26 Ind App 1 wherein, while dealing with a case of fire to a consignment of jute properly put on board a vessel, held that under

the Indian Carriers Act, the carrier can avoid the liability it is proves that there was no negligence on its part. But on the evidence in that case the

carrier was held to be liable for the loss caused by the fire. It was noted in that case that:

A fire took place and it is the common case that it did not arise from

spontaneous combustion. It, therefore, must have arisen from some cause either external to the flat or internal in the flat. If it occurred from a fire within, it would appear that the onus is not discharged by the defendants, because they had the control of the flat. If the fire took place inside, they must have done something or other, or something must have happened on the vessel inside of the flat, which led to the fire. They are, therefore, driven to suggest causes for its occurring from something external to the flat: and it certainly is very remote, and rather a fanciful, suggestion that it arose from some spark coming from certain dinghies or smaller boats that were in the neighbourhood.

The law as the railway's liability in respect of goods carried has been changed from time to time. Under the Railway Act of 1854 (Act 18 of 1854) the railway company was answerable for any loss or injury caused by gross negligence or misconduct on the part of their agents or employees. But under the Carriers Act of 1865 (Act 3 of 1865) the liability of the railway was treated to be that of an insurer. The next Act, Railway Act 1879 took the railway out of the Carriers Act by providing that nothing in the Carrier Act of 1865 shall apply to carriage by railways and by repeal of the 1854 Act the liability of the railways was again treated as that of insurers in respect of loss or injury to the goods carried. Under the Railways Act of 1890 (Act 9 of 1980) the liability of the railway was equated to that of bailees, instead of insurers. By the amendment in 1961 to the Act of 1890, the liability of the railway has again been equated to that of an insurer that is, of a common carrier as it is understood in English Law. But we are concerned in this case with the Railways Act of 1870 (1809?) before this amendment in 1961.

12. The question is whether the defendant in this case has exonerated itself by showing that they have taken due care and caution in the carriage of the goods. From the evidence discussed above, it seems to us that the railway has not discharged the onus by showing that all possible care and caution has been taken in this case. It is seen that the goods were transhipped from the narrow gauge to broad gauge at Murtazapur on 5-3-1959 in the suit wagon without the same being actually tested for water tightness. D.W. 1 has admitted that he assumed that the wagon was "water tight" as it was labelled as "stenciled water-tight," and that he was not aware as to

when the wagon was last overhauled. From this it is clear that the consignment of the cotton bales was placed in a wagon which was not actually tested to be watertight. There is another factor which is also significant. The goods were transhipped by a Contractor, one Kammal, from the narrow gauge to broad gauge and the transhipment according to D.W. 1 would have taken 30 to 45 minutes. It is not known how the goods were handled by the Contractor or his servants during transhipment. A doubt arises as to whether there was any negligence by the said Kammal or his servants during transhipment and it cannot be ruled out as the said Kammal or anyone of his employees have not been examined. The evidence of D.W. 1 that the transhipment was done under his supervision is too much to be believed as he could not be expected to have been present throughout on the scene during the course of transhipment which admittedly took 30 to 45 minutes. Further, there is no evidence before the Court as to the history of the wagon as to when it was overhauled and stenciled. Though D.W. 6 the Train Examiner has deposed that after the fire was extinguished there was a mechanical examination of the wagon, that he found the wagon without any defect and that he immediately released for traffic for re-loading, it is difficult for us to believe that there was such a thorough examination as spoken to by this witness for, if there was no defect in the wagon, fire should have originated from inside from spontaneous combustion, which is not the case put forward by the defence in this case, or the railway must have done something or other or something must have happened inside the wagon which led to the fire. We are left in this case with the doubt as to the origin or the cause of the fire. In this connection, we have to note that there was a departmental enquiry conducted on the cause of fire by the Traffic Inspector sometime after the fire was put out and this is spoken to by D.W. 2, the Assistant Station master at Balharsha. The said enquiry should have thrown some light as to the cause of the fire. But that report of the enquiry officer is not before the Court. The enquiry officer who could have thrown considerable light on this question has not also been examined. It is not known who were all the witnesses who were examined in the said enquiry and what was the result of the enquiry. In the absence of the examination of the enquiry officer who enquired into the cause of the fire immediately

after it occurred, we are not prepared to hold that the fire was only accidental. The defendant cannot be held to have discharged its onus of

showing that it had exercised all reasonable care and caution in dealing with the suit consignment. In the circumstances we are of the view that the

principle of *res ipsa loquitur* and the presumption u/s 114(g) of the Evidence Act may be applied to the facts of this case.

13. The learned counsel for the appellant contends that the enquiry report is not evidence, that the defendant is not bound to produce the same and

that the non-production of the same cannot lead to and adverse inference being drawn against the appellant-defendant. It is said that the enquiry

report is only an opinion expressed by the enquiry officer and it has no evidentiary value before the Court. It is true that the enquiry report or the

deposition of witness examined in the departmental enquiry cannot be treated as substantive evidence in this case, but the statements given by the

witnesses before the enquiry officer can be used for purposes of testing the veracity of the witnesses examined before the Court. The enquiry

report will throw considerable light as to the cause of the fire. Though the defendant in this case cannot be compelled to produce the document

against its will, the non-production of the same can be taken by the Court as an unwillingness on the part of the defendants to produce all the

contemporaneous documents relevant to the issue before the Court. As already stated, the defendant cannot be said to have discharged its onus of

providing that it has exercised all possible and reasonable care and caution which a prudent man would do if the goods were his own. On the facts

it has to be taken that steps taken by the Railways to secure the goods, against loss or damages were inadequate.

14. In the result we confirm the decree and judgment of the trial Court and dismiss the appeal with costs.

15. Appeal dismissed.