

(1960) 04 BOM CK 0007

In the Bombay High Court

Case No : Civil Revision Application No. 188 of 1959

Union of India and Others

APPELLANT

Vs

Oudh Sugar Mills

RESPONDENT

Date of Decision : 21-04-1960

Acts Referred:

Contract Act, 1872 — Section 151, 152, 161
Railways Act, 1890 — Section 72, 74

Citation : AIR 1961 Bom 130 : (1961) 63 BOMLR 44 : (1960) ILR (Bom) 841

Hon'ble Judges : Kotval, J

Bench : Single Bench

Advocate : K.V. Tambe and W.K. Sheorey, for the Appellant; M.R. Bobde, for the Respondent

Judgement

1. On 21-12-1956 a consignment of 60 barrels of til oil was despatched from Belanganj station near Agra to the plaintiff at Akola who had purchased the oil from the Arjun Oil Mills, Agra. The consignment was booked under railway receipt No. 9774/56 dated 21-12-56, at Ex. D-3. The consignment was "to self but the consignor, the Arjun Oil Mills, "endorsed the receipt in favour of the plaintiff. The consignment was at "owner"s risk" rates and on the receipt was the following endorsement:

"Loaded by sender and unloaded by sender. Drums old and dented".

The consignment travelled via Jhansi and Itarsi to Akola to which destination it was booked. It was received at Akola on 30-12-56 and when delivery was taken on behalf of the plaintiff, about three barrels were found to have been leaking and therefore open delivery was asked for. Upon weighment it was found that there was a shortage of 6 maunds and 24 seers in weight in the consignment. The plaintiff, after giving a notice, therefore, sued the applicant railway for damages which he estimated at Rs. 509/4/0 being the value by which the goods had fallen short.

2. In answer to the suit, it was the case of the defendant railway that the goods were inherently defective in so far as the drums in which the oil was contained were old and dented and that the leakage must have been due to the defect in the drums, that when the wagon was opened at Akola, its seals were intact, and that therefore there was no possibility of the goods having been handled or tampered with in transit. The railway attributed the loss to the defect in the barrels. They denied that there was any rash shunting at any time during the transit of the goods. They alleged further that there were no protective rings round the drums to protect them while being rolled along and the oil might have leaked out due to normal jerks in transit. For these reasons the railway could not be held responsible.

3. The Small Cause Judge who tried the suit held that the loss had been established and that when the goods were consigned at Belonganj the barrels were not leaking. Thus, according to the trial Judge, the evidence showed that the goods were intact when they were delivered and that was also proved at the time of taking delivery at Akola. Yet the goods were found short. Therefore, he came to the following finding:

"This proves that the loss occurred during the transit, while the goods were in possession of the railway. The railway cannot escape its liability as bailee and the loss is prima facie proof of the negligence and misconduct"

He therefore held the defendant railway liable for the loss of the goods and decreed claim for Rs. 509/4/0. He referred to the decision of the Patna High Court in Governor-General in Council Vs. Gouri Shankar Mills Ltd., .

4. The trial Judge relied upon Section 72 of the Indian Railways Act which merely provides that the responsibility of a railway administration for loss, destruction or deterioration of goods is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, subject to the other provisions of the Act. Undoubtedly, as stated in the Patna case to which I have just referred that responsibility as laid down in Section 72 implies that the railway must take such care of the goods as a man of ordinary prudence would take of his own goods of the same quality and value under similar circumstances. If Section 72 had stood alone, it might be possible to hold, as was held in the Patna case, that the loss of or damage to the goods entrusted to a bailee was prima facie evidence of negligence and that therefore the burden of proof to disprove negligence lay on the bailee in the absence of any special stipulation to the contrary. The Pallia case upon which the Small Causes Judge relied was a decision prior to the recent amendment of the Indian Railways Act whereby Sections 74-A to 74-D were added. All these sections were added merely to place qualifications upon the principal duty of the railway as laid down in Section 72. Prior to the amendment, the railways used to enter into special contracts modifying or limiting their liability under Section 72 by express contracts. Those contracts were popularly referred to as "Risk Notes". It was considered advisable however that the public using the railways should know their rights and liabilities in advance and that each Case should not depend

upon the particular terms of the agreement and therefore the Risk Note forms were abolished and Sections 74-A to 74-E incorporated in the Act.

5. In the instant case, the defendant railway has invoked in its favour the provisions of Sections 74-A and 74-C. According to the defendant railway, the goods, when tendered for carriage to the railway, were in a defective condition, as a consequence of which they were liable to deterioration, leakage, wastage or damage in transit for which Section 74-A(a) makes provision. The railway has also pleaded that the fact of such condition or defective Or improper packing had been recorded by the sender or his agent in the forwarding note and therefore the railway was not responsible for the leakage, wastage or damage. The defendant railway further pleaded that the goods were consigned at owner's risk rates and therefore under Sub-section (3) of Section 74-C, the railway was not responsible for the loss, destruction or deterioration of or damage to the goods unless the plaintiff proves negligence or misconduct on the part of the railway or any of its servants.

6. So far as the view taken by the trial Judge that the fact that the loss occurred during transit while the goods were in possession of the railway furnishes prima facie proof of misconduct and negligence on the part of the railway, is concerned, it seems to me that the learned trial Judge erred in law. As I pointed out, the Patna case relied upon by the trial Judge was a case prior to the amendment of the Act. At no stage in the judgment of the trial Judge has he referred to the provisions of Section 74-C. It was under that section that the defendant railway had sought protection because it had pleaded that the goods were consigned at owner's risk rates and therefore it was not liable unless negligence or misconduct was proved. A decision of the same High Court after the amendment has taken a wholly contrary view in *Union of India (UOI) Vs. Bishwanath Agarwalla*, . With reference to Section 74-C, it was observed in that case:

"When the statute requires proof of negligence, misconduct etc., for the liability for the loss, destruction, deterioration, leakage etc., to hold that the loss or damage is prima facie proof of negligence is to make the entire effect of Sections 74-A and 74-C nugatory. Here lies the importance of the qualifying words "subject to the other provisions of the Act occurring in Section 72 of the Indian Railways Act".

In my opinion, since the amendment of the Indian Railways Act, it is not a correct proposition to say that the mere fact that the goods entrusted to the railway have sustained damage or have been lost would be prima facie sufficient to show negligence or misconduct on their part. Undoubtedly, the fact of loss may be one of the circumstances that may be taken into account in judging the negligence or misconduct on the part of the railway, but where the matter is governed by the provisions of Section 74-G that circumstance alone cannot lead to such a conclusion.

7. The circumstances as they have been established upon the evidence in this

case are not in dispute. The goods when they were handed over to the railway were not in a damaged condition. The drums containing the oil were however described in the consignment note as "dented and old". The witness Krishna Kumar (D. W. 1), a servant of the railway, has qualified this description by admitting that by "old drum" he meant "a drum which has once been used", in other words, one which was not absolutely a new drum. Beyond that what was the condition of the drums has not been established in the present case. The drums full of oil were then placed inside the wagon and the loading was done by the consignor himself. The wagon was then sealed and there is evidence to show that it was received with the seals intact at Akola, thus eliminating the possibility of any human agency having interfered with the goods in transit. There is also no evidence that any natural agency affected the condition of the goods except the normal wear and tear which the goods would undergo while travelling in a goods wagon on a railway. When the wagon was opened at Akola, oil was found to have leaked on to the floor of the wagon. There is some dispute as to whether the unloading at Akola was done by the consignee, But having regard to the endorsement which I have reproduced above, made upon the face of the receipt itself, there is no doubt, in my opinion, that the unloading was to be done by the consignor which includes the person to whom he may endorse the receipt. Since it must be presumed that the terms of the contract were carried out, in the absence of any evidence, it must be held proved that the endorsee of the receipt, the plaintiff, or his agent, unloaded the wagon at Akola. There is evidence given by the witness Nandlal (P. W. 1) that a considerable quantity of oil had leaked out and flowed on to the floor of the wagon. When ascertained, 6 maunds and 24 seers of oil was found short.

8. These are the circumstances that are established upon the evidence. I am quite unable to see upon these circumstances how the railway could possibly be held responsible for negligence or misconduct. The railway on their part had a duty to transport the goods from Belanganj to Akola taking of them such care as a man of ordinary prudence would take of his own goods. The wagon was sealed at Belanganj and unsealed at Akola. There is absolutely no allegation that at the time of unloading the goods may have sustained damage, and indeed upon the only evidence in the case, the unloading, as I have held, was also "done by the plaintiff or his agent. Therefore, there is nothing on the record to show that it was due to any act or conduct on the part of the railway or their servants at the time of unloading that the loss of or damage to the goods occurred. To say in these circumstances that negligence on the part of the railway has been established would amount to holding that the mere loss of goods would be prima facie proof of negligence which as a proposition of law is, in my opinion, incorrect, I hold that there is no proof here that the loss of or damage to the goods in the present case was due to negligence or misconduct on the part of the defendant railway or their servants.

9. Mr. Bobde on behalf of the plaintiff referred to several cases, particularly a recent decision of this Court in *Ramkrishna Ramnath Shop v. Union of India*,

1960 Nag LJ 177: AIR 1960 Bom 344 ; Sattanmal Vishandas Vs. The Union of India (UOI), ; and M.K. Manickam Chettiar Vs. Union of India and Another, . In none of these cases were the circumstances similar to the circumstances in the present case. So far as Section 74-C is concerned it seems to me that there must be some distinction in the case of damage sustained to goods in transit by some external agency and damage sustained because of any inherent defect or weakness in the goods themselves. M.K. Manickam Chettiar Vs. Union of India and Another, were both cases where the goods were found damaged due to rain. In both the cases, the goods were consigned during rainy season, and when they were found to be damaged by rain water, the Courts upon those circumstances held that the facts showed negligence or misconduct on the part of the railway. The reasoning in both the cases was that it was the duty of the railway to have ensured that the goods entrusted to them as bailees and which when entrusted to them were in a dry condition should reach their destination in the same condition. That is no more and no less than the duty which is in terms cast upon a bailee by the provisions of the Indian Contract Act. In these cases, there was the crucial fact that knowledge was imputed to the railway when goods are transported during rainy season that they are liable to be damaged due to rain water getting into the wagon, and it was held that it was the duty of the railway to provide water-tight wagons. There was no such extraneous cause operating here, nor has there been proved in the present case any circumstance which would put the railway on guard and impose upon them a duty to take any particular care. The Rajasthan case was not a case where Section 74-C was held to apply. In that case, upon a consideration of the evidence the learned Judge held that the goods were despatched at the railway risk rate and decided the matter upon that finding. Section 74-C therefore was expressly held not to apply,

10. In the view I take of the matter as to the applicability of Section 74-C (3) it seems to me unnecessary to consider the other defence taken on behalf of the railway relying upon the provisions of Section 74-A. In my opinion, the decision of the Small Cause Judge was not in accordance with law. Upon the evidence, he should have held that no negligence or misconduct had been proved on the part of the railway, nor were they otherwise responsible. I allow the application for revision, set aside the judgment and decree of the Small Cause Judge and dismiss the plaintiff's suit with costs throughout.

11. Revision allowed.