

(1976) 07 DEL CK 0010

In the Delhi High Court

Case No : Civil Revision Appeal No. 197 of 1973

Union of India

APPELLANT

Vs

Gopal Dass Ramesh Chand

RESPONDENT

Date of Decision : 20-07-1976

Acts Referred:

Citation : (1976) ILR Delhi 508

Hon'ble Judges : B.C. Misra, J

Bench : Single Bench

Advocate : H.S. Dhir and Sat Pal, for the Appellant;

Judgement

B.C. Misra

(1) This revision petition has been filed by the Union of India u/s 25 of the Provincial Small Cause Courts Act, against the judgment and decree of the Additional Judge, Small Causes, dated 14th November, 1972, by which it has decreed the suit of the respondent for recovery of Rs. 359.38 out of a claim for Rs. 406.25.

(2) The material facts of the case are that 125 baskets of raw and fresh mangoes were booked on 30th May, 1967 from Vijayawada to New Delhi under the Parcel Way Bill (Ex. PI). They arrived in Delhi on 7th June, 1967 and when they were delivered to the respondent they were found to be damaged. The respondent took open delivery with a certificate that 25 per cent was the extent of damage. The respondent after service of statutory notice, filed a suit for recovery of the amount mentioned above on the ground that the Railway, owned by the petitioner, had been guilty of misconduct and negligence in carrying the parcel and was, Therefore, liable to pay the damages. The suit was contested on various grounds. The court below repelled all the grounds of defense and decreed the suit to the extent of Rs. 359.38, holding that the market value of the mangoes was Rs. 11.50 per basket and the total value of the goods at the said rate would be Rs. 1437.50 and its 25 per cent would be Rs. 359.38. The suit was

decreed with proportionate costs.

(3) Mr. H. S. Dhir, counsel for the petitioner, has raised three contentions, namely : (1) that the respondent had no locus standi to institute the suit, (2) the finding of the court on the negligence of the Railway is not supported by any evidence, and (3) there was no sufficient reliable evidence to find the market value of the goods and thereby determine the loss.

(4) I have heard the counsel for the parties and have perused the record of the case. The railway receipt was consigned in favor of the respondent. The testimony of PW1, Kishan Chand, is that he was an employee of the plaintiff and had gone to Vijayawada to get the goods booked, that he had paid the advances to the consignor and the goods were packed and booked in his presence and that they were booked the same day on which they were plucked and the goods were booked by passenger train. There is no cross-examination of this witness on the point that the plaintiffs had paid advances to the consignor. PW2, Gopal Dass, a partner of the plaintiff-firm, is the other witness. He has deposed that the plaintiffs had paid the advances to the consignor and they had a running account with the consignor and he proved Ex. P.5, a copy of the account of the consignor. The witness further stated that the plaintiffs had sold the goods as owners to some other parties and if the plaintiffs fail to realise the price of the goods, they had themselves to suffer. This statement shows that the property in the goods had passed to the plaintiffs.

(5) Mr. Dhir, however, relies on another statement of PW2 in cross-examination, where the witness stated that the plaintiffs worked as commission agents and charged 7 per cent commission. In my opinion, this statement of working as commission agents does not militate against the stand of the plaintiffs that the property stood passed to the consignee and they had advanced money for the same and were entitled to receive the goods. A commission agent is not by nature merely an employee or agent and it is consistent with its position to deal with the goods as principal to principal and acquire the property in the goods as well as realise the commission. On the evidence on record, I do not find any reason to interfere with the finding of the court below that the plaintiffs had property in the goods.

(6) The law on the subject has been laid down by the Supreme Court in Union of India (UOI) Vs. West Punjab Factories Ltd., , where the court was concerned with the question whether the consignor had a locus standi to sue the carrier, and the court observed that ordinarily, it was the consignor who could sue if there was damage to the consignment, because the contract of carriage was between the consignor and the railway administration, and where the property in the goods carried had passed from the consignor to consignee, the latter might be able to sue and whether title to goods had passed from the consignor to the consignee depended on the facts of each case.

(7) Avadh Behari J. in Union of India v. B. Prahalad & Co., Rsa 81 of 1969,

decided on 14th November, 1975 (2), after an exhaustive discussion on the question and also making a reference to the above noted decision of the Supreme Court, observed on page 22 of the judgment, thus :

"THE plaintiff as commission agent has sufficient interest in the goods and is entitled to sue. To hold to the contrary would be a retrograde step and would paralyse the entire mechanism of finance of our internal trade. In this vast country where goods are carried by railway over long distances and remain in transit for long periods of time, the railway receipt is regarded as a symbol of the goods for all purposes."

I am in respectful agreement with the views of my learned brother, Avadh Behari J.

(8) Mr. Dhir has, however, relied on the observations of H. L. Anand J. in Cr 60 of 1972, decided on 8th April, 1976 (Union of India v. Jashan Mal & Co.) (3). Anand J. has not referred to the decision of Avadh Behari J. mentioned above, although the same was earlier in time. His Lordship was concerned with the case of a commission agent, who did not have any interest in the goods except as an agent or the consignor. His Lordship observed on page 45 of the judgment, "what happens where the plaintiff on his own showing, as in the present case, states that he was a person to whom the goods had been sent by the owner not in the course of transfer by sale or otherwise or for consideration or by way of pledge, etc. but as a commission agent for eventual sale on behalf of the consignor, and such a person, (as held by his Lordship), would be beyond the scope of the rule because he claimed to be a consignee not in his own right but as a consignee who had been entrusted with the duty to sell the goods on behalf of the principal. Such a person could not claim by such a consignment any rights in relation to the property or in relation to the contract of carriage in addition to the bare right to receive the goods and to give a valid discharge." It is, Therefore, obvious that Anand J. has expressed the view that if the goods have passed on to the consignee in the course of trade by sale or otherwise for consideration, then the consignee certainly acquires a locus standi to institute the suit; on the other hand, if the commission agent has acted merely as an agent performing ministerial functions on behalf of his principal, then he may not have the property in the goods and consequently no locus standi to institute the suit. I am of the view that there is no real conflict between the views of H. L. Anand J. and Avadh Behari J. and the question in each case is to be answered on the facts and circumstances disclosed. In the instant case, the respondents had advanced money to the consignor, had themselves through their agent seen the loading of the goods at the starting station, and they had sold the goods on their own. As such, I am satisfied that the court below was right in returning a finding that the plaintiff respondents had locus standi to institute the suit. The finding is affirmed and the contention of the learned counsel is rejected.

(9) The court below has returned a finding on negligence on the part of the railway. It has inferred it from three circumstances; firstly that there was one

day's delay in loading the goods, secondly, that there was inordinate delay in detaining the train on the way and lastly, not the least, the Railway had failed to show how the parcel had been dealt with by it through the course of transit during the whole period the goods were in its possession, in spite of the fact being within its special knowledge and notice having been served on it. In reply to interrogatories, the Railway stated that it would produce the material evidence at the trial, but failed to do so and the court below has rightly drawn a presumption against the Railway, in view of section 114(g) of the Evidence Act. The court below has also found that the normal time taken by the Railway for transit between Vijayawada and New Delhi was five or six days and so there was a delay in the instant case and it was entitled to draw a presumption of negligence on the part of the Railway. Avadh Behari J. in the judgment cited above has also drawn a presumption against the Railway for its failure to disclose at the trial as to how the Railway had dealt with the parcel in transit. In a decision, *Union of India v. Jashan Mal & Company*, Cr 88 of 1969, decided by me on 9th January, 1974(4), I had the occasion to deal with the question in detail and held that where the goods are booked for carriage at owner's risk, the liability is measured by the provisions of sub-section (3) of section 74 of the Indian Railway Act and the Railway has been exempted from liability for loss, damages, etc. on account of any cause arising except upon proof of negligence or misconduct on the part of the Railway Administration and u/s 76F of the Act a statutory duty has been cast on the Railway Administration to disclose how the consignment had been dealt with throughout the time it was in its possession or control and if negligence or misconduct on the part of the Railway Administration or any of its servants could not be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor.

(10) In *Union of India v. The Delhi Cloth & General Mills Co. Ltd.*, Air 1964 Pun 147, it was held that any goods carried at owner's risk, the responsibility of the Railway is that of a bailee. The facts as to how the damage or loss had occurred to the goods were within the special knowledge of the Railway Administration, under the provisions of section 106 of the Indian Evidence Act, the Railway Administration was supposed to adduce evidence to show how the goods were dealt with in the course of the transit and that they had taken as much care as a man of ordinary prudence would do regarding his own goods and if the Railway Administration failed to produce such evidence, an adverse presumption would be drawn against it u/s 114(g) of the Evidence Act and in a case where the plaintiff called upon the Railway Administration to adduce certain evidence, which was in their exclusive possession, and they failed to do so, the presumption u/s 114(g) of the Act would be still stronger. In AIR 1937 152 (Privy Council), it was held that the failure of the Railway Company to produce evidence of guard for disclosure how the consignment was dealt with would entitle the court to draw a presumption u/s 114(g) of the Evidence Act that the evidence if produced would have been unfavorable to the Railway and that in consequence, misconduct by complicity in the theft of some servants of the company might fairly be inferred.

Under the circumstances, I hold that the court below was justified in returning a finding that the petitioner had been negligent and so was liable for the loss caused to the goods.

(11) This leads me to the consideration of the last contention of Mr. Dhir. He has contended that there is no sufficient evidence to show the market rate of the goods on the date they were due to be supplied. He has cited *The Union of India (UOI) Vs. Baijnath Madan Lall and Others*, , and *M/s. Nirmal Kumar v. Union of India*, 1970 (2) M.L.R. 294, in support of the proposition as to how the damages are to be assessed. There is no doubt that measure of damages is the difference between the market price of the goods on the date they were due and the value of the damaged goods. In the instant case, the respondents have succeeded in establishing their case. PW2 has stated on oath that the market rate during the relevant period was Rs. 11.50 to Rs. 13 per basket. He has supported the statement by reference to the statement of account. He has also stated that the plaintiffs had sold 123 baskets for Rs. 950 and the rest of the two baskets were thrown on the road as they were badly damaged. It is pertinent to notice that the petitioner has not led any evidence in rebuttal of the said statement. The court below was, Therefore, entitled and justified in relying upon the testimony of PW2 and holding that the market rate was Rs. 11.50 per basket. So far as the damage is concerned, the court has acted on the certificate furnished by the Railway that the damage in the instant case was 25 per cent. The court has, properly taken the market value at the lowest figure proved on the record, viz. 11.50, and finding the total value of the goods at Rs. 1437.50, calculated 25 per cent loss at Rs. 359.38. In arriving at this conclusion, the impugned order does not suffer from any legal infirmity. The court has not found damages by the value actually fetched for the damaged goods subsequently, and so its decision is not vulnerable, in view of the law laid down in the Patna case. The amount of damage awarded by the court is a question of fact and since it does not transgress any provision or rule of law, the finding does not call for interference by this court.

(12) As a result, I find no merit in the revision and dismiss the same with costs.