

(2017) 02 GAU CK 0003
In the Gauhati High Court
Case No : MFA No. 4 of 2010

Union of India

APPELLANT

Vs

M/s. Sunrise Traders

RESPONDENT

Date of Decision : 28-02-2017

Acts Referred:

Railway Claims Tribunal Act, 1987 — Section 23

Citation : (2017) 2 GauLT 294

Hon'ble Judges : Mr. S. Serto, J.

Bench : Single Bench

Advocate : Mrs. U. Chakraborty, SC, NF Railway and Mrs. M. Chattarjee, Advocate, for the Appellant; Mr. K.P. Maheshwari, Mr. A. Goyal, Mr. Arunav Choudhury, Mr. Bharat Maheshwari and Ms. Manisha Sharma, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. S. Serto, J. (CAV) - Heard Mrs. U. Chakraborty, learned counsel for the appellant and also heard Mr. A. Goyal, learned counsel for the respondent/claimant.

This is an appeal under section 23 of the Railway Claims Tribunal Act, 1987 against the judgment and order dated 26.10.2009 of the Railway Claims Tribunal of Guwahati Bench, Guwahati passed in Railway Claim Application No. 1/2006 wherein, the appellant was directed to pay a sum of Rs. 75,400/- as compensation to the respondent/petitioner, for the shortage of 377 bags of onion out of 9,510 bags, booked by the respondent claimant in the goods train belonging to the appellant and, on default, to pay an interest @ 6% p.a, from the date of filing of the case within 3(three) months till the realisation of the compensation amount, and also to pay cost of application and legal practitioner fee of a sum of Rs. 1,700/- and Rs. 1,500/- respectively.

2. The facts and circumstances of the case which led to the filing of this appeal are briefly stated herein below :-

That on 24.02.2003, the respondent/claimant, filed an application before the Railway Claims Tribunal, Guwahati Bench, Guwahati claiming as follows;-

(i) That out of 9,510 bags of onion he had booked in safe and secure condition and, under Railway's risk from Manmad in Maharashtra to new Guwahati, 377 bags were found missing when the goods reached the destination. Therefore, the Railway authorities were informed and they accordingly inspected and verified the shortage and the same was entered in the Railway record known as "Unloading tally books". And thereafter, CGS/NGC was also informed about the same through a letter dated 25/06-2-2000 with a request to issue short delivery certificate. However, CGS/NGC after putting his remark on the said letter expressed his inability to issue such certificate in the prescribed form purportedly, based on the direction of the headquarters not to do so. That the wagon seals and card labels were found absent and the doors of the wagons were also found with big gaps and in disturb condition, therefore, he submitted a claim for compensation to the General, Manager, N.F Railway vide his letter dated 27.03.2000, along with a request to issue short delivery certificate. But since the appellant did not respond positively he has been compelled to file the petition claiming a sum of Rs. 90,480/- for the loss suffered by him with an interest @ 18% p.a, and application fee of Rs. 2,896/- and Advocate fee as per rule.

(ii) On receipt of the application of the respondent, the Railway Tribunal issued notice to the appellant/respondent and, the case was tried on contest. The appellant filed an objection to the petition denying that the goods were booked under safe, sound and secure condition and, under the Railway Risk rate and, after meeting all the statutory requirements of the Railway Rule. The appellant on the other hand claimed that the goods were booked from truck to wagon without the supervision of the Railway employees, under the "Said to contain" remark and, at the risk of the respondent/claimant, therefore, Railway is not responsible for any shortage or damage supposedly suffered by the respondent/claimant. It was also claimed that doors of the wagons were kept half open though cover with jali at the request of the respondent/claimant. Therefore, for anything that may have happened on the goods while on journey, the Railways cannot be held responsible. It was also denied that the doors were found open at the time of unloading, seal and card labels were absent, flap doors were found with big gaps and stacks were in disturb condition. The appellant further denied the claim of the respondent/claimant that the Railway authorities inspected and verified the shortage when the goods were unloaded. The appellant also, denied that any loss was suffered by the respondent/claimant due to negligence on the part of the employees of the Railway. Lastly, it was stated that interest @ 18% p.a prayed for cannot be granted since the Railways did not have any contract with the respondent/claimant to pay interest.

(iii) After hearing the parties, the Railway Tribunal passed a short judgment and order dated 21.08.2006. The Tribunal, in the said judgment and order came to the conclusion that both parties failed to prove their respective case, therefore,

they should share the loss equally. Thereafter, the appellant was directed to pay a sum of Rs. 37,700/- to the respondent/claimant.

(iv) Not satisfied with the said judgment and order the appellant herein, filed an appeal under section 23 of the Railway Claims Tribunal Act, 1987 in this High Court and the same was registered as MFA No. 56/2007 and it is was disposed of on 24.09.2007, with the observations and directions given hereunder :-

"However, as the learned Tribunal has passed the order awarding compensation without discussing the materials available on record and wrongly shifting the burden of proof on the Railways even after holding that the claimant has failed to prove his case, I set aside the impugned order dated 21.08.2006 and remit the matter to it for giving a fresh decision on OA No. 116/06(M-7/03), upon hearing the learned counsel for the parties and on the basis of the materials available on record, within a period of two months from the date of receipt of this order. The parties are directed to appear before the learned Tribunal on 8.10.2007 for taking necessary order."

(v) Accordingly, the case was sent to the Railway Claims Tribunal, Guwahati Bench, Guwahati to try the case once again and decide on the materials on record. After hearing the parties the learned Tribunal passed the judgment and order dated 26.10.2009 which is impugned herein.

The relevant portion of the impugned judgment and order is given herein below :-

"Applicant in his affidavit states that there was total shortage of 377 bags i.e. 220 bags + 157 bags of onion. This deficiency was recorded in the unloading tally book by respondent railway. It is further written in the affidavit that the applicant was prevented to record the details of shortage and deficiencies in the Railway Delivery Book by CGS on the basis of Railway Order passed by Chief Claims Officer, NFR/MLG dated 19.02.1991 bearing No. C/65/0/48/ID but permitted them to put all facts about shortage in a letter form. Accordingly the applicant had submitted a letter to the respondent railway indicating all the shortages. Moreover, this fact was not denied by the respondent railway by filing any counter affidavit. Hence under the circumstances, it is noted that respondent railway is liable to compensate the claimant.

The application is allowed. The applicant has filed claim for shortage of 377 bags of onion @ Rs. 240/- per bag. But Rs. 200/- per bag has been accepted as reasonable rate as this case previously decided on 21.08.2006 at this rate. At this rate the compensation amount comes to Rs. 75,400/-

The respondent is directed to pay the amount of Rs. 75,400/- (Rupees seventy five thousand four hundred) only along with interest 6% per annum from the date of filing of the case within three months from the date of this order, failing which the amount shall carry interest @ 6% per annum till realization. Respondent shall also pay proportionate costs of application fee Rs. 1,700/- and legal practitioner's fee of Rs. 1,500/-"

3. It is submitted by the learned counsel for the appellant that after the parties were called up by the learned Tribunal the respondent filed an affidavit along with certain documents which will help the appellant to prove his case however, the same was not accepted by the Tribunal on the ground that this High Court, in the order dated 24.09.2007 had directed to decide the case based on the materials available in the record only. And this decision of the Tribunal has put the appellant in disadvantage in proving his case. After submitting as such, the learned counsel tried to draw my attention to the affidavit and the documents annexed thereto. However, the learned counsel for the respondent strongly objected the same and at the same time submitted that those documents are un-exhibited documents, therefore, this Court cannot look into them at this stage of the case. While agreeing with the submission of the learned counsel for the respondent and decision of the Tribunal in view of the High Court's order dated 24.09.2007 passed in MFA No. 56/2007 it may also be stated that the affidavit was filed on 20.02.2007 and, the impugned judgment and order was passed on 26.10.2009, in between the two dates the appellant could have filed an application for leave to file the affidavit and the documents and to exhibit them in evidence and in the event of such prayer not being allowed he could have come to this Court either on revision or in any way permissible under the law. But the appellant having kept quiet all along and all these times, I am afraid, it is too late in the day to ask this Court to look into those documents.

4. The learned counsel for the appellant after such preliminary submission submitted further as follows :-

That the goods were loaded straight from truck to wagon and they were booked under the "Said to contain" RR remarks, therefore, even if any loss or damage has occurred to the goods on the respondent/claimant, the appellant is not liable to pay any compensation. According to the learned counsel, when on a railway receipt the remark "Said to contain" is given the weight or the quantity of the goods mentioned in such receipt is only for the purpose of levying the freight charge on the goods booked and nothing more, therefore, the same should not be taken as an evidence to prove that such weight or quantity has been receipt by the railway. Therefore, to succeed in such a case the claimant has to prove the weight or quantity of the goods booked, and the shortage claimed to have been found, as the burden lies on him to do so.

5. Learned counsel for the respondent in reply submitted that "Said to contain" is not applicable in the case of the respondent/claimant because the terms "Said to contain" can be used only when goods are booked at private sidings and without the service of a goods clerk availability to supervise and tally specific numbers of packages by him. To support his case, the learned counsel drew my attention to Rule-1592 of Indian Railway Commercial Manual Rule Volume-II.

The provision of the Rule-1592 is given herein below :-

"1592. Loading and unloading of goods in assisted or private sidings, and his

wages and other costs are paid for by the owner thereof, the loading of goods will be supervised and tallied by the Goods Clerk, and railway receipts will be granted for the specific number of packages loaded. Similarly, unloading of inward goods will be supervised and tallied by him (see para 2513 also).

(b) Where no Goods Clerk is posted, consignments loaded in an assisted private siding will be booked at the serving station in the same way as any other consignment. However, since loading is not supervised by the railway staff, and also in view of the difficulty of making an accurate check of an already loaded wagon, only a "said to contain" receipt should be granted in such cases, the receipt being endorsed "Loading not supervised by railway staff no contents checked."

It is also submitted by the learned counsel for the respondent/claimant that since the shortage in the delivery of the consignment (onion) was recorded/entered in the "Unloading tally books" there is nothing more to prove from the side of the respondent/claimant regarding shortage of 377 bags of onion. But if the appellant wants to prove otherwise they should do so by producing the relevant document which is in their custody. Since that has not been done the presumption has to be drawn against them (appellant).

Learned counsel further submitted that it is the duty of the railways to prove that seal and card label were intact at the time of unloading and to do so the seal and card label should have been produced at the time of the trial. But, since the respondent/railway has failed to produce the same, presumption has to be drawn that the doors of goods wagons in which the goods of claimant were transported were not in proper shape and order, therefore, the claim of the respondent/claimant that there was shortage of his goods transported by the appellant at the time of delivery has to be accepted. At this, the learned counsel for the appellant submitted that since the period of 6(six) months for keeping such seal and card label, as per, Indian Railway Commercial Manual Rule-1714 was over the same was destroyed, therefore, they could not produce before the Tribunal. Learned counsel for the respondent/claimant in reply submitted that in the same provision it is provided that when there is a dispute the seal and card label should be submitted and kept under safe custody, therefore, the time limit given therein will not apply in such case. The learned counsel also submitted that the notice under section 106 of Railways Act, 1989 was served to the appellant on 31.03.2000 i.e 27 days from the date of booking which means that the notice was given within six months from the date of booking of the goods. Therefore, the appellant/railways cannot be exonerated from their duty to produce the seal and card label in good condition.

The provision of Rule-1714 of Indian Railway Commercial Manual Rule to which both the learned counsels referred to is as follows :-

"1714. Preservation of seals and labels.-Seals and labels should be carefully preserved for six months and then destroyed, but in the case of shortage from

wagons or any dispute or claim, they should be submitted with the missing and damaged goods report From Com./D-I Rev. (see Para-2155)".

On mere cursory perusal of the provision it is clear as submitted by learned counsel of the respondent that when there is a dispute the limit of six months to keep the seal and card label does not apply rather the same should be kept safe and secure and produce at the time of trial or settlement of the dispute.

Case referred to by the learned counsels :-

(i) Learned counsel for the appellant;-

(a) 2002 (1) GLT 605,

(b) AIR 1988 Ori. H.C. 267

(ii) Learned counsel for the respondent;-

(a) (1984) 1 GLR 276,

(b) Unreported MFA No. 17/2011 of GHC

6. From the submission of both the learned counsels and from the original claim petition and written objection filed by the respondent/claimant and the appellant respectively one thing that has clearly emerged is that there is no dispute on the claim of the respondent/claimant that his goods were booked with the appellant for transportation from Manmad in Maharashtra to new Guwahati. Therefore, the only issues that are required to be decided are as follows :-

(i) Under what remark i.e. "Said to contain" or safe and secure/under railways risk the goods of the respondent/claimant were booked and transported ?

(ii) Whether the wagons carrying the goods of the respondent/claimant reached the destination in safe and secure condition and if so whether the claim of the respondent/claimant that there was shortage of 377 bags of onion at the time of delivery is proved or not.

7. None of the parties seems to have produced any document to show that the goods were booked under the remarks of their respective claims in the petition or in the written objection filed.

It appears from the noting in the LCRs dated 21.05.2009 that the original record had been damaged by rain water, therefore, the counsels appearing for the parties were requested to supply the photo copies of the case record available with them and it was only thereafter that the case record was reconstructed. Be that as it may, the case has to be decided now with the materials available in the record.

8. Coming to the Issue No.1, the petitioner stated in his application submitted in the prescribed form the details of the booking particulars of the consignment showing, the date of booking, invoice/RR number, the place from where the

booking was done and the name of the destination, description of goods and also the details of shortage in the consignment i.e. 377 bags of onion. The respondent/claimant supports his claim with an affidavit. However, from the appellant's side a written objection was filed but no affidavit was filed and no document or oral evidence was also submitted in support of their case. In the affidavit the deponent had stated as follows :-

"That we are the consignee and hold legal title in terms of section 74 of the Railway Act 1989. The consignment of 951 bags onion in each, RRs booked from MMR to New Guwahati under Inv No. 161+163 to 165+167 RR No. 571317+571319 to 571321+571323 dated 16-02-2000 in safe, sound and secured condition under Railway risk rate after meeting all legal and statutory inspections as per Railway rules".

As stated above, none of the parties submitted any documentary evidence. The only evidence by way of affidavit was submitted by the respondent/claimant. Affidavit is accepted as a form of evidence under Rule-14 of the Railway Claims Tribunal Act, 1987.

"Rule-14 reads as follows :-

14. Filling of Affidavit :- (1) The Tribunal may direct the parties to give evidence, if any, by affidavit.

(2) Notwithstanding anything contained in sub-rule (1), where the tribunal considers it necessary for just decision of the case, it may order cross-examination of any deponent."

There is no record to show that the deponent of the affidavit submitted in support of the respondent/claimant's case was cross-examined by the appellant and other evidence were produced by the appellant which would show that what is stated in the affidavit of the respondent/claimant are not true. Under such circumstances, it has to be presumed that the appellant did not dispute the evidence given by the respondent/claimant in the affidavit.

In view of the above, the claim of the respondent/claimant that the goods were booked under the remarks safe, and secure condition and under the railway risk rate and not under "Said to contain" has to be accepted.

9. Coming to the Issue No.2, from the submission of the learned counsel for the appellant it appears that the seal and card label had been destroyed, whereas the railways are duty bound to keep it safe and secure beyond the period of six months since there is a dispute. The fact that the railways knew that a dispute had arisen before the expiry of six months time, from the date of booking of the consignment can be seen from the date of receipt of the letter dated 27.03.2000 submitted to the General Manager, N.F Railway, Maligaon, Guwahati. As can be seen from the record the letter or notice under section 106 of the Railway Act i.e. the letter dated 27.03.2000 of the respondent/claimant was received in the office of the appellant on 31.03.2000. The goods were booked on 16.02.2000 and the

said letter/notice was received in the office of the appellant on 31.03.2000, therefore, the notice was served within six months from the date of booking of the consignment. As such, the appellant as per the provision of the Indian Railway Commercial Manual Rule-1714 was duty bound to keep the seal and card label of the wagons under safe and secure condition. If they had produced the same the case of the respondent/claimant that his goods were lost while transit due to lack of care on the part of railways would have been proven wrong. But the appellant having not produced the same has attracted presumption that the goods while transit were not in safe and secure condition, therefore, the lost or shortage to the extent claimed by the respondent/claimant had occurred. At the cost of repetition but for the sake of clarity let it be stated here again that the claim of the respondent/claimant that 377 bags of onion was lost was supported by the affidavit which was not denied by cross-examination or by producing better evidence. Further, the appellant failed to produce seal and card label which could have prove whether the wagons reached destination in safe and secure condition or not. All these can only lead us to presumption that the appellant have not taken proper care of the goods/consignment while transporting the same and that has caused shortage of 377 bags of onion.

In view of the findings stated above and the reason given thereto the impugned judgment and award of the Railway Claims Tribunal of Guwahati Bench, Guwahati is upheld and the appeal is dismissed. There is no order as to cost.

With this, the appeal is disposed.