
(1969) 01 MP CK 0017

In the Madhya Pradesh High Court

Case No : C. Revision No. 148 of 1968

Union of India

APPELLANT

Vs

National Coal Development Corporation Ltd., Ranchi

RESPONDENT

Date of Decision : 01-01-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1972) JLJ 96

Hon'ble Judges : A.P. Sen, J

Bench : Single Bench

Advocate : N.L. Mukherji, for the Appellant; S.C Pandey, for the Respondent

Final Decision : Allowed

Judgement

A.P. Sen, J.—The Union of India, representing the South Eastern Railway, has filed this revision u/s 115 of the Code of Civil Procedure, against a decree of the second Additional District Judge, Bilaspur, dated 9-10-1967, affirming a decree of the Civil Judge, Class It, Katghora, dated 24-4-1967, whereby the claim for recovery of Rs. 990 as damages in the suit, for the alleged non-delivery of 3 pcs. of Phosphor Bronze Bush Rough Casting, bought by the National Coal Development Corporation Ltd., an undertaking in the public sector (hereinafter referred to as the "NCDC"), has been allowed.

2. The material facts are these. The goods in question were consigned by M/s. S.K. Mukerjee and Company, Calcutta, Ex. A. Ghat on the South Eastern Railway under R/R No. 760232, dated 18-6-1963, bearing Invoice No. 93, for delivery, at Korba, to the Deputy Superintendent of Collieries, NCDC. Admittedly, the goods were not delivered, and the NCDC, which was the consignee named in the R/R, instituted this suit against the Railways for damages. Contrary to the admitted fact of non-delivery, the Learned Counsel appearing for the Union of India tried to assert before me for the first time that non-delivery of the goods had not been established. That assertion is somewhat strange, coming as it does from a senior counsel. Before the Courts below, it had not been disputed that the goods were

actually lost in transit, presumably on account of the negligence and/or misconduct of the railway administration and its agents or servants, and the learned appellate Judge adverts to the fact of non-delivery as an "undisputed" fact. In view of the admission of non-delivery in the Courts below, the Learned Counsel for the Union of India cannot be permitted here to contend otherwise.

3. The Learned Counsel appearing for the Union of India then tried to assail the decree on other grounds, on which the claim had really been contested in the suit itself, viz :

"(1) there was no proof that title to the goods had passed to the consignee, i.e., the NCDC, and, therefore, it was not entitled to maintain any suit for damages for their non-delivery; and

(2) the goods having been consigned without any pre-payment of freight, no claim for refund of freight was maintainable. Alternatively when damages are claimed for non-delivery of goods, the resultant claim is inclusive of freight and, therefore, refund of freight cannot be separately had."

4. As regards the claim for refund of freight, the Learned Counsel for the NCDC has very frankly conceded that no claim for any refund of freight arises. It is, therefore, not necessary for me to deal with this aspect in detail. Suffice it to say that when a consignment is entrusted to the railways under a stipulation of this nature, i.e., "freight to pay" and the goods are lost in transit, it necessarily follows that no claim for refund of freight would be exigible, because no such payment was ever made. Alternatively, even if freight had been paid, that could not form any part of the claim in a suit for damages for non-delivery of goods, because the eventual damages claimed would be on the basis of the prevailing market price at the destination, which must of necessity be inclusive of freight. (See, AIR 1931 29 (Nagpur) and Bala Prasad Agiwai Vs. The Union of India (UOI),). That part of the claim in this suit must, therefore, be negatived, and the decree shall stand modified to that extent.

5. The only other ground urged is that, the NCDC, being a consignee of the goods, was not entitled to maintain any suit for damages for non-delivery of the goods, unless it is further proved that it had acquired their ownership. The argument is that, the contract of carriage was with consignors, namely M/s. S.K. Mukerjee and Company, and unless and until the price was paid, they remained the owners of the goods, and that the endorsement of R/R by them merely gave to the NCDC, the right to take delivery but it could not claim any damages for non-delivery, as title to the goods had not passed. In support of this submission, reliance is placed on Macnamara's Law of Carriers, 2nd Edition, p. 107; Halsbury's Laws of England (3rd Edition) Vol. 4, p. 196; The Morvi Mercantile Bank Ltd. and Another Vs. Union of India (UOI), ; Commissioners for the Port of Calcutta Vs. General Trading Corporation Ltd. and Another, and Ibrahim v. Union of India AIR 1966 Guj. These are an authority for the proposition that where the goods are consigned to self by the consignor and the railway receipt is endorsed

in favour of another, the endorsee cannot sue the railways for short delivery of non-delivery of the goods, merely by reason of the endorsement, in his favour. It is, accordingly, urged, particularly on the strength of certain observations of their Lordships of the Calcutta and Gujarat High Courts that a mere endorsement of the railway receipt does not transfer the property in the goods covered by it, and the endorsee cannot, therefore, be said to have acquired an interest in the goods, apart from the fact of his being an endorsee. That interest is, insufficient in law to clothe him with authority according to these decisions, to sue the railways, unless he has further acquired ownership in the goods. It is also urged that the decision of this Court in *Mulji Deoji v. Union of India* [6] does not lay down good law, and requires reconsideration. These contentions can hardly be accepted.

6. In *Morn Mercantile Bank v. Union of India* (supra), their Lordships of the Supreme Court have refrained from expressing any opinion on this question, stating:

"The India decisions cited at the bar do not deal with the question whether a valid pledge of goods can, be effected by transfer of documents of title, such as a railway receipt, representing the goods; they were mainly concerned with the question whether an endorsee of a railway receipt for consideration could maintain an action on the basis of the contract embodied in the said receipt; See, *Firm of Dolatram Dwarkadas v. Bombay Baroda and Central India Railway Company* ILR 38 Bom.659: .AIR 1914; *Shah Mulji Deoji v. Union of India*; *Commissioners for the Port of Calcutta v. General Trading Company* [4] & *Union of India v. Taherali* 58 Bom. LR 650 Bom. 178. These raise a larger question on which there is a conflict of opinion.

In the view we have taken on the question of pledge, it is not necessary to express our opinion thereon in these appeals."

(underlining--here italics -is mine)

It would thus appear that their Lordships' decision in that case merely proceeded on the pledge itself, and they refrained from expressing any opinion on the question whether an endorsee of a R/R can maintain an action for damages. That decision, therefore, cannot be relied upon as an authority for the proposition now tried to be enunciated by the Learned Counsel. It is however, true that the Calcutta and Gujarat High Courts have now struck a discordant note, namely, that a railway receipt is not a negotiable instrument and even if it were to be regarded as a quasi negotiable instrument, it cannot be said that by a mere endorsement and delivery of that instrument, not merely the right to take delivery of the goods represented thereby passes, but also the title in the goods themselves. In other words, their Lordships are of the view that the endorsee of a railway receipt is not entitled to sue the railways merely by reason of the endorsement, in his favour, unless he has acquired ownership in the goods. So far as I am concerned in this case, sitting here singly, I am bound by the

authority of this Court in *Shah Muiji Deoji v. Union of India* [supra], wherein the view taken by majority was to the contrary, and that view has throughout been followed in this Court in a large number of cases. Following that decision, I would, accordingly, reaffirm that when goods are consigned to self under a railway receipt and the receipt is endorsed in favour of another, the endorsee, by reason of the endorsement in his favour, becomes entitled to institute a suit against the railway administration for damages either for non-delivery or short delivery of the goods.

7. Apart from this, it is really not necessary to express any opinion on that aspect in this case, for reasons I shall presently state. The claim was contested not on the larger question, namely on the right of an endorsee for valuable consideration to institute a suit of this nature, but on the ground that title of the goods did not pass to it, and while taking this plea in denial, the Union of India had called upon the endorsee in their written-statement, to produce its books of account in proof of its averment that it had become the owner of the goods in question. The controversy in this suit is, there fore, limited to the question whether the ownership of the goods had passed to the NCDC. We have on record the testimony of Ghulam Mustafa, Stores Clerk, NCDC (P.W.1), showing that the supply of goods was made by Messrs S.K. Mukerji and company in compliance of an order placed by the NCDC with them. The railways have not cared to lead any evidence in rebuttal of this and the courts below have rightly accepted the testimony of this witness. That being so, it is clear that the NCDC had placed an order with Messrs S.K. Mukerji and Company for the supply of three pcs. of Phosphor Bronze Bush Rough Casting, i.e., the contract of sale was for the supply of unascertained goods. Now when such contract is made, title to the goods undoubtedly passes upon their appropriation to the contract of sale. Such appropriation was effected when the suppliers, Messrs. S.K. Mukerji and Company, separated the good contracted for, i.e., 3 pcs. of Phosphor Bronze Bush Rough Casting from the general mass of property, namely, their stock of such goods lying in the godown. When we look at the problem from another angle, we arrive at the same conclusion. Now, here the endorsee, i.e., the NCDC, also happens to be buyer of the goods. u/s 39 of the Sale of Goods Act, 1930, where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier for the purposes of transmission to the buyer is prime facie deemed to be a delivery of the goods to the buyer, That principle is so well settled that no authority is needed to support that proposition. Applying that principle, it would appear that on delivery of the goods in question to the South Eastern Railway, the title in them passed to the consignee. There is, therefore, no substance in the contention that the ownership of the goods had not passed to the endorsee and that it had no right to sue the railway for any damages. Even on the contrary view taken by the Calcutta and Gujrat High Courts, the suit shall be clearly maintainable on this view of the matter.

8. The result is that the revision fails and is dismissed with costs, but subject to

the modification indicated in para 4 above. Counsel's fee Rs. 50, if certified.