

(2013) 02 KL CK 0017
In the High Court Of Kerala
Case No : M.F.A. No. 190 of 2005

Union of India

APPELLANT

Vs

Pondy Roller Flour Mills (P) Ltd.

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Evidence Act, 1872 — Section 56, 57
Railway Claims Tribunal Act, 1987 — Section 16, 3
Railways Act, 1989 — Section 103, 106, 110, 81, 82

Citation : (2013) 2 KHC 729 : (2013) 3 KLJ 168

Hon'ble Judges : K. Hema, J;A. Hariprasad, J

Bench : Division Bench

Advocate : M.C. Cherian Sr. SC, for the Appellant; K. Srikumar and K. Manoj Chandran, for the Respondent

Judgement

K. Hema, J.—Application was filed by the respondent herein u/s 16 of the Railway Claims Tribunal Act, 1987 ("The Tribunal Act" for short) for compensation from Railway for the loss sustained by the respondent because of the damage caused to the consignment sent by railway. The said application was allowed and an award was passed in favour of the respondent for realization of Rs. 1,64,234/- from the appellant, with interest at the rate of 6% per annum, from the date of entrustment of the consignment to the Railways till the date of judgment with cost of Rs. 3,000/-. The appellant was given 45 days time to comply with the order. This appeal is filed by the railway challenging the said order. According to the claimant, 258 bags of Wheat were booked vide Ext. P1 dated 16-10-1997 from Khanna to Tellicherry by M/s. Sood Brothers. There was long delay in the consignment reaching the destination at Tellicherry. Though the claimant informed the railway from time to time about the delay, he was informed that the consignment reached Tellicherry Railway Station on 12-06-1998. Later on 09-04-1999, the Chief Claims Officer, Southern Railway sent a letter to the claimant stating that the consignment was disposed of on auction for an amount of Rs. 49,100/- and he was called upon to pay the wharfage charges pertaining

to the above consignment.

2. The goods were decayed and damaged as a result of the long delay caused in delivering the goods at destination by Railway Administration. They failed to compensate claimant even after the notice were served u/s 106 of the Railways Act, 1989. The respondent sought for a direction to appellant to pay an amount of Rs. 1,64,234/- by way of compensation for the loss sustained by the claimant in respect of the railway receipt being the value of 258 bags of Wheat plus freight paid.

3. The railway appellant filed a reply to the petition and took up the following contentions. The claimant refused to take delivery when the consignment reached the Tellicherry Railway station and on by virtue of Section 82(1) of the Railways Act and hence he lost the right to claim compensation for the loss sustained. The application is to be dismissed on the above score itself. The appellant also stated in the reply that the consignment said to contain 258 bags of Wheat were booked by the applicant from Khanna to Tellicherry under the Railway Receipt and consignment was directly loaded from truck to wagon by the consignor and the Railway staff did not supervise loading and the contents and condition of the bags were not checked. The claimant is put to strict proof of the actual endorsement of the sound condition of the consignment loaded at the forwarding station. Relying upon certain judgments, it was contended that the claimant is not entitled for compensation. The respondent did not admit the value of consignment and the claim in the petition.

4. PW 1 was examined and Exts. P1 to P7 were marked on the side of the claimant. The respondent examined RW 1 and marked Exts. R1 to R7 on either side. On an analysis of the rival contentions, learned Tribunal found that as per Section 82 of the Railways Act, the consignee or the endorsee shall take delivery of the consignment or part thereof and in case of failure to take delivery, wharfage charges may be levied. It was also held that the provision will not absolutely absolve appellant from its liability, though it empowers appellant to charge wharfage charges.

5. It was also held that claimant refused to take delivery and there was gross negligence on the part of appellant, for it has not fulfilled its commitment to its customer by delivering the consignment in reasonable time and thereby caused considerable financial loss and inconvenience to the claimant. The Tribunal also found that the claimant is entitled to the value of 258 bags of Wheat booked under Ext. P1, the railway receipt. Since Ext. P1 was admitted by the appellant, it was further held that taking judicial notice of Bill No. 349 dated 15-10-1997 for Rs. 5,37,098/- for 1018 bags of Wheat issued by M/s. Sood Brothers, Khanna, the applicant is entitled for a compensation of Rs. 1,64,235/- (Rs. 1,36,121/- being the cost of 258 bags of Wheat and Rs. 28,114/- being the freight paid). The above findings and the award passed by the Tribunal are challenged by the appellant in this appeal.

6. Heard both sides. Perused the records. The point arising for consideration in the light of the contentions raised are as follows:-

1. Whether the claimant loses right to claim compensation for the loss sustained due to the damage or deterioration of the articles sent to the Railway Administration for carriage, if he refuses to take delivery of the consignment, u/s 82(1) of Railways Act?

2. In the absence of the claimant proving the monetary loss actually sustained by him, can the Tribunal grant any compensation in his favour?

3. Whether in the light of what is contained in the railway receipt, the Tribunal can "take Judicial notice" of bill relating to the consignment and hold the railway responsible for payment of the amount covered by the bill?

7. Points 1 to 3: The appellant in the reply to the application filed by claimant for compensation raised a contention that since claimant refused to take delivery of the consignment, he loses his right to claim compensation from the railway, by virtue of Section 82(1) of the Railways Act. According to appellant the claimant is not entitled to get any compensation, since he refused to take delivery. It is an admitted case that the claimant refused to take delivery of the consignment in spite of notice issued to him regarding the reaching of the consignment in Tellicherry Railway Station.

8. The claimant did not approach the railway authorities for delivery of the articles and the authorities had to auction the consignment. In the light of the decision reported in Union of India (UOI) Vs. Ibrahim Gulaba Tobacco Merchant and Others, , Union of India representing the General Manager, South Eastern Railway, Calcutta v. M/s. Ibrahim Gulaba Tobacco Merchant and others, the proper course for the claimant is to take delivery of the consignment in the condition in which it is found after giving notice to the Officer, giving delivery as to the condition and then sue the railway for damage, it is argued. Since that has not been done, the claimant cannot be granted any compensation, it is argued.

9. Learned counsel for the respondent argued that the above aspect was considered by the Tribunal and it was rightly held that the provision contained in Section 82 of the Railways Act does not absolutely absolve the Railways from its liability, even though it empowers the respondent to charge wharfage charges. The decisions cited by counsel for appellant was not cited in the impugned judgment, but there is nothing wrong in the observation made by the Tribunal, it is argued.

10. In the light of the above contentions, we will consider the scope of Section 82 of the Railways Act. The said provision reads as follows:-

82. Partial delivery of consignments.- (1) The consignee or endorsee shall, as soon as the consignment or part thereof is ready for delivery, take delivery of such consignment or part thereof notwithstanding that such consignment or part thereof is damaged.

(2) In the case of partial delivery under sub-section(1), the railway administration shall furnish a partial delivery certificate, in such form as may be prescribed.

(3) If the consignee or endorsee refuses to take delivery under sub-section (1), the consignment or part thereof shall be subject to wharfage charges beyond the time allowed for removal.

11. Section 82 lays down that the consignee or the endorsee shall, as soon as the consignment is ready for delivery, take delivery of such consignment, notwithstanding that such consignment is damaged. Though as per Section 82, it is mandatory that the consignee must take delivery of the consignment, even if it is damaged, when the consignment is ready for delivery, sub-section (3) of Section 3 refers to the consequences of refusal to take delivery.

12. The only consequence for refusing to take delivery of the consignment is as stated in Section 82(3) and it is laid down therein that if the consignee or endorsee refuses to take delivery under sub-section (1), the consignment or part thereof shall be subject to wharfage charges, beyond the time allowed for removal. There is nothing in Section 82 to show that if the consignee refuses to take delivery of the consignment when it is ready for delivery, he will lose his right to compensation for the loss or damage caused to the consignment because of the delay or any other reason.

13. The only consequence of refusal to take delivery u/s 82(1) is that he will be liable for wharfage charges beyond the time allowed for removal. Therefore, the contention that the claimant is not entitled for compensation from the railway or that he lost the right to compensation since he refused to take delivery etc. cannot be accepted. The relevant portion from the decision relied upon by the learned counsel for the appellant (Union of India representing the General Manager, South Eastern Railway, Calcutta v. M/s. Ibrahim Gulaba Tobacco Merchant and others) is extracted hereunder:-

It is well settled that the Railway Administration is not bound to give open delivery on the demand of the consignor. The consignee has no right to demand that the goods shall be opened and inspected in the railway premises before he can be called upon to take delivery. What is proper for the consignee to do is that he should take delivery of the consignment in the condition in which it is found after giving notice as to its condition to the Officer giving the delivery, and then sue the Railway company for damage. (Para 13)

14. A reading of the above extract, clearly shows that first sentence itself is contrary to the provision contained in Section 81 of the Act. It is held in the above decision that the Railway Administration is not bound to give open delivery on the demand of consignment. But, Section 81 lays down that the consignment arrives in damage etc., consignee or the endorsee demands upon delivery, Railway Administration shall give open delivery in such manner as may be prescribed.

15. On going through the facts of the case referred to in the decision cited above, it is clear that when the said decision was rendered, Section 81 was not in the statute. In the above circumstances, the dictum laid down in the above decision cannot be applied to the facts of this case and it cannot be held that the proper course open to claimant is to take delivery of the consignment and then sue the railway only thereafter.

16. Now coming to the question whether any compensation can be granted in the absence of claimant proving monitory loss actually sustained to him. Compensation can be granted or not, it is necessarily to go into Section 110 of the Railways Act. Section 110 reads as follows:-

110. Burden of proof.- In an application before the Claims Tribunal for compensation for loss, destruction, damage, deterioration or non-delivery of any goods, the burden of proving -

(a) the monitory loss actually sustained; or

(b) where the value has been declared under sub-section (2) of section 103 in respect of any consignment that the value so declared is its true value, shall lie on the person claiming compensation, but subject to the other provisions contained in this Act, it shall not be necessary for him to prove how the loss, destruction, damage, deterioration or non-delivery was caused.

17. A reading of Section 110 clearly reveals that in an application for compensation of loss, destruction, etc., the burden to prove the monitory loss actually sustained shall be on the person claiming compensation. Therefore, in a claim petition filed u/s 16 for the loss, damage, destruction etc. caused to the goods, the claimant has to prove the actual monitory loss sustained to him. The loss can be sustained under the various circumstances, if some money is paid for purchasing the goods, such amount can be lost by the deterioration or the damage or destruction caused to the goods transported. There can be monitory loss by virtue of damage, destruction etc. caused to the goods.

18. In this case, the claimant made a claim for Rs. 1,64,234/- as the value of the goods plus freight charges paid. Learned counsel for appellant argued that there is absolutely no evidence to show that actual monitory loss was as claimed by appellant in the petition. Learned counsel for respondent pointed out with reference to affidavit filed by him before the Tribunal that, it has been specifically stated as per the averments in the petition. The value of one bag is Rs. 527.60/- and the value of 258 bags will come to Rs. 1,36,120.80/-. According to the claimant, the Wheat was purchased from M/s. Sood Brothers by Sale as per Bill No. 349 and the above bill was produced along with the original application.

19. A request was also made to mark the same as Ext. P2, as per paragraph 3 of the proof affidavit. But, trial court failed to mark the same. The said bill is available in the records. We are satisfied that the bill dated 15-10-1997, issued by the M/s. Sood Brothers which was produced by the claimant along with a

petition was available before the Tribunal. But, Tribunal failed to mark the same.

20. When PW 1 claimant was cross examined, it was brought out from his evidence that money was paid, as per demand draft and that there is endorsement regarding payments of amount and its satisfaction as per the demand draft. But the claimant did not produce either the copy of the demand draft, or any document to establish that money was actually paid for the 258 bags of Wheat. As per Section 110, the burden is on the claimant to prove the monitory loss actually sustained by him when he makes the claim for compensation from the railways, but no documents are seen marked in the proceedings to prove this fact. It appears from the reading of the deposition that there was some confusion and mistake in marking the documents.

21. It is stated in the cross examination by the appellant that the original of the railway receipt was marked as Ext. A3 and the Tribunal has recorded, "already marked as Ext. P1". In the affidavit, a specific averment is made that the sale bill issued was produced along with the application and the same was marked as Ext. P2. But, Ext. P2 marked in the application is something else. We also find that a bill referred to in the affidavit as produced along with the application, but it has not been marked.

22. On going through the impugned judgment, we find that attention of the Tribunal was not focused on the burden of proof. The Tribunal was not looked into whether the applicant has discharged the burden of proof u/s 110 of the Act. The Tribunal entered into certain findings on the basis of the bill referred to in Ext. P1. There can be no doubt that such reference and findings entered into on the relevant details of the bill are not legally correct. The Tribunal also proceeded as if "judicial notice" of the details in the bill can be taken by the Tribunal, since the appellant has admitted issuance of Ext. P1, wherein the bill was referred to.

23. There can be no doubt that the Tribunal has not even looked into the provisions contained in the Evidence Act relating to "judicial notice". The expression "judicial notice" was referred to in the judgment for the purpose of holding that the monitory loss was sustained by the appellant, which is established by the details in the bill. The number and other details which were referred to in Ext. P1 which is only a railway receipt. As per Section 56, the court can take judicial notice of certain facts, but what are such facts which referred to in Section 57 of the Evidence Act. Section 56 lays down that no fact of which the court will take judicial notice may be proved. The facts of which court must take judicial notice are referred to in Section 57.

24. A reading of Section 57 makes it clear that the Tribunal has patently go wrong on observing that judicial notice can be taken in respect of the details in the bill which was referred to in Ext. P1, which is only a railway receipt. The Tribunal was of a view that since Ext. P1 is admitted by the railway, all what are referred to therein can be acted upon by taking judicial notice of the facts stated therein. This is absolutely incorrect and not consistent with the provisions

contained in the Evidence Act which were referred above. The expression "judicial notice" has specific condition in the Evidence Act. In the light of the above discussion, we find that having failed to look into the question whether the applicant has discharged his payment as u/s 110. The impugned judgment cannot be sustained. The Tribunal is bound to look in to this aspect again and the impugned judgment has to be set aside. Since the bill is already in the record the matter requires a re-consideration and hence it is to be remanded. Opportunity has to be given to both sides to adduce evidence so as to decide whether claimant discharged the burden of proof as laid down u/s 110. The mistake appears to have occurred from the side of the Tribunal in not marking the bill. No party shall suffer because of such mistake. Therefore, the following order is passed:-

1. The impugned judgment is set aside in the light of the observation made in the judgment.
2. The case is remanded to the Tribunal for fresh consideration and dispose of in accordance with law.
3. The Tribunal shall give opportunity to both sides for adducing evidence if any, they propose to do so and dispose of the matter in accordance with law, within two months from the date of receipt of a copy of this judgment.
4. The party shall appear before the Tribunal on 27th March, 2013