
(1979) 04 OHC CK 0013
In the Orissa High Court
Case No : First Appeal No. 175 of 1970

Union of India (UOI) and Another	Vs	APPELLANT
Orissa Textile Mills Ltd. and Another		RESPONDENT

Date of Decision : 19-04-1979

Acts Referred:

Contract Act, 1872 — Section 41
Evidence Act, 1872 — Section 101 , 102, 103, 104
Railways Act, 1890 — Section 73, 78B

Citation : AIR 1979 Ori 165 : (1979) 48 CLT 245

Hon'ble Judges : R.N. Misra, J;P.K. Mohanti, J

Bench : Division Bench

Advocate : B.K. Pal, for the Appellant; S.S. Basu, for the Respondent

Final Decision : Partly Allowed

Judgement

R.N. Misra, J.—Defendants -- the Union of India representing the Central Railway and the South Eastern Railway --have carried this appeal against the judgment and decree of the First Additional Siibordiate Judge at Cuttack decreeing plaintiffs" suit for damages.

2. The Orissa Textile Mills Limited (hereinafter referred to as the "Company") is a public company having its registered office and factory at Choudwar, off Cuttack. A hundred bales of F. P. cotton procured by the Company were consigned in perfect condition from Shendurni, a station located on the Central Railway, to Charbatia , a station on the South Eastern Railway, for being delivered to the Company under Invoice No. 1 and Railway Receipt No. 218917 dated 6-2-1968. During transit, the consignment was badly damaged by fire and water and open delivery was given to the Company on assessment basis on 11-5-1968 vide Ext. 8 indicating damage to the consignment in the following way: (i) damage to 7 bales at 50% (ii) damage to 55 bales at 40% (iii) damage to 38 bales at 12% Claim was lodged by the company as required under the provisions of the Railways Act. As the consignment had been insured with the London and

Lanchashire Insurance Co. Limited (hereinafter referred to as the "Insurer"), the Company claimed the damage from the Insurer and the same was amicably settled. The Insurer became subrogated to the rights and remedies of the Company and became entitled to recover the loss arising out of the damages. Notice u/s 80 of the Civil P. C. was given and the suit came to be filed on 23-7-1965 by the Company and the Insurer as plaintiffs.

3. The two Railways filed separate written statements but their defence was almost identical. According to them the Insurer had not been validly subrogated to the rights and remedies of the Company and had, therefore, no right of suit. In the absence of notice u/s 78-B of the Railways Act by the Insurer, the suit by it was not tenable. There was no negligence or misconduct on the part of the employees of the Railway Administration of both the Central and the South Eastern Railway in dealing with the consignment. It was conceded that the consignment had been booked at Railway risk. In course of transit, after the consignment left the station of booking, the same had been transhipped to a broad-gauge wagon at Pachora and the consignment was found to be in order. After the wagon carrying the consignment reached Cuttack Railway Station, it was being carried to the Company's Railway siding in a Down O. T. M. Pilot train on 19-12-1963 and in course of that movement while the train was passing the west cabin of the Nergundi Railway Station, fire was first noticed in the wagon. The train was stopped, the wagon was isolated and water was poured into the wagon to extinguish the fire, at the earliest opportunity. It was admitted that the cause of fire is not known and may have been due to some live sparks coming into the wagon carrying the consignment. Ext. 8 had been prepared on the basis of guess work and no actual assessment had been made. As such without actual proof of loss, plaintiffs were not entitled to the damages claimed.

4. At the trial, four witnesses were examined on the side of the Company and two on behalf of the Railways. The Bill, the letter of subrogation, the power-of-attorney by the Company in favour of the Insurer, notice u/s 78-B of the Railways Act by the Company to the Railways, were marked as Exs. 1 to 4 respectively. The assessment certificate was marked as Ext. 8. Certain other documents were also produced by the plaintiffs.

5. The learned Trial Judge on the basis of the evidence placed before him came to hold :--

(i) the consignment of cotton when booked was in good and sound condition;

(ii) damage was caused during transit;

(in) the plaintiffs were entitled to compensation for damage;

(iv) even if the suit was hit on account of want of notice u/s 78-B of the Railways Act so far as the Insurer was concerned, it was maintainable qua the Company;

(v) even if the Company had been paid by its Insurer, its right to sue was not wiped out on that account; and

(vi) the right to sue for damages inherent in the contract between the Railways and the Company did not stand superseded or annulled.

Accordingly a decree for the entire claim has been given which is assailed in appeal by the Union of India representing the two Railways,

6. Mr. Pal for the appellants advances the following contentions:--

(i) On the case as made out, the Insurer only was entitled to maintain the suit and the Company had no subsisting cause of action. Reliance in support of this point is placed on Section 41 of the Contract Act.

(ii) Notice u/s 78-B of the Railways Act having not been given by the Insurer, the suit at its instance was not maintainable.

(iii) The immunity provided u/s 73 of the Railways Act was applicable to the facts of the case and, therefore, no liability could be fastened as against the carrier.

(iv) The certificate of damage could not be the sole basis for award of compensation, the law being that the compensation claimed has to be commensurate to the damage.

7. The letter of subrogation has been marked as Ext. 2 and the material part thereof reads thus:--

"In consideration of your paying to us a sum of Rs.. 16,833.70 in respect of the undermentioned goods insured with you under Certificate No. 177, we (the Company) hereby assign and transfer to you all our rights, title and interest in respect of the said goods, and all rights or claims against any person or persons in respect thereof.

And we also authorise you to use our name in any action or proceedings you may bring in relation to any of the matters hereby assigned and transferred to you, and we undertake for ourselves to concur in any matters or proceedings which you may deem expedient or necessary in any such action or proceeding, and to execute all documents which may be necessary, and generally to assist therein by all means in our power.

We further undertake, if called upon by you to do so, ourselves to undertake any such action or proceedings that you may direct on your behalf; it being understood that you are to indemnify us and any other persons whose names may necessarily be used against any costs, charges or expenses which may be incurred in respect of any action or proceedings that may be taken by virtue of this Agreement.

Section 41 of the Contract Act provides:--

"When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."

According to Mr. Pal for the Railways, between the Company and the Insurer

there existed a contract in terms of which any damage to the consignment was to be made good by the Insurer. Since the Company and the Insurer admitted that the damages under the contract of policy has been paid to the Company by the Insurer, the principle in Section 41 of the Contract Act is attracted. We are not at all impressed by Mr. Pal's argument. Admittedly, the Company had a contract with the carriers for the transshipment of the consignment of cotton. That contract was for the carriage of the goods from one point to another covered by the two Railways. If the contract failed to work out under certain contingencies, there arose liability for compensation. It is not the case of the Railway Administration that the contract of the Company with them had been performed by the Insurer. As just indicated, the contract which was the outcome of promise was for transshipment and the Company did not expect performance thereof by the Insurer. On the facts, Section 41 of the Contract Act is not attracted. The solitary decision on which Mr. Pal relied does not also appear to hold the field in regard to the real ambit of Section 41 of the Contract Act.

Ext. 2 contains these two material terms: (i) the Company authorises the Insurer to use the Company's name in any action or proceeding the Insurer may bring in relation to any of the matters assigned or transferred to the Insurer and the Company further undertook to concur in any matter or proceeding which the Insurer may deem expedient and necessary; and (ii) it also undertook, if called upon by the Insurer, to do so by itself but in that event the Insurer was to indemnify the Company as against costs, charges or expenses" which may be incurred. Ext. 2 does not seem to be an assignment. There is no transfer of title in the goods and all that had been agreed upon was that the Insurer would stand surrogated to the rights and remedies available to the Company. Under these premises, there is no force in Mr. Pal's contention that the Company had no right of suit.

8. Admittedly the notice u/s 78-B of the Railways Act, which is a condition precedent to maintaining a claim for damages had not been issued by the Insurer. According to Mr. Pal, non-issue of such a notice made the suit by the Insurer non-maintainable. Law is fairly settled that notice u/s 78-B of the Railways Act is obligatory. We have already found that in terms of Ext. 2, the Company's right of suit had not been extinguished and the Insurer could require the Company to file the suit. Thus the suit by the Company as laid is a valid one and even if the Insurer be found not to be entitled to sue, the suit cannot be dismissed though the Insurer may not get the benefit under the decree.

There, however, arises an interesting aspect for examination at this juncture. Under Ext. 2, the Insurer could use the name of the Company in the suit. The Insurer could also take action in its own name in view of the fact that Company's right had been transferred to it. The Insurer had no privity of contract with the carrier. It entered into a contract with the Company -- the consignor and the consignee -- to cover the risk of consignment over the transit. There is no requirement in law that subrogation should be made at any particular point of

time but should be before institution of the suit. In a given case, it was open to one to subrogate his right or remedies in respect of a claim even at the time of institution of the suit. For instance, in the instant case, if Ext. 2 had been entered into just before institution of the suit, would the question of want of notice u/s 78-B of the Railways Act strictly arise ? The claim is one and the claimant is also one, i. e. the Company. Just because the Company has sub-rogated its right to the Insurer, the Insurer has come into the field. In fact, being the subrogee, the Insurer has stepped into the shoes of the Company to exercise its rights and remedies. In the premises, steps taken by the Company are available to enure to the benefit of the Insurer and the notice that had been issued u/s 78-B of the Railways Act by the Company can be availed by the Insurer. No authority has been cited by Mr. Pal to us that this could not in law be done. While we reiterate our agreement with Mr. Pal's contention that notice u/s 78-B of the Railways Act was a condition precedent to the institution of the suit, we do not agree that in a set of facts as before us, it would not be open to the Insurer to take advantage of the notice issued by the Company. The second point advanced by Mr. Pal has, therefore, to be overruled.

9. Section 73 of the Railways Act provides :--

"Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery in transit, of animals or goods delivered to the administration to be carried by railway, arising from any cause except the following, namely :--

(a) to (h)

(i) fire, explosion or any unforeseen risk;

Provided that even where such loss, destruction, damage, deterioration or nondelivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods."

Under the scheme of the Railways Act, as a bailee, in respect of the goods entrusted to it for carriage at carrier's risk, the Railway is liable for damages. Section 73 of the Railways Act provides statutory immunity in respect of damages arising out of stated causes, but the proviso makes it abundantly clear that it is for the carrier to establish that the damage occurred in spite of use of reasonable foresight and care. Under the law, it was for the Railway Administration to plead immunity and it denied, establish the plea by proof". The proviso makes the position clear that immunity can be claimed only by the further proving that reasonable foresight and care had been used. The burden, therefore, is squarely on the Railway Administration to come under the umbrella of protection of immunity. According to the Railways, as pleaded in the written statement, the consignment was in perfect condition until it left Cuttack for the

Company's siding. It has been specifically admitted that the cause of fire is not known. D. W. 1 is a railway employee who came to prove that the engine of the train which carried the suit consignment had been fitted with a spark arrester. In cross-examination, he has, however, stated :--

"I cannot give the exact date when I examined the engine which carried the wagon. We have a register showing the date and details of examination. The said register is not available. I examined daily 12 outgoing engines and 5 stationary engines. I do not remember which engine carried the suit consignment. I also cannot say from which station that engine carried the goods. I examined the engine at Khurda Road."

In this view of the evidence and in the absence of the register, it cannot be said that the engine of the train which carried the suit consignment actually had a spark-arrester.

No witness has been examined to prove the facts pleaded in the written statement regarding the happening of the damage. Therefore, the Court is entitled to hold that the Railway Administration failed to lead evidence that there was use of reasonable foresight and care. The burden which squarely lay on the Railway Administration has not been discharged. The immunity of Section 73 of the Railways Act is consequently not available.

10. There is no dispute before us that the plaintiffs are entitled to reimburse themselves for the loss caused to them. Ext. 8 was on the basis of summary assessment. There is oral evidence to show that at the time Ext. 8 was prepared on the basis of estimated damage, the bales were still packed and the packing material around the bales had not been opened. In the circumstances, it must be held that Ext. 8 does not really represent a true and definite estimate of damage.

Mr. Basu for the plaintiffs concedes that it was for the plaintiffs to establish the extent of loss. Though there is general evidence that there has been loss, and we can assume that there has been loss on account of the fact that cotton has been damaged by fire as also water, the extent of damage has not been clearly proved. Taking advantage of this position, Mr. Pal contends that the plaintiffs' suit must be dismissed. In the facts of the case, we do not think it would be fair and just to dismiss the entire suit, when damage as a fact has not only been conceded in the note of assessment (Ext. 8), but also in the pleading itself. Mr. Basu argued that to prove specific loss in the instant case would have been difficult, keeping in view the fact that the entire cotton was mixed up in the Stores and in due course carried for the purpose of ginning and spinning. While we do not agree with Mr. Basu's submission, we think it would be appropriate to make an assessment of the loss instead of accepting the plaintiffs' claim. An assessment of loss in a case of this type is bound to be somewhat arbitrary and speculative and the method which we adopt keeps the matter within the same limits.

Ext 8 shows that all the hundred bales had been damaged though damage in

respect of some of the bales was more while in respect of others it was less. This aspect could be seen from the assessment certificate and we must assume that D. W. 2 had used his good senses in doing that assessment. The exact quantum of damage, however, could not possibly be assessed, as we have indicated, without opening the packings. Keeping this lacuna in view and being cognisant of the position that for the failure to prove actual loss, plaintiffs are to suffer, we reduce the plaintiffs' claim by a net amount of Rs. 3,000/- (three thousand) which means, plaintiffs would be entitled to a decree for a sum of Rupees 12,845.53. The reduction of Rs. 3,000/- has been arrived at by reducing the claim under the first head of the Schedule by Rs. 500/-, the second head of the Schedule by Rs. 1,750/- and the third head of the Schedule by Rs. 750/-.

11. The appeal is allowed in part and the decree granted by the trial court is modified to the extent indicated. The net result, therefore, is plaintiffs' suit shall be decreed for Rs. 12,845.53 paise with costs throughout. Plaintiffs shall not be entitled to any pendente lite interest in the trial court the same having not been granted in the decree under appeal, but future interest shall run from the date of the decree till payment.

P.K. Mohanti, J.

12. I agree.