

(1979) 08 PAT CK 0003
In the Patna High Court
Case No : A.F.A.D. No. 503 of 1972

Union of India (UOI) and Another

APPELLANT

Vs

Sita Ram Sah

RESPONDENT

Date of Decision : 01-08-1979

Acts Referred:

Railways Act, 1890 — Section 73, 74(3), 76, 76A

Citation : (1980) ACJ 257 : AIR 1980 Patna 93

Hon'ble Judges : Lalit Mohan Sharma, J; Hari Lal Agrawal, J

Bench : Division Bench

Advocate : P.K. Bose, for the Appellant; B.K. Prasad Sahu and Shrideo, for the Respondent

Final Decision : Allowed

Judgement

Hari Lal Agrawal, J.—This is a defendants' second appeal. It was placed earlier before a learned single Judge, but in view of some conflict between the decisions of different High Courts and there being no authoritative decision of this Court on the point, he referred the same to a Division Bench and accordingly it was placed before us.

The question is as to whether Section 76 of the Indian Railways Act is controlled by Section 74(3) or is independent of the same.

2. On 24-10-1962, 136 bags of onions were despatched from Hajipur Ghat railway station to Samapur railway station both on the North Eastern Railway. According to the plaintiff's case, the normal time taken in such a transit was only two days, but it reached the destination after an abnormal delay on 12-11-1962 when the assessment delivery was taken and the goods were found to have deteriorated to the extent of 60 per cent. Necessary certificate (Ext. 3) was given to the plaintiff to that effect. According to the plaintiffs case, on account of the above deterioration he suffered a loss of Rs. 1,578.10. He accordingly instituted the suit after serving the required notices under the law.

3. According to the case of the defendants, the wagon in question had arrived at Sonapur on the very next day of the booking, i.e., on 25-10-1962, but could not proceed onwards on account of the circumstances beyond their control, namely, the state of Emergency created by the Chinese aggression which resulted in heavy military movement, leading to congestion on the line on which the wagon had to travel. The consignment accordingly proceeded on its onward Journey on 30-10-1962 through a route other than the normal one and reached the destination on 7-11-1962 by which time the contents had become rotten, There was no negligence or misconduct on the part of the railway administration or its employees. There were a large number of other pleas with which we are not concerned here. It may, however, be mentioned that the consignment was booked at "owner's risk" rate.

4. The trial court dismissed the suit on the finding that the delay in carriage of the goods was not on account of any negligence but was due to the Emergency on account of the Chinese aggression. On appeal, however, the lower appellate court decreed the suit on the following findings:--

(i) the burden of proof of absence of negligence or misconduct was on the railway administration;

(ii) the Railways failed to establish that there was any state of Emergency and, therefore, there was no justification for not carrying the consignment through the usual route;

(iii) the detention of the consignment in question at Sonapur for five days was neither legal nor warranted by any circumstance that was beyond the control of the railway administration and the inordinate delay was caused due to the negligence or misconduct on the part of the railway administration. Accordingly it decreed the suit in part to the extent of Rs. 1,001.46, against which the present appeal has been filed.

5. It is not possible to accept the reasoning of the court of appeal below that the defendants had failed to prove their case of Chinese aggression by proper materials. Much evidence of this fact was not needed as the court could take judicial notice of the same. However, I would accordingly accept this part of the defendants' case of Chinese aggression. But this by itself would not clinch the issue. In order to answer the question the relevant provisions of the Railways Act have got to be examined.

The responsibility of the railway administration as carriers is contained in Chapter VII of the Act and Section 73 defines the general responsibility of railway administration as a carrier of animals and goods, but the provisions contained therein are subject to "as otherwise provided" in the Act. It must be noticed in this context that the entire basis of the liability has been altered by the Indian Railways (Amendment) Act, 1961 (Act 39 of 1961) by which in place of the old set an entirely new set of sections has been introduced. The point to be noticed is that Section 73 has changed the nature of liability of the railways from that of

a bailor into that of an insurer. To this section there is an exception and that is Section 74. Section 74 deals with the responsibility of the railway administration when the animals and goods are carried at owner's risk note. In that event, the railway is not to be held responsible for loss etc. except on proof that it was due to negligence or misconduct on the part of the railway administration or its servants.

The burden of proof ultimately rests with the plaintiff who has to satisfy the court that the defendant was negligent, but the duty of showing as to how the consignment was dealt with during the transit lies with the railway administration, being a matter within its special knowledge, and it is bound to make a disclosure as provided u/s 76F of the Act which, of course, is confined only in the case of a non-delivery or pilferage in transit. The position was all the same even before the amendment of the Act by Act No. 39 of 1961 or Act No. 56 of 1949. A Bench of this Court in the case of Choa Mahton v. Union of India in Council (1957 BLJR 222 223), which was a case under "risk note B" under old Section 72(b), observed that where it was a case of deterioration and not of a non-delivery of goods, no duty was cast upon the railway administration to make a full disclosure of the matter in which the consignment was dealt with. Of course, the consignor might call upon the administration to produce the relevant register of movement of wagons. However, there is no necessity of discussing this aspect of the matter any further as this question does not arise in this case.

6. Section 74 is a verbatim reproduction of old Section 74C. Sub-section (3) of Section 74, which provides the key for answering the question, reads as follows :--

"When any animals or goods are deemed to have been tendered to be carried, or are carried at the owner's risk rate, then, notwithstanding anything contained in Section 73, the railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery, in transit of such animals or goods from whatever cause arising, except upon proof that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on the part of the railway administration or of any of its servants."

On examining the above provision it becomes obvious that the liability of a railway administration for any loss etc. including deterioration in transit of any goods from whatever cause, for example in the case before us on account of delay or detention in transit, is excluded except upon proof that the loss etc. was due to negligence or misconduct on the part of the railway administration or of any of its servants.

7. Section 76 was inserted by Act No. 39 of 1961 for the first time, there being no corresponding section previously. This section reads as follows :--

"76. Responsibility for delay or detention in transit. A railway administration shall be responsible for loss, destruction, damage or deterioration of animals or goods proved by the owner to have been caused by delay or detention in their carriage,

unless the railway administration proves that the delay or detention arose without negligence or misconduct on the part of the railway administration or of any of its servants."

It is on this provision that it was contended by the learned counsel for the plaintiff-respondent that the burden has now shifted on the railway administration to prove that the delay or deterioration arose without any negligence or misconduct on its own part or of any of its servants.

8. Decisions of three High Courts were cited before us at the Bar where the provisions contained in Section 76 fell for consideration, namely, Calcutta, Madras and Madhya Pradesh; the earliest being of the Calcutta High Court in the case of Union of India (UOI) and Another Vs. Mamchand Agarwalla and Another, . The consignment in this case was of mangoes which was found to have been delayed in transit. Question arose before the learned single Judge as to whether on that finding alone the plaintiff would succeed in view of the provisions of Section 76 on the failure of the railway administration to discharge the burden that lay upon it to prove that the delay arose without negligence or misconduct on its part. On consideration of the relevant provisions it was held that Section 73 was the general provision to which there was an exception by Section 74. Therefore, the special provision in Section 74 would exclude the general provision in Section 73 and accordingly when there was no general responsibility u/s 73, Section 76 would not come into play. Accordingly it was observed that the operation of Section 76 was not controlled by Section 73 and that Section 73 being excluded by Section 74, Section 74 would apply rather than Section 76.

9. A contrary view, however, was taken by Shiv Dayal, J. in the case of Union of India (UOI) Vs. Shankerlal, where it was observed by the learned Judge that there was nothing in Section 74(3) or Section 76 to show that the latter is controlled by the former and, therefore, application of Section 76 applying the rule of construction of statutes, *generalibus specialia derogant* (special things, derogate from general), cannot be restricted to only those cases where the goods or animals are booked at "railway risk" rates as Section 76 is a proviso to Section 74(3).

10. Similarly the Madras High Court in the case of A. Rafeeq Ahmed and Co. Vs. The Union of India and Another, observed that "since this section deals specially and expressly with delay and detention in the carriage of the goods, it could be said that whenever an owner of the goods comes to court and claims damages on the basis of loss etc. on account of delay in transit it is only this section, namely, Section 76, that will apply and not any other section."

11. Having given my anxious consideration to the above decisions and examined the provisions contained in Chapter VII of the Railways Act, I feel myself unable to agree with the views expressed by the learned Judges of the Madhya Pradesh and Madras High Courts in the aforementioned cases and to hold that Section 76 stands independent of Section 73 and would apply a fortiori to all cases of

deterioration etc. irrespective of the nature of the booking of the consignment, i.e., "railway risk" or "owner"s risk", where it is on account of delay in delivery of the consignment. If that view is taken, then the restriction contemplated u/s 74(3) to the effect that the railway administration should not be responsible for loss, destruction, damage, deterioration or non-delivery, in transit, from whatever cause, would become redundant, as, in my judgment deterioration of goods in transit on account of delay is cause for the deterioration. In the Amending Act of 1961, delivery is only responsibility of the railway administration for damage caused on account of different reasons has been enumerated under various sections, such as Sections 75A, 76A, 76B and 76C, Section 75A refers to cases where goods are carried in open vehicles, Section 76 contemplates cases of detention or delay in transit. Section 76A deals with cases of transit by a deviated route. All these provisions, therefore, deal with different causes of loss or deterioration etc.

In my opinion, therefore, they cannot be held to be as provisos to Section 74 where the booking is under the "owner"s risk", but can be applied only in cases of general responsibility of the railway administration contemplated u/s 73. I would accordingly, following the view taken by the Calcutta High Court hold that the court of appeal below has committed an apparent error of law in holding that the defendants have failed to discharge the burden of proof.

12. The result of the above view is that the plaintiff's case falls within the mischief of Section 74 (3) and, therefore, in order to succeed in the suit he was bound to prove that the deterioration in question took place due to negligence or misconduct on the part of the railway administration or any of its servants. This, of course, has been established by him that a period of 13 days was taken in transit of the consignment in question, which was more than the usual time taken in such transit, but the plaintiff cannot get a decree merely on this evidence. He has further to establish that this delay was on account of the negligence and misconduct on the part of the railway administration. No evidence worth the name has been adduced on behalf of the plaintiff to prove the above fact, rather, on the evidence adduced on behalf of the defendants it is apparent that the defendants were helpless in carrying the consignment from the usual route as well as within the usual time due to the pressure on the line on account of the Chinese aggression as the movement of military had to be given a priority.

13. I would accordingly allow this appeal and set aside the judgment and decree of the court of appeal below, but at the same time would leave the parties to bear their own costs throughout.

Lalit Mohan Sharma, J.

14. I agree.