

(1979) 06 BOM CK 0012
In the Bombay High Court
Case No : First Appeal No. 605 of 1970

Union of India (UOI)	Vs	APPELLANT
Rameshkumar and Co.		RESPONDENT

Date of Decision : 15-06-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1890 — Section 78B
Railways Act, 1989 — Section 73, 78B

Citation : (1979) 06 BOM CK 0012

Hon'ble Judges : R.A. Jahagirdar, J;D.P. Madon, J

Bench : Division Bench

Advocate : B.R. Naik, for the Appellant; M.S. Nargolkar, for the Respondent

Judgement

D.P. Madon, J.—The respondents filed a suit in the Court of the Joint Civil Judge, Senior Division, Nasik, against the Union of India claiming for them as the owners and administrators of the Central and South Eastern Railways a sum of Rs. 17,612.54 P. as damages suffered by them by reason of the non-delivery of two consignments of onions delivered by them to the Western Railway Administration for carriage from Lasalgaon to Vijayanagaram. The learned Joint Civil Judge passed a decree in favour of the respondents for the amount claimed together with future interest at the rate of 4 percent per annum on the sum of Rs. 15,410 from the date of the suit till realization and the costs of the suit. It is against this judgment and decree that the present Appeal has been filed by the Union of India.

2. Each of the two consignments in question consisted of 335 bags of onions, each bag weighing 45 kilograms. The first consignment was booked on October 22, 1966 and the second on October 26, 1966. Both these consignments were booked at owner's risk. Nothing, however, turns upon this fact. The first consignment reached Rayghada Railway Station on October 30, 1966. It was unloaded there on October, 31, 1966. It appears that it was sold by the Railway

Authorities by auction on or about November 1, 1966 and fetched a sum of Rs. 3, 333.23 P. The second consignment reached Rayghada Railway Station on November 2, 1966 and was sold by auction the next day, that is, on November 3, 1966 and fetched a sum of Rs. 5,695.

3. In the railway receipts both the consignors and the consignees were shown as the respondents. The respondents had sent these railway receipts for taking delivery of the goods and for the sale thereof to Messrs Cherukuri Narasinga Rao, general Merchants and commission agents. The said agents informed the respondents that they had not received delivery of the consignments. According to the respondents, they deputed one Ramanlal to find out what had happened. On making inquiries it was then learnt that these goods had been disposed of by the railway administration at Rayghada. Because of this, the two railway receipts were returned to the respondents by the said agents by their letter dated November 16, 1966. In the said letter the said agents stated that they were unable to understand why the said goods had been auctioned because at the same time many wagons had reached Cutuck and Berhampur via Rayghada. Ultimately by their advocate's letter dated January 25, 1967 the respondents made a claim u/s 78-B of the Indian Railways Act, 1890, as also gave a notice u/s 80 of the Code of Civil Procedure, 1908, in respect of the claim which they had made in the suit. In the plaint it was stated by the respondents that their address was known to the railway authorities and in any event the same could have been easily found out, but the railway authorities negligently failed to do so and the goods were auctioned at a very low price without the respondents being informed about the consignment being held up at Rayghada. It was further alleged in the plaint that the respondents could easily taken delivery at Rayghada and would have been then able to sell the said consignments of onions at Rs. 23 per bag of 45 Kilograms. These allegations of the respondents were not denied by the appellants in their written statement. What was alleged in the written statement, however, was that after the consignments arrived at Rayghada, a station on the South Eastern Railway, it was found that the said consignment could not be dispatched further " due to dislocation of the entire train services, due to the agitation of steel plant, in Andhra Province at that time." It was further alleged in the written statement that the consignments being perishable were required to be sold by public auction at Rayghada. The amounts fetched in the auction sales were not even mentioned in the written statement. It is also significant that the written statement does not mention the dates on which the said auction sales took place. It may also be noted that even though admittedly these goods were disposed of by the railway administration and realized a total sum of Rs. 9,028.23 P., at no stage until the filing of the written statement were the respondents informed about the amount realized nor was any reply given to their claim made u/s 78-B of the Indian Railways Act or to the notice given by them u/s 80 of the Code of Civil Procedure. What is even more shocking is that the railway administration just sat tight on this amount and did not refund it at any time to the respondents. In their written statement the appellants did not

even admit liability to refund this amount but instead contended that the respondent's suit should be dismissed with costs. One would have expected the appellants, who are the owners and administrators of these two railways administrations and who are a welfare State, to have acted not like any ordinary dishonest defendant but in keeping with their character as a welfare State and to have straightway refunded this amount to the respondents after sale or at least to have brought it into Court. When the suit was filed.

5. At the hearing of the suit the respondents led the evidence of four witnesses. These witnesses have not only proved what the market rate of onions was at the relevant time but have proved that onions are not a perishable commodity like fruits or vegetables but can remain in good condition for a month and a half. It is further proved in evidence that there is a large market known as Titilghar, only about 15 miles from Rayghada, and that the goods could have been easily sold there. The only witnesses who was examined on behalf of the appellants was Devaralu S.L. Narsivloo, Relieving Clerk in the South Eastern Railway. What he was at the relevant date does not appear from his deposition. His residence is, however, given as Vijayanagaram. What he deposed was that the two suit consignments did not reach Vijayanagaram "due to steel agitation" and that the consignments were, therefore, unloaded at Rayghada Railway Station. He had brought to Court with him the unloading book. He further produced copies of auction papers, control order, etc. Which were according to him certified by the railway authorities as true copies. These documents were produced by him along with a yadi Exhibit 37/3. He also produced certain other papers. It appears that when these documents were produced, the respondents' Advocate was asked whether he admitted them, and on this yadi he has made a note "Not admitted." Strangely enough, these documents were admitted by the learned Joint Civil Judge in evidence and marked as Exhibits. Mr. Nargolkar, learned Advocate for the respondents, has contended that none of these documents were proved and were wrongly admitted in evidence. In our opinion, this objection of Mr. Nargolkar is justified. Not the slightest attempt was made to prove any of these documents and none of them should have been admitted in evidence. Assuming for the sake of argument, however, that these documents were rightly admitted or could have been admitted in evidence, they completely destroy the appellant's case. They show that communication during these days was possible between various railway stations, that messages could be sent from one railway station to another and that there was a message sent on November 1, 1966 which shows that it was not possible to take any action even for disposing of perishable goods and therefore the only thing that the railway administration was able to do was to reload seven perishable loads for different stations as mentioned in an earlier message dated October 31, 1966. By this message it was further stated that any further action regarding disposal of perishable goods could only be taken on resumption of normal workings. No attempt was at all made by the appellants to prove what was the nature of the alleged disruption of railway traffic or its extent or gravity.

6. The very fact that the first consignment reached Rayghada on October 30, 1966 and the second consignment, booked four days after the booking of the first consignment, reached Rayghada on November 2, 1966, four days after the arrival of the first consignment, shows that the running of the railways between Lasalgaon and Rayghada was normal. Even assuming that it was not possible for these goods trains to proceed further, the very fact that there was normal railway traffic between Lasalgaon and Rayghada shows that the Railway authorities at Rayghada could have very easily contacted the respondents at Loasalgaon. There is no explanation or evidence why these goods were sold with such unnatural hurry. There is no evidence how they were sold, where they were sold, what notice, if any, of such proposed sale was Vijaynagaram publicity, if any, was given to the proposed sale, how many persons were present at the time of the sale or the persons to whom these goods were sold. We have evidence on the record that the respondents contacted their agents at Vijaynagram in the beginning of November 1966. It is not possible to understand why, if a private party, namely, the respondents, could contact another private party, namely, their agents at Vijaynagram the railway authorities at Rayghada could not contact the respondents at Lasalgaon. As the admitted position shows; they made no efforts whatever to do so. This could only amount to negligence and misconduct on the part of the railway authorities.

7. Before us at the hearing of this appeal Dr. Naik, learned Advocate for the appellants, has confined himself to urging two points only. Dr. Naik's first contention was that by reason of the prevailing circumstances the railway administration became an agent of necessity and in such capacity sold the goods and, therefore, were exempt from liability by reason of the provisions of section 73 of the Indian Railways Act. Under that section, except as otherwise provided in the said Act, a railway administration is responsible for the loss, destruction, damage, deterioration or non-delivery, in transit, of animals or goods delivered to it for being carried by railway, arising from any cause except certain causes set out in Clauses (a) to (i) of the said section. What was relied upon was the last exception set out in Clause (i) which is as follows :---

"(i) fire, explosion or any unforeseen risk."

Emphasis was laid by Dr. Naik on the words "any unforeseen risk". There is, however, no evidence whatever on the record to show that there was any risk to the goods in question had they proceeded beyond Rayghada or had been retained at Rayghada until resumption of normal traffic, assuming there was any disruption of traffic. Even assuming that there was some disruption of traffic and it was not possible for the railway train to proceed further, the correspondence exchanged between the respondents and their agents clearly shows that normal train service must have resumed by the beginning of November, 1966. We have evidence on the record that onions were not a perishable commodity and could have easily remained in the same good condition for the one and a half months. In our opinion, the exception, contained in section 73, relied upon by Dr. Naik,

has no application, because this contention is based upon facts which are not present in the present case. Dr. Naik also relied upon the decision in *Sims & Co. v. Midland Railway Company*, 1913 (1) K.B. 103. In that case, goods were consigned by the defendants' railway for delivery to the plaintiffs. During transit, a general strike of railway servants, including the defendants' railway's servants, broke out and the defendants were unable to forward the goods to their destination. The goods becoming deteriorated, the defendants sold them. In an action to recover damages for breach of contract to deliver the goods the County Court Judge decreed the plaintiff's claim. Thereupon the defendants filed an appeal in the King's Bench Division. The appeal was allowed, the Appeal Court holding inter alia that in calculating what was a reasonable time for delivery the strike of the defendants' servants, which was not caused or contributed to by the defendants, must be taken into consideration as one of the circumstances existing at the time of the carriage of goods and the defendants were, therefore, not liable for the delay. In the course of his judgment Scrutton, J., observed that the doctrine as to sale by an agent of necessity applied to a carrier by land as well as by sea provided that the necessary condition existed, namely, that there was a real necessity for the sale, and that it was practically impossible to get the owner's instructions in time as to what should be done. We fail to see what relevance this authority, relied upon by Dr. Naik, learned Advocate for the appellants, has to the present case, because here the evidence conclusively established that none of the conditions which would justify a carrier in selling the goods without the owner's instructions existed.

8. The second contention raised on behalf of the appellants was that the trial Court erred in allowing interest on damages prior to the date of the suit. In their plaint the respondents had claimed compensation at the market price of Rs. 23 per bag of 45 kilograms for both the consignments with interest thereon from the date of each auction sale until the date of the suit. In respect of the first consignment the amount of such interest comes to Rs. 1,083.84 p. In respect of the second consignment it comes to Rs. 1,078.70 p.

9. The proposition is now well settled by decisions of the Supreme Court that interest prior to the date of the suit on an unascertained amount, such as unliquidated damages, cannot be granted. See *Mahabir Prashad Rungta Vs. Durga Datt*, ; *Union of India (UOI) Vs. Watkins Mayor and Co.*, ; & *Union of India (UOI) Vs. West Punjab Factories Ltd.*, 400-1. Mr. Nargolkar, learned Advocate for the respondents, however, sought to rely upon another decision of the Supreme Court, namely, *Union of India (UOI) Vs. The Steel Stock Holders Syndicate Poona*, The facts in that case were that the plaintiffs, who were dealing in iron goods, booked a consignment with the railway administration on December 15, 1961, at Bhilai, to be carried to Poona and to be delivered there to the consignee. After a long delay the consignment was delivered on July 21, 1962. The plaintiffs, alleging that the late delivery was due to gross negligence on the part of the railway administration which instead of sending the goods direct to Poona had diverted them to Aurangabad without any reason, claimed damaged

from the Union of India. The plaintiffs calculated the damages by way of interest at the rate of 12 per cent per annum on their locked-up capital. The trial Court accepted the plaintiff's case and awarded to them as damages interest at the rate of 6 per cent per annum on the amount deposited by them in the bank against the said goods. Dismissing the appeal filed by the Union of India the Supreme Court held that the plaintiffs had not claimed interest on any amount of damages suffered by them but had taken interest on the amount deposited by them in the bank as being money locked up for more than six months as a measure to determine the compensation which they could seek against the railway administration for its negligence in causing inordinate delay in the delivery of the goods. This Supreme Court authority, therefore, has no application to the facts of the present case. Here the respondents have not taken interest as a measure of damages but they have claimed interest as interest on the amount of damages suffered by them.

10. The result is that we partly allow this appeal and vary the decree passed by the trial Court by deleting from the amount of Rs. 17,612.54 p, the amount of interest allowed prior to the date of the suit, namely, a sum of Rs. 2,162.54p, that is to say, we substitute the following decree for the decree passed by the trial Court, namely, that the appellants do pay to the respondents a sum of Rs. 15,450 with interest at the rate of 4 per cent per annum on the sum of Rs. 15,410 from the date of the suit till payment or recovery and for the costs of the suit.

11. Since the appellants have substantially failed in this appeal, the appellants will pay to the respondents the costs of the appeal on the claim in suit which is allowed by this Court. The appellants will bear and pay their own costs of the appeal.