

(1971) 05 CAL CK 0023
In the Calcutta High Court
Case No : A.F.O.D. No. 92 of 1962

Union of India (UOI)

APPELLANT

Vs

Ratilal Jadavji

RESPONDENT

Date of Decision : 14-05-1971

Acts Referred:

Evidence Act, 1872 — Section 106
Railways Act, 1890 — Section 72, 74A, 74C

Citation : AIR 1971 Cal 515 : (1971) 1 CALLT 63 : 75 CWN 634

Hon'ble Judges : Amiya Kumar Mookerji, J; Alak Chandra Gupta, J

Bench : Division Bench

Advocate : Ajoy Kumar Basu, for the Appellant; Nirmal Kumar Ghosal, for the Respondent

Final Decision : Dismissed

Judgement

Amiya Kumar Mookerji, J.—This appeal is by the defendant. Union of India. It is directed against a decree for Rs. 12170/- passed against it for non-delivery in respect of 3 consignments of Ghee, booked from Veraval, a Railway Station on the Western Railway, for carriage to Howrah on the Eastern Railway.

2. The facts which are not disputed may be stated as follows:-- In the year 1951, on different dates 4 consignments of Ghee were booked by the plaintiff from Veraval for carriage to Howrah via Agra East Bank. On 15th June, 1951, 121 cases of Ghee were booked. 5 cases were found missing at the destination, remaining 116 cases were delivered to the plaintiff. Booked on the same date, in second consignment, 109 tins of Ghee were sent. In respect of which shortage of 20 mds. 35 srs. was detected at Howrah Station. In third consignment, booked on 6-7-1951 containing 138 tins of Ghee, 15 mds. 39 srs. were found short. The fourth consignment was booked on 1st August, 1951 consisting of 110 tins. In that consignment shortage was detected of 17 mds. 6 srs. Short certificates were issued by the railway administration with respect to all the above four consignments.

3. The plaintiff consignor claimed a total damage of Rs. 14204.56 for nondelivery of 5 cases regarding first consignment and short delivery with respect to remaining 3 consignments.

4. The defence was that the consignments were not properly and securely packed according to rules. The goods were booked on owner's risk for defective packing and at owner's risk rate. The shortage was due to negligence on the part of the sender in not packing the goods as required under the tariff rules and the defendant was not, therefore, liable to pay compensation as claimed.

5. The plaintiff's suit was decreed in part of Rs. 13,350/- by the Trial Court. The defendant, the Union of India took an appeal (F. A. 225 of 1954) to this Court. This Court confirmed the decree passed by the trial Court to the extent of Rs. 1180/- only with respect to 5 cases of Ghee tendered in the first consignment which were not delivered at all. Regarding other three consignments, this Court set aside the decree passed by the Trial Judge and remanded the case for rehearing on the ground that the learned Subordinate Judge was basically wrong because he proceeded on the basis that no rules for packing of Ghee were prescribed by the Central Government, whereas such rules had actually been framed. On remand, the suit was reheard by the learned Subordinate Judge, who again passed the decree in favour of the plaintiff with respect to aforesaid three consignments. Against the said judgment and decree, the defendant, Union of India preferred the present appeal.

6. By Act 56 of 1949, Sections 74-A to 74-E were inserted in the Indian Railways Act, 1890 (hereinafter referred to as the Act). The said sections were deleted by the Amendment Act 39 of 1961. It is a common case of the parties that having regard to the date of booking, the present case has to be decided in accordance with the provisions contained in the Act after its amendment by Act 56 of 1949 and before the said sections were deleted by 1961 amendment.

7. u/s 72 of the Act, the responsibility as it stood before 1961 amendment, of the Railway administration for the loss, destruction or deterioration of animals and goods delivered to the administration to be carried by railways, subject to other provisions of the Act, is that of a bailee under Ss. 151, 152 and 161 of the Contract Act. This general provision relating to the responsibility of the railway is qualified in two cases to which Sections 74-A and 74-C of the Act are applicable. Section 74-A says that when any goods are tendered to the railway administration in defective condition or defectively packed or packed in a manner not in accordance with the rules and the fact of such condition of defective or improper packing has been recorded by the sender or his agent in the forwarding note, in that case, the railway administration shall not be responsible for any deterioration, leakage, wastage or damage in the condition of the goods in which they are available for delivery at destination except upon proof of negligence on the part of the railway administration or of any of its servants. u/s 74-C of the Act, when the goods are carried at owners' risk rate, the railway administration shall not be responsible for any deterioration, leakage or damage except upon

proof of negligence or misconduct on the part of the railway or its, servants. So, in the cases covered either by Sections 74-A or 74-C of the Act, negligence or misconduct on the part of the railway or its servants is required, to be proved by the consignor,

8. In the present case we are concerned with 3 consignments of ghee.

It appears that in 2 out of 3 consignments, the sender made endorsements of defective packing though all the consignments were booked at owners' risk rate. Therefore, the said 3 consignments with the endorsements of defective packing would be governed under the provisions of Section 74-A of the Act and the remaining consignment u/s 74-C of the Act.

9. Mr. Basu, the learned Advocate, appearing on behalf of the appellant, contended that there was no obligation on the railway to disclose to the plaintiff as to how the goods were dealt with in the course of the transit or render any assistance to enable the plaintiff to prove his case. In 2 out of 3 consignments, the sender made endorsements of defective packing and the other consignment having been tendered at the owners' risk rate under provisions of Sections 74-A and 74-C of the Act, the railway administration would not be made liable except upon proof of negligence by the plaintiff. Even if there be any duty cast upon the railway administration to disclose how the goods were dealt with in transit, no inference can be drawn against them, unless the plaintiff has in the event of his dissatisfaction with the disclosure made, asked the Court to require the railway administration to make further disclosure. According to Mr. Basu, the plaintiff not having demanded any further disclosure, the Court should not make any adverse inference against the defendant. The plaintiff having given no evidence to show the negligence on the part of the railway, the court below erred in law in holding that railway was required prima facie to establish that shortage was due to defect in packing. In support of his contentions, Mr. Basu, referred to a Bench decision of the Patna High Court, *Sobharam Jokhram Vs. Union of India (UOI)*, .

10. Mr. Ghosal, the learned Advocate, appearing on behalf of the respondent, contended that the plaintiff was to satisfy the Court that the defendant was negligent, but the duty of showing how the consignment was dealt with during transit lay on the railway administration as a matter within its especial knowledge. Upon the materials on record, if the plaintiff could show that the railway administration or its servants had not shown due care, in that case it was not necessary for the plaintiff to demand from the defendant any further disclosure.

11. The trial Court found that the railway administration prima facie failed to establish that the loss was connected with the defective packing. In *Gangadhar Ram Chandra, a firm Vs. Dominion of India*, , which was followed by the trial court. Das Gupta J. in construing the risk note "A", the terms of which are similar to the provisions of Section 74-A of the Act, observed that it must appear prima facie that the loss which admittedly occurred was in some way connected with

defective condition of the packing, and when the defendant failed to establish such connection, special protection afforded by risk note "A" was not available to the defendant.

12. We have said hereinbefore! that Sections 74-A and 74-C are exceptions to the general liability of the railway as provided by Section 72 of the Act. Section 74-A clearly lays down that railway shall not be responsible in cases of defective conditions of the goods and defective packing except upon proof of negligence by the consignor. Therefore, it follows that the onus upon the plaintiff to prove negligence is restricted to the above two cases. Obviously, the burden at the first instance would be on the railway to show that loss was either due to defective conditions of the goods or defective packing. In *Gangadhar Ram Chandra, a firm Vs. Dominion of India*, , the shortage was found not due to wastage on account of bad conditions of the bags but due to the fact that they had been cut through the flap door gaps. In that context Dasgupta. J. observed that it was required to be proved by the defendant that the loss occurred was in some way connected with the defective packing. A similar view was taken by a Division Bench of the Madras High Court in *M.K. Manickam Chettiar Vs. Union of India and Another*, . In our view having regard to the terms of Sections 74-A and 74-C of the Act and, on the above authorities, the correct position is, that, in order to get the benefit u/s 74-A of the Act, the primary onus is on the bailee to show that loss was as contemplated in that section, in other words, the loss was due to defective condition and defective packing of the goods. When this initial onus is discharged by the railway, then the onus shifts on the plaintiff under the said section to prove negligence on the part of the railway administration. Accordingly, we are of opinion that the trial court has made a correct approach to the case.

13. u/s 106 of the Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is on him. Sections 74-A and 74-C of the Act are not in conflict with the said provisions of Section 106 of the Evidence Act the latter provisions being one of the modes of proving facts. All the facts regarding how the consignments were dealt with while under the custody of the railway are especially within their knowledge, and therefore, the railway must place before the Court all facts. When all the materials are placed before the Court, it is then for the plaintiff consignor to satisfy the Court that true inference from these facts, is, that, the railway and its servants did not exercise due care and skill required of a bailee. This position seems to be established on the decision of the Judicial Committee in *Dwarkanath v. Rivers Steam Navigation Co. Ltd.* AIR 1917 PC 173 : 27 Cal LJ 615.

14. Mr. Basu referred to a Bench decision of Assam High Court -- *Union of India v. Muralidhar Agarwalla* AIR 1951 Ass 173 in support of his contention that Section 106 of the Evidence Act is not applicable to cases covered by Sections 74-A and 74-C of the Act. At page 176 of the said report, Thadani, C. J. observed, "the risk note "A" expressly referred to leakage. The liability of the railway in such a case, we think, will be governed by the terms of risk note "A", and not by

the terms of Section 106 of the Evidence Act." The above decision is not supported by any reason.

15. When the truth of a party's allegations lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter. It is true that no obligation is cast upon the railway under Sections 74-A or 74-C of the Act to establish positively how the loss or damage occurred and to prove absence of negligence on their part, but the said two sections do not absolve the railway administration from proving facts especially within their knowledge. We are therefore inclined to follow the authority of the Judicial Committee in AIR 1917 PC 173; we hold that provisions of Section 106 of the Evidence Act will also have application to cases covered by Sections 74-A and 74-C of the Act.

16. In the Sobharam Jokhram Vs. Union of India (UOI), as referred to by Mr. Basu. it was held that railway was not bound to disclose where Clauses (a) and (b) of Section 74-D were not applicable. In the instant case, it is not disputed that Section 74-D of the Act has got no application. So, the above decision has got no relevance in the facts of the present case.

17. We now proceed to examine and consider the materials placed by the defendant in the Court below to find out whether any inference of negligence can be deduced from these materials.

18. The goods were carried in 3 wagons. Wagon No. 30025 contained 109 tins, wagon No. 4990, 110 tins and wagon No. 1774. 138 tins. With respect to 2 consignments there was aft entry in Gujrati language "liable to leakage", said D. W. 2 -- goods clerk at Veraval Bundar. He examined 5 to 10 per cent, of the tins. He found the tins were new. At the time of his examination, he did not notice any leakage. After loading was completed the wagon-doors were closed, labels were pasted on the wagon that the wagon "should not be fly or lose shunted". Grass was put in layers on the sides and below. The said witness was satisfied that there would be no damage by ordinary jerk. D. W. 3 was another assistant goods-clerk at Veraval. He said that in one forwarding note exhibit "D3", there was no note as to the condition of the tins. He also examined the tins and found them perfect and in new condition- At Viramgram, the goods were unloaded and again loaded to broad gauge wagons. D. W. 4 was a transshipment clerk at Viramgram. He did not find leaking of ghee in meter-gauge wagons. The grass was placed obtained from meter-gauge wagons. The tins were found in sound conditions and no leakage whatsoever was found. The said witness said that all precautions were taken but he could not say that tins would leak unless some additional pressure was given. D. W. 5, another transshipment clerk at Viramgram said, that in wagon No. 8599 he found 2 tins in leaking stage. "Not to be loose shunted" poster was there. Grasses were also spread. He said in his cross-examination that in the broad-gauge wagons precautions taken were not sufficient to prevent jerking and jolting. He did not report the matter to his superior officer. When the goods reached at Allahabad, the assistant goods-clerk, Allahabad, D. W. 11 found that seals in wagon No. 17743 broken on both sides.

He did not do any checking of the wagons. D. W. 12, the transshipment clerk at Katni Marwara also found that the seals of the wagon No. 4990 were missing. D. W. 10, the Guard at Assansol said, that, in wagon No. 30025, there was no seal but the rivets were intact. He did not notice any leakage of ghee. Exhibit "K" series -- missing and damaged goods returns, were proved by D. W. 7, the goods-shed clerk at Howrah. It appears from them exhibits that in wagon No. 17743 no caution label was found pasted on the wagon body, no dunnage was used. 55 drums were badly dented, bursted at joints and at the body as the corner of the tins dashed against one another due to absence of dunnage. In wagon No. 4990, the nature of the damage and the probable reasons recorded were 2 tins with a hole on the top lid dented, leaking and half emptied. 6 tins dented, pierced at bodies and sides. bursted at joints and leaking. No caution label was found pasted on the wagon body; no dunnage was used. All the 65 tins were badly dented, bursted so much so that they had been deshaped due to rough shunting which required proper investigation. In wagon No. 30025, no caution label was found pasted on the wagon body, no dunnage was used. 65 tins were badly damaged, bursted so much so that they had been deshaped. It is stated in the remark column, "it seems to have been due to rough shunting which requires proper investigation". All the reports were signed by Goods Supervisor, Howrah and forwarded to the Chief Commercial Manager (C) for disposal.

19. It appears from the evidence that tins were new and almost in perfect condition. Only 2 tins were found leaking in wagon No. 30025 and 1 tin in wagon No. 17743. It appears from the missing and damaged goods return exhibit "K" series that caution label was not found, although D. W. 7 said that posters "not to be loose shunted and not to be fly shunted" were pasted on the wagon body. In exhibit "K1" it is stated that the cause of damage to 55 drums was due to absence of dunnage. Mr. Basu remarked that there was no evidence that any dunnage was used. "Dunnage" is any light material wedged between the cargo to keep it from rolling when stowed. D. W. 2 said that grass was spread in layers on sides and below supplied by the senders. Some kind of dunnage was there. So, it cannot be said that there was no evidence that dunnage was used. The trial court upon these materials inferred that there was negligence and pilferage with respect to tins with a hole on the top lid and pierced at bodies. In the plaint no case of pilferage has been made out. No suggestion was also made to the defendant's witnesses about pilferage. So, considering the materials before us, we are of opinion the pilferage has not been proved in the instant case.

20. From the materials placed by the railway, it cannot be also inferred that shortage was due to defective condition or defective packing of the goods. So, the railway is not entitled to get the protection of the exceptions as provided in Section 74-A of the Act. Shortage in the instant case obviously is due to rough shunting and absence of dunnage. With the disappearance of the exceptions in Section 74-A, the provisions of Section 72 of the Act come in.

21. The railway administration as a bailee is bound to take as much care of the

goods bailed to them as a man of ordinary prudence would take of his own goods. It is the duty of the bailee to take all reasonable precautions to obviate the risks which may be reasonably apprehended. Considering the evidence and the materials on record it is abundantly clear that the defendant failed to take care of the goods as expected from a man of ordinary prudence.

22. We therefore hold that the railway administration is guilty of negligence with respect to the consignment tendered to them for carriage.

23. Mr. Ghosal, the learned Advocate for the respondent further contended that in terms of the forwarding note, the contract was to carry the goods via Agra East Bank, but wagon No. 4990 was diverted to circuitous route via Katni Marwara. By taking the goods by another route, the railway administration went outside the contract and could no longer rely on the protection afforded by Section 74-A of the Act.

24. In the plaint there is no averment of deviation by the railway from the agreed route. The plaintiff did not ask for any explanation from the railway administration about its adopting different route. So in these circumstances, we think that this point need not be pursued further.

25. On the materials it must be held that the plaintiff has succeeded in proving negligence on the part of the Railway also u/s 74-C of the Act.

26. In the above view, we maintain the decree passed by the trial court and dismiss this appeal. There will be no order as to costs.

Gupta, J.

27. I agree.